Number: U-I-388/22
Date: 8 June 2023

DECISION

At a session held on 8 June 2023 in proceedings to review constitutionality initiated upon the request of the Supreme Court, the Constitutional Court

decided as follows:

The Criminal Procedure Act (Official Gazette RS, No. 176/21 – official consolidated text) is not inconsistent with the Constitution.

REASONING

A

1. The Minister of Justice [hereinafter referred to as the Minister], on the basis of Article 530 of the Criminal Procedure Act (hereinafter referred to as the CrPA), has authorised the extradition of a foreigner, a citizen of the Russian Federation, to the competent authorities of that state for prosecution for the criminal offence of the embezzlement of a particularly large amount of money under the fourth paragraph of Article 160 of the Criminal Code of the Russian Federation. The foreigner brought an action against the decision before the Administrative Court, alleging, *inter alia*, that her extradition to the Russian Federation constituted a violation of the prohibition of torture under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR). In its judgment dismissing the action, the Administrative Court explained that the extradition procedure is divided into a judicial phase, in which the court decides whether the legal and constitutional conditions for extradition are met, and an administrative phase, in which the Minister of Justice decides on extradition. It stated that, in conformity with point 14 of the first paragraph of Article 522 of the CrPA, the question of whether there

exists a possibility that a foreigner would be subjected to torture or inhuman or degrading treatment or punishment in the requesting state is to be decided in the judicial phase of the procedure, and the Minister is bound by the decision of the court, as the matter has been decided with finality. The Administrative Court held that when deciding on an action against the Minister's decision in proceedings for the judicial review of administrative acts, the Minister and the Administrative Court could assess the foreigner's allegations concerning the likelihood of torture only if the foreigner had stated new grounds or presented new facts which she had not adduced in the judicial proceedings, but according to the Administrative Court the situation in the case at issue was not such. The foreigner filed a motion to file an appeal before the Supreme Court against the judgment of the Administrative Court, which was granted by the Supreme Court (hereinafter referred to as the applicant), but after the appeal before the Supreme Court was filed, the Supreme Court discontinued the proceedings and filed a request for a review of the constitutionality of the CrPA with the Constitutional Court.

2. The applicant opines that the CrPA contains an unconstitutional legal gap, as it does not define either substantive or procedural grounds for the Minister's decision-making that would ensure that there is no violation of the human right under Article 3 of the ECHR and Article 18 of the Constitution (the prohibition of torture). It explains that in the administrative phase of the extradition procedure on the basis of Article 530 of the CrPA, the Minister may only assess the exhaustively determined circumstances referred to in the third paragraph of that article, i.e. whether the foreigner has been granted international protection and whether the foreigner has committed a political or military criminal offence. Hence, the Minister’s position does not follow the position of the Administrative Court, namely that the Minister may exceptionally also assess the condition determined by point 14 of the first paragraph of Article 522 of the CrPA, i.e. that the person whose extradition is requested is not likely to be subjected to torture or inhuman or degrading treatment or punishment in the requesting state. According to the applicant, the Act does not allow for such an interpretation. However, in the applicant's view, since the Constitution requires a full and *ex nunc* review of the condition determined by point 14 of the first paragraph of Article 522 of the CrPA, the Act should provide that the Minister, as the final authority deciding on extradition, and the courts which, in proceedings for the judicial review of administrative acts, exercise judicial review over the Minister's decision, may also review this condition. The applicant opines that in the administrative phase of the extradition procedure, all new facts that might indicate a likelihood of a violation of the mentioned human right should be taken into account.

3. According to the applicant, the position of the Administrative Court that the Minister is bound by the final decision of the criminal court as regards the fulfilment of the conditions for extradition, including the condition determined by point 14 of the first paragraph of Article 522 of the CrPA, is convincing. However, the alleged deficiency of the CrPA is that it does not determine the limits of that finality and its relation to the Minister's decision-making. The applicant explains that the finality of a decision of a criminal court, by its legal nature, only covers the assessment of the facts and evidence

used by the criminal court during its decision-making, and that estoppel at later stages of the proceedings (as it interferes with the right to produce evidence in one's own favour under Article 22 of the Constitution) must be expressly provided for by law and cannot be established by case-law alone. As the CrPA does not expressly provide for estoppel, the CrPA [according to the applicant] does not provide that a foreigner is precluded from introducing new facts and evidence during the administrative phase of the procedure which he or she could have introduced during the judicial phase of the procedure, but which he or she has failed to do without a justifiable reason. In the applicant's view, these procedural rules are absent precisely because the CrPA does not provide any substantive basis for the Minister to rule on conditions that have already been previously assessed by the courts, and therefore it was not expected that the same issue – which would require detailed procedural regulation, also with the aim of preventing abuses that could lead to ineffective extradition procedures – would be decided on twice. As long as the substantive basis for the Minister's decision-making and the mentioned procedural rules are not adequately and in a constitutionally consistent manner regulated by the CrPA, it is also allegedly not possible to assess which facts were relevant for the decision and whether or not they were proven in the specific case. According to the applicant, the correctness of the (procedural) assessment of the actual circumstances by the Minister and the Administrative Court (as regards finality, the relevance of the new and renewed allegations, etc.) depends only on the question of the correct and constitutionally consistent statutory regulation of the extradition procedure.

4. The applicant opines that the alleged legal gap cannot be filled by constitutionally consistent interpretation. In the opinion of the applicant, the interpretation resulting from Order of the Constitutional Court No. U-I-779/21, dated 7 April 2022 (i.e. that in Article 530 of the CrPA the legislature provided the Minister the authorisation to decide in a discretionary manner, which he or she can use as protection from the possible unconstitutional consequences arising from subsequently modified circumstances), constitutes a serious risk to other legal values and to the already attained standards of legal certainty (Article 2 of the Constitution) and the legality of the work of the administration (Article 120 of the Constitution). The applicant explains that discretionary decision-making is a (relative) exception to the administration being bound by the law, which is why theory and case law (both in Slovenia and in comparable EU states) have always insisted that the existence of such authorisation must be clearly established by law or, in case of doubt, it must be deemed that the authority does not have discretionary power in deciding. In order to conclude that a law grants such authorisation, it is at a minimum required that the statutory provision contains express language indicating the granting of discretion (e.g. by stating "the authority may" or "the authority can") and that it is clear that the legislature intended to grant such authorisation. The purpose of the authorisation should also be clear from the law. According to the applicant, it does not follow from Article 530 of the CrPA that the Act authorises the Minister to exercise discretion when deciding, nor does the purpose of such authorisation. In fact, the first paragraph of Article 530 of the CrPA only determines the content of the possible decisions of the Minister, while the third paragraph

exhaustively lists the instances in which the Minister shall not authorise extradition. In light of the above, the applicant submits that the Minister's decision-making under Article 530 of the CrPA is fully legally bound decision-making. Furthermore, the applicant draws attention to the fact that a decision on extradition under the CrPA is a matter of implementing obligations under treaties, the observance of which inherently cannot be left to discretionary decision-making. It also stresses that discretionary decision-making, as a legally unbound decision-making process, is a completely inappropriate and pointless solution for situations wherein human rights protection must be ensured, since the observance of human rights must not depend on discretion. In connection therewith, it is submitted that, in reviewing a decision adopted in a discretionary manner, the court only examines whether the limits of the authorisation were observed (overstepping discretion) and whether the purpose for which the authorisation was granted was fulfilled (the abuse of discretion), but not whether the discretion was exercised correctly or substantively in the best possible way. The applicant submits that an overly broad interpretation of Article 530 of the CrPA would lead to a weakening of the already attained and fully established constitutional requirements of the principle of the legality of the functioning of the administration. As a result, administrative authorities could also deem that they have discretion in other instances regarding which the statutory text does not explicitly so provide. The applicant also submits that the question of when the authorisation to decide in a discretionary manner is granted is a question of the interpretation of statutory law, which is ultimately a matter to be decided by the applicant as the highest court in the state (Article 127 of the Constitution).

