THE DECISION OF SUPREME COURT OF BRAZIL
ON THE EXTRADITION REQUEST OF A HIZMET MEMBER

INTRODUCTION

This document is the translation of the vote of the Federal Supreme Court's Minister Edson Fachin, rapporteur on the extradition process against Ali Sipahi, a Hizmet inspired businessman, who was arrested on April 5, 2019 on his return from the U.S. The arrest request was made by the Turkish Government. The lawsuit was opened after the coup in 2016 and the content is the same/similar to thousands of other absurd arrests like being part of a terrorist organization (referring to members of the Hizmet Movement), for having an account with Bank Asya (which was a commercial bank and was in legal operation until it was closed after a coup in 2016), being a representative of the Turkish Chamber of Commerce in Belo Horizonte and supporting the Cultural Center.

Pre-trial detention in the case of extradition requests is the rule in Brazil. So, Ali was immediately arrested on landing in Brazil. He spent 34 days in prison at the federal police headquarters in São Paulo. After extensive media coverage and the reaction from society in general, his case was analyzed faster than normal and a hearing was scheduled for 06.08.2019 for the second panel of the Supreme Court, which has 5 members.

At this hearing, in addition to Ali's own lawyers, other entities defended him against this extradition, as amicus curiae. The result was 5 votes to 0 and Ali was acquitted. Each minister made a long statement explaining their votes. The lack of independent justice in Turkey, the reality of torture for prisoners; the non-existence of independent powers; the content of the political accusation of the process, which is not considered a crime in Brazil; that the Hizmet movement is not a terrorist organization; the absurd numbers of prisoners right after the attempted coup and the direction that Turkey has been taking since then were cited as the reasons for the non-extradition. All these facts make it clear that the country has entered an authoritarian regime and baseless charges against critics and opponents are standard in those regimes and this process is one of those.

The collective ruling that reports the votes of the 5 ministers was not ready until the translation of that document. But, as Minister Edson Fachin was rapporteur of the process, his vote serves as a summary of other votes and the positioning of the Supreme Court of Brazil.

EXTRADITION PROCESS 1.578 FEDERAL DISTRICT

VOTE

Link for the original in Portuguese: https://www.conjur.com.br/dl/stf-nega-extradicao-turco-naturalizado.pdf

Mr. Fachin (Rapporteur): The request for extradition for investigative purposes was submitted through diplomatic channels by the Government of Turkey to the detriment of its national ALI SIPAHI, through Note Verbale No. 694/2019, on the basis of the promise of reciprocity for similar cases.

The Turkish Government has submitted a request for the extradition of ALI SIPAHI, based on the promise of reciprocity for similar cases, according to the provisions of Article 84 (2) of the Law 13.445/2017.

The Ankara Court of Peace (Turkey) issued a warrant of arrest No. 7 dated 26 June 2018 for investigation 2017/1204200. The acts attributed to the extradition were allegedly committed in the city of Ankara, Turkey, and are allegedly part of the Fethullah Güllen Armed Terrorist Organization/The Parallel State Structure (FETÖ/PDY), which is subject to imprisonment of between 7.5 and 15 years, in accordance with Articles 314/2, 53/1, 58/9 and 63 of the Criminal Code of the Republic of Turkey, as well as Articles 5/1 and 7/1 of its Anti-Terrorist Law.

Typical behaviors were described in the application:

> "In a phone call on December 25, 2013, Fetullah Gülen, who is the leader of the Armed Terrorist Organization of Fethullah Gülen/The Parallel State Structure (FETÕ/PDY) was examined by the Ankara Public Prosecutor's Office in the framework of investigation 2014/37666 (....) ordered the members of the Organization to put money from their personal accounts in Bank Asya, the bank of the Fethullah Gülen/A Parallel State Structure (FETÕ/PDY).
>
> (...) following Fethullah Gülen's order, the defendant ALI SIPAHI deposited money in his bank account at Banco Asya, between 31 December 2013 and 24 December 2014, in the amount of 1,721.38 Turkish liras.
>
> (...) As a result, he supported the terrorist organization with funding.

