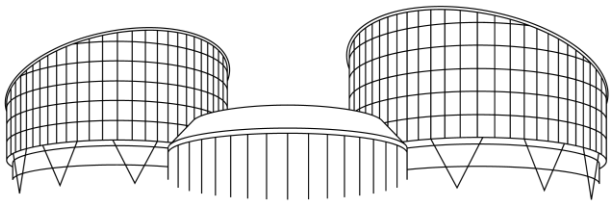

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF DIALLO v. THE CZECH REPUBLIC

(Application no. 20493/07)

JUDGMENT
(Merits)

STRASBOURG

23 June 2011

FINAL

28/11/2011

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

In the case of Diallo v. the Czech Republic,

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

Dean Spielmann, *President,*
Karel Jungwiert,
Boštjan M. Zupančič,
Mark Villiger,
Isabelle Berro-Lefèvre,
Ann Power,
Angelika Nußberger, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 31 May 2011,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 20493/07) 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 two Guinean nationals, Mr Ibrahima Diallo ("the first applicant") and Mr Mamadou Dian Diallo ("the second applicant"), on 15 May 2007.

2. The applicants were represented by Mr J. Větrovský, a lawyer with *Asociace pro právní otázky migrace*, a non-governmental organisation based in Prague. The Czech Government ("the Government") were represented by their Agent, Mr V. A. Schorm, of the Ministry of Justice.

3. On 19 May 2010 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Mr Ibrahima Diallo ("the first applicant")

4. On 8 November 2006 the first applicant arrived at Prague airport by plane from Dakar (Senegal), having transferred in Lisbon. Immediately after his arrival, he applied for asylum. For the whole period of his stay in the Czech Republic, he was held at the reception centre for asylum seekers at Prague airport.

1. Asylum proceedings

5. In his application for asylum he submitted that in Guinea he had participated in a teacher's strike and that subsequently police had come looking for him at home so he had had to flee. He feared that if returned to Guinea, he would be detained or even murdered. In a subsequent interview he specified that he had fled Guinea with the help of an employee of UNICEF, who also secured the assistance of a policeman.

6. On 15 November 2006 the Department for Asylum and Migration Policy of the Ministry of the Interior (*odbor azylové a migrační politiky ministerstva vnitra*) dismissed his asylum application as manifestly unjustified (*zjevně nedůvodná*) under section 16(1)(e) of the Asylum Act without examining its merits, stating that the first applicant had arrived from Portugal, which was considered a safe third country.

7. The first applicant applied for judicial review which, however, in cases rejected under section 16(1)(e) of the Asylum Act, did not have a suspensive effect. On 19 April 2007 he requested that those proceedings be terminated, which the Prague Municipal Court (*městský soud*) did on 31 May 2007.

2. Expulsion proceedings

8. On 23 November 2006 the Prague-Ruzyně Aliens and Customs Police Service (*referát cizinecké a pohraniční policie*) ordered the first applicant to leave the country by 2 December 2006. As the applicant did not comply with the order, the Police Service instituted administrative expulsion proceedings against him.

9. In the context of those proceedings the Police Service interviewed the first applicant on 3 December 2006. He reiterated that he could not return to his home country because he could be killed or injured there and would most likely be imprisoned. He submitted that he had been one of the

initiators of a student demonstration in which several participants were killed. The Police Service also requested, as required by law, an opinion of the Ministry of the Interior as to whether there were any obstacles to the applicant's removal. On 4 December 2006 the Ministry replied in the negative, stating that the first applicant was facing expulsion to Portugal, which was a safe country.

10. On 4 December 2006 the Aliens and Customs Police Service issued an administrative expulsion order (*správní vyhoštění*) ordering the first applicant to leave the country within twenty days and prohibiting him from entering the Czech Republic for six months. It held that the first applicant had stayed in the Czech Republic without a valid visa after his asylum request had been rejected.

11. On 28 February 2007 the Prague Aliens and Customs Police Directorate (*ředitelství služby cizinecké a pohraniční policie*) rejected the first applicant's appeal, upholding the reasoning of the Aliens and Customs Police Service. The first applicant received this decision on 13 March 2007.

12. On 15 May 2007 at about 4 a.m. and without prior notice, the first applicant was removed from the Czech Republic to Guinea by plane via Brussels. Later on, while the first applicant was in police custody in Guinea, his lawyer managed to contact him by telephone, but he refused to provide any information about his treatment in detention.

13. The first applicant is currently living in Saudi Arabia.

B. Mr Mamadou Dian Diallo ("the second applicant")

14. On 11 October 2006 the second applicant arrived at Prague airport by plane from Dakar (Senegal) with a transfer in Lisbon. He was denied permission to board a plane to Dubai and, subsequently, applied for asylum. During his stay in the Czech Republic, the applicant was held at both the reception centre for asylum seekers at Prague airport and the detention centre in Velké Přílepy.