5. In light of the foregoing, the applicant submits that the legal gap with regard to the effective protection of the human right determined by Article 3 of the ECHR and Article 18 of the Constitution cannot be filled by mere statutory interpretation and other legal instruments. Thus, there exist neither a substantive legal basis nor procedural solutions that would grant the Minister of Justice the authorisation to fully and *ex nunc* assess the related condition, nor statutory solutions that would prevent possible abuse of the mentioned protection (procedures) and thus strike the necessary balance with the public interest, which lies in both the observance of extradition treaties and the effective prosecution of perpetrators of criminal offences. According to the applicant, the relationship or balance between the rights of a foreigner (the accused or the convicted) as a party to the extradition procedure [on the one hand] and ensuring compliance with international obligations [on the other] can only be regulated by the legislature on the basis of democratic assessment. According to the applicant, due to the unconstitutional legal gap, the CrPA is consequently inconsistent with Article 2 of the Constitution.

6. The request was served on the opposing party, i.e. the National Assembly, which did not reply thereto, but the Government submitted its opinion on the matter. The Government opines that the procedural requirements for decision-making in the present case are not met. It alleges that if the applicant opines that a law or part of a law which it is required to apply is unconstitutional, it must stay the procedure in all cases in which it is required to apply such a law or part of a law in deciding on legal

remedies and initiate proceedings for a review of constitutionality by a single request. The Government explains that the applicant had previously already submitted a request for a review of the constitutionality of Article 530 of the CrPA in connection with other proceedings, but had not stayed the proceedings in the case in respect of which it has submitted the present request, although it had already been considering the present case at that time. For this reason, the condition determined by Article 23 of the Constitutional Court Act (Official Gazette of the Republic of Slovenia, Nos. 64/07 – officially consolidated text, 109/12, 23/20, and 92/21 – hereinafter referred to as the CCA) is allegedly not fulfilled. In the Government's opinion, the applicant has also failed to demonstrate that the Act cannot be interpreted in a constitutionally consistent manner by the established methods of interpretation. Moreover, according to the Government, in the case in respect of which the applicant submitted the request, the foreigner did not allege changed circumstances in the administrative phase of the extradition procedure and did not propose new evidence relevant to the decision whose content was not yet known to the criminal court, as the Administrative Court also stressed. For the above reason, in the Government's view, there is no legal need to submit a request for a review of constitutionality.

7. The Government also draws attention to the fact that the Constitutional Court has already answered the question raised by the present request in Order No. U-I-779/21, in which it explained that the legislature had granted the Minister authorisation to decide in a discretionary manner, which must be exercised in such a way so as to ensure the observance of human rights and fundamental freedoms.

8. According to the Government, even prior to the adoption of the Act Amending the Criminal Procedure Act (Official Gazette of the Republic of Slovenia, No. 91/11 – hereinafter referred to as the CrPA-K), when the condition referred to in point 14 of the first paragraph of Article 522 of the CrPA was not yet expressly determined in the law, it was considered that this condition had to be taken into account in both the judicial and administrative phases of the extradition procedure on the basis of the Constitution and the ECHR. In order to ensure clarity, this condition was expressly added in the CrPA-K among the conditions to be assessed by the Minister. However, since such a regulation allegedly allows for the interpretation that the assessment of this condition henceforth falls solely within the competence of the Minister, the Act Amending the Criminal Procedure Act (Official Gazette of the RS, No. 22/19) transferred this condition to the list of conditions to be assessed by the court. Allegedly, this also ensures the observance of the right determined by Article 23 of the Constitution. In the Government's assessment, this does not mean that the Minister may no longer assess this condition under the CrPA.

9. The Government explains that there can exist different instances in which a foreigner may allege the non-fulfilment of the condition referred to in point 14 of the first paragraph of Article 522 of the CrPA in the administrative phase of the procedure. In its assessment, the foreigner has no right to adduce facts and evidence in the administrative phase of the procedure which he or she already had in his or her

possession during the judicial phase of the procedure, as this would constitute an abuse of the procedure (the foreigner could thus prolong the duration of the extradition procedure, which, in the event of detention, could lead to the maximum duration of extradition detention being exceeded and to the foreigner's release from custody). According to the Government, the Minister may not, in the administrative phase of the procedure, assess facts and evidence that have already been assessed by the criminal court in the judicial phase of the procedure, as this would constitute a violation of the principle of the separation of powers. On the other hand, according to the Government, the foreigner may allege new facts and submit new evidence demonstrating changed circumstances with regard to the likelihood of torture even after the decision of the criminal court, and he or she may also repeat circumstances that he or she had already alleged during the judicial phase of the procedure but on which the criminal court did not adopt a position. In such instances, it is allegedly admissible and necessary – in view of the absolute prohibition of torture, which is also guaranteed by directly applicable international instruments – that also the Minister assess the likelihood of a violation of Article 18 of the Constitution directly on the basis of the Constitution or the ECHR (either *ex officio* or on the basis of an objection by the foreigner).

10. The Government also draws attention to the fact that in the event of a final and enforceable decision on the extradition of a foreigner to a state where the circumstances regarding ensuring human rights have changed since the finality of the Minister's decision and indicate a likelihood of a violation of the foreigner's human rights, the Minister may apply the institution of extraordinary annulment of the decision provided for in Article 278 of the General Administrative Procedure Act (Official Gazette of the Republic of Slovenia, Nos. 24/06 – official consolidated text, 126/07, 65/08, 8/10, and 82/13). It also stresses that since the beginning of the military invasion of Ukraine by the Russian Federation and the consequent exclusion of the Russian Federation from the Council of Europe and the termination of the jurisdiction of the European Court of Human Rights (hereinafter referred to as the ECtHR) with regard to new complaints from the Russian Federation, the competent Slovene authorities have not extradited any foreigners to the Russian Federation, taking into account the decision of the Ministers of Justice of the Member States of the European Union to limit judicial cooperation with Russia. However, the Minister allegedly cannot use the institute of extraordinary annulment in a case such as the present one, in which the Supreme Court stayed the execution of the decision.

