THE BULLETIN

The Bulletin is a publication of the European Commission for Democracy through Law. It reports regularly on the case-law of constitutional courts and courts of equivalent jurisdiction in Europe, including the European Court of Human Rights and the Court of Justice of the European Communities, as well as in certain other countries of the world. The Bulletin is published three times a year, each issue reporting the most important case-law during a four month period (volumes numbered 1 to 3). The three volumes of the series are published and delivered in the following year.

Its aim is to allow judges and constitutional law specialists to be informed quickly about the most important judgments in this field. The exchange of information and ideas among old and new democracies in the field of judge-made law is of vital importance. Such an exchange and such cooperation, it is hoped, will not only be of benefit to the newly established constitutional courts, but will also enrich the case-law of the existing courts. The main purpose of the Bulletin on Constitutional Case-law is to foster such an exchange and to assist national judges in solving critical questions of law which often arise simultaneously in different countries.

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The decisions are presented in the following way:

1. *Identification*
    - *a) country or organisation*
    - *b) name of the court*
    - *c) chamber (if appropriate)*
    - *d) date of the decision*
    - *e) number of decision or case*
    - *f) title (if appropriate)*
    - *g) official publication*
    - *h) non-official publications*
2. *Keywords of the Systematic Thesaurus (primary)*
3. *Keywords of the alphabetical index (supplementary)*
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G. Buquicchio

Secretary of the European Commission for Democracy through Law

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Strasbourg, October 2008

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Japan, Luxembourg, Russia, United States of America.

Précis of important decisions of the reference period 1 September 2007 – 31 December 2007 will be published in the next edition, *Bulletin* 2008/1, for the following country:

Argentina.

Armenia
Constitutional Court

Important decisions

Identification: ARM-2007-3-006

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 28.11.2007 / **e)** DCC-719 / **f)** On the compliance of Chapter 26 of Civil Procedure Code with the Constitution of the Republic of Armenia / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time**.

Keywords of the alphabetical index:

Judge, unaction, remedy, absence.

Headnotes:

The State has a positive obligation to protect the constitutional right to judicial remedy, both in the legislative and the law-enforcement procedures. On the one hand, the legislator must provide fully-fledged mechanisms and opportunities for judicial remedy. On the other hand, law-enforcement bodies must admit individuals' claims for examination without exception.

Summary:

I. The courts of general jurisdiction had refused to admit the applicant's complaint regarding actions and/or omissions on the part of the judiciary. Their reasoning was that the provisions of Chapter 26 of the Civil Procedure Code did not cover such claims. The applicant accordingly lodged a complaint before the Constitutional Court, challenging Chapter 26 in its entirety, because it did not make express provision for challenges to unlawful acts and omissions on the part of the judiciary.

The applicant argued that there was no way of overcoming the problem of the lack of scope to challenge acts and/or omissions on the part of the judiciary. For instance, there was no remedy against refusal to admit the civil suit through inaction on the part of a judge, due to the deficiency in the provisions of the Civil Procedure Code. The situation is even more serious, when there is no way of filling the gap in the legislation, and so individuals whose rights have been violated have no remedy, due to the lack of relevant norms in the legislation.

II. The Constitutional Court examined the content of the relevant articles of the Civil Procedure Code, and the Law on the Foundations of Administration and Administrative Procedure. This legislation deals with the repeal and challenge of unlawful *(contra legem)* acts or actions (omissions) of public agencies, local self-government bodies and their officials. The Court noted that Chapter 26 of the Civil Procedure Code deals only with judicial control over public bodies and officials, who do not administer justice.

Analysis of the legislation reveals that court judgments are subject to judicial review at appeal and cassation stage in cases stipulated by the Civil Procedure Code. The legislation also sets out the category of intermediate court decisions that are subject to review. Only those decisions are subject to review, which might suspend or hinder the implementation of the right of accessibility to a court. The rationale behind the exclusion of certain judicial acts from judicial review is to avoid delays in civil procedure. One therefore has to draw a distinction between acts of the judiciary and those of other public agencies. To do otherwise might make it difficult to comply with the principle of administering justice within a reasonable time.

The logic of appealing against judicial acts normally results in the referral of the problem to a higher court. Extension of the provisions of Chapter 26 of the Civil Procedure Code to appeals against the acts of the judiciary (as is already the case with other public agencies) would militate against the above logic. It could result in the opportunity to refer a decision made by the same court or even a higher one to a single judge in a lower position. It would also unleash the possibility of appeals against decisions passed by a panel of judges in a higher court to a single judge in a lower instance court.

The Court pronounced the provisions of the Part 26 of the Civil Procedure Code to be in conformity with the Constitution.

The applicant had claimed to have been deprived of his right to access to court, as the courts had refused to admit his claim through inaction, and he had no legal remedy against

such inaction. The Court held that the courts' inaction towards the claims undermined the nature of the right to judicial remedy. Such an approach made justice inaccesible for individuals. Such a situation is incompatible with the constitutional principles of rule of law.

The Constitutional Court emphasised that the constitutional right to judicial remedy implies a positive obligation of the State to safeguard it both in the legislative and the law-enforcement processes. On the one hand, the legislator must provide fully-fledged mechanisms and opportunities for judicial remedy. On the other hand, law-enforcement bodies must admit claims of individuals for examination without exception.

Languages:

Armenian.

Identification: ARM-2007-3-007

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 11.12.2007 / **e)** DCC-720 / **f)** On the compliance of Article 419.6 the Criminal Procedure Code with the Constitution of the Republic of Armenia / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.
5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time**.

Keywords of the alphabetical index:

Cassation Court, power to bestow legal force upon legal acts of inferior courts.

Headnotes:

Provisions allowing the Cassation Court to bestow legal force upon judicial acts by the Court of First Instance and the Appeal Court are constitutional because they prevent the rotation of cases within the judiciary and to ensure the implementation of the constitutional norm on administering justice within a reasonable time and of the principle of legal certainty.

Summary:

I. The applicant challenged the constitutionality of Article 419.6 of the Criminal Procedure Code. This provides that, as a result of review of acts of the Court of First Instance and the Appeal Court, the Cassation Court has the power to confer legal force on their decisions. He argued that this provision deprived him of his constitutional right to judicial remedy (Article 19 of the Constitution).

II. The Constitutional Court examined the above mentioned power of the Cassation Court, taking into consideration its constitutional status and its position in the judicial system. According to the constitutional status of the Cassation Court, appropriate amendments have been made to the current legislation. These include the power to confer legal force upon decisions by the Court of First Instance and the Appeal Court.

The Constitutional Court observed that this particular power (and others granted by the same amendments) prevented the rotation of cases within the judiciary. The rationale behind this amendment was to safeguard the implementation of the constitutional requirements to administer justice within a reasonable time and the principle of legal certainty.

The Constitutional Court held that the above power could be exercised at all times, where there are no changes to the factual circumstances of the case as a result of the proceedings at first instance and at the appellate stage, and where the facts that had given rise to the decisions were subject to the various assessments.

The Court found no conflict between the Constitution and the provision under scrutiny. The powers vested with the Cassation Court were in conformity with the Constitution, and the right to trial within a reasonable time guaranteed by the European Convention on Human Rights. However, the lack of powers bestowed by the legislative amendments could jeopardise the rights to judicial remedy, fair trial and trial within reasonable time.

Languages:

Armenian.

Azerbaijan
Constitutional Court

Important decisions

Identification: AZE-2007-3-003

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 26.09.2007 / **e)** / **f)** / **g)** *Azerbaijan*, *Respublika*, *Khalg gazeti*, *Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiya Mehkemesinin Melumati* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts**.
1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation**.
1.6.9 Constitutional Justice – Effects – **Consequences for other cases**.
3.10 General Principles – **Certainty of the law**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Property, right, distinction from right to use residence / Residence, right to use.

Headnotes:

Article 29.4 of the Constitution embodies two important legal guarantees of the right to property.

Firstly, nobody can be deprived of his or her property without a court decision. This eliminates any possibility of deprivation of the right to property contrary to the proprietor's will by any state body or official without a court decision.

Secondly, amortisation of a property for state and public needs can take place only after fair compensation for its value.

Although the right to property differs from the right to use residential areas; both rights need protection by a proportionate balancing of interests.

In case of a legal gap in specific legislation, ordinary courts have to directly apply general legislation and the Constitution if they provide better protection of the rights and lawful interests of the parties.

Summary:

I. On 3 July 1999, R. Agalarov's son Emil Agalarov and Elnara Zeynalova officially married. The bride came to live in her father-in-law's apartment. On 2 October 2000, their child was born, and on 3 November 2003, their marriage was dissolved in court. The bride moved to her father's house after the birth of the child, and is living there now. The decision of the Court of Appeal of 23 December 2004 recognised the right of E. Agalarova (Zeynalova) over the use of the residential area in her father-in-law's apartment. She was registered in this apartment, but the tense relationship between the parties made it impossible for her to live there. Nonetheless, R. Agalarov offered compensation to E. Agalarova (Zeynalova) for removal from the register and for leaving the apartment, as he wanted to sell it. She refused.

On 25 March 2005, R. Agalarov lodged proceedings at the Binagadi District Court of Baku city against E. Agalarova (Zeynalova) with a view to the termination of her right to use the apartment. The respondent argued that if she had to give up her right (and that of her child), they should receive compensation at market value that would allow them to purchase a renovated one-room apartment in the same district or another nearby area with satisfactory communal conditions in which a child could live. If this was impossible, she requested the Court to reject the proceedings.

Judicial proceedings subsequently took place, at the suit of R. Agalarov. The Binagadi District Court rejected the proceedings on 5 August 2005.

By a decision of 9 November 2005, the Court of Appeal declined R. Agalarov's appeal complaint and upheld the Binagadi District Court's decision of 5 August 2005.

On 31 March 2006, the Supreme Court rejected the cassation complaint of R. Agalarov and upheld the Appeal Court's decision.

R. Agalarov then turned to the Constitutional Court. He requested that it declare the general courts' decisions to be invalid, as they had not applied the provisions of the existing legislation correctly. Judicial acts had been issued in violation of his right to property and right to court. These judicial acts contravened the Constitution and Civil Code.

He pointed out that the court had rejected his complaint because there was no provision in housing legislation for compensation. He contended that this breached his right to property, and that, although he had addressed the court as a proprietor, he had not received a satisfactory reply. He observed that if the respondent continued to live permanently in her father's apartment, he would never be in a position to dispose his property, simply because of her passport registration in the apartment. As a result, he would be deprived of his property for the rest of his life.

II. The Plenum of the Constitutional Court noted that the judicial dispute between R. Agalarov and E. Agalarova (Zeynalova) started in 2005. During that period, two sources of legislation applied to the relationship between the parties.

Under Article 123.1 of the Housing Code, where the proprietor of an apartment brings family members to his or her apartment, they have equal authority to use the residential area in the apartment if no other reservations exist at the time the family members move in. In the second part of the article, this authority is described as a right.

Article 228.2 of the Civil Code stipulates that the establishment of the right to use part of a residential building, and the conditions of its enjoyment and termination are determined by an agreement concluded with the proprietor and certified by a notary public. Where there is no agreement as to the termination of the right, this can be terminated by the court, upon application by the proprietor, if compensation is paid in accordance with the market value.

When dealing with the dispute between R. Agalarov against E. Agalarova (Zeynalova), the general courts had not taken note of the Constitutional Court's decision of 27 July 2001 on Article 123 of the Housing Code. The court took the view then that it is up to the parties to an agreement to decide upon its form and conditions. The courts will resolve any disputes over the rules of use of residential areas and over expenses.

The issue of termination of the right to use a residential area is connected with the rules for using residential areas. The judicial dispute between R. Agalarov and E.Agalarova (Zeynalova) derived from their failure to reach agreement on the termination of the right to use the residential area owned by former bride's father-in-law and the latter's application launched before the court. Solving this type of issue in court is fully in line with the legal position of the Constitutional Court in the decision of 27 July 2001.

A distinction should be drawn between the right to property and the right to use residential areas. The right to property reflects individual ownership of material goods. It plays a vital role in the system of economic rights and freedoms in the general theory of human rights, international law acts (Article 17 of the Universal Declaration of Human Rights, Article 1 Protocol 1 ECHR, etc.) and fundamental human rights envisaged by the Constitution (Article 29).

The right to property is not simply a broad power reflected by the law, whereby the proprietor may use the property as he or she wishes in accordance with its functions and with his or her needs, and may also determine the legal status of the property. It also consists of the power, within the framework of the present legislation to eliminate interference by third parties with his or her powers over the property, as guaranteed by the state without damage to the rights and lawful interests of others. The proprietor may exercise his or her choice, in accordance with his or her interests.

The Civil Code regulates the right to property, the right to acquire it, and any limitations. The Code also deals with the protection of the right to property, as do the Criminal Code, the Code on Administrative Offences and certain other legislation.

Article 123.1 of the Housing Code stipulates that where the proprietor of an apartment brings his or her family members to the apartment, their right to equal use of the residential area would depend on the fact of absence of other reservations at the time. The article does not, however, determine any rules for the use. Indeed, neither this article nor the Housing Code in general provide for the rights of third parties using somebody else's residential area that could restrict a proprietor's right to dispose of his or her property.

Article 123.1 of the Housing Code does not provide the order for use of apartment by family members of the proprietor and other persons, neither does it provide for its termination. As a result, there is a lack of regulation in this field of relationships between proprietors and other parties. There was also some uncertainty as to the rights of both parties.

However, whilst the Housing Code does not make provision for compensation for termination of a right to use a residential area, the Civil Code offers better protection of the rights and lawful interests of the parties.

The refusal by the courts of general jurisdiction to deal with the matter due to lack of regulation within the housing legislation, and the factual refusal to deal with the concrete dispute, were unacceptable.

Despite the absence of regulation in the housing legislation, there were other norms in civil legislation that could form the basis for an application of an analogy of the law in order to deal with this legislative gap in the way the state intended.

The Plenum of the Constitutional Court therefore held that the decision of the Binagadi District Court of 25 March 2005 breached the requirements of Articles 13, 29, 71, 147 and 149 of the Constitution, paragraph 8 of the Transitional Provisions of the Constitution, and Articles 1.2, 11.1, 11.5 and 228.2 of the Civil Code.

A fair court examination had not taken place in the civil proceedings, resulting in a violation of R. Agalarov's right to court guaranteed by Article 60.1 of the Constitution. He had not been able to obtain effective remedy against breaches of his ownership rights.

The Plenum of Constitutional Court held that the Supreme Court of 31 March 2006 should be overturned. It contravened Article 60.1 of the Constitution and Articles 416, 417.0.3 and 418.1 of the Civil Procedure Code. The case should then be re-examined, in accordance with the present decision, and with the procedure and terms determined by the civil procedure legislation.

Languages:

Azeri (original), English (translation by the Court).

Belgium
Court of Arbitration

Important decisions

Identification: BEL-2007-3-006

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 19.09.2007 / **e)** 116/2007 / **f)** / **g)** *Moniteur belge* (Official Gazette), 29.10.2007 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status**.

Keywords of the alphabetical index:

Marriage, theft between spouses, exemption / Cohabitation, certainty / Marriage, mutual rights and obligations.

Headnotes:

The law may legitimately decide to grant special immunity in criminal cases, for the purpose of protecting marriage, a conjugal consortium organised by law, which alters the economic situation of the partners and creates mutual obligations.

Summary:

The Constitutional Court was asked by an investigating judge to give a preliminary ruling on Article 462 of the Criminal Code, which recognises grounds for exemption in cases where one spouse steals from another, but has no similar provision for persons who merely live together. The question was whether the provision in question violated the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution).

In its ruling, the Court held that the difference in treatment was based on an objective element, namely the fact that married couples had mutual rights and obligations defined by the Civil Code, which did not apply to unmarried couples, who had not accepted the same mutual legal commitments.

It acknowledged that the legislator had been entitled to grant special immunity to spouses, without extending exemption under the provision in question to unmarried couples. The community formed by unmarried cohabitants did not have the same certainty as that based on marriage, and did not generate the same rights and obligations.

It accordingly concluded that Article 462 of the Criminal Code did not violate the constitutional rules on equality and non-discrimination (Articles 10 and 11 of the Constitution).

Languages:

French, Dutch, German.

Identification: BEL-2007-3-007

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 19.09.2007 / **e)** 118/2007 / **f)** / **g)** *Moniteur belge* (Official Gazette), 31.10.2007 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests**.
5.1.1.5 Fundamental Rights – General questions – Entitlement to rights – **Legal persons**.
5.3.13.1.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Litigious administrative proceedings**.
5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file**.
5.3.13.20 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Adversarial principle**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

Keywords of the alphabetical index:

Private life, legal person, trade secrets / Private life, interference, adversarial proceedings / Rights of the defence, administrative file, confidentiality / Fundamental rights, balance.

Headnotes:

Respect for family life extends to the individual's right to establish and develop contacts, including professional or business contacts, outside his/her personal circle. To some extent, respect for private life also applies to legal persons, extending to protection of their trade secrets.

Respect for the adversarial principle generally means the right of parties to proceedings to inspect and comment on all documents or observations submitted to the court.

However, a balance must be struck between the rights of the defence and the interests protected by Article 8 ECHR.

Summary:

The Constitutional Court was asked by the Council of State to give a preliminary ruling on a number of provisions in the law on the Council of State, which require the authorities to place certain confidential documents in the administrative files, and communicate them to the parties. A decision concerning a public contract had been referred to the Council. The reporting judge had asked the opposing party, the Belgian State, to communicate an appendix to the tender submitted by the company which had won the contract. The State refused, arguing – like the successful company – that these data were confidential. The reporting judge took the view that the decision should be annulled, since the administrative file was incomplete. The Council of State accordingly decided to ask the Court for a preliminary ruling as to whether the adversarial principle implied that documents containing confidential information or connected with trade secrets must be included in the administrative file, and made available to the court and all the parties.

The Council of State also decided to ask the Court of Justice of the European Communities for a preliminary interpretative ruling on a number of provisions in European directives which raised the same type of problem.

In its decision, the Constitutional Court first defined the right to respect for private and family life protected by Article 22 of the Constitution, Article 8 ECHR and Article 17 of the International Covenant on Civil and Political Rights. Citing a number of judgments given by the European Court of Human Rights, it acknowledged that the right to respect for private life applied to legal persons, and included protection of their trade secrets and those of natural persons. It

also noted that protection against arbitrary or disproportionate interference by the authorities with the private activity of natural or legal persons was a general principle of Community law. In this connection, it cited a number of judgments given by the Court of Justice of the European Communities.

Since the provisions at issue might entail interference with the private life of the legal person concerned, the Court had to ascertain whether that interference had a lawful purpose and was in proportion to that purpose, even though interference might go further in the case of professional or business activities than in others.

The Court then observed that the provisions at issue guaranteed a fair hearing by ensuring that proceedings were adversarial. Respect for the adversarial principle was enshrined in Article 6 ECHR, which applied to the dispute pending before the Council of State.

Respect for that principle usually entailed the right of parties to proceedings to inspect, and comment on, all documents or observations submitted to the court.

Citing a number of judgments given by the European Court of Human Rights, the Court then weighed the rights of the defence against the right to respect for private life. It acknowledged that certain measures might restrict the rights of the defence when this was absolutely necessary, and noted, conversely, that interference with private life resulting from judicial proceedings must not exceed that rendered strictly necessary by the specific features of the case and the data involved.

It accordingly concluded that the provisions in question – if taken to mean that the opposing party might never withhold certain file documents from other parties on the ground that they were confidential – were not compatible with Article 22 of the Constitution, taken in conjunction with Article 8 ECHR and Article 17 of the International Covenant on Civil and Political Rights. It also found, however, that those provisions could be interpreted in a different way, which made them compatible with the said texts. Under that interpretation, the opposing party might plead confidentiality of certain documents in the file, and the Council of State might then assess that alleged confidentiality, striking a balance between fair trial requirements and those of trade secrecy. Citing a number of judgments given by the European Court of Human Rights and the Court of Justice of the European Communities, the Court considered that, although the withholding from one of the parties of documents essential to settlement of the dispute did violate the right to a fair hearing, that principle must yield when its strict application would entail a manifest violation of certain persons' right to respect for private life by exposing them to a particularly serious risk that would be very difficult to remedy.

Languages:

French, Dutch, German.

Identification: BEL-2007-3-008

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 10.10.2007 / **e)** 128/2007 / **f)** / **g)** *Moniteur belge* (Official Gazette), 24.10.2007 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.4.10.7 Constitutional Justice – Procedure – Interlocutory proceedings – **Request for a preliminary ruling by the Court of Justice of the European Communities**.
2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
2.1.3.2.2 Sources – Categories – Case-law – International case-law – **Court of Justice of the European Communities**.
3.1 General Principles – **Sovereignty**.
3.10 General Principles – **Certainty of the law**.
3.14 General Principles – ***Nullum crimen, nulla poena sine lege***.
3.26 General Principles – **Principles of Community law**.
4.16.1 Institutions – International relations – **Transfer of powers to international institutions**.
5.2 Fundamental Rights – **Equality**.
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence**.
5.3.13.24 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the reasons of detention**.

Keywords of the alphabetical index:

European arrest warrant, constitutionality / Criminal liability, dual / International criminal law, dual criminal liability, exception / European Community, legal order, unity / Surrender.

Headnotes:

Following the answer given by the Court of Justice of the European Communities to the questions put to it by the Constitutional Court in its request for a preliminary ruling on the Council of the European Union's Framework Decision on the European arrest warrant, the Constitutional Court decided that the Belgian law transposing that framework decision was not contrary to the Constitution, taken in conjunction with certain provisions of the European Convention on Human Rights.

Summary:

The non-profit-making association, "*Advocaten voor de Wereld*" (Lawyers for the World), sought repeal of the Act of 19 December 2003 on the European Arrest Warrant, which transposed the Council of the European Union's Framework Decision 2002/584/JHA of 13 June 2002 on the warrant and on surrender procedures between member states, and which had been adopted on the basis of Article 34.2.b EU. It put forward five arguments, alleging violation of the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken in conjunction with various provisions of the Constitution and the European Convention on Human Rights.

The applicant association argued, firstly, that the subject-matter (the European arrest warrant) could be regulated only by a convention and not by a framework decision, since, under Article 34.2.b EU, framework decisions could be adopted only for the purpose of approximating member states' laws and regulations. There had thus been a discriminatory breach of the constitutional guarantees applying to the powers of parliament (Article 168 of the Constitution), which covered all litigants.

After the Court of Justice had ruled, in its judgment of 3 May 2007 in Case C-303/05 on the preliminary question put to it by the Constitutional Court [BEL-2005-2-011], that the framework decision did not violate Article 34.2.b EU, the latter court concluded, from paragraphs 28 to 43 of that judgment, that the first argument was unfounded.

The applicant association argued, secondly, that the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken in conjunction with the right to personal freedom (Article 12 of the Constitution) and Articles 5.2, 5.4 and 6.2 ECHR, was violated by the fact that a person arrested for trial on a European warrant did not, if remanded, enjoy the guarantees provided by national law on detention on remand.

The Constitutional Court replied that the guarantees applying to arrest for the purpose of possible surrender were largely equivalent to those provided by the Act of 20 July 1990 on detention on remand. The investigating judge's decision to detain, on a European warrant, a person sought for trial was a judge's order which satisfied Article 12 of the Constitution and Article 5.2 and 5.4 ECHR. Nor did it violate the presumption of innocence enshrined in Article 6 ECHR, since the merits of the case had still to be determined in a manner consistent with the rights of the person covered by the warrant.

Replying to the association's third argument – that Section 7 of the disputed act violated Articles 10 and 11 of the Constitution, taken in conjunction with Article 13 of the Constitution and Article 6 ECHR, since a fair hearing was insufficiently guaranteed in the case of a person arrested on the strength of a judgment given *in absentia* – the Court ruled that Section 7 of the act, which transposed Article 5.1 of the Council's Framework Decision of 13 June 2002, specifically made surrender conditional on that person's being able to secure retrial in the state issuing the warrant.

The fourth and fifth arguments focused on Article 5.1 and 5.2 of the act. Paragraph 1 stated that the European arrest warrant would not be executed if the offences concerned were not punishable in Belgian law. However, paragraph 2 waived that rule for certain offences, which it specified, provided that these carried maximum prison sentences of at least three years in the issuing state. Such as Article 2.2 of the Council of the European Union's Framework Decision, which it transposed, Section 5.2 of the act listed offences for which surrender was possible under a European warrant without the requirement of dual criminal liability.

The applicant association argued that the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) was violated by the fact that Section 5.2 waived the dual liability requirement without objective and reasonable justification, although it still applied to other offences (fourth argument), and because the contested provision violated the principle of lawfulness in criminal matters by failing to define the offences it listed with sufficient clarity and precision (fifth argument).

In its Judgment no. 124/2005 of 13 July 2005, the Constitutional Court had put a second preliminary question on this matter to the Court of Justice [BEL-2005-2-011]. In its judgment of 3 May 2007, in Case C-303/05, that court had ruled that Article 2.2 of the framework decision was not invalidated by its dispensing with any examination of dual criminal liability. The Constitutional Court reproduced paragraphs 45 to 60 of the Court of Justice's judgment in its own decision.

Having noted that the Union was based on the rule of law (Article 6 EU), the Court of Justice recalled, in that part of its judgment, that the rule that offences and penalties must be strictly defined in law *(nullum crimen, nulla poena sine lege)* was one of the general legal principles on which the shared constitutional traditions of the member states were based, and had also been enshrined in various international treaties, particularly Article 7.1 ECHR. It observed that the framework decision did not seek to harmonise the offences in question, and that defining and determining penalties remained a matter for the member states, which must respect the principle of lawfulness.

The Court of Justice ruled that the Council could, without violating the principle of equality, waive the condition of dual criminal liability for certain offences.

The Constitutional Court considered that the reasons given by the Court of Justice in its judgment on the framework decision also applied *mutatis mutandis* to the Act of 19 December 2003, which transposed that decision into Belgian law. It also noted that the executing judicial authority was not required to execute European arrest warrants automatically. The rule in Section 5.2 of the act must be assessed with reference to the other conditions to which surrender was subject. Taking account of the other provisions in the act, the Court concluded that surrender under a European arrest warrant was accompanied by sufficient guarantees.

The Court accordingly dismissed the application.

