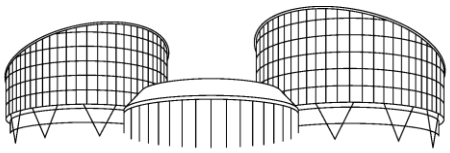

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF BUDREVICH v. THE CZECH REPUBLIC

(Application no. 65303/10)

JUDGMENT

STRASBOURG

17 October 2013

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Budrevich v. the Czech Republic,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Mark Villiger, *President*,
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
André Potocki,
Paul Lemmens,
Aleš Pejchal, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 24 September 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 65303/10) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Belarusian national, Mr Andrei Budrevich ("the applicant"), on 9 November 2010.

2. The applicant was represented by Ms H. Franková, a lawyer with the Organization for Aid to Refugees ("the OPU"), Prague. The Czech Government ("the Government") were represented by their Agent, Mr Vít A. Schorm, of the Ministry of Justice.

3. The applicant alleged, in particular, that he had had no effective remedy within the meaning of Article 13 of the Convention against his expulsion.

4. On 9 November 2010 the President of the Section decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings before the Court not to remove the applicant to Belarus.

5. On 20 September 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1979. In October 2006, using an assumed name, he left Belarus and entered the Czech Republic, where he currently resides. He was a party to numerous proceedings in the Czech Republic, of which the relevant ones are described below.

7. The applicant's true name was revealed in December 2009 when the Czech police sent his fingerprints to the Belarus police for identification.

A. Asylum proceedings

1. The first asylum request

8. On 28 October 2006 the applicant, using an assumed name, requested asylum in the Czech Republic. He explained that he had left Belarus in October 2006 because of pressure from the State authorities in connection with the fact that he had imported advertisements in support of the opposition candidate in the presidential elections, Aliaxandr Milinkevich. The applicant asserted that he had been detained for forty-five days and fined, and that his car and passport had been confiscated. Moreover, several searches had been carried out at his house. Following his departure from the country, police had repeatedly visited his home and warned his mother and sister that criminal proceedings would be initiated against him. Thus, he feared imprisonment in Belarus for cooperation with an illegal political party.

9. On 6 September 2007 the applicant's asylum request was rejected by the Czech Ministry of the Interior. The Ministry had carried out a detailed analysis of the applicant's situation and come to the conclusion that his allegations were contradictory and not credible. It noted, *inter alia*, that although the applicant might have originally been prosecuted and convicted for importing advertisements in support of the opposition candidate in the presidential election, this had only been a one-off activity carried out for a financial reward and the applicant had not been politically active in Belarus. Moreover, he had not made any attempt to lodge a criminal complaint against the persons who had allegedly pressurised him, or to move to another part of the country. Further, the applicant had already been punished on that account and did not have any political engagement in his country. There was nothing to indicate that he would face any new risk if he returned to Belarus.

10. On 22 May 2008, the Hradec Králové Regional Court upheld that decision. It found, *inter alia*, that the events referred to by the applicant were not serious enough to amount to "persecution for upholding political

rights and freedoms" since the applicant had also had problems with the police in connection with the importing of other goods.

11. On 10 June 2009 the Supreme Administrative Court dismissed a cassation appeal by the applicant on the ground that he had failed to specify the reasons for his appeal. This was because the applicant could not be reached by his lawyer, who stated that he could not complete the grounds of appeal without discussing them with the applicant. The Supreme Administrative Court considered that the applicant had been obliged to duly cooperate with his lawyer or to bear the consequences of his passivity.

2. The second asylum request

12. On 21 January 2010 the applicant lodged another asylum request on the ground that if returned to Belarus he would be prosecuted by the police and punished for having sought asylum in the Czech Republic. During his interview on 21 January 2010 he declared that he was not aware of any on-going criminal proceedings against him in Belarus. The proceedings were terminated by the Ministry of the Interior on 3 February 2010 on the ground that it was a repeated request and there were no new circumstances.

13. The decision was upheld by the Plzeň Regional Court on 13 September 2010. The court rejected the applicant's argument that the Ministry had known about a pending extradition request concerning the applicant in connection with an allegedly fabricated criminal prosecution in Belarus but had failed to take it into account. The court held, *inter alia*, as follows:

> "...only during the examination of the applicant's renewed asylum request was the Ministry of the Interior informed of the fact that the applicant was being sought on the national level in Belarus for drug trafficking ... and that a preliminary examination was being carried out into an extradition request in connection with criminal proceedings in Belarus.
>
> The court is of the opinion that under such circumstances the Ministry did not proceed erroneously given that it only asked the applicant whether he was aware that he was being prosecuted in Belarus (response: "No, I do not know anything about that.") and left any other steps to the competent authorities in the Czech Republic. Indeed, a repeated asylum request is ... inadmissible when the foreigner does not provide any new facts or findings which were not, for reasons for which the foreigner is not to blame, examined in previous proceedings which have already ended, but not when the administrative authority does not of its own motion re-examine any potential indication which would justify the granting of asylum. Therefore, the argument regarding the extradition request of Belarus cannot be regarded as well-founded."