1. Asylum proceedings

15. In his application for asylum he submitted that his father had been an active member of an opposition political party, Union for the New Republic, and had been detained and killed in 2000. After the death of his father, the applicant had created the Union for the Employment of Youth and became its president. He had continued to have contact with members of the opposition and his association had supported the trade unions. In 2006 a conflict began between the Government and trade unions and the Guinean Police had started looking for him.

16. On 15 October 2006 the Department for Asylum and Migration Policy of the Ministry of the Interior dismissed the second applicant's asylum request under section 16(1)(e) of the Asylum Act without examining

its merits, holding that the second applicant had arrived from Portugal, a safe third country.

17. The second applicant applied for judicial review and requested a suspension of the legal force of the administrative decision. He argued that according to the European Union Dublin Regulation, it was the Czech Republic that should process his request for asylum and not Portugal. Consequently, the Ministry should have considered the merits of his application.

18. On 15 March 2007 the Prague Regional Court (*krajský soud*) upheld the administrative decision not to grant the second applicant asylum. It agreed with the reasoning that the second applicant had arrived from Portugal, which is a safe third country, and that he should have asked for asylum there. The court did not deal with the second applicant's request for suspension of the legal force of the decision. The judgment was served on the second applicant on 10 May 2007. Having been removed from the Czech Republic before the expiration of the statutory time-limit, he did not appeal on points of law.

2. Expulsion proceedings

19. On 22 November 2006 the Prague-Ruzyně Aliens and Customs Police Service ordered the second applicant to leave the country by 1 December 2006. As the second applicant did not comply with the order, the Police instituted administrative expulsion proceedings against him.

20. In the context of those proceedings the Police Service held an interview with the second applicant on 3 December 2006 in which he reiterated his fears of returning to Guinea. It also requested, as required by law, an opinion of the Ministry of the Interior whether there were any obstacles to the second applicant's expulsion. On 4 December 2006 the Ministry replied in the negative, stating that the second applicant was facing expulsion to Portugal, which was a safe country.

21. On 4 December 2006 the Aliens and Customs Police Service issued an expulsion order against the second applicant prohibiting him from entering the Czech Republic for six months and ordering him to leave the country within twenty days. It held that the applicant had stayed in the country without a valid visa.

22. On 2 March 2007 the Prague Aliens and Customs Police Directorate rejected the second applicant's appeal, sharing the opinion of the Aliens and Customs Police Service. The second applicant was notified on 13 March 2007.

23. On 15 May 2007 at about 4 a.m. and without prior notice, he was removed from the Czech Republic to Guinea by plane via Brussels. His lawyer was not informed about the removal beforehand and has not managed to reach the second applicant since then.

24. On 30 November 2006 the second applicant had signed a power of attorney for Mr J. Větrovský, who is representing him in the proceedings before the Court, authorising him to take any legal action relating to his expulsion, including preventing the expulsion, and to make any claims arising from the situation, including, if necessary, representing him before the courts.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Asylum Act (no. 325/1999) (as in force at the relevant time)

25. Under section 16(1)(e) an application for asylum had to be rejected as manifestly unjustified if the applicant arrived from a country which the Czech Republic considered to be a safe third country or a safe country of origin, unless it was proven that in a particular case this country could not be deemed to be safe.

26. Section 32 stipulated:

> "1. an action against the decision of the Ministry concerning asylum shall be filed within 15 days of the serving of the decision.
>
> 2. Within seven days of the serving of the decision, an action may be filed against the decision on asylum
>
> a) which rejects the application as manifestly unjustified, ...
>
> 3. The filing of an action under subsections 1 and 2 has a suspensive effect, except in the case of an action against termination of the proceedings pursuant to section 25 or an action against a decision under section 16(1)(e) and (f).
>
> (4) The proceedings on an action fall within the jurisdiction of the regional court ...
>
> (5) The lodging of an appeal on points of law against the decision of the regional court on the action against the decision made by the Ministry in the matter of asylum pursuant to subsections (1) and (2) shall have a suspensive effect."

B. Aliens' Residence in the Czech Republic Act (no. 326/1999)

27. Under section 120a(1) the police, within the framework of making a decision on administrative expulsion pursuant to section 119 or section 120, are obliged to request from the Ministry of the Interior a binding opinion as to whether the alien's departure is possible (section 179). Under subsection (3) the Ministry will issue its binding opinion without delay.

28. Section 171(c) ruled out judicial review of a decision on administrative expulsion if prior to the proceedings on expulsion the alien

had been staying in the territory unlawfully. This provision was repealed by the Constitutional Court as unconstitutional in its judgment of 9 December 2008 (Pl. ÚS 26/07).