Supplementary information:

- See judgment of the Court of Justice of the European Communities of 3 May 2007, in the case no. C 303/05 *'Advocaten voor de wereld VZW'*, following the preliminary question of the Constitutional Court of Belgium of 13 July 2005 [BEL-2005-2-011];
- See also judgment of the Constitutional Court of Poland of 27 April 2005 [POL-2005-1-005] and the Constitutional Court of Germany of 19 July 2005 [GER-2005-2-002];
- See also Kestutis Lapinskas (former member of the Venice Commission, President of the Constitutional Court of Lithuania, representing the Court presiding the Conference of European Constitutional Courts – "The European Arrest Warrant from the view point of the European Constitutional Courts (www.europarl.europa.eu /meetdocs/2004_2009/documents/pv/586/586174/ 586174fr.pdf);
- See also replies to the question on the Venice Forum from Mr B. Banaszkiewicz, Polish liaison officer, in February-March 2005 and from P. Novackova, Czech Republic.

Languages:

French, Dutch, German.

Identification: BEL-2007-3-009

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 17.10.2007 / **e)** 132/2007 / **f)** / **g)** *Moniteur belge* (Official Gazette), 30.10.2007 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.4.9.2 Constitutional Justice – Procedure – Parties – **Interest**.
1.5.4.7 Constitutional Justice – Decisions – Types – **Interim measures**.
1.6.5 Constitutional Justice – Effects – **Temporal effect**.
5.4.1 Fundamental Rights – Economic, social and cultural rights – **Freedom to teach**.

Keywords of the alphabetical index:

Education, subsidy / Education, private, head teacher.

Headnotes:

Freedom of education includes the organising authority's freedom to select the personnel responsible for implementing the specific educational goals it has set itself. It does not prevent the law from placing restrictions on that freedom, particularly to ensure quality of education, provided that there is reasonable justification for these restrictions, and that they are proportionate to the aim and effects of the measure.

Summary:

The Constitutional Court had been asked to annul certain provisions in a decree issued by the French Community on 2 February 2007, determining the regulations applicable to head teachers. The application was lodged by a head teacher and by her school's governing board. Those parties applied to the Court to suspend execution of the disputed provisions – which it did in its Judgment no. 106/2007 of 19 July 2007. Under Section 25 of the special Act of 6 January 1989, the Court was required to give judgment on the application for annulment within three months of the judgment ordering suspension. Upon expiry of that three-month period, suspension would immediately become ineffective.

Under the contested provisions, the subsidising of schools forming part of the network subsidised by the French Community was henceforth conditional on the head teacher's being one of the staff "subsidised and remunerated by a subsidised salary". The first applicant, who had been head teacher for a considerable time, did not satisfy that condition. The Constitutional Court decided that she and the board of the school had an interest in proceeding, since they were directly and adversely affected by the contested provisions.

The applicants first argued that the disputed provision violated freedom of education (Article 24.1 of the Constitution) and did so in a discriminatory manner (Articles 10 and 11 of the Constitution).

The Court referred, first of all, to its case-law on freedom of education, which included the right to receive subsidies. That right was restricted, however, by the fact that the Community could link subsidies with requirements imposed in the general interest, which included the provision of high-quality education and observance of the rules on pupil numbers, and also by the need to divide the funds available between the Community's various areas of responsibility. Those measures could not in themselves be seen as interfering with freedom of education, unless it appeared that certain specific restrictions were not appropriate or proportionate to their purpose.

The Court held that the law-making authority was thus entitled to place restrictions on the organising authority's freedom to select its staff, particularly with a view to ensuring quality of education, provided that there was reasonable justification for those restrictions and that they were proportionate to the aim and effects of the measure.

To ensure quality of publicly funded education, the law-making authority was entitled to require that head teachers possess certain abilities, qualifications or training which ensured that they had the qualities needed for the post, and impose penalties for non-compliance with that requirement. The Court also held that the law-making authority had discretionary power to determine the requisite proof of ability, and did not regard the choice embodied in the contested provision as manifestly unreasonable, since it encouraged the organising authorities to appoint as head teachers persons whose qualifications, and also the professional experience those qualifications had allowed them to acquire, gave reason to suppose that they possessed the knowledge and experience needed to administer a school.

It considered, however, that the law-making authority had, in penalising non-compliance with that requirement by withdrawing subsidies, adopted a measure which was not reasonably proportionate to the aim pursued. It decided to annul the disputed provision, of which it had already suspended the effects.

The applicants also argued that the disputed provisions had violated Articles 10, 11, 23.3.1 and 24.4 of the Constitution by failing to introduce transitional measures for schools whose head teachers did not satisfy the condition laid down in the decree, although such measures had been introduced for certain other head teachers.

The Court considered that this difference in treatment was not reasonably justified, but that its annulment of the disputed provision had deprived this subsidiary application of its purpose.

Languages:

French, Dutch, German.

Bosnia and Herzegovina
Constitutional Court

Important decisions

Identification: BIH-2007-3-004

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 29.09.2007 / **e)** AP-286/06 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 86/07 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

1.2.1.11 Constitutional Justice – Types of claim – Claim by a public body – **Religious authorities**.
2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature**.
5.1.1.5 Fundamental Rights – General questions – Entitlement to rights – **Legal persons**.
5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship**.

Keywords of the alphabetical index:

Canonic law, application by State / Church, property / Church, state, separation.

Headnotes:

There had been no restrictions on the appellant's freedom of religion in the proceedings before the Supreme Court, which had declined to apply canon law. Such action is in accordance with the constitutional and legal position of religious communities.

Summary:

I. The appellant, the parish of St. Ante Padovanski of Bugojno, of the Franciscan Province of Bosna Srebrna, Sarajevo, lodged an appeal with the Constitutional Court against a judgment of the Supreme Court of the Federation of Bosnia and Herzegovina. The Supreme Court had rejected the appellant's claim for the recognition of its ownership rights over certain property, which was in the name of Father Bruno Batinic at the time of his death. The Supreme Court dismissed as irrelevant the contents of the written statement given before the solemn profession, and the text of the oath, by which Father Bruno Batinic undertook to observe the provisions of "the Holy Canons", as stated in the text of the oath. The appellant cited Canon 668 of the Code of Canon Law in support of its case. This prescribes that whatever a member of a religious institution acquires through personal effort or through the institution is acquired for that institution. To act otherwise would be to breach the vow of poverty. The Supreme Court rejected this argument. It concluded that the lower instance courts had erred in their finding that there were grounds for their application of the Canon Law in the provisions of the Protocol on Conversations between the representatives of the Government of the former Yugoslavia and the representatives of the Holy See, enacted in 1966 and ratified on 25 June 1966 in Belgrade. This was because Bosnia and Herzegovina did not take over the mentioned Protocol. Neither was a bilateral agreement concluded between Bosnia and Herzegovina and the Holy See.

The appellant contended that the Supreme Court's judgment had violated its rights to a fair trial, freedom of thought, conscience and religion and the right to property under Article II.3.e, II.3.g and II.3.k of the Constitution and Articles 6.1 and 9 ECHR, and Article 1 Protocol 1 ECHR. The Supreme Court had modified "the judgments of the lower-instance courts indiscriminately and without legal arguments".

II. The Constitutional Court held that the Supreme Court had given relevant and articulated reasons in its judgment, when it determined that the lower instance courts had erroneously assessed that the Canon Law was applicable to the present case, referring to the relevant provisions of the substantive law and procedural law, applicable to the present legal situation. The Constitutional Court took particular note of the Supreme Court's reasoning that Bosnia and Herzegovina did not take over the Protocol on Conversations between the representatives of the Government of SFRY and the representatives of the Holy See enacted in 1966, nor was a bilateral agreement concluded between Bosnia and Herzegovina and the Holy See.

The Constitutional Court also noted the provisions of the Constitution, the Law on the Legal Position of Religious Communities and the Law on the Freedom of Religion and the Legal Position of Churches and Religious Communities. Under Article 8.1 of the Law on the Freedom of Religion and the Legal Position of Churches and Religious Communities, the appellant,

as a religious community, has a status of a legal person. However, in accordance with the proclaimed principle of a secular social system under Article 14 of the above law, the state and religious communities shall be separate, and the appellant, as a religious community, has internal autonomy to apply its religious norms, which, under Article 11.1 of the said law, "have no civil and legal effects whatsoever". In order for Canon Law, as an internal legal norm of a religious community, (such as the appellant in these proceedings), to be introduced into the national legal system, that issue, by virtue of Article 15.1 of the above law, must be regulated by special agreement between the state and the religious community. No such agreement existed in the present case. The Constitutional Court mentioned Article 4 of the former Law on the Legal Position of Religious Communities, under which religious communities had to operate in accordance with the Constitution and the law. Article 12 of the law mentioned overleaf governs the legal position of religious communities, and allows religious communities to acquire property in accordance with the law. The Constitutional Court emphasised the principle of the rule of law under Article I.2 of the Constitution, which obliges ordinary courts to apply applicable legal norms and to adopt judgments accordingly.

The Constitutional Court held that the Supreme Court clearly explained its decision within the meaning of Article II.3.e of the Constitution and Article 6.1 ECHR. It rejected the contention in the appeal that the Supreme Court had arbitrarily misapplied the substantive law without reasoning behind its decision.

Dealing with the alleged breach of Article 9 ECHR, the Constitutional Court observed that, generally speaking, the definition of the protection and restriction of the freedom of religion in Bosnia and Herzegovina is in the Law on the Freedom of Religion and the Legal Position of Churches and Religious Communities. In essence, this law adopts the principles of the secular social system established by the old Law on the Legal Position of Religious Communities. The current legislation not only incorporates the provisions of Article 9 ECHR, but also places religious communities in their legal context, within the democratic and secular social system of Bosnia and Herzegovina.

There is a line of authority from the Human Rights Chamber for Bosnia and Herzegovina, and from the Convention institutions, to the effect that religious communities enjoy the protection of the rights under Article 9 ECHR in its collective dimension. The Constitutional Court therefore concluded that the appellant, as a religious community, is the holder of rights under Article II.3.g of the Constitution and Article 9 ECHR.

That being so, the question arose as to whether the Supreme Court's judgment restricted the freedom of the appellant, and, if so, whether such a restriction was justified within the meaning of Article 9.2 ECHR. For the restriction to be justified, it must be in accordance with the law and should be necessary in a democratic society to achieve one or more legitimate goals listed in Article 9.2 ECHR.

The Constitutional Court noted that the ordinary courts had established that Fr. Bruno Batinic had had his own property when he died, and that he had not bequeathed it to the appellant by will. Under canon law, a member of a religious order is obliged to make a will as a legal act disposing of his own property, which would be valid within the civil legal framework. The property of a physical person who is simultaneously a member of a religious order is not automatically the property of Church by operation of law, including the norms of canon law. The Supreme Court, taking into account the circumstances and the appellant's constitutional and legal status, concluded that the appellant did not submit evidence that could prove that he had lawfully acquired the property within the meaning of Article 23 of the Law on Legal Ownership Relations. As a result, the Constitutional Court held that the Supreme Court's judgment rejecting the appellant's claim did not place restrictions on the appellant's freedom as a religious community within the meaning of Article 9 ECHR.

Languages:

Bosnian, Serbian, Croatian, English (translations by the Court)

Bulgaria
Constitutional Court

Statistical data
1 September 2007 – 31 December 2007

Number of decisions: 2

There was no relevant constitutional case-law during the reference period 1 September 2007 – 31 December 2007.

Canada
Supreme Court

Important decisions

Identification: CAN-2007-3-004

a) Canada / **b)** Supreme Court / **c)** / **d)** 14.12.2007 / **e)** 31212 / **f)** Bruker v. Marcovitz / **g)** *Canada Supreme Court Reports* (Official Digest), [2007] 3 S.C.R. xxx / **h)** Internet: http://scc.lexum.umontreal.ca/en/index.html; [2007]; S.C.J. no. 54 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature**.
5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.

Keywords of the alphabetical index:

Religion, divorce, religious, agreement to provide / Contract, validity, breach, enforcement / Religion, freedom, impact on contract / Obligation, moral, contractual nature.

Headnotes:

An agreement to appear before rabbinical authorities to obtain a Jewish divorce (*get*) immediately upon the granting of a civil divorce is valid and binding under Quebec civil law. In light of countervailing rights, values, and harm, the husband cannot rely on his freedom of religion to claim immunity from damages for his unilateral contractual breach.

Summary:

I. The parties were married in 1969. Divorce proceedings were commenced in 1980 and three months later, the parties negotiated a Consent to Corollary Relief. Paragraph 12 of the agreement stated that the parties agreed to appear before the rabbinical authorities to obtain a Jewish divorce, or *get*, immediately upon the granting of the divorce. The civil divorce became final in 1981. Despite the

wife's repeated requests, the husband consistently refused to provide a *get* for 15 years. The wife sought damages for breach of the agreement. The husband argued that his agreement to give a *get* was not valid under Quebec law and that he was protected by his right to freedom of religion from having to pay damages for its breach. The trial judge found that the agreement was valid and binding and that a claim for damages based on a breach of this civil obligation was within the domain of the civil courts. The Court of Appeal allowed the husband's appeal. It found that because the substance of the obligation was religious in nature, the obligation was a moral one and was therefore unenforceable by the courts. In a majority decision, the Supreme Court reversed the Court of Appeal's decision.

II. The majority found that the fact that a dispute has a religious aspect did not by itself make it non-justiciable. Recognising the enforceability by civil courts of agreements to discourage religious barriers to remarriage addresses the gender discrimination those barriers may represent and alleviates the effects they may have on extracting unfair concessions in a civil divorce. This harmonises with Canada's approach to equality rights, to divorce and marriage generally, to religious freedom, and is consistent with the approach taken by other democracies.

Paragraph 12 of the agreement at issue satisfied all requirements under the Civil Code of Québec to make it valid and binding under Quebec law. The promise by the husband to provide a *get* was part of a voluntary exchange of commitments intended to have legally enforceable consequences, negotiated between two consenting adults, each represented by counsel. The Court was not asked to determine doctrinal religious issues, and there is nothing in the Civil Code preventing someone from transforming his or her moral obligations into legally valid and binding ones.

The husband was not entitled to immunity from damages for his unilateral contractual breach by invoking his freedom of religion under Section 3 of the Quebec Charter of Human Rights and Freedoms. The claim to religious freedom must be balanced and reconciled with countervailing rights, values, and harm, including the extent to which it is compatible with Canada's fundamental values. Determining when such a claim must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise. Here, the husband's claim did not survive the balancing mandated by the Quebec Charter and the Supreme Court's jurisprudence. Any impairment to the husband's religious freedom is significantly outweighed by the harm both to the wife personally and to the public's interest in protecting fundamental values such as equality rights and autonomous choice in marriage and divorce. These, as well as the public benefit in enforcing valid and binding contractual obligations, are among the interests that outweigh the husband's claim.

There was no reason to interfere with the trial judge's award for damages, interest and additional indemnity.

III. Two judges dissented. They emphasised that courts asked to resolve a private dispute relating to religion could properly play their role, limited to identifying the point at which rights converge so as to ensure respect for freedom of religion, only if they remained neutral where religious precepts are concerned. Here, the wife had not argued that her civil rights were infringed by a civil standard derived from positive law. Only her religious rights were in issue, and only as a result of religious rules. Thus, the ground for her claim for compensation conflicts with gains that are dear to civil society, and her claim places the courts in conflict with the laws they are responsible for enforcing. Where religion is concerned, the state leaves it to individuals to make their own choices. It is not up to the state to promote a religious norm. This is left to religious authorities.

It can be seen from an overview of the general approach taken by foreign courts with respect to religion and the legal mechanisms used to deal with *gets* that some of the solutions adopted are already available to Quebec and Canadian litigants, but that others are not because the rules are different in Canada. The decisions of each country's courts are based on mechanisms proper to that country and establish no principle of public law that would justify Canadian courts altering their approach. In Canada, the *get* issue is governed by internal private law rules.

Including an undertaking to appear before the rabbinical authorities in the corollary relief agreement has the effect neither of making this undertaking a right or obligation provided for in the Divorce Act or the Civil Code, nor of making it relief corollary to the divorce. Paragraph 12 of the agreement cannot, legally, be characterised as a contract. It is a purely moral undertaking. Neither the undertaking to consent to a religious divorce nor the religious divorce itself has civil consequences. Since the parties did not envisage a juridical operation, it must be concluded that one of the essential elements of contract formation – the object – is missing.

Even if this moral undertaking had been actionable, the assessment of damages would have required the court to implement a rule of religious law that is not within its jurisdiction and that violates the secular law

it is constitutionally responsible for applying. The damages claimed by the wife are based on her observance of specific religious precepts. Freedom of religion is not recognised as a means of forcing another person to perform a religious act. Nor can the civil courts be used to sanction the failure to perform such an act. Her argument, if it were accepted, would require recognition of a legal situation that is contrary to the rules of Canadian and Quebec family law, and to sanction the religious law would be to impose a rule that is inconsistent with the rights the secular courts are otherwise responsible for enforcing.

Languages:

English, French (translation by the Court).

Croatia
Constitutional Court

Important decisions

Identification: CRO-2007-3-010

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.10.2007 / **e)** U-I-390/2003 / **f)** / **g)** *Narodne novine* (Official Gazette), 122/07 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
3.18 General Principles – **General interest**.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.
5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Cultural heritage, protection / Law, cultural aim / Library, legitimate aim.

Headnotes:

The protection of library services is a legitimate and constitutionally envisaged aim. In safeguarding them, the State fosters and develops develop science, culture and the arts, and protects scientific, cultural and artistic goods as national spiritual values. Under the Croatian legislation on libraries, legal or natural persons publishing or producing library materials have to deliver a certain number of copies to libraries, free of charge and at their own expense. This does not constitute a disproportionate and potentially unconstitutional curb on entrepreneurial freedoms and the ownership rights of publishers and printing houses. In fact, the entrepreneurial freedoms and ownership rights of publishers and printing houses are subject to the obligation of contribution to the general welfare, as set out in Article 48.2 of the Constitution.

Summary:

I. The Constitutional Court did not accept a proposal for the constitutional review of Articles 37 and 39 of the Libraries Act (*Narodne novine* nos. 105/97, 5/98, 104/00), submitted by a natural person.

Under Article 37 of the Libraries Act, legal and natural persons publishing or producing material under Article 38 of the Act must deliver, free of charge and at their own expense, nine deposit copies of any such material to the National and University Library in Zagreb. Each publisher must also deliver a further copy of the material to the central library of the county where it conducts its business operations, in order to create a local collection. Some materials are printed, copied or produced and published in more than one language, or alphabet, or in several editions. Legal copies of each new edition must be made in each language and alphabet.

Under Article 39 of the Act, publishers of official publications (items published by state authorities and local government departments) must deliver, free of charge and at their own expense, two extra copies of their editions to the National and University Library and one copy to the Croatian Information-Documentation Referral Agency.

Under Article 38 of the Act, the definition of a deposit copy, whether it is intended for sale or for free distribution, includes publications such as books, magazines, reproductions of works of fine art, audiovisual materials and on-line publications.

The petitioner suggested that publishers should receive remuneration at market price for the stipulated number of deposit copies of the library materials in Article 37 and 39 of the Act. He disputed Article 39 of the Act, and pointed out that the publishers of official publications are legal or natural persons who do not receive finance under the state budget. He argued that the articles under dispute contravened Articles 3, 16, 48, 49, 50, 68 and 90 of the Constitution.

II. The Constitutional Court found no breach of the above constitutional provisions within the disputed provisions of the Act.

The Constitutional Court began its constitutional review by ruling that the limitation in question had been introduced in order to achieve a legitimate aim envisaged in the Constitution, in other words, to protect the library service as an area of national interest, thereby fostering, developing and protecting science, culture and the arts (Article 68.2 and 68.3 of the Constitution).

The Constitutional Court went on to observe that measures prescribed by the Act in order to achieve the above legitimate aim were not unnecessarily restrictive in the specific case. Starting from the principle of proportionality, under Article 16 of the Constitution, the Constitutional Court found that the obligation on publishers and printing houses outlined above did not pose a threat to their businesses. It therefore did not represent a disproportionate limitation or excessive restriction upon their entrepreneurial and ownership rights guaranteed in Articles 48.1 and 49.1 of the Constitution.

The Constitutional Court finally stated that with the entrepreneurial freedoms and ownership rights, which publishers and printing houses enjoy, comes an obligation of contribution to the general welfare, as set out in the second sentence of Article 48.2 of the Constitution. Thus, the disputed provisions did not contravene Article 48.1 of the Constitution, which guarantees the right of ownership. Ownership implies obligations and owners are obliged to contribute to the general welfare.

Languages:

Croatian, English.

Identification: CRO-2007-3-011

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.10.2007 / **e)** U-III-1600/2004 / **f)** / **g)** *Narodne novine* (Official Gazette), 114/07 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

5.2.2 Fundamental Rights – Equality – **Criteria of distinction**.
5.4.5 Fundamental Rights – Economic, social and cultural rights – **Freedom to work for remuneration**.

Keywords of the alphabetical index:

Civil servant, working hours, remuneration, equality.

Headnotes:

Where several categories of civil servants from the same Ministry work at night, it is not acceptable, under constitutional law, for only some of them to enjoy the right to extra pay for night work.

Such action on the part of a government body violates the constitutional rights of the petitioners. It denies them the right to compensation for night work guaranteed in Article 14.1 of the Constitution (prohibition of discrimination by position) in conjunction with Article 55.1 of the Constitution (right to fair remuneration).

Summary:

I. The applicants, two employees of the Ministry of Internal Affairs submitted an appeal regarding a claim for compensation from the Ministry for night work between 1 December 1994 and 31 December 1998.

The applicants were employed in the Data Protection sub-section of the Ministry. This work was carried out throughout the day, in an unbroken twenty-four hour period. As a result, they worked night shifts.

Until 1 December 1994, the applicants received a salary increased by 20% for aggravated work conditions during regular working hours pursuant to Article 100 of the Internal Affairs Act (*Narodne novine*, nos. 55/89, 18/90, 47/90, 19/91, 29/91 – consolidated wording, 73/91, 19/92, 76/94, 161/98, 128/99 and 29/00). They also received special compensation for night work. As from 1 December 1994, the Ministry stopped paying the applicants extra for night work. This was as a result of the Conclusion of the Collegiate Body of the Ministry, pursuant to which the Instruction for Logging and Calculating Night Work in the Police and Criminal Police Sector was issued on 28 December 1994. These regulations meant that, with effect from 1 December 1994, only ordinary and criminal police had the right to remuneration for night work.

The first instance court rejected the applicants' claim, on the basis of lack of legal ground in the applicable regulations pursuant to which the applicants would have had the right to be paid more for night work than the 20% salary increase that they received for aggravated work conditions. Under Article 100 of the Internal Affairs Act, funding for the salaries of workers at the Ministry was to be guaranteed under criteria determined in the legislation on the establishment of salary averages for administrative workers. Funding was reserved for this purpose in the state budget. There was a provision for an increase of at least 20% because of the special work conditions and the nature of the work and tasks performed by the workers.

The second instance court upheld the first instance judgment, on the grounds that a basic salary, increased by 20%, should cover all working conditions for the applicants during regular working hours. There were no grounds for extra payment for night shifts.

The applicants then lodged a constitutional complaint against the above judgments, arguing that they were in an unequal position in relation to other officials at the Ministry of Internal Affairs, over the right to receive extra pay for night work.

II. The Constitutional Court found that where several categories of civil servants from the same Ministry work at night, it is not acceptable, under constitutional law, for only some of them to enjoy the right to extra pay for night work. The extra payments were made solely on the basis of working at night; they did not depend on the type of work performed in the Ministry. This is explicit within the contents of the 1994 Instruction.

The Constitutional Court found that the applicants were in an unequal position from the perspective of working at night, in relation to their colleagues from other sections of the Ministry (i.e. ordinary and criminal police). This violated the applicants' rights under Article 14.1 of the Constitution (prohibition of discrimination by position) in conjunction with Article 55.1 of the Constitution (right to fair remuneration).

Languages:

Croatian, English.

Identification: CRO-2007-3-012

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 20.12.2007 / **e)** U-III-4286/2007 / **f)** / **g)** *Narodne novine* (Official Gazette), 1/08 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial**.
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Reasoning**.

Keywords of the alphabetical index:

Remand in custody, duration / Detention, reasons.

Headnotes:

A remand ruling that prolongs detention is a legal measure depriving a person of his or her fundamental human right to personal freedom. Before a final judgment about his or her guilt, the relevant court is under an obligation, at all times, to give a detailed explanation as to why it considers a prolonged period of detention is justified and necessary. Courts must examine the justification for prolonging detention in the light of the circumstances of every case, and establish and specify the legal grounds for this decision. It must demonstrate how it has concluded that the underlying reason for the detention still exists. In all cases, the reasons for extending detention must be in proportion to the aim this measure is to achieve. In circumstances where legal grounds for detention on remand undoubtedly exist, the court should respect the principle of proportionality and should order a less severe measure, if this would achieve the same purpose.

Summary:

I. The applicant lodged a constitutional complaint against the ruling of a second instance court of 2 November 2007, upholding a first instance court ruling of 15 October 2007. This ruling had extended the period of detention for the applicant in criminal proceedings which were still under way, in which he had been charged with several criminal offences committed in concurrence in Article 293.2 and others of the Criminal Code (*Narodne novine*, nos. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03 and 190/03). The applicant had been in custody since 7 August 2007, as a result of a ruling of 27 July 2007, ordering his detention on remand because he had been evading service of legal proceedings. The court deemed that there was a danger that he might abscond, thereby bringing into play the legal grounds under Article 102.1.1 of the Criminal Procedure Act (*Narodne novine*, nos. 110/97, 27/98, 58/99, 112/99, 58/02, 143/02, 62/03 and 111/03; referred to here as "ZKP"). Under these provisions, detention on remand can be ordered for somebody if there is reason to suspect that this person has committed a criminal offence and there are circumstances indicating the possibility of absconding (if the person is in hiding or their identity cannot be established). The rulings under dispute established that these grounds still existed.

The applicant argued that the rulings violated his constitutional rights under Article 22 of the Constitution in conjunction with the provisions of Articles 16.2, 18.1 and 29.1.

II. The Constitutional Court made the following observations.

Detention on remand, as a legal measure depriving a person of his fundamental human right to freedom in the period before a final court judgment proving him guilty has been delivered, is not a punishment for the detainee nor may it become a punishment. Detention may thus only be ordered in cases in which there is a high degree of probability that the person will be found guilty and sentenced to punishment.