14. In his cassation appeal the applicant stated that he had not been aware of the new prosecution in Belarus for drug-related offences either during the first asylum proceedings or when he lodged his second asylum request. Indeed, he had become aware of it only when the Plzeň Regional Prosecutor informed him of the extradition request lodged by the Belarusian

authorities (see below). He stressed, however, that the Ministry had been aware of his new prosecution in Belarus when it examined his second asylum request, as was demonstrated by the Plzeň Regional Court's decision quoted above.

15. On 28 February 2011 the Supreme Administrative Court quashed the Plzeň Regional Court's decision of 13 September 2010. It considered that the Ministry - which had known about the extradition request lodged by the Belarusian authorities when it examined the second asylum request - should have informed the applicant about it and not merely asked him whether he was aware of it. The Ministry's decision had been insufficiently reasoned since it had not examined the question whether the new criminal prosecution and the extradition request constituted a new circumstance rendering a new examination of the merits of the asylum request necessary.

16. On 18 May 2011 the Plzeň Regional Court, in application of the Supreme Administrative Court's decision, quashed the Ministry's decision of 3 February 2010 and remitted the case to the Ministry.

17. On 22 December 2011 the Ministry of the Interior, referring to its decision of 17 October 2011 in the fourth set of asylum proceedings (see below), terminated the proceedings. It stated that the same right, that is international protection, could not be granted twice. It further stated that the applicant had not lodged an action against the decision of 17 October 2011, which had become final on 19 November 2011 (see below). It was, however, not aware that the applicant had in fact challenged that decision.

18. On 14 December 2012 the appeals commission of the Ministry of the Interior quashed the decision to terminate the proceedings.

19. On 1 February 2013 the proceedings were again terminated on the ground of litispendence on account of the ongoing proceedings concerning the applicant's fourth request for asylum. The applicant did not challenge that decision.

3. The third asylum request

20. On 29 September 2010 the applicant lodged another asylum request, in which he mentioned that a fabricated criminal prosecution had been brought against him in Belarus in 2006.

21. The Ministry of the Interior rejected the request on 30 September 2010 pursuant to Section 10a(e) of the Asylum Act, on the ground that it was a repeated request and that there were no new circumstances. The Ministry noted that the applicant had not previously alleged that charges against him had been fabricated or that criminal proceedings had been initiated against him in Belarus. These circumstances had, however, been known to the applicant during the previous asylum proceedings since he had stated that he had left Belarus precisely because of the fabricated charges against him. According to the Ministry, these circumstances should have

been raised by the applicant in his previous requests and therefore could not be examined at this stage.

22. An attempt was made to serve the decision on the applicant in person on 1 October 2010. However, he refused to take receipt of it because his lawyer was not present and nor was an interpreter.

23. On 21 October 2010 the applicant requested judicial review of the decision. He maintained that the decision had not been validly delivered to him.

24. On 13 January 2011, the Prague Municipal Court rejected the applicant's action in respect of that decision as belated. The court held that the Ministry's decision had been validly served on the applicant on 1 October 2010, despite the latter's refusal to take receipt of it. According to the court, the case-file had not contained any power of attorney; consequently, it had been possible to validly deliver the decision directly to the applicant instead of to his lawyer. Nor had the presence of an interpreter been necessary since the applicant had submitted his asylum request in the Czech language and he had informed the Ministry that he was able to communicate in that language.

25. On 2 February 2011 the applicant lodged a cassation appeal.

26. On 31 May 2011 the Supreme Administrative Court found that the Ministry's decision had not been validly served upon the applicant because it should have been served also on his lawyer. Accordingly, it quashed the Municipal Court's decision.

27. On 1 February 2013 the proceedings were terminated on the ground of litispendence on account of the ongoing proceedings concerning the applicant's fourth request for asylum. The applicant did not challenge that decision.

4. The fourth asylum request

28. On 22 November 2010 the applicant lodged a fourth asylum request referring to the reasons given in his previous asylum applications.

29. On 17 October 2011 the Ministry of the Interior rejected the request for asylum, considering that the applicant did not face any persecution in Belarus within the meaning of section 12 of the Asylum Act. It considered, however, that in the light of the developments in Belarus following President Lukashenko's re-election, it could not exclude that the applicant would face a real risk of inhuman or degrading treatment upon his return. Therefore, the applicant was granted subsidiary protection under section 14a of the Asylum Act for one year from the date the decision became final (19 October 2011).

30. The applicant requested judicial review of that decision before the Hradec Králové Regional Court, arguing that he should have been granted asylum and not only subsidiary protection.

31. On 27 February 2013 the Regional Court rejected the action, endorsing the assessment of the applicant's situation by the Ministry.

32. In the meantime, on 9 August 2012 the applicant applied for an extension of his subsidiary protection granted on 17 October 2011.

33. On 3 June 2013 the Ministry granted that extension for twenty-four months because the situation in Belarus had not improved. The decision took effect on 11 June 2013 when it was delivered to the applicant.

B. Criminal proceedings and decisions on the applicant's expulsion

1. Proceedings before the Prague 10 District Court

34. On 14 February 2008 the Prague 10 District Court found the applicant guilty of the attempted theft of a mobile phone from a shop. He was sentenced to four months' imprisonment, suspended for eighteen months.