I will now examine the grounds provided for in the recent Migration Law (Law 13,445/2017):

1. Extradition of a naturalized Brazilian

Preliminarily, I eliminate the obstacle provided for in article 5, LI, of the Constitution, since the exception provided for in the same constitutional provision applies to the species, since it concerns the extradition of a naturalized Brazilian, who is attributed with typical conduct practiced before naturalization.

The subject of this extradition case, ALI SIPAHI, a Turkish national, born on 1 July 1988, of Ahmet Sipahi and Gulser Sipahi, resident of the State of São Paulo, obtained Brazilian citizenship by naturalization on 19 October 2016 (Ordinance No. 213, of 13 October 2016).

The crimes attributed to him would have been committed in the years 2013 and 2014, in a period

prior to naturalization, which took place in 2016, without the constitutional obstacle.

2. Non-retroactivity of Brazilian criminal law

The offence of armed terrorist organization is provided for in Article 314.1 of the Turkish Criminal Code (No. 5237) with a prison sentence of 10-15 years. The defendant's conduct is also covered by the Turkish Anti-Terror Law 3713/1991, as amended in 1995, 1999, 2003, 2006 and 2010.

In the Brazilian legal system, Law 13.260/2016 disciplines terrorism and reformulates the concept of terrorist organization:

> Art. 6 Receiving, providing, offering, obtaining, conserving, keeping in deposit, requesting, investing in any form, directly or indirectly, resources, assets, goods, rights, securities or services of any nature, for the planning, preparation or execution of the offences provided for in this Act:
>
> Sentence - confinement, fifteen to thirty years.

However, the retroactive application of Brazilian criminal law does not seem feasible. As noted above, the extradition request reports that the events took place between 31 December 2013 and 24 December 2014, during which time "on the order of Fethullah Gülen, the accused ALI SIPAHI deposited 1,721.38 Turkish liras into his bank account at Bank Asya".

The Brazilian legislation that complies with the constitutional mandate, typifying the crime of terrorism, only came to light on 16 March 2016, with the publication of Law No. 13,260 of that year.

At the time of the practice of the accused conducts, there was no criminalization in the common Brazilian criminal law, with the obstacle of the non-retroactivity of the Brazilian criminal law and, therefore, the impracticability of extradition.

In this regard, the Court has already noted in a vote to stone the dean of this Supreme Court, Min. Celso de Mello:

> "The legal meaning of the constitutional principle of the reservation of the law with regard to the classification and commission of crimes (CF, art. 5, point XXXIX, *nullum crime nulla poena sine praevia lege.* Double criminality: criterion governing the extra- judicial system. The need for the fact underlying the request for extradition (or the request for provisional arrest for extrajudicial purposes) to be simultaneously criminalized, at the time of its practice, both in Brazilian and in foreign State's criminal legislation. (...) Innocent situation in the case, since the punishable conduct attributed to the denounced foreign subject only began to be considered criminal in Brazil, in April 2013 (when the *vacatio legis* period of Law 12.737/2012, art. 4, was exhausted). Therefore, subsequently, until the date it was allegedly practiced in the United States of America". (EPP 732-QO, Min. Celso de Mello, trial 11/11/2014, Second Class, DJE 02/02/2015.

In another trial, the Court ruled, also under the direction of Justice Rapporteur Celso de Mello:

> Extradition and dual criminality. ....provided that the act charged constitutes a crime under the dual perspective of the legal systems in force in Brazil and in the foreign State that requires the application of the extradition measure. (...) What really matters, in the evaluation of the double criminality postulate, is the presence of the structuring elements of the criminal type *(essentialia delicti*), *as defined in the primary incrimination precepts contained in the Brazilian legislation and in force in the positive order of the requesting State, independently of the formal designation they attribute to the*

criminal acts.

(Ext. 953, Rel. Min. Celso de Mello, sentence of 28 September 2005, Plenary, DJ of 11/11/2005).

The first obstacle to extradition is therefore the absence of double criminality, which is why Brazilian terrorism law is post- facto and therefore inapplicable. The essential requirement of double criminality has therefore not been met.

