

II. ÚS 1260/17 of 15 August 2017

Extradition of a Person Who Has Been Granted Asylum in a Member State of the EU

Czech Republic
JUDGMENT
Constitutional Court
In the Name of the Republic

The Constitutional Court decided in the chamber composed of the presiding judge Jiří Zemánka (judge-rapporteur) and judges Ludvík David and Vojtěch Šimíček on the constitutional complaint of complainant R. M., represented by Mgr. Bc. Filip Schmidt, LL.M., a lawyer based at Ověnecká 78/33, Prague, against the resolution of the High Court in Olomouc, ref. No. 2 To 15/2017-68, of 20 February 2017, and the resolution of the Regional Court in Brno, ref. No. 11 Nt 201/2017-53, of 20 January 2017, with the participation of the High Court in Olomouc and the Regional Court in Brno as parties to the proceedings, and the High Public Prosecutor's Office in Olomouc and the Regional Public Prosecutor's Office in Brno as interveners, as follows:

I. The resolution of the High Court in Olomouc, ref. No. 2 To 15/2017-68, of 20 February 2017 and the resolution of the Regional Court in Brno, ref. No. 11 Nt 201/2017-53, of 20 January 2017, has infringed upon the complainant's rights guaranteed by Articles 8 (1) and (2) and Article 36 (1) of the Charter of Fundamental Rights and Freedoms and Article 5 (1) (f) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

II. The resolution of the High Court, ref. No. 15/2017-68, of 20 February 2017, and the resolution of the Regional Court in Brno, ref. No. 11 Nt 201/2017-53, of 20 January 2017, are annulled.

Reasoning:

I.

1. Through a constitutional complaint which complies with the formal requirements laid down by Act No. 182/1993 Coll., on the Constitutional Court, as amended (hereinafter referred to as the "Act on the Constitutional Court"), the complainant seeks the annulment of the decisions mentioned in the heading, claiming that such decisions have infringed upon his constitutional rights guaranteed by Article 8 of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the "Charter") and Article 5 of the European Convention on Human Rights (hereinafter referred to as the "Convention").

2. The content of the constitutional complaint and the relevant documents imply that the complainant is a national of the Russian Federation who has been a holder of international protection in the form of asylum in Austria since 17 November 2004. Through the judgment of 14 December 2009, he was convicted in his absence by the Korenov District Court in the Krasnodar Region, the Russian Federation, of committing a criminal offence of the illicit turnover of strongly acting or poisonous substances with the intention of selling them under Section 234 (4) of the Criminal Code of the Russian Federation. On 21 August 2008, an international search for the complainant was launched. At the request of the General Prosecutor's Office of the Russian Federation, file No. 81/3-504-08, of 26 September 2008, the proceedings were initiated in the Republic of Austria to extradite the complainant to the Russian Federation. This proceedings were suspended on 25 June 2009 by a decision of the Austrian Land Court for Criminal Proceedings in Vienna, file No. 353 HR60/09d, and the complainant's extradition to the Russian Federation was declared inadmissible, due to being contrary to Article 3 of the Convention and the principle of non-refoulement. On 17 January 2017, the complainant was inspected in the Czech Republic by the patrol of the Aliens' Registration Office, Search Unit in Znojmo. After it had been found out that an international arrest warrant was issued against the complainant, he was detained.

3. Through the contested resolution of the Regional Court in Brno and based on a petition by the Regional Public Prosecutor's Office in Brno of 19 January 2017, the complainant was taken into custody under Section 94 (1) of Act No. 104/2013 Coll., on international judicial cooperation in criminal matters, hereinafter referred to as the "International Judicial Cooperation Act"), while the period from 17 January 2017, 7:30 pm, is included. The Regional Court concluded that the international asylum protection acquired in Austria did not apply to the

complainant in the territory of the Czech Republic. The case is at the stage of a preliminary inquiry into the admissibility of extradition to the criminal prosecution in the Russian Federation, when the complainant is actually threatened by his extradition to the Russian Federation. The complainant is aware that he is protected in the territory of Austria by the granted asylum, so the easiest way to thwart the ongoing extradition proceedings is to travel to Austria, where the Czech judicial authorities will lose any power over him.