35. On 5 November 2008 the Prague 10 District Court found the applicant guilty of the theft of three pairs of shoes and sentenced him to expulsion from the territory of the Czech Republic for a period of thirty months. The applicant did not appeal against that decision.

36. On 9 September 2010 the applicant requested the suspension of the execution of the above expulsion on the ground that he would face prosecution for a fabricated criminal offence and risked a violation of his rights under Articles 3 and 6 of the Convention. He also referred to the Plzeň Regional Court's refusal to authorise his extradition (see extradition proceedings below), and informed the District Court that he had lodged another asylum request.

37. On 23 September 2010 the District Court granted the applicant's request for his expulsion to be stayed pending the decision on his asylum request.

38. According to the applicant he should have been expelled on 4 October 2010. The removal did not take place because before boarding the plane the applicant unsuccessfully attempted to commit suicide by cutting his neck.

39. On 25 October 2010 the District Court cancelled the suspension of the applicant's expulsion, referring to the dismissal of his asylum request by the Ministry of the Interior on 30 September 2010 which had terminated the third asylum proceedings. The decision was delivered to the applicant on 5 November 2010.

40. On 9 November 2010 the applicant appealed to the Prague Municipal Court.

41. On 10 November 2010 the District Court again stayed the expulsion, in compliance with the Court's request under Rule 39 not to proceed with

the expulsion until further notice. The District Court did not give any time-limit for the duration of the suspension.

42. On 13 January 2011, the Prague Municipal Court rejected the applicant's appeal of 9 November 2010 as belated. That decision was served on the applicant in April 2011. The court found that the applicant had received the challenged decision on 5 November 2010 and thus the last day to lodge an appeal had been 8 November 2010.

2. Proceedings before the Prague 5 District Court

43. On 3 October 2008 the Prague 5 District Court found the applicant guilty of the theft of a jacket. It sentenced him to ten months' imprisonment, suspended for three years.

3. Proceedings before the Prague 8 District Court

44. On 13 March 2009 the Prague 8 District Court found the applicant guilty of another theft of an electronic device. The previous sentence given on 14 February 2008 by the Prague 10 District Court was quashed and superseded by a sentence of one year's imprisonment and expulsion from the territory for five years. The court took into account that the applicant's first asylum request had been rejected. During the proceedings the applicant admitted that he had been a regular drug user. In particular, he had been using heroin for the past seven years.

45. The applicant served his prison sentence from December 2008 to 4 October 2010.

46. The execution of the sentence of expulsion was stayed on 11 November 2010 in accordance with the interim measure issued by the Court. According to the Government, this sentence cannot be executed prior to the execution of the previous sentence of expulsion of 5 November 2008 issued by the Prague 10 District Court (see paragraph 35 above).

C. Extradition proceedings

47. On 26 November 2009 Belarus requested the applicant's extradition for the purpose of his prosecution for drug-related offences. In early December 2009 the Plzeň Regional Prosecutor informed the applicant of the request, a fact which the applicant disclosed in his interview in the context of the fourth asylum proceedings.

48. On 28 January 2010 the prosecutor officially notified the applicant of the initiation of the extradition proceedings.

49. On 23 April 2010 the Plzeň Regional Court found the request for the applicant's extradition to Belarus inadmissible because there existed reasonable fears that the criminal proceedings brought against him in Belarus would violate his rights under Articles 3 and 6 of the Convention. It

relied on a report by the Ministry of Foreign Affairs of the Czech Republic and two reports by Human Rights Watch and Amnesty International provided by the United Nations High Commissioner for Refugees. These reports attested, with regard to Belarus, to the continuing persecution and short-term detention of persons for political reasons; lack of independence on the part of the judiciary; inhuman conditions of detention; ill-treatment by police; and regular violations of the right to a fair trial.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Asylum Act (no. 325/1999)

50. Under section 10a(e) a repeated asylum request is inadmissible when lodged by the alien after previous proceedings have been terminated if it does not contain any new facts or findings which were not, for reasons for which the alien is not to blame, examined in the previous proceedings.

51. Under section 12 asylum is granted to an alien if it is established in the proceedings that the alien has been persecuted for exercising political rights and freedoms, or has a well-founded fear of being persecuted for reasons of race, sex, religion, nationality, or membership of a particular social group or political opinion in the country of which he or she is a citizen or, in case of a stateless person, in the country of his or her last permanent residence.

52. Under section 14a (1) and (2) (b) and (d), subsidiary protection may be granted to an alien who does not fulfil the criteria for asylum if it has been established in the course of the proceedings on the granting of international protection that well-founded concerns exist in his or her case, or that, if returned to the State of citizenship, the alien would face a real risk of serious harm in the form of inhuman or degrading treatment or punishment, or if it would contravene the international obligations of the Czech Republic, and if the alien is unable or, on account of such risk, unwilling to avail him or herself of the protection of the State of which he or she is a citizen, or of the State of his or her last permanent residence.

53. Under section 32, lodging a request for judicial review of a decision of the Ministry concerning asylum does not have suspensive effect if the proceedings were discontinued because the asylum request was inadmissible under Section 10a(e).