11. The applicant did not express a position on the opinion of the Government.

B – I

The Decision of the Constitutional Court in case No. U-I-779/21

12. The Constitutional Court has already decided on a similar request of the applicant by Order No. U-I-779/21, dated 7 April 2022. In that case, the applicant challenged only

Article 530 of the CrPA. It argued that the legislature should have provided for a legal remedy whereby a foreigner, following a final decision of a court that the conditions for extradition had been met, or even following a decision of the Minister to authorise extradition, could request an assessment of new or changed factual circumstances which might be relevant in terms of protection of the right determined by Article 18 of the Constitution. The applicant argued that Article 530 of the CrPA does not allow the Minister to assess such circumstances since the grounds for the refusal of extradition determined by the third paragraph of that article are listed exhaustively, and the CrPA grants the power to assess the conditions for the admissibility of extradition to the court and not to the executive branch of power.

13. The Constitutional Court dismissed the mentioned request. It assessed that the applicant had not demonstrated that the challenged provisions of the Act could not be interpreted in a constitutionally consistent manner. It explained that the legislature, in the first paragraph of Article 530 of the CrPA, granted the Minister the authorisation to decide in a discretionary manner, which means that the Minister may, despite a decision by the criminal court that the conditions for extradition are met, refuse to extradite a foreigner if he or she considers it inappropriate. However, in the instances listed in the third paragraph of Article 530 of the CrPA, the Minister may not authorise extradition. The Constitutional Court stated that the Minister must use his or her discretion in such a way so as to ensure the observance of human rights and fundamental freedoms, but the applicant did not explain in its request why, if the statutory regulation is interpreted in such a way so as to allow the Minister to exercise his or her discretion in deciding whether to extradite a person, it would be inconsistent with the Constitution. In light of the foregoing, the Constitutional Court held that the applicant failed to demonstrate that Article 530 of the CrPA could not be interpreted by the established methods of interpretation in such a way so as to ensure the assessment of new or changed circumstances that could be relevant in assessing whether there is a serious risk that the foreigner would be subjected to inhuman or degrading treatment as a result of his or her removal from the country. From the Order of the Constitutional Court it also follows that the applicant must take into account European Union law when interpreting the disputed provision (the case, unlike the present case, fell within the sphere of European Union law, as it concerned the extradition of a citizen of the Federal Republic of Germany to the United States of America) and that the Court of Justice of the European Union has already adopted the position that, in such a situation, where the citizen in question alleges a serious risk of inhuman or degrading treatment in the event of extradition, the requested member state must ascertain, before any extradition is carried out, that it would not interfere with the rights determined by the second paragraph of Article 19 of the Charter of Fundamental Rights of the European Union (OJ C 202, 7. June 2016).

B – II

Procedural requirements

14. The second paragraph of Article 23 of the CCA determines that if the Supreme Court deems a law or part thereof which it should apply to be unconstitutional, it stays proceedings in all cases in which it should apply such law or part thereof in deciding on legal remedies and by a request initiates proceedings for a review of its constitutionality. If the conditions for submitting a request contained in the aforementioned paragraph are not fulfilled, the Constitutional Court rejects the request in accordance with the first paragraph of Article 25 of the CCA.

15. The Constitutional Court does not concur with the position of the Government that the request at issue must be rejected on the grounds that the applicant did not stay the proceedings in the initiating case already when it filed the previous request, on which the Constitutional Court decided by Decision No. U-I-779/21. While the second paragraph of Article 23 of the CCA provides that the applicant shall, before submitting a request, stay the proceedings in all cases in which it is required to apply a law or part thereof which it considers to be inconsistent with the Constitution, the CCA does not prescribe that the applicant's failure to stay the proceedings in some of these cases will deprive the applicant of the power to submit a request in relation thereto at a later stage. The Constitutional Court rejects a request on the grounds of not staying the proceedings only if the applicant has not stayed the proceedings in the case in respect of which the request is made. However, the situation in the case at issue is not such because the applicant attached to the request Order No. X Ips 3/2022, dated 28 September 2022, staying the proceedings.

16. According to its established case law, the Constitutional Court also rejects the court's request on the basis of Article 25 in conjunction with Article 23 of the CCA if the applicant fails to substantiate that in the stayed proceedings it is required to apply the (allegedly unconstitutional) statutory regulation in a manner that prevents it from reaching a constitutionally consistent decision. Namely, pursuant to Article 23 of the CCA (and Article 156 of the Constitution), the Constitutional Court is only entitled to intervene where a constitutional review of a law is necessary to ensure a constitutionally consistent decision in specific judicial proceedings.[1] Hence, in the request, the court must substantiate in a clear and precise manner (i) that it must base its decision in the specific case on the challenged (allegedly unconstitutional) statutory regulation or that the alleged unconstitutionality relates to the specific case on which it must decide (the so-called continuity between the challenged statutory regulation and the decision-making of the court in the specific case),[2] and (ii) that the challenged statutory

[1] See Orders of the Constitutional Court No. U-I-204/15, dated 3 March 2016, paras. 5 and 8 of the reasoning, and No. U-I-217/20, dated 4 November 2021, para. 8 of the reasoning.

[2] See Decisions of the Constitutional Court No. U-I-85/09, dated 21 September 2010 (Official Gazette RS, No. 79/10), para. 3 of the reasoning, and No. U-I-290/12, dated 25 April 2013 (Official Gazette RS, No. 40/13), para. 3 of the reasoning.

regulation cannot be interpreted in a constitutionally consistent manner (the relevance of the decision of the Constitutional Court to the decision in the specific case).[3]

17. In instances where the applicant alleges that a law contains an unconstitutional legal gap, the continuity between the challenged statutory regulation and the decision-making of the court in a particular case is demonstrated if the alleged unconstitutional legal gap also extends to the particular case. However, in order [for the Constitutional Court] to be able to make such an assessment, the applicant must first clearly determine the limits of the unconstitutional legal gap.

18. The applicant submits that the CrPA is inconsistent with Article 2 of the Constitution because it does not allow the condition referred to in point 14 of the first paragraph of Article 522 of the CrPA to be decided on also in the administrative phase of the extradition procedure. However, it does not follow from the request that, in the opinion of the applicant, the Constitution requires an assessment of the mentioned condition in the administrative phase of the procedure without any limitation. The petitioner submits that in the administrative phase of the procedure any new facts that may have arisen should be taken into account. It can also be discerned from the request that the applicant would not find constitutionally disputable a regulation that would prohibit an assessment, in the administrative phase of the extradition procedure, of those facts and evidence that the foreigner could have adduced in the judicial phase of the procedure, but which he or she did not adduce without a justifiable reason. The applicant indicates that the determination of such an estoppel would even be necessary to prevent abuse of the procedure. Hence, the request can be understood in the sense that, in the assessment of the applicant, an unconstitutional legal gap in the CrPA is present to the extent that the CrPA does not allow a foreigner to adduce facts and evidence in the administrative phase of the procedure in relation to the condition referred to in point 14 of the first paragraph of Article 522 of the CrPA, which, for justifiable reasons, the foreigner was not able to adduce in the judicial [phase of the] procedure – either because they are objectively new and therefore did not exist at the time of the decision-making by the criminal court, or because the foreigner was not aware of them at the time or was unable to use them.