4. The complainant filed a complaint against the resolution on preliminary custody, which was dismissed as unfounded by the High Court in Olomouc by the contested resolution pursuant to Section 148 (1) (c) of the Criminal Procedure Code. The High Court found the decision of the court of first instance to be lawful and factually correct, in which the court had sufficiently convincingly dealt with the complainant's arguments. Even in the High Court's view, the fear of a possible escape of the complainant in order to avoid the extradition proceedings in the Russian Federation still remains.

5. The complainant's custody lasted until 29 March 2017, when the Regional Court in Brno, by its resolution, ref. No. 11 Nt 201/2017-161, of 29 March 2017, decided that under Section 91 (1) (o) of the International Judicial Cooperation Act, the extradition of the complainant for the unconditionally imprisonment for 4 years, imposed upon him by the judgment of the Korenov District Court, Krasnodar Region, Russian Federation, of 14 December 2009, for committing a criminal offence of illicit turnover of strongly acting or poisonous substances with the intention to sell pursuant to Article 234, No. 3 of the Criminal Code of the Russian Federation, with the execution of punishment in a general regime correctional facility, is not admissible (sentence I) and, at the same time, released the complainant from the preliminary custody pursuant to Section 95 (4) of the International Judicial Cooperation Act (statement II).

II.

6. The complainant argues in his constitutional complaint that, as early as the time of his lustration by the police and at the latest at the time of the detention session at the Regional Court in Brno, the state authorities were aware of that the complainant was the holder of international protection in Austria and that, therefore, his extradition to the Russian Federation could not be implemented with respect to the principle of non-refoulement, as enshrined in Article 33 of the Convention on the Legal Status of Refugees. It is deemed that, given the common asylum system of the European Union, the holders of international protection in another Member State should be regarded as the holders of international protection in the Czech Republic. This results from both Article 78 (1) of the Treaty on the Functioning of the European Union and Article 21 (1) of the so-called Qualification Directive 2011/95/EU of 13 December 2011.

7. The complainant, referring to the case-law of the Constitutional Court, the European Court of Human Rights, and the Court of Justice of the European Union, points out that the deprivation of any individual's personal freedom must always be tied to a viable purpose, and in a situation where it is clear that the extradition is not possible the person cannot be remanded in custody for that purpose. The European Court of Human Rights considers the absence of binding relation between the custody and the purpose of the custody as wilfulness contrary to the requirements of Article 5 (1) (f) of the Convention. The complainant's longer than two-month custody had thus no legitimate purpose. Even if the interference with his personal freedom does not last because he was released from custody, the decision to remand him into custody is unconstitutional in his opinion and it is necessary to insist on its annulment.

III.

8. At the request of the Constitutional Court, the constitutional complaint was commented on by the parties to the proceedings, namely the Regional Court in Brno and the High Court in Olomouc, and the interveners, namely the Regional Public Prosecutor's Office in Brno and the High Public Prosecutor's Office in Olomouc.

9. The Regional Court in Brno stated in its statement that it did not agree with the complainant's arguments as contained in the constitutional complaint, and that his constitutional rights were not infringed upon by the court. The court therefore proposed that the constitutional complaint be dismissed.

10. The High Court in Olomouc referred in their entirety to the contested decisions, which, in the court's opinion, did not infringe upon the complainant's rights and freedoms. The court justified its opinion by the finding that, at the time of deciding on the custody, the courts had at their disposal unsubstantiated claims of the complainant who

had been detained in the Czech Republic without the necessary documents. The court pointed out that upon the conclusion of the preliminary inquiry into the matter the competent public prosecutor filed on 10 March 2017 a petition to declare the extradition inadmissible and, in that respect, the complainant was released from custody on 29 March 2017. The restraint of the complainant's freedom by the custody was, therefore, justified, at least for the time of the accelerated preliminary inquiry, by the provision of documents certifying the truth of the complainant's arguments. Therefore, the court regarded the constitutional complaint as manifestly unfounded.