54. Under section 53a (1) and (4), subsidiary protection is granted for the period for which the beneficiary of subsidiary protection is at risk of serious harm (see section 14a), and at least for one year. The beneficiary of subsidiary protection is granted a residence permit for the territory [of the Czech Republic] for the period set out in the decision granting subsidiary protection. If the beneficiary of subsidiary protection continues to be at risk of serious harm and if no reasons for withdrawing the subsidiary protection

arise, the Ministry must extend the subsidiary protection period, and the extension must be under normal circumstances for at least two years.

55. Under paragraph 5 of that provision if the Ministry fails to decide on the application for extension within the period of validity of the residence permit, the validity of the permit must be extended until the day the decision of the Ministry becomes final.

B. Criminal Code (Act no. 40/2009)

56. Under Article 80 § 3 a sentence of expulsion is inadmissible if, *inter alia*, the person has been granted asylum or subsidiary protection, or if there is a risk that the offender will be persecuted on account of his race, ethnicity, nationality, belonging to a social group, or political or religious beliefs in the State of return, or if he could be exposed to torture or other inhuman or degrading treatment or punishment.

C. Code of Criminal Proceedings (Act no. 141/1961)

57. Under Article 350b § 4, where a person sentenced to expulsion requests asylum and that request is not clearly manifestly unfounded, the president of the chamber considering the case must suspend the execution of the expulsion, at the person's request or of his own motion.

Under § 5 of the same provision a sentence of expulsion cannot be executed during the period for which the person has been granted subsidiary protection.

58. Under Article 350h if after the adoption of a judgment imposing a sentence of expulsion circumstances under which that sentence is inadmissible will arise, the court shall waive the sentence of expulsion.

59. Under Article 393(k) an extradition request cannot be granted if there are reasonable fears that criminal proceedings in the requesting State will violate Articles 3 and 6 of the Convention or that imprisonment in that State will not be executed in compliance with Article 3 of the Convention.

III. RELEVANT INTERNATIONAL MATERIAL CONCERNING THE HUMAN RIGHTS SITUATION IN BELARUS

60. The relevant international material concerning the human rights situation in Belarus are set out in the Court's judgments in *Y.P. and L.P. v. France*, no. 32476/06, §§ 37-45, 2 September 2010, and *Kozhayev v. Russia*, no. 60045/10, §§ 55-60, 5 June 2012.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

61. The applicant complained that he faced a real risk of ill-treatment in Belarus and therefore his expulsion would violate Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

62. The Government contested that argument and maintained that the applicant had lost his victim status as he had been granted subsidiary protection and the expulsion could therefore not be executed.

63. The applicant maintained that he was still a victim because the expulsion had been enforceable and had only been prevented by his unsuccessful suicide attempt and then the Court's interim measure. That violation of Article 3, which had already occurred, had not been recognised by the domestic authorities. Furthermore, he had not been granted asylum but only temporary subsidiary protection.

64. The Court reiterates that in cases concerning threatened expulsion or extradition it does not examine the question whether a violation has already happened but whether it would happen were the removal executed (see the operative parts of the judgments in, for example, *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161, and, more recently, *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, 28 June 2011). Therefore, contrary to the applicant's argument, what is at issue in this case is not a violation that has already materialised but a prospective violation in the event that the applicant is removed to Belarus.

65. It follows that the relevant time for considering such a complaint, when the applicant has not yet been removed, is when the Court examines the case (see, for example, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 69, ECHR 2005-I). The Court must thus assess whether the applicant can still be considered a victim at the present time.

66. In this context, the Court reiterates that the word "victim" in Article 34 of the Convention denotes the person directly affected by the act or omission in issue. In other words, the person concerned must be directly affected by it or run the risk of being directly affected by it. It is not therefore possible to claim to be a "victim" of an act which is deprived, temporarily or permanently, of any legal effect (see *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, § 92, ECHR 2007-I). In cases where the applicants faced expulsion or extradition the Court has consistently held that an applicant cannot claim to be the "victim" of a measure which is not enforceable. It has adopted the same stance in cases where execution of the

deportation or extradition order has been stayed indefinitely or otherwise deprived of legal effect and where any decision by the authorities to proceed with deportation can be appealed against before the relevant courts (see *Nasrulloyev v. Russia*, no. 656/06, § 59, 11 October 2007, with further references, and *Dobrov v. Ukraine* (dec.), no. 42409/09, 14 June 2011).

67. Turning to the present case, the Court notes that on 3 June 2013 the Ministry of the Interior extended the subsidiary protection of the applicant for twenty-four months. The granting of subsidiary protection constitutes a bar to execution of an expulsion under Article 350b of the Code of Criminal Procedure (see paragraph 57 above). Consequently, the applicant does not currently face a risk of expulsion.

68. The Court observes that at the end of the twenty-four-month period the applicant will be able to request a further extension of the subsidiary protection, and to lodge an appeal if his request is rejected. During those proceedings he will have a valid residence permit. The applicant will thus have access to proceedings in which his claim of a risk of ill-treatment in Belarus will again be assessed at the end of his subsidiary protection (see *Ghosh v. Germany* (dec.), no. 24017/03, 5 June 2007, where the Court considered it important that before a possible repeated attempt to execute his extradition the applicant would have access to a procedure in which his claim of possible ill-treatment in the target country would be newly assessed).