19. With regard to the specific case in which it stayed the proceedings, the applicant explains: (i) that the Administrative Court adopted the position that the Minister could, during the administrative phase of the procedure, assess the foreigner's allegations concerning the likelihood of torture in the requesting state if the foreigner had adduced new grounds or new facts which she had not yet adduced in judicial proceedings; however, in the view of the Administrative Court, the present case does not concern such a situation; (ii) that the applicant does not concur with the Administrative Court's position that in accordance with the statutory regulation currently in force the Minister is authorised to assess such allegations; (iii) that the applicant has granted leave to

[3] See Order of the Constitutional Court No. U-I-238/12, dated 23 January 2014 (Official Gazette RS, No. 10/14), paras. 7–9 of the reasoning.

appeal before the Supreme Court regarding the question of whether the Minister responsible for justice is bound, when deciding, by the decision of criminal courts in extradition proceedings under Articles 527 and 528 of the CrPA; and (iv) that it will only be possible to carry out an assessment of which facts are relevant to the decision and whether they have been demonstrated in the particular case (i.e. an assessment of whether the decisions of the Minister and the Administrative Court are correct) on the basis of a constitutionally consistent statutory regulation. He adds that it is clear from the contested decision of the Minister that he did not take evidence and did not assess the newly submitted summary reports in respect of the violation of Article 3 of the ECHR, as he is not competent to do so. It can therefore be discerned from the applicant's submissions that during the administrative phase of the procedure the foreigner submitted evidence which she did not submit during the judicial phase of the procedure, and which were intended to prove the likelihood that she would be subjected to torture in the requesting state. The continuity between the challenged statutory regulation and the applicant's decision-making is thus sufficiently demonstrated.

20. According to the Constitutional Court, the applicant also explained why it opines that the challenged statutory regulation cannot be interpreted in a constitutionally consistent manner.

21. In light of the above, according to the Constitutional Court, the procedural requirements for deciding substantively on the request have been met.

B – III

The scope and perspective of the review

22. The Constitutional Court limited its assessment to the alleged unconstitutionality as described in paragraph 18 of the reasoning of this Decision, i.e. to the question of whether the CrPA (as a whole) is inconsistent with the Constitution because it allegedly does not allow a foreigner to adduce in the administrative phase of the procedure facts and evidence relating to the condition referred to in point 14 of the first paragraph of Article 522 of the CrPA that he or she could not adduce in the judicial proceedings for justifiable reasons. The Constitutional Court did not assess the conformity with the Constitution of the statutory regulation regarding the possibility of adducing other facts and evidence, nor regarding the possibility of adducing facts and evidence after the administrative phase of the extradition procedure has been completed.

23. The applicant alleges that due to the unconstitutional legal gap, the CrPA is inconsistent with Article 2 of the Constitution. The alleged unconstitutional legal gap is not a legal gap in the ordinary sense, i.e. a situation wherein no legally predetermined

legal rule can be found for a particular legally relevant concrete situation.[4] Namely, the applicant submits that the CrPA must be interpreted as determining in the third paragraph of Article 530 thereof two conditions that are to be assessed by the Minister in the administrative phase of the procedure, which, according to an *a contrario* argument (i.e. on the basis of the conclusion that a case which is not expressly regulated is subject to the opposite regulation as that of a case that is expressly regulated), means that the Minister is not entitled to assess the other conditions, including the condition referred to in point 14 of the first paragraph of Article 522 of the CrPA. According to the applicant, an unconstitutional legal gap therefore does not exist because the law does not regulate the question of whether the Minister may assess the mentioned condition, but because it (implicitly) regulates that question in a way that does not ensure observance of the prohibition of torture under Article 18 of the Constitution and Article 3 of the ECHR. In view of the above, the Constitutional Court assessed the challenged statutory regulation from the perspective of Article 18 of the Constitution and Article 3 of the ECHR.

An overview of the challenged regulation

24. Chapter XXXI of the CrPA (Articles 521–533a) regulates the procedure for deciding on the extradition of accused and convicted persons at the request of a foreign state. According to Article 521 thereof, the above regime applies subsidiarily, i.e. unless a treaty provides otherwise.[5] The procedure for deciding on extradition is divided into two phases. In the first (judicial) phase, a non-trial panel assesses whether the statutory conditions for extradition determined by the first paragraph of Article 522 of the CrPA are met. One of these conditions (point 14 of the first paragraph of Article 522 of the CrPA) is that

> there is no risk that the person whose extradition is requested would be subjected to torture or other inhuman or degrading treatment or punishment in the requesting state.

If a panel of the competent court assesses that the statutory conditions for extradition have not been fulfilled, it adopts an order refusing the extradition request (the first paragraph of Article 527 of the CrPA). In such an event, the procedure for deciding on extradition is concluded already in the judicial phase. If, on the other hand, the panel finds that the legal conditions for extradition have been fulfilled, it establishes such by an order. The foreigner has the right to appeal to a court of second instance (Article

[4] See M. Pavčnik, *Teorija prava, Prispevek k razumevanju prava* [Theory of Law: A Contribution to Understanding Law], 5th revised edition, IUS Software, GV Založba, Ljubljana 2015, p. 309. As regards the relationship between an unconstitutional legal gap and a legal gap, see S. Nerad, *Pravna praznina in protiustavna pravna praznina* [A Legal Gap and an Unconstitutional Legal Gap, Pravna praksa, No. 29–30 (2010), pp. 6–8.

[5] Extradition between EU Member States has been replaced by a special surrender institute regulated in Part II of the Cooperation in Criminal Matters with the Member States of the European Union Act (Official Gazette RS, Nos. 48/13, 37/15, 22/18, and 94/21).

528 of the CrPA). Once this order becomes final, the case moves to the second (administrative) phase of the procedure, in which the Minister of Justice decides on extradition (Article 529 of the CrPA). The Minister's decision-making is governed by Article 530 of the CrPA, which provides:

> (1) The Minister responsible for justice shall issue a decision authorising or refusing extradition. He or she may also issue a decision to suspend extradition on the grounds that the foreigner whose extradition is requested is the subject of criminal proceedings before a national court for another criminal offence or is serving a sentence in the Republic of Slovenia.
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> (2) Should the suspension of extradition referred to in the first paragraph result in the prosecution in the requesting state becoming time-barred or severely hindered, provisional extradition for the purpose of criminal proceedings may be granted at the reasoned request of the requesting state. The Minister of Justice shall decide on the admissibility of provisional extradition upon obtaining the prior opinion of the authority before which the criminal proceedings are pending or which is responsible for the enforcement of criminal sanctions. Provisional extradition may be granted provided it does not jeopardise the course of the criminal proceedings conducted against the person in the Republic of Slovenia and if the requested state has ensured that the person in the requesting state will remain in detention throughout the period in question, and also that the person will be returned to the Republic of Slovenia within the time limit determined by the Republic of Slovenia.
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> (3) The Minister of Justice shall not authorise the extradition of a foreigner if he or she has been granted international protection or if he or she has committed a political or military criminal offence.

