

**Case No.:** Up-402/12-16  
U-I-86/12-11  
**Date:** 5 July 2012

## DECISION

At a session held on 5 July 2012 in proceedings to decide upon the constitutional complaint and to review constitutionality initiated by Leonid Naydin, represented by Odvetniška družba Čeferin, o. p., d. o. o., Grosuplje, the Constitutional Court

decided as follows:

- 1. Koper Higher Court Order No. I Kp 35889/2011, dated 27 March 2012, in conjunction with Koper District Court Order No. I Ks 35889/2011, dated 24 February 2012, are annulled and the case is remanded to the Koper District Court for new adjudication.**
- 2. The petition to review the constitutionality of the first paragraph of Article 527 of the Criminal Procedure Act (Official Gazette RS, Nos. 32/07 – official consolidated text, 68/08, 77/09, and 91/11) is rejected.**
- 3. The constitutional complaint against Koper Higher Court Order No. 35889/2011, dated 3 November 2011, is rejected.**

## REASONING

### A.

1. The complainant challenges the orders of the Koper District Court and the Koper Higher Court which established that the conditions for his extradition to the Republic of Belarus are fulfilled. In Order No. I Ks 35889/2011, dated 9 September 2011, the Koper District Court established (i) that the conditions for extradition with regard to the criminal offences of establishing or joining a group for the purpose of perpetrating criminal offences under the first paragraph of Article 285 of the Penal Code of the Republic of Belarus (hereinafter referred to as the PCRB) and of providing a bribe under the second paragraph of Article 431 of the PCRB were fulfilled and (ii) that the conditions for extradition with regard to the criminal offences of abuse of office or official powers under the third paragraph of Article 424 of the PCRB and of accepting a bribe under the third paragraph of Article 430 of the PCRB were not fulfilled. The complainant's attorneys lodged a complaint, challenging the part of the order allowing the extradition. By Order No. I Kp 35889/2011, dated 3 November 2011, the Koper Higher Court annulled the first instance order in its entirety. In the new proceedings, the

Koper District Court decided by Order No. I Ks 35889/2011, dated 24 February 2012, that the conditions for the extradition of the complainant with regard to the criminal offence under the third paragraph of Article 424 of the PCRB were fulfilled, but dismissed the extradition request with regard to the remaining criminal offences. By Order No. I Kp 35889/2011, dated 27 March 2012, the Koper Higher Court dismissed the complaint of the complainant and his attorneys.

2. The complainant, i.e. the petitioner, alleges a violation of Article 22, the first paragraph of Article 23, and Article 28 of the Constitution, as well as of Article 20 of the Constitution and Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR). He alleges that in its order dated 3 November 2011 the Koper Higher Court *ex officio* also annulled the part of the order of the court of first instance that the complainant had not challenged. In doing so it allegedly violated Article 22 and the first paragraph of Article 23 of the Constitution. For the same reasons he also presented a petition for the review of the constitutionality of the first paragraph of Article 527 of the Criminal Procedure Act (hereinafter referred to as the CPA), according to which the district court panel *ex officio* sends an order by which it rejects an extradition request to the court of second instance for review.