69. Moreover, there is nothing to prevent the applicant from applying in the meantime for a waiver of the sentence of expulsion under Article 350h of the Code of Criminal Procedure (see paragraph 58 above). Furthermore, when the term of his subsidiary protection comes to an end the applicant will be able to lodge a new application with the Court and request an interim measure.

70. In view of these considerations, the Court concludes that the applicant lost his victim status when he was granted subsidiary protection (see also *I.M. v. France*, no. 9152/09, § 95, 2 February 2012).

71. In response to the applicant's argument, the Court adds that the Convention does not require any particular form of protection but only that a person should not be removed to a country where he or she would face a real risk of treatment contrary to Article 3 of the Convention. Consequently, the argument of the applicant that the protection he was afforded was only temporary is misconceived and is not relevant from the point of view of Article 3 of the Convention.

72. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

II. RULE 39 OF THE RULES OF COURT

73. The Court reiterates that a decision to declare a complaint inadmissible is final and not subject to any appeal to either by the Court or by any other body (see, for example, *De Souza Ribeiro v. France* [GC], no. 22689/07, § 51, ECHR 2012). Moreover, in the present case the applicant does not currently face a risk of expulsion (see, conversely, *Singh and Others v. Belgium*, no. 33210/11, 2 October 2012).

74. In these circumstances, the Court considers it appropriate to discontinue the interim measure indicated to the Government under Rule 39 of the Rules of Court (see paragraph 4 above).

III. ALLEGED VIOLATION OF ARTICLE 13 IN CONJUNCTION WITH ARTICLE 3 OF THE CONVENTION

75. The applicant complained that he had had no effective remedy at the relevant time against his expulsion to Belarus. He relied on Article 13 of the Convention, which reads:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

76. The Government contested that argument.

A. Admissibility

77. The Government, referring to their arguments under Article 3 of the Convention that that complaint was manifestly ill-founded because the applicant had lost his victim status under Article 34 of the Convention, maintained that Article 13 of the Convention was inapplicable. In their view, a manifestly ill-founded claim of a violation of the Convention could not be considered arguable for the purposes of Article 13.

78. The applicant argued that he had not had an effective remedy at the decisive points when he became aware of new relevant facts, in particular the extradition request and the decision of the Plzeň Regional Court not to allow his extradition because of the risk of violations of Articles 3 and 6 of the Convention.

79. The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief.

do so (see, among many other authorities, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 53, ECHR 2007-II).

80. In the above-mentioned case the Court found a complaint under Article 13 in conjunction with Article 3 of the Convention concerning an expulsion admissible even though it found the Article 3 complaint inadmissible as the applicant had lost his victim status owing to a subsequent granting of asylum. It noted that the alleged violation of Article 13 had already occurred at the time the threat of the applicant's removal was lifted, and that the State had not acknowledged, either expressly or in substance, and then afforded redress for, the alleged breach of the Convention (see *Gebremedhin [Gaberamadhien]*, cited above, § 56, and similarly *I.M. v. France*, cited above, § 100).

81. The Court considers that the same conclusions apply in the present case. The applicant argued that the violation of Article 13 had occurred at the time of lodging the application. Therefore, the question that needs to be examined is whether his claim under Article 3 of the Convention was arguable at that time. A subsequent loss of victim status under Article 3 cannot automatically and retrospectively dispense the State from providing effective remedies in the preceding period.

82. In this context, the Court observes that the Plzeň Regional Court concluded on 23 April 2010 that the applicant could not be removed to Belarus because there was a real risk of violation of his rights under Articles 3 and 6 of the Convention there (see paragraph 49 above). Furthermore, by an internal instruction, the Minister of the Interior of the Czech Republic decided not to carry out any expulsion of persons to Belarus from 22 December 2010 owing to continuing reprisals by President Lukashenko's regime, which implies that such a situation must have existed before December 2010. The Court also takes into account the relevant international material. Accordingly, the applicant's claim that he would run a real risk of treatment contrary to Article 3 of the Convention in Belarus was arguable between 23 April 2010 and 9 November 2010, when he lodged his application with the Court.

83. The Court thus considers that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, or inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

84. The Government firstly stressed that an applicant who was refused asylum was not expelled on the basis of that refusal (or on discontinuation of the asylum proceedings), but on the basis of a decision on his expulsion. Each of the two sets of proceedings was autonomous and had its own

remedies, usually with suspensive effect. In both criminal and administrative expulsion proceedings, the risk of serious harm was examined and the expulsion could not be carried out if there were justified reasons to fear that the risk was real.

85. In their view, the applicant, who was to be expelled on the basis of his criminal sentence of expulsion had had at least three types of remedies at his disposal by means of which he could have obtained a review of his claims under Article 3 of the Convention. These were, firstly, the ordinary and extraordinary remedies that applied to criminal proceedings, then asylum proceedings, and, finally, a waiver of the expulsion sentence under Article 350h of the Code of Criminal Procedure.

86. In the context of the criminal proceedings, the applicant had had the option of lodging standard appeals against the criminal judgments that would have had suspensive effect. Furthermore, a complaint against the Prague 10 District Court's order of 25 October 2012 cancelling the stay of the expulsion sentence would also have had automatic suspensive effect. The applicant could have lodged a complaint against the decision without any substantiation and he could have supplemented it later following consultation with his counsel.

