Czech Republic
RULING
Constitutional Court

On behalf of the Republic

The Constitutional Court decided in a committee composed of the President, Katerina Simackova (Judge-Rapporteur) and the Judges Ludvik David and Vojtech Simicek, on the constitutional complaints of the complainants:

a) Ch.-H. Ch., represented by Mgr. Miroslav Krutina, lawyer with legal seat at 27 Vyšehradská St., Prague 2, against the resolution of the High Court in Prague file no. 14 To 161/2018 of 30.5.2019 and the resolution of the Municipal Court in Prague file no. Nt 407/2018 of 27.9.2018;
b) S.-K. Ch., represented by the same lawyer, against the resolution of the High Court in Prague file no. 14 To 139/2018 of 16.5.2019 and the resolution of the Municipal Court in Prague file no. Nt 410/2018 of 7.8.2018;
c) Y.-Ch. Ch., represented by the same lawyer, against the resolution of the High Court in Prague file no. 14 To 134/2018 of 18.4.2019 and the resolution of the Municipal Court in Prague file no. Nt 408/2018 of 21.8.2018;
d) H.-L. Ch., represented by the same lawyer, against the resolution of the High Court in Prague File no.: 14 To 160/2018 of 17.06.2019 and the resolution of the Municipal Court in Prague file no. Nt 409/2018 of 9.10.2018;
e) Ch.-A. L., represented by the same lawyer, against the resolution of the High Court in Prague file no. 14 To 131/2018 of 17.06.2019 and the resolution of the Municipal Court in Prague file no. Nt 406/2018 of 7.8.2018;
f) W.-K. L. represented by the same lawyer, against the resolution of the High Court in Prague file no. 14 To 127/2018 of 18.04.2019 and the resolution of the Municipal Court in Prague file no. Nt 405/2018 of 14.8.2018;
g) Y.-Ch. L. Represented by the same lawyer, against the resolution of the High Court in Prague file no. 14 To 140/2018 of 31.05.2019 and the resolution of the Municipal Court in Prague file no. Nt 404/2018 of 21.8.2018 and
h) H.-CH. W Represented by the same lawyer, against the resolution of the High Court in Prague file no. 14 To 138/2018 of 16.5.2019 and the resolution of the Municipal Court in Prague file no. Nt 403/2018 dated 14.8.2018

with the participation of the **High Court in Prague** and the **Municipal Court in Prague** as parties to the proceedings and **Municipal Public Prosecutor's Office in Prague** as an intervening party, as follows:

I. The resolutions of the High Court in Prague file no. 14 To 161/2018 of 30.5.2019, file no.: 14 To 139/2018 of 16.5.2019, file no.: 14 To 134/2018 of 18. 4.2019, file no.: 14 To 160/2018 of 17.6.2019, file no. 14 To 131/2018 of 17.6.2019, file no. 14 To 127/2018 of 18.4.2019, file no. 14 To 140/2018 of 31.5.2019, file no.: 14 To 138/2018 of 16.5.2019 and the resolutions of the Municipal Court in Prague file no. Nt 407/2018 of 27.9.2018, file no. Nt 410/2018 of 7.8.2018, file no. Nt 408/2018 of 21.8.2018, file no. Nt 409/2018 of 9.10.2018, file no. Nt 406/2018 of 7.8.2018, file no. Nt 405/2018 dated 14.8.2018, file no. Nt 404/2018 of 21.8.2018 and file no. Nt 403/2018 of 14.8.2018, violated the

fundamental right of the complainants not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment under article 7 para. 2 of the Charter of Fundamental Rights and Freedoms and Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

II. These decisions are therefore canceled.

Reasons:

I. Definition of the case and previous course of proceedings

1. Complainants who consider themselves to be citizens of Taiwan are subject to extradition proceedings (extradition proceedings) to the People's Republic of China ("PRC"). The general courts have decided that it is permissible to extradite complainants to PRC for criminal prosecution for the crime of fraud. The complainants were supposed to commit fraud by pretending to be PRC police, prosecutors and other representatives of PRC state bodies and other entities as an organized group, through internet communication from a property in Prague contacting citizens of PRC living in Australia and persuading them to transfer various high amounts on the PRC bank account.

2. The complainants submitted constitutional complaints against the resolutions of the Municipal Court in Prague and the High Court in Prague on the admissibility of their extradition to the PRC. The Constitutional Court suspended the enforceability of the decision of the municipal courts on the admissibility of the issued.

3. The complainants applied for international protection. Following the issuance of the contested decisions of the municipal courts on the admissibility of their issuance, the Ministry of the Interior granted on July 10, 2019 to complainants subsidiary protection for a period of 12 months. The Ministry of the Interior has come to the conclusion that in the event of return to the PRC or extradition to the PRC, the complainants are in danger of serious injury within the meaning of section 14 para. 2 letter a) the law on asylum, "imposition or execution of the death penalty", and letter b), "torture or inhuman or degrading treatment or punishment of the applicant for international protection".

4. The complainants subsequently re-applied for release from pre-trial detention and pointed out that they had been granted an subsidiary protection. The Municipal Court and the High Court rejected the appellants' appeals, but these resolutions were annulled by the Constitutional Court in the ruling of file no. II. ÚS 3219/19 of 26.11.2019. The subsidiary protection granted prevented the extradition from being carried out, and the further pre-trial detention of the appellants thus lacked the intended purpose. The general courts by rejecting the request for release, violated the right of the complainants to personal liberty under art. 8, para. I and 5 of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the "Charter").

5. According to the information resulting from the contested decisions of the High Court, no criminal prosecution was initiated against complainants in the territory of the Czech Republic. The knowledge gained in the territory from their criminal activity was passed on to the Chinese party, which initiated criminal proceedings on their basis. The High Court explained in detail the reasons why the conditions for criminal prosecution not in the Czech Republic, but in the requesting state are met (see clause 24 below).

6. Following the finalization of the High Court's decision, on 31 July 2019 the Minister of Justice turned to the Supreme Court with a motion to review the decisions of both courts. Minister of justice had doubts as to whether the court's decision was in conflict with Art. 3 (Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"). In accordance with section 95 para. 5 of the Act on International Judicial Cooperation in Criminal Matters therefore submitted a motion to the Supreme Court to review the decisions of the municipal and high courts. The Supreme Court declined the Minister's motions for all eight resolutions; the first of them was resolved by file no. 11 Tcu 105/2019 of 30.11.2019 and the others relied on it.

A. Process of extradition procedure

7. In January 2018, the Municipal court ordered the pre-trial detention of the complainants. As part of a preliminary investigation, the Municipal Public Prosecutor's Office in Prague informed the Ministry of Justice, which subsequently informed the Ministry of Foreign Affairs of the PRC of the arrest of the complainants. The request from the Chinese authorities to extradite the complainants was forwarded by the Ministry of Justice to the Public Prosecutor's Office in 2018. The Ministry of Justice requested arrest warrants from the Chinese authorities, a description of the act, legal qualifications and a reference to the legal provisions of each requested person, the text of the legislation showing that the conduct was a criminal offense; a statute of limitations for the prosecution, a description of each person with information on his or her identity and citizenship, a description of the evidence available to the Chinese authorities. Assurances were provided by the Chinese side that a death penalty would not be imposed or served, that persons concerned will not be transferred to a third country, and that, if the requested persons are sentenced to imprisonment, they will have the right to parole after serving wo-thirds of the sentence imposed, assurance of the application of the principle of specialty (these persons will not be prosecuted or convicted or deprived of their liberty for an offense committed before extradition other than that for which they were extradited) and assurances of reciprocity (the term "diplomatic guarantees" is also used in the text).

8. The Public Prosecutor's Office obtained reports on the observance of human rights in criminal proceedings in the PRC from the Department of Asylum and Migration Policy of the Ministry of the Interior of the Czech Republic and the Ministry of Foreign Affairs (hereinafter "MFA"), Department of Human Rights and Transformation Policy. At the beginning of March 2018, the Ministry of Foreign Affairs sent information to the Public Prosecutor's Office on the state of human rights in the Republic of China, drafted in cooperation with the Embassy of the Czech Republic in China while relying on the reports of US Department of State for year 2016 and final recommendations of UN Committee against torture and other reports. The file summarizes the report for 2017 of US Department

of State with conclusions similar the conclusion of the 2016 report. The file also includes a Human Rights Watch report for 2017 from the Ministry of the Interior, Department of Asylum and Migration Policy.

9. The report of the Ministry of Foreign Affairs shows that cases of inhuman, degrading treatment or torture have been recorded regularly in the last five years: "Over the last 5 years, the Chinese judiciary has passed a number of positive changes (...). However, it is not possible to say that the judicial system of PRC was independent, on the contrary, it is fully subject to the control of the Chinese Communist Party (CCP). In cases where the CCP considers the case as "politically sensitive" with possible destabilizing potential, then it actively intervenes in the investigation and trial. For the last 5 years, we have regularly recorded cases of inhuman treatment, degrading treatment and, in some cases, torture. These cases are most often related to the interrogation of human rights activists or persons (including members of the CCP) suspected of corruption (including embezzlement of money) or other undesirable behavior that damages the image of the CCP. In these and other cases, the right to a fair trial is not respected. Given the role of the CCP, this is a characteristic valid for the whole territory of the PRC." The Ministry of Foreign Affairs concluded that, "on the basis of continuous monitoring of the state of human rights and domestic political reforms in the country ... there is a real possibility that a person extradited to PRC may be subjected to inhuman treatment, in extreme cases even torture in the investigation, torture during interrogation, especially in politically sensitive cases. Nor can China be considered to fully comply with diplomatic assurances that the person or persons will not be treated in violation of Article 3 of the European Convention on Human Rights" (emphasis removed).

10. To substantiate its conclusions, the Ministry of Foreign Affairs referred to some reports from international organizations. According to the final recommendations of the UN Committee against Torture in the periodic review, the Committee "received a number of reports of cases of torture. According to the committee, this conduct is an integral part of the Chinese criminal justice system, in which the accusation is based on a forced confession. Although the situation is changing slightly for the better in this respect, cases of confessions obtained in this way are not isolated. The committee's final recommendations confirm the influence of the Chinese Communist Party on the decisions of the judicial institutions, especially in politically sensitive cases." Although, following the amendment of the Penal Code in 2012 and 2014, the Committee noticed a slightly positive shift in the fact that torture is unacceptable, "the interpretation of torture is still not in line with the requirements of international law". The Anti-torture Committee found that there was still "a big gap between legislation and implementation (note: the Chinese side acknowledged the existence of torture when officials called on courts not to take into account evidence enforced by torture)." Torture is used as a tool in obtaining confessions in politically motivated cases or in investigating corruption. Inhuman treatment and torture were used as a means of interrogation even after a public statement by the Minister of Public Security and the Chief Prosecutor in 2016, who declared these practices inadmissible for obtaining evidence.

