

Khamrakov vs Russia

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Abstract

This essay analyzes the sentence enacted in 2015 by the European Court of Human Rights, App n° 68894/13 or “Khamrakulov versus Russia”. Despite this is not the knowntest sentence related to "ill-treatment" and "asylum seeking", it is extremely relevant for the following jurisprudence and doctrine related with Migration and Asylum Law. As it is one of the newest cases about this topic, the resolution can be relevant for the near future.

The structure is the following. First at all, the essay analyzes the facts, and the law pleaded by the parties: Khamrakulov, an Uzbek national and Russia, the sued state. Secondly, we are going to go into the applicable law to the case according to the European Court of Human Rights. We point out in the essay the controversial facts and the relevance of the case regarding immigration law and we are going to analyze also the pleaded “ill-treatment”. Moreover, we are going to detain in the “European Court of Human Rights” Jurisprudential System for refugees. Finally, a personal conclusion will be given.

Key Words

Migration Law, Asylum Seeker, Russia, Uzbekistan, ECHR, ill-treatment, Asylum Law, migrants

Resumen

Este ensayo analiza la sentencia promulgada por el Tribunal Europeo de Derechos Humanos, Khamrakulov vs Russia App n° 68894/13.

A pesar de que no es una de las sentencias más famosas en relación al derecho migratorio y de asilo, es una de las más recientes y con más poder e influencia en la doctrina y jurisprudencia reciente y próxima. La estructura de este ensayo es la siguiente. Partiendo del análisis de los hechos, pasaremos al derecho alegado por las partes: por Khamrakulov, uzbeko de 16 años, como por Rusia, el Estado. En segundo lugar, acudiremos al derecho aplicable al caso, según el TEDH. Enfatizaremos en los hechos controvertidos y la relevancia del caso en el derecho migratorio y de asilo. Nos detendremos en la construcción jurisprudencial del TEDH sobre el derecho migratorio, y de asilo, así como de los refugiados, citando sentencias relevantes aplicables al caso. Finalmente, la autora ofrecerá una opinión personal sobre el tema.

Palabras Clave

Derecho migratorio, derecho de asilo, TEDH, no tortura, no devolución, non-refoulement, migrantes, Uzbekistán, Rusia.

1. Aims of the Essay

The aims of the essay is to analyze the following sentence enacted in 2015 by the European Court of Human Rights, App n° 68894/13 or “Khamrakulov versus Russia”. First at all, I am going to analyze the facts. Then, we are going to go into the law pleaded by the parties: Khamrakulov, an Uzbek national and Russia, the sued state. Thirdly, we are going to go into the applicable law to the case according to the European Court of Human Rights. We are going to point out in the essay the controversial facts and the relevance of the case regarding immigration law and doctrine, and we are going to analyze also the pleaded “ill-treatment”. Moreover, we are going to detain in the “European Court of Human Rights” Jurisprudential System for refugees. Finally, a personal conclusion will be given.

This essay is not going only to analyze the facts, the applicable law and the position of the court but it is going to analyze also the controversial facts, both parties and the legal aspects. It is also important to go into the importance of the case for the future, and its impact in immigration and refugee law. As this case is not as old as other cases, it can be a precedent for other cases in the foreseeable future.

2. Content.

2.1 The Facts.

Mr Abdilaziz Makhmudzhanovich Khamrakulov was born in 1994 in Osh, Kyrgyzstan, despite he and his family had Uzbek ethnic origin. However, they had to leave the Kyrgyz Republic in 2010 after “*the mass disorder and inter-ethnic clashes*” (Khamrakulov v. Russia 2015) in the region of Osh in June 2010¹. He moved to Russia in September to continue his secondary education, as he was still 16 years old.

