



BRILL

Passive Extradition: The *Corte di Cassazione* Rules on the Need to Verify whether, Especially in Time of War, Detention Conditions and Punishments in the Requesting State May Violate Fundamental Human Rights, also Taking into Consideration the Health Status of the Individual

Note to Corte di Cassazione (Sezione VI penale), Criminal proceedings Against A.S., 1 March 2022, No. 10656

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Abstract

The contribution analyzes judgment No. 10656/2022 of the *Corte di Cassazione*, wherein the Court has ruled on a passive extradition from Italy to Russia following a request issued by the latter in relation to a Russian former КВГ member currently suffering from multiple sclerosis, after an arrest warrant had been issued against her for a common crime committed in Russia. The *Corte di Cassazione*, when considering the appeal well-founded, pointedly specifies which assessments shall be undertaken – also in light of the obligations arising from the European Convention on Human Rights – by the Italian judicial authority (*i.e.*, the *Corte d'Appello*) called upon to decide on an extradition request involving a seriously ill individual, taking into account the detention conditions in the requesting State as well as the punishments prescribed

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therein in terms of the potential risk for the individual of being subjected to inhuman or degrading treatment.

Keywords

extradition – human rights – inhuman or degrading treatment – detention conditions – health of prisoners – European Convention on Human Rights

1 Legal Maxim of the Judgment

In the context of a passive extradition procedure, whenever the defense fulfills its burden of alleging objective, precise, reliable, and updated elements regarding the harsh conditions of detention in the requesting State, thereby raising a concern that extradition may result in a treatment incompatible with the fundamental rights of the individual, the Italian judicial authority shall not outweigh such a concern through a generic reference to the assurances received from the foreign judicial authority. Besides, assessments as to whether the conditions of detention as well as the type of punishments inflicted in the requesting State may entail inhuman or degrading treatment must be carried out, even more thoroughly, anytime there is an ongoing armed conflict involving the requesting State. Furthermore, in the event the extradition concerns a seriously ill person, the judicial authority entrusted with the decision as to whether extradition must be granted shall carry out an individualized assessment about the compatibility of the whole extradition procedure with the health conditions of the individual, including the possibility of initiating or continuing any necessary medical treatment inside the requesting State's prisons.

2 Translation Into English of the Most Significant Passages of the Judgment

(Paragraph 3) Given that any political persecution disguised as a criminal prosecution for a common crime constitutes within the Italian legal system – pursuant to Articles 3 and 13 of the Italian Constitution as well as to Articles 5 and 14 of the ECHR – a ground for compulsory rejection of an extradition request, in those inter-State relations carried out on the basis of a convention, the requested State has the power to deny extradition only insofar there are

serious grounds for believing that the relevant extradition is a ‘disguised’ one. Therefore, should the content of the request fail to provide evidence demonstrating that such a risk is well-founded, the individual has the burden of alleging elements and circumstances capable of substantiating the concern that the extradition *per se* constitutes a violation of one of the fundamental human rights.

(Paragraph 4) The complain of a lack of motivation regarding the non-recognition of the existence of any risk of detention in violation of the fundamental rights appears to be well grounded [...]. Indeed, the extradited has fulfilled her burden of alleging objective, precise, reliable, and updated elements regarding the detention conditions in the requesting State, likely to substantiate the concern that her extradition would prelude her being exposed to a treatment incompatible with the fundamental human rights [...] which is not outweighed by the generic reference in the appealed judgment to the ‘assurances’ received from the Russian Judicial Authority.

(Paragraph 4) In relation to passive extradition, for the purpose of ascertaining the condition precluding extradition set forth in Article 698 (1) of the Code of Criminal Procedure, the Corte d’Appello shall verify whether the criminal punishments provided for by the legislation of the requesting State, regardless of its formal denomination, consists of a treatment that violates fundamental human rights. [...] In this regard, the assessment made by the Corte d’Appello in relation to the type of sanction applicable to the crime object of to the proceedings as to which extradition was requested turns out to be deficient. [...] Rather, the Corte d’Appello should have ascertained whether the punishment prescribed by the Russian Penal Code as an alternative to imprisonment – regardless of its translation into Italian (*lavori forzati*), which seemingly evokes inhuman and degrading treatment – consists of a treatment that violates the fundamental human rights, thus precluding extradition.