11. At the beginning of her statement, the public prosecutor of the Regional Public Prosecutor's Office summarised the relevant data concerning the complainant's detention. The complainant was questioned after his detention by the police authority pursuant to Section 93 (2) of the International Judicial Cooperation Act, and the data mentioned by him were verified in the police database of the Czech Republic and the Police Cooperation Centre Mikulov - Drasenhofen, from where the available police information about the detainee was obtained within the time limit set for detention. The police authority was thus informed at first that a residence card and a conventional passport were issued for the complainant on 9 August 2004 and 5 January 2007 respectively in the Republic of Austria. However, this information had to be verified in the preliminary inquiry because the complainant did not have any other evidence to prove his identity than his driver's licence. In this respect, he does not consider the complainant's claim that he submitted an officially authenticated decision to grant the asylum in Austria as true. It was only in the preliminary inquiry that the data on the granting of asylum and the residence permit to the complainant in the territory of the Republic of Austria was confirmed, namely only after the public prosecutor, as part of requesting additional information as of 26 January 2017, requested the Federal Office for the Asylum in Vienna to provide information relating to granting the asylum to the complainant and to send the confirmation of valid personal documents issued by the Austrian administrative authorities to the complainant. At the same time, the public prosecutor requested the Federal Ministry of Justice of the Republic of Austria to provide additional information on the issue of possible extradition proceedings against the complainant in the Republic of Austria based on the arrest warrant in question. The public prosecutor's response was received on 27 February 2017 and included a decision of the Austrian authority to grant asylum as issued on 17 January 2004 in Linz. Upon receipt of additional information including a copy of the decision to grant asylum to the complainant, a preliminary hearing of the complainant was conducted on 24 February 2017 and the Regional Court was filed on 10 March 2017 with a petition for a decision not to allow the complainant to be extradited to the Russian Federation, which was granted by the Regional Court by its resolution on 29 March 2017. This implies that the competent authorities proceeded as quickly as possible, when it was their duty to verify the data obtained from the police databases. Therefore, they cannot be reproached for having to restrain the personal freedom of an internationally sought complainant. In conclusion, the public prosecutor pointed out that it would be helpful for the work of the Czech judicial authorities if the authorities of the Republic of Austria, after the extradition proceedings conducted in 2009, entered in the system of internationally sought persons a record that the sought person had been subject to extradition proceedings in the Republic of Austria based on the arrest warrant of the requesting state and that the request was not complied with due to granting asylum. The right of asylum applies to the territory of the state which has granted it and must be respected in the executing state based on the international agreements which the Czech Republic is a party to. Under the identified factual situation, it was necessary to restrain the complainant's personal freedom as at the mentioned stage of proceedings the facts required by law for rejecting the requesting state's request for extradition (Section 89 of the International Judicial Cooperation Act) were not established. The public prosecutor therefore suggested that the constitutional complaint be dismissed as manifestly unfounded.

12. The High Public Prosecutor's Office in Olomouc stated that it did not use its right to comment. However, it requested the delivery of the ruling of the Constitutional Court.

13. In the reply to the submitted statements, the complainant responded primarily to the statement of the public prosecutor of the Regional Public Prosecutor's Office in Brno. He referred to the public prosecutor's petition to declare inadmissibility of the extradition of 10 March 2017, which shows that the granting of asylum in the Republic of Austria as the impossibility of extradition to Russia as a reason for the impossibility of custody was already mentioned by the complainant at the custody hearing, when he informed about the date of granting asylum and reasons therefor. Obtaining an officially certified translation of such a decision in Austria is a relatively complicated issue for the person in custody. However, within a common asylum system of the European Union, the sharing of information in the common information system where foreigners with asylum granted or asylum seekers are registered is expected and constitutes a necessary condition. It is therefore incomprehensible to him that the verification of this information by the law enforcement authorities should last longer than a month, especially in the situation where the foreigner is held in custody. The above-mentioned petition of the Regional Public Prosecutor's Office in Brno states on page 7 that the relevant Austrian authorities granted the status of the holder of international protection in Austria on 16 February 2017. At the latest since then, the complainant's custody was unlawful because its purpose was clearly unfeasible.

IV.