After several months, in February 2011, he was charged in Kyrgyzstan for his participation in “*mass rioting, kidnapping, destruction of property and damage to property*”,² crimes supposedly committed in Kyrgyzstan, and consequently put on the “*wanted list*”. Years passed and Khamrakulov was not captured, however, on January 2013, he was arrested in Russia and the process of extradition started, as the Kyrgyz authorities had interest on

¹ Related to the same violence period in Osh, Kyrgyzstan, we can find the case of Murodil Tadzhibayev vs Russia, who leaved the Kyrgyz Republic with Abdilaziz Khamrakulov. “*Further information on UA 271/13 RUSSIAN FEDERATION - FOUR ASYLUM-SEEKERS AT RISK OF EXTRADITION*”; Amnesty International; March 7th, 2014; url: www.amnesty.se/upload/apps/webactions/urgentaction/2014/03/07/44602014.pdf

² In Kyrgyzstan the legal age for being criminal liable is 16 years old.

continuing the process in its original country. Herein we have the first controversy we are going to find in the case.

The arguments of the Prosecutor of Kyrgyzstan laid on the classification of the crimes, as they argued that the extradition “*was related to ordinary criminal offences and was not aimed at persecuting the applicant on religious or political grounds, or ground relating to his nationality*”³. We have to point out here that, Khamrakulov had Uzbek origin and he had to leave Kyrgyzstan because the mass disorder and inter-ethnic classes. In contrary, the plaintiff’s lawyer claimed the high risk that Khamrakulov had if he was extradited to the Kyrgyz Republic, to suffer inhuman treatment and violations of Human Rights. But finally, the Russian Prosecutor continued with the extradition request because “*there were not grounds in Russian or international law for refusing to extradite the applicant.*”⁴, and there were not causes established of the Criminal Procedure Code of Russia that could exclude this possibility; even though the applicant tried to stop the procedure of extradition on September 2013. The Supreme Court of Russia denied the appeal arguing that the applicant would not be deprived of his fundamental guarantees and rights (in November 2013). While the extradition process was being studied, it was also studied his detention process. He was applied interim measures by the Russian Court and released from custody on January 2014.

At that point of the facts, I see the importance to analyse that the applicant had to leave Kyrgyzstan because his ethnical condition (Uzbek origin) and during a critical moment that could be an attempt against his integrity, ethnic and inclusively, live; when he was only 16 years old, despite he was already legally over-aged according to Kyrgyz Law. The first “note” we are going to have in consideration is his particular ethnic condition. The second characteristic is that he leaved the country during a controversial moment. Thus according to the article 1 A of the Geneva Convention of 1951 as amended by the Additional Protocol of 1967, a refugee is a person who has a well founded fear of being persecuted because his or her specific, concrete, ethnic, religious, sexual origin.⁵ Had Khamrakulov this well-founded fear? Yes.

2.2 Was Khamrakulov considered a refugee?

³ *Khamrakulov v. Russia*. Application no. 688894/13, European Court of Human Rights; April 16th, 2015

⁴ *Khamrakulov v. Russia*. Application no. 688894/13, European Court of Human Rights; April 16th, 2015

⁵ Article I.A; Chapter I; Convention and Protocol relating to the Statues of Refugees; United Nations High Commissioner for Refugees; New York 1967.

Khamrakulov applied for refugee status while his extradition order and imprisonment were being studied. Why he applied for this status? He pleaded that returning to Kyrgyzstan would be a threat against his Human Rights and life. He did not commit any crime in Kyrgyzstan but the authorities wanted him for his Uzbek origin (as we analysed before). He also argued that he was not a member of any organization as political parties, religion, sects....

The refugee status was denied on July on the same year by the Moscow migration authority while the public opinion claimed for his freed.