87. The Government further noted that in the context of the asylum proceedings the applicant had mentioned the crucial information of his allegedly fabricated criminal prosecution in Belarus only in his third asylum request in September 2010, although it appeared from his statements that he had already been aware of it at the time of his departure from Belarus in 2006. In any case it was clear that the applicant had received the information about his prosecution on 28 January 2010 in the official notification that the prosecutor had initiated extradition proceedings against him. However, the applicant had not informed the Ministry of the Interior of that fact during the then pending second asylum proceedings. In any case, even in the asylum proceedings the applicant had ultimately had an effective remedy because in both the second and third asylum proceedings he had been successful in his cassation appeals.

88. Moreover, the fact that the administrative action against the decision on his second application for asylum had not had suspensive effect was irrelevant because at the time of bringing the action the applicant had already been serving his sentence of imprisonment, of which he still had six months left, and during that period it was not possible to expel him. The applicant therefore had not faced any immediate danger.

89. Lastly, the Government maintained that the applicant could have instituted proceedings for a waiver of the expulsion sentence under Article 350h of the Code of Criminal Procedure. In the course of the enforcement of an expulsion sentence, a court was obliged to take into consideration the possible emergence or existence of circumstances relevant to a waiver of the execution of the sentence. A criminal court's duty to assess an applicant's

case from the perspective of Article 3 of the Convention was therefore not limited by the coming into effect of a decision imposing a sentence of expulsion.

90. Having been granted subsidiary protection, the applicant should have lodged an application for a waiver of the sentence of expulsion, which would most probably have been granted. In the event of a court's negative decision on such an application, the applicant could have lodged a complaint which would have had automatic suspensive effect.

91. In sum, the Government contended that at the decisive points in the criminal and asylum proceedings the applicant had benefited from an automatic suspensive effect at all levels of the proceedings, with the exception of the inadmissible repeated applications for asylum. With regard to Article 350b of the Code of Criminal Procedure, the asylum proceedings as a whole had also satisfied the Court's requirement of automatic suspensive effect because the execution of the expulsion sentence had been stayed on the grounds of the pending asylum proceedings.

92. The Government added that the applicant had failed to lodge a constitutional appeal, which was also an effective remedy, as was clear from the Court's recent case-law in cases against the Czech Republic.

93. The applicant maintained that the Czech legal system had not offered him any effective opportunity to contest his expulsion at the decisive points when he became aware of new relevant facts, in particular the Belarus extradition request and the decision by the Plzeň Regional Court that his extradition was not allowed because of the risk of violations of Articles 3 and 6 of the Convention.

94. He considered it irrelevant that it had been open to him to appeal against the criminal judgments in which he had been sentenced to expulsion because they had been delivered before the decisive time when, according to him, there had been a real risk of his treatment contrary to the Convention in Belarus.

95. Regarding the remedies under the Code of Criminal Procedure in the context of the enforcement of the expulsion sentence, the applicant argued that neither a request to stay the expulsion under Article 350b nor a request for a waiver under Article 350h had automatic suspensive effect. Accordingly, it was immaterial that a possible appeal against those decisions would have had suspensive effect. Furthermore, pending asylum proceedings were not an automatic obstacle to the execution of a sentence of expulsion under Article 350b except for those that the criminal court assessed as not manifestly unfounded.

96. The applicant further maintained that the three-day time-limit for lodging an appeal against the Prague 10 District Court's decision of 25 October 2010 cancelling the suspension of his expulsion (see paragraph 39 above) had been too short and made that legal avenue ineffective. He had been detained while awaiting his expulsion on Friday 5 November 2010

when he received the decision, written in what was for him a foreign language. The deadline for appeal had expired on Monday 8 November 2010. Owing to the restrictions on making a phone call (it was necessary to make a special written request in order to use the telephone), he had been unable to contact his lawyer in due time. Moreover, a return call could not be directly transferred to the applicant without a prior written request. He had therefore forwarded the decision to his lawyer by regular post, but the lawyer had received it only on 9 November 2010. Even though the lawyer had lodged the appeal on the same day, it had been considered belated.

97. Further, even if the appeal had not been rejected as belated, it could not be deemed to be an effective remedy since the criminal courts were not equipped to examine the situation in the country of origin. Such an examination could only be carried out by the Ministry of the Interior.

98. Asylum proceedings had also proved not to be an effective remedy at the decisive points because both his second and third asylum proceedings had been terminated without a decision on the merits. The requests for judicial review of those decisions had had no suspensive effect. It was therefore immaterial that the he had in fact been successful with his requests for judicial review because at the relevant time his expulsion had been averted only because of his suicide attempt and the Court's interim measure under Rule 39.

99. His third asylum request had been rejected in just one day without the Ministry of the Interior giving any consideration to his arguments that his extradition was not permissible. Since the asylum proceedings had been terminated, a request for judicial review did not have suspensive effect. Although it was theoretically possible to lodge a suspension request, such requests were in practice ineffective.

100. In sum, at the decisive times none of the domestic authorities had evaluated the risk of ill-treatment prohibited by the Convention that the applicant faced in Belarus.

2. The Court's assessment

(a) General principles

101. The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law.

102. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so.

