

Case No.1N-1-2006  
Procedural decision category 1.1.2.3.

COURT OF APPEAL OF LITHUANIA  
COURT RULING  
IN THE NAME OF THE REPUBLIC OF LITHUANIA

23<sup>rd</sup> October 2006  
Vilnius

Judge of the Department of Criminal Cases of the Court of Appeal of Lithuania Tomas Seskauskas,  
with performance of the office of court clerk by Inga Kavaliauskaite,  
in attendance of Public Prosecutor Meilute Mejeriene,  
defender, lawyer Vitoldas Petravicius,  
extraditable person Igor Babenko,  
interpreter Alvyra Klipciuviene,

By procedure stipulated in Article 74 of the Code of Criminal Procedure (the CCP) of the Republic of Lithuania, acting as the higher court, considered *the complaint of the defender of extraditable person Igor Babenko* concerning the part of the ruling of Vilnius District Court the 8<sup>th</sup> September 2005 by which the court ruled to extradite Igor Babenko to the Russian Federation for offences, designated in Part 4 of Article 160 and Part 1 of Article 174 of the Criminal Code of the Russian Federation (the CC of the RF), committed in the territory of the Russian Federation in the period of 2002-2005.

Having scrutinized the complaint and familiarizing with the material on extradition of and asylum granting to I.Babenko submitted by the General Public Prosecutor's Office and newly received in the course of the present legal procedure, and having heard explications of the procedure participants the judge

established:

Following Articles 71 and 73 of the Code of Criminal Procedure of the Republic of Lithuania (hereinafter – the CCP) by the petition of 25.07.2005 the Public Prosecutor of the General Public Prosecutor's Office of the Republic of Lithuania asked to extradite Igor Babenko to the Russian Federation for the criminal offences committed in the territory of the Russian Federation.

The petition points out that the General Public Prosecutor's Office of the Republic of Lithuania received a letter of the General Public Prosecutor's Office of the Russian Federation asking to extradite citizen of Russia Igor Babenko following European Convention 'Relating to Extradition' 1957 and Agreement of the Republic of Lithuania and the Russian Federation 'On Legal Assistance and Legal Relations in Civil, Family and Criminal Cases' 1992 (hereinafter – Bipartite Agreement of the Republic of Lithuania and Russian Federation 1992). The General Public Prosecutor's Office of the Russian Federation asks to extradite the person in question to the Russian Federation for criminal persecution for the criminal offences committed in the territory of the Russian Federation in the period of 2002-2005: appropriation of foreign property and dissipation thereof in aggravating circumstances, legalization (money laundering) of funds and other property, acquired by the person through a criminal offence, in aggravating circumstances. The petition specifies that by Criminal Case No. 50047 Igor

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Babenko is accused for commitment of offences defined in Part 4 of Article 160 and Part 1 of Article 174 of the CC of the RF. Preliminary investigation established that in the period of 2002-2005 through the abuse of his office as the Bank Manager of the Branch Office of Stock Commercial Bank 'Menatep Sankt-Peterburg' in Stavropol and acting in an organized group of persons involved in anticipatory agreement, Igor Babenko appropriated and rifled by the method of dissipation foreign property entrusted to the members of the group and owned by stock company "Stavropolkrajgaz" and Stock Commercial Bank 'Menatep Sankt-Peterburg', money and notes for totally 333 m Roubles, including foreign property directly entrusted to him – money owned by 'Menatep Sankt-Peterburg' amounting to 133.082.000,00 Roubles. Igor Babenko is also suspected of financial and other transactions in Stavropol in the period of 2002-2004 with the help of the funds and notes amounting to 260.574.000,00 Roubles, acquired through offensive actions, for the purpose of making an impression that he legally managed, used and had in his disposition the aforementioned money and notes.

Attachments to the Public Prosecutor's petition record that in the case investigated by the Headquarters South Federal District of the General Public Prosecutor's Office of the Russian Federation I.Babenko is arraigned as the accused, and the decision of 10.06.2005 of the investigator for particularly important cases gives charges against the accused for offences defined in Part 4 of Article 160 and Part 4 of Article 174<sup>1</sup> of the CC of the RF.