29. Section 179 regulates obstacles to an alien departing from the territory of the Czech Republic:

> (1) An alien's departure shall not be permitted if there is reason to believe that, if returned to the state of which he is a citizen, or, in the case of a stateless individual, to the state in which he last held permanent residence, he would be in real danger of serious harm as defined in subsection (2) below and that, due to this danger, he is either unable or unwilling to accept protection from the state of which he is a citizen or in which he last held permanent residence.
>
> (2) For the purposes of this Act, serious harm is understood to be:
>
> a) the imposition or execution of a death penalty;
>
> b) torture, or inhuman or degrading treatment or punishment;
>
> c) serious threat to life or human dignity due to unwarranted violence in situations of international or internal armed conflict; or
>
> d) if the alien's departure would be in conflict with the Czech Republic's international obligations.

III. RELEVANT REPORTS PERTAINING TO THE SITUATION IN GUINEA

30. The Court has described the situation in Guinea in *M.A.D. v. France* (dec.), no. 50284/07, 12 October 2010. The following documents pertain to the situation there at the time relevant for the present application.

A. Documents drawn up in the context of the Universal Periodic Review by the United Nations Human Rights Council

1. *Compilation prepared by the United Nations Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 (A/HRC/WG.6/8/GIN/2), 19 February 2010*

> "19. On 13 June 2006, the Secretary-General stated that he was deeply concerned by the killings of approximately 10 students during the demonstrations on 12 June 2006. He underlined the need for the non-violent resolution of disputes and called on the authorities to exercise restraint.
>
> 20. On 22 January 2007, the Secretary-General stated that he was gravely concerned at the excessive use of force resulting in the loss of life in clashes in Guinea. He

strongly urged the Government to carry out investigations into the killings with a view to bringing those responsible to justice, and to take the necessary measures to ensure the safety of all citizens throughout the country. He urged the parties to engage in dialogue in order to find a peaceful resolution to the dispute.

21. On 13 February 2007, the High Commissioner for Human Rights condemned the reported killing of civilians in Guinea days before, and recalled that fundamental human rights cannot be curtailed even in a state of emergency. The same day, the Secretary-General reiterated his grave concern over the worsening political and security situation in Guinea, and stated that he deplored the continued loss of lives and the wanton destruction of property. He urged the Government and the security forces to exercise maximum restraint and to scrupulously uphold the rule of law and respect for human rights, and he urged the labour leaders to refrain from inciting violence and the destruction of property.

...

40. In January 2007, the Special Rapporteurs on the right to freedom of opinion and expression and on the question of torture drew the Government's attention to the general strike, which began on 10 January 2007 in Conakry, in protest against the Government and its management of the country. During the strike four persons were killed, many were injured and at least 60 were arrested."

2. Report of the Working Group on the Universal Periodic Review, A/HRC/15/4, 14 June 2010

31. During the discussion in the Human Rights Council, the Guinean Government admitted that "a lack of political will has affected the implementation of national and international legislation on human rights. That deficiency has led to serious and massive human rights violations by successive Governments. Denunciations and complaints, linked to political instability and lack of security, have resulted in massive uprisings and general disputes. ... Human rights violations, which commenced in June 2006, have continued up to September 2009."

B. US Department of State Human Rights Reports on Guinea

32. In 2006 and 2007 the US State Department Country Reports on Human Rights Practices reported serious human rights abuses in Guinea including killings and ill-treatment of student demonstrators by security forces, arbitrary arrests and intimidation of citizens during general strikes and inhuman and life-threatening prison conditions. The reports also noted instances when persons suspected of inciting violence during the general strike were detained for a few days and after release without any charges were repeatedly harassed by security officers and threatened in anonymous phone calls.

33. At the same time the reports noted that political detentions rarely exceeded a few days and those persons were generally extended more

protection than other detainees due to the NGO and media attention their cases attracted.

C. Amnesty International Reports on Guinea

34. According to Amnesty International's 2008 annual report Guinean security forces used excessive force against demonstrators, arbitrary detention and killings by security forces were reported and torture and other ill-treatment of protesters and detainees were widespread in 2007:

> "Against the background of a serious economic crisis, Guinea's two principal trade unions, supported by the main opposition parties, called a general strike in January 2007. ... President Lansana Conté ... attempted to suppress the movement by force. Throughout January, at the beginning of the movement, members of the security forces shot at peaceful demonstrators, killing dozens of people and injuring others. Despite this use of force and the arrest of some civil society leaders and trade unionists, the general strike continued and in late January the trade unions demanded the appointment of a consensus government.
>
> In February ..., clashes between the demonstrators and the security forces increased and a state of emergency was declared on 12 February. ...
>
> In May, members of the armed forces took to the streets in the capital, Conakry, and other towns, demonstrating and firing into the air. At least 13 people were killed and others were injured by stray bullets.
>
> ...
>
> An Independent Commission of Inquiry was established in May 'charged with conducting investigations into grave human rights violations and offences committed during the strikes of June 2006 and January and February 2007'. Dozens of people, including demonstrators and employees of a private radio station, were arrested for short periods of time by the security forces during the general strike. Some were tortured in custody."