11. According to the Ministry of Foreign Affairs (MFA), the report of US Department of State on the state of human rights in the country in 2016 deals with prison conditions. Prisoners are denied access to adequate medical care, thus routinely punishing prisoners of conscience. Chinese prisons are overcrowded and with the poor hygiene conditions. There are strict disciplinary measures and the ability of prisoners to communicate with the outside world or to practice religion is severely limited. The MFA report of March 2018 further states that "standards for Chinese prisons are low. There are strict conditions in prisons, which allow only

very limited movement. Overcrowded cells, unsatisfactory hygienic and dietary conditions are very common. There are known cases where EU citizens were held in a 25 m^2 cell with 22 other prisoners, they were only allowed to leave the cell twice a week without access to daylight. In the winter months, prisons are insufficiently heated. Prisoners are very often sick."

12. The MFA report of 22 March 2018 also deals with the state of the judiciary: "China is improving and streamlining its judicial system, but it is moving in a different direction from the Western system based on the independence of the judiciary. Everything is subject to the Party, there is no certainty of a fair trial. (...) We cannot expect the judiciary, or in particular the right to a fair trial, to undergo positive changes in the short or medium term. The trend will be rather the opposite. "According to the Ministry of Foreign Affairs, despite the positive changes, we cannot talk about the independence of the judiciary at all. According to a Human Rights Watch report for 2017, the regime is isolating its opponents, and there have been reported cases of disappearances. The Amnesty International Report of 2017/18 recalls that legislation governing the activities of the secret services gives them unlimited powers, lacking, for example, guarantees for protection against arbitrary detention.

13. The Ministry of Foreign Affairs also supplemented the information concerning the extradition of Taiwanese citizens to mainland China. During the preliminary investigation, the detainees stated that if a Chinese citizen from the mainland committed a criminal act, he would not be punished as severely as those from Taiwan. They also feared that the police would force them to confess by physical violence, although they did not commit the act. The Ministry of Foreign Affairs stated that it did not have any information that would indicate a violation of human rights in the execution of a sentence based on Taiwanese origin. "However, it cannot be ruled out that individuals may be exemplary punished (with reference to the ability of Chinese courts to act or the inability of Taiwanese courts). Given the state of independence of the Chinese judiciary, the political interest of the Chinese Communist Party may interfere with criminal proceedings." From the extranet of the Supreme Public Prosecutor's Office, the Public Prosecutor's Office also provided another report from the Ministry of Foreign Affairs on the state of human rights in China, which significantly overlapped with the above information.

14. The prosecutor's office asked the Chinese authorities for reassurance on certain issues. Finally, the following assurances were provided: (a) under the Criminal Code, the maximum penalty for embezzlement (or fraud) does not include the death penalty, so that once extradited to the PRC, the requested persons will not be sentenced to death for fraud; (b) the requested persons will be able to apply for conditional release; (c) the principle of specialty is respected; (d) the requested persons will not be transferred to a third country after extradition without the consent of the Czech authorities due to the criminal offenses they committed before the transfer; (e) the Chinese authorities will provide reciprocal cooperation in cases of similar requests from the Czech authorities; (f) In the future, the Chinese authorities will not insist on higher verification in the case of extradition requests submitted by the Czech authorities (note of 7 February). Arrest warrants, citations of the Criminal Code and other regulations were attached, including regulations on the power of state authorities to prosecute offenders, jurisdiction of state authorities for extradite proceedings, or provisions on conditional release, a statute of limitations, and a document on Legal rights of a criminal suspect after he was extradited to the People's Republic of China, and a citation of the Prison Act. Following further communication, the Chinese authorities added: (g) that they will allow, at the request of the public authorities, to visit and meet the place of detention of the requested persons (in response to a request that consular staff to be able to visit and speak with them without the presence of

a third party); and h) that employees of the Czech Republic will be able to participate in public court proceedings in the matter of requested persons; and i) that upon request, the Czech state authorities will be informed of the outcome of the criminal proceedings and will receive copies of the final decisions in the case. In July 2018, the Chinese authorities sent a file of evidence on which the prosecution was based. As part of the requested assurances, a promise that consular staff would be able to speak to extradited persons without the presence of third parties was missing. In this regard, the Chinese side promised the meetings of consular staff with prisoners in accordance with the provisions related to visits to Chinese prisons but did not promise that the meetings would take place without the presence of third parties.

15. The Public Prosecutor's Office also obtained from Eurojust an overview of which Member States of the European Union have extradited persons to the People's Republic of China in the last three years and with what result. The following countries have bilateral extradition agreements with the PRC: Belgium, Bulgaria (extradited two Chinese citizens, without assurances), France (extradited 2 persons), Lithuania (not action taken yet), Portugal (1 case resolved in 2014, but not extradited, as no assurance was provided that the death penalty would not be imposed; in addition, it was a civil matter), Romania (no action taken yet); Spain. There were seven cases in Spain, in two of them an extradition took place, with the demand of diplomatic assurances that the death penalty would not be imposed and that release would be allowed after a certain period of time. Later, the Prosecutor's Office received information on the extradition of 121 suspects of Taiwanese origin to the PRC. In this case, Spain received requests for extradition from both the PRC and Taiwan. It preferred extradition to the PRC before extradition to Taiwan, as Spain has full diplomatic relations and a bilateral agreement with the PRC, not with Taiwan, and Spain received a request for extradition to the PRC first. In the decision of the Supreme Court of Spain, No. 21/2016 of 16 February 2018, which dealt with the matter of human rights of extradited persons in a way that such a statement must be specified in relation to a specific person and a specific act. Outside the bilateral agreements, Hungary dealt with three cases. One was terminated due to the statute of limitations, in the second, Chinese citizen agreed to be extradited, and in the third a Chinese citizen went to PRC by himself (Hungary handed over his criminal proceedings after being assured that he would not be sentenced to death penalty). In Slovenia, one extradition case was opened where the courts found extradition admissible, but the Ministry of Justice, given the lack of guarantees regarding the conditions of imprisonment, namely the situation in prisons, such as hygiene, temperature, free movement, fresh air, ventilation, separate rack, etc. release was not allowed. Furthermore, in January 2018 in Slovenia, the police closed an extensive investigation also against persons of Taiwanese origin in a similar case, which is now being heard in the local constitutional court. Eleven people were prosecuted, seven of whom fled. In Sweden, one case appeared in 2015, but extradition was refused due to the statute of limitations. No extradition cases have been reported in the last three years in Austria, Croatia, Denmark, Estonia, Finland, Germany, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Slovakia, the Netherlands, and the United Kingdom.

16. On 17 of July 2018, the Public Prosecutor's Office submitted a motion for a decision on the admissibility of the extradition of all the complainants to the Municipal Court after a preliminary investigation. It suggested the proceeding to be conducted with regard to all requested persons jointly. The Prosecutor's Office stated that assurances regarding the possibility of monitoring the course of criminal proceedings and their compliance with Chinese law and the principles arise from art. 6 of the Convention and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provide a real and

practicable guarantee, so there is no reasonable fear that Chinese criminal proceedings would be in conflict with the Czech Republic's obligations under international treaties on human rights and fundamental freedoms. The prosecutor's office explained why it accepted that the Chinese side did not provide assurances about the right of consular staff to contact the requested persons without the presence of third parties. Representatives of the Chinese side explained that, under international consular law, consular staff have such rights only against nationals of their own state, during the negotiations in May 2018. This argument was accepted by the Public Prosecutor's Office.

17. The complainants argued that there was no independent judiciary in the PRC, that conditions in Chinese prisons were very poor, and that they did not believe that the PRC would comply with the assurances given. They based their concerns on information provided by the Ministry of Foreign Affairs and obtained by the Public Prosecutor's Office itself, which showed that the judiciary was not independent but it is under the political control of the Communist Party. They were concerned about the use of torture during criminal proceedings. The evidence submitted does not constitute a sufficiently comprehensive set of evidence according to them, for a guarantee that it will not be a contrived process. The complainants added further evidence to their concerns, namely a press release from the Office of the High Commissioner for Human Rights (OHCHR) of 18 May 2018, according to which UN (United Nations) experts criticized Spain's decision to extradite Taiwanese people to the PRC as follows: the penalty for crimes could lead to [the persons concerned] to severe sanctions in the extradition order, such as forced labor or even the death penalty. “They also substantiated the opinion of the Director of the Taipei Economic and Cultural Office on the issuance of the requests. He fears that the accused persons will not be brought to justice, they will be ill-treated and they may be tortured and sentenced to disproportionately high prison terms, and he has asked the office so that the suspected persons of serving a sentence were sent to Taiwan or serving it in the Czech Republic. The complainants also submitted a statement from Amnesty International on the human rights situation in China, stating: “The Chinese legal system generally uses overly vague terms that can be easily misused as needed. Accusations of separatism, subversive activity, threats to national security or national interests occur very often, in almost any crime. Weaknesses in the justice and criminal justice systems also allow torture and other ill-treatment and unfair trials.” Later, the complainants attached the opinion of the Czech Helsinki Committee.

B. Content of the contested decisions

18. By the contested resolutions, the Municipal Court gradually decided on the admissibility of extradition of all complainants to the PRC for an act listed in the appendix to the extradition request for an offense of fraud under Chinese criminal law, according to Section 95 para. 1 of the Act on International Judicial Cooperation and according to Art. 16 para. 1 of the United Nations (UN) Convention against Transnational Organized Crime (published under No. 75/2013 Collection of International Treaties). With regard to the grounds for non-extradition, the Municipal Court stated that undoubtedly in individual cases violations of national regulations and interstate conventions in criminal proceedings in the PRC occur, and probably to a greater extent than in the Czech Republic, also with regard to the completely different area, population and, in general, other living conditions and cultural customs. However, as shown by the assurances submitted by the PRC authorities, the authorities prevent similar situations from occurring and recurring, and the wider possibilities for scrutiny and complaints by various institutions, in this case our representative bodies, also contribute to this. The extradition was

conditioned by the Municipal court with diplomatic guarantees.

19. Following the applicants' complaints, the High Court annulled the individual orders of the Municipal Court in the statement of acceptance of the assurances and again ruled that the applicants' extradition was admissible while accepting the specified diplomatic guarantees.