(Paragraph 5) The caselaw of the Corte di Cassazione has clarified, with regard to passive extradition, that the Corte d’Appello must assess, also by requesting additional information, the circumstances brought forward by the person concerned in relation to the risk of being subjected to inhuman or degrading treatment, thus acquiring ‘individualized’ information about the detention regime that will be reserved for the extradited, also considering, in addition to the general conditions of detention in the requesting State’s prisons, the health and age of the extradited person in relation to his/her specific conditions of detention, and, where applicable, further seeking for assurances as to whether the person concerned may continue to receive medical treatment in the requesting State’s detention facilities.

3 Summary

3.1 *The Arrest Warrant and the Request for Extradition from Italy to Russia*

The judgment under analysis concerns an extradition procedure between Italy and Russia, initiated from an extradition request issued by the latter against A.S., a Russian citizen formerly belonging to the KGB (*Komitet Gosudarstvennoj Bezopasnosti*), the main intelligence agency for the Soviet Union until the early 1990s. At the time the extradition request was issued, A.S. was a defendant within a criminal investigation related to a proceeding for multiple manslaughter committed in complicity in a private clinic, where several persons died because of the use of harmful medications. Specifically, on 11 February 2021 the Meshchanskiy Court issued an arrest warrant against her – who used to work as an employee in the clinic’s administrative department responsible for the purchase of those medications – in respect of the crime of “Production, storage, carriage or sale of goods and products, fulfillment of works or rendering of services which do not meet safety standards”, set forth in Article 238 of the Russian Criminal Code. In March 2021, A.S. sought international protection in Italy for being allegedly exposed to the risk of persecutory and/or discriminatory acts since, in her view, the proceedings against her were initiated for substantially political reasons, albeit formally pertaining to a common crime. Indeed, she used to conduct private investigations on counterfeiting activities and illicit distribution of anesthetics involving prominent Russian public figures. On 4 June 2021, A.S. was arrested in Italy. Given the risk of escape, the Italian judicial authority first ordered a pre-trial detention in prison, later replaced by other precautionary measures less restrictive of her personal freedom. Nevertheless, having A.S. denied her consent to extradition, the Italian Ministry of Justice forwarded the extradition request to the national judicial authority competent on the matter (*i.e.*, the *Corte d’Appello di Milano*), further asking the requesting State to provide detailed information about the detention conditions in Russia as to decide on the relevant extradition procedure.

3.2 *The Judgment of the Corte d’Appello di Milano*

With a judgment dated 16 December 2021, the *Corte d’Appello di Milano* established the existence of the conditions for granting extradition, namely, a precautionary measure legitimately issued by the requesting foreign authority, the double criminality requirement and the absence of any impeding cause concerning the type of crime for which she was being prosecuted in Russia, being it a common one. Furthermore, taking into consideration the report

submitted by the Russian Public Prosecutor's Office in response to the request for information issued through the Italian Ministry of Justice, the *Corte d'Appello* considered the detention conditions in place at that time in Russia to be satisfactory. Likewise, it concluded for the non-existence of any risk of persecutory and/or discriminatory acts against A.S. Additionally, the *Corte d'Appello* considered as generic, hence not relevant, the other arguments put forward by A.S.'s counsel. Suffering A.S. from multiple sclerosis, the defense insisted on the risk of being exposed to ill-treatment precisely because of her critical health status, as further demonstrated by a medical certificate dated 15 December 2021, whereby a specific therapy was prescribed for treating her pathology. Nonetheless, the *Corte d'Appello* rejected all these arguments, thus concluding that the extradition request should have been granted.

3.3 *The Appeal Before the Corte di Cassazione*

Against the judgment of the *Corte d'Appello di Milano* A.S. lodged an appeal before the *Corte di Cassazione* (i.e., the Court of last resort within the Italian judicial system), challenging under several grounds the decision reached by the *Corte d'Appello*. Notably, A.S. first complained about the erroneous ascertainment of the conditions necessary to grant extradition, having the *Corte d'Appello* misrepresented the facts underlying the crime charged against her. It was also contested that the *Corte d'Appello* did not duly consider the violation of the right to a fair trial, as she was first indicted without receiving any prior information about the developments of the criminal proceedings and then prevented from being assisted by her own counsel of choice, despite having already appointed one. As for the risk of being exposed to politically driven persecution, A.S. highlighted that the crime charged against her in Russia, albeit intended as a common one, was being prosecuted for political reasons since she used to belong to the KGB. Furthermore, precisely because of her former affiliation to the KGB, a complaint was made about the *Corte d'Appello* having failed to ascertain whether she would have been transferred to a separate unit or detention facility to avoid being likely subjected to ill-treatment perpetrated by other ordinary prisoners. In relation to the detention conditions in the requesting State, from the appellant's view, the Court disregarded all the documentation filed by her defense aimed at proving that – contrary to the general allegations set forth in the report submitted by the Russian authority – the conditions of prisoners in Russia are extremely poor. Indeed, precisely with respect to detention conditions in those penitentiaries where A.S. should have been transferred, her defense duly proved that, in several cases, they amounted to a violation of Article 3 of the European Convention on Human