3. Characterization of political crimes

The second obstacle to granting the extradition request lies in the political characterization of the criminal conduct attributed to the extraditing party.

According to the charges made in the extradition trial, the extraditing ALI SIPAHI, following an order from the religious leader, deposited money in the bank account of the aforementioned institution, which would have occurred between 31 December 2013 and 24 December 2014 in the amount of 1721.38 Turkish liras, when Brazilian legislation did not yet classify the conduct charged with extradition as terrorism**.**

It could be argued that the conduct would fall within the criminal types contained in the National Security Act, Act No. 7,170, in force since 14 December 1983, when, in which the conduct imputed to the accused is concerned, has the following description:

> Art. 16 - Integrate or maintain an association, party, committee, class entity or group that aims to modify the current regime or the rule of law, by violent means or with the use of serious threats.
>
> Sentence: Confinement, 1 to 5 years.
>
> Art. 17 - Attempt to change, by the use of violence or serious threat, the order, the current regime or the rule of law.
>
> Sentence: Prison, 3 to 15 years.
>
> Single Paragraph - If serious bodily injury occurs, the penalty is increased by half; if death occurs, it is increased by twice.

The jurisprudence of this Court has already recognized that, at least in the specific legislation, political crimes are those defined in Law No. 7,170/83, which defines crimes against national security and political and social order. In this line of interpretation, the conduct with which the accused is charged would be provided for in the national security law and, ipso *facto,* would also be characterized as a political offence.

The scope of the prohibition of extradition for political offences is reflected in foreign doctrine. In Ivan Anthony Shearer's work we find the beginnings of the fence:

> The exception for political offences first appeared in the extradition treaty between Belgium and France in 1834.
>
> The philosophical concepts generated by the French Revolution encouraged participation and political change and legitimized resistance to tyrannical rule. Therefore, granting asylum to political offenders was conceived as a duty in almost all cases.

> One of the first countries to adopt specific domestic legislation exempting political offenders from extradition was Belgium in 1833. The first treaty on exemption from the political offence of extradition appeared in the treaty between France and Belgium in 1834.
>
> (I A. THE SHEARER, EXTRADITION IN INTERNATIONAL LAW 16 (1971)

Steven Lubet and Morris Czackes put the latest concerns in the field of political dissidence and the necessary protection of individual freedom:

> The growing concern for individual freedom, political dissent and human rights in the world has recently given rise to several international representations. International concern may have peaked with the adoption of the Universal Declaration of Human Rights by the United Nations in 1948. The authors of the Declaration sought to promote an uninhibited political debate by providing foreign nations with the possibility of granting asylum to those accused of political acts.
>
> The exception for political crimes is not limited to non-violent dissent; revolutionary or counter-revolutionary violence can also be protected from extradition. While this view may occasionally lead to unpleasant results, it is clear that revolution enters the realm of political activity. However, certain acts of violence, which exist on the fringes of the legitimate revolution, call into question the ability to protect such activities from extradition and punishment.
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> (Steven Lubet, Morris Czackes, The Role of the American Judiciary in the Extradition of Political Terrorists, 71 *Journal of Criminal Law and Criminology* 193 (1980)

As for the definition of political crimes, the Federal Supreme Court has embraced the subjective doctrine, understanding that specific malice - a special purpose of action, embodied in the political desideratum - is necessary to perfect the political offence:

> *1. As the Constitution* does not define a political offence, it is up to the interpreter to do so taking into account the specific case and the law in force.
>
> *2. A political offence only exists when the assumptions of Article 2 of the National Security Law* (Law 7,170/82) are met, to which are added those of Article 1: the materiality of the conduct must impair or expose, actually or potentially, the danger of injury to national sovereignty, so that, although the conduct is typified in Article 12 of the LSN, it is necessary to add the political motivation*. (STF - RC 1468 second, Rel. Min. Ilmar Galvão, Rel. p/ Judgment Min. Maurício Corrêa, DJ 16.8.2000)*

In another trial, the eminent minister Marco Aurélio pointed out:

> The Brazilian legal system does not recognize a political crime whose conceptual characterization results, exclusively, from the motivation of the author of the criminal conduct. To this end, the criminal act must also actually or potentially threaten national security, a legal-political concept which, by being identified in the values referred to in articles 1 and article 2, II, of Law 7170/83 constitutes the very material object of the criminal protection provided by the State to legal assets relevant to the institutional organization in force in Brazil. (SR 160.841 SP, vote of Min. Marco Aurélio, p. 1573).

