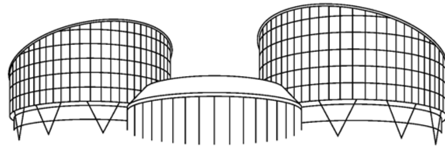

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF G.S. v. BULGARIA

(Application no. 36538/17)

JUDGMENT

STRASBOURG

4 April 2019

FINAL

19/04/2019

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of G.S. v. Bulgaria,

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

Angelika Nußberger, *President*,
Yonko Grozev,
Síofra O'Leary,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Lətif Hüseynov,
Lado Chanturia, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 19 March 2019,

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

PROCEDURE

1. The case originated in an application (no. 36538/17) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Georgian national, Mr G.S. ("the applicant"), on 22 May 2017. The President of the Section acceded to the applicant's request not to have his name disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicant was represented by Mr N. Bibilashvili and Mr Sh. Manelidze, lawyers practising in Tbilisi, Georgia. The Bulgarian Government ("the Government") were represented by their Agent, Ms I. Stancheva-Chinova of the Ministry of Justice.

3. The applicant alleged, in particular, that the Bulgarian authorities' decision to extradite him to Iran would, if implemented, expose him to corporal punishment contrary to Article 3 of the Convention in that country.

4. On 30 May 2017 the Court, acting pursuant to a request by the applicant, indicated to the Government, under Rule 39, not to extradite him to Iran until the conclusion of these proceedings. The Court gave priority to the application under Rule 41 and gave the Government notice of it under Rule 54 § 2 (b).

5. On 31 July 2017 the Georgian Government, who had been advised of their right to submit written comments (Article 36 § 1 of the Convention and Rule 44 § 1), said that they would not seek to exercise this right, adding that they expected the Court to adhere to its consistent approach to extradition cases raising issues under Article 3 of the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1951 and is currently detained in Sofia Prison.

A. The applicant's arrest and detention on the basis of an Interpol red notice

7. On 17 December 2016 the applicant took a flight from Kutaisi, Georgia, to Sofia, Bulgaria. When trying to pass through the passport control at Sofia Airport, he was arrested pursuant to a red notice issued by the National Central Bureau of Interpol for Iran on 14 September 2016.

8. According to the red notice, on 24 June 2016 the applicant and another person had stolen by means of trickery a bag containing 50,000 euros from a foreign-exchange office in Tehran. The applicant's alleged accomplice had been arrested, but the applicant had fled Iran the same day.

9. The notice went on to say that the offence in connection with which the applicant was being sought was one under Article 656 of the Iranian Penal Code (see paragraphs 38-40 below), and that the maximum penalty in respect of it was three years' imprisonment.

10. The next day, 18 December 2016, the National Central Bureau of Interpol for Iran confirmed that the applicant was still being sought and sent to the Bulgarian authorities a copy, in Persian, of the warrant for his arrest.

11. The same day the Bulgarian prosecuting authorities detained the applicant for seventy-two hours. On 21 December 2016 they asked the Sofia City Court to place him in detention for up to forty days pending receipt of a formal extradition request by the Iranian authorities.

12. The Sofia City Court heard the prosecuting authorities' application the same day. In his closing statement, the applicant said:

> "[S]ending me to Iran would be unfair, because they have no laws, they decide as they please, they will ascribe this to me and I will not make it home. You know their laws! I have no one to protect me there. They have no laws and judges, but decide as they please. Can you give the sheep to the wolves?"

13. Having deliberated immediately after the hearing, the Sofia City Court allowed the prosecuting authorities' request. It noted, *inter alia*, that at that stage it was not yet deciding whether to extradite the applicant but simply whether to keep him in custody in the meantime.

14. The applicant's court-appointed counsel appealed against that decision. However, when the appeal was heard by the Sofia Court of Appeal on 27 December 2016, the applicant said that he had not instructed the

court-appointed counsel to lodge it and wished to be represented by counsel of his own choice. In view of the applicant's statement, the court discontinued the appeal proceedings.

B. The Iranian extradition request in respect of the applicant

15. In January 2017 the Iranian authorities submitted to the Bulgarian authorities an extradition request in respect of the applicant. The request stated that the act allegedly committed by him constituted an offence under Article 656 § 4 of the Iranian Penal Code (see paragraphs 38-40 below), and specified that according to the text of that provision the punishment envisaged under it was six months' to three years' imprisonment.

16. In the request the Iranian authorities assured their Bulgarian counterparts that the applicant would not face torture or inhuman treatment if extradited to Iran. They also expressed their willingness to honour extradition requests by Bulgaria. On that basis, on 26 January 2017 the Bulgarian Minister of Justice confirmed that *de facto* reciprocity existed between Bulgaria and Iran with respect to extradition.

C. Extradition proceedings against the applicant

1. At first instance

17. Extradition proceedings against the applicant were opened in the Sofia City Court on 29 January 2017. He had counsel of his own choice and was given an interpreter into Russian, a language that he apparently speaks.

18. The same day the prosecuting authorities presented to the applicant and his counsel the extradition request and the documents enclosed with it (see paragraphs 15 and 16 above).

19. The prosecution also asked the court to keep the applicant in detention until the conclusion of the extradition proceedings. The court allowed that request the same day, 29 January 2017.

20. The court heard the extradition case on 6 and 28 February, 23 March and 12 April 2017.

21. The line of argument taken by counsel for the applicant from the outset was that the evidence enclosed with the extradition request left some doubt about the actual date and time of the offence the applicant had allegedly committed, and that he could not have committed it on the date and at the time initially specified because he had by then already left Tehran. The prosecution urged the court to invite the Iranian authorities to clarify the date and time of the commission of the alleged offence.