The request of extradition of the General Public Prosecutor's Office of the Russian Federation points out that offences incriminated to I.Babenko are detailed in the attachments, his extradition in related to his prosecution, assures that he would be entitled to all possibilities of defence against the charge in the Russian Federation, notifies that the limits of prosecution had not passed and he does not have any immunity exempting from criminal persecution.

Arrest as detention means was assigned by the ruling of 15.06.2005 of Jesentuki City Court of Stavropol region of the Russian Federation motivating that I.Babenko, being accused of the grave offence and the particularly grave offence, left the Russian Federation and hid from preliminary interrogation.

Having considered the petition of the Public Prosecutor of the General Public Prosecutor's Office of the Republic of Lithuania, by the ruling of the 8<sup>th</sup> September 2005 Vilnius District Court decided to sustain it and extradited Russian citizen Igor Babenka, born on the 28<sup>th</sup> February 1950 in Kretinga, the Republic of Lithuania, to the Russian Federation for the offences designated in Part 4 of Article 160 and Part 1 of Article 174 of the CC of the RF and committed in the territory of Russia in the period of 2002-2005.

The court stated that the case includes a number of data allowing the assumption that the suspected Igor Babenka had committed offences in territory of the Russian Federation and is subject to extradition to the Russian Federation. Offences incriminated to him, the commitment of which he is suspected of, fall under the category of criminal cases and they correspond to the offences defined in Part 2 of Article 25, Part 2 of Article 183, Part 2 of Article 184, Part 1 of Article 216 of the Criminal Code of the Republic of Lithuania (hereinafter – the CC ). The court noted that the situation defined in the case conforms to the provisions of Bipartite Agreement of the Republic of Lithuania and Russian Federation 1992, European Convention 'Relating to Extradition' 1957, and Ruling No.42 29.12.2003 of the Senate of the Supreme Court of Lithuania 'On Judicial Practice Applying International Agreements of the Republic of Lithuania and Rules of the Criminal Code and the Code of Criminal Procedure Defining Extradition of a Person to a Foreign Country of His/Her Extradition to International Criminal Court'. No grounds for denying extradition of citizen of Russia I.Babenko to the applying country were established in the case. In the court's opinion, argumentation of the suspected I.Babenko that the criminal case instigated against him bears a political nature are unsubstantiated, there are no such data present in the case. Moreover, documents on conclusion of the loan agreement by I.Babenko, the ruling of the court of the United Kingdom, etc. submitted in the course of hearing of the case, do not provide for any basis of doubting of reasonability of requirements of the Russian Federation. The court accepted that the case includes data witnessing that the accused has health problems, nevertheless pointed out that in the considered case the current state of health of I.Babenko does not impede fulfilment

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of the request of extradition of the General Public Prosecutor's Office of the Russian Federation.

In his complaint *the defender of extraditable person Igor Babenko* asks for annulment of ruling 08.09.2005 of Vilnius District Court and adoption of another ruling denying extradition of I.Babenko to the Russian Federation. To the defender's mind, the court proved to be biased through ignoring of the data contained in the extradition material and following only the motives and arguments of the General Public Prosecutor's Office of the Republic of Lithuania.

The defender of I.Babenko contradicts the court conclusion that the arguments of the accused of the political nature of the criminal case brought against him are unjustified. The defender notes that neither I.Babenko himself nor his defence denied that the offence, I.Babenko is accused of, is political, however both the arguments of the defended and information provided by the defence give solid basis for claiming that the criminal case against I.Babenko has immediate connection to other cases regarded by the authorities of the Russian Federation as criminal and Western democracies and public organizations – as political.