20. Regarding the MFA's doubts whether China will fully comply with the diplomatic assurances given, according to the Supreme Court, "in recent years, no Czech citizen has been serving his sentence and the embassy has no direct reference to Chinese prisons, and there is no mention of that, in the past, that office, in monitoring compliance with the guarantees relating to the extradited person, would have had any information of its own or at least provided to it, all the more as to justify doubts as to compliance with such guarantees" (clause 18 of the resolution). The High Court also considered whether the assurance was provided by an entity other than the one authorized to do so. According to The High Court, it is not for the requested State to investigate whether the rules based on the political practice or the national rules of the requesting State have been complied with in the formulation of the individual documents in which the guarantees are enshrined. Art. 50 of the PRC Extradition Act, which regulates the competence of the General Prosecutor's Office and the Supreme Court in providing guarantees regarding the limits of criminal prosecution or imposition of punishment. There is no reason to doubt whether the requesting State has followed its laws in formulating the extradition request. It is up to the requesting state to assess whether it is up to the Chinese Supreme Court to provide a guarantee regarding the limitation of a possible sentence, which is to state that a certain type of sentence cannot be imposed because it is not permitted by law.

21. According to the High Court, the municipal court did not conceal that in the area of justice and prisons there are a number of problems with respecting the rights and freedoms of prosecuted persons, although it is possible to state efforts to gradually eliminate them and improve the overall situation. However, these negative findings would have to relate to "either a group of accused and convicted with which the requested person can be associated or it must be such a wide spread and obvious phenomenon in the requesting state that it is highly probable that they would also punish that person during the criminal proceedings or the execution of a sentence. In order to identify such a situation, there is no need to prove that the requested person will necessarily be punished by a breach of the right to a fair trial or a breach of the prohibition of torture, there is a reasonable likelihood that such a consequence will arise." (Paragraph 24 of the resolution). The High Court further stated that "the Municipal court (...) has provided evidence through a number of documents describing the situation, especially in the judiciary and prisons in the requesting state, and has not concluded that the alleged violations of the right to a fair trial before Chinese courts are so numerous and that they could generally be applied to the whole of the judiciary in the requesting State, or that there would be a risk of extradition of the requested person." (clause 25 of the resolution). In addition, the High Court referred to the case-law of other European Union countries in assessing extradition requests. If the conditions as regards respect for the rights of the accused to a fair trial and the prohibition of torture were so deterrent and unsustainable, those States would certainly not declare extradition admissible.

22. The High Court referred to the case-law which examines whether the requesting State is a party to international conventions aimed at the protection of human rights and fundamental freedoms and whether those conventions contain functional mechanisms for monitoring compliance with them. It is necessary to examine whether the reports on the observance of

human rights show substantial reasons to believe that the violation of the prohibition of torture in the given case is really threatened [it referred to the ruling in file no. I. ÚS 752/02 of 15.4.2003 (N 54/30 Collection of rulings and resolutions 65)], the Municipal Court took evidence by a number of documents describing the situation in prisons and the judiciary and did not find that violations of the right to a fair trial were so numerous and common that they could be generally applied to the whole judiciary or that there would be a real threat even if the complainants were extradited. It appears from the wording of the act that any criminal prosecution should not be of a political nature, as it is an act of a pecuniary nature. The human rights reports in China also confirm the efforts to punish people from Taiwan more severely. According to the High Court, worse living conditions in prisons alone cannot be considered to be an obstacle to extradition. Information on the extradition of Taiwanese citizens to China from the Ministry of Foreign Affairs was assessed by the High Court as "the PRC's efforts to extradite the requested persons, even if they are Taiwanese citizens, have clear and logical procedural reasons and cannot be confused with efforts to suppress this ethnic group" (clause 28 of resolutions).

23. Regarding the guarantee of a fair trial and compliance with the prohibition of torture and ill-treatment in criminal proceedings as well as in the possible execution of sentences and other issues, the High Court itself turned to the Chinese authorities through the embassy and added further assurances from the PRC. The High Court also asked for assurances that the requested persons would have a guarantee of communication with the representatives of the embassy of the Czech Republic both on the initiative of the embassy and upon request of the persons subject to extradition. It received an addendum from them, named Rights of Suspects for Criminal Offenses under the Law after their extradition to the PRC. The Chinese authorities point out that the PRC has acceded to more than 20 international human rights conventions, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. They also contain provisions of Chinese criminal law, including the prohibition of using torture to confess the guilt and rights of suspects during criminal proceedings, as well as the rights of prisoners. Regarding the visit of consular staff, the Chinese embassy confirmed that consular staff of the Czech Republic will be able to visit prisoners in accordance with Chinese law. The High Court therefore added a list of those assurances to the operative part in the part relating to those guarantees. According to The High Court, these assurances correspond to the requirements of the case-law of the Supreme Court (file no. 11 Tcu 43/2009) and the Constitutional Court [ruling file no. I. ÚS 2462/10 of 10.11.2010 (N 221/59 Collection of rulings and resolutions 195)].

24. Regarding the objection that the crime was committed partly on the territory of the Czech Republic, the High Court stated that no criminal prosecution is currently being conducted against these persons in the Czech Republic. None of the complainants is a citizen of the Czech Republic, they came to its territory only for the purpose of carrying out the activity which they were detained for, and also all persons who suffered from their activity, identified so far, are citizens of the PRC. Ensuring the presence of all the above-mentioned persons during criminal proceedings and communication with them in the course of its process is undoubtedly much easier in the requesting state than in the Czech Republic, as well as finding and deciding on the proceeds of crime. There are also other circumstances that preceded the act itself, and their focus is outside the territory of the Czech Republic - from identifying the victims to deciding who commits the act and travels to the Czech Republic for that purpose. If the criminal prosecution ended in the imposition of a custodial sentence, its execution would also be more acceptable to convicts in an environment in which they can communicate. According to the

High Court, the conditions are thus met for the criminal prosecution to be conducted not in the Czech Republic, but in the requesting state.

25. Following court decisions on the admissibility of the applicants extradition, the Ministry of Interior granted them subsidiary protection on 10 July 2019 for a period of 12 months.

26. In addition, in the summer of 2019, the Minister of Justice turned to the Supreme Court with doubts about the correctness of the decision and with a proposal to review the decisions of both courts. The Supreme Court declined this proposal. The court decisions were duly substantiated according to it, even if the complainants were extradited after the expiration of subsidiary protection, this is in accordance with the law and the international obligations of the Czech Republic. The decision of the Supreme Court was not contested by the current constitutional complaint.

II. Argumentation of the parties

27. According to the complainants, there is a reasonable concern that, if extradited, criminal proceedings in the PRC would not comply with the principles set out in Art. 3 and 6 of the Convention, or a custodial sentence imposed or envisaged in the PRC would not be carried out in accordance with the requirements of art. 3 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. According to the complainants, there was a real risk of violation of their fundamental human rights and freedoms if they were prosecuted in the PRC. They consider that if the general courts, despite the reports referred to by them or established in the file, allowed the applicants to be extradited to the PRC, this would violate the applicants' fundamental right to a fair trial under art. 36 para. 1 of the Charter.

28. They claim that, as Taiwanese, they face the likelihood of worse treatment, that their cases will not be decided by independent courts, and that there will be no fair trial and, if necessary, they will get disproportionate punishment. In addition, according to the complainants, the conclusion of the general courts that other states of the European Union extradite Taiwanese citizens to the PRC for criminal prosecution is not supported by the file. The only State whose courts have ruled on the admissibility of the extradition of Taiwanese citizens to the PRC is Spain, and even in this case this decision is considered as excess by OHCHR.

29. The complainants also point to the state of prisons and the risk of ill-treatment in prisons. In addition to very poor living conditions and insufficient health care, monitoring of inhuman conditions in prisons is not working well. Prisoners are not allowed to be visited by their family members.

30. Furthermore, the complainants consider that the assurances given by the PRC are not sufficient, as they are in breach of art. 3 of the Convention and do not protect against the risk of ill-treatment. Nor can it be inferred from them that there will be no reclassification into another crime of the same kind for which the death penalty can already be imposed. It is not assured that the complainants will be guaranteed the right to a fair trial, that they will not be subjected to torture or other ill-treatment, that their rights will be respected in custody or in prison. In the event that the criminal proceedings end with the imposition of Rest by imprisonment, the communication of the complainants with the representatives of the embassy of the Czech Republic will not be allowed. The complainants further argue that the assurances had not been issued by the competent state authorities. The complainants fear the imposition

of a disproportionate (exceptional life sentence).

31. According to the complainants, there is also a risk of a breach of the principle of specialty, as the Chinese authorities' statement indicates that the prosecution is likely to be performed for a number of frauds and not just the three acts mentioned in the extradition request.

32. The complainants also argue that the evidence submitted did not meet the normal requirements, as it did not bear a legalization clause or anything else from which its authenticity and accuracy could be inferred. Some evidence has not been translated into Czech. Even the request for extradition and the arrest warrant was not properly officially translated into the Czech language (or superlegalized), and there is no guarantee of their accuracy. The courts should therefore not consider a request for extradition in this form at all. The complainants further argue that they had not been translated by the Public Prosecutor's Office's proposal to declare the extradition admissible into a Chinese language that they would understand. A simple oral translation of the Public Prosecutor's Office's proposal by an interpreter is not sufficient, given the scope and complexity of the document.

33. According to the complainants, the general courts did not receive any of the evidence (for example, interceptions of telephone calls intercepted by the Czech Police), and it is not possible to find out on a basis of what they came to the suspicion that the three acts according to the extradition request were committed by the complainants, or that the three acts had taken place at all. Thus, the courts did not explain their reasoning as to the evidence which, in their view, testifies to the justification of the applicants' suspected criminal activity. Although the courts state that the extradition materials substantiate the applicants' suspected criminal activity to a large extent, they do not provide any specific evidence (which is to be included in the extradition materials) on which base they can come to such a conclusion.

34. According to the complainants, there is no reason for the prosecution to be preferred in the PRC rather than in the Czech Republic, as the only evidence source available is the Czech police and the victims that live in Australia, not in China. Thus, there is no legal reason to preference to prosecute in the PRC, nor there will be a proper determination of facts.

35. The Constitutional Court invited the parties to the proceedings to comment on the constitutional complaint. In its observations, the High Court referred to the contested orders. It stated that the courts assumed that the requested persons had not been publicly involved in the past and should therefore not face politically motivated sanctions in this respect. Given that this is a pecuniary crime, their nationality should not play a role, the PRC would seek to extradite them in the case of any other nationality. The courts did not overlook the shortcomings in the judiciary and prisons, but examined whether these shortcomings posed such a serious threat that they could lead to a violation of fundamental rights and freedoms, and also considered safeguards that could reduce the potential danger. They considered the assurances provided to be reliable and sufficient, while accepting explanations of the assurances which precluded the imposition of the death penalty even in the event of a change in the qualification of the offense. The High Court considered that the applicants had been given adequate assistance not to suffer damage to their rights as a result of their lack of knowledge of the language of the case. The court stated in the reasoning of the decision why the request for a translation of the public prosecutor's proposal was not accepted. In particular, it stated that the complainants had the opportunity to acquaint themselves with the extradition

request already during the interrogation in the preliminary investigation, in the pre-trial detention decision and the evidence of these documents in translation, which they could re-acquaint under the right of access and, they also had to acquaint in a public hearing held before the Municipal court. This took place at all times with the participation of an interpreter, and the complainants stated that they had been acquainted with the content of the Public Prosecutor's Office's proposal. The condition under which according to section 28 para. 4 of the Criminal Procedure Code, the written translation can be replaced by translation of the content of the document, if it was also prepared.