103. In order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 288-290, ECHR 2011, with further references).

104. In view of the importance which the Court attaches to Article 3 of the Convention, and of the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the notion of an effective remedy under Article 13 requires (i) close and rigorous scrutiny of a claim that there exist substantial grounds for believing that there is a real risk of treatment contrary to Article 3 in the event of the applicant's expulsion to the country of destination, and (ii) a remedy with automatic suspensive effect (see *Jabari v. Turkey*, no. 40035/98, § 50, ECHR 2000-VIII; *M.S.S. v. Belgium and Greece*, cited above, § 293; and *Diallo v. the Czech Republic*, no. 20493/07, § 74, 23 June 2011).

(b) Application in the present case of the above-mentioned principles

105. The Court firstly notes that the removal of the applicant was ordered in the context of criminal proceedings in which he was twice sentenced to expulsion. Consequently, it was against these decisions that the applicant should have had an effective remedy within the meaning of Article 13 of the Convention.

106. The Court observes that the applicant could have challenged the decisions in an appeal which had suspensive effect. Therefore, in the normal course of events he had access to an effective remedy. However, the present case raises rather an exceptional situation in that the facts which constituted the basis for the applicant's claims that he would be subjected to treatment contrary to Article 3 of the Convention in the destination State became known to him only after the expulsion orders became final and after his first asylum proceedings – in which he had also access to remedies with automatic suspensive effect – had been terminated. He could not, therefore, have used those arguments in the first asylum proceedings or in his appeals against the criminal decisions sentencing him to expulsion (see *Mohammed v. Austria*, no. 2283/12, § 74, 6 June 2013).

107. The Court has thus to decide what is the relevant point of time for a consideration of the applicant's present complaint. It notes that there is

disagreement between the parties as to when it became known to the applicant that criminal proceedings for drug-related offences had been opened against him in Belarus. The Court considers, however, that it is not necessary to decide on this matter. It observes in this connection that on 23 April 2010 the Plzeň Regional Court decided not to extradite the applicant to Belarus because of reasonable fears that in Belarus his rights under Articles 3 and 6 of the Convention would be violated. It referred to reports attesting to, *inter alia*, the detention of persons for political reasons, inhuman conditions of detention and ill-treatment by police (see paragraph 49 above). In the Court's view, that finding inevitably made that claim arguable in Convention terms. When sentencing the applicant to expulsion on 5 November 2008 and 13 March 2009, the criminal courts did not know about the criminal proceedings in Belarus or the judgment of the Plzeň Regional Court. However, the circumstances changed and the opinion of the Regional Court, which was a new fact, could not be ignored. The applicant thus should have had access to an effective remedy between 23 April 2010, the date of the Regional Court judgment, and 4 October 2010, when his prison sentence finished and therefore the first day when the expulsion sentence could have been executed (see also *Mohammed*, cited above, §§ 74-75, where the Court did not take into account for the purposes of considering whether the applicant had access to an effective remedy any remedies available before the time when his claim became arguable owing to a change in his situation).

108. The Government pointed to several remedies that the applicant had had access to and that were, in their view, effective. The Court will examine them in turn.

109. First, the Court considers that the ordinary remedies within the criminal proceedings were clearly unavailable to the applicant at the relevant period. The criminal judgments which sentenced the applicant to expulsion became final before that time (see paragraph 106 above).

110. As to a request for a waiver of the expulsion order under Article 350h of the Code of Criminal Procedure, the Court finds that this did not constitute an effective remedy as it would not have had suspensive effect. It is true that such a waiver would have been granted because the applicant had received subsidiary protection; however, that was only granted on 17 October 2011, after the relevant period.

111. As to a constitutional appeal, the Court observes that such an appeal does not have automatic suspensive effect and cannot, therefore, constitute an effective remedy in the context of expulsion (see *Diallo*, cited above, §§ 83-84). The cases referred to by the Government are not relevant in the present case as they did not concern expulsion or extradition.

112. It thus remains to be decided whether the lodging of a fresh asylum request was an effective remedy against the applicant's expulsion.

113. Under Article 350b of the Code of Criminal Procedure a criminal court must suspend the execution of an expulsion when the person sentenced to expulsion applies for asylum, unless such a request is clearly manifestly unfounded. Indeed, on 23 September 2010 the Prague 10 District Court stayed the expulsion pending the decision on the applicant's asylum request (see paragraph 37 above). The suspension was cancelled only on 25 October 2010 after the dismissal of the applicant's third asylum request became final on 1 October 2010 (see paragraph 39 above). The criminal court thus proceeded correctly when it stayed the applicant's expulsion because of the pending asylum proceedings. Consequently, the lodging of a fresh asylum request by the applicant on 29 September 2010 had suspensive effect and the applicant had in theory an effective remedy for his complaint under Article 3 at the relevant time.

114. Nevertheless, because of the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, it is not enough that an effective remedy exists in theory. The Court must ascertain whether the applicant's claim in the context of that remedy was indeed subjected to close and rigorous scrutiny, as required by the Court's case-law (see *M.S.S. v. Belgium and Greece*, cited above, § 321, and *Singh and Others v. Belgium*, no. 33210/11, §§ 103-105, 2 October 2012).