An action may be brought before the Administrative Court against a decision of the Minister of Justice to extradite a foreigner (the first paragraph of Article 530a of the CrPA).

25. Prior to the entry into force of the CrPA-K, assessment of the condition referred to in point 14 of the first paragraph of Article 522 of the CrPA was not expressly determined in the Act, in either the judicial or administrative phase of the procedure. The CrPA-K added this condition in the third paragraph of Article 530 of the CrPA. The legislature therefore expressly determined in this amendment that the Minister may not authorise the extradition of a foreigner if there is a likelihood that the foreigner would be subjected to torture or inhuman or degrading treatment or punishment in the requesting state. Subsequently, this provision of the third paragraph of Article 530 of the CrPA was deleted by the CrPA-N and transferred to point 14 of the first paragraph of Article 522 of the CrPA. It follows from the draft CrPA-N that

> both the courts in the judicial phase of the extradition procedure and the Minister of Justice in the administrative phase of the extradition procedure are obliged to take into account both the ECHR and the case law of the ECtHR, [therefore] the amendment to the CrPA-K provides that the Minister of Justice, when

> deciding whether to allow the extradition of a foreigner, shall also consider whether there exists a likelihood that the person whose extradition is sought would be subjected to torture or to inhuman or degrading treatment in the requesting state. [...] In practice, the CrPA-K amendment (the third paragraph of Article 530 of the CrPA) has not proved to add value to the procedure for deciding on extradition. In practice, the existing regulation has allowed for the interpretation that the decision on this circumstance is solely within the competence of the Minister of Justice, which clearly does not hold true in the light of what has been stated. The assessment of alleged violations of human rights guaranteed by the ECHR as well as the Constitution is certainly within the power of each judicial and administrative authority bound by international legal instruments and the Constitution of the Republic of Slovenia. [...] Taking into account the fact that the Constitution guarantees persons the right to independent judicial protection of their rights, and in particular of their human rights, it is reasonable that also possible alleged violations of human rights, including the prohibition of torture and inhuman and degrading treatment, are first and foremost and primarily decided on by an independent and impartial tribunal, and not by the Minister of Justice, which is an administrative authority of the executive branch of power. [...] Given the nature of the decision-making process, the judicial phase of an extradition procedure may be deemed to be focused on ascertaining whether the conditions prescribed by national law and multilateral and bilateral international agreements binding on the State are fulfilled, while the decision of the Minister of Justice, as the head of the administrative authority of the executive branch of power in an extradition procedure, is also political in nature and involves a discretionary margin of appreciation.[6]

The constitutional starting points

26. Article 18 of the Constitution determines that no one may be subjected to torture or to inhuman or degrading punishment or treatment. The right determined by Article 18 of the Constitution is absolute, which means that it cannot be interfered with on the basis of the third paragraph of Article 15 of the Constitution.[7] Nor can it be suspended or restricted in a war or state of emergency (the second paragraph of Article 16 of the Constitution). According to established constitutional case law, Article 18 of the Constitution, *inter alia*, prohibits a person from being extradited or deported to another

[6] The Draft Act Amending the Criminal Procedure Act, EVA: 2016-2030-0033, 31 January 2019, pp. 181–182.

[7] Decisions of the Constitutional Court No. U-I-238/06, dated 7 December 2006 (Official Gazette RS, No. 134/06, and OdlUS XV, 83), para. 14 of the reasoning; No. U-I-292/09, Up-1427/09, dated 20 October 2011 (Official Gazette RS, No. 98/11, and OdlUS XIX, 27), para. 13 of the reasoning; No. U-I-189/14, Up-663/14, dated 15 October 2015 (Official Gazette RS, No. 82/15), para. 46 of the reasoning; and No. U-I-59/17, dated 18 September 2019 (Official Gazette RS, No. 62/19, and OdlUS XXIV, 14), para. 62 of the reasoning.

state if there exists a real risk that he or she would be subjected to torture or inhuman or degrading punishment or treatment (the principle of non-refoulement).[8]

27. The obligation of states to not expel, deport, or extradite any person if there are substantial grounds for believing that he or she may be subjected to torture is also expressly determined by the first paragraph of Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Official Gazette RS, No. 24/93, MP, No. 7/93).

28. According to ECtHR case law, a similar rule follows from Article 3 of the ECHR. The ECtHR explains that,[9] in accordance with the established international law, states parties to the ECHR indeed have the right to control the entry of foreigners, their residence permits, and their expulsion or extradition; the sovereignty of states is limited by the rule that they may not remove, expel, or extradite an individual to another state if there exist substantial grounds for concluding that there is a real risk that the individual would be subjected to torture or to inhuman or degrading treatment or punishment as a result. Since the prohibition of torture is absolute, the mentioned rule applies regardless of the legal basis for extradition, i.e. also when the state is fulfilling its obligation to cooperate in international criminal matters by extraditing a person. According to ECtHR case law, the assessment of a real risk of torture or inhuman or degrading treatment or punishment must be focused on the foreseeable consequences of extradition, taking into account both the general situation in the state and the individual's personal circumstances. As a starting point, it is the applicant who must adduce the evidence indicating that risk. If he or she adduces such evidence, it is for the Government to disprove the applicant's claim beyond any doubt.

29. The ECtHR emphasises that the decisive factor for assessing whether there has been a violation of Article 3 of the ECHR in a particular case is whether the state has in fact exposed the individual to the risk of unlawful conduct under Article 3 of the ECHR. For this reason, the ECtHR does not assess the existence of a real risk in the light of the facts existing at the time the extradition decision was adopted *(ex tunc*), but at the time of the (intended) extradition (*ex nunc*). If the individual has already been extradited, the ECtHR takes into account the facts that were known or ought to have been known to the state at the time of extradition. If extradition has not yet taken place, the ECtHR takes into account the situation at the time when its decision was adopted.

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[8] See Decisions of the Constitutional Court No. Up-78/00, dated 29 June 2000 (Official Gazette RS, No. 66/2000, and OdlUS IX, 295), para. 14 of the reasoning; No. U-I-238/06, para. 10 of the reasoning; No. Up-763/09, dated 17 September 2009 (Official Gazette RS, No. 80/09), para. 6 of the reasoning; No. U-I-292/09, Up-1427/09, para. 13 of the reasoning; No. U-I-155/11, dated 18 December 2013 (Official Gazette RS, No. 114/13, and OdlUS XX, 12), para. 11 of the reasoning; No. Up-1472/18, dated 13 December 2018 (Official Gazette RS, No. 2/19, and OdlUS XXIII, 31), para. 7 of the reasoning; and No. U-I-59/17, para. 26 of the reasoning.

[9] Hereinafter taken from the Judgment of the Grand Chamber of the ECtHR in *Khasanov and Rakhmanov v. Russia*, 29 April 2022, paras. 93–109 of the reasoning.