Rights (“ECHR”). Apart from all the allegations regarding detention conditions, the appellant also contested that no attention was paid to the potential inhuman or degrading character *per se* of the punishment other than imprisonment to which she might have been subjected in Russia, *i.e.*, forced labor. Lastly, when ruling on the extradition request, the *Corte d’Appello* should have given more consideration to the appellant’s critical health conditions, whilst it merely requested the Russian authority to ensure a *generic* respect for her health, without investigating whether her medical status was compatible with the whole extradition procedure and whether it would have been possible to initiate or continue the relevant medical treatment.

3.4 *The Judgment No. 10656/2022 of the Corte di Cassazione*

After having examined the appeal without the intervention of the parties, as prescribed by Article 23 (8)(9) of the Legislative Decree No. 137/2020, the *Corte di Cassazione* overruled the appealed judgment of the *Corte d’Appello di Milano*, thus remitting the case to a different section of the said Court for the purpose of celebrating a new trial. Preliminarily, the *Corte di Cassazione* dismissed the first ground of appeal (*i.e.*, the fact that the *Corte d’Appello* misrepresented the crime for which A.S. was being prosecuted in Russia); likewise, it considered unfounded the grounds relating to the alleged political reasons behind the criminal proceedings initiated against her in Russia and which, according to the appellant, should have prevented the *Corte d’Appello* from granting extradition. Indeed, from the appellant’s view, her former affiliation to the KGB and her private investigations on activities involving prominent Russian public figures constituted the very reason behind the criminal proceedings initiated against her, thus rendering the extradition a disguised one. In this regard, the *Corte di Cassazione* noted that, insofar the extradition request does not reveal its hidden political motivations, anyone who seek to apply the political offence exemption is under a duty to submit evidence to that effect. Nonetheless, A.S. failed to comply with such a duty. Conversely, the *Corte di Cassazione* accepted as well-founded the other grounds of appeal, namely that the *Corte d’Appello* failed to duly verify: *i*) whether there was any risk of inhuman and degrading treatment in relation to the conditions of detention in the requesting State, *ii*) whether the punishment alternative to imprisonment *per se* amounted to a violation of human rights, and *iii*) whether the extradition procedure was incompatible with the health status of the appellant. As for the conditions of detention, The *Corte di Cassazione* observed that the *Corte d’Appello* failed to adequately motivate the exclusion of the risk of being subjected to ill-treatment, as it had indeed not properly examined the copious documentation submitted by the appellant, all of which provided accurate and reliable

information about the harsh detention conditions in Russia. Moreover, the *Corte di Cassazione* further considered insufficient the assessment made by the *Corte d'Appello* regarding the punishment alternatively prescribed for the crime for which extradition was sought, having the latter failed to ascertain whether forced labor may constitute a treatment that *per se* violates fundamental human rights. Likewise, in the *Corte di Cassazione's* view, the reasoning behind the rejection of the complaint regarding the health conditions of A.S. was inadequate inasmuch the *Corte d'Appello* based its decision solely on the alleged *experimental* nature of the relevant medical treatment, not considering the *reliable* medical certification submitted by the appellant, which could have timely provided details about the treatment plan.