The defender draws attention to the fact that Moscow Meschanskij Court of the Russian Federation delivered the sentence in the so-called M.Chodorkovski case. In the course of the procedure officials of the Russian Federation, the Public Prosecutor supporting the charge being among them, notified M.Chodorkovski and P.Lebedev that since the 2<sup>nd</sup> February 2004 another criminal case against the said persons in appropriation of funds acquired through offensive actions is being investigated. Company 'Menatep' as well as the bank under the same name were established by M.Chodokovski. At the beginning of 'Menatep' operation the aforementioned was managing the Board of the bank by acting as the Chairman thereof, whereas now sentenced P.Lebedev was holding the position of the Chairman of the bank. In 1998 I.Babenko took the office of the Director of the branch office of 'Menatep Sankt-Peterburg' in Stavropol, the main clients of which were the companies directly or through intermediating enterprises related to oil company 'Jukos': 'Stavropolnefteprodukt', 'Stavropolterminal', 'Torgovij dom Jukos', 'Apatit', and a number of others. Not only financial transactions of the said companies, but also other payments were performed through Stavropol branch office. It was incumbent upon the Bank Manager by his office to be familiar with and he was aware of all cash flow schemes.

The defender points out that the bank office under the management of I.Babenko was directly connected with concern 'Jukos', since necessary proofs, allowing substantiation new charges against M.Choorkovski, P.Lebedev and other persons, may be acquired through the last link of the financial bodies, or Stavropol branch office of commercial bank 'Menatep Sankt-Peterburg', as it was.

The defender assumes that through associating such actual circumstances with the circumstances referred to by I.Babenko and the data provided by the defence, it becomes more credible than incredible that the offence, for which I.Babenko is accused and asked to be extradited to Russia, is directly connected to so-called M.Chodorkovski or 'Jukos' case. The defender states that the offence, in connection to which Russia asks for extradition of I.Babenko, is regarded as the offence immediately related to the offence of a political nature, therefore the applied country - the Republic of Lithuania – has the right to deny extradition of he person on the basis of Part 1 of Article 3 of European Convention 'Relating to Extradition' 1957, signed and ratified both by Lithuania and Russia, and paragraph 3 of Part 3 of Article 71 of the CCP.

The defender of the extraditable person I.Babenko criticizes the data provided by the preventive bodies of Russia, substantiating the charges laid against the accused for, to the defender's mind, ostensibly economical violations. The defender draws the court's attention to the protocol of interrogation of Vladimir Jerin of 16.06.2005, by evidence of which the Russian preventive bodies actually buttress their charges against I.Babenko. The aforementioned person was interrogated by Chief Interrogator of Federal Security Service S.Plechanov. The defender maintains that in 2004 V.Jerin was detained by the Security Service for assumption of funds, unrelated to I.Babenko case, therefore the conformity of the circumstances defined by V.Jerin to the reality gives doubts and represents that the investigation is being carried out by the Federal Security Service of Russia.

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The defender draws attention to the fact that at the beginning of the year O.Lijev, mentioned in the accusation, in accordance with which he cooperated with I.Babenko, delivered a petition in respect of bringing of a criminal case against the Manager of Stavropol branch office of 'Menatep Sankt-Peterburg' bank. A suit was entered and later on cancelled, however a part of the previous accusations were included in the new cases just at the moment when I.Babenko refused disclosure of confidential information on the bank clients related to 'Jukos' concern to the Russian security bodies. The defender finds it unclear why prior to expiration term of the loan agreement (on 118.950.000,00 Roubles) the case for dissipation of the same amount is being brought. The complaint also states that the top officials of the General Public Prosecutor's Office of the Republic of Lithuania have publicly declared that the defended shall be extradited, named him a criminal by infringing the principle of presumption of innocence and his other rights provided for in the Convention on Protection of Human Rights and Fundamental Freedoms.

Another part of the defender's complaint in respect of legality of prolongation of the arrest of the extraditable I.Babenko was scrutinized by the ruling of 28.09.2005 of the Court of Appeal of Lithuania.

The extraditable I.Babenko, his defender and the Public Prosecutor attending the procedure of the higher court request sustaining of the complaint.

The defender's complaint is partially sustainable. The ruling of the lower court, being the subject of the defender's appeal, cannot be deemed legal and is annulled.