35. Amnesty International also reported on a particular case of a member of the Union of the Guinean Youth who was arrested twice in February 2007: "He was beaten with rifle butts and police officers walked on him and kicked him in the chest while he was handcuffed with both arms behind his back. Officers tied both his elbows behind his back and inserted a baton between his arms, pulling on it at regular intervals to increase the pain."

D. Human Rights Watch Reports on Guinea

36. In its August 2006 report "The Perverse Side of Things" Human Rights Watch documented cases of serious torture in detention facilities and reported that "Security forces and other government officials in Guinea routinely violate some of the most basic civil and political rights, including the inherent right to life, freedom from torture, freedom of expression,

freedom of assembly, and the right to a trial within a reasonable period. These violations are committed against individuals accused of common crimes as well as those persons security forces perceive to be government opponents."

37. In a note released on 15 February 2007 "Security Forces Abuse Population Under Martial Law" it reported that Guinean security forces were using martial law declared on 12 February 2007 as an excuse to terrorize ordinary Guineans and, under the guise of re-establishing law and order, were acting like common criminals, beating, robbing and brutalizing the population they were supposed to protect.

THE LAW

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

38. The applicants complained that they had no effective remedy for their arguable claim under Article 3 of the Convention that they would be ill-treated if returned to Guinea. They relied on Article 13 of the Convention, which reads as follows:

> "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."

39. The Government disputed the applicants' assertions.

A. Admissibility

1. *Incompatibility* ratione personae *and motion to strike out the application regarding the second applicant*

40. The Government objected that the second applicant had not submitted a power of attorney for the representative that had lodged the present application on his behalf which, consequently, had to be declared inadmissible as incompatible *ratione personae*. Alternatively, they maintained that since the applicant had not contacted his counsel at any time after his expulsion, he must be deemed to have lost interest in pursuing his application, which thus had to be struck out of the list of cases under Article 37 § 1 (a) or (c) of the Convention.

41. The second applicant's counsel maintained that he had only lost contact with his client due to his unlawful expulsion to Guinea, of which he

had at no point been informed, having learned of it only later from another person who had been detained with the second applicant. He admitted that despite his continuous attempts he had so far not been able to re-establish contact with the second applicant, but that this was most probably due to the fact that he was in hiding. According to information provided by the first applicant, who is, however, not in direct contact with the second applicant either, the latter is currently somewhere in Sierra Leone. Nevertheless, the representative argued that he had submitted a general power of attorney duly signed by the second applicant which, in the circumstances of the present case, should be deemed sufficient.

42. With reference to Rules 36 and 45 of the Rules of Court, the Court observes that the application form was signed by the second applicant's lawyer. The form was accompanied by a power of attorney signed by the second applicant, authorising his lawyer to act on his behalf and to represent him before any court in relation with his expulsion from the Czech Republic, including preventing the expulsion, and to make any claims arising from the situation. It notes that this power of attorney was not withdrawn (see, *a contrario*, *K.M. and Others v. Russia* (dec.), no. 46086/07, 29 April 2010).

43. In these circumstances the Court considers that the applicant has sufficiently demonstrated that he wished Mr J. Větrovský to make an application to the Court on his behalf (see *Ivan Kuzmin v. Russia*, no. 30271/03, § 49, 25 November 2010). Accordingly, it holds that the application cannot be rejected as incompatible *ratione personae* pursuant to Article 35 §§ 3 and 4 of the Convention and dismisses the Government's objection.

44. Regarding the related and alternative objection of the Government, that is, that the application should be struck out of the list of cases, the Court observes that the inability of the lawyer to contact his client is a direct consequence of the State's action in expelling the latter to Guinea without any prior notice to that effect. The present case is thus materially different from all the cases referred to by the Government in which the lawyer lost all contact with the applicant but not due to any act of the State (see *Ali v. Switzerland*, 5 August 1998, *Reports* 1998-V; *Chirino v. the Netherlands* (dec.), no. 31898/04, 4 May 2006; *Noor Mohammed v. the Netherlands* (dec.), no. 14029/04, 27 March 2008; and *Ramzy v. the Netherlands* (striking out), no. 25424/05, 20 July 2010).

45. The Court further notes that the present case is different from those cases referred to by the Government where there was either no power of attorney (see *Nehru v. the Netherlands* (dec.), no. 52676/99, 27 August 2002), or the validity of which was questioned (see *Hussun and Others v. Italy* (striking out), nos. 10171/05, 10601/05, 11593/05 and 17165/05, § 46, 19 January 2010).

46. The Court also considers that the situation of the second applicant is akin to that of the applicants in *Shamayev and Others v. Georgia and Russia*, § 312, no. 36378/02, ECHR 2005-III, where the applicants' lawyers were unable to re-establish contact with their clients because of acts of the respondent Governments. In that case, the Court stressed that those circumstances could not be attributable to the applicants.