The *ex nunc* assessment ensures that information that has emerged after the final decision on extradition is also taken into account, which is important where a long period of time elapses between the final decision and the actual extradition.[10] The position of the ECtHR is that the state must establish a legal regime that allows for changed circumstances to be taken into account.[11]

30. Also relevant to the present case is the Decision of the Constitutional Court in case No. U-I-238/06, in which the Constitutional Court reviewed the statutory regulation which allowed the reopening of an asylum procedure only if the applicant attached to the new asylum application evidence of changed circumstances that arose in the state of origin after the final decision refusing asylum had been issued in the previous procedure, but not if he or she attached evidence of circumstances which had already existed prior to that moment. The Constitutional Court clarified that the mere fact that the circumstances arose before the preliminary decision was adopted does not mean that such they cannot entail compelling reasons justifying the conclusion that there is a real risk that the applicant would be subjected to inhuman treatment if he or she were to be returned to the state from which he or she originates. It held that the statutory regulation does not allow for all substantially changed circumstances relevant from the point of view of the constitutional prohibition of torture to be taken into account, and that therefore it interferes with the right determined by Article 18 of the Constitution. As the interference with the right determined by Article 18 of the Constitution is not permissible in any instance even due to the absolute nature of this right, the Constitutional Court decided that the challenged statutory regulation is inconsistent with Article 18 of the Constitution. The Constitutional Court also decided that, until the established unconstitutionality is remedied, the competent authorities, when assessing changed circumstances that allow for the reopening of the asylum procedure, must take into account both decisive facts arising after the decision was adopted in the previous procedure, as well as facts that arose prior to the adoption of the previous decision but which the asylum seeker failed to mention for legitimate reasons. It explained that such a regulation is also the only way in which the legislature will be able to remedy the established unconstitutionality.

31. It hence follows from the summarised case law of the Constitutional Court and the ECtHR (which is also relevant for an assessment from the perspective of Article 18 of the Constitution)[12] that, under Article 18 of the Constitution, an individual must have the possibility to prove in an extradition procedure that there is a real risk that he or she would be subjected to torture or inhuman or degrading punishment or treatment in the

[10] *Ibidem*, para. 106 of the reasoning.

[11] Judgment of the Grand Chamber of the ECtHR in *Maslov v. Austria*, dated 23 June 2008, para. 93 of the reasoning.

[12] The Constitutional Court deems that the content of Article 3 of the ECHR is covered by Article 18 of the Constitution, and therefore, during the assessment from the perspective of Article 18 of the Constitution, the case law of the ECtHR must also be taken into account (Decision of the Constitutional Court No. U-I-59/17, para. 27 of the reasoning).

requesting state. If the competent authority has already carried out such assessment and has adopted the position that such a risk does not exist, an individual must be given the possibility, until the actual extradition, to request a reassessment of this risk, whereby he or she may rely on both facts and evidence that arose after the initial decision and on facts and evidence that arose earlier but which the individual did not adduce due to legitimate reasons (changed circumstances). As an integral part of Article 18 of the Constitution, this guarantee is absolute, which means that its limitations (in the public interest or due to the rights of others) are not admissible.

32. This requirement of Article 18 of the Constitution primarily binds the legislature when regulating the extradition procedure.[13] The extradition procedure must be designed to allow for an assessment of changed circumstances up to the time of extradition. On the other hand, it must be taken into account that human rights and fundamental freedoms are exercised directly on the basis of the Constitution (the first paragraph of Article 15 of the Constitution). Hence, human rights are not merely binding guidelines for the legislature, but guarantees directly applicable to every individual. The authorities deciding on the rights and duties of individuals have a duty to interpret statutory provisions in a way that ensures the observance of human rights and fundamental freedoms.[14]

The review of the challenged statutory regulation

33. The CrPA expressly entrusts the assessment of the likelihood that the foreigner whose extradition is sought would be subjected to torture or inhuman or degrading treatment or punishment in the requesting state to a court in the judicial phase of the extradition procedure (point 14 of the first paragraph of Article 522 of the CrPA), but not to the Minister in the subsequent administrative phase of the procedure. The Act does not provide the Minister an express basis even for assessing changed circumstances. Once the judicial phase of the procedure is over, the foreigner cannot allege the changed circumstances by any other legal remedy.

34. By Order No. U-I-779/21 (paragraphs 16–18 of the reasoning), the Constitutional Court stated that in Article 530 of the CrPA, the legislature granted the Minister the power to decide on extradition at his or her discretion, except in the instances referred to in the third paragraph of Article 530 of the CrPA (i.e. if the foreigner is granted international protection or if what is at issue is a political or military criminal offence), in which case the Minister must not, under any circumstances, authorise the extradition of the foreigner. Hence, the Minister has the power to refuse to extradite a foreigner if

[13] *Cf.* Decisions of the Constitutional Court No. U-I-292/09, Up-1427/09, para. 14 of the reasoning, and No. U-I-189/14, Up-663/14, para. 25 of the reasoning.

[14] *Cf.* Decisions of the Constitutional Court No. U-I-25/95, dated 27 November 1997 (Official Gazette RS, No. 5/98, and OdlUS VI, 158), para. 30 of the reasoning, and No. U-I-227/14, Up-790/14, dated 4 June 2015 (Official Gazette RS, No. 42/15, and OdlUS XXI, 3), para. 18 of the reasoning.

he or she deems it inappropriate, despite a court's decision that the conditions for extradition are met. In this interpretation, the Constitutional Court proceeded from the view (which has been repeatedly stated by the ECtHR in its decisions) that the decision to (not) extradite a foreign national constitutes exercise of the sovereign right of a state to decide who may be on its territory, and also relied on the theory of international criminal law.[15] The Constitutional Court deemed that the interpretation according to which Article 530 of the CrPA grants the Minister discretionary power is possible, but did not address the question of whether it might be inconsistent with the Constitution, as the applicant did not submit any constitutional arguments in this respect.[16]

35. In the present request, the applicant opposes this interpretation in a substantiated manner. It alleges that it is inconsistent with Articles 2 and 120 of the Constitution. It further alleges that such discretionary power does not guarantee adequate protection of human rights (see paragraph 4 of the reasoning of the Decision).

36. The applicant correctly summarises the hitherto case law of the Constitutional Court when it argues that, in accordance with the principle of legality determined by the second paragraph of Article 120 of the Constitution (which determines that administrative authorities perform their work independently within the framework and on the basis of the Constitution and laws), an authority may only adopt a discretionary decision if it has the legislature's explicit or implicit authorisation to adopt such a decision (implicit authorisation is usually, but not always, defined by terms such as “can" or "may").[17] Moreover, the purpose of such authorisation must, as a general rule, already be explicitly stated in the law or at least clearly apparent or identifiable from the text of the law, and not perhaps merely from the reasoning of a draft law in the

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[15] Fišer stresses that extradition (as opposed to surrender between EU Member States) is an inter-state legal transaction whereby a foreigner or a stateless person is extradited to a foreign state on the basis of a judicial procedure in order to be tried by that state or to be subject to a criminal sanction. Until the end of the 17th century, it was deemed that extradition was an act of the will of the ruler and therefore a purely political gesture towards another state or towards the ruler of another state. The first inter-state extradition treaties were established in the 18th century, and since the second half of the 19th century this area has been increasingly fully legally regulated. In an extradition procedure, judicial decision-making is gaining in importance, while the decision-making of the executive is receding into the background. However, the executive power still has an important role to play in the extradition procedure. In the author's view, the Minister, when deciding on the basis of Article 530 of the CrPA, may refuse extradition if he or she considers it inappropriate, despite a court's decision that the conditions for extradition have been met. The theory mentions the lack of reciprocity in non-contractual extraditions as one of the possible reasons for refusing extradition on this ground. All taken from Z. Fišer, in: M. Ambrož *et al*., *Mednarodno kazensko pravo* [International Criminal Law], Uradni list Republike Slovenije, Ljubljana 2012, pp. 401–404.