4 Critical Analysis

4.1 Introduction

The *Corte di Cassazione* seems to confirm its well-established caselaw on passive extradition in relation to all those cases where there is a real and imminent risk of a violation of one or more fundamental rights, also considering the obligations stemming from the ECHR. Indeed, extradition granted by a State Party of the Convention may raise issues under Article 3 ECHR¹ when substantial grounds exist for believing that the relevant person would, if extradited, be potentially subjected to ill-treatment in the requesting State.² Whilst one can surely agree with the decision to overrule the judgment of the *Corte d'Appello*, thus remitting the case to a different section of the latter for celebrating a new trial in light of the *Corte di Cassazione's* findings,³ certain points of the legal reasoning behind such a decision may seem less compelling, further representing a missed opportunity for the Court to clarify some fundamental issues

1 CASSESE, "Prohibition of Torture and Inhuman or Degrading Treatment or Punishment", in CASSESE et al. (eds.) *The Human Dimension of International Law: Selected Papers of Antonio Cassese*, Oxford, 2008, p. 295 ff., pp. 299–315.

2 *Soering v. the United Kingdom*, Application No. 14038/88, Judgment of 7 July 1989, paras. 88–91. The *Soering* case represents the leading authority in the jurisprudence of the ECtHR on extradition and the principles set forth therein have been consistently applied by the Court ever since.

3 In this regard, it is nonetheless worth nothing that – according to Art. 706 of the Code of Criminal Procedure – an appeal to the *Corte di Cassazione* against a judgment whereby the *Corte d'Appello* has ruled on an extradition request is allowed *also* on the merits, so that the Court *de facto* operates as a judge of second instance. Thus, it appears rather questionable that, when dismissing the first ground of appeal, the *Corte di Cassazione* held that it was not entitled to rule on the matter, given that it was a substantive one.

related to passive extradition. Therefore, in the following paragraphs some of the major features of the judgment under comment will be analyzed, pertaining to those safeguards the requested State must apply when there is a well-founded risk for the individual of being subjected to inhuman and degrading treatment either while in prison,⁴ or by virtue of any punishment alternative to imprisonment that may be inflicted upon him/her. Close attention will be devoted to two aspects that may affect the outcome of an extradition procedure, namely, the relevance of the health status of the individual facing extradition and the involvement of the requesting State in an armed conflict, also for the purpose of assessing the reliability of assurances provided by the latter.

4.2 *The Insufficiency, for the Purpose of Granting Extradition, of Generic Assurances Regarding Detention Conditions in the Requesting State, Especially in the Context of an Ongoing Armed Conflict*

A first noteworthy issue addressed by the *Corte di Cassazione* concerns the insufficiency of generic assurances from the requesting State to exclude any risk that the individual, if extradited, might be subjected to ill-treatment. Indeed, as to the allocation of the burden of proof, the *Corte di Cassazione* has affirmed that – in those situations where the existence of such a risk is proven by reliable international sources – the judicial authority is under a duty to seek individualized information from the requesting State about punishments that will be inflicted as well as assurances that they will not be contrary to Article 3 ECHR,⁵ even where there has been no defensive allegation to that effect.⁶ Thus, the same reasoning shall apply *a fortiori* when, as in the case at stake, the individual has fulfilled his/her burden of alleging detailed, precise, concordant, and updated evidence as to prove the actual risk of being subjected to ill-treatment in violation of Article 3 ECHR.⁷ Conversely, merely generic assurances from the foreign judicial authority will not be considered enough to grant extradition. As of the subject giving assurances, to effectively entail the commitment of a State to comply with whatever is claimed, such assurances must be given

4 For an overview of the issues that prohibition of inhuman or degrading treatment or punishment may raise in relation to individuals deprived of their liberty, see PUSTORINO, *Introduction to International Human Rights Law*, Berlin – Den Haag, forthcoming, p. 128 ff.

5 JANIS, KAY and BRADLEY, *European Human Rights Law: Text and Materials*, 3rd ed., Oxford, 2008, pp. 215–227.

6 *Corte di Cassazione (Sezione VI penale)*, *Criminal proceedings against Pasciuc Petru*, 26 January 2022, No. 9680, para. 2; see also *Criminal proceedings against Balcan Veaceslav*, 23 July 2020, No. 22818, para. 3.