22. The court did so, in the exercise of its powers under section 17(3) of the Extradition and European Arrest Warrant Act 2005 (see paragraph 34

below), and in a diplomatic note of 5 April 2017 the Iranian authorities said that the applicant had committed the offence at 1.40 p.m. on 23 June 2016.

23. In his closing statement on 12 April 2017 counsel for the applicant argued that the extradition request, even as supplemented later, failed in various ways to comply with the formal requirements. He said that doubts about the date and time of the commission of the alleged offence – 23 or 24 June 2016 – persisted, and that the available evidence gave rise to misgivings about whether the applicant had really committed the offence. He also pointed out that although Bulgaria had extradition agreements with many States, Iran was not among them.

24. The same day the Sofia City Court allowed the request for the applicant's extradition to Iran. It found, *inter alia*, that the extradition request met all formal requirements, and that it was permissible to proceed on the basis of the *de facto* reciprocity between Bulgaria and Iran. It also noted that the Iranian authorities had given assurances that the applicant would not face torture or inhuman treatment, and that there were no reasons to suspect that he would be exposed to a real risk of such treatment. In particular, Iranian law only envisaged imprisonment in respect of the alleged offence. It was not for the extradition court to delve into the merits of the criminal case.

2. On appeal

25. Counsel for the applicant appealed to the Sofia Court of Appeal. He reiterated that the applicant had already left Tehran at the time when the alleged offence had been committed.

26. The appeal hearing took place on 9 May 2017. Counsel for the applicant made the same points as those that he had made at first instance (see paragraphs 21 and 23 above).

27. In a final decision of the same date, the Sofia Court of Appeal upheld the Sofia City Court's decision to allow the extradition request, for essentially the same reasons. It likewise noted that according to the information from the Iranian authorities, the punishment possibly awaiting the applicant was a term of imprisonment.

28. The court also decided to keep the applicant in detention pending his extradition to the Iranian authorities.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Extradition and European Arrest Warrant Act 2005

1. Prohibition of extradition capable of leading to ill-treatment

29. Section 7 of the Extradition and European Arrest Warrant Act 2005 sets out circumstances in which requests for extradition from Bulgaria must

be refused. These include a risk that the requested person would be subjected to “violence, torture, or inhuman or degrading treatment in the requesting State”, or a failure to guarantee his or her “rights in relation to the criminal proceedings and the execution of the punishment in accordance with the requirements of international law” (point 5).

30. This provision is similar to its predecessor, Article 439b § 2 (3) of the 1974 Code of Criminal Procedure, added in 1997. A leading textbook on the subject (А. Гиргинов, *Екстрадицията по българското право*, Сиела, 1998 г., p. 113) commented that its text was based on Article 3 (f) of the Model Treaty on Extradition adopted by the General Assembly of the United Nations in 1990 (Un Doc. A/RES/45/116).

31. Another textbook (А. Гиргинов, *Международна правна помощ по наказателни дела*, Софи-Р, 2012 г., pp. 45-46) said that section 7(5) of the 2005 Act had been put in place in execution of Bulgaria’s obligations under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see paragraph 60 below), which it had signed and ratified in 1986.

2. *Information about the relevant criminal law of the requesting State*

32. Section 9(3) of the 2005 Act sets out the types of documents which must be enclosed with an extradition request. These include a description of the offence under the law of the requesting State and a copy of the applicable legal provisions (section 9(3)(2)).

3. *Verification of the extradition request*

33. Extradition requests must be made through the Bulgarian Ministry of Justice (section 9(1) of the 2005 Act). The Minister or an authorised official checks the request and the enclosed documents. If they do not meet the requirements of section 9, he or she can return them to the requesting State with an indication of the deficient points (section 10 of the 2005 Act).

4. *Possibility to seek further clarifications from the requesting State*

34. Under section 17(3) of the 2005 Act, the court hearing the extradition case can seek additional information from the requesting State. This information can relate to the matters under section 9(3) (see реш. № 44 от 19.03.2010 г. по в. ч. н. д. № 70/2010 г., ВнАС, and прот. опр. от 28.06.2016 г. по ч. н. д. № 2805/2016 г., СГС).

35. In a 2009 case, faced with deficient information about the criminal law of the requesting State, the Sofia Court of Appeal repeatedly sought clarifications and, in the absence of a satisfactory response, refused the extradition request (see реш. № 236 от 10.06.2009 г. по в. н. ч. д. № 90/2009 г., САС).

5. Finality of extradition decisions

36. Section 20(3) of the 2005 Act provides that the decisions of the courts of appeal in extradition cases are final. According to the Supreme Court of Cassation's case-law, such final extradition decisions cannot be reopened in any circumstances (see реш. № 135 от 26.03.2013 г. по н. д. № 194/2013 г., ВКС, III н. о.).

B. Recent decisions on extradition to Iran

37. It appears that in recent years, apart from this case, the Bulgarian courts have only twice had occasion to deal with requests for extradition to Iran, both times again on the basis of *de facto* reciprocity. In both cases the Sofia Court of Appeal refused the requests, chiefly on the basis that the requested persons had obtained international protection. In the second case the court also found that the requested person would risk torture or inhuman or degrading treatment or punishment in Iran owing to his political views (see реш. № 129 от 08.04.2015 г. по в. ч. н. д. № 306/2015 г., САС, and реш. № 279 от 23.09.2015 г. по в. ч. н. д. № 881/2015 г., САС).