In respect of the defender's appeal to verify the reliability of data, recorded in procedural documentation of individual preliminary investigation bodies of the Russian Federation (evidence of V.Jerin, other persons, circumstances in which they appear in the case), which substantiate the charges against I.Babenko, it shall be responded that this is beyond the subject of extradition procedure. During extradition court does not decide whether the data provided by the applied country are sufficient to substantiate guiltiness of the extraditable person, whether the extradited person is guilty of the incriminated offences, which serve as the basis for the applicant country to request extradition. The court decides only if a sufficient basis for extradition is present: 1) if that is allowed under international agreements, national laws and other legal regulations, 2) whether the conditions for extradition are available, i.e. extradition is substantiated by data provided to the court. Such condition verification actually infers that the court decides whether there would be a basis for suspecting the person of a crime, which, if committed in the applied country, would be punished in conformity with the punitive laws of the applied country.

In this case while deciding whether there is a basis and conditions for extradition of I.Babenko to the Russian Federation, international agreements shall be complied with: European Convention 'Relating to Extradition' and supplementing protocols adopted in Paris on the 13<sup>th</sup> December 1957, Bipartite Agreement of the Republic of Lithuania and Russian Federation 1992, Article 9 of the CC, and Article 71 of the CCP. In the ruling of 08.09.2005 Vilnius District Court did not reasonably see the possible basis of denial of I.Babenko extradition, referred to in the defender's appeal against the said court ruling, i.e. the fact that I.Babenko is persecuted by the applying country for the political offence. In the case investigated by the Headquarters of South Federal District of the General Public Prosecutor's Office of the Russian Federation I.Babenko is accused of particular offences done with regard to ownership and economics, and the data submitted before the court do not represent that I.Babenko is being persecuted for offences committed with political motives or crimes done in respect of independence, territorial integrity and constitutional system of the Russian Federation, and the offences had the purpose of encroaching on the internal system and operation of specific bodies of the applying country. Thus the defender's appeal to see the basis for the extradition denial, provided for in Part 1 of Article 3 of European Convention 'Relating to Extradition', paragraph 3 of Part 3 of Article 9 of the CC, repeated in paragraph 3 of Part 3 of Article 71 of the CCP, is not sustainable.

Nevertheless, in the course of the extradition procedure, there emerged another basis for denying extradition of I.Babenko, not referred to in the appeal, provided for in Part 4 of Article 9 of the CC, and present in paragraph 1 of Part 1 of Article 62 of Bipartite Agreement of the Republic of Lithuania and Russian Federation 1992. The process of asylum provision initiated by the extraditable

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I.Babenko himself resulted in that by the decision of the Migration Department under the Ministry of Interior of the Republic of Lithuania No. 15/6-5-12 PR-12 of 30.01.2006 I.Babenko was entitled to one of the asylum forms provided in the Republic of Lithuania – the status of a refugee and permit of residence in the Republic of Lithuania. The latter decision took effect after overruling of the appeal of the General Public Prosecutor's Office to annul such decision simultaneously declaring its legality and reasonability by the decision of 16.10.2006 of the Highest Administrative Court of Lithuania. With the entitlement of I.Babenko with the status of a refugee he cannot be extradited to the Russian Federation for criminal persecution for the offence defined in Part 4 of Article 160 of CC of the RF. Thus the ruling to extradite I.Babenko to the Russian Federation for the offence committed in the territory of Russia in the period of 2002-2005, defined in Part 4 of Article 160 of CC of the RF shall be annulled.