115. The Court observes that the Ministry of the Interior dismissed the third asylum request as inadmissible in one day with a very short reasoning on the basis that the applicant had failed to support his request with any new facts. It did not consider the allegedly fabricated proceedings against him for drug trafficking to be a new fact because it concluded that the applicant had known about them at the time of the previous asylum proceedings and he ought to have mentioned them then. The Ministry made no mention at all of the judgment of the Plzeň Regional Court of 23 April 2010.

116. The Court considers that omission particularly serious as it was that judgment that made the applicant's claim under Article 3 particularly credible (see paragraph 109 above). When a domestic court makes such a decision, it cannot be ignored by other relevant authorities. That applies especially in the context of subsequent asylum proceedings, for which it is highly relevant as it is primarily in those proceedings that the risks for the applicant in his country of origin needs to be assessed.

117. The Court is aware of the fact that asylum proceedings and extradition proceedings are separate and that the relevant bodies can reach different conclusions. Nevertheless, as a minimum, the Ministry should have thoroughly engaged with the said decision and convincingly explained why it did not consider that new fact, which had not existed at the time of applicant's previous asylum requests, relevant for its decision on the merits of the asylum request. As it failed to do so, the Court cannot conclude that the Ministry subjected the applicant's claim to close and rigorous scrutiny.

In fact the Ministry did not examine the merits of the applicant's claim at all.

118. The Court further observes that a request for judicial review of such a decision did not have automatic suspensive effect. This was also reflected in the decision of the Prague 10 District Court, which cancelled the suspension of the expulsion right after the decision of the Ministry of the Interior (see paragraph 39 above). Accordingly, the third asylum proceedings were not an effective remedy against the applicant's expulsion.

119. The Court further notes that the Ministry of the Interior terminated the second asylum proceedings on 3 February 2010, that is, before the crucial decision of the Plzeň Regional Court. An appeal against that decision also did not have automatic suspensive effect. Nevertheless, as the applicant did not risk expulsion before 4 October 2010, when his prison sentence was about to finish, the Court must look at whether during those proceedings the relevant authorities subjected the applicant's claim to close and rigorous scrutiny, since the granting of some form of protection in those proceedings could also have prevented the applicant's expulsion.

120. The court observes that the Ministry, even though it knew about the criminal proceedings against the applicant, failed to address them in its decision on the applicant's second asylum request. Indeed, it was for that reason that that decision was considered unlawful by the Supreme Administrative Court in its judgment of 28 February 2011.

121. The subsequent decision of the Regional Court of 13 September 2010 did not examine the applicant's arguments either. It did not at any rate evaluate the consequences of the decision of this court not to allow his extradition. Accordingly, not even the second asylum proceedings can be considered to have been an effective remedy against his expulsion as his claims were not subjected to any scrutiny during the relevant period.

122. The last possibly effective remedy suggested by the Government was an appeal within the context of proceedings under Article 350b of the Code of Criminal Procedure against the decision of the Prague 10 District Court of 25 October 2010 cancelling the suspension of the expulsion. The applicant indeed lodged such an appeal but it was dismissed as belated (see paragraph 42 above).

123. The Court observes that in the proceedings under Article 350b of the Code of Criminal Procedure the criminal court does not examine thoroughly the applicant's claim about a real risk of treatment contrary to Article 3 in the event of his expulsion to the destination country but only stays the enforcement of the expulsion in order to enable the competent authorities to decide on these matters in the asylum proceedings. Consequently, as at the relevant time the applicant's asylum proceedings were no longer pending, an appeal under Article 350b could not result in practice in a review of the applicant's claims.

124. In the light of these considerations the Court finds that the applicant did not have an effective remedy for his Article 3 complaint at the relevant time.

125. There has accordingly been a violation of Article 13 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

126. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

127. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

128. The Government considered the amount absolutely disproportionate to any loss he may have suffered and asked the Court to award no damages in the event of a finding of a violation.

129. Even though the applicant must have experienced some suffering and frustration as a result of the failure of the national authorities to subject his arguable claim under Article 3 of the Convention to close scrutiny at the relevant time, the Court, having regard to its case-law (see *I.M. v. France*, cited above, § 166, and *Singh and Others v. Belgium*, § 111), considers that the finding of a violation constitutes adequate redress, in the circumstances of the case, for the non-pecuniary damage which the applicant can claim to have sustained.

B. Costs and expenses

130. The applicant also claimed EUR 3,400 for costs and expenses.

131. The Government maintained that no award should be made to the applicant under this head because he had not submitted any documents in support of his claims.

132. According to the Court's settled case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred and are also reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 283, ECHR 2006-V). Moreover, the Court cannot award those costs and expenses that are not supported by any documents (see *Husák v. the Czech Republic*, no. 19970/04, § 63, 4 December 2008).

133. The Court observes that the applicant failed to submit any supporting documents regarding his costs and expenses. Accordingly, no award can be made under this head.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 13 in conjunction with Article 3 of the Convention admissible and the remainder of the application inadmissible;

2. *Decides* to discontinue the interim measure indicated to the Government under Rule 39 of the Rules of Court;

3. *Holds* that there has been a violation of Article 13 in conjunction with Article 3 of the Convention;

4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

5. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 October 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President