III. RELEVANT INFORMATION ABOUT IRAN

A. Article 656 § 4 of the Iranian Penal Code

38. According to an English translation of Part Five of Iran's Penal Code, published in 2013 on the website[1] of the Iran Human Rights Documentation Center, a non-governmental organisation based in Connecticut, United States of America, Article 656 § 4 of the Code reads:

> "If a theft does not meet the requirements for the *hadd*[2] punishment and satisfies the following conditions, the offender shall be sentenced to six months to three years' imprisonment and up to 74 lashes:
>
> ...
>
> 4. The thieves are two or more persons."

39. The text of Part Five of the Code, published in Persian on a website operated under the auspices of the Iranian legislature,[3] also says that theft

1. https://iranhrdc.org/islamic-penal-code-of-the-islamic-republic-of-iran-book-five/, accessed on 5 March 2019
2. *Hadd* or *hodud* (pl.), defined as "crimes against God," are offences laid down by Sharia law. Offences for which Sharia law does not envisage specific penalties but which are seen as infringing religious or State interests are called *ta'zir*. For *ta'zir*, the State is usually free to define the elements of the offence and fix the appropriate punishment (Human Rights Watch, *Codifying Repression: An Assessment of Iran's New Penal Code*, 2012, p. 8).
3. http://rc.majlis.ir/fa/law/show/92683?keyword=%D9%85%D8%AC%D8%A7%D8%B2%D8%A7%D8%AA, accessed on 5 March 2019

under that provision is punishable with six months' to three years' imprisonment and up to seventy-four lashes.

40. So does the text of the Code published in Persian on a website operated under the auspices of the judiciary in Tehran.[4]

41. According to a 2014 report (*Iran's Penal Code: Report on Conflicts With Human Rights Law*)[5] by Südwind, a non-governmental organisation based in Austria which has consultative status in the United Nations Human Rights Council, in Iran theft which does not amount to *hadd* but merely to *ta'zir* is punishable with up to seventy-four lashes (rather than amputation, which is the punishment envisaged for *hadd* theft) (at pp. 17-18 of the report).

B. Recent reports on flogging as a form of punishment in Iran

1. Reports by United Nations bodies

42. In its concluding observations on the third periodic report by Iran under Article 40 of the International Covenant on Civil and Political Rights, made public in November 2011 (UN Doc. CCPR/C/IRN/CO/3), the Human Rights Committee expressed concern about "the continued imposition of corporal punishment ..., in particular amputations and flogging for a range of crimes, including theft" (at p. 4, § 16).

43. In a 2012 report to the General Assembly (UN Doc. A/67/369) the first Special Rapporteur on the situation of human rights in Iran said that according to unpublished data submitted to him, "3,766 flogging sentences ha[d] been implemented since 2002" (at p. 17, § 55).

44. In a report of March 2017 to the Human Rights Council (UN Doc. A/HRC/34/65) the second Special Rapporteur on the situation of human rights in Iran said that since her appointment, she had received numerous reports about the use of amputations, blinding and flogging as forms of punishment (at p. 6, § 26).

45. In a report of March 2017 to the Human Rights Council on the situation of human rights in Iran (UN Doc. A/HRC/34/40) the Secretary General said that a "wide range of acts considered as crimes under the Penal Code are punishable by flogging, including ... theft". He added that he did not "share the view of the [Iranian] Government, which argue[d] that Islamic punishments [we]re effective deterrent penalties and more humane in comparison with long-term imprisonment" (at p. 5, § 23).

46. In a (posthumous) report of March 2018 to the Human Rights Council (UN Doc. A/HRC/37/68) the second Special Rapporteur on the situation of human rights in Iran said that according to information received

4. http://www.ghavanin.ir/detail.asp?id=1232, accessed on 5 March 2019
5. http://www.iranhrc.org/uploads/docs/docs_en/reportiranpenalcode.pdf, accessed on 5 March 2019

by her, “over 100 flogging sentences have been awarded, and 50 have reportedly been implemented in the course of 2017” in Iran (at p. 8, § 29).

47. In their comments on that report, made also in March 2018 (UN Doc. A/HRC/37/68/Add.1, at p. 13), the Iranian Government said:

> “[T]he physical punishments which are anticipated in the laws of the Islamic Republic of Iran are legislated and legalized, and therefore they are not in contradiction with Iran’s obligations under paragraph 7 of the International Covenant on Civil and Political Rights.
>
> As for the issue of the use of lash punishments in the Islamic law, it has been considered and stipulated to prevent similar crimes and to reduce the use of sentences of imprisonment, which by themselves, have had major social, moral and economic consequences. Regrettably, this punishment has been interpreted wrongfully, by the West, as a degrading punishment. Lash punishments are issued and enforced as a substitute punishment for limited cases and, at the discretion of the judge, could be replaced by cash penalty. In addition, research shows that, in most cases, convicts prefer to receive a few lashes rather than going through a few months of imprisonment.”

48. In a report of March 2018 to the Human Rights Council on the situation of human rights in Iran (UN Doc. A/HRC/37/24), the Secretary General said that “the judiciary continue[d] to sentence people to cruel, inhuman and degrading treatment, such as amputation of limbs, blinding and flogging in accordance with the provisions of the Penal Code” (at p. 5, § 18). He also noted that the “Iranian Penal Code continue[d] to include a wide range of acts that can be punished by flogging, including ... theft”. He went on to say that according to statements by judicial officials in the media, “over 100 flogging sentences [had been] issued, and at least 50 reportedly implemented in 2017”, and that “19 sentences of amputation of hands or feet [had been] issued and at least five such sentences [had been] carried out” (at p. 6, § 20).