The Moscow Migration authority argued:

- There was not any real risk for persecution.
- His family leaved in Kyrgyzstan even though they had also Uzbek origin and he had also a treat of favour within the Osh town council who gave him an scholarship.
- He did not have any reason to be fear of being persecuted in Kyrgyzstan because his particular religion, political thoughts or ethnics. Thus he was not considered a refugee according to the Geneva Convention of 1951, that defines a Refugee as a person who has a *“well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”*⁶
- He did not exhausted all the national jurisdictional stages, to ask for asylum needed *“have recourse to available and sufficient remedies within the national legal system”*⁷

The applicant argued the following:

- The scholarship he got came from his former college and not from Osh Town Council, inaugurated by the “Uzbek expatriate community for young people” who also leaved Kyrgyzstan after the riot in June 2010, when Khamrakulov

⁶ Article I; Chapter I; Convention and Protocol relating to the Statues of Refugees; United Nations High Commissioner for Refugees; New York 1967.

⁷ “ECtHR - Khamrakulov v. Russia Application no.68894/13 16 April 2015”; European Data Base of Asylum Law; rec: <http://www.asylumlawdatabase.eu/en/content/ecthr-khamrakulov-v-russia-application-no-6889413-16-april-2015>

leaved. According to Amnesty International, five Uzbeks leaved Kyrgyzstan in the same period and were also convicted for the same reasons as Khamrakulov.⁸

- Furthermore, he and his relatives suffered continuous discrimination, xenophobic and racist episodes, and lived under the pressure of Kyrgyz authorities.
- He exhausted all the possible remedies due to the Russian Jurisdictional System, and, as we are going to explain later, the cassation system in Russia does not work like in most of the “occidental” jurisdictional system.

Thus, did Khamrakulov reunited the necessary requirements to be considered a Refugee according to the Geneva Convention as amended by the 1967 Additional Protocol?

- Khamrakulov was a “non-national” from Russia (legally founded by the article 1.A.2 of the Geneva Convention of 1951).
- He had a well-founded fear to return to his country and to be persecuted for reasons of race, religion, and so on there were several cases of ethnic Uzbeks who fled the Kyrgyz Republic during the same period of time because the same riot and ethnic-clash riots and conflicts and convicted within the same crimes without any criminal background); because he would be probably tortured (he also supported that his family was under pressure by the Government).
- Khamrakulov was persecuted by the Kyrgyz Government, a state actor.
- Had Khamrakulov reunited any cessation or exclusion causes? He never was a refugee so he could not stop being a refugee. Furthermore, he was not part of the “excluding” group as he was not considered to be a criminal, international criminal prosecuted for humanitarian crimes, genocide, against public order etcetera.⁹

In conclusion, if he reunited all the requirements for being considered a refugee, why he was not considered a refugee? Why the same ECHR sentence did not specify it as well?

⁸ “*Abdilaziz Hamrakulov, Vohid Aliyev, Murodil Tadzhibayev, and Botir Turgunov, all from Osh region in southern Kyrgyzstan, fled to Russia after four days of violent clashes between ethnic Kyrgyz and ethnic Uzbeks in southern Kyrgyzstan in June 2010*”; Further information on UA 271/13 RUSSIAN FEDERATION - FOUR ASYLUM-SEEKERS AT RISK OF EXTRADITION”; Amnesty International; March 7th, 2014; url: www.amnesty.se/upload/apps/webactions/urgentaction/2014/03/07/44602014.pdf

⁹ Article 1.F; Chapter I; Convention and Protocol relating to the Statues of Refugees; United Nations High Commissioner for Refugees; New York 1967.

2.3 UNHCR and the Moscow Authorities.

As his asylum request was finally denied, and the Moscow Authorities did not accept his claim, the applicant pleaded to the **Russian Representative's Office of the UNHCR** (United Nations High Commissioner for Refugees), and surprisingly (or not, depending of the point of view), the United Nations had received a similar case about an ethnic Uzbek who leaved Kyrgyzstan within the same period of time and was also convicted for the same "crimes" (the case of Murodil Tadzhibayev v. Russia that was mentioned before). The United Nations considered that *"there was a real threat that ethnic Uzbeks accused of offences during the mass disorder in June 2010, including the applicant, would be subjected to torture and other inhuman treatment and punishment in the event of extradition to Kyrgyzstan."*¹⁰ Furthermore, at same time of his application to the UNHCR, Amnesty International claimed for the liberation of Khamrakulov and four others Uzbeks who were in exactly the same situation.¹¹

However, the Moscow authorities denied again the application based on the same arguments explained in the last epigraph. Khamrakulov had to wait even more years to see his application fulfilled, considering it a violation of article 5 para 4 of the Convention of Human Rights, explained later.

