

**Case number:**

Up-1472/18

ECLI:

ECLI:SI:USRS:2018:Up.1472.18

Challenged act:**Operative provisions:****Abstract:**

It would be contrary to the right determined by Article 18 of the Constitution if a person whose surrender is required were not able to claim a violation of the prohibition of torture merely due to having given consent to surrender since consent to torture cannot have a legal effect. Article 18 of the Constitution imposes on courts, also in such cases, the duty to enable a decision on the merits of the requested persons' allegations regarding the existence of the risk of torture in the requesting state.

[Publisher's Note: The full text of this Decision/Order is available only in Slovene. The text published below is a summary prepared for the annual report.]

Prohibition of Torture

By Decision No. **Up-1472/18**, dated 13 December 2018 (Official Gazette RS, No. 2/19), the Constitutional Court decided on the constitutional complaint of a Montenegrin citizen who challenged the order of an investigating judge of the Ljubljana District Court on the approval of his extradition to Montenegro and the order of the panel of that court on the dismissal of the appeal against the order of the investigating judge. The complainant alleged a violation of the rights determined by Articles 18 and 22 of the Constitution. Allegedly, the court did not adopt a position as to the evidence and the claim that in the event of extradition the complainant would be subjected to torture or inhuman or degrading treatment. Allegedly, he demonstrated by two judgments of the competent court of the requesting state that in the requesting state he is under threat of torture, disablement, and death.

The Constitutional Court proceeded from the fact that, in accordance with valid international law, states have the right to control the entry of foreign nationals, permits for their stay, as well as expulsions and extraditions. However, the sovereignty of the state is limited by the prohibition of removing, expelling, or extraditing a national to a state in which there exists a serious danger that he or she will be subjected to inhuman treatment (the *non-refoulement* principle). In the event of removal, expulsion, or extradition, protection is guaranteed by Article 18 of the Constitution, which determines that no one may be subjected to torture, inhuman, or degrading punishment or treatment. It follows from the established constitutional case law that that Article prohibits a person regarding whom there exists a real threat that in the event he or she returns to the state from which he or she came he or she will be exposed to inhuman treatment from being extradited or expelled to that state.

The procedure for deciding on the extradition of the complainant to the requesting state was carried out in accordance with the provisions of the Criminal Procedure Act (the CrPA). Two procedures are regulated by this Act: the regular procedure and the expedited procedure. In a regular procedure, the assessment of the conditions for extradition is divided into two phases. First, once the opinion of the

investigating judge is obtained, the non-trial panel ascertains whether the statutory conditions for extradition are fulfilled. If the conditions for extradition are fulfilled, the case is sent to the Minister of Justice, who then decides on the extradition. In the second phase of the procedure the Minister of Justice issues a decision by which he or she approves or rejects the extradition. The Minister does not approve the extradition of the foreign national if the latter enjoys the right to asylum, if a political or military criminal offence is concerned, or if it is probable that the person whose extradition is requested would be tortured or treated or punished in an inhuman or degrading manner in the requesting state (the third paragraph of Article 530 of the CrPA). Judicial protection before the Administrative Court is ensured against the decision of the Minister.

In the case at issue, once the complainant was given the legal instructions by the investigating judge, he stated that he concurs with the extradition. In such an event, the court decides on the extradition in an expedited procedure. In an expedited procedure, once the investigating judge verifies whether the statutory conditions are fulfilled, he or she decides on the extradition. There is no second phase, i.e. decision-making by the Minister of Justice; instead, once the order is final, the investigating judge communicates the decision to the Minister of Justice, who immediately thereafter notifies the requesting state of the decision of the court. In an expedited procedure the law does not specifically impose on the investigating judge the obligation to assess whether there exists a probability that the requested person would be subjected to torture in the requesting state. However, it would be contrary to the right determined by Article 18 of the Constitution if the person whose extradition is requested could not allege a violation of the prohibition of torture merely because he or she has already given consent to be extradited, as consent to torture cannot have legal effects. Article 18 of the Constitution imposes on courts the duty to enable also in such an event substantive consideration of the allegations of the requested person regarding the existence of the danger of torture in the requesting state.

The Constitutional Court opined that the constitutionally consistent interpretation of these statutory provisions is that the court would deem that by making such allegations concerning torture the complainant implicitly revoked his consent to extradition. In such an event, decision-making would continue in accordance with the rules that apply to the regular extradition procedure, which means that the danger of torture, taking into account the allegations made by the complainant and the evidence he produced, would be assessed by the competent ministry. Since the court did not deem the complainant's allegations regarding the danger of torture to entail a revocation of his consent to extradition and did not proceed with its decision-making in conformity with the rules of the regular extradition procedure, it did not enable the complainant a substantive assessment of those allegations. Thereby, it violated his right to the prohibition of torture determined by Article 18 of the Constitution.

Thesaurus:

Legal basis:

Cases joined:

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Full text:

Type of procedure:

ustavna pritožba

Type of act:

posamični akt

Applicant:

Božidar Samardžić, Črna Gora

Date of application:

19. 11. 2018

Date of Decision:

13. 12. 2018

Type of decision adopted:

odločba

Outcome of proceedings:

razveljavitev ali odprava

začasno zadržanje

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