47. In the present case the Court considers that it is similarly no fault of the second applicant that he was deported to Guinea at 4 a.m. without any prior notice either to him or his lawyer and, as a consequence, the lawyer lost all contact with him. The Court considers that it would be artificial and speculative to presume that the applicant does not intend to pursue his application, as envisaged by Article 37 § 1 (a) of the Convention.

48. Accordingly, in the special circumstances of the present case, where the inability of the lawyer to contact the second applicant was a consequence of the latter's deportation by the State, the Court dismisses the Government's objection.

2. Non-exhaustion of domestic remedies

49. The Government further maintained that the applicants had not made use of any remedies regarding their complaint that their right under Article 13 of the Convention had been violated. They held that a distinction must be made between a remedy within the meaning of this provision, taken together with Article 3 of the Convention, that is, proceedings in which the applicants can raise their claim of the risk of a violation of Article 3 of the Convention on the one hand, and proceedings in which it is possible to remedy a violation of Article 13 of the Convention on the other hand. Given that the applicants only allege a violation of Article 13 of the Convention, they should have exhausted the latter remedies.

50. According to the Government, if an applicant claims that there has been a violation of Article 13 of the Convention due to the absence of effective proceedings in which claims of a violation of Article 3 of the Convention would be reviewed, he is obliged, in accordance with the principle of subsidiarity, to raise a claim about the non-existence of an effective remedy before the domestic authorities, provided such a possibility exists. The purpose of such proceedings would not be to remedy the alleged violation of Article 3 of the Convention but only to make right the alleged violation of Article 13 of the Convention.

51. They submitted that in this respect the applicants should have requested judicial review of the administrative decisions on expulsion and eventually lodged a constitutional appeal.

52. The applicants disagreed, arguing that the question of non-exhaustion of remedies under Article 13 of the Convention is inextricably linked to the merits of the complaint.

53. The Court reiterates that under Article 35 § 1 it may only deal with a matter after all domestic remedies have been exhausted. Applicants must have provided the domestic courts with the opportunity, in principle intended to be afforded to Contracting States, of preventing or putting right the violations alleged against them. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in the domestic system in respect of the alleged breach of an individual's Convention rights (see, among many other authorities, *McFarlane v. Ireland* [GC], no. 31333/06, § 107, ECHR 2010-... and *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI). Therefore, Article 13 of the Convention guarantees the existence of effective domestic remedies, which the applicants must normally exhaust under Article 35 § 1 of the Convention before lodging their application with the Court.

54. The only remedies which Article 35 § 1 requires to be exhausted are those that relate to the breach alleged and are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness: it falls to the respondent State to establish that these conditions are satisfied. As the Court has held on many occasions, 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 remedy required by Article 13 must be "effective" in practice as well as in law, in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred (see *McFarlane v. Ireland* [GC], cited above, §§ 107-108 and *Kudła v. Poland* [GC], cited above, §§ 157-158).

55. The close affinity between Article 13 of the Convention and the obligation to exhaust domestic remedies under Article 35 § 1 of the Convention means that if there are no effective domestic remedies that the applicants must exhaust, an issue under Article 13 arises and applicants can lodge a complaint under Article 13 in conjunction with another substantive provision of the Convention. Consequently, if the Court required exhaustion of domestic remedies regarding Article 13 complaints then Article 13 of the Convention would have to guarantee also effective remedies for alleged violations of Article 13 itself. In the view of the Court this interpretation is, however, ruled out by the fact that Article 13 is only ancillary to other "rights and freedoms as set forth" in the Convention and applies only in conjunction with a substantive right provided for in the Convention. It thus cannot be invoked independently or "in conjunction" with itself.

56. Moreover, any separate domestic remedies for Article 13 complaints do not necessarily need to be effective for the arguable claim under the provision of the Convention with which Article 13 is invoked. Applicants would thus be forced to exhaust domestic remedies that did not provide an effective remedy for their main claim. The Court considers that this would be against the object and purpose of Article 13, which is to guarantee provision of an effective remedy for arguable claims of breaches of the substantive provisions of the Convention. The question whether the remedies suggested as effective for Article 13 claims could also ultimately provide an effective remedy for the arguable claim under the other substantive provision of the Convention must be considered at the merits stage and not at the admissibility stage.

57. In the present case, the applicants complain that none of the domestic authorities reviewed the merits of their claim under Article 3 of the Convention. They thus made a complaint before the Court that they had no effective remedy under domestic law regarding their Article 3 claim that they would be subjected to ill-treatment if expelled to Guinea. Their Article 13 complaint is only auxiliary to the substantive matter and was made only when the applicants, in pursuing their claims under Article 3, considered that they had no effective remedy in that regard. The applicants' primary concern is a breach, or the prevention of a breach, of the substantive provision of the Convention in conjunction with which they made their Article 13 complaint. Whether their complaint is well-founded is a question to be considered at the merits stage.