14. The Constitutional Court has pointed out on many occasions in the past that it is not entitled to interfere with the decision-making activities of ordinary courts because it is not the top of their system (cf. Articles 81 and 90 of the Constitution). If the courts proceed in accordance with the content of Chapter Five of the Charter, the Constitutional Court may not assume the right of scrutiny over their activities (Article 83 of the Constitution). On the other hand, however, the Constitutional Court is entitled and obliged to assess whether the proceedings as a whole were fair and that the constitutionally guaranteed fundamental rights or freedom of the complainant have not been infringed upon.

15. The Constitutional Court points out that the personal freedom guaranteed by Article 8 of the Charter and Article 5 of the Convention represents one of the most important values of a democratic state and rule of law (see e.g. the Constitutional Court's judgment, file No. I. ÚS 3326/13 of 15 January 2014 (N 5/72 of the Collection of Judgments of the Constitutional Court 69); the judgment of the ECtHR in the case of *Župa v. Czech Republic* of 26 May 2011, No. 39822/07, Section 45]. Therefore, the procedure of public authorities in connection with the restraint of personal freedom must be assessed in a stricter manner [judgment file No. II. ÚS 336/06 of 28 March 2007 (N 56/44 of the Collection of Judgments of the Constitutional Court 719)]. The insistence on compliance with all the conditions for any restraint of personal freedom as provided by law provides a basic guarantee that the rights of the individual concerned will actually be respected and that there will be no abuse of power in his case (judgment file No. III. ÚS 916/13 of 17 February 2015, N 33/76 of the Collection of Judgments of the Constitutional Court 451). Similar safeguards are provided by Article 5 of the Convention or Article 9 of the International Covenant on Civil and Political Rights.

16. In the present case, given the content of the constitutional complaint, it is especially necessary to consider whether the interpretation given and the application of the applicable provisions regulating the decision-making on the restraint of the complainant's freedom by preliminary custody do not create unacceptable constitutional law consequences, i.e. whether they do not constitute an inadmissible interference with the complainant's legal position at that level, which is protected by constitutional law, in particular by the Charter, including the right to judicial protection (fair trial) within the meaning of its Chapter Five, and the Convention.

17. When assessing whether the reasons for the preliminary custody under Section 94 (1) of the International Judicial Cooperation Act were given as for the complainant, it is necessary to take into account the entire course of extradition proceedings as described above, which resulted in a decision to declare the complainant's extradition to the Russian Federation inadmissible pursuant to Section 91 (1) of the International Judicial Cooperation Act. The deprivation of the individual's personal freedom must always be directed towards its purpose also in the context of extradition proceedings and may only last for the period of time strictly necessary in relation to the public interest pursued by the realisation of the custody (see judgment, file No. II. ÚS 331/10 of 26 May 2010, N 106/57 of the Collection of Judgments of the Constitutional Court 371). The European Court of Human Rights considers the absence of binding preliminary custody to a viable purpose arbitrary and contrary to the requirements of Article 5 (1) of the Convention (see *Chahal v. the United Kingdom*, the judgment of the Grand Chamber of 15 November 1996, No. 22414/93, Section 112). Even a considerably shorter deprivation of personal freedom may be in conflict with Article 5 (1) of the Convention if the possibility of realising the purpose of deprivation of freedom has proved to be dubious in the circumstances over time (see *Efraimidi v. Greece*, judgment of 21 June 2011, No. 33225/08, Sections 54 to 56). Thus, the European Court of Human Rights has found, within the meaning of Article 5 (1) (f) of the Convention, 3-month custody unlawful, while the relevant findings were made by the competent authorities as early as less than a month of custody.

18. In the present case, the competent law enforcement authorities had at the time of the complainant detention the complainant information that the complainant had been granted international protection in the form of asylum in the Republic of Austria and had been granted residence in the territory of the Republic of Austria. This was confirmed by the public prosecutor of the Regional Public Prosecutor's Office in Brno, when she stated that after the police had been arrested, the complainant was interrogated under Section 93 (2) of the International Judicial Cooperation Act and the data he had stated were verified in the police database of the Czech Republic and the police station Mikulov - Drasenhofen from where the available police information was obtained within the detention deadline for the detainee when the police authority was initially informed that the complainant had been issued with a residence card issued on 9 August 2004 and a conventional passport. As implied by the reasoning of the contested resolution of the court of first instance, the court had documentary evidence available to it while deciding on the preliminary custody, namely the notice of the Lower Austrian Police Headquarters, which shows that the complainant is a holder of a residence permit in Austria issued on 9 August 2004 and a holder of a