36. In its observations, the Municipal Court merely referred to the contested resolutions.

37. The Municipal Public Prosecutor's Office in Prague stated in its statement that the courts obtained a number of information from various entities and responded to the findings of human rights in the PRC. Both the Public Prosecutor's Office and the courts have made every effort to provide assurances that would guarantee the most adequate response to the shortcomings that were identified. Regarding the reality of their compliance, there is no past negative experience of non-compliance by the PRC authorities, as there is no relevant experience when extradited to the PRC. On the issue of the threat of disproportionate punishment, the Public Prosecutor's Office stated that "the imposition of punishment or determining a penalty for a specific crime is a matter of the criminal policy of a particular state, which includes such efforts as the use of a means of criminal repression to reduce a certain type of crime. Given the differences in criminal policy, legal culture and legal development between states, there is sufficient reason to conclude that there is a risk of a cruel, inhuman or degrading punishment that would be an obstacle to the extradition of a person." According to the Public Prosecutor's Office, whether or not other states, including EU Member States, extradited persons to the PRC to prosecute is of limited relevance to the Czech courts, and both courts have taken note of this situation as information that cannot be based on or which cannot justify a decision on the request for extradition.

38. The High Public Prosecutor's Office in Prague stated in relation to the complainant c) that according to art. 16 para. 1 of the UN Convention against Transnational Organized Crime, promulgated under no. 75/2013 Collection of International Treaties, the state has a general obligation to extradite a person who was supposed to have committed a criminal activity and resides in the territory of the Czech Republic to the authorities of a foreign state. As the High Court extended and clarified the assurances contained in the operative part of its decision, which made the admissibility of the applicants' extradition conditional, it acted in accordance with the case-law in relation to the right to a fair trial and the prohibition of torture, inhuman or degrading treatment. In relation to complainant e) the High Public Prosecutor's Office did not comment and in relation to other complainants it waived the position of intervener.

III. Procedural preconditions for proceedings before the Constitutional Court

39. The Constitutional Court first addressed the issue of the admissibility of a constitutional complaint, also taking into account the fact that the applicants challenged the decisions of the courts, although their actual issuance is still conditioned by the decision of the Minister of Justice.

40. Although the Minister of Justice has not yet authorized extradition to a foreign state pursuant to Section 97 (1) of the Act on International Judicial Cooperation, the municipal and

high courts have already stated that extradition is admissible. According to the constant case-law of the Constitutional Court, the final decisions against which a constitutional complaint can be filed are both the decisions of the courts on the admissibility of extradition and the decision of the Minister of Justice on the permission of extradition. Both of these decisions differ from each other in their purpose and subject of assessment, and both have the nature of a decision on the last procedural environment which the law provides to the extradited person for the protection of his rights. The deadline for filing a constitutional complaint is assessed separately for each of these decisions. In the case that the complainants considered that the decisions of the courts were already interfering with their fundamental rights, they could not wait for the decision of the Minister of Justice to allow extradition - see for more details the opinion of the Plenum in file no. Pl. ÚS-st. 37/13 of 13.8.2013 (ST 37/70 Collection of rulings and resolutions 619; 262/2013 Collection), Especially paragraphs 8-14. Although this opinion was issued before the Act on International Judicial Cooperation came into force, it therefore concerned the regulation of the extradition procedure pursuant to Section 390 and the following of the Criminal Procedure Code, the Act on International Judicial Cooperation did not change the procedure for extradition to a foreign state. Even the now effective legal regulation of extradition proceedings in Act on International Judicial Cooperation is therefore subject to the conclusions of the cited opinion, as the Constitutional Court has already concluded in its case-law (see Judgment no. II. ÚS 3219/19 of 26.11.2019, paragraph 27; ruling file no. II. ÚS 3505/18 of 3. 6. 2019, paragraphs 37-39).

41. The Minister of Justice used the opportunity to apply to the Supreme Court with a proposal to review the decisions of general courts pursuant to section 95 para. 5 Act on International Judicial Cooperation, as it itself had doubts about the admissibility of the extradition. However, as stated by the Constitutional Court in the already cited opinion of the Plenum, file no. Pl. ÚS-st. 37/13, para. 13, in this case it is not a remedy that would be available to an individual and which would be obliged to exhaust before filing a constitutional complaint according to section 75 para. 1 of the Act on the Constitutional Court. Thus, in the context of a court decision on the admissibility of extradition, the decision on the last procedural environment provided by the Act on the Protection of Rights should "always be considered a resolution of the High Court ruling on a complaint against a regional court decision on the admissibility of extradition" (ibid.). With regard to the cited conclusion, the opinion expressed in *obiter dicta* of judgment file no. IV. ÚS 353/12 of 10.10.2012 (N 171/67 Collection of rulings and resolutions 97), para. 18, according to which it is necessary in the case of an initiative of the Minister of Justice to initiate review proceedings before the Supreme Court pursuant to section 397 para. 3 of the Criminal Procedure Code (now section 95 para. 5 Act on International Judicial Cooperation), wait with the filing of a constitutional complaint for the decision of the Supreme Court. The Constitutional Court further states that it is not necessary to challenge the decision of the Supreme Court on the proposal of the Minister of Justice to review the decision by a constitutional complaint.

42. A constitutional complaint against the contested resolutions of the High Court and the Municipal Court on the admissibility of extradition is therefore admissible; decisions of the Supreme Court issued in proceedings on a proposal of the Minister of Justice pursuant to section 95 para. 5 Act on International Judicial Cooperation has not been attacked and are therefore not the subject of these proceedings. As the Supreme Court rejected the proposal of the Minister of Justice, in the event of the expiry of the period for which the applicants were granted subsidiary protection (if not extended), the applicants could be allowed to be extradited and subsequently extradited.

IV. Assessment of the justification of constitutional complaints

43. In proceedings on constitutional complaints, the Constitutional Court, as a judicial body for the protection of constitutionality, confines itself to assessing whether constitutionally guaranteed fundamental rights and freedoms have been violated by decisions of public authorities or the procedure preceding their issuance.

44. The purpose of extraditing persons to prosecute or serving a sentence in a foreign state is to ensure that a person suspected of having committed a criminal offense or convicted of a criminal offense does not avoid criminal proceedings or the execution of a sentence by residing in another state. By extraditing a person, the issuing State allows him or her to be prosecuted in the State which is competent to do so, without prosecuting himself or herself. Through this procedure, it primarily fulfills its international legal obligations [see the judgment in file no. I. ÚS 1015/14 of 23. 8. 2016 (N 155/82 Collection of rulings and resolutions 451, paragraph 31].

45. One of the important international obligations, the purpose of which is to ensure that the crime does not go unpunished, is the obligation *of aut dedere aut judicare* (either extradite or prosecute). It is a commitment of states to cooperate with each other so that there is no state of impunity [INTERNATIONAL LAW COMMISSION. The obligation to extradite or prosecute (aut dedere aut judicare). Final Report of the International Law Commission. United Nations 2014, available at: https: //legal.un.org/ilc/texts/instruments/english/reports/7 6 2014.pdf, p. 2]. According to the International Law Commission, the general test used in the various conventions aimed at prosecuting serious crimes is that "the State of deprivation of liberty will refer the case of the alleged offender to the competent authorities if he does not extradite the suspect." This obligation is supplemented by various provisions requiring States to: (a) criminalize such offenses; (b) establish the power to prosecute the offense where there is a link between the offense and the alleged offender is present in the territory and is not extradited; (c) enact legislation to ensure that the alleged offender is apprehended for the duration of the preliminary investigation; and (d) consider the offenses to be subject to extradition" (ibid., p. 6.) Although the Convention against Transnational Organized Crime contains the principle of *aut dedere aut judicare* in Art. 16 para. 10 only to a limited extent, if it is a question of stopping the extradition process due to the fact that they are own citizens of the issuing state, ie in cases irrelevant to the present case, the Criminal Code nevertheless enshrined this principle in general in section 8 para. 1, Therefore, the Constitutional Court emphasizes the need not to leave the committed crimes unpunished, either by extraditing the suspects or prosecuting them in the Czech Republic.

46. In the present case, the Constitutional Court will consider whether the courts violated the prohibition of torture and cruel, inhuman and degrading treatment or punishment (principle of non-refoulement) by deciding on the admissibility of extradition to the PRC (Part A) and whether these concerns are remedied by diplomatic assurances (Part B).

A. Prohibition of torture and cruel, inhuman or degrading treatment or punishment

a) Legal basis

47. The complainants' objections mainly concern the imminent breach of non-refoulement obligation, or the principle of non-refoulement. The essence of the principle of non-refoulement is the prohibition of a state to return an alien in any way to another state in which his life or personal liberty would be endangered on the basis of his race, religion, nationality,

social class or political conviction (Art. 33 para. 1 of the Convention relating to the Status of Refugees), or in which he would be in danger of violating his right to life (Art. 2 of the Convention) or that he will be subjected to torture or to inhuman or degrading treatment or punishment (Art. 3 of the Convention, Art. 7 para. 2 of the Charter) or, exceptionally, even in cases where a foreigner would be threatened with a glaring denial of the rights to personal liberty (Art. 5 of the Convention) or to a fair trial (Art. 6 of the Convention), as follows, for example, from the judgment of the European Court of Human Rights (ECHR) in Othman (Abu Qatada) v. The United Kingdom of 17 January 2012 No. 8139/09. The following rules for assessing violations of Art. 3 of the Convention is fully applicable in assessing any return of an alien, if there is a risk of violation of the principle of non-return, the same procedure applies to deportation and extradition (newly e.g., ECHR ruling in Trabelsi v. Belgium of 4 September 2014 no. 140/10, section 116). They are also applicable when assessing the prohibition of torture or cruel, inhuman or degrading treatment or punishment under Art. 7 para. 2 of the Charter.