58. In view of the above considerations, the Court finds that the remedies that need to be exhausted under Article 35 § 1 of the Convention relate to the substantive provision in conjunction with which Article 13 of the Convention is being invoked. Accordingly, the Court does not share the opinion of the Government that Article 35 § 1 of the Convention requires applicants alleging a violation of Article 13 of the Convention to exhaust any separate domestic remedies pertaining to that claim and thus dismisses this objection.

3. Arguable claim

59. The Government maintained that the applicants' claims of a violation of Article 3 of the Convention were not arguable. Consequently, in their view, the complaint under Article 13 had to be rejected as incompatible with the Convention *ratione materiae*.

60. The Court, however, considers that this objection is more appropriately considered as an objection on the ground that the complaint is manifestly ill-founded (see *Bolgov v. Russia* (dec.), no. 28780/03, 6 May 2010; *Svinarenkov v. Estonia* (dec.), no. 42551/98, 15 February 2000; or *McParland v. the United Kingdom* (dec.), no. 47898/99, 30 November 1999).

61. The applicants maintained that their claims that they would be ill-treated if expelled to Guinea were arguable given the general situation in that country. They also noted that since no domestic authority had reviewed their claims, the Government could not maintain that they were not arguable. In response to the objection of the Government on the ground that they had not challenged the binding opinions of the Ministry of the Interior that there had been no obstacle to them leaving the country, they held that there had been no reason to do so, since those opinions had only dealt with their possible expulsion to Portugal, which would not have been a problem.

62. Regarding the first applicant, the Government noted that he had been an ordinary participant in the teacher's strike and that there was no evidence that he faced an increased risk of persecution. They added that in his interview on the application for asylum he had noted that a policeman had assisted him in leaving the country, and thus his claim that he was sought by the police was, at the least, disputable. They also referred to reports of the US Department of State that even though participants in the strikes and demonstrations were the target of police violence they were kept in custody for short periods and those arrested for political reasons were treated better than "ordinary" prisoners and presumably were therefore not subjected to treatment contrary to Article 3 of the Convention. In any case the available reports did not indicate that the participants in the strikes and demonstrations were continuously persecuted and that the first applicant faced, several months after the strike, a risk of ill-treatment within the meaning of Article 3 of the Convention. Lastly, the Government noted that in his appeal against the decision on administrative expulsion, the first applicant had not challenged in any way the binding opinion of the Ministry of the Interior that there was no obstacle to his leaving the country, which cast doubts on the reality and depth of his fears of possible ill-treatment in the Republic of Guinea.

63. Regarding the second applicant, the Government admitted that as the president of an association that apparently had a political focus, he could have faced a more serious risk than the first applicant. Nevertheless, they believed that it had been an association of secondary school students, and the information provided by the second applicant had not indicated that the ruling regime ascribed any particular importance to this association, or indeed that it had been involved in any political activity. As in the case of the first applicant, the Government stressed that in his appeal against the decision on administrative expulsion the second applicant had not challenged in any way the binding opinion of the Ministry of the Interior that there was no obstacle to his leaving the country. Moreover, in the asylum proceedings before the court, he did not raise the claim that he would risk ill-treatment if returned to the Republic of Guinea.

64. The Court reiterates that "arguable" does not mean that the substantive right must have been violated (see *Leander v. Sweden*,

26 March 1987, § 79, Series A no. 116). "Arguability" must be determined in the light of the particular facts and the nature of the legal issue or issues raised (*Boyle and Rice v. the United Kingdom*, 27 April 1988, § 55, Series A no. 131).

65. In *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 340 in conjunction with § 445, ECHR 2005-III the Court considered that the applicants' legitimate fear, when in view of the situation in the target country, of being confronted with a threat to their lives or treatment contrary to Article 3 of the Convention, was subjectively well-founded and genuinely perceived as such, and that their claim for the purpose of Article 13 of the Convention was thus arguable.

66. In determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to Article 3 exists, the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu*. Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the extradition (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 69, ECHR 2005-I).

67. Examining the facts of the present case, the Court takes account of the various reports that documented serious human rights violations in Guinea at the relevant time, that is, 2006 and 2007. The reports contain information about the use of excessive force, occasionally resulting in deaths, against demonstrators and participants in strikes, the arbitrary arrest and persecution of such individuals and inhuman conditions of detention.

68. The Government relied on the information from the US Department of State Reports that persons arrested for political reasons were treated better than "ordinary" prisoners and presumably were therefore not subjected to treatment contrary to Article 3 of the Convention. The Court is however of the opinion that better treatment does not necessarily mean treatment in compliance with Article 3 of the Convention. At the same time it notes other reports that torture and other ill-treatment of protesters and detainees was widespread at that time. It also notes the admission of the Guinean Government in 2010 before the UN Human Rights Council that "serious and massive" human rights violations were committed between June 2006 and September 2009.