2. *Reports by non-governmental organisations*

49. According to a publication on the website of the Abdorrahman Boroumand Center for Human Rights in Iran, a non-governmental organisation based in Washington D.C., United States of America:

> “In ... Iran, at least 148 crimes are punishable by flogging. The laws related to flogging are broad and encompass a wide array of acts recognized as crimes. The criminal code recognizes corporal punishment (hadd and ta’zir) for offenses such as ... theft ...”[6]

50. On its website the Center also maintains a database of all cases about which information is available in which the Iranian courts have meted out a flogging sentence. It specifies that the data is “not exhaustive, as Iranian authorities do not systematically or thoroughly release information on flogging sentences or implementation”, but that it was able to build up the

6. https://www.iranrights.org/projects/flogging, accessed on 5 March 2019

database using “official statements and reports by the Iranian media and international and local human rights organizations, as well as testimonies of victims and witnesses”.

51. According to that database, the annual number of reported floggings for the whole of Iran between 2000 and 2013 had fluctuated between 81 (in 2000) and 1,832 (in 2009), with an average of 531. 1,129 of all floggings during that period had been carried out in Teheran. A perusal of the country-wide data relating to the period between 2007 and 2013 reveals reports of flogging for various forms of theft and related offences, including “purse snatching” (20 lashes), “buying stolen goods” (40 lashes), “breaking the lock and stealing the items from her husband’s store” (74 lashes), “stealing from the charity box” (30 lashes), “stealing from a twelve-year-old boy” (15 lashes), “stealing cash” (50 lashes), “stealing from Afghans” (20 lashes), “participation in pickpocketing” (50 lashes), “purse snatching” (74 lashes), “stealing four pigeons” (30 lashes), “stealing cables and power equipment” (40 lashes) and “stealing power cables” (70 lashes).

52. According to a report of January 2017 entitled “Iran: Wave of floggings, amputations and other vicious punishments”[7] by Amnesty International, “[h]undreds are routinely flogged in Iran each year, sometimes in public”, and the use of corporal punishment, including flogging, is “prolific”. The report went on to say that under Iranian law more than a hundred offences are punishable by flogging, including theft.

53. According to Amnesty International’s report on Iran for 2017-18,[8] “[s]cores of individuals, including children, [had] faced up to 100 lashes for theft and assault as well as for ... extra-marital relationships, attending mixed[-]gender parties, eating in public during Ramadan or attending peaceful protests.” The report also stated that “[d]ozens of amputation sentences [had been] imposed and subsequently upheld by the Supreme Court”.

54. According to a 2012 report (*Codifying Repression: An Assessment of Iran’s New Penal Code*)[9] by Human Rights Watch, under Iranian law flogging must be administered to a man while he is standing upright and stripped of his clothes (except for his genitals, which should remain covered), and should not target his head, face or genitals. For their part, women are to be flogged while seated with their clothes tightly bound to their body (fn. 7 on p. 10).

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7. https://www.amnesty.org/en/latest/news/2017/01/iran-wave-of-floggings-amputations-and-other-vicious-punishments/, accessed on 5 March 2019
8. https://www.amnesty.org/en/countries/middle-east-and-north-africa/iran/report-iran/, accessed on 5 March 2019
9. https://www.hrw.org/sites/default/files/reports/iran0812webwcover_0.pdf, accessed on 5 March 2019

C. Iran's position in relation to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

55. Thus far, 165 States have become party to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1465 UNTS 85). Six other States have signed but not yet ratified it. Iran is one of the 26 States which have not signed it.[10]

56. According to two reports by the Secretary-General of the United Nations on the situation of human rights in Iran (UN Doc. A/63/459, at p. 7, § 24, and UN Doc. A/64/357, at p. 9, § 29), when the Iranian Parliament approved the above-mentioned Convention in 2002, the Guardian Council overruled that decision, reportedly owing to perceived conflicts with Islamic principles.

57. When several States urged Iran to accede to that Convention during the second cycle of the Universal Periodic Review by the United Nations Human Rights Council in 2014 (UN Doc. A/HRC/28/12, at pp. 11-12), Iran declined, saying that "[s]ome recommendations [had been] made without due regard to the fundamental values and Islamic teachings governing [its] society", "contravene[d] substantively the Constitution and basic laws of the Country" and "vividly contravene[d] the spirit of cooperation ... by using accusatory allegations in ambiguous and inappropriate language with the aim to suggest unacceptable presumptions and claims" (UN Doc. A/HRC/28/12/Add.1, at pp. 3-4).

58. The recommendation, made on the same occasion, that Iran amend its Penal Code and outlaw corporal punishments (UN Doc. A/HRC/28/12, at p. 23), was likewise rejected by it (UN Doc. A/HRC/28/12/Add.1, at p. 4).

D. International condemnation of flogging in Iran

59. Since 2001 the General Assembly of the United Nations has consistently expressed its concern (more recently, its "very serious" and "deep" concern) at, *inter alia*, the use of flogging as a form of punishment in Iran (see General Assembly resolutions nos. 56/171, 58/195, 59/205, 60/171, 61/176, 62/168, 63/191, 64/176, 65/226, 66/175, 67/182 and 68/184, all of which were supported by Bulgaria).

IV. RELEVANT INTERNATIONAL MATERIAL

A. United Nations

60. Article 3 § 1 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1465 UNTS 85)

10. http://indicators.ohchr.org/, accessed on 5 March 2019

provides that States Parties to that Convention must not, *inter alia*, extradite someone to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. To determine whether there are such grounds, the competent authorities must take into account, *inter alia*, the existence in the destination State of "a consistent pattern of gross, flagrant or mass violations of human rights" (Article 3 § 2).

61. In its General Comment No. 4 on the implementation of that Article, issued in September 2018 (UN Doc. CAT/C/GC/4), the United Nations Committee against Torture said that in deciding whether someone should be removed from their territory, States should consider, *inter alia*, whether he or she would be exposed to a sentence of corporal punishment if sent to a State in which such punishment is permitted by law (at pp. 6-7, § 29 (f)).