2.4 Law pleaded by the Applicant.

Khamrakulov firstly alleged that there was a violation of **Article 3 of the Convention for the Protection of Human Rights and Freedoms** (European Convention of Human Rights), signed in Rome in 1950 which exposes: *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."*

In contestation to the Russian Government, the plaintiff argued that he *"had exhausted all effective domestic remedies"*¹², which means that he depleted all the Russian Judicial

¹⁰ *Khamrakulov v. Russia*. Application no. 68894/13, European Court of Human Rights; April 16th, 2015

¹¹ *"In his appeal against the judgment of 22 January 2014 the applicant requested a rigorous examination of his arguments related to the risk of ill-treatment. He again referred to various reports of international organisations and reputable NGOs to support his position, including the UNHCR's letter of 12 September 2013 in respect of himself and four other individuals of Uzbek ethnic origin"; Khamrakulov v. Russia*. Application no. 68894/13, European Court of Human Rights; April 16th, 2015

¹² *Khamrakulov v. Russia*. Application no. 68894/13, European Court of Human Rights; April 16th, 2015

Instances and the “cassation” in the Russian system does not have a suspensive effect¹³, otherwise, his process would be suspended until the Court’s decision. Thus it means that according to this party, all the internal ways were used and the only remedy they had was to plead to the ECHR.

One of the arguments of the Russian Government to defend their position as we are going to analyse in next epigraph, was that the Kyrgyz Republic had improved their Human Rights situation. It was completely denied by this party, as they raised the **United Nations Committee against Torture report** (that is possible to read in the sentence *Khamrakulov v. Russia*, no. 68894/13 in section 41) considered Kyrgyzstan’s second periodic report and in December 2013 issued concluding observations (CAT/C/KGZ/CO/2), in which is set forth that Kyrgyzstan was clearly violating the article 3 of the European Convention of Human Rights, there was a widespread use of ill-treatment and torture, besides it also gathered a similar case: the case of *Azimjan Askarov*, “*an ethnic Uzbek human rights defender prosecuted on criminal charges in connection with the death of a police officer in southern Kyrgyzstan in June 2010*”.¹⁴

Even though it was not directly mentioned, they defended the principle of “non-refoulement” defined in the article 33.1 of the **United Nations Geneva Convention relating to the Status of Refugees**, 1951: “*No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*”¹⁵ It is related to what it was explained before, if was *Khamrakulov* a “considered” refugee or not. Even though the rule of the Court did not say nothing about, he reunited all the requirements a “refugee needs” in order to be considered that, and, according to International Law, the principle of “non-refoulement” is part of Customary Law so it should be applied to every country even though is a signing or party state or not.

¹³ “(...) He further claimed that the Government had failed to adduce any arguments showing that the remedies under Chapters 47.1 and 48.1 of the CCrP were effective. In particular, cassation appeals pursuant to Chapters 47.1 and 48.1 of the CCrP did not have an “automatic suspensive effect”. *Khamrakulov v. Russia*. Application no. 68894/13, European Court of Human Rights; April 16th, 2015

¹⁴ United Nations Committee against Torture considered Kyrgyzstan’s second periodic report and in December 2013 issued concluding observations (CAT/C/KGZ/CO/2); rec. *Khamrakulov v. Russia*. Application no. 68894/13, European Court of Human Rights; April 16th, 2015