[16] See Order of the Constitutional Court No. U-I-779/21, para. 18 of the reasoning.

[17] Decision of the Constitutional Court No. U-I-255/13, dated 18 February 2016 (Official Gazette RS, No. 18/16, and OdlUS XXI, 21), para. 11 of the reasoning.

legislative procedure. In fact, if the purpose of the discretionary power is not specified, the norm is not clearly defined. This enables the possibility of a different application of the law and the arbitrariness of state authorities.[18] Therefore, the criterion of foreseeability is at the forefront of the test of whether the discretionary power is consistent with the second paragraph of Article 120 of the Constitution. In fact, this criterion does not require that all of the detailed conditions and procedures governing the application of a law are determined in the text of the law itself. However, the scope of the discretion and the manner in which it is exercised must be sufficiently clear, taking into account the legitimate aim of the measure in question, in order to ensure that the individual is adequately protected against arbitrary interferences.[19]

37. The first sentence of the first paragraph of Article 530 of the CrPA provides that the Minister of Justice adopts a decision by which he or she authorises or refuses extradition. In this provision, the Act indeed does not give the Minister any explicit discretionary power, nor does it use words such as “can” or "may". However, this does not in itself mean that the (implied) discretionary power granted cannot be sufficiently clearly discerned from the Act. In the Constitutional Court's assessment, this authorisation can be inferred from the design of Article 530 of the CrPA as well as from the design of the entire extradition procedure. If the law were to allow the Minister to refuse extradition only on the grounds determined by the third paragraph of Article 530 of the CrPA, it would be reasonable for him or her to determine these grounds in the first paragraph, immediately after the first sentence quoted above. The fact that the legislature only provided for such grounds in the third paragraph, after the provisions governing the suspension of extradition and provisional extradition, allows for the interpretation that these are only two grounds on which the Minister must not authorise extradition, and that he may also refuse extradition on other grounds within the scope of his or her discretion. This view is also supported by the fact that the legislature has provided for a two-step procedure for deciding on extradition, whereby the court first determines whether the statutory conditions for extradition are met, and then the executive branch of power – the Minister – decides whether to carry out the extradition. If the administrative phase of the procedure were merely a matter of assessing the conditions for extradition under the third paragraph of Article 530 of the CrPA, there would be no reason for two separate phases of the procedure, as these conditions could also be assessed by the court. The assessment of whether a foreigner is to be granted international protection and whether a political or military criminal offence has been committed is not inherent in, or to such an extent connected to, the executive branch of power that the legislature would, for that reason alone, have introduced an

[18] Decisions of the Constitutional Court No. U-I-69/92, dated 10 December 1992 (Official Gazette RS, No. 61/92, and OdlUS I, 102); No. U-I-92/99, dated 20 September 2001 (Official Gazette RS, No. 82/01, and OdlUS X, 158), para. 6 of the reasoning; No. U-I-65/08, dated 25 September 2008 (Official Gazette RS, No. 96/08, and OdlUS XVII, 49), para. 29 of the reasoning; and No. U-I-255/13, para. 12 of the reasoning.

[19] Decision of the Constitutional Court No. Up-558/19, dated 12 January 2023 (Official Gazette RS, No. 17/23), para. 26 of the reasoning.

additional procedural step, including a new chain of judicial protection.[20] This is particularly true in view of the fact that detention may be ordered in an extradition procedure against a foreigner, and that in such an instance the procedure must be particularly expeditious (see the fourth paragraph of Article 524 in conjunction with the second paragraph of Article 200 of the CrPA). The only reasonable explanation for the legislature's division of the extradition procedure into a judicial phase and an administrative phase is that it gave the judicial and the executive branches of power different roles therein. The role of the judicial branch of power is clearly that of a guarantor; the court assesses whether the necessary conditions for extradition determined by the first paragraph of Article 522 of the CrPA are met, and can only make a final decision on extradition by refusing the extradition request, but cannot grant it (if the court finds that the conditions for extradition are met, it will only issue a declaratory order to that effect). The decision to grant a request for extradition may only be made by the executive branch of power, which, in addition to taking into account the necessary conditions for extradition laid down in the third paragraph of Article 530 of the CrPA, must also consider the appropriateness of extradition. The executive branch of power therefore has a wider margin of discretion than the courts, which cannot assess the question of appropriateness.

38. For the above reasons, in the assessment of the Constitutional Court, the Minister's power to exercise discretion is sufficiently clearly discernible from Article 530 of the CrPA. However, as regards the purpose of this authorisation, the situation is different. The applicant rightly draws attention to the fact that Article 530 of the CrPA does not contain any points of reference from which it could be concluded for what purpose the legislature granted the Minister the power to decide in a discretionary manner or what objectives the Minister must pursue in his or her decision. Nor can the purpose of the discretion be inferred from the remainder of the statutory text governing the extradition procedure. Therefore, if Article 530 of the CrPA is interpreted as meaning that the Minister has discretion to decide on extradition, individuals are not given insight into the criteria on the basis of which the decision will be made.

39. However, in the assessment of the Constitutional Court, it is not crucial for the decision in the present case whether Article 530 of the CrPA grants the Minister the power of discretionary decision-making and whether this power is defined in a constitutionally consistent manner. As the applicant rightly points out, discretion in itself does not provide adequate protection of the right determined by Article 18 of the Constitution. While discretion may *allow* the Minister to adopt a decision that ensures the protection of this right, it does not imply an *obligation* to adopt such a decision (the essence of discretion lies precisely in the fact that it does not oblige the decision-maker to adopt a specific decision, but rather leaves him or her free to choose, from among

[20] According to the case law of the Supreme Court, under the current legislation, the court is already required to make a *prima facie* assessment of whether the conditions referred to in the third paragraph of Article 530 of the CrPA are fulfilled when deciding on extradition detention (see Supreme Court Judgment No. XI 38913/2019, dated 18 October 2019).

legally equally possible decisions, the one that he or she considers to be the most appropriate in the specific case, in view of the public interest.[21] However, if this obligation arises from some other provision of the international or national legal order, such discretion is then limited thereby.[22]