Because of the stated legal purpose and the legal nature of detention on remand, there is express provision in the legislation for an investigation by the competent judicial council as to the continued existence of legal grounds for detention once the indictment, motion to indict or indictment without investigation has been put forward. This must take place every two months, until judgment is pronounced, from the day when the earlier remand ruling entered into legal force. The defendant must then either be committed to custody or released.

If it decides to continue detention on remand, the competent court must give a thorough explanation as to why it has adjudged this measure necessary, and examine the justification for prolonging detention carefully, in the light of the circumstances of every specific case.

The grounds for prolonging detention on remand must be proportional (Article 16.2 of the Constitution) to the aim this legal measure is to achieve in each individual case, and the competent court is required to take account of this. Although legal grounds for detention on remand under Article 102.1 ZKP may exist, the court must still respect the principle of proportionality and order less severe measures if this would achieve the same purpose (Article 87.1 and 87.2 ZKP).

In the case under consideration, the Constitutional Court cited Article 102.1.1 ZKP, which requires proper assessment of the circumstances indicating the possibility that the person may abscond. In ordering detention on remand, courts must define which circumstances in that particular case indicate a danger that the defendant may abscond. Courts are also under a duty to assess these circumstances by applying the principle of proportionality provided for in Article 87.2 ZKP.

The Constitutional Court found that the courts in these particular proceedings had omitted to do this. The only explanation they gave for remanding the defendant in custody (and subsequently extending that detention), was that the applicant could not be served with the indictment. In effect, therefore, there was no proper explanation of the reasons for invoking Article 102.1.1 ZKP. As a result, the law vas violated, along with the applicant's right to liberty under Article 22 of the Constitution. This fundamental human right may be restricted only under conditions prescribed in the Constitution.

The Constitutional Court also pointed out that the circumstances of the case under scrutiny indicate that a further detention period might lead to a constitutionally impermissible disproportion between the legal purpose and legitimate aim of detention, its total duration in this case and its necessity. There are numerous other legal measures at the court's disposition to ensure a defendant's attendance in court, including the power of the competent courts to remand the defendant in custody again at a later stage of proceedings. The Constitutional Court therefore overturned the rulings.

Languages:

Croatian, English.

Czech Republic
Constitutional Court

Important decisions

Identification: CZE-2007-3-011

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 13.09.2007 / **e)** I. US 643/06 / **f)** On the interpretation of the concept of global securing of customs debt (a global customs guarantee) / **g)** *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.6.3 Constitutional Justice – Effects – **Effect *erga omnes***.
3.9 General Principles – **Rule of law**.
3.10 General Principles – **Certainty of the law**.
3.12 General Principles – **Clarity and precision of legal provisions**.
5.3.16 Fundamental Rights – Civil and political rights – **Principle of the application of the more lenient law**.
5.3.38.4 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Taxation law**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.
5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

Keywords of the alphabetical index:

Act, administrative, requirement / Customs tariff / Property, right, restriction / *In dubio pro libertate*, principle / *In dubio mitius*, principle.

Headnotes:

In cases of unclear interpretation of a statutory rule, a public authority is required to take into account the settled practice of application and interpretation, including case law (the law in the material sense). In a democratic state, based on the rule of law, a change in the application practice in the area of public law may not apply retroactively to the detriment of fundamental rights and freedoms (the prohibition of retroactivity).

If there are several possible interpretations of a public law norm, it is necessary to select the one which does not interfere, or interferes least, in the given fundamental right or freedom (the principle *in dubio pro libertate*).

Customs are a form of tax. Bank guarantees for customs debt are a public law institution, and permitting a guarantee in any form is an administrative act, with all the requirements that must be imposed on an administrative act. Imposing a tax obligation, based upon the interpretation of statutory provisions that would extend a tax obligation to situations that, under law, are not subject to tax obligations, is a violation of the right to own property under Article 11.1 of the Charter of Fundamental Rights and Freedoms.

Summary:

I. On 29 March 1996, a bank (the petitioner) issued a global customs guarantee in favour of the customs office in XY, whereby it agreed to pay, for a particular customs declarer, a customs debt up to a maximum of CZK 300,000, if it was not paid by the statutory deadline. On 15 April 2004, the customs office issued several decisions (assessments), in which it called on the petitioner to pay the office's receivable of customs and tax in the stated amount. The two specified assessments, related to the subject of the constitutional complaint, concerned payment shortfalls that were to have arisen through non-payment of debt assessed by two individual customs declarations from 12 February 1997.

The petitioner filed an appeal against both assessments, regarding the interpretation of the institution of a global customs guarantee under § 256 of Act no. 13/1993 Coll. (The Customs Act), in force through 30 June 1997. The argument was made that this should not be construed as applying to every individual debt from an unlimited series of debts, but to the aggregate of all debts of a customs debtor. The customs directorate in XY denied the petitioner's appeal, and agreed with the interpretation that a guarantee applies to every individual customs debt. The petitioner contested both decisions in an administrative complaint. The Municipal Court in XY upheld the petitioner's case. The customs directorate subsequently filed a cassation complaint against both decisions. The Supreme Administrative Court overturned them. Then, the Municipal Court in XY, bound by the legal opinion of the Supreme Administrative Court, issued decisions denying the petitioner's administrative complaints as unfounded. In its two constitutional complaints, combined for joint proceedings and decision, the petitioner sought annulment of the contested decisions by the Municipal Court in XY.

II. The Constitutional Court assessed the interpretation the customs bodies and courts had made of § 256 of the Customs Act and appendix no. 25 to Decree no. 92/1993 Coll., which implemented certain provisions of the Customs Act (as amended by Decree no. 8/1996 Coll). This version was in force from 15 January 1996 to 30 June 1998. It reviewed the contested decisions in the light of the fundamental right to property under Article 11.1 of the Charter, which must be interpreted as an institutional guarantee. Interference with this fundamental right is only possible where this is covered by legislation. This case involved the area of customs, which is a public law assessment, in the form of an indirect consumption tax. Bank guarantees for customs debt are a traditional public law institution that is subject to strict regulation. Permitting a guarantee in any form is an administrative act with all the requirements that must be imposed on a "perfect" administrative act. A private person has a right to good faith in acts performed by the public authorities, supported by the presumption of correctness. In a democratic state based on the rule of law, the greatest care is necessary in the creation of legal regulations; nevertheless, one cannot avoid ambiguities. In that case it is necessary to apply the principle *in dubio pro libertate,* one form of which is the rule *in dubio mitius.* This means that in imposing and collecting taxes under the law, the public authorities are required to preserve the essence and significance of the fundamental rights and freedoms, i.e., in case of doubt they must proceed less strictly. Together with the requirement of clarity and precision for legal provisions, the settled practice in application and interpretation is also important, and in unclear cases, the public authorities must consider it. In a law-based state, a new legal framework in the area of public law may not apply retroactively to the detriment of fundamental rights and freedoms. Based on Article 11.5 of the Charter of Fundamental Rights and Freedoms, the state authorities, when setting and collecting taxes and fees, must act within the bounds of law, and this provision must also be interpreted in the material sense, i.e. so that a public authority, when exercising its authority, will respect the protection of an individual's fundamental rights.

The Constitutional Court stated that the legal framework for global customs guarantees was not clear, and pointed to the frequent changes in the content of that institution, which also concerned the issue of the scope of the guarantee, which is the subject of the constitutional complaint. In the Court's view, the petitioner could only have expected repeated performance after Decree no. 135/1998 Coll., which, with effect as of 1 July 1998 until 30 June 1999 expressly stated that a guarantee applies to every individual customs debt. At the time of issue of the

global customs guarantee and the creation of the customs debt, the payment of which the petitioner guaranteed under the conditions of that guarantee, the interpretation of the relevant statutory provisions was not clear. The petitioner's interpretation was (in view of the foregoing), constitutional, and in accordance with the practice of customs bodies at that time. In this regard, the Constitutional Court laid out the existing practice of the customs offices, including their conduct in the petitioner's case. The customs office did not exercise repeated application of the customs guarantee until two years later, which meant a change in interpretation on its part (retroactively). The petitioner accordingly had to pay more under the guarantee than it could justifiably have expected at the time of issue of the guarantee, in view of the wording of the legal regulations then in force and the practice at the time. This interfered in its right to property ownership under Article 11.1 of the Charter of Fundamental Rights and Freedoms. Therefore, the Constitutional Court granted the constitutional complaint and overturned the contested decisions by the Municipal Court in XY.

In its reasoning, the Constitutional Court also addressed the question of the binding nature of the legal opinion in its resolutions, as well as the importance of denying a constitutional complaint due to evident lack of justification in terms of the legality of the decision it contests. It concluded that a resolution is not binding *erga omnes ad liminem*.

Languages:

Czech.

Identification: CZE-2007-3-012

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 27.09.2007 / **e)** II. US 789/06 / **f)** Requisites of an order to tap telephone communications / **g)** *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.
5.3.36.2 Fundamental Rights – Civil and political rights – Inviolability of communications – **Telephonic communications**.

Keywords of the alphabetical index:

Telephone tapping, necessary safeguards.

Headnotes:

Before issuing a wire-tapping order under the Criminal Procedure Code, the Court must consider the justification for criminal proceedings, or the specific purpose for which the information is required. If it does not do so, it contravenes the right to protection of confidentiality of documents and other records and reports. This right is protected by the Charter of Fundamental Rights and Freedoms and the Constitution.

Summary:

I. A police body initiated criminal prosecution steps against the petitioner that involved investigation for suspicion of having committed the crime of fraud. This was alleged to have happened when, as an attorney, in complaints filed in the name of his client, he cast doubt upon the conditions for confiscation of his client's property by intentionally withholding or giving incomplete information about certain facts concerning the determination of nationality and conditions of confiscation. It was suggested that he had thereby attempted to lead state bodies into error, or take advantage of their error and thus unjustifiably acquire the property of other persons to the benefit of his client. In the criminal proceedings, at the request of the police body, the judge of the District Court in XY issued an order to obtain data on telephone calls from the numbers of the petitioner and his office. Having completed the investigation, the police body opened a criminal prosecution of the petitioner for the crime of fraud. A prosecutor from the Supreme State Prosecutor's Office annulled a resolution to initiate criminal prosecution. The matter was then suspended by decision of the police body.

In his constitutional complaint, the petitioner sought to have the order annulled, and sought delivery of a copy of the records of telephone operations, which exist in the form of printed extracts in the police file. He requested their destruction. The petitioner stated that a record of an attorney's telephone operations is not possible in the case of conversations between an attorney and a client, that it is possible to tap to an attorney's telephone operations only while they are going on, so that it could be interrupted at any time and all records of unjustified tapping immediately destroyed. Thus it is not possible to evaluate a recording subsequently, or a record of actual operations, as in the present case. He objected that the court order did not allow any defence to the person whose rights had been infringed, even ex post, unless the injured person accidentally learnt about the interference, as happened in this case. Only in the case of criminal proceedings before the court is such a measure reviewed, and then only its formal aspects. In the present case, the justification of the court decision is merely a transcript of the proposal, without its own arguments.

II. The Constitutional Court first considered interpretation of the right to protection of the confidentiality of documents and other records and reports guaranteed by Article 13 of the Charter of Fundamental Rights and Freedoms, and the conditions for legitimate interference in that right. It described judicial review in the form of a court order under § 88 and § 88a of the Criminal Procedure Code as one of the guarantees in reviewing the necessity of interfering in that constitutionally guaranteed right, and also considered the requirements of such an order. One of them is the purpose of obtaining the data (in the form of data about the crime concerning which the criminal proceedings are being conducted), which must be reviewed taking into account whether the act took place that is alleged to be a crime, whether that act was committed by the defendant and from what motives; it is also necessary to review that purpose with regard to whether the interference is necessary in a legitimate public interest, and whether the interference is proportionate to the aim pursued.

The Constitutional Court concluded that the police procedure exceeded the bounds of constitutionality, because, even before initiating criminal prosecution, when the act had not yet been clearly defined, nor the circle of suspects specified, the police performed an action governed by Chapter Four of the Criminal Procedure Code as an ordinary act, and not as a non-postponable or non-repeatable act.

The Constitutional Court concluded that the general court did not consider whether the criminal proceedings were properly opened. They had not considered the basis of the suspicion that the petitioner might have committed a crime; neither had they considered why the information requested was necessary. They had also failed to consider why it is possible to perform this act as "ordinary", rather than non-postponable or non-repeatable. Thus, the order lacks sensible justification, or connection with any constitutionally protected purpose.

The conclusion of the police body and the reviewing state prosecutor, which led to suspension of the criminal matter, is purely legal. In order for it to be reached, it was not necessary to provide such extensive evidentiary material. The police body that initiated criminal proceedings, the reviewing state prosecutor, and the judge ruling on the contested order, given the evident absence of any indicia indicating justification for suspicion that the petitioner might have committed a crime, already had the possibility to reach the same conclusion that led to the suspension of the case.

The Constitutional Court stated that the court order violated the petitioner's right to protection of confidentiality of documents and other records and rights guaranteed by Article 13 of the Charter of Fundamental Rights and Freedoms, in connection with the first sentence of Article 90 of the Constitution. Before issuing the order, the court did not even consider the justification of the criminal proceedings or the particular purpose for the requested information about telephone operations. The Constitutional Court also stated that the police body violated Article 2.4 of the Constitution in connection with Article 13 of the Charter of Fundamental Rights and Freedoms by not destroying the records of telephone operations that it has in documentary form.

The Constitutional Court's judgment granted the constitutional complaint, annulled the order from the judge of the District Court in XY, and ordered the Police of the Czech Republic to destroy its file records about telephone operations obtained in documentary form based on the abovementioned judge's order. The Constitutional Court rejected the petitioner's proposal to issue copies of the records of telephone operations, as it was not competent to review such a proposal.

None of the judges filed a dissenting opinion.

Languages:

Czech.

Identification: CZE-2007-3-013

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 16.10.2007 / **e)** Pl. US 53/04 / **f)** Different retirement ages for men and women depending on the number of children raised / **g)** *Sbírka zákonů* (Official Gazette) – no. 341/2007 Coll. and *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.
5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.
5.2.3 Fundamental Rights – Equality – **Affirmative action**.
5.4 Fundamental Rights – **Economic, social and cultural rights**.
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

Keywords of the alphabetical index:

Mother, child raising, preferential treatment for retirement / Proportionality, definition / Retirement, age, preferential treatment of women.

Headnotes:

Equality is a relative category that requires the removal of unjustified differences. The principle of equality in rights must be understood to mean that legal differentiation in the approach to certain rights may not be a manifestation of arbitrariness, but it does not lead to the conclusion that any person must be granted any right at all. Preferential treatment must be based on objective and reasonable grounds (a legitimate aim) and there must be a proportional relationship between that aim and the means used to achieve it (legal advantages).

In the area of economic, social, and cultural rights, the legislature has greater scope to apply its idea of the permissible bounds of de facto inequality. Setting different retirement ages for women depending on the number of children raised, compared to the single retirement age for men, regardless of the number of children raised, pursues a legitimate aim. The distinguishing criterion, consisting of a person's sex and the number of children raised, does not violate the principle of equality and is not a manifestation of arbitrariness by the legislature.

Summary:

I. The Constitutional Court considered a petition from the Supreme Administrative Court (the petitioner) seeking to annul § 32 of Act no. 155/1995 Coll., on Pension Insurance. The petitioner was of the opinion that the contested provision, which set a different retirement age for women only, depending on the number of children raised, was inconsistent with the constitutional order. The petitioner pointed out that in Czech law the retirement age is traditionally set differently for women and men, and for women it is further differentiated according to the number of children raised. According to the petitioner, there are no reasonable grounds to justify differences in the conditions and amount of appropriate security provided in old age where only a particular group of persons is given an advantage due to meeting special conditions and another group meeting the same conditions is denied the advantage. Thus, although there are no material grounds for this related to the different sexes, the law establishes different rights for participation in pension insurance, based on the sex of the person caring for a child. Setting the retirement age in accordance with caring for children creates unequal conditions for men and women. The petitioner pointed out that women enjoy advantageous status under Article 29 of the Charter of Fundamental Rights and Freedoms (the "Charter") and highlighted Article 32.4 of the Charter in relation to caring for children as part of the rights of both parents.

II. The Constitutional Court pointed out that in the event of conflict between fundamental rights or freedoms and the public interest or other fundamental rights or freedoms, it is necessary to review the purpose of interference in relation to the means used. That review uses the principle of proportionality (in the wider sense). This can also be described as a ban on excessive interference in rights and freedoms. In accordance with its case law, it reiterated that equality is a relative category that requires the removal of unjustified differences. Legal differentiation in the approach to certain rights may not be a manifestation of arbitrariness, but the principle of equality does not lead to the conclusion that any person must be granted any right at all. Thus, different treatment is permissible in principle, if there are objective and reasonable grounds for a differentiated approach.

According to the Constitutional Court, the repeal of the contested provision would only remove a certain advantage from women/mothers, without giving men/fathers, as part of the "equalising of rights," the same advantages as women/mothers. The Constitutional Court found that the approach of giving advantages to women who raised children was based on objective and reasonable grounds. It took into account historical and sociological grounds, as well as comparative law, and referred to the arguments made by the parties and in position statements, and found that the contested provision is based on the existence of a legitimate aim. The Constitutional Court found no arbitrariness on the part of the legislature when passing the contested provision. It concluded that the repeal of the provision would deviate from the principle of minimising interference, because a solution of the unequal status of men and women in pension insurance is not possible without a comprehensive and wisely-timed reform of the entire pension insurance system. An overhaul of the entire pension system, and the determination of socially tolerable and economically acceptable positions, is also necessary.

The judgment of the plenum of the Constitutional Court denied the Supreme Administrative Court's petition.

Two dissenting opinions were filed, dissenting both from the verdict and from the legal arguments within the reasoning.

Languages:

Czech.

Identification: CZE-2007-3-014

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 30.10.2007 / **e)** Pl. US 2/06 / **f)** Registration of religious legal entities by the Ministry of Culture / **g)** *Sbírka zákonů* (Official Gazette) – no. 10/2008 Coll. and *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.6.3.1 Constitutional Justice – Effects – Effect *erga omnes* – ***Stare decisis***.
3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature**.
3.9 General Principles – **Rule of law**.
3.10 General Principles – **Certainty of the law**.
5.2 Fundamental Rights – **Equality**.
5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship**.
5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.

Keywords of the alphabetical index:

Church, registration, constitutive / Religious society, registration / Church, registration, criteria.

Headnotes:

Under Article 16.2 of the Charter of Fundamental Rights and Freedoms (the "Charter"), churches and religious societies do not enjoy absolute autonomy in establishing so-called church legal entities without regard to the subject of the activities. The law may set objective, reasonable, formal conditions, and if these are met, the administrative body must record the church legal entity (the criterion of entitlement to recording). Thus, the construction of the creation of church legal entities based on the evidentiary principle can be supplemented with elements of registration for purposes of protecting other constitutionally relevant values (a legitimate aim), here the protection of the principle of legal certainty and the rights of others.

Summary:

I. The petitioners, a group of senators, filed a petition to repeal Act no. 495/2005 Coll., which amends the Act on Churches and Religious Societies, or to repeal those provisions of the Act that were amended by that Act. They sought the repeal of other related provisions in legislation on voluntary service, employment and accounting.

The petitioners observed that Act no. 495/2005 Coll. made extensive amendments to the Act on Churches and Religious Societies. As a result, the record of church legal entities maintained by the Ministry of Culture would now be of a constitutive nature rather than a declaratory one. It would no longer mean recording, but registration, and this contravened Article 16.2 of the Charter, in the light of Constitutional Court Judgment Pl. ÚS 6/02 (4/2003 Coll.).

II. The majority of the plenum of the Constitutional Court recapitulated the fundamental principles underlying Judgment Pl. ÚS 6/02. These included the principle of a lay state on the one hand, and the principle of the autonomy of churches and religious societies on the other. The state may not interfere in their activities, and if their activity is limited to internal matters (in particular their structural organisation), in principle there is no scope for judicial review. Thus, the legitimate aims for limiting the principle of the autonomy of churches and religious societies are the principle of legal certainty and protection of the rights of others (Article 1.1 of the Constitution, Article 16.4 of the Charter of Fundamental Rights and Freedoms).

In the first place, the Constitutional Court denied the petition to repeal the amendments in Act no. 495/2005 Coll. Parliament clearly did not lack legislative competence to enact this legislation. The problem was not caused by alleged lowering of the previous standards of rights and freedoms, or by the alleged failure to respect the legal opinion of the Constitutional Court stated in the judgment.

The Constitutional Court pointed out that it is permissible, under the Constitution, to exclude certain subjects (legal entities derived from churches and religious societies) – in view of the subject of their activity – from the regime of the Act on Churches and Religious Societies. Under Article 16.2 of the Charter of Fundamental Rights and Freedoms, churches and religious societies do not enjoy absolute autonomy in establishing so-called church legal entities without regard to the subject of the activities. In the creation of church legal entities, elements of respect for the principle of the autonomy of churches and religious societies can be seen in the principle that a record will always be entered (the criterion of entitlement to recording), if the applicant meets objectively reasonable conditions provided by statute. The majority of the plenum took the view that the obligation for church legal entities to provide the subject of activity, by-laws, name, statutory body including personal data of the members and the manner in which the statutory body acts, could not be considered objectively unreasonable or in the nature of harassment. The rationale behind the requirement was the principle of legal certainty (or protection of third persons). In relation to the principle of the autonomy of churches or religious societies, this requirement did not constitute a disproportionate burden upon the subjects, as founders of legal entities. Rejection of an application for registration can be based only on evaluation of the formal requirements in the petition, and may not be a "substantive review."

A church legal entity established for the profession of a religious faith does not exist from the stance of the legal order until the moment when it is entered in the register, even though its creation is then retroactive to the day it was established. The Constitutional Court deemed this a constitutional arrangement with respect to the principle of legal certainty and protection of third persons. The Constitutional Court also pronounced constitutional the framework that ties the creation of other church legal entities, established in order to provide charitable, social or health services, to the entry of that legal entity in the register. The majority of the plenum of the Constitutional Court were of the opinion that construction of the creation of church legal entities based on the evidentiary principle can be supplemented with elements of registration in order to protect other constitutionally relevant values (a legitimate aim). These included the protection of the rights of third persons or the principle of legal certainty.

The Constitutional Court also rejected the argument that the Act violates the rights of a minority (religious people). It stated that Article 6 of the Constitution is quite clearly aimed at the general political (social) level, and the Charter protects national and ethnic minorities. Articles 15.1 and 16 of the Charter of Fundamental Rights and Freedoms provide specific protection for the constitutional status of religious people.

The majority of the plenum also pointed out that this judgment does not deviate from the legal opinions expressed by the Constitutional Court in Judgment Pl. ÚS 6/02, and that it therefore does not need to be passed by nine votes under § 13 of the Act on the Constitutional Court. The judgment by the plenum of the Constitutional Court rejected the senators' petition. Seven judges filed dissenting opinions regarding the verdict and the reasoning of the judgment.

Languages:

Czech.

Identification: CZE-2007-3-015

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 06.11.2007 / **e)** II. US 3/06 / **f)** Protection of the principle of confidence in obligation relationships / **g)** *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

2.1.1.3 Sources – Categories – Written rules – **Community law**.
3.9 General Principles – **Rule of law**.
5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.
5.4.7 Fundamental Rights – Economic, social and cultural rights – **Consumer protection**.
5.4.8 Fundamental Rights – Economic, social and cultural rights – **Freedom of contract**.

Keywords of the alphabetical index:

Consumer protection, Community law, applicability.

Headnotes:

The general courts are required to provide protection not only to the principle of free will, but also to the principle of protecting the confidence of a person toward whom a legal act is intended, and finding the necessary balance between them. If they do not do so, they violate the right to a fair trial guaranteed in Article 36.1 of the Charter of Fundamental Rights and Freedoms (the “Charter”).

Summary:

I. In 1995 the plaintiff, (an individual), concluded a purchase contract with company XY outside the seller’s usual place of business, at a presentation, in the presence of a sales representative and other persons. He felt that he was manipulated into signing the contract. He was informed about the opportunity to rescind the contract, which he subsequently did by telephone. Nonetheless, in 1998 the company sued him for an amount due (just before the expiration of the statute of limitations, although it had not previously sought payment outside court). The general courts (the Supreme Court of the CR, the municipal court in XY and the District court in XY) granted the complaint, having concluded that the contract had been validly entered into and there were no grounds for rescission in the contract. They found no evidence that the act had been performed under duress and under conspicuously disadvantageous conditions. In his constitutional complaint, the plaintiff sought to have the decisions of the general courts annulled, because he believed that they violated his constitutionally guaranteed right to a fair trial, guaranteed in Article 36.1 of the Charter of Fundamental Rights and Freedoms and Article 6.1 ECHR. He claimed that the general courts did not sufficiently emphasise the application of good morals on the contractual relationship between him and the company.

II. The Constitutional Court began by observing that the general courts had inadequately evaluated the application of good morals to the overall contractual relationship existing between the plaintiff and the company (including conduct before and after conclusion of the contract). In reviewing inconsistency with good morals, they focused only on individual provisions in the contract. It described this approach as formalistic.

The legal relationship in question arose in 1995. However, the Constitutional Court noted that, due to the manner of its creation and by its nature, it was a relationship analogous to those arising on the basis of so-called consumer contracts. There was no express provision for these contracts within the Civil Code until the amendment (effective 1 January 2001, which aimed to harmonise Czech law with European consumer law, or the *acquis communautaire* in that area. The starting point of consumer protection is the postulate that a consumer is in an unequal position vis-à-vis a professional vendor. The common feature of the new mandatory framework is an attempt to even out this *de facto* imbalance through law, by limiting the free will derived under Article 2.3 of the Charter of Fundamental Rights and Freedoms. The Constitutional Court sees in this provision both a structural principle and an individual’s subjective right, which can be limited in order to promote another right or public interest based on law, where that limitation must be proportionate to the aim pursued. Such conditions must also be achieved through interpretation of law in cases of *“de facto”* consumer relations that arose before the new legal framework went into effect. Viewed materially, the position of a contracting party concluding a contract before the new legal framework came into force was no different from that of a consumer concluding a contract under the regime of consumer contracts. In order to correct the imbalance, it is necessary to seek an interpretation of law which, on one hand, will ensure that this goal is reached, and on the other hand will proportionately limit free will. The Constitutional Court also stressed that the parent company must have been familiar with the European regulation, as its registered office was in the EU.