B. Interpol

62. Article 83 § 2 of Interpol's Rules on the Processing of Data sets out the minimum "judicial" data which each red notice must contain in order to be published. According to sub-paragraphs (b)(iii) and (iv) of that provision, this data must include:

> "(iii) [the] law(s) covering the offence (whenever possible, and subject to national law or the rules governing the operation of the international entity, the requesting National Central Bureau or international entity shall provide the wording of the relevant penal provision(s)); and
>
> (iv) [the] maximum penalty possible ..."

63. According to Article 86 of the Rules, Interpol's General Secretariat must legally review red notices before their publication to ensure compliance with, in particular, Article 2 of Interpol's Constitution, which refers to "the spirit of the 'Universal Declaration of Human Rights'".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

64. The applicant complained that the decision to extradite him to Iran would, if implemented, put him in danger of treatment contrary to Article 3 of the Convention, which provides:

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

A. Admissibility

1. The parties' submissions

65. When discussing the merits of the complaint under Article 3 of the Convention in their initial observations, the Government pointed out that in the extradition proceedings neither the applicant nor his counsel had referred to a risk to his life or physical integrity or a danger of his being subjected to an inhuman or degrading punishment in Iran.

66. In reply, the applicant submitted that he had adverted to such a risk at the detention hearing on 21 December 2016. He added that in any event it had been incumbent on the Bulgarian authorities to check the real text of Article 656 of the Iranian Penal Code, especially since they had agreed to extradite him to Iran on the basis of *de facto* reciprocity rather than pursuant to an extradition agreement.

67. In their supplementary observations the Government submitted that the applicant's failure to make the point in the extradition proceedings raised the question whether he had duly exhausted domestic remedies, as required by Article 35 § 1 of the Convention.

2. The Court's assessment

68. According to Rule 55 of the Rules of Court, "[a]ny plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its ... observations on the admissibility of the application".

69. Although in their initial observations the Government pointed out that the applicant had failed to raise the question of risk of ill-treatment in the extradition proceedings, they did not explicitly frame that point as a non-exhaustion plea. They did so for the first time in the supplementary observations that they made in reply to the applicant's submissions (compare, *mutatis mutandis*, with *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, §§ 60-61, 15 November 2018).

70. This raises the question whether the Government are estopped from pleading non-exhaustion of domestic remedies (see *Dhahbi v. Italy*, no. 17120/09, §§ 24-25, 8 April 2014; *G.C. v. Italy*, no. 73869/10, §§ 36-37, 22 April 2014; *Boris Kostadinov v. Bulgaria*, no. 61701/11, § 44, 21 January 2016; and *Khlaifia and Others v. Italy* [GC], no. 16483/12, §§ 52-54, 15 December 2016). In this case, however, it is not necessary to decide the point (see, *mutatis mutandis*, *Cocchiarella v. Italy* [GC], no. 64886/01, § 45, ECHR 2006-V; *Tănase v. Moldova* [GC], no. 7/08, § 122, ECHR 2010, and *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 128, 14 April 2015), as the Government's objection is in any event to be rejected, for the following reasons specific to the present application.

71. To exhaust domestic remedies, as required by Article 35 § 1 of the Convention, an applicant cannot simply have recourse to a remedy capable of overturning the impugned measure on grounds unrelated to the complaint of a violation of a Convention right. It is the Convention complaint which must have been aired before the domestic authorities, at least in substance. It would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground for challenging an impugned measure at national level, and then apply to the Court on the basis of the Convention argument (see, among other authorities, *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III; *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 75, 25 March 2014; and *Nicklinson and Lamb v. the United Kingdom* (dec.), nos. 2478/15 and 1787/15, § 90, 23 June 2015). The exhaustion rule also requires that any procedural means capable of preventing the breach of the Convention be used in the domestic proceedings (see *Cardot v. France*, 19 March 1991, § 34, Series A no. 200).

72. In this case, the applicant and his counsel, though resisting the extradition to Iran and appealing against the first-instance decision that allowed it, did not at any point during the proceedings in Bulgaria advert to the risk of a flogging punishment in Iran. The applicant's vague reference to the alleged arbitrariness of the Iranian judicial system, made moreover not in the course of the extradition proceedings themselves but during the preliminary proceedings relating to his detention pending extradition (see paragraph 12 above) cannot be seen as duly raising that question. At the same time, since under Bulgarian law a risk that the requested person would be subjected to torture or inhuman or degrading treatment is an absolute bar to extradition (see paragraph 29 above), the Bulgarian courts would have been required to engage with such arguments and investigate the point. Indeed, they have already done that in relation to requests for extradition to Iran (see paragraph 37 above).

73. This omission, however, appears to have been largely attributable to the conduct of the Bulgarian authorities, which presented the applicant and his counsel with certified papers attesting that the only form of punishment possibly awaiting him in Iran was imprisonment (see paragraph 18 above), and proceeded on that basis throughout the extradition proceedings. In the face of such official information, on which they should have normally been able to rely, the applicant and his counsel cannot be faulted for not delving into the point. An applicant cannot be blamed for failing to use a remedy if that is due to a situation voluntarily created by the authorities (see, *mutatis mutandis*, *Čonka v. Belgium*, no. 51564/99, §§ 42-46, ECHR 2002-I).

74. Apparently the applicant first became aware of the risk of corporal punishment in Iran after the end of the extradition proceedings in Bulgaria, when his new lawyers in Georgia applied to this Court on his behalf and sought the indication of an interim measure under Rule 39 of the Rules of

Court (see paragraphs 2-4 above). At that stage, however, there was no longer any opportunity to have the point considered by the Bulgarian courts in the light of freshly available information, since under Bulgarian law extradition proceedings concluded by means of a final decision cannot be reopened in any circumstances (see paragraph 36 above).