3. According to the complainant's statements, the Koper Higher Court also violated the right to the equal protection of rights under Article 22 of the Constitution before considering the complaints in the new proceedings. Before the session of its panel it allegedly sent the case files to the competent state prosecutor, who prepared a written proposal that the complaints be dismissed. Allegedly, this proposal was not served on the complainant nor his attorneys and, therefore, the defence did not have an opportunity to acquaint itself with its content and provide a statement regarding such. The complainant further alleges that no adequate document in accordance with point 3 of the third paragraph of Article 523 of the CPA was attached to the extradition request of the Republic of Belarus. Allegedly, a detention order which had been adopted by the state prosecutor's office of the requesting state, instead of by a court as required by Article 20 of the Constitution and Article 5 of the ECHR, was attached to the extradition request. Conducting extradition proceedings without an adequate request of the foreign state allegedly constitutes a violation of Article 22 of the Constitution. According to the complainant's assertions, this safeguard was also violated because the courts allegedly concluded without providing adequate reasons, i.e. arbitrarily, that there are sufficient reasons to conclude that there is a reasonable suspicion that the criminal offence had been committed with regard to which the extradition had been requested; that under Slovene criminal law the specific allegations of the authorities of the Republic of Belarus against the complainant can be legally qualified as criminal solicitation to commit a qualified form of the criminal offence of abuse of office under the fourth paragraph in conjunction with the third paragraph of Article 261 of the Penal Code (Official Gazette RS, Nos. 63/94, 23/99 – PC); that the condition of dual criminality was fulfilled and prosecution for the criminal offence with regard to which the court concluded that the conditions for extradition were fulfilled was not barred by a relative statute of limitations. The complainant also alleges that mass violations of human rights occur in the Republic of Belarus.

4. By Order No. Up-402/12, the panel of the Constitutional Court accepted the constitutional complaint against Koper Higher Court Order No. I Kp 35889/2011, dated 27 March 2012, in conjunction with Koper District Court Order No. I Ks 35889/2011, dated 24 February 2012, for consideration and decided that the implementation of these acts be suspended until the final decision.

5. The Constitutional Court inspected the case file of Koper District Court Case No. II Pom-i 35889/11, in which the challenged individual acts had been adopted.

### **B – I.**

6. In the procedure for the extradition of defendants and convicted persons (Chapter XXXI of the CPA), the court established by the challenged final order that the conditions for the extradition of the complainant to the requesting state were satisfied, i.e. that the conditions under points 1 to 7 of Article 522 of the CPA [1] (the judicial stage of the extradition procedure) were fulfilled. Pursuant to Article 523 of the CPA, the procedure for the extradition of defendants and convicted persons is initiated at the request of a foreign state. *Inter alia*, an indictment, a judgment, a detention order, or other equivalent document must be attached to the extradition request (point 3 of the third paragraph of Article 523 of the CPA). The competent court decides whether the conditions for extradition determined in points 1 to 7 of Article 522 of the CPA are fulfilled on the basis of such document and other possible documents attached to the extradition request. When deciding on an extradition request, the court is, as in the case of any other judicial decision, bound by the Constitution and laws (Article 125 of the Constitution). Therefore, the court is obliged to also interpret the aforementioned provisions of the CPA in a constitutionally consistent manner. When deciding, it may not adopt positions which entail a violation of individuals' constitutionally protected human rights and fundamental freedoms.

7. The complainant's extradition procedure was initiated by a request to which a decision on the measure of detention of the State Prosecutor's Office of the Republic of Belarus, dated 2 December 2009, had been attached. The complainant alleges that, in accordance with Article 20 of the Constitution and Article 5 of the ECHR, only a court, not the state prosecutor's office, may order detention and, therefore, it is not admissible to take this decision into account as a valid basis for deciding on extradition, as is required by point 3 of the third paragraph of Article 523 of the CPA. By the challenged order, the Higher Court held that the decision attached to the extradition request satisfies the requirements of Article 20 of the Constitution. According to the position of the Higher Court, the content of the term "decision on detention" from point 3 of the third paragraph of Article 523 of the CPA also encompasses such documents on the basis of which the personal freedom of an individual is interfered with which are not adopted by a court provided they establish the existence of a reasonable suspicion that a criminal offence has been committed and the precondition of absolute necessity.