The Constitutional Court stated that protection of free will cannot be absolute where there are other fundamental rights, constitutional principles or other constitutionally approved public interest that are capable of proportionately limiting free will. This principle makes fundamental the protection of the person who performed a legal act trusting a particular factual situation presented to him by the other party. Because they did not recognise the functioning of that principle, the general courts had erred, and accordingly violated the plaintiff's right to a fair trial guaranteed by Article 36.1 of the Charter of Fundamental Rights and Freedoms. They had not reached the conclusion that undoubtedly followed from the factual findings, that the seller had tried to get the buyer (the plaintiff here) to believe that the contract was advantageous, but with the help of information that could be described, at a minimum, as incorrect. Examples included an unknown environment on the premises of the buyer's other clients, a "formula-type" contract, purchase price in Deutschmarks, payments in Czech crowns, and erroneous oral information about the possibility of rescinding the contract. In addition, the buyer did not receive a copy of the contract after signing it. The company's claim could not be given legal protection, in view of the fact that it acted inconsistently with the principle of protection of the confidence of the plaintiff, or inconsistently with the principle of legal certainty.

The Constitutional Court added that there were other reasons than those predicated in constitutional law to afford the plaintiff protection. These could be found in the doctrinal application of community law. The Constitutional Court stated that the general courts should find such an interpretation of those provisions of the Czech Civil Code that were in force when the contract was concluded as would take into account the content and purpose of European consumer protection. This was so, despite the fact when the relationship arose, the legal order of the Czech Republic did not contain an express legal framework implementing a regulation of community law (a directive) and the Czech Republic was not a member of the EU.

The Constitutional Court accordingly granted the constitutional complaint and annulled the contested decisions of the general courts.

Languages:

Czech.

Estonia
Supreme Court

Important decisions

Identification: EST-2007-3-004

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 26.09.2007 / **e)** 3-4-1-12-07 / **f)** Petition of the Tallinn Administrative Court of 9 May 2007 to review the constitutionality of Section 15.2.6 of the Value Added Tax Act / **g)** *Riigi Teataja III (RTIII)* (Official Gazette) 2007, 32, 259, www.riigikohus.ee / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

2.2.1.6.4 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Secondary Community legislation and domestic non-constitutional instruments**.
3.22 General Principles – **Prohibition of arbitrariness**.
4.10.7.1 Institutions – Public finances – Taxation – **Principles**.
5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens**.
5.2.2 Fundamental Rights – Equality – **Criteria of distinction**.
5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

Keywords of the alphabetical index:

Equal treatment, unequal situations / Public finance, sales tax / Tax, rate / Tax, assessment, objection / Tax, burden, equality / Tax, value added, equality.

Headnotes:

The concept of substantial equality means equal treatment for equals and unequal treatment for unequals. However, not all instances of unequal treatment of equals amount to violations of the right to equality. The prohibition on unequal treatment for equals comes into play where a group of persons or a situation is treated unequally on an arbitrary basis. Unequal treatment may be deemed arbitrary when there is no reasonable justification for such

differentiation. If there is a reasonable and appropriate ground, unequal treatment by law is justified.

The Supreme Court found that unequal treatment of value added taxpayers, based only on their sources of funding, was unjustified and therefore unconstitutional.

Summary:

I. The norm under scrutiny here was Section 15.2.6 of the Value Added Tax Act (or "VATA"). It allowed the application of the more favourable 5 % value added tax rate, where somebody organising a performance or a concert had received funds from the state, rural municipality, city budget or the Cultural Endowment of Estonia amounting to at least 10 % of their budget revenue for the calendar year.

A non-profit association "*Muusikaliteater"* ("the association") availed itself of this provision and sold tickets to two of its musicals at a 5 % value added tax rate. The Pohja Tax and Customs Centre of the Tax and Customs Board (the "TCB") required the association to pay additional sums of value added tax, as it did not agree that the association was entitled to apply the 5 % rate of value added tax. The association filed a complaint with an administrative court, requesting the repeal of the TCB's order. The association also asked that Section 15.2.6 of the VATA not be applied, as it was out of line with Articles 12.1 and 31 of the Constitution and with European Union law.

The Tallinn Administrative Court repealed the TCB's order and declared the condition in Section 15.2.6 of the VATA unconstitutional. It held that the unequal treatment of organisers depending on their sources of financing was arbitrary and in conflict with the freedom to engage in enterprise. The Administrative Court initiated constitutional review proceedings and referred the case to the Supreme Court.

II. The Constitutional Review Chamber examined the conformity of Section 15.2.6 of the VATA with the principle of equal treatment in legislation arising from Article 12.1 of the Constitution and from general principles of European law. The principle of equality in legislation requires that laws treat equally all persons who are in a similar situation and manifests the idea of substantial equality: equals must be treated equally and unequals unequally. However, the Chamber observed that not all instances of unequal treatment of equals amount to breaches of the right to equality. The prohibition on unequal treatment of equals is violated when a group of persons or a situation is treated unequally on an arbitrary basis, i.e. when there is no reasonable justification for such differentiation. Where reasonable and appropriate grounds exist, the unequal treatment by law is justified.

The Chamber argued that Section 15.2.6 of the VATA failed to achieve the desired aim. The norm enables performing arts institutions, who receive at least ten per cent of their funding from public funds, to apply the 5 % value added tax rate to all their performances and concerts, irrespective of whether these are high culture performances and concerts. However, the circle of private performing arts institutions offering high culture events cannot be restricted to those institutions who receive such financing from public law funds. The Chamber accordingly decided that the condition for the application of the value added tax incentive, established in Section 15.2.6 of the VATA, was arbitrary. The Chamber found no other reasonable and appropriate grounds justifying the discrimination prescribed in this norm.

Having found the condition set up in Section 15.2.6 of the VATA to be out of line with the constitutional principle of equal treatment (Article 12.1), the Chamber declared the provision unconstitutional and invalid. It decided to proceed no further with the administrative court's allegations as to the conflict of Section 15.2.6 of the VATA with the freedom to engage in enterprise, established in Article 31 of the Constitution.

Supplementary information:

The case also touched briefly upon the question of conformity of Estonian law with a tax directive of the European Communities. Tallinn Administrative Court, when assessing the constitutionality of Section 15.2.6 of the VATA, had taken the view that a performing arts institution registered in another Member State of the European Union cannot practically fulfil the conditions in the above norm. The norm therefore contravened Article 14 of the Treaty establishing the European Union, which guarantees the free movement of goods, persons, services and capital within the internal market.

The Supreme Court pointed out that at the time of the dispute, Section 15.2.6 of the VATA would have been based upon the Sixth Directive – the common system of value added tax; uniform basis of assessment. See Articles 13.A.1.n and 12.3.c of Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes. By making this statement, the Supreme Court factually admitted the primacy of the European secondary legislation over domestic legislation.

Languages:

Estonian, English.

Identification: EST-2007-3-005

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 01.10.2007 / **e)** 3-4-1-14-07 / **f)** Petition of the Tallinn Administrative Court of 30 May 2007 to review the constitutionality of Sections 120, 130.1, 131.3, 133.1 and 133.3 of the Public Service Act / **g)** *Riigi Teataja III (RTIII)* (Official Gazette) 2007, 34, 274, www.riigikohus.ee / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.22 General Principles – **Prohibition of arbitrariness**.
5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law**.
5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age**.

Keywords of the alphabetical index:

Equal treatment, unequal situations / Public Service, retirement, discrimination / Dismissal on grounds of age.

Headnotes:

The concept of substantial equality entails equal treatment for equals and unequal treatment for "unequals". The prohibition on unequal treatment for equals is violated when a group of persons or a situation is treated unequally on an arbitrary basis. Unequal treatment can be regarded as arbitrary where there is no reasonable justification for such differentiation. The Supreme Court found, that in public service, unequal treatment based on age is not in conformity with the Constitution.

Summary:

I. Citizenship and Migration Board officials Elli Klein and Mare Linntamm were released from service due to their age under Section 120.1 of the Public Service Act (PSA). E. Klein and M. Linntamm filed actions with the Tallinn Administrative Court, requesting, among other things, a declaration that Section 120.1 contravened Articles 12 and 19 of the Constitution.

By its judgment of 30 May 2007 the Tallinn Administrative Court satisfied the actions in part. When adjudicating the matter the Administrative Court did not apply Section 120.1 of the PSA, and declared Sections 120, 130.1, 131.3, 133.1 and 133.3 of the PSA, as provisions related to Section 120.1 of the PSA, unconstitutional. In its judgment, the Tallinn Administrative Court found that Section 120.1 of the PSA deprived officials in public service of their protection against dismissal, so that elderly officials could be dismissed simply due to their advanced age. The fact that a person can no longer work in an office because he or she has reached a certain age, constitutes an intensive infringement of free self-realisation, established in Article 19.1 of the Constitution. This possibility of dismissing officials of a certain age simply because of their age does not serve the interest of the democratic social order. Article 12 of the Constitution does not allow somebody to be treated unequally by comparison with others solely due to age, if there are no reasonable and proportionate grounds. Section 120.1 of the PSA places those who have reached a certain age in an unequal situation in comparison to younger persons, where the differentiation is due to age.

II. The norm with decisive importance for the adjudication of the dispute was Section 120.1 of the PSA. It provides that an official may be released from service due to age when he or she attains sixty-five years of age. Other PSA norms came under scrutiny, including those regulating the procedure of release from service due to age and the obligations of an agency towards an official released under Section 120.1 of the PSA. These norms jointly formed a uniform regulation related to the release from service of officials of sixty-five and over, and bore a close relationship to the provision under dispute. Section 120.2 of the PSA specifies the date of release, Section 130.1 provides for advance notice of release from service due to age. Section 131.3 deals with compensation, and Section 133.1 and 133.3 regulate the timing of the release from service due to age.

The Constitutional Review Chamber examined the conformity of Sections 120, 130.1, 131.3, 133.1 and 133.3 of the PSA with the principle of equal treatment in legislation arising from Article 12.1 of the Constitution. The principle of equality in legislation requires that laws treat equally all persons who are in a similar situation and manifests the idea of substantial equality: equals must be treated equally and unequals unequally. The prohibition on unequal treatment for equals is violated when a group of

persons or a situation is treated unequally on an arbitrary basis, i.e. when there is no reasonable justification for such differentiation. Where reasonable and appropriate grounds exist, unequal treatment by law is justified.

Section 120.1 of the Public Service Act offers administrative agencies the possibility of releasing from service officials who are sixty-five and over, without substantive reason and based solely on one formal criterion – the age. This provision therefore differentiates between persons who are released from service due to the attainment of this age, and those who have not been released, irrespective of whether they have reached the age of sixty-five. In short, Section 120.1 of the PSA leaves the release or non-release of these persons to the discretion of the respective administrative agency. It is possible that in every-day administrative practice, those over sixty-five are released because of their age and without substantive reasons, because the law does not require this. To avoid arbitrary unequal treatment the criteria for release from service must be transparent and reflect the actual situation. Consequently, there was no reasonable or appropriate justification for the infringement of the general right to equality, and it amounted to arbitrary unequal treatment. For those reasons, Section 120.1 of the PSA and the related norms contravened Article 12.1 of the Constitution.

Having found that Sections 120, 130.1, 131.3, 133.1 and 133.3 of the PSA breached the principle of equal treatment under Article 12.1 of the Constitution, the Chamber declared the provisions unconstitutional and invalid.

Supplementary information:

This judgment gave rise to lively discussion in the public arena, and prompted a large number of complaints from persons dismissed from public service due to their age.

Languages:

Estonian, English.

Germany
Federal Constitutional Court

Important decisions

Identification: GER-2007-3-015

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 13.03.2007 / **e)** 1 BvF 1/05 / **f)** / **g)** / **h)** *Deutsches Verwaltungsblatt* 2007, 821-831; *Wertpapiermitteilungen* 2007, 1478-1483; *Gewerbearchiv* 2007, 328-333; *Neue Zeitschrift für Verwaltungsrecht* 2007, 937-941; *Europäische Grundrechte-Zeitschrift* 2007, 340-349; *Zeitschrift für neues Energierecht* 2007, no. 2, 163-167; CODICES (German).

Keywords of the systematic thesaurus:

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts**.
1.3.5.2.2 Constitutional Justice − Jurisdiction − The subject of review − Community law − **Secondary legislation**.
2.1.3.2.2 Sources – Categories – Case-law – International case-law – **Court of Justice of the European Communities**.
2.2.1.6.3 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Secondary Community legislation and constitutions**.
4.7.6 Institutions – Judicial bodies – **Relations with bodies of international jurisdiction**.
5.2.2 Fundamental Rights − Equality − **Criteria of distinction**.
5.3.13.2 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Effective remedy**.

Keywords of the alphabetical index:

Environment, emissions trading / Environment, climate protection / Environment, greenhouse gas, reduction / Environment, protection.

Headnotes:

1.a The Federal Constitutional Court and the competent courts will not evaluate the national implementation of European Community directives

which contain mandatory provisions and allow Member States no discretion as to how to effect implementation based on the standard of the fundamental rights contained in the Basic Law as long as the case-law of the Court of Justice of the European Communities generally ensures protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law.

b. To ensure that such effective protection exists, the competent courts are obliged to evaluate Community rules according to the standards of Community fundamental rights and, where appropriate, they may request a preliminary ruling pursuant to Article 234 of the Treaty establishing the European Community.

2. The decision concerns the question of the consitutionality of Section 12 of the Act on the National Allocation Plan for Greehouse Gas Emission Allowances in the 2005 to 2007 Allocation Period.

Summary:

I. Trade in greenhouse gas emission allowances has been possible in Europe since 2005. This is based on the Emissions Trading Directive adopted by the European Community, according to which participating states must issue emission allowances to resident companies that allow the emission of a certain quantity of greenhouse gases. If emissions fall below the thresholds in the allowances, the companies concerned may sell these unused allowances to other companies who exceed their allocated quota of greenhouse gas emissions. The purpose of the trade is to bring about a reduction in greenhouse gas emissions in a cost-effective and economic way.

In order to implement Community law, the German legislature adopted, *inter alia*, the Allocation Act 2007 (hereinafter the "Act"), which entered into force on 31 August 2004. This Act lays down the total quantity of allowances for carbon dioxide emissions in Germany for the period of 2005 to 2007 and the rules for the allocation of emission allowances. It distinguishes between existing and new installations. The latter are in principle accorded preferential treatment in the allocation of allowances over the former on the basis of different allocation rules. Section 12 of the Act contains a special allocation rule, which provides for the recognition of early reductions in emissions. Under this section, installations whose emissions have been reduced due to modernisation measures taken between 1 January 1994 and 31 December 2002 are accorded preferential treatment in the allocation of allowances over existing installations that have not been modernised; the preferential treatment is given for a period of twelve calendar years following the conclusion of the modernisation measures. This provision is intended to ensure that significant early action in relation to the cleaning up of industry and the energy sector, in particular in the new *Länder* (states), is at least partially taken into account in the allocation.

The present proceedings concern the judicial review of Section 12 of the Act. The government of the *Land* Saxony-Anhalt is of the opinion that the section is not compatible with the principle of equality before the law since it does not sufficiently acknowledge early modernisation measures. It claims that this results in competitive disadvantages for many East German companies in particular. In its view, companies which made their contributions to the reduction of greenhouse emissions early on through the adoption of modernisation measures in the 1990s are at a disadvantage. The government of Saxony-Anhalt alleges that their early action was either not recognised at all (in the case of modernisation occurring up until 1994) or – in comparison with new installations – not adequately recognised (in the case of modernisation occurring up to and including 2002). In comparison with companies which had not brought about a reduction in emissions in the past, the companies which had contributed most and for the longest amount of time to a reduction in carbon dioxide emissions are seriously disadvantaged.

II. The application for judicial review of a statute was unsuccessful. The First Panel of the Federal Constitutional Court held that Section 12 of the Act was compatible with the Basic Law. In particular, this section does not violate the requirement of equal treatment. Preferential treatment of new installations, i.e. installations that were modernised after 2005, over installations that were modernised early, is objectively justified. The legislature may provide special investment incentives for additional new installations and future modernisations in the interests of active climate protection. This is precisely the purpose of the trade in emissions.

In essence, the decision is based on the following considerations:

The Federal Constitutional Court is entitled to undertake a complete review of Section 12 of the Act. It is true that the Federal Constitutional Court and the competent courts will not evaluate the national implementation of European Community directives containing mandatory provisions by the standard of the fundamental rights contained in the Basic Law as long as the [case-law of the Court of Justice of the]

European Communities generally ensure protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law ("Solange II" case-law). The recognition of early reductions in emissions, as provided for in Section 12 of the Act, is, however, made expressly a matter for the discretion of the Member States and thus is not of an obligatory nature.

Section 12 of the Act does not violate the equal treatment requirement contained in Article 3.1 of the Basic Law.

There is no objectively unjustified unequal treatment of installations which underwent early emissions reductions (Section 12 of the Act) *vis-à-vis* installations which were replaced by new installations in 2005 or later (Section 10 of the Act). The preferential treatment of new installations in comparison with installations with early reductions in emissions in the issuance of allowances is objectively justified. Section 10 of the Act aims, in particular, to achieve by 2012, a 21 % reduction in the level of greenhouse gas emissions as compared to the emission level in 1990. The provision creates innovation incentives for new installations and thus serves to promote active climate protection. In contrast, measures that were taken prior to the emissions trading scheme entering into effect, do not have any further effects on climate protection. Section 12 of the Act is concerned only with appropriate compensation for past action.

Nor is it possible to find unequal treatment which is not justified under constitutional law if one compares the allocation of allowances for modernisations of old installations after 1 January 2005 with the allocation of allowances for early emissions reductions pursuant to Section 12. The legislature may provide special incentives for future modernisations, particularly where the reduction in carbon dioxide is of a considerable degree. This is precisely the purpose of the trade in emissions.

Similarly, there is no constitutionally unjustified unequal treatment of the installations falling within the scope of Section 12 of the Act in comparison with the installations which were modernised before 1994. It is true that an operator who modernised its installation by the end of 1993, and thus contributed to the reduction in greenhouse gases, will not receive any preferential treatment. Such operators will be treated in the same way as operators of installations that have not been modernised. This unequal treatment is, however, justified. The Federal Government's choice of 31 December 1993 as the cut-off date was objectively justified by the fact that reliable data required for ascertaining any relevant early reduction in emissions would not otherwise have been available. Furthermore, the legislature's consideration that, based on current technical knowledge, it no longer considers measures undertaken at least eleven years before the time the emissions trading scheme took effect and which today no longer serve to further reduce greenhouse gas emissions to be particularly worth rewarding from a climate change perspective is not constitutionally objectionable.

Supplementary information:

Two constitutional complaints lodged against the Act (1 BvR 1847/05 and 1 BvR 2036/05, which are published on the website of the Federal Constitutional Court) were not admitted by the First Panel of the Federal Constitutional Court for decision.

Cross-references:

The "Solange II" case-law mentioned in the decision is reported in the Decision of 22 October 1986, 2 BvR 197/83, *Special Bulletin "Inter-Court Relations"* [GER-1986-C-001].

Languages:

German.

Identification: GER-2007-3-016

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 13.06.2007 / **e)** 1 BvR 1783/05 / **f)** Ban on the novel "Esra" / **g)** / **h)** *Deutsches Verwaltungsblatt* 2007, 1425-1431; *Wettbewerb in Recht und Praxis* 2007, 1436-1455; *Archiv für Presserecht* 441-453; *Zeitschrift für Urheber und -Medienrecht* 2007, 829-845; *Europäische Grundrechte-Zeitschrift* 2007, 592-609; CODICES (German).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests**.
5.1.4 Fundamental Rights − General questions − **Limits and restrictions**.
5.3.32 Fundamental Rights − Civil and political rights − **Right to private life**.

5.4.22 Fundamental Rights − Economic, social and cultural rights − **Artistic freedom**.

Keywords of the alphabetical index:

Novel, biographical, dissemination and publication, ban / Intimate sphere, violation, publication of a novel.

Headnotes:

1. The banning of a novel is a particularly serious encroachment on artistic freedom so that it is necessary for the Federal Constitutional Court to examine, on the basis of the specific circumstances of the case at hand, the compatibility of the challenged decisions with the constitutional guarantee of artistic freedom.

2. Artistic freedom in the case of a literary work in the form of a novel requires the application of standards specific to art. This leads, in particular, to a presumption that a literary text is fiction.

3. The right to artistic freedom includes the right to use real life models.

4. There is a correlation between the degree to which an author creates an aesthetic reality divorced from the facts and the intensity of the violation of the right of personality. The greater the similarity between the copy and the original, the more serious the impairment of the right of personality. The more the artistic depiction touches on the dimensions of the right of personality that are afforded special protection, the greater the fictionalisation must be in order to rule out violations of the right of personality.

Summary:

I. The novel “Esra” by Maxim Biller was published by the complainant’s publishing house. The novel tells the story of the love affair between Esra and the first-person narrator and includes some of the most intimate details of their relationship.

The civil courts prohibited the publishing house from publishing and disseminating the novel in response to the lawsuit brought by the author’s former girlfriend and her mother, who recognised themselves in the novel characters Esra and Lale, and who claimed that the book was a biography which did not differ significantly from reality. The Federal Court of Justice upheld the ban. The complainant lodged a constitutional complaint against its decision.

II. The constitutional complaint was successful in part. The First Panel of the Federal Constitutional Court found that the challenged decisions had violated the complainant’s fundamental right to artistic freedom to the extent that they had granted the mother a right to an injunction. On the other hand, they were not constitutionally objectionable to the extent that they had granted the former girlfriend a right to an injunction in the form of a total ban on the novel.

In essence, the decision is based on the following considerations:

The novel “Esra” is a work of art. Even if the main subject of the dispute is the degree to which the author describes real life people in his work, it is at all events clear that his aim is to present this reality in an artistic manner. However, artistic freedom (Article 5.3.1 of the Basic Law) is not guaranteed without all restriction, but immediately reaches its limits in other provisions of the Basic Law which protect a legal interest that is also significant in the constitutional order of the Basic Law. In particular, the general right of personality (Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law) is considered a possible limit on the artistic depiction of a person on whom a novel is based. In order to delineate the limits in a specific case, it is considered necessary to clarify whether the impairment of the right of personality is so serious that it is necessary for it to take precedence over artistic freedom.

In order to assess the seriousness of the impairment of the general right of personality, it is necessary, according to the Court, to apply standards specific to art. It will be possible to use these standards to help determine the resemblance suggested by a novel to its reader of particular facts to reality. In this connection, a literary work in the form of a novel should initially be seen as a work of fiction. This presumption also applies if real people are recognisable as the models for the characters in a novel. The right to artistic freedom includes the right to use real life models. Nevertheless, there is a correlation between the degree to which an author creates an aesthetic reality divorced from the facts and the intensity of the violation of the right of personality. The greater the similarity between the copy and the original, the more serious the impairment of the right of personality. The more the artistic depiction touches on the dimensions of the right of personality that are afforded special protection, the greater the fictionalisation has to be in order to rule out violations of the right of personality.

According to these criteria, the challenged decisions do not in relation to the mother apply in every respect the necessary standards specific to art and thus they violate the guarantee of artistic freedom. It is true that the civil courts’ findings that the mother is

recognisable on the basis of a series of biographical characteristics as the model for the novel character are not constitutionally objectionable. Nonetheless, the civil courts were content with determining that the novel character Lale was portrayed in a very negative light and saw this as a violation of the mother's right of personality. In doing so, they did not pay sufficient heed to the fact that, as the work at issue is a novel, the first assumption is that it is a work of fiction. The assumption that a work of fiction is at issue is also supported by the fact that the author describes Lale mostly through his repetition of the stories, rumours and impressions of other people rather than from his own experience. It is quite typical of a work of literature, inspired by reality, to mix real and fictitious accounts. Under these circumstances such literature would be denied fundamental rights protection if it was enough for a violation of the right of personality that one can recognise the model for the novel character and that the novel character has negative characteristics. This kind of understanding of the right to one's own biography would not do justice to the right to artistic freedom. Instead what would be necessary was proof that the author is suggesting to the reader that certain parts of his account should be regarded as really having happened and that precisely these parts violate a right of personality because they contain false and defamatory statements or because they have no place whatsoever in the public domain since they go to the core of personality. The existence of such proof is not evident from the challenged decisions.

On the other hand, to the extent that the challenged decisions grant the former girlfriend a right to an injunction they are not constitutionally objectionable. Unlike in the case of her mother, the civil courts found not just that she was recognisable, but also that certain accounts in the novel amounted to specific serious violations of her right of personality. The former girlfriend is not just recognisable in the novel character Esra. Her role also relates to central events which occurred directly between her and the first-person narrator (who is not difficult to recognise as the author) during her relationship with him. The right of personality of the former girlfriend suffers a particularly serious violation due to the realistic and detailed account of events originating from the immediate experiences of the author. In the opinion of the Federal Constitutional Court, this occurs, in particular, through the exact account of some of the most intimate details of a woman who is clearly recognisable as having really been an intimate partner of the author. This amounts to a violation of her intimate sphere and is thus an area of the right of personality belonging to the core of human dignity. Due to the overriding importance of the protection of the intimate sphere, the former girlfriend, who is made recognisable as Esra, does not need to tolerate readers asking themselves the question suggested by the novel, namely whether the events reported in the novel have also occurred in reality. Therefore a weighing of the publishing house's artistic freedom against the former girlfriend's right of personality favours the latter. The same applies to the account of the life-threatening illness of her daughter. In view of the special protection given to children and to the mother-child relationship, the account of the illness and the mother-child relationship characterised by it in the case of two clearly identifiable persons does not belong in the public domain.

The challenged decisions rightfully imposed a total ban on the book to the extent that they allowed the motion for an injunction by the former girlfriend. It is not, according to the Federal Constitutional Court, the task of the courts to delete certain passages or make certain changes so as to exclude the possibility of a violation of the right of personality.

The vote on the decision of the First Panel was five in favour and three against. The three minority judges of the First Panel prepared dissenting opinions.

Languages:

German.

Identification: GER-2007-3-017

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 03.07.2007 / **e)** 1 BvR 2186/06 / **f)** Horseshoeing / **g)** / **h)** *Europäische Grundrechte-Zeitschrift* 2007, 732-738; CODICES (German).

Keywords of the systematic thesaurus:

3.16 General Principles − **Proportionality**.
3.20 General Principles - **Reasonableness**.
5.1.4 Fundamental Rights − General questions − **Limits and restrictions**.
5.2.1.2.1 Fundamental Rights - Equality - Scope of application - Employment - **In private law**.
5.4.4 Fundamental Rights − Economic, social and cultural rights − **Freedom to choose one's profession**.