Although the constitutional text does not distinguish between the two categories (crimes against national security and political crimes) they ended up being equivalent in the infraconstitutional field, since the National Security Law absorbed political crimes.

It is true that this hermeneutic aspect has the incidence of the constitutional prohibition of extradition for political crimes, applicable indiscriminately to foreigners and, of course, to Brazilians

naturalized at any time.

As a result, the STF has signed an understanding that political crimes have been incorporated into the infraconstitutional framework with the *status* of crimes against national security.

In this case, assimilation to the types provided for in the National Security Act would lead to the question of the peculiar treatment of political offences, in this case, without the Court's conditions for political offences with violence, it would lead to the hypothesis prohibited by the Federal Constitution. (*Article 5 LII shall not grant extradition of aliens for political offences or offences of opinion*)

If, at the time of the facts, there was no special Brazilian legislation to combat terrorism and if the **execution of extradition were assimilated to political crimes, there would be a constitutional obstacle to extradition,** and it is worth recalling the historical, firm and eloquent jurisprudence of the Federal Supreme Court in the protection of those accused of political crimes (HC 33722/DF, Judge Nelson Hungria, trial 28/09/1955: Written record: Political crime. Extradition is not permitted, provided it is not related to the ordinary crime (HC 3372/DF, Rel. Min. Nelson Hungria, First Panel, DJ

24.11.1955, pp. 15136, Ement. Vol. 00237-02, pp. 00635, Patient: Jacques Charles Noel de Bernonville).

The second obstacle to extradition, that is to say, its fence in the case of a political offence, is therefore obvious in this case.

4. Presentation of the extraditing party to a court or emergency tribunal. Guarantee of due process.

Finally, a third obstacle to the request for extradition must be examined. The recent Migration Law (Law 13.445/2017) prohibits the granting of extradition when: (Art.82, VIII - the extraditing party has to respond, in the requesting State, before a court or an emergency tribunal;)

Beyond the simple characterization of a political crime or an emergency tribunal, this Court has already examined thoroughly the scope of the "emergency tribunal" dictum to see a broader scope, which is to ensure a fair trial with *due process of law.*

Political instability and even resignations of judges, as well as arrests of opponents to the government of the requesting state (Edoc 49), can be considered a notorious fact. In such circumstances, there is at least justified doubt as to whether the extraditing party will be effectively subjected to an independent and impartial tribunal, within a framework of institutional normality, safe from exogenous and endogenous instability and pressure.

The European Parliament resolution of 13 March 2019, approving the 2018 report, condemned the increased scrutiny by the executive and the political pressure on the work of judges and magistrates:

> "(...) 6 Condemns the increasing control by the executive and the political pressure on the work of judges and magistrates; stresses that a thorough reform of the legislative and the judiciary is necessary for Turkey to improve access to the judicial system, to enhance its effectiveness and to provide better protection of the right to be tried within a reasonable time; underlines that these reforms are necessary for Turkey to fulfil its obligations under international human rights law

> It is concerned that the dismissal of more than 4,000 judges and prosecutors constitutes a threat to the independence and impartiality of the judiciary; it also considers that the detention of more than 570 lawyers constitutes an obstacle to the right of defense and a violation of the right to a fair trial;
>
> It also condemns the arrest and judicial harassment of human rights lawyers;
>
> Calls on the Working Party on Reform to analyze the judicial reform strategy and make it compliant with the standards required by the EU and the Council of Europe; calls on Turkey to ensure the involvement of all stakeholders, including civil society organizations, throughout the reform process; urges the Commission to monitor the proper use of EU funding for the training of judicial and law enforcement officials, which should not be used to legitimize repressive behavior (European Parliament, Texts Adopted, 13/03/2019, Report 2018 on Turkey). (http://www.europarl.europa.eu/doceo/document/TA- 8-2019-0200_EN.html.)