7 *Corte di Cassazione (Sezione VI penale)*, *Criminal proceedings against Lia Achille*, 14 February 2019, No. 11492, para. 3.

solely or jointly by the central government of that very State (either directly or through diplomatic channels), rather than by the judicial authority alone. Furthermore, it is noteworthy the reference made – albeit in a manner that is neither thorough nor entirely persuasive – to the ongoing conflict between Russia and Ukraine, which would require an even more in-depth scrutiny in relation to the assurances provided by the requesting State. On a closer look, such an approach seems consistent with the position taken by the European Court of Human Rights (“ECtHR”),⁸ which has indeed affirmed that assurances are not *per se* sufficient to ensure that, once extradited, proper protection will be granted to the concerned person against the risk of ill-treatment contrary to Article 3 ECHR, rather requiring a comprehensive case-by-case assessment of the situation existing at the relevant time in the State.⁹ The requested State shall, thus, obtain and examine all necessary information so as to duly verify the reliability of the assurances provided by the requesting State that the standards set forth in the ECHR for ensuring the compliance with Article 3 in relation to the treatment of detainees are met.¹⁰ In this regard, it may be inferred that assurances – whether diplomatic or judicial – shall be considered *per se* not reliable should they be given by a State involved in a conflict, inasmuch that State would not be able to comply with such assurances.

4.3 *The Need to Verify Whether Punishments Prescribed in the Requesting State as an Alternative to Imprisonment May Constitute per se an Inhuman or Degrading Treatment*

Another issue which is certainly of interest concerns the emphasis placed by the *Corte di Cassazione* on the need to verify whether, beyond their formal definition, punishments provided for the crimes charged in the requesting State consist of a treatment that violates fundamental rights. In another recent case of extradition to Russia, the Court already had the opportunity to state this principle by establishing that, when dealing with crimes alternatively subject to two or more punishments, the requested State shall verify whether the punishment other than imprisonment is compatible – in terms of nature and

8 IZUMO, “Diplomatic Assurances against Torture and Ill Treatment: European Court of Human Rights Jurisprudence”, *Columbia Human Rights Law Review*, 2010, p. 233 ff., p. 234.

9 *Khasanov and Rakhmanov v. Russia*, Applications Nos. 28492/15 and 49975/15, Judgment of 29 April 2022, para. 101; *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09, Judgment of 17 January 2012, para. 187; *Saadi v. Italy*, Application No. 37201/06, Judgment of 28 February 2008, para. 148.

10 *Corte di Cassazione (Sezione VI penale), Criminal proceedings against Pasciuc Petru*, 26 January 2022, No. 9680, para. 3.

manners of execution – with the provisions set forth in the ECHR.¹¹ That said, differently from the judgment above recalled, in the one at issue the Court did not dwell on the fact that the provision of forced labor for those convicted in a criminal proceeding is not prohibited *tout court* by international human rights law.¹² Indeed, whilst it is undeniable that Article 4 ECHR establishes that no one may be required to perform forced labor, the very same provision specifies that any work to be performed during detention – as well as during any other condition similar to detention – does not fall under its scope of application.¹³ In this regard, the ECtHR has clarified that, for the work inflicted not being in violation of the Convention, it must be envisaged in a way that does not go beyond what may be considered *ordinary* in the contest of punishments for criminal conviction, with a view to assisting the individual in reintegrating into society.¹⁴ Besides, one shall also bear in mind that, within the Italian legal system, some measures consisting of performance of a work activity are envisaged *in lieu* of detention in prison,¹⁵ although their application is always conditional on the prior consent given by the defendant. The matter seems, thus, to pertain more to those safeguards to be applied when enforcing alternative punishments. Consequently, it requires an assessment that can be undertaken by the *Corte d'Appello* solely upon requesting and obtaining individualized information on the specific punishment, if any, inflicted upon the individual for whom extradition is sought, to exclude its falling within the scope of application of Article 4 ECHR, as well as within those punishments and treatments entailing a condition precluding extradition under Article 698 (1) of the Code of Criminal Procedure.¹⁶ Considering the above, in the instant case the absence of any detailed information about the implementation of the potential alternative punishment consisting of forced labor should have thus prevented the *Corte d'Appello* from granting extradition.

11 *Corte di Cassazione (Sezione VI penale), Criminal proceedings against Smyshlyaev Andrey*, 30 January 2020, No. 8616, para. 2.

12 JANIS, KAY and BRADLEY, *cit. supra* note 5, p. 231.

13 ZAGREBELSKY, CHENAL and TOMASI, *Manuale dei diritti fondamentali in Europa*, 3rd ed., Bologna, 2022, pp. 201–204.

14 *Meier v. Switzerland*, Application No. 10109/14, Judgment of 9 February 2016, para. 66; *Van Droogenbroeck v. Belgium*, Application No. 7906/77, Judgment of 24 June 1982, para. 59.