8. Everyone has the right to personal liberty (the first paragraph of Article 19 of the Constitution). On the basis of Article 19 (Protection of Personal Liberty), the Constitution guarantees this right by protecting it. Such entails that the constitutional protection of personal liberty above all refers to the restriction of the powers of those state authorities that interfere with the liberty of individuals. [2]

9. The second paragraph of Article 19 stipulates that no one may be deprived of their liberty except (i) in such cases and (ii) pursuant to such procedures as are provided by law. As regards the deprivation of liberty in the form of detention, the cases and procedure for such interference are to a large degree determined already by the Constitution. Pursuant to the first paragraph of Article 20 of the Constitution, a person reasonably suspected of having committed a criminal offence may be detained only on the basis of a court order when this is absolutely necessary for the course of criminal proceedings or for reasons of public safety. This provision of the Constitution thus determines three conditions under which detention can be ordered: (1) reasonable suspicion, (2) a judicial decision, and (3) its absolute necessity for the course of criminal proceedings or for public safety. The constitutionally determined requirements that must be considered when ordering detention, which restricts the right to personal liberty, represent, at the same time, constitutional procedural safeguards for the individual which must be observed in order to allow for the state to interfere with his or her right under the first paragraph of Article 19 of the Constitution. In this regard, the requirement of there being a judicial decision is in fact essential, as it is precisely an independent judge who will impartially assess whether the requirement of reasonable suspicion and the requirement of the absolute necessity of the interference with the right to personal liberty are fulfilled.

10. The requirement of a judicial decision, as defined in the first paragraph of Article 20 of the Constitution, relies on the tradition of the so-called *habeas corpus* complaint and necessarily entails the safeguards guaranteed by the right to judicial protection under the first paragraph of Article 23 of the Constitution. Such entails the explicit constitutional requirement that following the deprivation of liberty (apprehension, arrest) by the executive branch of power a person be delivered without delay to the judiciary [3] or that a decision on detention may only be adopted by a court which is constituted by law, independent, and impartial. The meaning of the requirement that there be a judicial decision on detention, as is required by the first paragraph of Article 20 of the Constitution, is crucial for ensuring the protection of the individual against arbitrary state interferences with his or her personal freedom. It is justified by the constitutional principle of the independence of the judiciary which, on the one hand, means that the judge, when deciding as the bearer of judicial power, is bound only by the Constitution and laws (Article 125 of the Constitution) and, on the other hand, it is founded on the principle of the separation of powers (the second paragraph of Article 3 of the Constitution), which *inter alia* requires that the bodies or bearers of the individual branches of power are separate from each other or that they are not identical. [4] The independence of judges is closely linked to their impartiality in specific judicial proceedings. It is possible to speak of such a characteristic when a court hears the statements of both parties before reaching a decision [5] and when the procedural functions of the participants in the proceedings are separate from each other. Therefore, with regard to deciding on interferences with personal liberty (as well as in general), the role of an independent and

impartial judiciary, or of the judge as the bearer of the judicial function, represents an essential precondition for the realisation of the protection of the individual in relation to the state.

11. The right to personal liberty (and security) is also guaranteed by Article 5 of the ECHR. Similarly as the second paragraph of Article 19 of the Constitution, the first paragraph of Article 5 ECHR stipulates that no one shall be deprived of their liberty save in the instances (exhaustively listed in points a to f of that provision) and in accordance with a procedure prescribed by law. With regard to interferences with liberty, three strands in particular may be identified as running through the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR), i.e. (i) that the list of admissible interferences with liberty from the first paragraph of Article 5 of the ECHR is exhaustive and that they have to be interpreted narrowly, (ii) that the requirement that each interference be lawful, procedurally and substantively, has to be strictly observed, and (iii) the importance of the promptness or speediness of judicial control of the deprivation of liberty (the third and fourth paragraphs of Article 5 of the ECHR).

12. The final point, namely the importance of a judicial decision regarding interferences with personal liberty and the importance of judicial protection of this right, clearly follows from the wording of Article 5 of the ECHR and the position of the ECtHR. The third paragraph of Article 5 of the ECHR requires that everyone who has been deprived of their liberty according to point c) of the first paragraph of Article 5 of the ECHR, i.e. among other reasons for the purpose of bringing them before the competent legal authority due to the reasonable suspicion that they have committed a criminal offence, shall be brought promptly before a judge or other officer authorised by law to exercise judicial power. Moreover, pursuant to the fourth paragraph of Article 5 of the ECHR, everyone who has been deprived of their liberty has the right to initiate proceedings by which the lawfulness of their detention shall be speedily decided by a court and their release ordered if the detention is not lawful.