69. Regarding the individual circumstances of the applicants, the Court notes that according to their statements the first applicant participated in demonstrations and strikes against the Government and was sought by the police. The second applicant was the president of a student youth association, which supported the trade unions in their struggle against the government. He was also sought by the police. The Court notes that these

statements have not at any time been disputed by the domestic authorities or found to be untrue.

70. The Court reiterates that an arguable claim does not entail certainty. Given the available information on the human rights situation in Guinea 2006 and 2007 and the personal circumstances of the applicants the Court considers that their fears were subjectively well-founded and genuinely perceived as such. Accordingly, the claims of the applicants under Article 3 of the Convention must be considered arguable for the purposes of Article 13 of the Convention.

71. 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. Observations of the parties

72. The applicants complained that none of the domestic authorities had reviewed the merits of their claim that they faced treatment contrary to Article 3 of the Convention in their country of origin. At the same time the requests for judicial review of the decisions not to grant them asylum had had no automatic suspensive effect. Replying to an objection of the Government on the ground that he had withdrawn his request for a judicial review in the asylum proceedings, the first applicant stated that this had been due to the fact that he had already been held at the airport for a long time and he intended to lodge a new asylum application by which he hoped to be released from the airport reception centre. However, he had not been able to do so while his original application had been pending.

73. The Government maintained that the applicants could have obtained a review of their claims in the asylum proceedings and that while lodging the request for a judicial review they could have asked that the legal force of the decisions be suspended. They held that the first applicant had withdrawn his action and that a judgment had been delivered prior to the expulsion of the second applicant. They also maintained that the applicants should have requested judicial review of the administrative expulsion decisions, notwithstanding that it had been ruled out by law at that time, and ultimately should have lodged constitutional appeals, which would have been successful as evidenced by the judgment of the Constitutional Court of 9 December 2008.

2. The Court's assessment

74. The Court reiterates that in the circumstances of extradition or expulsion and a claim in conjunction with Article 3 of the Convention,

given the irreversible nature of the harm which might occur if the alleged risk of torture or ill-treatment materialised, and the importance which the Court attaches to Article 3, 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 was 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 *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 387, 21 January 2011; *Baysakov and Others v. Ukraine*, no. 54131/08, § 71, 18 February 2010; and *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 66, ECHR 2007-V).

75. Turning to the present case, the Court notes that the applicants were parties to two sets of proceedings in which their claim that there was a real risk of ill-treatment in their country of origin could have been examined, namely, the asylum proceedings and the administrative expulsion proceedings.

76. Regarding the asylum proceedings, the Court notes that their asylum applications were rejected by the Ministry of the Interior without a consideration on the merits, on the ground that they had arrived from Portugal, which was considered a safe third country. In this context the applicants argued that under the European Union Dublin Regulation it was the Czech Republic and not Portugal which should have examined their asylum request. It is, however, not the Court's task to interpret European Union law or domestic law; it suffices to note that the applicants were not eventually expelled to Portugal but to their country of origin.

77. The Court observes that the applicants' claims that there was a real risk of ill-treatment in their country of origin were not subjected to close and rigorous scrutiny by the Ministry of the Interior as required by the Convention, or in fact to any scrutiny at all. At the same time, their requests for judicial review did not have an automatic suspensive effect because their asylum requests had been considered manifestly unjustified. A constitutional appeal would not have had an automatic suspensive effect either.

78. Given the lack of automatic suspensive effect as required by Article 13 of the Convention, the first applicant cannot be faulted for not having properly exhausted the judicial review proceedings as suggested by the Government (see *M.S.S. v. Belgium and Greece* [GC], cited above, § 396).

79. Regarding the second applicant, the Court notes that unlike the first applicant the domestic court had reviewed his request for judicial review before he was expelled. However, not even the Regional Court subjected his arguable claim under Article 3 of the Convention to careful scrutiny but only confirmed the decision of the Ministry that his claim was manifestly unjustified because Portugal was a safe third country.

80. In these circumstances, the Court considers that the asylum proceedings did not provide the applicants with an effective domestic remedy within the meaning of Article 13 of the Convention.

81. Regarding the administrative expulsion proceedings, the Court similarly notes that none of the authorities examined the merits of the applicants' arguable claim under Article 3 of the Convention. In particular, the conclusions of the compulsory opinions of the Ministry of the Interior that there were no hindrances to the applicants' expulsion were explicitly based on the assumption that the applicants were liable to be expelled to Portugal only.

82. The Court observes that a judicial review of the administrative decisions in these proceedings was explicitly ruled out by a provision of the Aliens Act valid at that time. Yet, the Government argued that the applicants should have, nevertheless, challenged that domestic provision before the Constitutional Court.