Keywords of the alphabetical index:

Profession, standardisation / Profession, monopolisation / Profession, qualification, requirements, excessive.

Headnotes:

Decision regarding the requirements of Article 12.1 of the Basic Law as to subjective prerequisites for the admission to a profession upon the integration of several professions into the sphere of hoof care. [Official Headnotes]

This profession has been redefinded to bring together several professions into the sphere of hoof care. These provisions result in a direct encroachment upon the occupational freedom by subjective conditions for the admission to this profession. To the extent that the new rules reserve bare hoof care to state certified farriers, they are placing an unreasonable burden on the complainants, who can no longer choose the abolished profession of hoof care provider in the future. The burden on the subjects of the fundamental right no longer has a reasonable relationship to the benefits accruing to the general public. [Unofficial Headnotes]

Summary:

I. In their constitutional complaint, the complainants, who chose to enter into the profession of hoof care provider or hoof technician − who operate training institutions for hoof care and hoof technology, or who teach at such institutions − object to the integration of their professional activities into the newly drafted Act on Horseshoeing. The professional designation “hoof care provider” includes hoof care exclusively on barefoot horses, that is, horses without hoof protection or with only temporary hoof protection such as horse boots. On the other hand, specialists for all types of hoof care methods and hoof protection with the exception of metal horseshoes – which is reserved for farriers – are “hoof technicians.”

II. In essence, the constitutional complaints were successful. The First Panel of the Federal Constitutional Court stated that Articles 1.3.1, 1.3.2 and 1.6.1 each in conjunction with Article 2.1 of the Act on the Reform of the Regulations regarding Horseshoeing Law and on the Amendment of Animal Protection Law Provisions of 19 April 2006 (hereinafter referred to as “the Act”) is incompatible with Article 12.1 of the Basic Law (occupational freedom) and void to the extent that professional groups, which carry out work on hooves for the purpose of protection, maintenance of health, correction, or treatment without affixing a metal horseshoe, are encompassed by these provisions, as are persons and institutions that train persons to perform such work. The constitutional complaints were otherwise rejected as unfounded.

In essence, the decision is based on the following considerations:

The legislature has integrated the professions of hoof care provider, hoof technician, and farrier into one uniform profession. The legal definition in § 2 no. 1 of the Act expands the term of horseshoeing, which characterises the profession, to include all work performed on a hoof for the purpose of protection, maintenance of health, correction, or treatment. Some complainants were unable to continue in their profession as hoof technician because horseshoeing is only allowed to be performed by certified farriers recognised by the state (§ 3.1 of the Act). Consequently, there is a direct encroachment upon the occupational freedom by subjective conditions for the admission to this profession. The same applies to those complainants who are still in training to become hoof care providers or hoof technicians and who now are required to also obtain and prove particular proficiency and knowledge regarding metal horseshoes and forging techniques as professional admission prerequisites. Subjective professional admission prerequisites also apply to those complainants who, as operators of hoof care training institutions, train others as hoof care providers and hoof technicians. The necessary state certification as a training institution particularly requires that technical forging proficiency and knowledge must be taught (cf. § 6.2.1 – 6.2.3 of the Act), which the complainants are not prepared for, given the focus of their previous training. Similarly, the freedom to choose an occupation or a profession for those complainants who previously worked as teachers in specialised training without holding the now required qualification as a farrier teacher is now affected. They are now required to hold this qualification in order to continue their work.

The encroachment upon the complainants’ occupational freedom is not justified.

To the extent that the new rules reserve bare hoof care to state certified farriers, they are placing an unreasonable burden on the complainants, who can no longer choose the abolished profession of hoof care provider in the future. The concern regarding an improper narrowing of care offerings can also be allayed by the fact that admission to the profession of hoof care provider will be made dependent upon the acquisition and proof of the theoretical knowledge that is necessary to be able to select the approaches indicated in each case from the full spectrum of care. Thus, even without technical training in the forging process, the ability can be created and the willingness can be promoted to

refer to and if necessary recommend another hoof care approach can be identified that can be applied is indicated in an individual case, such as horseshoeing or alternative hoof protection materials, even though the hoof care providers cannot perform these methods themselves.

There is no monopoly on healing of human beings by doctors. Although licensed non-medical practitioners *(Heilpraktiker)* must refer patients to doctors as soon as the limits of their medicinal knowledge and abilities have been reached, for decades no abuses have become evident such that the legislature deemed it necessary to intervene in the interests of public health. In accordance with this experience, the assessment that monopolisation of bare hoof care in favour of farriers does not provide a benefit for animal health that decisively goes beyond that which can be achieved by proven theoretical knowledge of the entire spectrum of hoof care methodology is justified. The result is that the burden on the subjects of the fundamental right no longer has a reasonable relationship to the benefits accruing to the general public.

Likewise, the burden on those complainants who cannot continue their professional activities without successfully completing training to become a farrier is unreasonable. A reasonably limited "excess" of training requirements is acceptable when the limitation on freedom associated therewith is balanced by increased professional opportunities and social standing. Measured in this way, the new qualification requirements are not at all related to the professional activities of hoof technicians. They do not need the required proficiency, knowledge, and abilities on the forging technique because they do not seek to include metal horseshoes as part of their future professional activities – on the contrary, they expressly exclude this. In order to provide animal owners with competent contact persons, it is sufficient that hoof technicians be required to obtain and prove theoretical knowledge for admission to their profession which enable them, without limitation, to select the indicated approach in each case from the entire spectrum of care including metal horseshoes, to counsel animal owners accordingly, and to refer the case to a farrier when necessary. In addition, by acquiring proof of technical forging qualifications, hoof technicians do not increase their professional opportunities or social standing, which could counter-balance the excess requirements.

Acquisition and proof of an unreasonable over-qualification is also required from those complainants who operate training institutions for hoof care and hoof technology (cf. § 6.1 in conjunction with § 2.1 of the Act) as well as the complainants who teach at such institutions.

The same applies to those complainants who can only continue their professional activities when they acquire state certification as farrier teachers (cf. § 3.2 of the Act).

Languages:

German.

Identification: GER-2007-3-018

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 20.09.2007 / **e)** 2 BvR 855/06 / **f)** / **g)** / **h)** *Zeitschrift für das gesamte Familienrecht* 2007, 1869-1874; *Deutsches Verwaltungsblatt* 2007, 1431-1435; *Europäische Grundrechte-Zeitschrift* 2007, 609-614; CODICES (German).

Keywords of the systematic thesaurus:

2.1.3.2.2 Sources – Categories – Case-law – International case-law – **Court of Justice of the European Communities**.
4.6.9.3 Institutions − Executive bodies − The civil service − **Remuneration**.
4.7.6 Institutions – Judicial bodies – **Relations with bodies of international jurisdiction**.
5.2.2.11 Fundamental Rights − Equality − Criteria of distinction − **Sexual orientation**.
5.2.2.12 Fundamental Rights − Equality − Criteria of distinction − **Civil status**.

Keywords of the alphabetical index:

Civil partnership, same-sex, civil servant / Civil servant, homosexual, remuneration, allowance for married persons / Marriage, protection / Civil partnership, marriage, relationship.

Headnotes:

It is not in breach of the general principle of equality (Article 3.1 of the Basic Law) for civil servants who live in a registered partnership, not to receive a "married person's allowance".

Summary:

I. Civil servants are granted a family allowance in addition to their basic salary. Its amount is in line with the salary scale and the salary step which corresponds to the circumstances in which the family finds itself. In accordance with § 40.1.1 of the Federal Civil Servants' Remuneration Act *(Bundesbesoldungsgesetz*, hereinafter: the Act), step 1 includes married, widowed and divorced civil servants insofar as they are obliged to provide maintenance on the basis of marriage ("married person's allowance"). In accordance with § 40.1.4 of the Act, other civil servants receive the step 1 family allowance only if they grant maintenance to a person who lives in their dwelling and the income of this person does not exceed a specific amount.

The complainant was a civil servant until mid-2004. She established a registered civil partnership at the end of 2001. The German legislature created the institution of the registered civil partnership by Act of 16 February 2001 as an independent institution under family law for same-sex couples.

The complainant's action for payment of the married person's allowance before the administrative courts, which went up to the Federal Administrative Court, was unsuccessful. Her constitutional complaint claimed a violation of the general principle of equality contained in Article 3.1 of the Basic Law. Over and above this, she took the view that her right to her lawful judge had been violated because the Federal Administrative Court had not met its duty to submit a reference for a preliminary ruling to the European Court of Justice in accordance with Article 234.3 of the Treaty establishing the European Community with regard to Directive no. 2000/78/EC.

II. The constitutional complaint was not admitted for decision for lack of prospects of success. The First Chamber of the Second Panel of the Federal Constitutional Court found that the restriction of the married person's allowance to married civil servants is constitutionally unobjectionable.

The ruling is based in essence on the following considerations:

There has been no violation of the general principle of equality contained in Article 3.1 of the Basic Law. The favouring of married civil servants as against civil servants in a registered civil partnership by § 40.1.1 of the Act is restricted to married persons already receiving the step 1 family allowance because of their civil status and without regard for the income of their spouse. Whilst with married persons, therefore, the financial burdens typically presumed to ensue from marriage lead to the family allowance being granted on an across the board basis, with a registered civil partnership it is necessary to substantiate these burdens in an individual case. The complainant refused to provide information on her actual burden. The favouring of married civil servants is justified by Article 6.1 of the Basic Law. This constitutional provision places marriage under the special protection of the state system; as a value-deciding fundamental provision, it places the state under an obligation to protect and promote marriage. The constitutional promotional mandate entitles the legislature to prioritise and favour marriage over other living arrangements as the civil partnership of a man and a woman formally entered into.

There has also been no violation of the principle of the state's obligation to take care of civil servants' welfare. In the context of its obligation to take care of civil servants' welfare in line with their office, the legislature must ensure that each civil servant is also able to meet his or her maintenance obligations towards his or her family. The civil servant's family is deemed thereby to include spouses and the community of a civil servant with his or her children. The term 'family' within the meaning of the principle of the state's obligation to take care of civil servants' welfare does not include a civil servant's civil partner even after the introduction of the registered civil partnership as a new type of civil status.

The Federal Administrative Court was not obliged to submit a reference for a preliminary ruling to the European Court of Justice. The European Court of Justice has not yet found on the question of whether Directive no. 2000/78/EC prohibits granting remuneration elements such as the family allowance to married persons only, thereby excluding employees in registered civil partnerships. The Federal Administrative Court has not unjustifiably exceeded the latitude which was at its disposal in view of such incomplete nature of the line of rulings. Taking account of the recitals to the Directive, it reached the conclusion that Directive no. 2000/78/EC did not create an obligation to also grant to employees who have entered into a registered civil partnership remuneration elements granted to married employees.

Languages:

German.

Hungary
Constitutional Court

Statistical data
1 May 2007 – 31 December 2007

Number of decisions:

- Decisions by the Plenary Court published in the Official Gazette: 53
- Decisions in chambers published in the Official Gazette: 8
- Other decisions by the Plenary Court: 93
- Other decisions in chambers: 50
- Number of other procedural orders: 102

Total number of decisions: 306

Important decisions

Identification: HUN-2007-3-005

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 17.05.2007 / **e)** 27/2007 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2007/61 / **h)**.

Keywords of the systematic thesaurus:

3.3.2 General Principles – Democracy – **Direct democracy**.
3.9 General Principles – **Rule of law**.
4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy**.
5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.

Keywords of the alphabetical index:

Legislative omission / Referendum, result, binding force on Parliament.

Headnotes:

The Constitutional Court identified an unconstitutional omission to legislate, as there was no provision within legislation as to how long the result of a decisive national referendum binds Parliament. Neither was there any provision for amending a statute enacted or confirmed as a result of the referendum or a statute confirmed by the referendum. Parliament had also failed to deal with the possibility of initiating a further referendum on the same question.

Summary:

The Court reviewed petitions claiming that there had been an unconstitutional omission on the part of the legislator. The Court pointed out that the rule of law requires that legal institutions and instruments operate in a predictable way. The lacunae in the statutory provisions on referenda make it impossible to apply the current statute properly.

The Court emphasised that the right to referenda is a fundamental political right. According to the jurisprudence of the Constitutional Court every fundamental right entails not only an entitlement for a subjective protection but also an objective obligation of the State to provide the preconditions for the exercise of the right. With respect to the obligatory referendum, these institutional guarantees include statutory provisions regulating the binding nature of the result of the referendum and the possibility to initiate a further referendum on the same question.

Under Article 28/B.2 of the Constitution, a majority of two thirds of the votes of the Members of Parliament present is required to pass legislation on national referenda and popular initiatives. This means that although the Constitution contains detailed rules on referenda, a statute can limit the scope of the right to referenda in accordance with Article 8.1.of the Constitution. Besides, by a two-third majority of the Members of Parliament, it is possible to enact and amend constitutional provisions regulating the referenda and popular initiatives.

Justice László Trócsányi attached a dissenting opinion to the judgment. He argued that since the Constitution contains very detailed provisions on referenda and popular initiatives, statutes should not regulate questions affecting directly the direct exercise of power by the people. Regulating the questions required by the Constitutional Court in its current decision is possible only at a constitutional level.

Languages:

Hungarian.

Identification: HUN-2007-3-006

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 20.06.2007 / **e)** 39/2007 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2007/77 / **h)**.

Keywords of the systematic thesaurus:

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.
5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.
5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.
5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

Keywords of the alphabetical index:

Vaccination, obligatory / Public health, vaccination, obligatory.

Headnotes:

The protection of children's health and the protection against contagious diseases justify compulsory vaccination for certain age groups from a constitutional perspective.

Summary:

I. The Constitutional Court reviewed petitions criticising the regulations of the Health Act on compulsory vaccination. A couple refused to have their child vaccinated under the compulsory vaccination scheme set out in the law then in force. The couple asked the Constitutional Court to assess the compliance with the Constitution of the relevant provisions of the Health Act.

Act CLIV of 1997 on health care permits health care authorities to limit individuals in the exercise of their rights to personal freedom in order to prevent and combat contagious diseases and epidemics, and to increase the human body's resistance to contagious diseases. The purpose of vaccination is to develop active and/or passive protection against contagious diseases. The Minister for Health Care, Social and Family Affairs sets out in a decree the contagious diseases for which compulsory vaccination may be required, on an age-related basis. If somebody required to undergo vaccination fails to satisfy this obligation, despite written notification, the health care authority shall order vaccination by a resolution. Such a resolution is enforceable straightaway, regardless of legal remedy (Articles 56-58).

II. The Court's decision stated that the protection of children's health and the protection against contagious diseases justify from a constitutional standpoint compulsory vaccination at certain ages. The Court accepted the presupposition of legislators based on scientific knowledge, that the benefits of compulsory vaccination for both the individual and society outweigh any possible harm that may affect vaccinated children as side effects. The system of compulsory vaccination was found not to contravene children's rights to physical integrity. At the same time the Constitutional Court stated that the system of compulsory vaccination may result in more significant harm for parents whose expressed religious conviction or conscience is not in harmony with vaccination. Yet it judged that the regulation is in accordance with the requirements of the neutrality of the state. The objective legal norms (which are binding on everybody) protecting the health of children (and all other children, all in all society as a whole) are based upon regulation based on natural sciences, rather than the acceptance of the truth content of different ideologies.

Health authorities order vaccination by means of a decision, if somebody does not comply with a preliminary written notice. The medical officer may grant temporary or permanent exemption, where vaccination would probably have a harmful impact on somebody's health.

The Constitutional Court found that there had been an unconstitutional omission to legislate. Parliament had failed to provide an effective legal remedy in cases of denying exemptions from compulsory vaccination. It called upon Parliament to fulfil its legislative duty by 31 March 2008.

The Constitutional Court pronounced unconstitutional the provisions of the Health Act under which a decision ordering vaccination is enforceable immediately, with no recourse to legal remedy. It directed the immediate repeal of this provision. The Constitutional Court observed that only an extraordinary danger of epidemic would justify such a provision. The fact that there was no scope for taking into consideration the views of the person affected was unconstitutional.

The Court ruled that a provisional regulation I (not presently in force) was unconstitutional, on the basis that the rights and duties of children and parents in relation to compulsory vaccination were not wholly discernible from provisions.

Péter Kovács presented a dissenting opinion to the decision, which Barnabás Lenkovics also joined. They expressed concern that legal formality should not overwhelm medical sciences, medical deontology and the medical profession, as this would not assist with the protection of public health.

Languages:

Hungarian.

Identification: HUN-2007-3-007

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 22.11.2007 / **e)** 91/2007 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2007/159 / **h)**.

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality**.
5.3.12 Fundamental Rights – Civil and political rights – **Security of the person**.
5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings**.
5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

Keywords of the alphabetical index:

Civil proceedings, witness protection / Witness, protection / Legislative omission.

Headnotes:

If individuals who received witness protection (and secret handling of their data) during criminal proceedings are then deprived of such protection when called as witnesses in civil proceedings arising from damages for a criminal act, this violates the prohibition against discrimination.

Summary:

I. The petitioner requested a ruling of unconstitutional omission to legislate from the Constitutional Court. The petitioner expressed concern that the legislator had made no provision in civil procedure for the secret handling of the personal data of witnesses, who had been allowed secrecy during criminal proceedings, but were denied such protection during civil proceedings on damages caused by a criminal act or offence.

The Civil Procedure Act does not recognise the institution of confidential witness data. As a result, judges hearing civil lawsuits are under no obligation to accommodate requests to keep witness data secret. Ultimately, the decision whether to grant such requests rests with the judge. Witnesses under threat or other undue influence will make it difficult or even impossible to pass an objective judgment in a case.

II. The Constitutional Court observed that the fulfilment of the constitutional duty of jurisdiction and the state obligation to protect fundamental rights gives the basis for the protection of witnesses' lives, physical integrity and personal freedom. However, the right to defence of witnesses and victims is not a constitutional fundamental right, and the state has no constitutional duty to regulate and operate the witness protection system. The legislator is free to decide who to include in this system, and under what circumstances.

In this case the Constitutional Court found that there had been an unconstitutional omission to legislate, based on Article 70/A.1 of the Constitution. When judging discrimination, the bases for comparison were the provisions. These related to individuals who received protection as witnesses in criminal proceedings by secret handling of their data, who were then called as witnesses in civil proceedings regarding a remedy for damages resulting from a criminal act. The victim of the criminal act does not belong to this personal sphere, because he or she participates in the civil proceedings as a party, not a witness. The procedural position of witnesses belonging to this homogeneous group is comparable and essentially identical. Therefore, according to the Constitutional Court the differentiation between individuals taking part in the procedures as witnesses, in relation to the secret handling of personal data is not justified. It is arbitrary, and contravenes the prohibition of discrimination. The Constitutional Court called upon Parliament to fulfil its obligation to legislate by 30 June 2008.

Languages:

Hungarian.

Kazakhstan
Constitutional Council

Important decisions

Identification: KAZ-2007-3-001

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 18.04.2007 / **e)** 4 / **f)** On the Official Interpretation of Articles 12.2, 62.2 and 62.8, 76.1, 77.3.3 and 77.3.5 of the Constitution of the Republic of Kazakhstan / **g)** *Kazakhstanskaya pravda* (Official Gazette) / **h)** CODICES (Kazakh, Russian).

Keywords of the systematic thesaurus:

5.3.13.10 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial by jury**.

Keywords of the alphabetical index:

Jury, trial, right, exercise, time / Criminal proceedings / Investigation, criminal.

Headnotes:

The accused should have the right to apply for trial by jury before the main trial is set down for hearing, rather than waiting for notification of the completion of preliminary investigations.

Summary:

The Criminal Procedure code states that an accused can only apply for trial by jury once he has been informed that preliminary investigations are complete, and when the materials of the case are introduced to him. This provision also states, “further application for jury trial cannot be accepted”.

The Constitutional Council made the following observations regarding juries and the rules of criminal procedure.

Article 75.2 of the Constitution refers to a number of constitutional safeguards in relation to juries, such as the protection of the rights and freedoms of the accused. Juries have a special and influential role in legal proceedings at the first instance stage.

Articles 13.2, 75.2, 76.2 and 77.3.3 of the Constitution indicate that the legislator should afford the accused further opportunities to apply for a trial by jury, not only in Article 546.3 of the Criminal Procedure Code but also in other legislation. This is because legal power extends to all cases, arising under the Constitution, other enactments, and international agreements to which Kazakhstan is a party (see Article 76.2 of the Constitution). Furthermore, the main purpose of pre-trial procedure in criminal cases is the preparation of the criminal case for trial. Control over the lawfulness of criminal procedure takes place in legal procedure in court.

The Constitutional Council suggested that the Government of Kazakhstan should consider making amendments to legislation pertaining to jury trial, in order to consolidate this right within legislation, thereby enhancing the rights of parties to legal proceedings.

Languages:

Kazakh, Russian.

Latvia
Constitutional Court

Important decisions

Identification: LAT-2007-3-001

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 11.02.2007 / **e)** 2006-08-01 / **f)** On the constitutional compliance of the provision in Section 71.1 of the Law on State Social Allowances (where the person concerned is not in employment as an employee or on a self-employed basis in accordance with the Law On State Social Insurance) / **g)** *Latvijas Vestnesis* (Official Gazette), no. 34(3610), 27.02.2007 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors**.
5.1.1.4.2 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Incapacitated**.
5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

Keywords of the alphabetical index:

Child, disabled, care by parents / Family, right to benefits.

Headnotes:

Latvian legislation stipulates that benefit for a disabled child is payable to the person who cares for the child, provided that person is not in employment. This was found not to be proportionate to the legitimate objective pursued, namely the provision of full value care for a disabled child in a family environment.

The restriction on receiving benefit, depending on the recipient's employment situation, may have a considerable impact on family welfare. The state may be striving to provide care for a disabled child in a family environment, but such a restriction may in fact affect the interests of the disabled child itself and his or her care, as well as that of other family members, *inter alia*, those of other children.

Summary:

I. The Law on State Social Allowances defines benefit for the care of disabled children as being an allowance that can be paid regularly. It is payable to a person who cares for a disabled child, if that person is not employed.

Three families with disabled children filed a petition, in which they suggested that the link between employment status and the right to receive benefit contravened the Constitution, as it was not a particularly appropriate measure for ensuring the protection of the interests of disabled children. The legislation as it stood could give rise to circumstances where somebody looking after a disabled child, who has been unemployed for some time, loses competitiveness in the labour market and risks losing professional qualifications. This has a negative effect on the rights of a disabled child, and those of other children, since the living standards of a child directly depend upon those of his parents.

II. The Constitutional Court noted the obligation, under the Constitution, to form a proper system and to safeguard children, family and marriage. It follows from Article 110 of the Constitution that the State has a positive obligation to set up and maintain a system that aims at the social and economic protection of the family. This would include one that provided special social and economic protection for disabled children.

In the Constitutional Court's opinion, the provision under scrutiny restricts basic rights, in that somebody can only receive benefit for care of a disabled child if they are out of work. However, it concluded that the restriction was provided for by law and had a legitimate objective – to provide full value care for disabled children with serious physical and functional disorders in a family environment.

As to the proportionality of the restriction, the Constitutional Court pointed out that the implementation of social rights and the maintenance of a system of social and economic protection depend on the economic situation and the resources available to the State. As the economy develops, the state has the wherewithal to grant higher allowances to separate inhabitants. With this comes the obligation to increase financial and other investment into the system of social, economic and cultural rights, for different categories.

The Constitutional Court concluded that where social rights are incorporated in the Constitution, the State cannot waive them. Such rights are not simply declaratory by nature. Whatever stage the economy has reached, states are still obliged to take measures to use all resources at their disposal to provide at least a basic package of social rights.

The legitimate objective here is the safeguarding of the interest of the child. The Court assessed whether the restriction was the best way to achieve this objective, and the impact it had on the welfare of families with disabled children with serious physical and functional disorders. It held that the restriction could have a considerable and possibly negative impact on families, which would be against the interests of the disabled child, his carers and other family members.

The Constitutional Court held that the provision contravened Article 110 of the Constitution.

Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2006-10-03 of 11.12.2006;
- Judgment no. 2006-07-01 of 02.11.2006;
- Judgment no. 2005-19-01 of 22.12.2005;
- Judgment no. 2005-09-01 of 04.11.2005, *Bulletin* 2005/3 [LAT-2005-3-006];
- Judgment no. 2004-02-0106 of 11.10.2004, *Bulletin* 2004/3 [LAT-2004-3-007];
- Judgment no. 2003-19-0103 of 14.01.2004;
- Judgment no. 2001-11-0106 of 25.02.2002, *Bulletin* 2002/1 [LAT-2002-1-003];
- Judgment no. 2001-02-0106 of 26.06.2001, *Bulletin* 2001/2 [LAT-2001-2-003];
- Judgment no. 2000-08-0109 of 13.03.2001, *Bulletin* 2001/1 [LAT-2001-1-001].

European Court of Human Rights:

- *James and Others v. the United Kingdom*, Judgment of 21.02.1986, Series A, no. 98, para. 46.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2007-3-002

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 11.04.2007 / **e)** 2006-28-01 / **f)** On the Compliance of the Second Sentence of Section 22.4 of the Law “On Personal Income Tax” with Article 92 of the Constitution of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), no. 62(3638), 17.04.2007 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

1.1.4.3 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Executive bodies**.
1.6.2 Constitutional Justice – Effects – **Determination of effects by the court**.
3.4 General Principles – **Separation of powers**.
3.16 General Principles – **Proportionality**.
3.19 General Principles – **Margin of appreciation**.
4.6.6 Institutions – Executive bodies – **Relations with judicial bodies**.
4.7.9 Institutions – Judicial bodies – **Administrative courts**.
5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.
5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

Keywords of the alphabetical index:

Tax, assessment by the Court / Tax, tax authority, rights / Appeal, time-limit / Administration, proper functioning / Evidence, submission, deadline.

Headnotes:

The prohibition on the submission of evidence during court proceedings constitutes a restriction on the right to a fair trial under the Constitution. It hampers the implementation of the principles of versatile, objective, and fair examination of cases, as set out in procedural laws. The mechanism of rights protection cannot be deemed efficient, if due to inefficiency of the contestation phase, there is no reason to contest in a higher institution the corresponding decision.

The objective of administrative courts is to subject actions of executive power to independent, objective, and competent court control. Administrative courts exercise control over the operations and expediency of state administration. It follows from the principle of separation of powers that the administrative court is

not entitled to make decisions, the adoption of which is within the competence of the executive power.