¹⁵ UN General Assembly; “*Convention Relating to the Status of Refugees*”; July 28th, 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>

As we mentioned before, this party argued that the delay of the process, the lack of guarantees and effectiveness were a violation of article 5 para 4 of the European Convention of Human Rights: *“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”*¹⁶ The plaintiff stated that the process of detention and extradition lasted for three years, and the guarantees of a just and fair trial were not accomplished. If we take a brief look to the facts, it is important to remember that actually there were not “concrete crimes” for detaining Khamrakulov, besides simultaneously there were other three similar cases to his, of Uzbek origin men who leaved Kyrgyzstan because their ethnic background and were also charged of those crimes.

2.5 Law pleaded by the Russian Government.

First at all, I would like to point out that the arguments of this party are based more on the criminal proceeding (claiming the Russian Code of Criminal Procedure) and the “general Human Rights” situation in Kyrgyzstan, than in concrete articles of the European Convention of Human Rights. Of course, for this party the article 3 was not appropriated to the case and of course they also denied the United Nations Committee observations regarding the “not appropriate” situation of respect of Human Rights in Kyrgyzstan.

On one hand, the Government stated that the applicant did not “finish” the correct procedure, it means that the applicant did not go to all the stages and appeals needed in the Russian law for appealing finally to the ECHR. It was needed to go to the Cassation Court. This argument was based legally on chapters 47 and 48 of the Russian Code of Criminal Procedure.¹⁷

On the second hand, the Government also tried to “defend” the Kyrgyz Republic, arguing that Kyrgyzstan, was a member of important international organizations, the same United Nations and it had also *“ratified all fundamental international conventions on human rights. In particular, Kyrgyzstan had been a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 since 5 September 1997, and to its Optional Protocol of 18 December 2002 since 29 December 2008.”* For this reason, it had

¹⁶ Article 5 para 4; European Convention for the Protection of Human Rights; Rome, 1950.

¹⁷ *“The Government also submitted that the applicant had failed to lodge cassation appeals pursuant to Chapters 47.1 and 48.1 of the Russian Code of Criminal Procedure (“CCrP”) against the Supreme Court’s appeal judgment of 6 November 2013 upholding the extradition order.” Khamrakulov v. Russia. Application no. 68894/13, European Court of Human Rights; April 16th, 2015*

introduced reforms in their internal institutions according to these conventions. After many paragraphs trying to argue the favourable situation of Kyrgyzstan, they took up the argument alleged along all the Statement of Defence: that the applicant would not be in risk in Kyrgyzstan.

2.6 The Court Decision.

The court ruled in favor of the applicant. There reaffirmed that there was a violation of **Article 3** of the Convention if the applicant would be extradited to Kyrgyzstan and a violation of **Article 5 para 4** of the same text because the process took more time than the allowed. As they were similar cases to Khamrakulov's, the Court ruled similarly to the rest, and pointed out that *“These judgements hold that extradition to Kyrgyzstan would be a violation of Article 3 of the European Convention of Human Rights (prohibition of torture or other ill-treatment, including sending people to places where they would face a real risk of treatment in violation of this prohibition).”*¹⁸

However, there is a moment when it is said: the court *“Decides to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable, in the interests of the proper conduct of the proceedings, not to extradite the applicant until such time as the present judgment becomes final or until further order.”* Is it a real solution for that case? Why they did not mention something about his seek for asylum or his refugee status? Why the European Human Rights Court just “indicate” the Russian Government that they shall not extradite the applicant to Kyrgyzstan? Is it actually effective? We are going to discuss it later.

3. Critical Reflections.

3.1 June 2010 crisis.

Firstly, it is important to make an inflexion point on the historical and geographic situation of Osh, Kyrgyzstan, at the time of Khamrakulov's. Institutions as the International Coalition for the Responsibility to Protect, Amnesty International or OSCE, were focused on the ethnic conflict that occurred at that time in Kyrgyzstan. The same United Nations (UNCHR) reported *“indiscriminate killing and rape, taking place in Kyrgyzstan on the basis on ethnicity.”*¹⁹; more than 300.000 displaced people whereof over 100.000 people

¹⁸ “Amnesty International Public Statement”; Amnesty International, AI index: EUR 58/1846/2015; June 10th, 2015.