83. The Court notes, however, that in the content of such proceedings the Constitutional Court would not have reviewed the merits of the applicants' arguable claims under Article 3 of the Convention but would have dealt only with the question of conformity of the particular provision of the Aliens Act with the Constitution. Moreover, such proceedings would not have had an automatic suspensive effect on the applicants' expulsion, and they would have been liable to deportation at any time. Consequently, the Court does not consider that lodging a request for judicial review of the decision on administrative expulsion and a subsequent constitutional appeal would have been an effective remedy in the present case.

84. Regarding the possibility of a direct constitutional appeal claiming a violation of Article 3 of the Convention as suggested by the Government, the Court likewise notes that it would not have an automatic suspensive effect and thus does not satisfy the requirements of Article 13 of the Convention in the present context.

85. Accordingly, none of the domestic authorities examined the merits of the applicants' arguable claim under Article 3 of the Convention and there were no remedies with automatic suspensive effect available to the applicants regarding the authorities' decision not to grant them asylum and to expel them. In view of the foregoing, the Court finds that there has been a violation of Article 13 of the Convention taken in conjunction with Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

86. The applicants further complained that by deporting them without prior notice the State had denied them an effective right of individual application to the Court in that they could not request an interim measure. They relied on Article 34 of the Convention, which reads:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

87. The Court firstly observes that in the present case the applicants complained that their rights under Article 13 in conjunction with Article 3 of the Convention were violated. They did not allege a violation of Article 3 of the Convention itself, in which case it might have been appropriate to request an interim measure. Consequently, the fact that they could not ask for an interim measure to stay their expulsion under Article 3 of the Convention does not raise an issue in the present case.

88. Regarding their claim under Article 13 of the Convention, the Court does not consider that the applicants' expulsion has any bearing on it. The subject matter of that complaint is the lack of an effective domestic remedy regarding expulsion and not the expulsion itself. They were able to duly submit this complaint to the Court, as evidenced by the present application.

89. Consequently, the respondent State has not failed to comply with its obligations under the last sentence of Article 34 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

90. 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

91. The applicants claimed EUR 5,000 each in respect of non-pecuniary damage.

92. The Government considered that the finding of a violation would constitute sufficient just satisfaction for any non-pecuniary damage the applicants might have sustained. Regarding the second applicant, the Government added that no damages should be awarded to him in any case because since there was no contact between him and his lawyer, the lawyer was not in a position to know about the second applicant's claims.

93. The Court has found that no national authority subjected to close scrutiny the applicants' arguable claim under Article 3 of the Convention. In these circumstances, the Court considers that the applicants' suffering and frustration cannot be compensated for by a mere finding of a violation. Having regard to the nature of the violations found and making an assessment on an equitable basis, the Court awards the first applicant

5,000 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable.

94. Regarding the second applicant the Court notes that his whereabouts are currently unknown. His representative's attempts to re-establish contact with him were to no avail. Thus, the Court considers that the question of the application of Article 41 regarding the second applicant is not ready for decision (*Muminov v. Russia*, no. 42502/06, § 143, 11 December 2008). Accordingly, it should be reserved and the subsequent procedure fixed, having regard to any agreement which might be reached between the Government and the second applicant (Rule 75 § 1 of the Rules of Court).

B. Costs and expenses

95. The applicants claimed together EUR 500 for costs and expenses comprising of telephone communication between the lawyer and the applicants in Saudi Arabia and Guinea and costs of photocopying and postal services.

96. The Government maintained that no award should be made under this head because the applicants had not submitted any documents to support their claims.

97. 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.

98. The Court observes that had the applicants been represented by a regular lawyer their expenses would be documented by invoices drawn up by that lawyer. However, since the applicants in the present case were represented by an NGO, they could not present such invoices.

99. Nevertheless, the Court considers that the administrative expenses are supported by documents and information contained in the case file. Firstly, all the documents that were sent to the Court evidently constitute an expense, including the postal service fees. Secondly, it is clear from the information in the case file that the lawyer was in contact with the first applicant several times in Guinea and Saudi Arabia. Regard being had to these considerations, to the documents in its possession and to its case-law, the Court considers it reasonable to award the sum of EUR 400 to the first applicant under this head.

C. Default interest

100. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints under Article 13 of the Convention in conjunction with Article 3 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 13 of the Convention in conjunction with Article 3 of the Convention;
3. *Holds*

   (a) that the respondent State is to pay to the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

   (i) EUR 5,000 (five thousand euros) to the first applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;

   (ii) EUR 400 (four hundred euros), plus any tax that may be chargeable to the first applicant, in respect of costs and expenses;

   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the first applicants' claim for just satisfaction.
5. *Holds* that the question of the application of Article 41 regarding the second applicant is not ready for decision;

   accordingly,

   (a) *reserves* the question;

   (b) *invites* the Czech Government and the applicant to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;

   (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 23 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President