48. Wrong treatment within the meaning of Art. 3 of the Convention must reach a certain minimum level of seriousness, depending on the circumstances of the case, the length of the treatment examined, the effects on physical and mental health and, in some cases, the sex, age or state of health of the victim concerned. In order for treatment to be considered inhuman or degrading, the suffering or humiliation must go beyond the necessary suffering or humiliation associated with a particular form of legitimate punishment or treatment (judgment of the Grand Chamber of the ECHR in Saadi v. Italy, cited above, sections 134-135),

49. Wrong treatment in the context of return to the country of origin can occur, for example, due to poor prison conditions [find file no. I. ÚS 752/02 of 15. 4. 2003 (N 54/30 Collection of rulings and resolutions 65)], or imprisonment for life without excluding the hope of parole [Iorgov v. Bulgaria (No 2) of 2.9.2010 no. 36295/02]. Conditions in facilities depriving freedom of movement may achieve inhuman or degrading treatment under Art. 3 of the Convention, for example in the case of overcrowded facilities and insufficient provision of heating, hygiene, sleeping conditions, food, leisure activities or contact with the outside world. In assessing the conditions in which a person is deprived of his or her liberty, account must be taken of the cumulative impact of those conditions, including the specific circumstances of the applicant (ECHR ruling in Dougoz v. Greece, no. 40907/98, section 46). Even the overcrowding of places of detention may in itself be sufficient to violate Art. 3 of the Convention, with the ECHR generally requiring a personal space of at least 3 m^2 for each person deprived of his or her liberty. In cases where the lack of space is not so serious, the assessment of conditions is approached by other living conditions, such as access to toilets in dignified conditions, ventilation, ensuring access to daylight, adequate heating and compliance with hygiene conditions. Thus, for example, if a space between 3 and 4 m^2 was available to everyone, and at the same time this space was not sufficiently ventilated and illuminated, even in these cases in the past the ECHR found a violation of Art. 3 of the Convention (see ECHR ruling in Florea v. Romania of 14 September 2010 No. 37186/03, section 51 and the case-law cited therein). At the same time, when assessing the violation of Art. 3 of the Convention in the context of forced return to the country of origin, given the prospective nature of this assessment, the circumstances of ill-treatment of prisoners cannot usually be determined as precisely as when assessing the treatment of prisoners in a domestic context; e.g. the thoughtfulness of such treatment, whether it is aimed at breaking the applicant's will, intending to humiliate him, etc. (for more details see ECHR ruling of 10 April 2012 in Babar Ahmad and Others v. the United Kingdom no. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09,

section 178-179).

50. The extent of the requirement to prove the grounds for non-return of a person to be forced return depends on the specific facts of the case, the assertion of what is potentially threatened and also the right guaranteed by the Convention.

51. According to the settled case-law of the ECHR on Art. 3 of the Convention, the phenomenon of proceedings before the ECHR is, in principle, for the applicant to provide evidence capable *of proving that there are substantial grounds for believing that* he would be exposed to a real risk of treatment contrary to Art. 3 of the Convention. If the complainant submits such evidence, it is the task of the State to dispel doubts about this danger [cf. Judgment of the Grand Chamber of the ECHR in the case of Saadi v. Italy of 28 February 2008 No. 37201/06, section 129, most recently e.g., the judgment in the case of R.K. v. France of 9 July 2015 No. 61264/11, section 59, in case-law of the Constitutional Court, this principle is also referred to as the *"substantial-grounds test",* cf. file no. I. ÚS 2462/10 of 10, 11. 11. 2010 (N 221/59 Collection of rulings and resolutions 195) and file no. II. ÚS 670/12 of 5. 9. 2012 (N 150/66 Collection of rulings and resolutions 269), paragraphs 28-29].

52. Although it is up to the complainants, who claim that their forced return to their homeland will violate art. 3 of the Convention to submit as many documents and information as possible to the degree of risk assessment, the ECHR acknowledges that, for example, it may be very difficult, if not impossible, for asylum seekers to obtain such evidence in similar cases (ECHR ruling in Bahaddar v. Netherlands, cited above, of 19 February 1998, No 25894/94, section 45 and in Mawajedi Shikpohkt v. Netherlands of 27 January 2005, No 39349/03). In assessing the plausibility of allegations for which no direct evidence has been substantiated, it is therefore necessary, given the specific situation of these persons, to make a fundamental decision in favor of the complainants (*"benefit of the doubt"),* if these allegations can be considered plausible in light of information on the country of origin concerned (see, for example, the judgment of the ECHR in Case R. C. v. Sweden, 9 March 2010, No. 41827/07, section 50).

53. The complainants' allegations should reach a similar level of credibility as the "defensibility" applied under Art. 13 of the Convention (cf. ECHR Research and Library Division, Directorate of the Jurisconsult, *Article 3: The Court's approach to burden of proof in asylum cases,* Council of Europe / European Court of Human Rights, 2016, available at: https: //www.eclu '. coe.int/Documents/Research_report__Art3_burden_proof_asylum_cases_ENG.PDF, paragraphs 1-5). Established case-law of the Constitutional Court no. 7 para. 2 of the Charter considers as defensible such a statement, which is not completely untrustworthy and unlikely, it is possible spatially and temporally, it is sufficiently specific and unchangeable in time (cf. the file no. II. ÚS 1376/18 of 10. 12. 2019, paragraph 33). In contrast to situations where the allegation of a violation of Art. 7 para. 2 of the Charter in the context of the right to an effective investigation, in relation to the defensibility of the allegation that forced return threatens to violate Art. 7 para. 2 of the Charter, it is necessary to rely on reports on countries of origin, taking into account the above-mentioned specifics of cases of forced returning aliens. Thus, complainants can base their concerns mainly on the reports of country of origin if they do not have direct evidence of past persecution or harm they have experienced in their country of origin, provided that their allegations are credible.

54. If the person concerned submits a defensible claim that he is in danger of harm

incompatible with Art. 3 of the Convention, it is up to the state authorities to dispel doubts that there is a real risk of such harm. There will be no real risk of such harm when there is a "mere possibility" of ill-treatment (ECHR ruling in Vilvarajah and Others v. The United Kingdom, cited above) of 30.10.1990 Nos 13163/87, 13164/87, 13165/87, 13147/87 and 13148/87, section 111), but at the same time there is no need to exceed the standard 'more likely than not' (cf. the judgment of the ECHR in Saadi v. Italy, cited above, section 140, see also EUROPEAN ASYLUM SUPPORT OFFICE. Qualification for International Protection. Directive 2011/95/EU, Judicial Analysis. IARLJ/EASO. 2016, available at: https://www.easo.europa.eu/sites/default/fiIes/QIP%20-%20JA.pdf, part 2.80.1).

55. With regard to the fact that Art. 3 of the Convention contains an absolute prohibition on torture, inhuman or degrading treatment or punishment, a thorough examination is needed as to whether, after forced return, an individual is not at risk of being subjected to the ill-treatment prohibited by this provision (ECHR ruling of 11 July 2000 in Jabari v. Turkey No. 40035/98, section 39). The State is obliged to take into account not only the evidence submitted by the alien concerned, but also other facts which are relevant for the assessment of the case. The existence of a real danger must be assessed in the light of the facts which were or should have been known to the State at the time of the expulsion (or *ex mine;* cf. the ruling of the Grand Chamber of the ECHR of 23.8.2016, JK and others v. Sweden No. 59166/12, section 87).

56. Assessment of the real risk of injury according to Art. 3 Conventions must be proportionate and sufficiently substantiated by national documents as well as documents from other reliable and objective sources. Due to the absolute nature of the protection under Art. 3 of the Convention, the assessment needs to be "adequate and sufficiently substantiated by local materials as well as materials from other reliable and objective sources, such as other Contracting and non-Contracting States, UN bodies and reputable NGOs" (cf. ECHR ruling in Salah Sheekh v. Netherlands of 11 January 2007, No. 1946/04, section 136). Account must be taken of "the authority and reputation of the authors of the report, the seriousness of the inquiries carried out, the continuity and context of the conclusions and whether those allegations are confirmed by other sources" (Saadi v. Italy, cited above, section 143). In assessing the independence, reliability and objectivity of the author of a report, it is "important ... also to take into account the extent to which the author of the report is represented in the country of origin and his ability to obtain information on the spot" (ECHR ruling in NA. v. United Kingdom of Great Britain and Northern Ireland of 17.7.2008 No. 25904/07, sections 120-122), In other words, the information must be current, relevant, sufficiently verified from various objective sources, from reliable authors.

57. It follows from the above that the absolute prohibition of torture or cruel, inhuman or degrading treatment or punishment (ill-treatment) guaranteed in Art. 3 of the Convention, Art. 7 para. 2 of the Charter calls for a thorough review of whether, following a forced return (extradition or expulsion), there is no real danger that an individual will be exposed to ill-treatment. A thorough review means that the assessment of the real risk of injury must be adequate, up-to-date and sufficiently verified from objective sources from more reliable authorities.

b) Application of the above principles

58. The complainants had already argued against the Prosecutor's Office's proposal that there

was no independent judiciary in the PRC, that Chinese authorities could use torture to coerce the complainant to plead guilty during the prosecution, and that conditions in Chinese prisons were poor. In addition, according to them, it can be questioned whether the PRC will comply with the assurances provided.

59. The Public Prosecutor's Office procured, and the general courts subsequently used the relevant reports from the Ministry of Foreign Affairs. The MFA report was prepared in cooperation with the Czech Embassy in China and using other sources: final recommendations of UN Committee against Torture for the year 2015, the report of US Ministry of Foreign Affairs on Human Rights for 2016, and the report of Human Rights Watch for 2017. Another report from the Ministry of Foreign Affairs, also prepared by the Department of Human Rights, was received by the Public Prosecutor's Office from the extranet in June 2018. The authors of these reports have a sufficient reputation, and some even operate directly in the country to which the information relates, and the reports would thus meet the requirements for reliability and objectivity of information sources stemming from the case-law of the ECHR. However, it would be more appropriate for the courts and the Public Prosecutor's Office to rely on the full text of these reports, and not only on their contents documented by the Ministry of Foreign Affairs. These contents dealt in part with what threatened human rights activists, and it was sometimes difficult to ascertain what of the information provided to ordinary criminals.

60. For the purposes of risk assessment according to Art. 3 of the Convention, the contents of these reports lacked details containing the original wording of the reports and information relating to cases similar to the complainants' case, ie whether ill-treatment also threatens suspects in telecommunications fraud in certain circumstances. Such reports exist, given the number of people China has already prosecuted in this regard in the past. For example, according to the publicly available China Daily article: *Telecom fraud* to intensify on 7. 11. 2018, available at: https://www.chinadaily.com.en/a/201807/ll/WS5b454e7fa3103349141e2019.html, Chinese police detained 2,700 suspects and uncovered 8,000 cases in which the suspects pretended to be either customer personnel lines of telecommunications companies, or for law enforcement officers (as in the case of the complainants) in order to lure money from victims who were mostly on the Chinese mainland. The main accused came from Taiwan and often settled abroad for committing the crime.