15 See, *inter alia*, Art. 54 of the Legislative Decree No. 274/2000.

16 *Corte di Cassazione (Sezione VI penale), Criminal proceedings against Kornilov Denis*, 13 March 2019, No. 16018, para. 5.

4.4 *The Non-Assessment of the Alleged Violation of Due Process as a Circumstance Precluding Extradition*

Among the grounds of appeal analyzed by the *Corte di Cassazione*, no attention was paid to the one concerning the alleged violation of due process in relation to the relevant extradition procedure. Whilst it is undisputed that the right to a fair trial holds a prominent place in every democratic society, its role within extradition procedures has not been fully clarified yet.¹⁷ For instance, the ECtHR used to consider that, when a decision to grant extradition has been reached in circumstances where the individual has already suffered or risks suffering a blatant denial of the right to fair trial in the requesting State, one cannot *a priori* exclude an issue whether principles of due process have been allegedly violated.¹⁸ Nonetheless, according to its subsequent caselaw, Article 6 (1) ECHR shall not apply *ratione materiae* to extradition proceeding.¹⁹ As a matter of facts, dealing with the extraterritorial dimension of the application of fair trial standards (*i.e.*, respect for due process in the requesting State), albeit the requested State is not obliged to assess whether the proceedings precluding extradition were entirely compatible with all the requirements set forth in Article 6 ECHR, as long as there is evidence that a flagrant denial of justice already occurred or is likely to occur, it shall refuse to cooperate and grant extradition.²⁰ Therefore, the decision of the *Corte di Cassazione* to refrain *tout court* from any assessment regarding the alleged violation of the principles of due process as a circumstance potentially precluding extradition seems at least questionable, insofar it represents a missed opportunity to clarify the relevance of due process standards within extradition proceedings.

4.5 *The Relevance Pursuant to Article 3 ECHR of the Health Conditions of the Individual for the Purpose of Assessing the Risk, if Any, of Being Subjected to Inhuman or Degrading Treatment in the Requesting State*

By considering well-founded the complaints related to the applicant's health condition, the Court upheld the position previously adopted in some other judgments regarding extradition proceedings involving seriously ill

17 VAN DER WILT, "On the Hierarchy between Extradition and Human Rights", in DE WET and VIDMAN (eds.), *Hierarchy in International Law: The Place of Human Rights*, Oxford, 2012, p. 148 ff., pp. 157–158.

18 See *supra* case cited at note 2, para. 113.

19 *Mamatkulov and Askarov v. Turkey*, Applications Nos. 46827/99 and 46951/99, Judgment of 4 February 2005, paras. 82–83.

20 *Drozd and Janousek v. France and Spain*, Application No. 12747/87, Judgment of 26 June 1992, para. 110.

individuals. Notably, one can quite agree with the emphasis posed by the Court on the following aspect, that is, upon evidence summoned by the applicant demonstrating the actual risk of being exposed to inhuman or degrading treatment, not only the judicial authority of the requested State must evaluate the *general* conditions of detention in the requesting State. It shall also, and most importantly, verify the *individual* conditions that the person concerned would face, if extradited, in light of his/her health status,²¹ especially in those cases where it has been proven a systematic deficiency within the requesting State's penitentiary system. Such an approach detects the vulnerable situation faced by detainees and prisoners, who should therefore not be subjected to sufferings greater than those inevitably inherent in the very limitation of one's own personal freedom.²² Specifically, as far as persons deprived of liberty are concerned, by virtue of the positive obligations arising from Article 3 ECHR each Contracting Party must ensure that detention takes place in a manner compatible with the respect for human dignity.²³ In light of the above, the reasoning behind the decision of the *Corte di Cassazione* on this matter seem perfectly coherent with the caselaw of the ECtHR, the latter having clarified, indeed, that putting a seriously ill person in prison under unsuitable conditions, whereby him/her cannot receive adequate medical care, may constitutes an ill-treatment contrary to Article 3 ECHR.²⁴

4.6 *Issues Under Article 3 ECHR Whereby a Seriously Ill Foreigner is Extradited to a State Which Cannot Guarantee the Same Level of Medical Care*

Whilst the *Corte di Cassazione* rightfully stressed the importance of assessing the health status of the individual and the possibility of continuing medical care inside the detention facilities of the requesting State for the purpose of evaluating the risk of being subjected to inhuman or degrading treatment, for the very same purpose no assessment was made on whether the individual, if extradited, may not be granted the same level of medical care ensured in the requested State. In this respect, looking again at the ECtHR's case law, it seems

21 *Corte di Cassazione (Sezione VI penale), Criminal proceedings against Olgesashvili Tamila*, 9 February 2021, No. 8078, para. 5; see also *Criminal proceedings against Tosi Emma*, 6 June 2019, No. 39110, paras. 3–4.