I should also mention that the Supreme Court of the United Kingdom recently rejected four extradition requests made by Turkey in relation to its own nationals for alleged terrorist practice. On April 12th of this year, the Supreme Court confirmed a decision by the ordinary courts in the United Kingdom that had refused to extradite Turkish citizen AKIN IPEK, a businessman accused by the Turkish government of being involved in the Gulen movement. (https://www.supremecourt.uk/decided-cases/index.html)

And in the face of such instabilities in the political life of the requesting State, the solution presented, in a court for the protection of individual freedoms, is by the refusal of extradition that one cannot consider with certainty the guarantee of a fair trial according to the constitutional concessions.

In the 1960s, the Supreme Court faced a similar dilemma. In a context of instability typical of post-revolutionary movements, the Cuban government requested the extradition of one of its nationals and had the request rejected. The Supreme Court understood, in the lapidary vote of Judge Victor Nunes Leal, that "the lack of guarantees, which is presumed in the court of exception, is what justifies this reservation in the general principle of extradition". Minister Victor Nunes Leal continued: "In the first case, it is the very configuration of the judicial power that makes extradition difficult; in the second, it is the political environment, agitated by the spirit of the revolution, and marked by the unlimited powers of the government, that can compromise the functioning of the ordinary courts themselves. In one situation or another, the freedom, security or life of the subject of this extradition case is in danger, and it is these superior goods that the law wishes to protect, when it prohibits the surrender of those who will be tried by an emergency tribunal (Ext. 232/CA - Cuba, Plenary Court, unanimous, DJ 17/12/1960, p. 03947, RTJ vol. 26, p, 1)

Here is the antiquated precedent of this Supreme Court in scoring that the situation is assimilated to the court by the court of exception. Judge Celso de Mello, dean of this Court, in a lapidary vote on Extradition 1362/DF: "It should be recalled, moreover, that the essentiality of international cooperation in the criminal repression of common crimes does not exempt the Brazilian State - and, in particular, the Federal Supreme Court - from ensuring respect for the fundamental rights of the foreign subject who may suffer, in our country, extradition proceedings initiated by any foreign State. The fact that the foreigner has the legal status of extradition is not sufficient to reduce him/her to a state of submission incompatible with the essential dignity inherent in him/her as a human being and which confers on him/her the ownership of inalienable fundamental rights, among which the guarantee of "due process of law" is insurmountable because of its importance. In matters of

extradition law, the Federal Supreme Court cannot and must not be indifferent to violations of fundamental procedural guarantees. The fact is that the Brazilian State - which owes unrestricted obedience to the very Constitution that governs its institutional life - has assumed, by virtue of that same political status, the very serious duty of always giving pre-eminence to human rights (art. 4, II). The extradited person thus assumes, in the process of extradition, the unavailability of rights, the inviolability of which must be preserved by the State to which the extradition request was addressed. The possibility of depriving, in a criminal court, of the "due process of law", in the multiple contours in which this principle is developed, guaranteeing the rights and the very freedom of the accused - guarantee of a broad defense, guarantee of an adversarial procedure, equality between the parties before the natural judge and guarantee of impartiality of the investigating judge - prevents the valid granting of the extradition request (RTJ 134/56-58, Rel. Min. CELSO DE MELLO).

In summary, in the present case, there are substantial grounds for denying the extradition request, either because of the atypicality of the conduct, the facts imputed to the extradition predate the Brazilian law that criminalized terrorism, or because it appears as a political crime in light of the subsumption of the conduct to the national security law, or because the political instability is evident and there is no guarantee of the judiciary's predicates and of a fair and impartial trial with *due process of law.* Also because it does not ensure that the extradited person is guaranteed a fair trial by an independent judge.

For these reasons, I reject the request for extradition.