61. The complainants themselves stated and justified their fears of return. In order to fulfill the requirement to make defensible allegations that there are serious grounds for believing that they could be in real danger of ill-treatment, they have substantiated them not only with reports from the Public Prosecutor's Office but also with Amnesty International, the Office of the United Nations High Commissioner for Human Rights. (OHCHR) on similar cases of extradition from Spain and a statement by the director of the Taipei Economic and Cultural Office pointing out fears of torture and non-compliance with the principles of fair process.

62. Amnesty International's August 2018 report states not only to activists: “The Chinese legal system generally uses overly vague terms that can be easily misused as needed. Accusations of separatism, subversive activity, threats to national security or national interests occur very often, in almost any crime. Weaknesses in the judiciary and criminal justice system further allow for torture and other ill-treatment and unfair trials. 'In the section on activists, there is a detention report that applies to any detainees: “However, conditions in Chinese detention facilities are relatively hard and are often in conflict with international standards,

especially the UN Standard Rules on the Treatment of Prisoners. Suspected individuals are arbitrarily detained, then in custody, they are exposed to ill-treatment, torture, or they are denied the necessary medical care, contact with family or their own lawyer. Unfair trials and high tremors are no exception, and according to statistics, virtually every accused is subsequently found guilty." As part of the general assessment of the situation, Amnesty International states that "last but not least, China often broadcasts pre-arranged confessions on state television, which include interviews with detainees."

63. The OHCHR's May 2018 press release from the complainants, which commented on a similar Spanish case, stated that UN representatives were concerned that persons of Taiwanese origin suspected of committing telecommunications fraud could be subjected to torture after their extradition to China, or punished by forced labor or even the death penalty. Although it is only a press release, it indicates that the OHCHR also challenges the Spanish decision, on which the Public Prosecutor's Office and the courts relied as an example of other European Union countries acceding to the admissibility of extradition to China. In addition, the Ministry of Justice later requested more details on the case, received a copy of one of the Spanish decisions, and found in it that the Spanish court had accepted the admissibility of extradition under Art. 3 of the Convention did not deal in detail (see the proposal of the Ministry of Justice sent to the Supreme Court). This press release indicated the need to find out more about Spanish decisions, given that the Public Prosecutor's Office and the ordinary courts referred to the practice of other European courts.

64. The above country of origin reports, in conjunction with reports provided by the Public Prosecutor's Office, which did not differ in the description *of ill-treatment problems in the PRC*, provided strong grounds for believing that the complainants would be exposed to treatment that is in contrary to Article 3 of the Convention. In view of the content of the reports, the complainants' allegations can be considered defensible as they were not entirely unreliable and unlikely and were sufficiently specific and unchangeable. In these circumstances, the courts should have rebutted the doubts that there was a real risk of such treatment, by carefully examining whether the applicants were at risk of ill-treatment using credible and reliable reports or sufficient assurances (see section B below on diplomatic assurances offered by Chinese authorities).

65. With regard to the obligation of any state body dealing with the return of a foreigner to the country of origin to find out as up-to-date whether there is no risk of ill-treatment in the country of origin, not only from sources submitted by the complainant (see paragraph 55), the Constitutional Court most of which were already covered by a summary of the Ministry of Foreign Affairs, only they were not in the file in full text. From these reports, it appears that there is a higher probability than just the "mere possibility" that suspects will be subjected to ill-treatment either by public authorities during criminal proceedings or as a result of poor prison conditions.

66. The High Court did not see the worse living conditions for the operation of prisons described in the file reports as an obstacle to extradition, but its conclusion can hardly be upheld in the light of information describing more fundamental difficulties than just "worse living conditions". According to a MFA report, Chinese prisons are overcrowded and have poor hygiene conditions. There are known cases where EU citizens were held in a $25m^2$ cell with 22 other prisoners, they were only allowed to leave the cell twice a week without access to daylight. In the winter months, prisons are insufficiently heated. Prisoners are then sick very

often. The information already indicated the real risk of ill-treatment to which the complainants might be exposed due to poor prison conditions (see paragraph 49 above).

67. The issue of the threat of ill-treatment during imprisonment was dealt with superficially by the municipal court, the High Court elaborated the justification for this threat. However, it set a high standard of proof which did not meet the requirements of the case-law of the ECHR by stating that negative findings would have to relate to "either a group of accused and convicted with which the requested person can be associated or it must be such a wide spread and obvious phenomenon in the requesting state that it is highly probable that they would also punish that person during the criminal proceedings or the execution of a sentence. In order to identify such a situation, there is no need to prove that the requested person will necessarily be punished by a breach of the right to a fair trial or a breach of the prohibition of torture, there is a reasonable likelihood that such a consequence will arise." According to the High Court, the alleged violations of the right to a fair trial before the Chinese courts were not so numerous and widespread that they could be generally extended to the entire judiciary in the requesting state, or that there would be a risk of extradition of the requested person. If the conditions for respecting the rights of the accused to a fair trial and the prohibition of torture were so frightening and unsustainable, the Supreme Court would certainly not declare extradition admissible, according to the High Court.

68. The MFA report, prepared regarding the PRC, in general, lists the methods used to torture prisoners in order to obtain confessions: "sleep deprivation, physical violence, painful ways of sitting or standing during interrogations, which in extreme cases take place without breaks for several days, etc." According to the Ministry of Foreign Affairs, inhuman treatment, degrading treatment or torture is used during court proceedings to enforce confessions. Cases of torture for the purpose of confession are also mentioned in the final recommendations of UN Committee against Torture for 2015. The MFA report states that these cases "are most often related to the interrogation of human rights activists as well as those suspected of corruption or other undesirable behavior that damages the image of the [Chinese Communist Party]." Human Rights Watch has reviewed 158,000 criminal convictions published on the Supreme Court's [PRC] website, of which 432 convictions alleged torture. Only less than six percent of the judges disregarded the confessions. Those detained claimed to have been physically and mentally tortured during police interrogations, such as hanging by their wrists, beating with batons and other objects, and prolonged sleep deprivation. All suspects in these 432 cases were convicted, even in cases where their confession was ruled out on suspicion of torture. Lawyers also said investigators resorted to methods of torture that are much more difficult to detect. Interrogations recorded on video were often manipulated and pleaded guilty was recorded after the suspects were tortured in order to weaken the credibility of their allegations of torture. Lawyers who tried to point out the problem of torture in the criminal system themselves became the target of intimidation and harassment. Source: Human Rights Watch. Tiger Chairs and Cell Bosses Police Torture of Criminal Suspects in China. 13.5 2015. Available at: https://www.hrw.org/report/2015/05/13/tiger-chairs-and~celLbosses/police-torture-criminaLsuspects-china). These conclusions are not limited to human rights activists or other particularly persecuted groups.

69. According to the UN Committee against Torture, there is still a "big gap between legislation and implementation" and "the Chinese side, ... has acknowledged the existence of torture." A report by the Ministry of Foreign Affairs in general to China states that the vast majority of cases of torture are documented during detention in "designated locations". The

report also concludes that "Inhuman treatment or torture continues to be used as a means of interrogation even after a public statement by the 2016 Minister of Public Security and the PRC Prosecutor General declaring these practices inadmissible for obtaining evidence." The MFA reports from the extranet add that "Some written laws are interpreted by courts and authorities as needed, not according to the principles of justice or impartial justice. All components of the system must actively contribute to building loyalty to the Party. (...) It cannot be said that the courts are impartial and respect the right to a fair trial. In the case of politically sensitive cases (both with foreigners and citizens of the PRC), the criminal proceedings from the beginning to the end are under the political control of the Communist Party, and the right to a fair trial is not respected."

70. The latest available conclusions of the 2016 UN Committee against Torture, again quoted in the MFA report, state in full: "Although many legal and regulatory provisions prohibit the use of torture, the Committee remains deeply concerned by reports that the practice of Torture and ill-treatment remains firmly rooted in the criminal justice system, which relies too much on a confession as a basis for conviction. It also expresses its concern at the information that most of the alleged torture and ill-treatment takes place during pre-prosecution and extrajudicial detention and that they come from public security officers who have excessive powers during criminal investigations without effective scrutiny from the prosecutor's office and the judiciary." (Concluding Observations of the UN Committee against Torture in the China Regular Report, CAT/C/CHN/CO/5, 3.2.2016, available at: https://www.ecoi.net/en/file/local/1202556/1930_1465463147_gl601744.pdf, paragraph 68).

71. In addition to the reports referred to by the Ministry of Foreign Affairs, the Constitutional Court found from publicly available sources that, according to reports, suspects from telecommunications fraud were probably treated in this way in the past. The *Human Rights Watch Dispatches article: Ending Extra-legal Deportations to China* of April 24, 2016 addressed 45 Taiwanese citizens extradited to China in April 2016 from Kenya due to a telecommunications fraud: "Shortly after the Kenyan courts accepted the extradition of suspects, the Taiwanese suspects (and possibly suspects from mainland China) boarded a plane and were sent to China. However, pictures of Taiwanese with handcuffs on niches and hoods on their heads and the subsequent public broadcasting of their "confession of guilt" hardly assure that they will enjoy anything that at least resembles a fair trial. (...) "(article available at: https://www.hrw.org/news/2016/04/24/dispatches-ending-extra-legaL deportations-china) In the article *Chinese police 'admits torture' of dead suspect* of 23 March 2017, Agence France-Presse: "Police in central China's Henan province issued a rare statement admitting that some police officers may have tortured a suspect who died during the arrest. (...) On March 12, 2017, a suspect died while our investigation department was dealing with a telecommunications fraud case. (...) The police, who dealt with the case, is suspected of using torture to force the suspect to confess guilt (...), adding that violating personnel will be 'severely punished'. "(Article available at: https://wap.business~standard.com/article-amp/pti-stories/chinese "police-admit-torture-of-dead-suspect-1 170321 008561 .html)

72. While the last article would seem to at least make the Chinese authorities responsible for the use of torture and ill-treatment, other reports suggest that, in fact, allegations of torture have rarely been properly investigated: "Victims (tortures) face enormous obstacles when they demand that perpetrators of torture be held accountable. Prosecutors rarely investigate allegations of torture, although they sometimes force them to hold public opinion. "According to the article, in cases that are subject to media attention, the authorities conduct superficial

investigations, but do not find anyone responsible for the mistreatment. In cases not under the supervision of the press, the level of liability is even lower. [Network of Chinese Human Rights Defenders*: CHRD Demands Accountability & Justice for Victims of Torture* (Chinese human rights defenders demand accountability and justice for victims of torture), dated 22.06.2017, available at: https://www.nchrd.org/2017/06/chrd-demands-accountability-justice-for-victims-of- torture /].