document not yet identified, issued by the Aliens' Registration Office in Vienna under No. K1043701, as well as a response from the Police Cooperation Centre at the request of 18 January 2017, which showed that the complainant had already been granted asylum in Austria, and the report of the Police Presidium of the Czech Republic of 19 January 2017, which found that the complainant had a valid asylum status in Austria and was granted a residence permit. Based on this report, the court has further found that the complainant is not currently subject to any extradition proceedings, while the dismissal of his extradition to Russia was subject to the proceedings with the Austrian Ministry of Justice under ref. No. BMJ-4033574/0005-IV/I/2009.

19. Although, as implied by her statement, the public prosecutor considered necessary to verify such data on the granting of asylum, the residence permit, and the outcome of extradition proceedings in Austria in the preliminary inquiry, the basic information, including the statement of the Police Presidium of the Czech Republic that the complainant had a status of the asylum-seeker in the Republic of Austria, was already available to the competent law enforcement authorities. As a result, other preliminary inquiries should have been made, with respect to the serious circumstances already identified, with maximum care and acceleration, but this did not happen. Contrary to the assertion by the public prosecutor that, at the request for additional information on the granting of asylum of 26 January 2017, she received adequate answers as late as 27 February 2017, she stated in the petition to declare the inadmissibility of the complainant's extradition to the Russian Federation of 10 March 2017 that, on the basis of the report by the Federal Foreign and Asylum Office of the Republic of Austria of 16 February 2017, it was confirmed that the complainant had been granted unlimited asylum in the Republic of Austria since 2004 and that, on the basis of a report by the Federal Ministry of Justice of the Republic of Austria of 10 February 2017, it was confirmed that in the Republic of Austria the extradition proceedings were commenced against the complainant in 2008 with a view to his extradition to the Russian Federation, while the final resolution of the Regional Criminal Court of Vienna of 25 June 2009 declared the extradition inadmissible because of concern that the criminal proceedings in the requesting state do not comply with the principles of Articles 3 to 6 of the Convention.

20. In the situation described when the court while deciding on the petition of a public prosecutor to place the complainant in preliminary custody was aware based on the assertion of the complainant himself that he had been granted asylum in the Republic of Austria, and that extradition proceedings had also been unsuccessful in the case in the past, which was confirmed by the documentary evidence quoted by the court - the notification of the Lower Austrian Police Headquarters, the reply by the Police Cooperation Centre, and the report by the Police Presidium of the Czech Republic, the court should have considered more carefully the legitimacy of preliminary custody and the applicability of other ways to obtain proper extradition proceedings. The complainant promised that he would stay in Brno until the end of the extradition proceedings in case of release from detention, which was not accepted by the court. The risks of the validity of the preliminary custody, linked to the existence of the international protection granted in Austria, were not considered by the court at all and, in addition, the court found that the international protection of the complainant acquired by asylum in Austria does not apply to the above-mentioned person in the territory of the Czech Republic. The opinion pronounced in the decision of the court of first instance was not even corrected by the appeal court which fully agreed with the former court's conclusions on the legitimacy of preliminary custody.

21. On the contrary, the obligation of the two courts deciding on the restraint of personal freedom of the complainant by preliminary custody was to pay due attention to the previous decisions of the authorities of other Member States of the European Union, including the authorities of the Republic of Austria, issued in the asylum and extradition proceedings, of which they knew, as they constitute an obstacle to the admissibility of the extradition of the complainant to the Russian Federation and, in terms of the extradition proceedings, they are also relevant for assessing the need to detain the complainant by way of preliminary custody.