13. According to the position of the ECtHR, particularly in the initial stage following an arrest (the third paragraph of Article 5 of the ECHR), the individual must be guaranteed judicial control of the interference, independent of his or her application and without delay. [6] The purpose of such control is to ensure effective safeguard against abuses of power by the prosecuting authorities and other abuses which are most common in the initial stage following an arrest. This safeguard is not observed if the detention is reviewed by a state prosecutor or another officer exercising the function of investigation or prosecution who may later demand that criminal proceedings be initiated, [7] even though their position provides them with a certain degree of independence. [8]

14. The fundamental goal of the provision of Article 5 of the ECHR is protection against any arbitrary or unjustified interference with the personal liberty of individuals. [9] A deprivation of liberty which is prolonged beyond the initial period and which has not been ordered by a court or a judge cannot constitute a lawful interference in the sense of the first paragraph of Article 5 of the ECHR. The safeguard against the arbitrariness of such deprivation of liberty is precisely the requirement of judicial protection. [10] A crucial precondition of the protection of the right to personal liberty as guaranteed by the Constitution and the ECHR is thus

(particularly) that there exist judicial protection which is separate from the parties to the proceedings or the prosecuting authorities, independent, and impartial.

15. The safeguards determined by the ECHR for the admissibility of restrictions of the right to personal liberty are thus equally entailed in the outlined provisions of the Constitution. Regardless of the complainant's reference also to Article 5 of the ECHR, the Constitutional Court, therefore, judged the alleged violations of the right to personal liberty only from the viewpoint of the constitutional provisions. A violation of the safeguards under the first paragraph of Article 20 of the Constitution leads to a violation of the right to personal liberty under the first paragraph of Article 19 of the Constitution. Consequently, these safeguards must also be observed by a judge deciding whether the conditions for the extradition of a defendant to a foreign state are fulfilled.

16. During the proceedings the complainant repeatedly asserted, for the first time already in a statement dated 25 August 2011, which was presented in writing at the first hearing on 29 August 2011 (Article 526 of the CPA), that the detention order which was attached to the extradition request had not been adopted by a court and thus, pursuant to the first paragraph of Article 20 of the Constitution, may not be taken into account as valid grounds for a decision on extradition. In the challenged order the court of first instance did not respond with any reasoning to this allegation of the complainant, which is inadmissible from the viewpoint of Article 22 of the Constitution, which requires a court to reply to relevant constitutional legal arguments. The higher court, however, adopted the position that this document complied with the requirements of Article 20 of the Constitution and therefore represented an adequate "decision on detention" pursuant to point 3 of the third paragraph of Article 523 of the CPA and as such was a relevant attachment to the extradition request. It wrote that the order of the State Prosecutor's Office of the Republic of Belarus relied on the provisions of Articles 116 to 119 and Article 126 of the Criminal Procedural Code of the Republic of Belarus and that the detention order had been issued by the leader of the investigative team, a higher court investigating judge in charge of exceptionally complex cases of the State Prosecutor's Office of the Republic of Belarus. Consequently, it is allegedly not entirely correct that the detention order had not been adopted by a court merely on account of the fact that due to the regulations of the Republic of Belarus such operates within the state prosecutor's office. According to the position of the court of second instance, the attached order also fulfils the conditions of (the first paragraph of) Article 20 of the Constitution because it (i) summarises the alleged act and provides concrete facts, (ii) reasons that the detention is necessary due to the danger of obstruction of the preliminary investigation as well as that the defendant would hide from the investigative authorities and the court, and (iii) provides the complainant with a right to appeal.