¹⁹ “Crisis in Kyrgyzstan”, International Coalition for the Responsibility To Protect; 2010, rec: <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kyrgyzstan>

had to cross the border and move to other country.²⁰ It was considered “(...) *the worst inter-ethnic clashes to hit Kyrgyzstan since the collapse of the Soviet Union.*”²¹ After this crisis, there were critics to the Kyrgyz Government for not having an impartial position regarding it, “*In November 2010, 72 people were detained on charges relating to the June ethnic violence, and 17 defendants from the Uzbek ethnic community were sentenced to life in prison. The judicial process has been criticized by human rights organizations including Human Rights Watch, as “most of the arrests seem to be targeted against the Uzbek community”, and defendants, their families, and attorneys have been threatened and attacked.*”²²

Secondly, the case of Khamrakulov was not an aisled case: at the same time the Moscow Government started to process his extradition to Kyrgyzstan, there were other process opened in Russia against Uzbek ethnic nationals from Kyrgyzstan like Murodil Tadzhibayev, Botir Turgunov, Nabid Abdullayev, Mamadaliyev and Vohid Aliyev.²³ Amnesty International impinged on those cases several times, and accused Kyrgyzstan to violate all the international treaties and covenants for the protection of Human and Civil Rights, as it has signed the major of them. “*Kyrgyzstan has issued dozens of extradition requests for ethnic Uzbeks whom the authorities accuse of having organized or participated in the June 2010 violence in Osh and Jalal-Abad. Most of those sought have fled to Russia, with lesser numbers seeking refuge in Kazakhstan and Ukraine. The European Court of Human Rights has now issued several judgements on the risk of torture and other ill-treatment for ethnic Uzbeks accused of involvement in the June 2010 violence and threatened with return from Russia to Kyrgyzstan.*”²⁴ The most important case we could probably find was Gayratbek Saliyev v. Russia, also an Uzbek ethnic national from Kyrgyzstan who had to leave his country for the same reasons as Khamrakulov and also was in charged of the same crimes as Khamrakulov. His asylum seeking was also denied and his extradition order continued. The Government also argued that there were

²⁰ United Nations High Commissioner for Human Rights.

²¹ FORESTIER-WALKER, R.: “Kyrgyz conflict an 'immense crisis'; Al Jazeera; June 15th, 2010; rec: <http://www.aljazeera.com/news/asia/2010/06/201061751248769765.html>

²² “Crisis in Kyrgyzstan”, International Coalition for the Responsibility To Protect; 2010, rec: <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kyrgyzstan>

²³ “URGENT: four asylum-seekers at risk of extradition”; Amnesty International; March 7th, 2014, rec: https://www.amnestyusa.org/files/uaa27113_0.pdf

²⁴ “Amnesty International Public Statement”; Amnesty International, AI index: EUR 58/1846/2015; June 10th, 2015.

no reasons for not extraditing as the situation for Human Rights, justice system and fair trials had improved in Kyrgyzstan²⁵. Exactly, the fail was the same: violation of articles 3 and 5 para 4 of the European Convention of Human Rights.

3.2 The “ECHR System” for refugees and its effectiveness. Khamrakulov as a refugee.

We have explained along the essay the arguments of both parties and why Khamrakulov could be considered a refugee. It is not easy to define what a refugee is or not, and was even more difficult during 2013 and 2015 (when the ECHR finally ruled). This is why it is our task to analyze the refugee status under the “ECHR System”, and why it is effective or not. Firstly, it is important to notice that the nouned “ECHR System” is based on case-law. Secondly, it is focused on these articles of the European Convention for Human Rights: article 3 (the one alleged in this case), article 8, article 13 and article 4 of the Fourth Add Protocol to the ECHR.