22. Pursuant to Article 3 (2) of the Treaty on the Functioning of the European Union, the European Union shall constitute an area of freedom, security and justice for its citizens, without internal border controls, where the free movement of persons is guaranteed, together with appropriate measures relating to the protection of the external borders, asylum, immigration, and preventing crime prevention. The provisions above are followed by Articles 67 and 78 et seq., expressing the requirement for a common European asylum system and a common asylum status, as well as Article 82 et seq. on the mutual recognition of judgments in criminal matters. Article 33 of the Convention on the Status of Refugees includes the principle of ban on return to the state which the international protection holder who has been granted asylum comes from (the principle of non-refoulement), which also applies to the extradition proceedings, namely also the asylum applicant (see *Chahal v. the United Kingdom*, of 15 November 1996, No. 22414/93). This construction complies with Section 91 (1) (b) (o) of the International Judicial Cooperation Act, according to which the extradition of a person to a foreign state is inadmissible in respect of a person granted international protection in the Czech Republic, namely within the scope of protection granted to

that person by another legal regulation or by an international treaty, or if this extradition would be contrary to the obligations arising for the Czech Republic from international treaties on human rights and fundamental freedoms.

23. It follows that holders of international protection granted in another Member State of the European Union must be regarded as holders of international protection also in the Member State in which the extradition proceedings are taking place and such person may not be transferred to the state which the person came from before the asylum is granted.

24. An improper view of the courts of international asylum-protection granted in Austria is clearly manifested in connection with the further (already constitutionally-compliant) procedure of the court of first instance in deciding on the petition of the public prosecutor to decide on the inadmissibility of the complainant's extradition to the Russian Federation. Through the resolution of the Regional Court in Brno of 29 March 2017, the complainant was released from custody when the court concluded that his extradition was inadmissible in view of the granting of international protection in the Republic of Austria, where the extradition to the Russian Federation, the Chechen Autonomous Republic, had already been decided in the past to be inadmissible, as the complainant could become a victim of persecution that would endanger his fundamental human rights. However, more than two months have elapsed since the complainant was placed in preliminary custody, and at the time of deciding on custody it was clear from the relevant documents that the extradition would not be feasible.

25. It can be concluded that the law enforcement authorities and the courts deciding on the preliminary custody of the complainant had information from the beginning of the proceedings that the complainant's extradition to the Russian Federation would not be possible due to the international protection granted to the complainant in the Republic of Austria. A further verification of this information lasting several weeks cannot be considered with respect to the limitation of the complainant's personal freedom as the time necessary for the purpose of custody, as even according to the belief of the Constitutional Court the complainant's status as an asylum seeker should and could have been verified within a much shorter time. If the courts, through reasonable information that reasonably questioned the possibility of realising the purpose of depriving the complainant of his personal freedom, decided on the legitimacy of the preliminary custody and did not consider the use of other measures available to them, and furthermore assessed the international protection granted to the complainant in the Republic of Austria in contravention of the obligations arising for the Czech Republic from international treaties, their decision must be regarded as arbitrary and infringing upon the right of the complainant to a fair trial under Article 36 (1) of the Charter. In the light of the circumstances of the case, the restraint of the complainant's personal freedom, devoid of any real purpose and lasting longer than 2 months, may be regarded as violating Article 8 (2) and (5) of the Charter and Article 5 (1) (f) of the Convention, as the status of the complainant as an asylum seeker could and should have been verified within a shorter time than it has actually happened.

26. Even though the complainant was released from the custody on 29 March 2017 and the interference with his personal freedom is no longer in force, the Constitutional Court, having regard to the opinion of the Plenum of the Constitutional Court, file No. Pl. ÚS-st. 25/08 of 6 May 2017 (ST 25/49 of the Collection of Judgments of the Constitutional Court 673), annulled the contested decisions for their unconstitutionality.

27. Finally, the Constitutional Court notes that the oral hearing was not ordered in accordance with Section 44 of the Act on the Constitutional Court, since no further clarification could be expected from it.

28. In view of the above, the Constitutional Court upheld the constitutional complaint [Section 82 (1), (2) (a) of the Act on the Constitutional Court] and annulled the two contested decisions [Section 82 (3) (a) of the Act on the Constitutional Court].

Appeal: No appeal is permissible against the judgment of the Constitutional Court.

In Brno on 15 August 2017

Jiří Zemánek, m.p.
Presiding Judge