Implementation of a correct and fair fiscal regime, and the protection of the rights and legal interests of taxpayers, is not possible without decent, fair, competent and efficient court control.

The duty to pay tax always entails restrictions on property rights, as well as other restrictions established by law. These must be proportionate to the legitimate objective – protection of values of constitutional importance.

The legislator has a considerable margin of appreciation in establishing tax control and procedure, but there are limits to it. Freedom of action is only to be deployed in order to ensure performance of the taxpayer's obligations.

Where such power is used in a way that militates against the objectives of the safeguarding of rights and personal interests, this is not compatible with the principles of a democratic state under the rule of law.

Summary:

I. The Constitutional Court examined a case brought before it in applications by the Department of Administrative Cases of the Senate of the Supreme Court and the Administrative Regional Court.

Under the Law on Personal Income Tax, establishing the amount of taxable income and the amount of personal income tax to be paid, documentation in support of income and expenditure and other material will only be recognised as evidence if it is submitted to the State Revenue Service (the SRS) before the date established by the SRS. Any documentation handed in after that date will not be recognised as evidence.

The applicants argued that this provision disproportionately restricted the right to fair trial.

II. The Constitutional Court emphasised that the objective of a judicial state is to ensure efficient control of operations of state administration. Such control occurs in two stages − in the superior institution in the frameworks of state administration, and thereafter − in the Administrative Court. The superior institution examines the case repeatedly in point of fact. The Administrative Court implements control over lawfulness or considerations of expediency of an administrative act passed by the institution within the framework of margin of appreciation.

The contested provision provided for mandatory action on the part of the institution, excluding freedom of action. The institution can only assess information and evidence if the taxpayer submits it to before the SRS deadline.

There is nothing to stop the Administrative Court from accepting evidence submitted after SRS deadline. However, the Administrative Court cannot evaluate the case in its terms, since the principle of separation of power prevents courts from undertaking the implementation of state administration functions.

The Court reiterated that the right to fair trial includes fair and impartial adjudication. This, in turn, includes the right to an option to submit evidence. The Court took the view that the provision under scrutiny restricted the right to fair trial. There is no direct provision within the Constitution for cases where the right to fair trial can be restricted. Nonetheless, the rights are not absolute; a certain degree of limitation is possible.

The Court turned to the question of the lawfulness of the restriction. It held that it had a legitimate objective, namely the protection of interests of society as a whole, including human rights and social welfare, the efficient collection of taxes and the prevention of evasion. However, the Constitutional Court concluded that the restriction was disproportionate. Less restrictive means could have been deployed, which would not have had such a restrictive impact on the right to fair trial, whilst simultaneously safeguarding efficient tax administration and operation of court institutions.

The Constitutional Court does not have the power to interfere with the specifics of how the government decides to collect taxes. The Court established that this is in fact the State's responsibility, deriving from the right to fair trial, to ensure a possibility for a person to submit evidence at full extent at any stage of the procedure, as well as express argumentation with respect to the evidence submitted by the opposing party.

The Constitutional Court found the provision to be in conflict with Article 92 of the Constitution.

It postponed the repeal of the provision, to allow the legislator time to develop and implement new regulations. At the same time, in order to safeguard the rights of those who had brought cases before the Administrative Court prior to the handing down of the present judgment, the Court held that, from their perspective, the provision would be invalid from the date of the adoption of that judgment.

Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2001-10-01 of 05.03.2002;
- Judgment no. 2002-04-03 of 22.10.2002, *Bulletin* 2002/3 [LAT-2002-3-008].

European Court of Human Rights:

- *Bendenoun v. France*, Judgment of 24.02.1994, Series A, no. 284, p. 20, para 47, *Bulletin* 1994/1 [ECH-1994-1-004];
- *Golder v. United Kingdom*, Judgment of 21.02.1975, Series A, no. 18, p. 18, para 38, *Special Bulletin Leading Cases – ECHR* [ECH-1975-S-001];
- *Hentrich v. France*, Judgment of 22.09.1994, Series A, no. 296-A, pp. 19-20, para 39, *Bulletin* 1994/3 [ECH-1994-3-013].

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2007-3-003

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 26.04.2007 / **e)** 2006-38-03 / **f)** On the Compliance of the Plan of Binding Regulation no. 4 of 25.01.2006 by Limbaži City Council on "Graphical Section of the Spatial Plan of Limbaži City and Regulations of Utilisation and Construction of the Territory", (whereby the Land Parcel of 24 C'su Street is Included in the Territory of Natural Foundation of the Target Group of Territorial Utilisation and Real Estate or of Free Construction Territory for Wood Parks and Parks), with Article 105 of the Constitution of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), no. 70(3646), 28.04.2007 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

1.4.4 Constitutional Justice – Procedure – **Exhaustion of remedies**.
3.9 General Principles – **Rule of law**.
5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

Property, social obligation.

Headnotes:

In the field of the protection of human rights, a person's rights to propose amendments to a legal act are not to be considered as a remedy.

A request by individual made to the Minister for the suspension of the validity of an unlawful spatial plan cannot be considered an effective remedy for the protection of human rights. The utilisation of this right is dependent on considerations of usefulness made within the framework of freedom of activity pertaining to the Minister.

A constitutional complaint is normally a subsidiary, or additional, mechanism for protecting individual basic rights. Sometimes, however, it is impossible to prevent the violation of basic rights with the general means of rights protection. In this situation, a constitutional complaint is the only effective remedy that an individual can employ, in order to achieve the repeal of a spatial plan drawn up by local government, which the individual in question deems to be unlawful.

General procedural terms in Constitutional Court procedure are established for legal stability, namely, in order to ensure the hearing of cases within a reasonable period.

The right to property in a democratic country governed by the rule of law is not absolute. It carries with it the social obligation on the owner towards society. Property cannot be used for purposes that are in conflict with interests of the society.

Summary:

I. On 25 January 2006, Limbaži City Council adopted Binding Regulation no. 4 on "Graphical Part of the Spatial Plan of Limbaži City and Regulations of Utilisation and Construction of the Territory".

In his constitutional complaint, the applicant claimed that there had been a disproportionate interference with his right to property. With the spatial plan, his property (the land parcel), had been included in the territory of natural foundation of the target group of territorial utilisation and real estate or of free construction territory for wood parks and parks. This constituted a restriction upon his right to deal freely

with the land parcel that he owned, as the established purpose of utilisation for the land parcel involved a ban on building.

The institution that had passed the act under scrutiny asked the Constitutional Court to dismiss the application on two grounds, namely failure to exhaust all the general remedies, and for failure to observe the deadline by which the application should have been filed with the Constitutional Court.

II. The Constitutional Court pronounced the application admissible; there were no grounds for terminating proceedings. The constitutional complaint is the only efficient remedy, which a person can employ, in order to achieve repeal of a local government's spatial plan, which that person considers unlawful. The other methods of achieving the repeal of the act set out in the institution's written statements could not be considered as an effective remedy for the protection of an individual's human rights.

The Constitutional Court further stated that the right to property could be limited.

It also found that the restriction was lawful and that it had a legitimate objective – the interests of society as a whole. The local government authority here had impinged on somebody's rights, but they were also trying to develop the land in question in a way that would benefit society as a whole.

Given that there was a legitimate objective behind the restriction, and there was no other (and less stringent) way of achieving that goal, with a lesser impact on the applicant's rights, the Constitutional Court concluded that the restriction was proportionate to this objective. It also found the contested provision to be in compliance with Article 105 of the Constitution.

Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2005-19-01 of 22.12.2005;
- Judgment no. 2005-10-03 of 14.12.2005;
- Judgment no. 2004-18-0106 of 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];
- Judgment no. 2003-16-05 of 09.03.2004, *Bulletin* 2004/1 [LAT-2004-1-003];
- Judgment no. 2002-09-01 of 26.11.2002, *Bulletin* 2002/3 [LAT-2002-3-009];
- Judgment no. 2002-01-03 of 20.05.2002;
- Judgment no. 2001-12-01 of 19.03.2002, *Bulletin* 2002/1 [LAT-2002-1-004].

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2007-3-004

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 08.06.2007 / **e)** 2007-01-01 / **f)** On the compliance of the words "up to 1 January 1996" of Section 13.2 and Section 13.3 of the Law on Personal Income Tax with Article 91 of the Constitution of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), no. 95(3671), 14.06.2007 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

1.3.5.14 Constitutional Justice – Jurisdiction – The subject of review – **Government acts**.
3.19 General Principles – **Margin of appreciation**.
5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.
5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis***.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.
5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension**.

Keywords of the alphabetical index:

Income tax, assessment basis / Tax, income, calculation / Policy, social / Pension, taxation / Pension, system, change, incidence on taxation.

Headnotes:

The legislator is entitled to acknowledge pensions as an object of personal income tax. Such action by the legislator does not violate the assigned margin of appreciation established in the Latvian Constitution.

The right to pensions, irrespective of the date of grant or source of funding, forms part of the content of the notion "property" included in the first sentence of Article 105 of the Constitution.

Summary:

I. On 19 December 1996, the Latvian Parliament passed legislation amending the Law on Personal Income Tax. Irrespective of their distribution source, pensions were henceforth to be deemed as a source of taxable annual earnings. There were two exceptions.

1. for persons to whom a pension has been granted up to 1 January 1996 the non-taxable minimum shall be in the amount of this pension, and
2. for persons to whom a pension has been granted or recalculated after 1 January 1996, the non-taxable minimum for pensions shall be 1980 lats per year.

In a constitutional complaint, the applicant pointed out that the exceptions overleaf created different treatment for those awarded a pension before 1 January 1996 and those awarded a pension after that date. The different treatment manifested itself in such a way that the non-taxable minimum of the first group was equal to the amount of the pensions, but that of the second group – 1980 lats per year or 165 lats per month.

II. The Constitutional Court stressed that the principle of equality prohibits state institutions from enacting legislation that provide for different treatment of persons who enjoy equal conditions without reasonable basis. In the present case, the Court found that the above-mentioned groups of persons enjoyed equal and comparable conditions, but the contested provisions (two exceptions) provided for different treatment. After assessing all the facts, the Constitutional Court concluded that there were reasonable grounds for such a differentiated approach to the taxation of pension, in that it was connected to the introduction of the new pension system.

The Court noted that the introduction of the new system was the result of a political compromise. It concluded that it had to refrain from assessing political issues because initially they are at the jurisdiction of the legislator.

The Court then assessed whether the legislator had violated the applicant's fundamental rights without good reason, by establishing this differentiated approach. It held that, irrespective of the date of grant or source of funding, the right to pensions forms part of the content of the notion "property" included in the first sentence of Article 105 of the Constitution.

The judgment also mentioned that the legislator is entitled to acknowledge pensions as an object of personal income tax, since state social insurance payments are exempt from personal income tax.

The Constitutional Court ruled that there was no breach of the constitutional principle of equality.

Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2006-28-01 of 11.04.2007;
- Judgment no. 2006-04-01 of 08.11.2006;
- Judgment no. 2005-19-01 of 22.12.2005;
- Judgment no. 2005-12-0103 of 16.12.2005;
- Judgment no. 2005-08-01 of 11.11.2005;
- Judgment no. 2005-02-0106 of 14.09.2005;
- Judgment no. 2004-18-0106 of 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];
- Judgment no. 2003-14-01 of 04.12.2003, *Bulletin* 2005/3 [LAT-2005-3-006];
- Judgment no. 2003-04-01 of 27.06.2004, *Bulletin* 2003/2 [LAT-2003-2-009];
- Judgment no. 2002-15-01 of 23.12.2002;
- Judgment no. 2002-01-02 of 20.05.2002;
- Judgment no. 2001-12-01 of 19.03.2002, *Bulletin* 2002/1 [LAT-2002-1-004];
- Judgment no. 2001-07-0103 of 05.12.2001;
- Judgment no. 2001-02-0106 of 26.06.2001, *Bulletin* 2001/2 [LAT-2001-2-003];
- Judgment no. 2000-07-0409 of 03.04.2001, *Bulletin* 2001/1 [LAT-2001-1-002].

European Court of Human Rights:

- *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, 12.04.2006, para 51.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2007-3-005

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 18.10.2007 / **e)** 2007-03-01 / **f)** On Compliance of the Words "for an Unlimited Term" of Part 1 of Section 7 of the Constitutional Court Law with Articles 83, 91.1 and 101.1 of the Constitution of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), no. 170 (3746), 23.10.2007 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

1.1.2.1 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Necessary qualifications**.
4.7.4.1.2 Institutions – Judicial bodies – Organisation – Members – **Appointment**.
4.7.4.1.4 Institutions – Judicial bodies – Organisation – Members – **Term of office**.
5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law**.

Keywords of the alphabetical index:

Civil service, term of office, specific rights after expiration.

Headnotes:

Rights to fulfil civil service are not confined to those holding the office of a civil servant or a similar position in public administration. They also extend to those fulfilling public service in the position of a public prosecutor or a justice. Rights to fulfil civil service do not bestow a guaranteed right to occupy a certain position in the civil service.

The responsibility to present and justify the legitimate objective behind different treatment during Constitutional Court proceedings falls primarily upon the institution that has passed the contested act. This remains the case where Parliament has not indicated the legitimate objective of the different treatment.

The legitimate objective behind the necessity to impose certain requirements on those who put themselves forward for judicial office and the order according to which persons are admitted to judicial office is the right of other persons to a fair trial.

Article 83 of the Constitution states that judges are to be independent and subject only to the law. It also obliges the legislator to set out clear guidance, in legislation on the judicial system, for the development of judges' careers. The absence of such rules or a margin of appreciation for the executive power when deciding on the development of a judge's career may jeopardise the independence of judges.

Summary:

I. The Ombudsman and a former Constitutional Court judge submitted an application contending a violation not only of the right to hold a position in the civil service, (including the right to fulfil it in the position of a justice), and the principle of equality. Section 7.4 of the Constitutional Court Law guarantees the rights to the former position of a judge only for somebody who, under the Law on Judicial Power, has been appointed to judicial office for an unlimited term.

II. The Constitutional Court reiterated that rights to fulfil public service do not bestow guaranteed rights to occupy a certain position in the civil service. Article 101 of the Constitution provides in general for the rights of a person to continue fulfilling public service. The fact that the legislator has not put in place a special procedure for justices of the Constitutional Court to continue civil service once their term of office has expired does not per se violate the basic rights established in Article 101 of the Constitution.

The Constitutional Court noted that Section 7.4 of the Constitutional Court Law sets out different rules for continuation of civil service for justices of the Constitutional Court in the issue of legal policy. This falls within the competence of the legislator. Although the regulation of these issues might be useful, the absence of a separate regulation per se does not violate basic rights.

The establishment of a special order for the continuation of civil service for separate groups of persons is an issue for political determination by the legislator. Nonetheless, the legislator must observe the basic rights and general legal principles established in the Constitution, particularly, the principle of equality before the law.

The Constitutional Court examined the compliance of the contested provision with Article 91 of the Constitution, which guarantees equality of all persons. It found that there was a legitimate objective behind the necessity to impose certain requirements on those standing for judicial office and the order in which persons are appointed to the position of a justice, namely the rights of other persons to a fair trial. In order to justify the different treatment, the legitimate objective must comply with the principle of proportionality.

In order to establish whether the principle of proportionality had been observed, the Constitutional Court investigated whether the means selected by the legislator were appropriate for achieving the legitimate objective, whether methods that are more lenient existed of reaching it, and whether the legislator's actions were commensurate or proportionate. Noting the importance of the Constitutional Court as a constitutional institution and considering the applicant's situation, the Constitutional Court concluded that the means selected were not appropriate for the reaching the legitimate objective. Thus, the contested provision did not comply with Article 91 of the Constitution.

The Constitutional Court assessed whether the principle of judicial independence had been observed. Article 83 of the Constitution requires the legislator to set out clear guidance for the development of a judge's career in the laws on the judicial system. Absence of such order of freedom of action provided by institutions of the executive power when deciding on the development of a judge's career may jeopardise independence of judges. Since the legislator has not provided for an order of exercise of rights in the contested provision, it does not comply with Article 83 of the Constitution.

One judge submitted a dissenting application. He agreed that the Constitutional Court had to eliminate the violation of the rights of the former justice resulting from the application of the contested provision. However, he disagreed with several of the arguments and conclusions within the judgment.

Cross-references:

Previous decisions by the Constitutional Court in the following cases:

- Judgment no. 2006-31-01 of 14.06.2007;
- Judgment no. 2006-30-03 of 02.05.2007;
- Judgment no. 2006-12-01 of 20.12.2006;
- Judgment no. 2005-24-01 of 11.04.2006;
- Judgment no. 2005-12-0103 of 16.12.2005;
- Judgment no. 2005-02-0106 of 14.09.2005;
- Judgment no. 2004-18-0106 of 13.05.2005; *Bulletin* 2005/2 [LAT-2005-2-005];
- Judgment no. 2004-04-01 of 05.11.2004; *Bulletin* 2004/3 [LAT-2004-3-008];
- Judgment no. 2003-08-01 of 06.10.2003; *Bulletin* 2003/3 [LAT-2003-3-010];
- Judgment no. 2002-15-01 of 23.12.2002;
- Judgment no. 2002-06-01 of 04.02.2003;
- Judgment no. 2001-12-02 of 19.03.2002; *Bulletin* 2002/1 [LAT-2002-1-004];
- Judgment no. 2001-10-01 of 05.03.2002;
- Judgment no. 2001-08-01 of 17.01.2002; *Bulletin* 2002/1 [LAT-2002-1-001];
- Judgment no. 2001-06-03 of 22.02.2002; *Bulletin* 2002/1 [LAT-2002-1-002];
- Judgment no. 2001-02-0106 of 26.06.2001, *Bulletin* 2001/2 [LAT-2001-2-003];
- Judgment no. 2000-07-0409 of 03.04.2001; *Bulletin* 2001/1 [LAT-2001-1-002];
- Judgment no. 2000-03-01 of 30.08.2000; *Bulletin* 2000/3 [LAT-2000-3-004].

Lithuanian Constitutional Court:

- Judgment of Lithuanian Constitutional Court of 21.12.1999 in Case no. 16/98, *Bulletin* 1999/3 [LTU-1999-3-014].

European Court of Human Rights:

- *Campbell and Fell v. The United Kingdom*, Judgment of 28.06.1984, para. 78, *Special Bulletin ECHR* [ECH-1984-S-005];
- *Langborger v. Sweden*, Judgment of 22.06.1989, para. 32;
- *Bryan v. The United Kingdom*, Judgment of 22.11.1995, para. 37, *Bulletin* 1995/3 [ECH-1995-3-022];
- *Coeme and others v. Belgium*, Judgment of 22.06.2000, para. 120.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2007-3-006

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 21.12.2007 / **e)** 2007-12-03 / **f)** On the compliance of the Part of Ādaži Land Use Plan Providing for Construction in the Flooding Area of The Big Baltezers Lake with Article 115 of the Constitution of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), no. 207(3783), 28.12.2007 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

1.3.5.8 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by federal or regional entities**.
1.6.1 Constitutional Justice – Effects – **Scope**.
1.6.2 Constitutional Justice – Effects – **Determination of effects by the court**.
1.6.6.1 Constitutional Justice – Effects – Execution – **Body responsible for supervising execution**.
3.19 General Principles – **Margin of appreciation**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.5.1 Fundamental Rights – Collective rights – **Right to the environment**.

Keywords of the alphabetical index:

Land-use plan / Environment, protected zone / Economy, procedural, principle / Environment, protection.

Headnotes:

Public institutions are under a duty to create and secure an effective system of environmental protection. This implies a duty to take the protection of the environment into account at the stage of drafting and adopting the objectives of a policy or legislation, and when the time the adopted laws are applied or the political objectives are implemented.

The right to live in a benevolent environment is of direct and immediate application. This means that, under Article 115 of the Constitution, a person has the right to apply to the court about action or inactivity by a body governed by public law, which has violated the rights and legitimate interests of this person.

Land use planning is one of the measures for achieving the aims of the state environmental policy, including the sector connected with the environment. Article 115 of the Constitution bestows extensive rights upon society in this regard.

The margin of appreciation in the sector of territorial planning is not unlimited. General legal principles, principles for state administration and principles of territorial planning shall serve as guidelines for accurate and adequate use of the margin of appreciation in this sector.

The territory of the validity or applicability of the respective law or regulation becomes highly significant in cases when the Constitutional Court recognises any provision as unconstitutional. If it is a provision of a law or a Cabinet regulation, it becomes invalid across the entire State territory, unless the Court has established otherwise. If the Court has recognised any provision of regulations issued by a local government as being non-compliant with a legal norm of a higher legal force, it does not automatically lead to the invalidity of provisions of the same content of regulations issued by another local government body.

If the Constitutional Court were to repeatedly assess a regulation that had already been pronounced non-compliant with a norm of higher force in another case but was still valid as it was included in regulations issued by other local government authorities, this would be in conflict with the procedural economy principle.

Summary:

I. The applicants in this constitutional complaint contended that the Land use plan providing for construction in the flooding area was in conflict with Article 115 of the Constitution. Under this article, the State shall protect the universal right to live in a benevolent environment by providing information about environmental conditions and by promoting the preservation and improvement of the environment. They suggested that the plan was out of line with Section 37.1.4 of the Protective Belt Law, under which local authorities are prevented from allowing construction in territories that are recognised as flooding areas.

II. The Constitutional Court, in assessing the compliance of the contested provision with the Constitution, considered other legal provisions relating to environmental rights. The Constitutional Court reiterated that according to the interpretation of Section 7.2.2 and 37.1.4 of the Protective Belt Law provided by the court in previous judgments, one cannot allow areas with probability of flooding at least once in a hundred years to be designated as territories for construction. This interpretation plays a great role in the adjudication of the case.

In the judgment, the conclusion was reached that raising the ground level in areas with the probability of flooding at least once in a hundred years in order to carry out construction is considered as construction in the sense of the Construction Law. Such activities are *expressis verbis* prohibited by Section 37.1.4 of the Protective Belt Law.

The Constitutional Court pointed out that the rationale behind norms regulating environmental protection, as well as land use planning, is to ensure the uniform observance of the requirements of environmental protection across all local government authorities.

In view of the interpretation provided in the judgment and because the laws regulating environmental protection provide that those performing certain activities must adhere to the highest possible standards of environmental protection, the Constitutional Court ruled the contested provision to be in conflict with Article 115 of the Constitution.

The Constitutional Court established that it is possible to reach the aims of public administration, as well as those of environmental protection most efficiently through collaboration between public administration institutions.

The Constitutional Court drew attention to the fact that it is the duty of the Cabinet of Ministers to ensure the execution of judgments by the Constitutional Court.

Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2006-09-03 of 08.02.2007;
- Judgment no. 2005-12-0103 of 16.12.2005;
- Judgment no. 2003-16-05 of 09.03.2004; *Bulletin* 2004/1 [LAT-2004-1-003];
- Judgment no. 2002-14-04 of 14.02.2003; *Bulletin* 2003/1 [LAT-2003-1-002];
- Judgment no. 2001-07-0103 of 05.12.2001.

Languages:

Latvian, English (translation by the Court).

Liechtenstein
State Council

Important decisions

Identification: LIE-2007-3-003

a) Liechtenstein / **b)** State Council / **c)** / **d)** 03.07.2007 / **e)** StGH 2006/111 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts**.
1.6.9.2 Constitutional Justice – Effects – Consequences for other cases – **Decided cases**.
2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
2.2.1.5 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and non constitutional domestic legal instruments**.
4.7.2 Institutions – Judicial bodies – **Procedure**.
5.2 Fundamental Rights – **Equality**.
5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.

Keywords of the alphabetical index:

Res judicata / Judgment, review / European Court of Human Rights, judgment, binding effect / European Court of Human Rights, judgment, execution / European Court of Human Rights, decision, national, reopening.

Headnotes:

The fact that the European Court of Human Rights allows an individual petition has no direct consequences for the domestic judgment, and in particular does not directly entail its modification. Where a judicial decision is found to infringe the European Convention on Human Rights, the

Convention does not require that the judgment of the European Court of Human Rights, finding a decision of a Liechtenstein court contrary to the Convention, should be given an effect that would deprive the decision of its *res judicata* effect. Nor does the legal reappraisal made by the European Court of Human Rights constitute, in Liechtenstein, an argument in favour of reopening the proceedings, for want of appropriate provisions.

Article 41 ECHR permits national court decisions with *res judicata* effect to be left intact when they are found to have been delivered in breach of public international law. Even though this consequence is unsatisfactory in cases where review would be necessary from the standpoint of redress, it is not the function of the court to legislate in the legislator's place.

Since the impugned decision prompting an application to reopen the proceedings is not valid on the ground of procedural defect, it suffices that the European Court of Human Rights has found a violation of the Convention, any other measures to restore a situation in accordance with the Convention being unnecessary for that reason.

Summary:

After the European Court of Human Rights had found a procedural defect infringing Article 6.1 ECHR in a final judgment of the Administrative Court, the Administrative Court dismissed an application to reopen the proceedings invoking the decision of the European Court of Human Rights. The State Council did not allow the appeal against this dismissal, citing the legal situation in Liechtenstein which, unlike certain neighbouring states such as Switzerland, Austria or Germany, lacked appropriate provisions on review. In that connection, it left in abeyance the question whether, in the event of the relevant decision being unfair, an obligation to carry out a review should not perhaps be inferred from the principle of equality.

Languages:

German.

Netherlands
Council of State

Important decisions

Identification: NED-2007-3-005

a) Netherlands / **b)** Council of State / **c)** Third Chamber / **d)** 17.10.2007 / **e)** 200702225/1 / **f)** Stichting Taalverdediging v. Staatssecretaris van Defensie / **g)** / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

4.3.1 Institutions – Languages – **Official language(s)**.
4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces**.

Keywords of the alphabetical index:

Police officer, uniform, inscription in English.

Headnotes:

A decision arising from an application to end the obligation on police officers to wear, whilst carrying out their official duties, jackets on which the English word “POLICE” is printed, lacks legal effect and is not suitable for judicial review in administrative law courts.

Summary:

I. The Language Defence Foundation (referred to here as “the Foundation”) was informed in writing, by the State Secretary for Defence, in the name of the Commander of the Royal Netherlands Military Constabulary, that its request to instruct officers not to wear, in the carrying out of their official duties, jackets with English words (rather than Dutch) on the back, would not be honoured. The Foundation contested this decision, but the State Secretary held it to be inadmissible. The Foundation then launched proceedings in an administrative law court. The District Court upheld the state secretary’s declaration of inadmissibility. The Administrative Jurisdiction Division of the Council of State upheld the District Court’s judgment.