75. In view of all this, the complaint, so far as it concerns the possible corporal punishment awaiting the applicant in Iran, cannot be rejected for non-exhaustion of domestic remedies. The exhaustion rule is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of the case (see, among other authorities, *Van Oosterwijck v. Belgium*, 6 November 1980, § 35, Series A no. 40; *Akdivar and Others v. Turkey*, 16 September 1996, § 69, *Reports of Judgments and Decisions* 1996-IV; and *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 116, ECHR 2007-IV).

76. The complaint is furthermore not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

77. The Government submitted that none of the material in the extradition case could have led the Bulgarian authorities to suspect that the applicant would be in danger of ill-treatment if surrendered to Iran. In particular, in their extradition request the Iranian authorities had given assurances in that regard, and when describing the text of Article 656 § 4 of the Iranian Penal Code, had not mentioned that it also envisaged flogging. The Interpol red notice had not said anything of the sort either. The Bulgarian authorities could not be expected to know Iranian criminal law, especially since the information about it provided by the Iranian authorities had seemed complete and accurate. The applicant and his counsel had not raised the point either. His vague statement at the hearing on 21 December 2016 could not be taken into account, as at that stage the courts had only been deciding whether to keep the applicant in custody pending extradition, not whether to extradite him.

78. The applicant submitted that the Bulgarian authorities had agreed to extradite him to Iran on the basis of *de facto* reciprocity, rather than pursuant to an extradition agreement. In doing so, they had not subjected the request of the Iranian authorities – in particular the part concerning the punishment likely to be imposed on him under Article 656 of the Iranian Penal Code – to proper scrutiny, even though the duty to assess the risk of ill-treatment in the event of extradition stemmed from Bulgaria's own law.

Such scrutiny had been particularly necessary because it was well known that people accused and convicted of offences in Iran were often subjected to torture and inhuman and degrading punishments, which were lawful in that country. No other European State was extraditing people to Iran. In the applicant's view, the risk of his suffering ill-treatment was real. He referred in this connection to reports by Amnesty International and Human Rights Watch.

2. *The Court's assessment*

(a) General principles

79. The principles governing cases in which removal from the territory of a Contracting State, whether by way of extradition or otherwise, may entail a risk of treatment contrary to Article 3 of the Convention in the destination State are settled. They were first set out in *Soering v. the United Kingdom* (7 July 1989, §§ 81-91, Series A no. 161), and were more recently restated in detail in *Mamatkulov and Askarov v. Turkey* ([GC], nos. 46827/99 and 46951/99, § 66-70, ECHR 2005-I), *Babar Ahmad and Others v. the United Kingdom* (nos. 24027/07 and 4 others, §§ 167-79, 10 April 2012), *Harkins and Edwards v. the United Kingdom* (nos. 9146/07 and 32650/07, §§ 119-31, 17 January 2012), *Savriddin Dzhurayev v. Russia* (no. 71386/10, §§ 148-53, ECHR 2013 (extracts)) and *Trabelsi v. Belgium* (no. 140/10, §§ 116-20, ECHR 2014 (extracts)), as well as in a judgment against Bulgaria (see *M.G. v. Bulgaria*, no. 59297/12, §§ 74-82, 25 March 2014).

80. The principles governing the assessment of assurances by the destination State were, for their part, comprehensively set out in *Othman (Abu Qatada) v. the United Kingdom* (no. 8139/09, §§ 186-89, ECHR 2012 (extracts)).

(b) Application of those principles in this case

81. It is scarcely in doubt that the punishment alleged to await the applicant in Iran – up to seventy-four lashes – is contrary to Article 3 of the Convention. Although this is not a relevant consideration in the extradition context, where not only a risk of torture but also a risk of inhuman and degrading treatment or punishment is a bar to surrender (see *Babar Ahmad and Others*, §§ 169-76, and *Harkins and Edwards*, §§ 121-28, both cited above), it should be accepted that such a punishment amounts to torture (see *M.A. v. Switzerland*, no. 52589/13, § 58, 18 November 2014).

82. The salient question is whether there are substantial grounds to believe that the applicant runs a real risk of being subjected to such punishment. This question has two elements. The first is whether the alleged offence in connection with which the Iranian authorities seek the applicant's

extradition is indeed punishable with flogging. The second is whether he is at a real risk of being given such a sentence and of having it carried out.

83. Since information about the punishment which could be inflicted under Article 656 § 4 of Iran's Penal Code only came to light after the end of the domestic proceedings, the Court must itself carry out a full and *ex nunc* evaluation of the two above points (see *J.K. and Others v. Sweden* [GC], no. 59166/12, § 83, 23 August 2016, with further references). Indeed, according to its settled case-law, if an applicant has not yet been extradited or deported when the Court considers the case, the reality of the risk in the destination country is to be assessed at the time of the Court's decision (see, among other authorities, *Chahal v. the United Kingdom*, 15 November 1996, § 86, *Reports* 1996-V; *Mamatkulov and Askarov*, cited above, § 69; and *Umirov v. Russia*, no. 17455/11, § 93, 18 September 2012).

84. On the first point, it should be noted that before a red notice can be published by Interpol, the relevant National Central Bureau must provide information about the penal laws relating to the offence (even their actual wording, when possible) and the maximum penalty possible (see paragraph 62 above). The text of the provision under which the applicant is being prosecuted in Iran – Article 656 § 4 of the Iranian Penal Code – was reproduced in the red notice issued by the National Central Bureau of Interpol for Iran and then in the Iranian extradition request (see paragraphs 9 and 15 above), but that text was incomplete and did not refer to flogging as a form of punishment. The Bulgarian authorities did not check this, apparently taking their Iranian counterparts at their word.