The extradition data submitted before the court show that charges against I.Babenko in the Russian Federation are subject to not only Part 4 of Article 160 of CC of the RF, but also Part 4 of Article 174<sup>1</sup>. It was particularly because of qualified legalization of the property acquired through the criminal offence that the Russian Federation was applying for extradition of I.Babenko. This notwithstanding, the petition of the Public Prosecutor of the General Public Prosecutor's Office of the Republic of Lithuania to Vilnius District court asks to extradite the suspected I.Babenko for the offence defined in Part 1 of Article 174 of CC of the RF, i.e. for the crime of entirely different nature and gravity than asked by the Russian Federation, due to a technical error. Due to the said offence, extradition is not possible on the grounds of international agreements (Part 1 of Article 2 of European Convention 'Relating to Extradition' 1957, Part 2 of Article 61 of Bipartite Agreement of the Republic of Lithuania and Russian Federation 1992), since such activity is even punished by imprisonment. The aforementioned technical error in deciding issues of extradition of a person to a foreign country results in important legal outcomes. Provisions of European Convention 'Relating to Extradition' 1957 and Bipartite Agreement of the Republic of Lithuania and Russian Federation 1992, respective law regulations of the CC provide for the possibility of extradition of person not for the crime in general, but for expressly identified and named offences, which afterwards set the limits of criminal persecution of the person. The extradited person may be sentenced only for the crime he/she was extradited for. Therefore, while the lower court failed to properly verify all extradition circumstances and adopted the decision on extradition of I.Babenko under Part 1 of Article 174 of CC of the RF, the limits of criminal persecution of the extradited person were reset, although the authorities of the Republic of Lithuania were not entitled to such freedom of discretion. In respect thereof, in the absence of consideration of the request of the Russian Federation for extradition for the offence defined in Part 4 of Article 174<sup>1</sup> of CC of the RF, in the absence of the decision of the lower court in respect of the said issue, and verification whether there is the basis and conditions for extradition for the offence, the part of the ruling of Vilnius District Court of 08.09.2005 on extradition of the suspected I.Babenko from the Republic of Lithuania for the criminal act defined in Part 1 of Article 174 of CC of the RF is annulled as well.

The Court of Appeal of Lithuania, as a higher court considering only the appeal of the defender of the extraditable person against the decision of the lower court, at this stage of the procedure, by its own initiative cannot rectify the infringement and resolve the issue of extradition of I.Babenko to the Russian Federation for the crime defined in Part 4 of Article 174<sup>1</sup> of CC of the RF, as this would encroach on the right of the suspected I.Babenko to defence, the scope and tactics of which was formed by the petition of the Public Prosecutor of the General Public Prosecutor's Office of the Republic of Lithuania. Through rectifying of the said error, the legal status of I.Babenko cannot differ from such status that he would have had the appeal to the court been duly done. The right to defence from the circumstances referred to in the petition of the Public Prosecutor has to be safeguarded from the procedure at the lower court, and, furthermore, the extraditable person shall be assured the right to appeal against the decision of the lower court.

Procedural law regulations regulating extradition of a person to a foreign country do not provide for the possibility to refer the issue settlement to the previous procedure stage, whereby the said error may be eliminated. In respect thereof, the higher court assumes that such type of error may be eliminated through the appeal to the court concerning extradition of a person to a foreign country for the offence, which was not referred to and in respect of which the court did not adopt a legal decision. It is

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obvious that in the case of the Public Prosecutor's petition concerning extradition for qualified legalization of the property acquired through the criminal offence, i.e. the offence, the punishment for which is provided for on the basis of the international agreement (paragraph 5 of Article 7 of the CC), it has to be also verified whether there emerged any basis for extradition denial due to a newly established circumstance that I.Babenko conform to the regulatory criteria of the status of a refugee and reasonably senses fair of being persecuted in the Russian Federation in connection with his pertinence to 'the group of persons related to oil concern 'Juko' and Mikhail Chodorkovski case'.

With regard to the motives specified above the part of the ruling of Vilnius District Court concerning extradition of I.Babenko subject to the appeal is annulled.

Thus following Article 74 of CCP of the Republic of Lithuania, the judge of the higher court

resolves:

to annul the part of the ruling of Vilnius District Court of 08.09.2005 by which the court decided to extradite Igor Babenko to the Russian Federation for the offences, designated in Part 4 of Article 160 and Part 1 of Article 174 of the CC of the RF, committed in the territory of the Russian Federation in the period of 2002-2005.

The present ruling is final and unappealable.

Judge

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Tomas Seskauskas  
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Senior Specialist  
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Jurga Laurinaviciute  
24.10.2006/