II. In the letter to the Foundation, the state secretary had simply explained why an international term had been preferred over a Dutch word in order to indicate that the officers concerned were members of the police force. There was no decision taken here, in the sense of the General Administrative Law Act. Whilst it was a written decision by an administrative authority, it did not constitute a public law act. The obligation to wear jackets bearing English words is a matter of internal (domestic) organisation. If members of the public are confused by the English terminology, this is a factual consequence, not a legal one.

Languages:

Dutch.

Identification: NED-2007-3-006

a) Netherlands / **b)** Council of State / **c)** Third Chamber / **d)** 05.12.2007 / **e)** 200609224/1 / **f)** The Reformed Political Party upon appeal against a decision by the District Court of the Hague's judgment (number AWB 06/2696) in the case of the Reformed Political Party and others v. the Minister for the Interior and Kingdom Relations / **g)** / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

2.1.1.4.12 Sources – Categories – Written rules – International instruments – **Convention on the Elimination of all Forms of Discrimination against Women of 1979**.
3.3.3 General Principles – Democracy – **Pluralist democracy**.
4.5.10.2 Institutions – Legislative bodies – Political parties – **Financing**.
5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.
5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.

Keywords of the alphabetical index:

Election, candidate, gender / Election, candidacy, restriction / Political party, subsidy.

Headnotes:

Granting a subsidy to a political party that deems women to be ineligible to stand for elections does not amount to an application of statutory regulations that is in conflict with Article 7 of the UN Convention on Elimination of All Forms of Discrimination against Women, which is binding on all persons in the sense of the Constitution.

Summary:

I. The Minister for the Interior and Kingdom Relations (referred to here as "the Minister"), rejected an application made by the Reformed Political Party (referred to here as ''the RPP'') for a subsidy under the Political Parties (Subsidies) Act 1999. The RPP lodged an appeal against this decision in the administrative law section of the District Court of The Hague. The court upheld the Minister's decision. The Administrative Jurisdiction Division of the Council of State allowed the RPP's appeal.

II. The Political Parties (Subsidies) Act allows ministers to grant subsidies to political parties holding seats in Parliament after elections to the House of Representatives and the Senate (see Section 2). However, this entitlement expires after the imposition of an unconditional fine by a criminal law court on the basis of some specific anti-discrimination provisions in the Penal Code (Section 16). Article 7 of the UN Convention on Elimination of All Forms of Discrimination against Women (referred to here as "the Convention"), requires State Parties to take all appropriate measures to eliminate discrimination against women in national public and political affairs. In particular, it requires them to ensure that women have equal rights to men, to stand for election to all publicly elected bodies (under a) and to participate in non-governmental organisations and associations concerned with national public and political affairs (under c). Under the Constitution, provisions of treaties and of resolutions by international institutions which may be of universal application by virtue of their contents shall become binding after they have been published (Article 93 of the Constitution). Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions (Article 94 of the Constitution).

The Minister had taken the view that he was bound by a judgment given by the civil law section of the District Court of The Hague, where the Court had declared that the State had acted in breach of Article 7 of the Convention, and therefore unlawfully. The Court had imposed an injunction on the Minister

not to apply Section 2 of the Political Parties (Subsidies) Act in relation to the RPP for breach of Article 7 of the Convention, as long as women were not treated equally by the RPP in terms of membership. The RPP was founded in 1918 and calls for government based entirely on biblical teachings. The Administrative Jurisdiction Division of the Council of State acknowledged that the Minister had been bound by the injunction imposed in the course of the civil law proceedings. Nonetheless, this did not preclude the RPP from seeking a judgment from the administrative law courts; such jurisdiction stems from the General Administrative Law Act and the Council of State Act.

The Administrative Jurisdiction Division of the Council of State held firstly that parts of Article 7 of the Convention were of universal application, by virtue of its contents in the sense of the Constitution.

The Administrative Jurisdiction Division held secondly that the Convention did not rule out a balance between the application of Article 7 of the Convention on the one hand and other fundamental rights, including freedom of religion, association and assembly, on the other hand. This followed from the legislative history of the Convention and of the Act of Parliament sanctioning the Convention.

Thirdly, the Administrative Jurisdiction Division held that the Section 2 of the Political Parties (Subsidies) Act must be applied to the application for subsidy lodged by the RPP. The legislative history of the Political Parties (Subsidies) Act showed that the Act was aimed at the maintenance and enforcement of political parties in the Dutch democratic system. The functioning of these parties was vital to that system. Moreover, the legislator had included Article 16 of the Political Parties (Subsidies) Act, having regard to Article 7 of the Convention. The intention of the legislator was that courts should make the decisions about the running and accountability of political parties, rather than subjecting them to political decision-making.

According to the Administrative Jurisdiction Division of the Council of State, the legislator had not been unreasonable in the weighing of interests. There was nothing manifestly wrong with prohibiting discrimination against women and safeguarding their ability to participate in public life on an equal footing with men on the one hand, and securing the proper functioning in democratic society of political parties on the other. The Administrative Jurisdiction Division of the Council of State also attached importance to the fact that women, overall, could obtain full membership of political parties. Parties which had developed a tradition regarding equality between the sexes which differed from prevailing opinions and legal developments must to be able to conduct debates unhampered, within the boundaries set by criminal law. This was in line with the case law of the European Court on Human Rights, regarding the banning of political parties.

Finally, the Administrative Jurisdiction Division of the Council of State held that the RPP fulfilled every legal requirement and was entitled to a subsidy based on the Political Parties (Subsidies) Act.

Supplementary information:

The abovementioned proceedings before the civil law section of the District Court of the Hague (resulting in the judgment of 7 September 2005, no. HA ZA 03/3395) were initiated by a foundation established to bring test cases in order to improve the legal and social position of women. After that judgment, the Reform Political Party allowed women to apply for full membership. Following the current judgment by the Administrative Jurisdiction Division of the Council of State, the Minister announced that a subsidy would be granted to the RPP.

Languages:

Dutch.

Poland
Constitutional Tribunal

Statistical data
1 September 2007 – 31 December 2007

Number of decisions taken:

Judgments (decisions on the merits): 43

- Rulings:
  - in 23 judgments the Tribunal found some or all challenged provisions to be contrary to the Constitution (or other act of higher rank)
  - in 11 judgments the Tribunal did not find the challenged provisions to be contrary to the Constitution (or other act of higher rank)
- Initiators of proceedings:
  - 13 judgments were issued upon the request of courts – the question of legal procedure
  - 12 judgments were issued upon request of private individuals (physical or natural persons) – the constitutional complaint procedure
  - 5 judgments were issued upon the request of the Commissioner for Citizens' Rights (i.e. Ombudsman)
  - 2 judgments were issued upon the request of local authorities
  - 1 judgment was issued upon the request of the First President of the Supreme Court
  - 1 judgment was issued upon the request of occupational (professional) organisations
- Other:
  - 2 judgments was issued by the Tribunal in plenary session
  - 1 judgment were issued with dissenting opinions

Important decisions

Identification: POL-2007-3-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 11.05.2007 / **e)** K 2/07 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2006, no. 85, item 571; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2007, no. 35, item 48 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review**.
1.5.6.3 Constitutional Justice – Decisions – Delivery and publication – **Publication**.
1.6.5 Constitutional Justice – Effects – **Temporal effect**.
1.6.7 Constitutional Justice – Effects – **Influence on State organs**.
3.9 General Principles – **Rule of law**.
3.12 General Principles – **Clarity and precision of legal provisions**.
3.15 General Principles – **Publication of laws**.
3.16 General Principles – **Proportionality**.
4.6.9.2.1 Institutions – Executive bodies – The civil service – Reasons for exclusion – **Lustration**.
5.3.13.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Scope**.
5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence**.
5.3.24 Fundamental Rights – Civil and political rights – **Right to information**.
5.3.25.1 Fundamental Rights – Civil and political rights – Right to administrative transparency – **Right of access to administrative documents**.
5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation**.
5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.
5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law**.
5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.
5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.

Keywords of the alphabetical index:

Right to information, condition / Lustration, procedure / Public function, person discharging / Collaboration / Data, correction, right / Act, secret, binding force / Legislation, correct, principle.

Headnotes:

The Polish Constitution envisages the universal right of access to official documents and data collections regarding the subject, and the right to demand the correction or deletion of untrue or incomplete, or information acquired by means contrary to statute. The constitutional right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute, which constitutes a reference to and elaboration of the right of privacy shall not be effectively limited to any one category of persons by way of statute. There is an unlimited scope of application to the right to informational autonomy, due to the guarantee function of the right to legal protection of one's honour and good reputation. Any limitation of the above right must be in line with the principle of proportionality.

The State may acquire, gather and make accessible only such information on citizens as is necessary in a democratic state ruled by law. On the one hand, the individual is entitled to legal protection of their private and family life as well as their honour and good reputation and to correct untrue, incomplete information, or information acquired by means contrary to statute. These two constitutional standards are binding upon any lustration procedure.

The principle of proportionality should be understood not only as a component part of constitutional principles that do not allow for the limitation of rights and freedoms of the individual, but also as a principle that constitutes an inherent component of the concept of a democratic state ruled by law. This principle outlines all significant components of a statutory regulation, ergo – for example – the subjective and objective scope of the regulation, the depth of interference by the State with personal or public affairs of individuals or the nature and severity of sanctions.

Under the Constitution, in a state ruled by law, secret normative or quasi-normative acts do not possess the nature of binding law. Accordingly, they shall not constitute the source of any rights or obligations granted or imposed by anyone upon citizens. The situation of citizens in a democratic state shall be determined solely by means of constitutional sources of law.

Neither the right to vote, nor the right to stand as a candidate in elections shall be exhausted in the act of voting itself. As for the right to stand as a candidate in elections, it shall not only encompass the right to be elected, but shall also involve the right to exercise the mandate obtained by way of elections conducted in a non-defective manner.

The principle of protection of trust in the State and its laws requires that in the event of imposing new obligations a certain period of adaptation to new regulations be specified. This should encompass such important issues for citizens as the rights and freedoms of persons elected for their functions. An appropriate adaptation period in such cases would be the term of office of persons elected in universal and direct elections.

Summary:

The subject of review in the present case was the Lustration Act (hereinafter: "the Act") which introduced amendments to other acts in matters concerning the submission of lustration declarations and the conduct of lustration (vetting).

The review was initiated by a group of *Sejm* Deputies.

The judgment declaring the unconstitutionality encompassed a considerable number of provisions referred for review, yet not to such an extent that one could allege the unconstitutionality of the entire Act.

The subject of the constitutional review in the case of lustration consists in examining whether the choice of values has been arbitrary, and – in particular – whether it adequately takes into account the protection of the constitutional freedoms and rights of the individual, and whether the procedure specified in the Act satisfies the requirements of a democratic state ruled by law. The intensity of control by the Constitutional Tribunal shall be all the more greater when provisions (norms) relate to more fundamental, constitutionally safeguarded rights of the individual, and where the provisions may lead to the imposition of sanctions on the individual with greater intensity.

Lustration should focus on threats to the fundamental rights of the individual and to the process of democratisation. Its purpose should not be the punishment of persons presumed guilty. This task has been vested in public prosecutors applying penal law. The aim of lustration proceedings should not be revenge. Abuse of the procedure for political or social goals should not be tolerated.

A democratic state ruled by law possesses all necessary means to guarantee that justice will be done and the guilty will be punished. It must not, and should not, satisfy the thirst for revenge, rather than serve the justice. It must respect such fundamental human rights and freedoms as the right to fair trial, the right to be heard or the right to defence, and apply such rights also to persons who failed to apply them when they were in power. Provisions of penal law must not be adopted which would be given retroactive

force. However, it will be permissible to bring to court all persons responsible for any acts or negligence which, when perpetrated, were not recognised as offences according to the national law then in force, but which were deemed such in the light of general legal principles adopted by civilised nations. If the actions of an individual clearly violated human rights, the contention that the person only carried out orders shall not preclude either the unlawful character of such acts, or the guilt of the individual. In consequence, the Act may only be applied towards an individual, not collectively.

It stems both from the nature of lustration procedure, which is similar to penal procedure, and from the obligation to apply provisions of the Code of Penal Procedure where appropriate, that a lustrated person shall enjoy all procedural guarantees, including the application of the *in dubio pro reo* principle, where the person undergoing lustration is to be given the benefit of the doubt as well as the right to defence. Of particular significance among the procedural guarantees shall be the presumption of innocence principle (Article 5.1 of the Code of Penal Procedure), which – within the framework of the lustration procedure – shall be understood as a presumption of the veracity of lustration declarations at all stages of proceedings.

The Tribunal has assessed the definition of collaboration (Article 3a.1 of the Act) as being in conformity with the indicated bases of review, provided that it is understood that the mere expression of somebody's willingness to engage in collaboration with the security organs will not suffice; actual activities undertaken that materialise the collaboration.

The definition of collaboration with security agencies shall be characterised as follows. Collaboration must consist of contacts with State security agencies, where the person collaborating provides the organs with information. The collaboration must be conscious, that is, the person undertaking such collaboration must be aware that he or she has established contact with representatives of one of the agencies enumerated in Article 2.1 of the Act. It must be secret, thus the person undertaking such collaboration has to be aware that the fact of collaboration and the course thereof have to remain secret, in particular should not be disclosed to persons and circles about whom the information was gathered. It must involve the operational gathering of information by the agencies enumerated in Article 2 of the Act. Lastly, collaboration may not be limited to a declaration of will; there has to be a conscious undertaking of particular activities in order to fulfil duties arising from such collaboration.

The submission of any declaration by a citizen at the request of authorities must be protected by the presumption of the veracity of facts and circumstances contained therein. This presumption may, obviously, be rebutted by way of an adopted procedure and upon the fulfilment of certain conditions. Lustration declarations may not take the form of a kind of inadmissible little game with the citizen, or a certain test of truthfulness.

The inclusion within the category of security agencies of both civil and military organs and institutions of foreign states performing “similar” tasks to those of the Polish security agencies, within the meaning of the Act, has been found to be unconstitutional. “Similarity” is not a sufficiently precise notion, and raises doubts as to the specificity of provisions of penal law, as stemming from the principle of a democratic state ruled by law.

Distinguishing State security agencies from the body of organs and institutions making up the apparatus of the totalitarian state, shall not be entirely arbitrary in nature; it must consist in the indication of an essential feature common to all units, and which could determine that State security agencies should be considered individually in the light of the goal of the Act.

Judging from the constitutional regulations (Articles 61.1 and 103), somebody discharging a public function undoubtedly becomes a public person by way of performing tasks of public authority, managing communal assets or the property of the State Treasury. The notion of a “public person” shall not be synonymous with the notion of a “person discharging public functions”. Not every public person may be considered as one who discharges a public function. Discharging a public function entails the performance of certain tasks in an office, within the institutional framework of public authority, within other decision-making positions in the public administration, and any other public institutions. Therefore, whether or not a function is a public one will depend upon whether a given person has been vested with at least a narrow scope of decision-making competence within a given public institution.

Lustration shall not apply to persons holding positions in private or semi-private organisations, since such organisations are characterised by too limited an infrastructure to enable the violation of fundamental human rights and the process of democratisation or to pose a threat to it.

Legislation provides for a sanction of a fixed period of forfeiture of right to discharge public functions, (i.e. for 10 years). This takes place automatically, where lack of veracity of a lustration declaration is found. The Tribunal has judged this to be unconstitutional.

Where loss of veracity is found, this penalty of forfeiture also applies to people who collaborated with security agencies under compulsion or in fear of loss of their lives or health. If somebody was acting under compulsion in fear of losing their lives or jeopardising their health or that of those closest to them should not be subject to sanction, because the compulsion leads to the invalidity of a declaration of will. A provision that does not provide for the application of a diversified sanction for failure to fulfil a statutory obligation of a public character may not meet the standards of the principles of correct legislation (Article 2 of the Constitution) or the requirements of the principle of proportionality.

The obligation to submit lustration declarations by persons elected in universal elections which had taken place before the Act came into force has been found by the Tribunal as unconstitutional.

Insofar as the second Sentence of Article 21.2 of the Act deprives a court of the right to specify the lower limit on the period of forfeiture of the right to stand as a candidate in elections, it has been found unconstitutional, on the grounds that the provision envisages only one sanction for submitting an untrue lustration declaration (loss of the right to stand as a candidate in elections for ten years).

The automatic nature of sanctions for submitting untrue lustration declarations, operating under legislation, with no scope for specialist disciplinary courts, familiar with the characteristics of a given profession, to diversify responsibility in the process of adjudicating, infringes both the principle of diligent legislation as specified in Article 2 of the Constitution, and the principle of proportionality.

The provision envisaging, in certain instances, extension of the scope of the right to access to information contained in the documentation of State security agencies to include so-called sensitive information has been found by the Tribunal to be unconstitutional.

When devising a system of universal access to information relating to persons discharging public functions, the legislator, for reasons that are inexplicable in light of the Constitution, limited such access, but excluded only some of the so-called sensitive data. These included racial or ethnic origins, religious convictions, religious affiliation and data on the state of health or sexual life. This list was too narrow.

The Act, as its title suggests, concerns the disclosure of information “stored” in achieves which comprise documents of the security apparatus. One may not question the necessity to disclose the information (hence to undertake lustration) in order to protect the mechanisms of a democratic state against threats emerging from the totalitarian past. However, this does not provide a reason why one may and should constitutionally approve of the disclosure of any kind of information stored in the archives, since full disclosure thereof infringes the constitutional principle of informational autonomy, the mechanism for which is specified in Articles 47 and 51 of the Constitution.

Norms declared unconstitutional lose their binding force at the date of the promulgation of a judgment by the Constitutional Tribunal in the Journal of Laws. Nonetheless, the mere pronouncement of the judgment by the Tribunal, upon completion of review procedures, shall not be without legal significance. As of the date of public delivery of a judgment (which always occurs prior to the derogation of the unconstitutional provision by way of promulgation of the judgment in the Journal of Laws) the provision under review shall lose its presumption of constitutionality. Bodies applying provisions which have either already been declared unconstitutional or which are within the delay period when the entry into force of a judgment has been postponed by the Tribunal should take into account the fact that they are dealing with provisions that have lost their presumption of constitutionality.

Formerly, double negation (as in the expression “is not inconsistent”) often resulted in the confirmation of constitutionality, based on the rules of logic. At present it has a different, unambiguous and consolidated meaning, established alongside the evolution of the jurisprudence. Currently, the formula “is not inconsistent with” is used exclusively in relation to instances where an inadequate basis of constitutional review has been put forward in an application: the situation exists where the application incorrectly identifies a basis of review, whereby the Tribunal, while essentially not assessing the appropriateness of the basis of review, does not express its opinion as regards the constitutionality, and hence the provision under review remains constitutional based on the presumption of constitutionality thereof.

In order to fulfil the condition of “promulgation of a statute”, publication of the next issue of the Journal of Laws is necessary, and the issue has to be available for distribution. From the perspective of Article 88 of the Constitution, it is irrelevant whether the addressees of a normative act have taken the opportunity to acquaint themselves with the content of a normative act which had been promulgated in accordance with the required procedures. This principle is dictated by an axiological postulate based on moral-political principles inherent in the concept of

a “state ruled by law”, and by a pragmatic postulate of making legal regulations an effective instrument to influence the behaviours of those to whom they are addressed.

Pursuant to Article 190.2 of the Constitution, this is the promulgation of judgments of the Constitutional Tribunal that shall exclusively be encompassed by the constitutionally guaranteed obligation of “immediate publication” (in other cases such an obligation is regulated by way of ordinary legislation). Such differentiation is justified because in the case of a decision issued by the Tribunal, the elimination from the legal system of norms deemed unconstitutional as quickly as possible is at issue. In the case of promulgation of statutes, one is dealing with the introduction of norms encompassed by the presumption of constitutionality. Accordingly, as a matter of principle, it will be necessary to minimise the occurrence of situations where norms already deemed unconstitutional, yet formally being part of the legal system, would actually be applied.

The Tribunal undertook the review of constitutionality only in respect of provisions that had been expressly identified by the applicants for review, and only where the request for constitutional review had been well-founded by them. Adjudicating upon the remaining provisions would go beyond the scope of the application, and hence would be inadmissible.

Where an applicant associates the challenged normative content with a certain editorial unit of an act, and where for the reconstruction of the content thereof it is also necessary to take into consideration a different part of the same act (not directly identified by the applicant), the Tribunal will face no restrictions in reviewing all those provisions of the act which in aggregate contain the challenged normative content.

Nine dissenting opinions were filed with the judgment.

Cross-references:

Decisions of the Constitutional Tribunal:

- Judgment U 6/92 of 19.06.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, no. I, item 13;
- Resolution W 5/93 of 14.07.1993, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 2, item 48;
- Judgment K 25/95 of 03.12.1996, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1996, no. 6, item 52; *Bulletin* 1996/3 [POL-1996-3-018];
- Judgment K 24/97 of 31.03.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 2, item 13; *Bulletin* 1998/1 [POL-1998-1-007];
- Judgment K 24/98 of 21.10.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 6, item 97;
- Judgment K 39/97 of 10.11.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 6, item 50; *Bulletin* 1998 *Bulletin* 1998/3 [POL-1998-3-018];
- Judgment K 30/98 of 23.06.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 5, item 101; *Bulletin* 1999/2 [POL-1999-2-023];
- Judgment K 4/99 of 20.12.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 7, item 165; *Bulletin* 2000/1 [POL-2000-1-003];
- Judgment K 21/99 of 10.05.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 4, item 109; *Bulletin* 2000/2 [POL-2000-2-013];
- Judgment SK 18/01 of 08.04.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 2, item 16; *Bulletin* 2002/3 [POL-2002-3-024];
- Judgment SK 5/02 of 11.06.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 4, item 41; *Bulletin* 2002/2 [POL-2002-2-018];
- Judgment K 7/01 of 05.03.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 3, item 19; *Bulletin* 2003/2 [POL-2003-2-017];
- Judgment K 44/02 of 28.05.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 5, item 44;
- Judgment SK 12/03 of 09.06.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 6, item 51; *Bulletin* 2003/3 [POL-2003-3-024];
- Judgment SK 53/03 of 02.03.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 3, item 16;
- Procedural decision SK 32/01 of 14.04.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 4, item 35;
- Judgment K 20/03 of 13.07.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 7, item 63;
- Judgment SK 1/04 of 27.10.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 9, item 96;
- Judgment K 31/04 of 26.10.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 9, item 103; *Bulletin* 2005/3 [POL-2005-3-010];

- Judgment K 17/05 of 20.03.2006, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 3, item 30; *Bulletin* 2006/3 [POL-2006-3-011];
- Judgment SK 21/04 of 26.07.2006, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 7, item 88;
- Judgment U 5/06 of 16.01.2007, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2007, no. 1, item 3;
- Judgment K 8/07 of 13.03.2007, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2007, no. 3, item 26.

Decisions of the European Court of Human Rights:

- Decision 38184/03 of 30.05.2006 *(Matyjek v. Poland)*.

Languages:

Polish, English, German (summary).

Portugal
Constitutional Court

Statistical data
1 September 2007 – 31 December 2007

Total: 183 judgments, of which:

- Prior review: 1 judgment
- Abstract *ex post facto* review: 3 judgments
- Appeals: 149 judgments
- Complaints: 25 judgments
- Declarations of inheritance and income: 4 judgments
- Political parties' accounts: 1 judgment

Important decisions

Identification: POR-2007-3-008

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 28.11.2007 / **e)** 589/07 / **f)** / **g)** *Diário da República* (Official Gazette), 13 (Series II), 18.01.2008, 2519-2525 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
3.17 General Principles – **Weighing of interests**.
5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent**.

Keywords of the alphabetical index:

Identity, right / Descent, right to know / Descent, child, interests / Paternity, challenge, deadline.

Headnotes:

Even if a biological truth principle can be said to exist in the ambit of the law of descent, this principle has no constitutional status and cannot be used as the sole grounds for a finding of unconstitutionality *vis-à-vis* the rule establishing a deadline for commencing an action to disprove paternity.

Setting a deadline for a putative father to attempt to disprove his paternity does not necessarily constitute an intolerable restriction on the right to development of personality defined as the right to live his life freely, provided the fact of forfeiting the right to commence such an action is accompanied by an appropriate weighting of opposing values.

Summary:

In this judgment the Constitutional Court ruled on the alleged unconstitutionality of the Civil Code article establishing a deadline on the right of a child's mother's husband to commence an action to disprove his paternity during his marriage to the mother, where it has been scientifically proved that the litigant is not in fact the biological father of the aforementioned child.

The decision in question was based on the Constitutional Court's judgment *erga omnes* to the effect that the provisions of Article 1817.1 of the Civil Code on the deadline for children wishing to initiate an action to establish paternity are unconstitutional, which subsequently became established case-law. These provisions were declared unconstitutional because they set a two-year time-limit on initiating proceedings starting from the date of the child's coming of age. The question in the instant case is whether the considerations underlying the Constitutional Court's declaration of unconstitutionality of the provisions of Article 1817.1 of the Civil Code relating to actions to establish paternity can be transposed wholesale to the appraisal of the deadline set for commencing an action to disprove paternity.

It emerges from the case-law of the Constitutional Court that the unconstitutionality of the time-limit for children to bring an action to establish paternity involves the principle of proportionality, that is to say that this time-limit/deadline was declared unconstitutional because it was deemed to be not a limitation but rather an intolerable restriction on the fundamental rights to personal identity and to development of personality, as well as on the fundamental rights in terms of family life.

The question in the instant case is whether the provision which is the subject of the appeal violates the mother's husband's fundamental right to personal identity, thus potentially justifying the conclusion that by virtue of a constitutional provision he should be able to commence the said proceedings at any time, irrespective of the date on which the husband, being entitled to bring the action, became aware of the circumstances prompting reasonable doubts as to his paternity.

A difference of degree was deemed to exist between an action to establish paternity – where the point at issue is the applicant's right to personal identity and where imposing a time-limit is liable to infringe his/her right to knowledge of his/her parents' identities – and an action to disprove paternity, which is geared to defining the legal status of the initiator of the action *vis-à-vis* a relationship established by legal presumption.

