

# Current Affairs

## Judgment of the Constitutional Court no. II. ÚS 2299/19 of 9 April 2020 – Press Release

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The lower courts failed to properly assess the risk of torture or other ill-treatment which would occur if the applicants were extradited to the People's Republic to China

The IInd Senate of the Constitutional Court (judge rapporteur Kateřina Šimáčková) ruled in favour of eight Taiwanese applicants and abolished decisions of the High Court in Prague and the Municipal Court in Prague. Those courts held that it is permissible to extradite applicants to the People's Republic of China (hereinafter China) for criminal prosecution for telecommunications fraud bearing in mind diplomatic assurances provided by China in the present matter. The applicants complained before the Constitutional Court that in mainland China they might be subject to torture, inhuman or degrading treatment or punishment. The Constitutional Court found their constitutional complaint well-founded.

The absolute prohibition of torture or similar cruel, inhuman or degrading treatment or punishment (ill-treatment) enshrined in Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 7 para. 2 of the Czech Charter of Fundamental Rights and Freedoms comprises a positive obligation of the State to duly examine whether a person after her or his forced return – extradition or expulsion – would face a real risk to be subject to ill-treatment. The obligation of thorough review must be understood as a duty to conduct an assessment of a real risk which is proportional, current and sufficiently based on objective sources provided by several reliable authorities.

If a foreigner in the situation of forced return puts forward serious reasons to believe that she or he might be in risk of ill-treatment, the competent authority deciding on her or his return – in the present case the High Court in Prague and the Municipal Court in Prague – must refute all doubts that he or she would be, in the country to he or she is to be returned, subject to a real risk of ill-treatment. If the High Court in Prague held that as a condition to rule against the extradition, the ill-treatment would have to be a phenomenon as ordinary that it would be highly probable that it would affect the returned individual or it would have to be a wide-ranging and abundantly occurring practice, such conclusions do not comply with constitutional and international standards of the protection against ill-treatment.

The Constitutional Court took into account in particular reports of the Czech Ministry of Foreign Affairs and the Czech Embassy in the People's Republic of China as well as the opinions and reports of international bodies and organisations. It follows from the cited that in case of their extradition the applicants would be in the situation of a real risk of ill-treatment due to poor conditions in prisons and mistreatment of suspects during criminal prosecution and also during imprisonment. The lower courts failed to take duly into account those reports and the risk of ill-treatment of the applicants.

Even the diplomatic assurances provided by China, which the courts considered sufficient, have not ruled out the risk of ill-treatment. Diplomatic assurances may only be relied on in the extradition proceedings if those are of such nature to effectively minimize the risk of ill-treatment after the return of an individual and if those may be in good faith considered reliable. The principle of non-refoulement to a country where individuals may risk to be tortured or otherwise ill-treated will only be complied with if in a particular case diplomatic assurances effectively removing any real risk of ill-treatment in the country in question were to be provided. In the current case, however, the provided assurances were not of nature to effectively minimize the risk of ill-treatment. Those assurances were not provided by an authority competent to do so according to the Chinese law and it was, hence, unclear whether those would bind Chinese criminal prosecution authorities. The overview of the relevant provisions of the Chinese criminal law and of the international conventions by which the country is bound may not be considered as sufficient protection against ill-treatment as it is common knowledge that in practice various forms of ill-treatment occur. Having regard to the fact that the Czech Republic has no experience regarding the compliance of the People's Republic of China with assurances provided, it would have been appropriate to remain cautious and to examine whether similar assurances provided to other European countries were complied with in the past. Nor the reassurance that the applicants would be allowed to be visited by the officers of the Czech Embassy pursuant the conditions set by Chinese law appears to be a sufficient guarantee. Those visits were not supposed to take place without the presence of third parties and, moreover, the Chinese legislation does not provide for conditions under which any such visits may take place and it is, thus, unclear how the reassurance would be carried out in practice.

The lower courts have, therefore, violated the applicants' right to a thorough assessment of any risks of torture, inhuman or degrading treatment in case there were to be returned to their country of origin, as they failed to gather all necessary information on the potential risk, as they applied, when assessing any such information, too high standard of proof of wide-range or high probability (in respect of conditions in prisons and the course of criminal prosecution) and, thus, considered the diplomatic assurances provided to be sufficient even though, in reality, those do not constitute a sufficient guarantee which would rule out the real risk of ill-treatment.