As the court mentioned in their decision and as the plaintiff argued, the article 3 of the European Convention for Human Rights prohibits explicitly torture and inhuman treatments and punishments: Khamrakulov suffered discriminating and inhuman treatments in his origin country for his ethnic condition. Yes, it is true that he suffered discriminating and inhuman treatments and he was also punished and persecuted for something he did not do just because his ethnic condition.

The article 8 states that everyone has the right to be respected for his private life and family, and that there *“shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime,(...)”*²⁶ Khamrakulov v. Russia did not present any prima facie for arguing that this man could be considered a public danger (cessation or exclusion of the definition of refugee according to article 1 A of the Additional Protocol of 1967 to the Geneva Convention of 1951). Moreover, we shall note that this case did not come alone but together with cases like the ones mentioned before (Abdullayev v. Russia case that has a lot

²⁵DUPRAZ, S.; GOETH-FLEMMICH, B.; KUBÍČEK, M.; SELVAGGI, E.; SKOCZELAS, M.; VERBET, E.: “Case Law by the European Court of Human Rights of Relevance for the Application of the European Conventions on International Co-Operation in Criminal Matters” Committee of experts on the operation of European Conventions on co-operation in criminal matters; European Committee on Crime Problems; Strasbourg; October 10th, 2017.

²⁶ Article 8; European Convention for the Protection of Human Rights; Rome, 1950.

of parallelisms²⁷, Turgunov v. Russia, etcetera), cases where the applicants were also condemned for crimes that were not committed by the plaintiffs, where the asylum seeking process were denied and where the extradition orders continued as the Russian government considered that “*they would not receive any torture or ill-treatment in Kyrgyzstan.*”²⁸

One of the most important articles that we could apply to this case under the “ECHR System” is the article 13 of this text. This article specifies: “*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*”²⁹ If we look back, in epigraph 2 we explained the arguments of the Russian Government which stated that the applicant did not exhausted all the remedies within Russian jurisdictional system thus, his application was not proper. However, with this article, it is possible to ensure an “extra” protection to the person whose rights are being violated, as it states that Khamrakulov had the right to have an effective remedy before the Russian government understood that his rights were violated by the Kyrgyz (and Russian also) government. One of the critics we could have to the plaintiff’s paper is the absence of arguments regarding this article, because they stated that they depleted all the possible legal means and also went deeply into the “cassation” functioning rather than appealed directly to this article that could be more in accordance the appeal to the European Court of Human Rights.

The last article under the ECHR system is the article 4 of the Fourth Add Protocol to the ECHR. This article specifies: “*Collective expulsions of aliens is prohibited*”. Can we apply this article to this case? I would give an affirmative answer to this question, but first, was Khamrakulov an alien? Yes, as an alien is the name given to someone who is not a national from a concrete state thus Khamrakulov was an alien from Russia. As we have mentioned before, the case of Khamrakulov was not an aisle case and there were other Uzbek-Kyrgyz

²⁷ “*Relying on Article 3 (prohibition of torture and of inhuman or degrading treatment), Mr Abdullayev complains that, if extradited to Kyrgyzstan, he would be subjected to torture or inhuman or degrading treatment or punishment because he belongs to the Uzbek ethnic minority. He further complains, under Article 5 § 4 (right to have lawfulness of detention decided speedily by a court), that his appeals against two of the detention orders were not examined “speedily” and that there was no effective procedure by which he could have challenged his detention.*”; Forthcoming judgments and decisions of the ECHR; European Court of Human Rights, October 9th, 2015; rec: <file:///C:/Users/Natalia%20Cosio/Downloads/Forthcoming%20judgments%20and%20decisions%2013-15.10.15.pdf>

²⁸ *Khamrakulov v. Russia*. Application no. 68894/13, European Court of Human Rights; April 16th, 2015

²⁹ Article 13; European Convention for the Protection of Human Rights; Rome, 1950.

men who had to suffer the same as Khamrakulov did in the same period of time and for the same reasons. Could it be considered a “massive expulsion”? It could be considered a great expulsion of “aliens” but without being responsible of this expulsion (the Russian government tried to “blame” the Kyrgyz Government).