40. The key issue for deciding in the present case is therefore whether there exists a rule in the legal order which *obliges* the Minister to assess the foreigner's allegations of changed circumstances in the administrative phase of the procedure. Since such a provision cannot be found in the Act, the only remaining question is whether this obligation of the Minister is derived directly from Article 18 of the Constitution. In paragraph 32 of the reasoning of this Decision it was explained that, in accordance with the first paragraph of Article 15 of the Constitution, human rights and fundamental freedoms are exercised directly on the basis of the Constitution. When it comes to the decision-making of administrative authorities on human rights, the second paragraph of Article 120 of the Constitution must also be taken into account, according to which administrative authorities perform their work independently within the framework and on the basis of the Constitution and laws. According to the Constitutional Court's established case law, two requirements follow from this provision: (1) individual acts of the executive branch of power may only be adopted on the basis of the law, which means that they must be based on a sufficiently precise substantive basis in the law, and (2) they must be within the framework of the law, which means that they must not exceed the possible meaning thereof. Hence, the second paragraph of Article 120 of the Constitution prohibits administrative authorities from amending or independently regulating statutory matter.[23] If the law does not grant them a certain authorisation, they may not assume it on their own. This is all the more true when it comes to deciding on human rights and fundamental freedoms. In its Decision No. U-I-79/20, dated 13 May 2021 (Official Gazette RS, No. 88/21, and OdlUS XXVI, 18, see in particular paragraphs 71–72 and 97–98 of the reasoning), the Constitutional Court clarified that the initial assessment of whether, to what extent, and in what manner a particular human right should be interfered with in order to protect some other human right or a public interest must be carried out by the legislature. Hence, administrative authorities do not have the power to balance between several human rights or between a human right and the public interest without an appropriate statutory basis. It must be taken into account, however, that the mentioned doctrine applies to situations wherein deciding on interferences with human rights is at issue and not to situations where the protection of

[21] See Decision of the Constitutional Court No. Up-558/19, para. 26 of the reasoning. See also E. Kerševan and V. Androjna, *Upravno procesno pravo, Upravni postopek in upravni spor* [Administrative Procedural Law, Administrative Procedure, and Proceedings for the Judicial Review of Administrative Acts], GV Založba, Ljubljana 2017, p. 68.

[22] This is the way in which the statement of the Constitutional Court in Decision No. U-I-779/21 (para. 17 of the reasoning) that the administrative authority is obliged to use its discretion, taking into account the public interest in such a way so as to ensure the observance of human rights and fundamental freedoms, must be understood.

[23] Decision of the Constitutional Court No. Up-558/19, para. 24 of the reasoning.

an absolute human right, i.e. a human right that does not allow any limitations, hence a balancing against the rights of others or the public interest, must be ensured. In such situations, there is no fear that the administrative authorities would interfere with the legislature's powers by protecting such a human right directly on the basis of the Constitution in the absence of any other effective legal remedy. Therefore, the principle of legality does not prevent them from doing so. On the contrary, since administrative authorities are also bound by the Constitution on the basis of the second paragraph of Article 120 of the Constitution, they are obliged to directly protect, in the framework of their procedures, absolute human rights for the protection of which no other effective legal remedy is available, even if the law does not impose on them such an obligation.

41. It has already been stated that no other legal protection of the right determined by Article 18 of the Constitution is provided after the judicial phase of the extradition procedure has been concluded. It has also already been clarified that the right determined by Article 18 of the Constitution and the guarantee for individuals resulting therefrom that until the actual extradition they will be provided an assessment of changed circumstances that indicate a real risk that they will be exposed to one of the prohibited actions referred to in Article 18 of the Constitution by being extradited are absolute, which means that they cannot be subjected to any balancing against the rights of others or the public interest. It is therefore not possible to concur with the applicant that the statutory regulation of this issue is key to striking an appropriate balance between the rights of a foreigner and the public interest, which lies in respecting inter-state extradition treaties as well as in the effective prosecution of the perpetrators of criminal offences. A statutory regulation that interferes with the right determined by Article 18 of the Constitution in the name of the public interest would be inconsistent with the Constitution.

42. It follows from the foregoing that the Minister, within the framework of the administrative phase of the extradition procedure, is obliged, directly on the basis of Article 18 of the Constitution, to assess a foreigner's allegations of changed circumstances and, if they are substantiated, to refuse extradition.[24] Due to the absolute nature of the right determined by Article 18 of the Constitution, no statutory concretisation of this obligation is required. Hence, simply because the Act does not require the Minister to make such an assessment it is not inconsistent with the Constitution. One could only speak of an inconsistency of the Act with Article 18 of the Constitution if it clearly prohibited the Minister from making such an assessment (and, concurrently, also did not provide some other effective legal protection). Such was the situation in case No. U-I-238/06 (see paragraph 30 of the reasoning of this Decision), wherein there was no doubt that the law did not allow for an assessment of certain

[24] Similar is stated in Administrative Court Judgment No. I U 1351/2020, dated 21 October 2020, para. 63 of the reasoning, and in A. Erbežnik, *Nevarnost dehumaniziranih postopkov kazenskopravnih izročitev tretjim državam* [The Danger of Dehumanising Criminal Extradition Procedures to Third States], Pravna praksa, No. 45 (2021), pp. IV–VI. See also the Draft CrPA-N, pp. 181–182, summarised in paragraph 25 of the reasoning of this Decision.

relevant circumstances, and as a result a constitutionally consistent interpretation of the law was not possible.[25] In the present case, on the contrary, the Act can be interpreted in such a way that the circumstances referred to in the third paragraph of Article 530 of the CrPA, on the grounds of which the Minister must not authorise extradition, are not determined exhaustively. It also follows from the draft of the CrPA-N (see paragraph 25 of the reasoning of this Decision) that the amendments to Articles 522 and 530 of the CrPA were not intended to remove the competence to assess the condition referred to in the current point 14 of the first paragraph of Article 522 of the CrPA from the Minister, but to remove any doubt that the court has the primary competence to assess this condition.

43. In view of the above, the Constitutional Court held that the CrPA is not inconsistent with the Constitution. The Constitutional Court again stresses that the above-mentioned assessment refers only to the question of the constitutional consistency of the statutory regulation of the administrative phase of the extradition procedure, and not to the question of whether the Act regulates in a constitutionally consistent manner the possibility of assessing changed circumstances after the conclusion of the administrative phase of the extradition procedure until the actual extradition.

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44. The Constitutional Court adopted this Decision on the basis of Article 21 of the CCA and the second indent of the second paragraph in conjunction with the fifth paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, Nos. 86/07, 54/10, 56/11, 70/17, and 35/20), composed of: Dr Matej Accetto, President, and Judges Dr Rok Čeferin, Dr. Dr. Klemen Jaklič (Oxford, UK; Harvard, USA), Dr Rajko Knez, Dr Neža Kogovšek Šalamon, Dr Špelca Mežnar, and Marko Šorli. The Decision was adopted unanimously.

Dr Matej Accetto
President

[25] The regulation challenged in case No. U-I-238/06 reads as follows: “An asylum seeker whose application for asylum in the Republic of Slovenia has already been refused may submit a new application for asylum only if he or she provides evidence that his or her circumstances have changed significantly since the previous decision was adopted. Otherwise, the competent authority shall not initiate the procedure and shall reject the application by an order."