85. For its part, in the light of the information now before it, the Court finds little reason to doubt that Article 656 § 4 of Iran's Penal Code does provide for a punishment of up to seventy-four lashes in addition to imprisonment. The English-language translation of Part Five of the Code published by the Iran Human Rights Documentation Center and the Persian text of Part Five of the Code which appears on two websites operated under the auspices of the Iranian legislature and judiciary (see paragraphs 38-40 above) all confirm this. It is also borne out by the 2014 report by Südwind and, albeit in less detail, by reports of United Nations bodies and non-governmental organisations (see paragraphs 41, 42, 45, 48, 49, 52 and 53 above). Further, albeit indirect, evidence of that is the information that flogging sentences are commonly imposed and carried out in Iran in respect of a broad range of offences, and that the Iranian authorities regard them as a legitimate form of punishment (see paragraphs 43, 44, 45, 46 and 47 above).

86. The next question is whether the applicant is at a real risk of being given such a sentence and of having it carried out. The decisions of the Bulgarian courts are of no assistance when assessing this, as they laboured under the assumption that the only penalty possibly awaiting the applicant in Iran was imprisonment (compare, *mutatis mutandis*, with *López Elorza*

v. Spain, no. 30614/15, § 109, 12 December 2017, and with *X v. Sweden*, no. 36417/16, § 59, 9 January 2018). The information available to them was insufficient to allow them to conclude that he would not run a real risk of being sentenced to flogging if extradited to Iran.

87. Having examined the point in the light of the various international reports that flogging sentences are commonplace in Iran (see paragraphs 43, 44, 46, 48, 50 and 52 above), and the, albeit unofficial, information that at least until 2013 such sentences had been imposed and carried out in a number of cases concerning various forms of theft and related offences (see paragraph 51 above), the Court finds that risk sufficiently established. Nothing suggests that it has subsided owing to more recent developments in Iran.

88. That risk cannot be sufficiently dispelled by the possibility that the applicant might be acquitted (see, *mutatis mutandis*, *Soering*, cited above, § 94). Nor is there anything to imply that, in the event of conviction, flogging would be outside the normal range of sentencing options available to the Iranian courts in the specific circumstances of his case (contrast *King v. the United Kingdom* (dec.), no. 9742/07, § 19, 26 January 2010, and *López Elorza*, cited above, §§ 112-16), that as an alien he would be treated more leniently, or that, once imposed, such a sentence would not be carried out. The Iranian authorities apparently do not systematically provide information on the imposition and implementation of flogging sentences (see paragraph 50 above). For their part, the Government, which were in the circumstances best placed to obtain information on these matters from the Iranian authorities, have not put before the Court any material showing how the criminal proceedings against the applicant would be likely to unfold – for instance information about the course of the proceedings against his alleged accomplice (contrast *López Elorza*, cited above, § 115) –, or material indicating what factors would guide the Iranian courts' choice of sentence in the event of conviction (contrast *Soering*, cited above, § 97, and *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, §§ 133-34, ECHR 2010).

89. The last point for consideration is whether the risk of flogging could be obviated by way of assurances from the Iranian authorities.

90. Those authorities included in their extradition request an assurance, couched in general stereotyped terms, that the applicant would not be subjected to torture or inhuman treatment (see paragraph 16 above). This assurance cannot be regarded as sufficient, for at least two reasons. First, the extradition request omitted to specify that Article 656 § 4 of the Iranian Penal Code envisaged not only imprisonment but also flogging as a type of punishment. This raises profound misgivings about the Iranian authorities' trustworthiness in this matter. Secondly, it appears that those authorities do not regard flogging and other forms of corporal punishment as inhuman or degrading. Indeed, they recently publicly stated that they considered

flogging as a legitimate form of punishment which has been "interpreted wrongfully, by the West, as ... degrading" (see paragraph 47 above). The exact tenor of their assurance in that respect is thus quite uncertain.

91. These points also tend to cast doubt on whether further assurances by the Iranian authorities would sufficiently ward off the risk that the applicant would suffer punishment contrary to Article 3 of the Convention if extradited to Iran.

92. Another factor raising doubts in relation to that risk is that Iran apparently regards flogging and other forms of corporal punishment as relating to an important aspect of its sovereignty and legal tradition. Indeed, it is one of the few States which have not even signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; it has consistently declined to do so (see paragraphs 55 and 56 above). It has also expressly refused to follow recommendations to remove corporal punishments from its Penal Code (see paragraphs 57 and 58 above). This shows that the Iranian authorities are still fully intent on resorting to such punishments, even in the face of strong international pressure.

93. There is, moreover, nothing to suggest that compliance with any assurances in that respect could be effectively verified (compare with *Gayratbek Saliyev v. Russia*, no. 39093/13, § 66, 17 April 2014, and contrast *Othman (Abu Qatada)*, cited above, §§ 203-04). There is no evidence that the Bulgarian diplomatic services have already cooperated with the Iranian authorities in relation to such matters (see *M.G. v. Bulgaria*, cited above, § 94 *in fine*, and contrast *Burga Ortiz v. Germany* (dec.), no. 1101/04, 16 October 2006). More importantly, assurances against torture by a State in which it is endemic or persistent should as a rule be approached with caution (see, among other authorities, *Ismoilov and Others v. Russia*, no. 2947/06, § 127, 24 April 2008; *Yuldashev v. Russia*, no. 1248/09, § 85, 8 July 2010; and *Rustamov v. Russia*, no. 11209/10, § 131, 3 July 2012).

94. It follows that the decision to extradite the applicant to Iran would, if implemented, give rise to a breach of Article 3 of the Convention owing to the possible punishment that awaits him there.