17. Pursuant to the first paragraph of Article 20 of the Constitution, only a court may decide on the deprivation of liberty in the form of detention. The constitutionally consistent interpretation of the term "decision on detention" under point 3 of the third paragraph of Article 523 of the CPA, therefore, cannot include an individual document on detention which was not adopted by a court. Regardless of the regulation and designation in individual legal systems, such may not be a body which operates within the state prosecutor's office, i.e. one of the parties to the criminal proceedings which at the same time in the name of the state

exercises the function of prosecuting perpetrators of criminal offences. [11] The guarantee that the individual will be ensured a fair trial lies precisely in an independent court which impartially, taking into account all other constitutional safeguards, decides whether such prosecution of the individual is justified and also whether the restrictions of his or her human rights and fundamental freedoms that already took place during the criminal investigation and even before its initiation were justified. A person operating within the state prosecutor's office, even though designated as an "investigating judge", is neither a bearer of judicial power nor does he or she fulfil the fundamental safeguards of complete independence and impartiality inherent only to bearers of judicial power. It is evident that the requirement of independence and impartiality safeguarded by the requirement that there be a judicial decision on detention cannot be satisfied by a decision adopted by a state prosecutor or a person within the state prosecutor's office who is charged with the investigation of the criminal offence. The fact that a judge, as a bearer of judicial power, must decide on the justification of an interference with a human right or fundamental freedom, and within this framework also with one of the most important of such, i.e. the right to personal liberty, during criminal proceedings or before the initiation of such, is a crucial aspect of respecting this human right. The manner in which the investigative stage of criminal proceedings is conducted in an individual state cannot lead to a different conclusion.

18. The explicit constitutional requirement that there be a judicial decision on detention, i.e. that there be the safeguard of an independent and impartial judge who decides on the justification of an interference with the right to personal liberty, cannot be overlooked on account of the finding that the other conditions for detention determined in the first paragraph of Article 20 of the Constitution (namely a reasonable suspicion that a criminal offence has been committed and the absolute necessity of the measure) are fulfilled, as was done by the Higher Court. An interference with personal liberty can only be constitutionally justified if all the prescribed requirements are fulfilled, the requirement of a judicial decision even foremost. An interpretation of point 3 of the third paragraph of Article 523 of the CPA according to which the term "decision on detention" also includes a document not issued by a court thus constitutes a denial of the meaning of judicial protection of the right to personal liberty and is contrary to the first paragraph of Article 20 of the Constitution. Such interpretation does not protect the individual from arbitrary interferences with his or her right to personal liberty; therefore, it constitutes a violation of the complainant's right under the first paragraph of Article 19 of the Constitution.

19. Due to the established violation of the complainant's right to personal liberty, the Constitutional Court annulled the challenged orders and remanded the case to the court of first instance for new adjudication without reviewing the other asserted human rights violations.

## **B – II.**

20. In addition to the constitutional complaint, the complainant lodged a petition for the initiation of the procedure to review the constitutionality of the first paragraph of Article 527 of the CPA, which allegedly requires the higher court in extradition proceedings to review *ex*

*officio* the order of the court of first instance if such is favourable to the defendant. The challenged provision is allegedly incompatible with Article 22 and the first paragraph of Article 23 of the Constitution.

21. A petition to initiate the procedure to review the constitutionality of a regulation may be lodged by anyone who demonstrates legal interest (the first paragraph of Article 24 of the Constitutional Court Act, Official Gazette RS, No. 64/07 – official consolidated version – hereinafter referred to as the CCA). Pursuant to the second paragraph of the mentioned Article, legal interest is deemed to be demonstrated if a regulation whose review has been requested by the petitioner directly interferes with his or her rights, legal interests, or legal position.