73. Given that the PRC generally does not allow for a monitoring of prison conditions, more detailed reports on the situation in prisons are very rare and can rather be obtained from foreign judgments called for by experts (e.g., the High Court of New Zealand in *Kyng Yup Kim v. the Minister of Justice in New Zealand,* CA562/2017 [2019] NZCA209, which annulled the extradition decision to China on 11 of June 2019). For this reason, the opinion of the embassy of the Czech Republic, which has an insight into the situation in the PRC, is also gaining in importance.

74. The conclusions of the reports contained in the court files are so serious that they cannot be dealt with by reference to the practice of another European Union country which has extradited Chinese citizens to their country of origin in a similar case (Spain, other cases from Bulgaria and France, without any information on whether these were similar cases) or by arguing that the high number of bilateral agreements concluded indicates a high level of confidence in European countries in relation to China. Referring to the practice of other Member States, the High Court also failed to add that there are also states which, on the other hand, have refused to declare extradition against China (e.g., Slovenia due to unsatisfactory prison conditions or Portugal with regard to failure to provide assurance that the death penalty was not imposed, see clause 15 above).

75. In relation to the Taiwanese origin complainants and its' impact on how the complainants would be treated, the High Court stated that the findings did not support "allegations of a stricter or unlawful punishment of members of other nations and nationalities in criminal proceedings". In this regard, the Ministry of Foreign Affairs stated that extraditing Taiwanese citizens to mainland China is a politically sensitive issue, as it can be used by the Chinese government as proof of sovereignty over the entire territory, including Taiwan. At the same time, the embassy had no information that the human rights of prisoners of Taiwanese origin were not respected precisely because of their origin. However, exemplary punishment of such persons with reference to the incompetence of the Taiwanese courts or the possibility that the political interest of the Chinese Communist Party ("Communist Party") will enter criminal proceedings cannot be ruled out. Other reports showed that the right to a fair trial was not respected in matters damaging the image of the PRC and the Communist Party. The director of the Taipei Economic and Cultural Office expressed similar concerns (however, the credibility of his statement may be affected by Taiwan's political interests, and therefore the weight of this statement is lower than that of the Ministry of Foreign Affairs). Unlike the High Court, according to which these findings do not confirm the attempt to punish persons of Taiwanese origin more severely, the Constitutional Court considers that the information provided suggests a possible political dimension to the treatment of complainants according to their origin. In addition, it would be appropriate to take into account the fact that part of the fraud for which the complainants are being extradited was that they pretended to be Chinese authorities, and thus the effort to protect the CCP's image may come into play. So far, this aspect remains only on a speculative level unsupported by the complainants' arguments, however, in the opinion of the Constitutional Court, it cannot be completely disregarded when

considering the risk of ill-treatment of complainants.

76. Thus, if extradited, the complainants would face a real risk of ill-treatment due to poor prison conditions and the treatment of suspects during criminal proceedings, as well as in prison, despite the fact that they are not human rights activists or other persons of particular attention. Chinese authorities. Although the risk assessment in the case of forced return is somewhat speculative (Saadi v. Italy, cited above, section 142) and it is not usually possible to determine precisely the circumstances of possible ill-treatment of prisoners, such as when considered in the domestic context, assessment of the country of origin reports. For a thorough assessment, it was necessary to obtain the full text of the reports referred to by the Ministry of Foreign Affairs, as they showed that the conclusions which the general courts applied only to human rights activists in fact concerned a wide range of prisoners. In addition to the above, the Constitutional Court notes that it is surprising that the Ministry of the Interior, Department of Asylum and Migration Policy provided only one report at the request of the Public Prosecutor's Office, although it is a state body with professional qualifications to seek *non-refoulement* risk assessment information.

77. The High Court's requirement to demonstrate a high probability that the complainants would also be affected by the ill-treatment is also incompatible with the requirements of the ECHR case-law on Art. 3 of the Convention. According to the ECHR, the standard "more likely yes then no" does not need to be exceeded.

78. In summary, if the court does not provide sufficient evidence to assess what is threatening the extradited alien in the country of origin in the light of the circumstances of his case (here the treatment of ordinary prisoners) and requires the court to rule on the wrongful return. Treatment was such a self-evident phenomenon that it would be highly probable that it would affect the returned individual, or that it would be a widespread and numerous practice, it does not meet the standards of protection against ill-treatment resulting from Art. 3 of the Convention, Art. 7 para. 2 Charter.

B. Diplomatic guarantees offered by the Chinese authorities

a) Legal basis

79. Even in the event of a threat of violation of the prohibition of ill-treatment in relation to persons to be extradited, the reality of the risk of torture, inhuman or degrading treatment or punishment may be reduced by the so-called diplomatic guarantees of the requesting state. However, even in such a case, the criteria set out in the case-law of the ECHR must be met.

80. Diplomatic locks are arrangements between two States by which the receiving State provides a guarantee (obligation) to the receiving State that the person to whom the guarantee relates will be treated in accordance with the conditions set out in this arrangement, or in accordance with obligations under international law [United Nations High Commissioner for Refugees (UNHCR). UNHCR Notes on Diplomatic Assurances and International Refugee Protection. Geneva, 2006, paragraph 1, available at: http://www.refworld.org/docid/44dc81164.html]. States of origin thus undertake to eliminate the risk of human rights violations by guaranteeing, in addition to their current obligations, compliance with the conditions guarantees. Diplomatic locks can only be relied on if they are an appropriate means of eliminating the dangers to the person concerned (effectively minimizing the risk of ill-treatment upon return) and can also be considered reliable in good

faith (ibid., Paragraph 20). Therefore the article 3 of the Convention will not be violated in a particular case if diplomatic locks are sufficient to eliminate the real risk of ill-treatment (Othman (Abu Qatada) v. The United Kingdom, cited above, section 186). The weight of these assurances depends on the circumstances prevailing at that time (ibid., section 187).

81. Respect for human rights in the state to which the person is to be forcibly returned (extradited) and which provides guarantees in this regard is essential. In the case of a state where there is a systematic violation of human rights, especially the rights locked by Art. 2 and 3 of the Convention, which are absolute, nor the granting or negotiation of individual termination may be found to be sufficient (Othman (Abu Qatada) v. The United Kingdom, cited above, section 188, similarly to the UNHCR Note on Diplomatic Assurances, paragraph 21). However, only in rare cases the human rights situation is so serious that guarantees cannot be taken into account at all (Othman (Abu Qatada) v. The United Kingdom, cited above, section 188). The state expelling or issuing foreigners must take into account, in addition to the dangers facing foreigners in the receiving country, the question of how effectively the guarantees will be put into practice. For the purpose of assessing the effectiveness of the guarantees provided by a particular State, account should be taken, for example, of whether the responsible national authorities will be bound by the guarantees provided by the authorities responsible for offering guarantees, the general human rights situation and any practice of respecting or non-compliance with diplomatic guarantees (UNHCR Note on Diplomatic Assurances, paragraph 21).

82. The issuing State shall examine the quality of the guarantees provided and whether these locks can actually be relied on, taking into account the following factors: (i) whether the competent court has an opportunity to acquaint itself with the terms of these diplomatic guarantees; (ii) whether the guarantees are sufficiently specific or, conversely, vague and too general; (iii) who provided the locks and whether that person is entitled to bind the receiving State; (iv) where such guarantees have been issued by the Central Government of the receiving State, whether local authorities can be expected to be bound by them; (v) whether or not the guarantees relate to treatment that is lawful in the receiving State; (vi) whether the guarantees have been provided by a Contracting State of the Council of Europe; (vii) the length and importance of bilateral relations between the receiving and issuing States, including whether the receiving State has in the past observed similar locks provided; (viii) whether compliance with those guarantees can be verified objectively through diplomatic or other monitoring mechanisms, including unhindered access to the legal representatives of the person concerned; (ix) whether the recipient state has an effective system of protection against torture, including its willingness to cooperate with international monitoring mechanisms (including non-profit organizations working for the protection of human rights at international level) and whether it is willing to investigate allegations of torture and punish persons; (x) whether the person concerned has in the past been ill-treated in the receiving State; and (xi) whether the reliability of the guarantees provided has already been examined by national courts in the issuing State Party (ECHR ruling in Othman (Abu Qatada) v. the United Kingdom, section 189, cited above).

83. Unlike diplomatic assurances regarding the non-imposition of the death penalty, locks relating to whether an individual will be subjected to torture, inhuman or degrading treatment in the receiving state require “constant vigilance and supervision by competent and independent 'personnel'” (UNHCR Note on Diplomatic Assurances, paragraph 22). It is therefore easier to monitor assurances in relation to the threat of the death penalty than

assurances that the person will not be subjected to inhuman or degrading treatment or torture [ibid., Paragraph 22, quotation from the judgment of the Supreme Court of Canada in Suresh v. Canada (Minister of Citizenship and Immigration), 2002, paragraph 124]. State which provides guarantees regarding torture or other ill-treatment must have sufficiently effective control of persons who may commit ill-treatment [Council of Europe, Report by Alvaro Gil-Robles, Commissioner for Human Rights, 21-23 of April 2004, CommDH (2004)13, 8 of July 2004].

b) Application of the above principles

84. In the present case, a combination of possible ill-treatment in various forms appears to be problematic: first of all, it has very poor conditions in prisons, including ill-treatment of prisoners, and on the part of court proceedings, where there is a risk of ill-treatment to obtain evidence or confessions. Therefore, there is a real risk that complainants will be subjected to ill-treatment, and in this case, it is more difficult to monitor the assurances provided or to have sufficiently effective control over those who could mistreat them, even more so as a general breach of this obligation can only be difficult to identify (see clauses 68-69 above).

85. The Public Prosecutor's Office and both general courts have gradually demanded a number of assurances. Although the Municipal Court agreed that human rights violations in China occurred to a greater extent than in the Czech Republic, it also found that the existing possibilities for control by the Chinese authorities, and beyond that, provided sufficient safeguards against ill-treatment, diplomatic locks, including a guarantee of control by the Czech embassy. The High Court clarified the assurances, both by requesting additional safeguards regarding the threat of torture in prisons, and by supplementing the assurances already given in the statement.