22 *Jalloh v. Germany*, Application No. 54810/00, Judgment of 11 July 2016, para. 68.

23 PUSTORINO, *cit. supra* note 2, pp. 128–130; ZAGREBELSKY, CHENAL and TOMASI, *cit. supra* note 13, p. 198.

24 *Contrada v. Italy (No. 2)*, Application No. 7509/08, Judgment of 11 February 2014, para. 77; *Scoppola v. Italy (No. 4)*, Application No. 65050/09, Judgment of 17 July 2012, para. 47; *İlhan v. Turkey*, Application No. 22277/93, Judgment of 27 June 2000, para. 87.

undisputed that, in all situations involving the removal (regardless it being expulsion or extradition) of a seriously ill person, there is no need to assess whether the care available in the receiving/requesting State would be equivalent to the one provided for in the returning/requested State.²⁵ Nonetheless, before removing the concerned individual, one shall verify on a case-by-case basis if the average medical care in the other State is at least sufficient, so to prevent the individual from being exposed to the risk of ill-treatment contrary to Article 3 ECHR.²⁶ That said, at first glance it would have been thus appropriate for the Court to also include such an assessment in the relevant judgment. However, as clarified by the jurisprudence of the *Corte di Cassazione* itself, by virtue of the twofold nature characterizing passive extradition in Italy (partly administrative and partly judicial), any discretionary evaluations entrusted to the Ministry of Justice, such as those regarding the assessment as to whether the seriously ill individual should continue to receive care in Italy due to the inadequacy of treatments available in the foreign country, are beyond the powers of the *Corte d'Appello*.²⁷ Therefore, when the person concerned has proven to be seriously ill, the only assessment pertaining to the Italian judicial authority concerns the concrete risk for the extradited person of being subjected in the requesting State to treatment which, precisely in view of his/her medical condition, would be of an objectively inhuman nature.²⁸

4.7 Conclusion

All in all, one may confirm that the *Corte di Cassazione* stood by its own case-law on passive extradition concerning seriously ill individuals which, if extradited, risk being subjected to inhuman or degrading treatment by virtue of the prison conditions in the requesting State, as well as of the potentially human rights-infringing nature of any alternative punishment provided for therein. Moreover, given the rejection of certain grounds of appeal, the general tendency towards narrowing the scope of application of the political offense exception²⁹ also seems to be upheld, the Court rather focusing on whether extradition can be granted only insofar previous assessments pertaining to

25 *Paposhvili v. Belgium*, Application No. 41738/10, Judgment of 13 December 2016, para. 189; *Savran v. Denmark*, Application No. 57467/15, Judgment of 7 December 2021, paras. 130–131.

26 *ibid.* See also PUSTORINO, *cit. supra* note 2, pp. 101–102.

27 *Corte di Cassazione (Sezione VI penale), Criminal proceedings against S.R.*, 4 March 2014, No. 11941, para. 3.2.

28 *Corte di Cassazione (Sezione VI penale), Criminal proceedings against Tosi Emma*, 6 June 2019, No. 39110, para. 2.

29 GRIFFIT QC and HARRIS, “Recent developments in the law of extradition”, *Melbourne Journal of International Law*, 2005, p. 33 ff., p. 43.

other potential human rights violations have been successfully carried out. However, it is worth recalling that, following its expulsion from the Council of Europe on 16 March 2022 (*i.e.*, approximately two weeks after the judgment at stake was delivered), as of 16 September 2022 Russia is no longer a member of the ECHR.³⁰ This will inevitably require States Parties to the ECHR to exercise an even stricter scrutiny than hitherto in relation to the risk for the individual concerned of being subjected to inhuman or degrading treatment in the requesting State before granting extradition to Russia.

³⁰ ZANGHÌ, “La problematica partecipazione della Federazione Russa al Consiglio d’Europa: dall’ammissione alla perdita dello status di membro”, *Ordine Internazionale e Diritti Umani*, 2022, p. 318 ff., pp. 340–341.