22. The petitioner's legal interest for a decision on the petition was based on the constitutional complaint which the Constitutional Court granted on the basis of the established violation of the right to personal liberty (the first paragraph of Article 19 of the Constitution) and due to this violation annulled the challenged orders of the courts of first and second instance. Therefore, the eventual granting of the petition could not influence the decision regarding the constitutional complaint. Such entails that the petitioner did not demonstrate legal interest for the initiation of the procedure to review the constitutionality of the challenged provision of the CPA. Therefore, the Constitutional Court dismissed the petition (Item 2 of the operative provisions).

### **B – III.**

23. The complainant challenges Koper Higher Court Order No. I Kp 35889/2011, dated 3 November 2011, which annulled the order of the court of first instance in the initial procedure by which the latter court determined that the conditions for extradition with regard to two of the alleged criminal offences were fulfilled (Article 528 of the CPA), but rejected the extradition with regard to the remaining two criminal offences regarding which it had been requested (Article 527 of the CPA).

24. In the proceedings at issue, the Constitutional Court annulled Koper Higher Court Order No. I Kp 35889/2011, dated 27 March 2012, and Koper District Court Order No. I Ks 35889/2011, dated 24 February 2012, both issued in the new proceedings on the basis of the challenged order, and remanded the case to the court of first instance for new adjudication (Item 1 of the operative provisions). Such entails that the complainant does not have legal interest for a decision on the constitutional complaint against the challenged order (the second indent of the first paragraph of Article 55b of the CCA), therefore, the Constitutional Court dismissed such (Item 3 of the operative provisions).

### **C.**

25. The Constitutional Court reached this decision on the basis of the first paragraph of Article 59, the third paragraph of Article 25, and the second indent of the first paragraph of



Article 55b of the CCA, and the first indent of the second paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, Nos. 86/07, 54/10, and 56/11), composed of: Vice President Mag. Miroslav Mozetič, Judges Dr. Mitja Deisinger, Dr. Dunja Jadek Pensa, Dr. Etelka Korpič – Horvat, Jasna Pogačar, Dr. Jadranka Sovdat, and Jan Zobec. The decision was adopted unanimously.

Mag. Miroslav Mozetič  
Vice President

[1] The provision was subsequently amended and complemented by the Act Amending the Criminal Procedure Act CPA-K (Official Gazette RS, No. 91/11).

[2] Constitutional Court Decision No. U-I-18/93, dated 11 April 1996 (Official Gazette RS, No. 25/96, and OdlUS V, 40).

[3] Constitutional Court Decision No. U-I-282/99, dated 13 April 2000 (Official Gazette RS, No. 42/00, and OdlUS IX, 84).

[4] For a more detailed account of the content and meaning of the right to an independent judge, see Constitutional Court Decision Nos. U-I-60/06, U-I-214/06, and U-I-228/06, dated 7 December 2006 (Official Gazette RS, No. 1/07, and OdlUS XV, 84), point 54 *et seq.*

[5] Constitutional Court Decision No. Up-763/03, dated 8 April 2004 (Official Gazette RS, Nos. 51/04 and 62/04).

[6] Compare with the ECtHR Judgment in the case *Aquilina v. Malta*, dated 29 April 1999, point 47 *et seq.*

[7] Compare with, for example, the ECtHR Judgments in the cases *Pauwels v. Belgium*, dated 26 May 1988, *Niedbala v. Poland*, dated 4 July 2000 (point 48 *et seq.*), and *Assenov and others v. Bulgaria*, dated 28 October 1998 (point 145 *et seq.*).

[8] The ECtHR Judgment in the case *Huber v. Switzerland*, dated 23 October 1999 (point 37 *et seq.*).

[9] The ECtHR Judgment in the case *McKay v. United Kingdom*, dated 3 October 2006, point 30.

[10] Compare with, for example, the ECtHR Judgment in the case *Baranowski v. Poland*, dated 28 March 2000 (in particular point 57).

[11] Compare with the ECtHR Judgements cited in footnotes Nos. 7 and 8.