95. In view of this conclusion, it is not necessary to examine whether the conditions of the applicant's possible detention in Iran or the prospect of his being ill-treated in detention there would also give rise to an issue under Article 3 of the Convention (see *Rafaa v. France*, no. 25393/10, § 44, 30 May 2013). Nor is it necessary to rule on the admissibility and merits of his complaints that if extradited to Iran, he would risk a flagrant denial of justice and suffer discrimination owing to his being a Christian.

II. ALLEGED UNFAIRNESS OF THE EXTRADITION PROCEEDINGS

96. The applicant complained that the extradition proceedings had been unfair, in breach of Article 6 of the Convention.

97. According to the Court's case-law, extradition proceedings do not involve the determination of the civil rights and obligations of the person concerned or of a criminal charge against him or her within the meaning of Article 6 § 1 of the Convention (see, among other authorities, *Mamatkulov and Askarov*, §§ 81-82, and *Trabelsi*, § 160, both cited above).

98. This complaint is therefore incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a), and must be rejected in accordance with Article 35 § 4.

III. RULE 39 OF THE RULES OF COURT

99. In accordance with Article 44 § 2 of the Convention, this judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after its date, if referral of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer the case under Article 43 of the Convention.

100. The indication that the Court made under Rule 39 of the Rules of Court (see paragraph 4 above) must therefore remain in force until this judgment becomes final or until the Court takes a further decision on this matter.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

101. 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

102. The applicant sought 20,000 euros (EUR) in respect of non-pecuniary damage for the mental anguish that he has suffered while detained and awaiting his possible extradition to Iran, and the deterioration of his health while in the custody of the Bulgarian authorities.

103. The Government were of the view that the claim was exorbitant and that the finding of a breach would amount to sufficient just satisfaction.

104. The Court finds that in this case an award of just satisfaction can only be based on the breach of Article 3 of the Convention relating to the

applicant's potential extradition to Iran. There is no causal link between this prospective violation and the alleged distress and health problems suffered by him during his detention pending extradition.

105. Since the Bulgarian authorities have complied with the interim measure indicated by the Court (see paragraph 4 above) and refrained from putting into effect the decision to extradite the applicant until the conclusion of these proceedings, no breach of Article 3 has yet occurred. In these circumstances, the Court's finding that the decision to extradite the applicant to Iran would, if implemented, give rise to a breach of that Article amounts to sufficient just satisfaction (see, among other authorities, *Soering*, § 127; *M.G. v. Bulgaria*, § 102; and *Umirov*, § 160, all cited above).

B. Costs and expenses

1. The applicant's claim and the Government's comments on it

106. The applicant sought reimbursement of EUR 4,600, said to have been incurred in counsel's fees, and EUR 1,760 allegedly spent on translation services and postage. He specified that those sums had been paid by his family and friends. In support of the claim, he submitted a number of documents (fee agreements, bank documents, invoices and so on) showing that various third parties had paid sums to his lawyers and various translators, and for postage.

107. The Government submitted that the claim in respect of lawyers' fees had not been properly substantiated and was in any event exorbitant. They pointed out that the fee agreements submitted by the applicant had been made by another person rather than the applicant, and that those agreements had been made only with his first representative, Mr S. Manelidze, who had not signed the observations submitted on behalf of the applicant. Moreover, the first fee agreement referred only to the extradition proceedings, in which Mr Manelidze had not taken part. Also, the sums mentioned in the two agreements amounted in total to 10,722 Georgian Lari, which equalled EUR 3,496 rather than the EUR 4,600 claimed by the applicant. For its part, a payment order by yet another third person to the applicant's counsel in the extradition proceedings in Bulgaria did not show that the applicant had himself paid any sums in relation to those proceedings.

108. The Government went on to say that the documents in support of the applicant's claim in respect of translation expenses did not show that the sums had been spent for translations relating to this case, and that they likewise showed that the sums had been paid by others rather than the applicant. There was no indication that the remaining payment documents had anything to do with the case either.

2. The Court's assessment

109. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see, as a recent authority, *Merabishvili v. Georgia* [GC], no. 72508/13, § 370, 28 November 2017).

110. In this case, the applicant did not assert or submit any documents showing that he had himself paid or was under a legal obligation to pay any of the sums for which he sought reimbursement. It appears that all items of expenditure in respect of which he submitted supporting documents had been settled by third parties. His exact relationship with those third parties is unclear, and there is nothing to suggest that he is legally bound to reimburse any of those sums. The Court is therefore not satisfied that the expenses were actually incurred by him (see, *mutatis mutandis*, *Öztürk v. Germany* (Article 50), 23 October 1984, § 8, Series A no. 85, and *Metodiev and Others v. Bulgaria*, no. 58088/08, § 59, 15 June 2017).

111. It follows that the applicant's claim in respect of costs and expenses must be rejected in full.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning the risk of the applicant's being subjected to punishment contrary to Article 3 of the Convention if extradited to Iran admissible, and the complaint concerning the alleged unfairness of the extradition proceedings against him inadmissible;

2. *Holds* that if the decision to extradite the applicant to Iran is implemented, there would be a breach of Article 3 of the Convention owing to the possible punishment that awaits him there;

3. *Holds* that it is not necessary to examine whether the applicant's extradition to Iran would give rise to other issues under Article 3 of the Convention, or to rule on the admissibility and merits of his complaints that if extradited to Iran he would risk a flagrant denial of justice and discrimination;

4. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to extradite the applicant until such time as this judgment becomes final or until further order;

5. *Holds* that the finding of a potential breach of Article 3 of the Convention constitutes in itself sufficient just satisfaction;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 4 April 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Angelika Nußberger
President