4. Conclusions.

The impact of *Khamrakulov v. Russia*, cannot be analyzed separately from the other cases which were handled at the same time. Probably, this case in particular, is not the most famous, but it is important all in all. On one hand it makes us realize that the migration phenomena is not an aisle case located nowadays in Syria but, people were migrants since the beginning of the times. It also shows the importance of the institution of “Asylum Seeking” for the protection of fundamental rights and liberties, and the lack of guarantee-based jurisdictional systems around the world. On the other hand, this case rises up this question: even though Kyrgyzstan and Russia signed all the treaties related with Human Rights, it is possible to see a lack of application of those Human Rights in their own systems.

I do see the importance of this case in relation to the situation at the time and currently of Kyrgyzstan and Russia regarding Human Rights. Despite of all the ratifications of Human Rights related treaties and protocols and so on and so forth those states signed, they continued committing different attempts to Human Rights, denying fair trials and protection, being denounced by different Human Rights institutions, etcetera. Amnesty International denounced the critical situation regarding rights and liberties of Kyrgyzstan after the 2010 crisis and the lack of impartiality of the investigations and trials: *“No impartial and effective investigation took place into human rights violations, including crimes against humanity, committed during the June 2010 violence and its aftermath. The authorities failed to take effective measures to end torture and other ill-treatment and bring perpetrators to justice. (...) Prisoner of conscience Azimjan Askarov remained in detention while the homes of lawyers and the NGO who worked on his and other ethnic Uzbeks’ cases were raided by security officials.”*³⁰ This case seems the real importance of ratifying, signing or simply “collecting” international documents for certain countries in the world: for a European state could be dishonourable but, even though is sad and unfair, the major part of the states of the world are not a democracy, and not all the regions of the world proclaim the defence of Human Rights and Human Dignity.

³⁰ “AI - Amnesty International: Amnesty International Report 2015/16 - The State of the World’s Human Rights”; Kyrgyzstan, February 24th, 2016 (available at [ecoi.net](http://www.ecoi.net)) ; rec http://www.ecoi.net/local_link/319829/445200_en.html

Furthermore, the consciousness of protecting the less favourable groups is not the same in all the cultures. We, as a European country, live in a region which promote the creation and establishment of what a Human Right is, and, depending of the regions, the conceptions are different. This is also one of the obstacles we can find to all the mechanisms and institutions for cooperation in order to protect the migrants and the people who have to leave the countries, and the ones included in the “refugee” group. If Khamrakulov asked for asylum in Belgium he may had other destiny and venture but, seriously, the major part of possible refugees have hopeless situations which they will try to solve as soon and faster as possible. I do not see the need to sign and to sign more and more treaties, protocols and conventions if there is not a real cooperation or if there are not real institutions who can control that or try to avoid the conflicts between the signing or non-signing states giving just “rules” and “guides”. We also have studied that the principle of “non-refoulement” is part of the Customary Law so it should be apply to any country even is a signing country or not but, have we seen any proven guarantee along this case that Russia was not going to “devolve” Khamrakulov to his original country?

We will not stop people flowing from one country to another but we can also stop people fleeing from their countries. Warsan Shire, a Kenyan writer, wrote down that “*No one leaves home unless home is the mouth of a shark.*” And there cannot be any more truthful quote for summarizing: Khamrakulov would not leave Kyrgyzstan if he was not threatened there, and he would not have pleaded to the ECHR if the country in which he had to establish, would guaranteed his fundamental and human rights.

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