86. The PRC provided assurances that the complainants would not be sentenced to death, that they would have the opportunity to apply for parole, and that the principle of specialty would not be extradited to a third state without the consent of the Czech authorities. In addition, the Chinese authorities quoted the provisions of Chinese criminal law, including the Prisons Act, and assured that the detention site would be allowed under the relevant regulations and that embassy staff would be able to participate in public hearings, be informed of the outcome of criminal proceedings and receive copies of judgments. On the other hand, it was not possible to provide the ordinary courts with the assurance originally sought that consular staff would be able to speak to the persons concerned without the presence of third parties with reference to international consular law (see paragraph 16 above). Additional assurances in the form of information on the rights of suspected criminal offenses under the law after their extradition to the PRC, as a guarantee of a fair trial and compliance with the prohibition of torture and other ill-treatment, were obtained by the High Court.

87. From the point of view of the judgment of the ECHR in Othman (Abu Qatada) v. The United Kingdom, the conditions of diplomatic assurances to the general courts and to the Constitutional Court are therefore known (paragraph i in paragraph 82 above). In order for locks to be sufficiently credible, they must be submitted by a body empowered to do so (see subparagraph iii in paragraph 82 above). The lack of credibility of the assurance in this regard was pointed out, for example, by complainant c) already in his statement on the Public Prosecutor's Office's proposal on the admissibility of extradition. The municipal court did not address this argument at all and the high court rejected it. There is no bilateral agreement between the states, and therefore, according to the High Court, it is not considered a flawed

procedure for notes to be transmitted by embassies. The High Court refused to consider whether the requesting State had complied with Chinese law, as "in Art. 50 of the Extradition Act of the People's Republic of China regulates the competence of its General Prosecutor's Office and the Supreme Court in providing guarantees regarding the limits of prosecution or sentencing, there is no reason to doubt whether the requesting State followed its laws in formulating an extradition request."

88. In assessing the credibility of guarantees, according to the case-law of the ECHR cited above, the issuing State must ensure that guarantees are provided by a body empowered to do so under national law (see the ECHR ruling in Soldatenko v. Ukraine, 23.10.2008, no. 2440 / 07, section 73, according to which guarantees do not stand, it is uncertain whether the competent authority provided it, for the opposite example, where the locks were provided by an authority authorized to do so, see the ECHR ruling in Shamayev and Others v. Georgia and Russia, 12.04.2005, No. 36378/02, section 344). According to the article No 2 of the Chinese Extradition Act, unless otherwise provided in a bilateral agreement, the Ministry of Foreign Affairs of the PRC is required to communicate during the extradition proceedings. According to the article No 50, the Ministry of Foreign Affairs of the PRC may provide the required assurances on behalf of the PRC. However, if the assurance restricts criminal prosecution, it is necessary for the General Prosecutor's Office of the PRC to decide on it, if it is a restriction in relation to the sentence imposed, this assurance must be decided by the Supreme Court of the PRC. The assurances were provided successively in documents dated 7 of February 2018 under the heading of the Ministry of Foreign Affairs of the PRC, and further assurances were sent and signed exclusively by the PRC Embassy in Prague (dated 7 of June 2018, 22 of July 2018 and 6 of August 2018). While Chinese legislation in the Art. 48 of the Extradition Act allows for the assistance of diplomatic services in emergency cases prior to the submission of a formal request for extradition, it does not allow the provision of diplomatic assurances. The credibility of assurances not provided by the Supreme Court of the PRC (as regards punishment) and the Prosecutor General's Office of the PRC (as regards prosecution) is thus questioned and does not meet the standards required by the case-law of the ECHR. This aspect is crucial, in particular, if the guarantee is not provided by the competent state authority, it is not at all certain whether it will be sufficiently binding on other state authorities. In this case, it is not known whether the locks provided by the Embassy of the PRC in Prague are binding on law enforcement authorities.

89. Furthermore, although the guarantees provided relate to treatment which is lawful (subparagraph v in paragraph 82 above), they cannot be considered sufficiently specific (see subparagraph ii in paragraph 82 above). In particular, as regards the guarantee that the complainants would not be subjected to any ill-treatment and that they would be subjected to a fair trial, which the High Court again demanded separately - which was entirely appropriate for the Chinese authorities (moreover perhaps without the right to do so) international conventions on human rights and an overview of the rights of persons subject to criminal proceedings by law. However, the ECHR also considers locks in the form of a mere reference to existing national law and international human rights treaties to be insufficient to provide sufficient protection against the risk of ill-treatment in cases where there are credible reports that the state authorities have tolerated or resorted to conduct in a clear manner contrary to the Convention (Saadi v. Italy, cited above, section 147). In these circumstances, these assurances cannot be considered to be specific enough to effectively protect the complainant from imminent ill-treatment.

90. The credibility of the guarantees is also weakened by the statement of the Ministry of Foreign Affairs that the PRC cannot be considered to fully respect diplomatic assurances that the person or persons will not be treated in breach of Article 3 of the ECHR. The High Court did not consider the MFA's view relevant in this regard, as the ministry itself states that "in recent years no Czech citizen has been serving his sentence and the embassy has no direct reference to the situation in Chinese prisons, nor there is any mention in the report of whereas, in the past, the office of control of compliance with extinction relating to the extradited person would have any information of its own or at least mediated, all the more so as to justify doubts as to compliance with such guarantees". One of the criteria required by the ECHR case-law is also the length and significance of the bilateral relations of the receiving and issuing States, including whether the receiving State has in the past observed similar locks provided (see subparagraph vii in paragraph 82 above). In the event that the issuing State has no experience in complying with the guarantees provided, it is more appropriate to be more cautious than to accept the guarantees without any doubt, all the more so as further reports reveal various cases of human rights violations. Alternatively, the ordinary courts should have sought to establish compliance with the guarantees on the basis of which persons were extradited from other European countries.

91. The lack of experience with the guarantees in the case of the PRC could to some extent replace the possibility of independent control of prison conditions objectively through diplomatic or other monitoring mechanisms (see subparagraph viii in paragraph 82 above) requested by the Prosecutor's Office to visit issued persons by consular staff without the presence of third parties. However, the Chinese authorities did not comply with this request. Regarding the objection of the Chinese authorities that this is a requirement not regulated by consular law, it should be emphasized that in the present case it is not a requirement arising from consular law governing the embassy's relations with Czech citizens (including European Union citizens) intergovernmental guarantee against the risk of ill-treatment. In addition, it would be more appropriate if the request for such a guarantee also included the possibility for the complainants themselves to initiate a visit. The High Court has repeatedly called for assurances about the possibility of visiting requested persons by consular staff on their own initiative, and the Chinese embassy reiterated the assurance given before such a visit could be made under Chinese law.

92. Reports in the case file show that ill-treatment is used as a means of interrogation in the PRC (MFA report). The possibility of a mere visit of extradited persons in the presence of Chinese staff, during which the persons visited may have concerns about any ill-treatment, does not appear to be a sufficiently effective way to monitor compliance with the promise. In the current situation, where visits are to be allowed under Chinese law, it is not even clear how this assurance should work in practice. Pursuant to Section 48 of the attached Prison Act, convicts of imprisonment may meet with their relatives or guardians. It does not follow from the law that other visits beyond its scope are possible, and the assurance provided does not specify such a right. As for the possibility of correspondence, it is extended to other persons, but "correspondence is subject to prison control. The prison may detain correspondence, the content of which has been found to prevent the correction of convicts "(section 47 of the documented Prison Act). Therefore, even this possibility of written communication would not be realistically usable for the complainant in case of ill-treatment.

93. Another aspect that could reverse doubts about the credibility of safeguards is an effective system of protection against torture and other ill-treatment, including whether the

state is willing to cooperate with international monitoring mechanisms and to investigate allegations of ill-treatment and ill-treatment of those responsible to punish (see subparagraph ix in the paragraph 82 above). However, the general courts also did not address this aspect in their decisions.

94. It follows from the above that the diplomatic guarantees provided do not effectively minimize the risk of ill-treatment after forced return and cannot be considered reliable in good faith, therefore they were not sufficient in the case of the complainants to eliminate the real risk of ill-treatment contrary to Art. 7 para. 2 of the Charter and Art. 3 of the Convention in case of extradition of complainants to the PRC.

C. Conclusion

95. **The absolute prohibition of torture or cruel, inhuman or degrading treatment or punishment (ill-treatment) guaranteed in both art. 3 of the Convention and art. 7 para. 2 of the Charter calls for a thorough review of whether for individuals subjected to forced return (extradition or expulsion), there is no real danger to be exposed to ill-treatment. A thorough review means that the assessment of the real risk of injury must be adequate, up-to-date and sufficiently verified from objective sources from more reliable authorities.**

96. **If, in a situation of forced return, the alien provides serious grounds for believing that he or she is at risk of harm in the form of ill-treatment, the competent national authority responsible for the decision on forced return must dispel doubts that in the country to which the alien is returned, he is in real danger of being mistreated. If that State authority requires, in order to rule on the inadmissibility of forced extradition, that ill-treatment be so obvious that it is highly likely to affect the returned individual, or that it be a widespread practice, this does not meet the standards of protection against ill-treatment, resulting from art. 3 of the Convention, art. 7 para. 2 of the Charter.**

97. **Diplomatic guarantees in extradition proceedings can only be relied on if they effectively minimize the risk of ill-treatment upon return and if they can be considered reliable in good faith. Article Art. 3 of the Convention or 7 para. 2 of the Charter will therefore not be violated by the forced return of an alien only if, in a specific case, diplomatic guarantees are sufficient to eliminate the real risk of ill-treatment in the country to which the alien is extradited.**

98. The High Court and the Municipal Court intervened in the applicants' right to have a thorough assessment of the risk of torture, cruel, inhuman or degrading treatment at the time of their decision in the event of the applicants' return to their country of origin by failing to obtain sufficient information on the imminent risk by applying too high standard of proof of commonness or high probability (in terms of prison conditions and the prosecution itself) in assessing this information and by assessing diplomatic assurances as sufficient, even though they did not in fact provide a sufficient guarantee to eliminate the real risk of ill-treatment; In so doing, the ordinary courts infringed Article 7 para. 2 of the Charter and Article 3 of the Convention.

99. In view of these grounds for annulment of the contested resolutions, the Constitutional Court no longer considered the applicants' further objections.

100. As the contested resolutions violated the complainants' fundamental right for the public

authorities to thoroughly assess whether they would be subjected to torture or ill-treatment, inhuman or degrading treatment or punishment under Art. 7 para. 2 of the Charter and Art. 3 of the Convention, the Constitutional Court granted the constitutional complaint pursuant to section 82 para. 2. a) of the Act on the Constitutional Court and according to section 82 para. 3 letter a) of this Act on the Constitutional Court annulled the contested resolutions of the Municipal Court and the High Court.

Instruction: Decisions of the Constitutional Court cannot be appealed

At Brno, 2 April 2020

Katerina Simackova
Chairwoman of the court committee