According to law, the period in which an action to establish paternity can be initiated begins at the time of an objective fact (the date of the applicant's majority or emancipation), thus making it impossible to bring the action if the person has only become aware of the actionable situation after the lapse of a two-year period from the date in question. In this context, the rule that paternity cannot be established on the basis of an objective deadline criterion where the reasons for the action only emerge after this deadline has lapsed was declared disproportionate and incompatible with the right to personal identity. In such situations the provision enshrined an effective negation of the child's ability to ascertain his/her descent and was accordingly declared unconstitutional.

On the other hand, in attempting to disprove paternity (the subject of the judgment in question), the putative father has the same period for initiating proceedings as in the case of an action to establish paternity, but the period begins on the date of a subjective fact, viz his realisation of the circumstances potentially disproving his paternity. The Constitutional Court considers this period reasonable and appropriate for weighing up the interest of exercising the right to dispute one's paternity and properly considering the factors that might potentially influence the decision to bring an action. The putative father cannot contend that he was unable to exercise this right given that, drawing on his personal knowledge of the facts demonstrating the non-existence of a genuine relationship by descent, he still has sufficient time to disprove the presumption of paternity.

In conclusion the Constitutional Court holds that there is no parity between the two limitation periods and consequently decides not to declare the time-limit in question unconstitutional on grounds of violation of the rights to personal identity and development of personality.

The judgment was adopted unanimously, although two declarations were submitted along with the vote.

Cross-references:

For Portuguese constitutional case-law on action to establish paternity and action to disprove paternity, see judgment [POR-2005-3-010] and the supplementary information provided.

Languages:

Portuguese.

Identification: POR-2007-3-009

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 11.12.2007 / **e)** 609/07 / **f)** / **g)** *Diário da República* (Official Gazette), 48 (Series II), 07.03.2008, 9789-9794 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
3.17 General Principles – **Weighing of interests**.
5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent**.
5.3.43 Fundamental Rights – Civil and political rights – **Right to self fulfilment**.

Keywords of the alphabetical index:

Identity, right / Descent, right to know / Descent, child, interests / Paternity, action to establish / Paternity, action to disclaim.

Headnotes:

Deadlines for bringing an action to disprove paternity can only be accepted if they do not disproportionately restrict the main fundamental rights to personal identity and development of personality and the right to found a family.

Summary:

The question of the constitutionality of the time-limit for initiating an action to establish paternity is under increasing debate. The Constitutional Court has already dealt with this constitutionality issue on several occasions, albeit in connection with the time-limits for commencing actions to establish paternity. The main grounds set out for these decisions have been based on the idea that the provisions in question flow from a balance among several contradictory rights or interests, leading to an acceptable limitation on, rather than a restriction of, the exercise of the applicant's right to personal identity.

The argument may be different in the case of deadlines for bringing an action to disprove paternity because some of the legal situations challenged in such case may have been established a long time previously, thus potentially heightening the need to defend the stability and certainty of the law.

The inclusion in the Constitution of a fundamental right to knowledge and recognition of maternity and paternity as one dimension of the right to personal identity secured under Article 26.1, must be considered as an effective enshrinement of this right.

It is nevertheless accepted that other values, such as those arising from the stability and certainty of the law, may have to be taken into consideration in weighing up the interests at issue, thus overriding the evidence of biological truth.

The question is whether, from the constitutional angle, the rules on the lapse of the right to establish paternity are justified by the need to balance divergent interests, describing them as restrictive and consequently liable to be deemed constitutionally legitimate in the light of the principle of proportionality.

The provisions of Article 1842.2.c of the Civil Code establish the principle of the lapse of the right of a child who has initiated an action to disprove paternity and who was born before his or her mother's marriage. In line with this principle, the child must bring the action within one year from the date of his or her majority or emancipation or, subsequently, within one year from the date on which (s)he has learnt of the circumstances suggesting that (s)he was not his/her mother's husband's child.

The decision complained of ruled that this legal provision was unconstitutional on the grounds that the deadline set by the law for bringing the action is irrelevant in the light of biological truth.

In connection with an action brought by a mother and her husband to disprove paternity, the setting of short deadlines has so far been positively interpreted as protecting the child's interest not to be at an indefinite risk of preclusion of the legal presumption of paternity.

As regards action to disprove paternity as brought by a child, the one-year deadline laid down in Article 1842.1.c is evidently insufficient to appropriately reflect the facts and facilitate an action to disprove the putative paternity, particularly in such cases as the instant one where the circumstances proving that the mother's husband is not the biological father came to light around the date of the child's maturity and independence.

Inasmuch as the provisions of Article 1842.1.c set a one-year deadline from the date on which a child who is of full age or emancipated was apprised of circumstances suggesting that (s)he is not the child of his/her mother's husband, enabling him/her to exercise the right to challenge the putative paternity of the mother's husband, the Constitutional Court concluded that it was unconstitutional in that it violated the rights to personal identity and development of personality and the right to found a family, and failed to fulfil the conditions for unambiguous compliance with the principle of proportionality.

The judgment was adopted, with one vote against, ruling that the decision was based on insufficient grounds for legitimacy, and that furthermore the Constitutional Court had no jurisdiction for the point at issue since it was not responsible for sanctioning political choices in the legislative field.

Consideration of comparative law shows that setting time and other limits on the right to attempt to disprove paternity is not an isolated legislative measure (cf. the Spanish Civil Code and corresponding French, Swiss and German legislation). The European Court of Human Rights has also pronounced on legal time-limits on actions to disclaim putative paternity on the part of the mother's husband. It has emerged from the Court's various decisions that the setting of legal deadlines is not in itself contrary to the European Convention on Human Rights, notably Article 8 ECHR. The main thing is that the deadline set should effectively enable holders of the right in question to have recourse to a given procedural facility in order to counter the legal presumption of paternity in order to give precedence to biological truth.

Cross-references:

For Portuguese constitutional case-law on action to establish paternity and action to disprove paternity, see judgment [POR-2005-3-010] and the supplementary information provided.

Languages:

Portuguese.

Identification: POR-2007-3-010

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 19.12.2007 / **e)** 617/07 / **f)** / **g)** *Diário da República* (Official Gazette), 31 (Series II), 13.02.2008, 5630-5634 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.
5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Marriage, property, community / Marriage, property, separation / Property, marital, system / Debt, wage, attachment, system of marital property.

Headnotes:

The prohibition of discrimination based on sex – in connection with the effects of marriage – comprises the inherent positive requirement that the spouse/husband and the spouse/wife must have the same dignity in law.

The fact is that recognising the same dignity for both spouses means also acknowledging that neither (as husband or wife) needs special systematic protection *vis-à-vis* the other, in the personal or property spheres.

Summary:

In order to implement the constitutional principle of equality between spouses, the 1977 reform of the Civil Code adopted the principle of joint management of marital property. However, it excluded some types of property because of the obvious need for flexibility in juridical transactions. One of these exceptions concerns individual earnings by each spouse from their respective occupations. These earnings are managed by the spouse who receives them, even though they are common property under the applicable system of marital property.

In this appeal the Constitutional Court had to consider whether, in view of the principles of the rule of law, guarantee of private property and equality of rights and duties of spouses, it is constitutionally permissible for one spouse freely to dispose of his or

her wages (and specific items of property) to pay off debts for which (s)he alone is responsible, where the said earnings are part of the couple's common property and the spouse who is not liable to the debt has always contributed to household expenses.

The constitutionality of the provisions of Articles 1682.2 and 1696.2.b of the Civil Code was challenged. The former provides that each spouse may legitimately sell or commit, by an *inter vivos* deed, any jointly or separately held items which (s)he administers. The latter lays down that the proceeds of the work and copyright of the spouse liable to the debt, as well as his or her own property, must be used to pay off any debts for which (s)he is solely responsible, even if, in principle, his/her own property is primarily liable to the said debts, whereby half of the common property is liable on a secondary basis.

So the question is whether the spouse who is not liable to the debt can halt attachments requested by third parties on the grounds of an infringement of constitutional provisions, given that each spouse's wage is an item of common property under the system of community of after-acquired property – which applies in the instant case – and that the attachable amount was established at one-third of the wage of the spouse against whom the attachment was ordered.

The Court concluded that substantial changes in relations within the family lay outside the ambit of both constitutional and ordinary law, and consequently decided not to declare the provisions in question unconstitutional.

Languages:

Portuguese.

Romania
Constitutional Court

Important decisions

Identification: ROM-2007-3-003

a) Romania / **b)** Constitutional Court / **c)** / **d)** 09.10.2007 / **e)** 871/2007 / **f)** Decision on the constitutionality or otherwise of Emergency Government Ordinance no. 110/2005, regarding the sale of premises belonging to the State and to administrative territorial units which were used as consulting rooms; or for the practice of medicine, approved with amendments and supplements by Law no. 236/2006 / **g)** *Monitorul Oficial al României* (Official Gazette), 701/17.10.2007 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
5.3.39.1 Fundamental Rights – Civil and political rights – Right to property – **Expropriation**.
5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

Keywords of the alphabetical index:

Asset, public, sale, forced / Health, protection, obligation.

Headnotes:

The case arose from an Emergency Government Ordinance, ordering the sale of assets belonging to administrative territorial entities. A maximum price was set for these assets, which included consulting rooms, and premises where medical practice took place. This represented a forced transfer of ownership, in contravention of the provisions on expropriation, enshrined within the Romanian Constitution and the European Convention on Human Rights. It also contravened the right to health protection and flouted the State's obligation to safeguard public health and hygiene, set out in the Constitution.

Summary:

I. On 23 March 2007, the Cluj District Court (Division of Contentious Administrative and Fiscal Matters, Employment Disputes and Social Security) issued an Interlocutory Order, making a referral to the Constitutional Court. The District Court challenged the constitutionality of Emergency Government Ordinance no. 110/2005. This governed the sale of assets owned by the State or by administrative-territorial entities, which were used as consulting rooms or for the practice of medicine. The District Court also challenged the constitutionality of certain provisions of Law no. 236/2006, on the approval of the Government Emergency Ordinance no. 110/2005.

In support of its arguments about the lack of constitutionality, the District Court pointed out that the legislation under scrutiny covered assets within the public domain of administrative-territorial entities, rather than the private domain. The Government of Romania could not make decisions about assets within the private ownership of another public institution. The District Court also relied upon constitutional provisions under Article 136.2 and 136.4 of the Constitution on the guarantee and protection of private property, and the inalienability of public property.

II. The Constitutional Court noted that the ordinance placed local authorities under an obligation to list in full the premises used as consulting rooms and those used for the practice of medicine; and to sell them. If administrative territorial units cannot dispose of their assets freely, and cannot decide whether to sell them, this impinges upon their ownership rights. The Court therefore ruled that the ordinance contravened the provisions of Article 44.1 (first sentence) on the guarantee of the right to private property.

The Court also pointed out that the Ordinance brought about a forced transfer of ownership, in breach of the provisions on expropriation within Article 44.3 of the Constitution and Article 1 Protocol 1 ECHR. There is a clear line of authority from the European Court of Human Rights to the effect that deprivation of ownership must take place in accordance with national legislation, and it must be in the public interest. With regard to compensation for the owner for the loss of his right, the European Court of Human Rights has held that, in absence of reparatory compensation, Article 1 Protocol 1 ECHR would only assure an illusory and ineffective protection of the ownership right (see "*James and others v. the United Kingdom*", 1986). Thus, where there is deprivation, the State must provide compensation of an amount reasonably related to the value of the asset. If this does not happen, the measure represents a disproportionate interference with the right to private property and a breach of the balance between the requirement to safeguard ownership rights and exigencies of a general nature. The Court also noted the discrepancy between the prices set out in the Ordinance and the market value of the assets. As the prices in the Ordinance were unreasonable, it was out of line with the requirements imposed by constitutional and international norms.

The Court found the ordinance to be in breach of Article 33 of the Constitution, which places the State under an obligation to take measures to safeguard public health and hygiene. Implicit in this obligation is the guarantee of sufficient material resources for the medical service. As the ordinance would result in the sale of premises used as consulting rooms, and for the practice of medicine, the premises would probably be used for a different purpose. As a result, the State would no longer have the material resources to fulfil its constitutional obligation. It would be unable to guarantee citizens' rights to health protection.

The Court upheld, by majority vote, the District Court's contention that Emergency Government Ordinance no. 110/2005, approved with amendments and supplements by Law no. 236/2006, was unconstitutional.

Cross-references:

The same decision was made, by majority vote, as to the unconstitutionality of the provisions of Articles 1, 4.1, 5.1 and 8 of the Emergency Government Ordinance no. 110/2005, through Decision no. 870 of 9 October 2007, published in the Official Gazette of Romania, Part I, no. 701/17.10.2007. This decision was pronounced in previous proceedings, where only the provisions of Articles 1, 4.1, 5.1 and 8 of the Emergency Government Ordinance no. 110/2005 were challenged for unconstitutionality.

Languages:

Romanian.

Slovakia
Constitutional Court

Statistical data
1 September 2007 – 31 December 2007

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 10
- Decisions on the merits by the Court panels: 189
- Number of other decisions by the plenum: 7
- Number of other decisions by the panels: 326

Slovenia
Constitutional Court

Statistical data
1 September 2007 − 31 December 2007

The Constitutional Court held twenty-two sessions during the above period. Eleven were plenary and ten were in Chambers. Of these, two were in civil chambers, two in penal chambers and six in administrative chambers. There were 444 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 1 118 unresolved cases in the field of human rights protection (denoted Up- in the Constitutional Court Register) from the previous year at the start of the period 1 September 2007. The Constitutional Court accepted 119 new U- and 1 059 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court resolved 4 590 (Up-) cases in the field of the protection of human rights and fundamental freedoms (20 decisions issued by the Plenary Court, 4 570 decisions issued by a Chamber of three judges).

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas the rulings of the Constitutional Court are not generally published in an official bulletin, but are handed over to the participants in the proceedings.

However, the decisions and rulings are published and submitted to users:

- In an official annual collection (Slovenian full text versions, including dissenting/concurring opinions, and English abstracts);
- In the *Pravna Praksa* (Legal Practice Journal) (Slovenian abstracts, with the full-text version of the dissenting/concurring opinions);
- Since August 1995 on the Internet, full text in Slovenian as well as in English http://www.us-rs.si;
- Since 2000 in the JUS-INFO legal information system on the Internet, full text in Slovenian, available through http://www.ius-software.si;
- Since 1991 bilingual (Slovenian, English) version in the CODICES database of the Venice Commission.

Important decisions

Identification: SLO-2007-3-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 10.10.2007 / **e)** Up-679/06 and U-I-20/07 / **f)** / **g)** *Uradni list RS* (Official Gazette), 101/07 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
3.12 General Principles – **Clarity and precision of legal provisions**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.3.13.9 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Public hearings**.
5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence**.
5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality**.

Keywords of the alphabetical index:

Court, president, appointment, proposal / Judge, independence / Judge, appointment, checks and balances / Judicial council, judge, appointment / Judicial council, functions.

Headnotes:

The Judicial Council is an authority that is intended for the exercise of the independence of the judicial branch of power. It also has the role of directing personnel policy in terms of judicial posts and the posts of court presidents. If, therefore, only one candidate fulfilling the requisite conditions comes forward, following an invitation for applications, the Council is not obliged to propose them to the Minister if it does not believe that person to be a suitable candidate for the office of court president. The Minister can only appoint as president a candidate put forward by the Judicial Council. This establishes a balance that is in conformity with the Constitution, which prevents excessive influence by the executive branch of power over the appointment of courts' presidents. There has been no breach in this instance of the doctrine of separation of powers.

The right to impartial adjudication is not guaranteed in circumstances which would arouse serious suspicion in a reasonable person as to the impartiality of a Supreme Court judge, or the Court itself, not simply from the petitioner's perspective but also from an objective standpoint.

Summary:

I. The Judicial Council had put the complainant forward to the Minister of Justice as sole candidate for appointment to the position of President of the District Court in Ljubljana. The Minister rejected the Judicial Council's proposal and decided not to appoint the complainant. In proceedings for the judicial review of administrative acts, the court of first instance granted the complainant's petition, overturned the Minister's decision, and referred the case to the Minister for new proceedings. Both the complainant and the Minister appealed against the Administrative Court's decision. In Judgment no. I Up 143/2006, dated 29 March 2006, the Supreme Court dismissed the complainant's appeal, upheld the Minister's appeal, and altered the Administrative Court judgment dismissing the complainant's petition against the Minister's decision. In the Supreme Court's view, under Article 62.2 of the Courts Act, during the process of appointing the President of the District Court, the Minister has the right to select a candidate even if the Judicial Council has only put forward one candidate for consideration. In such circumstances, the Minister can either reject the Judicial Council's proposal and decline to select that candidate, or appoint them to the position of President of the Court.

In his petition to the Constitutional Court, the complainant challenged the constitutionality of certain provisions of the Court Act and the Civil Procedure Act. He also lodged a constitutional complaint against the Supreme Court judgment. He pointed out that the character and contents of Article 62.2 of the Courts Act allow the authorities to ascribe different meanings to its text. Thus, in the present case, the Minister, the Administrative Court, and the Supreme Court adopted different interpretations of the provision. He suggested a fourth approach – one that, in his view, was the only one to be constitutionally admissible. He suggested that the Constitutional Court should issue an "interpretative" decision, establishing that Article 62.2 is not inconsistent with the Constitution if it is interpreted or applied to mean that the Minister may not refuse a proposal by the Judicial Council for the appointment of the President of a court when the Judicial Council only puts one candidate forward. General statements by the petitioner suggest that, in his opinion, this is the only interpretation of Article 62.2 which would enable the Judicial Council

to have a constitutional position that is equivalent to the Minister's, it is also the only interpretation which ensures that, in the process of appointment of a President of the Court, only objective criteria are considered. This ensures the independence of judges in the performance of the judicial office. See Articles 3.2 and 125 of the Constitution. The petitioner stressed that a central tenet of his petition was the argument that the challenged provision was incompatible with the principles of legal foreseeablity (rule of law), enshrined in Article 2 of the Constitution, and the right to the effective protection of rights (Article 25 of the Constitution). The provision was also out of line with the right to the equal protection of rights determined in Article 22 of the Constitution.

The petitioner went on to contend violation of other constitutional rights. These included the right to equality before the law, (Article 14.2 of the Constitution), the right to the equal protection of rights, (Article 22 of the Constitution), the right to an impartial court (Article 23.1 of the Constitution), and the right to the public pronouncement of a judgment (Article 24 of the Constitution). Other violated rights included the right to a trial without undue delay (Article 23.1 of the Constitution), the right to an effective legal remedy (Article 25 of the Constitution), and the right to equal access to all positions of employment under equal conditions (Article 49.3 of the Constitution). The petitioner cited two Supreme Court judgments. He alleged that the facts of these cases were essentially similar to those in the present matter, and suggested that the Supreme Court had not given sufficient reasons for its departure from the established case-law. In addition, the petitioner argued that the Supreme Court should have pronounced the judgment in public. As it did not do so, there was a potential breach of his constitutionally guaranteed right to a publicly pronounced judgment. Moreover, the complainant alleged that a judge had taken part in the Supreme Court's decision-making who should have been disqualified, as there were circumstances that cast doubt upon his impartiality. He explained that he had requested the judge's disqualification, but that the President of the Supreme Court had rejected his request. The petitioner explained that judges could themselves ask to stand down, in circumstances that could cast doubt on their impartiality.

II. The Constitutional Court decided that Article 62.2 of the Courts Act was not inconsistent with the Constitution, and dismissed the petition requesting the commencement of proceedings for the review of the constitutionality of sentence 2 of Article 321.2 of the Civil Procedure Act. It also stated that Supreme Court Judgment no. I Up 143/2006 of 29 March 2006 had deprived the petitioner of his right to an impartial trial, as enshrined in Article 23.1 of the Constitution.

The Constitutional Court did not find the challenged provision of the Courts Act on the appointment of presidents of courts to be out of line with the principle of a state governed by the rule of law (Article 2 of the Constitution). It found the provision to be sufficiently clear, since, in accordance with general rules of interpretation, it could be interpreted in such a way that the Minister's power to appoint the president of a court also encompasses the right to select candidates or not to appoint a proposed candidate.

The petitioner had challenged the provisions of the Courts Act from the standpoint of the principle of the separation of powers (see Article 3.2 of the Constitution). The Court pointed out that, rather than allowing the autonomy of individual branches of power, the doctrine establishes mutual dependency between them. The institution of checks and balances is an essential part of the principle of the separation of powers, both from a functional and an organisational point of view. Judges do have powers for which there is no direct accountability to the electorate. However, it is a requirement of the mutual dependency of holders of various offices of state authority that both the legislative and executive branches participate in the appointment of judges and presidents of courts. The Judicial Council is an authority that is intended for the exercise of the independence of the judicial branch of power. It also has the role of directing personnel policy with respect to judicial posts and the posts of court presidents. If, therefore, following an invitation for applications, only one candidate who fulfills the conditions responds to the invitation, the Council is not obliged to propose them to the Minister if it does not believe that they are suitable to take up office as court president. The Judicial Council has to make a substantive selection among the candidates. The Minister can only appoint as president a candidate who has been proposed by the Judicial Council. This establishes a balance that is in conformity with the Constitution, which prevents excessive influence by the executive branch over the appointment of court presidents.

The Court found the provision to be in conformity with the Constitution, as it means that an appointment to the post of court president can only take place where both authorities agree on the suitability of the candidate. It is not, therefore, out of line with the principle of the separation of powers.

The petitioner had suggested a violation of Article 125 of the Constitution, on judicial impartiality. The Constitutional Court observed that, under the regulations in force at the point of the review, court presidents did not have the power to interfere with the exercise of judicial independence. One had to bear in mind that court presidents could only be judges of the

court of the same rank or higher. The Minister would only choose between judges who had already been appointed to permanent judicial office guaranteed by the Constitution. In the exercise of that office, they must be independent and bound only by the Constitution and the law. There was no constitutional problem, therefore, with that part of the challenged regulation under which the president of a court is appointed by the executive branch of government.

The Constitutional Court then examined the alleged violation of Article 49 of the Constitution (freedom of work) in conjunction with Article 23 of the Constitution (right to judicial protection). It observed that, when standing for the position of president of a court, the individual has no rights under national legislation or even the Constitution to occupy such a position. He or she only has the right to compete for such a position with others under equal conditions. Thus, the fact that, under the provision in question, the Minister can refuse to appoint as president the candidate proposed by the Judicial Council cannot, *per se*, be inconsistent with the right to compete with others under equal conditions for the position of the president of a court in conjunction with the right to effective judicial protection.

The petitioner had suggested that certain provisions of the Civil Procedure Act were inconsistent with Article 24 of the Constitution, namely the public nature of court proceedings. The Court pointed out that in certain more demanding cases the court may decide to issue judgments in writing, instead of pronouncing them in court. This forms part of the legislative regulation of the manner of the exercise of the right to the pronouncement of judgments in public. Constitutional review in such cases is restricted. This decision could not be described as unsound. The right to the pronouncement of judgments in public is related to the public character of the pronouncement, not necessarily the fact that it is done orally.

Finally, the petitioner had argued that there had been a breach of Article 23.1 of the Constitution (the right to judicial protection and the requirement that courts be impartial). He had complained about one of the Supreme Court judges, with whom he had been in a serious and public dispute over certain principles of judicial ethics. He had already filed a motion for that judge's disqualification. However, judge was not disqualified from presiding over his case. The Constitutional Court upheld this argument, on the basis that, under these circumstances, suspicion might be aroused in a reasonable person about the impartiality of the judge and even the court itself, not simply from the complainant's perspective but also objectively. In the current case, the court had not satisfied the standards imposed by the right to impartial adjudication.

Supplementary information:

Legal norms referred to:

- Articles 23, 24 and 49 of the Constitution;
- Articles 21, 26.2, 47, 49, 55.b.1.1 and 55.b.1.2 of the Constitutional Court Act.

Languages:

Slovenian, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-2007-3-010

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 25.09.2007 / **e)** CCT 59/06; [2007] ZACC 17 / **f)** Michael Hermann Armbruster and Another v. The Minister of Finance and Others / **g)** www.constitutionalcourt.org.za/Archimages/11062.PDF / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.22 General Principles – **Prohibition of arbitrariness**.
5.1.4.3 Fundamental Rights – General questions – Limits and restrictions – **Subsequent review of limitation**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

Authority, administrative, discretionary power / Currency, exchange control, confiscation / Customs, property, confiscation / Forfeiture / Seizure, property, hardship, mitigation.

Headnotes:

A broad discretion for the seizure and forfeiture of foreign currency is to be permitted where the relevant factors are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance; where the relevant factors are indisputably clear; and where the decision-maker is possessed of expertise relevant to the decision to be made.

Summary:

I. The applicant was caught at the OR Tambo International Airport, Johannesburg, attempting to take foreign currency valued at ZAR 100 000 out of the country. The currency was seized immediately upon discovery and was subsequently forfeited to the State in terms of Exchange Control Regulations. The applicant was afforded an opportunity to make representations to the State as to why the currency should not be forfeited. The State then decided not to return any of the currency to him. The applicant applied to the High Court for an order setting aside the forfeiture, but the application was unsuccessful.

The applicant then applied for leave to appeal to the Constitutional Court. He contended that the Regulations provided officials with a discretion as to whether or not to forfeit property without guidelines to indicate how the discretion was to be exercised. This, the applicant submitted, violated his right not to be arbitrarily deprived of property under Section 25.1 of the Constitution. He also submitted that his right to access to court was violated.

The respondents contended that the basis for the forfeiture was that the person in possession of the currency possesses it unlawfully in contravention of the regulations. He or she would therefore not be deprived of something which he or she was entitled to possess. Such a person is not subjected to a fine or penalty, something which might follow from prosecution at a later stage. In recognition of the fact that the forfeiture might have an unduly punitive effect, the Treasury is empowered to mitigate that effect by directing that the currency be returned in whole or in part.

II. In a unanimous judgment, Mokgoro J held that in terms of the regulations the currency was not forfeited immediately upon seizure. Instead, the decision whether or not to return any currency is only reached after representations are made by the affected person. It was also found that the currency would be returnable in circumstances where that is necessary to ameliorate undue hardship or injustice. The Court held further that, in any event, the exercise of this discretion is subject to judicial review. A broad discretion was to be permitted where the relevant factors are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance; where the relevant factors are indisputably clear; and where the decision-maker is possessed of expertise relevant to the decision to be made.

The Court held that although the discretion was wide, the Regulations sought to mitigate undue hardship and injustice and that while forfeiture of currency did have a punitive element, it did not amount to a criminal penalty. It was found further that the exercise of this discretion did not amount to the performance of a judicial function, but rather was administrative in

nature. The Court concluded that the Regulations neither violated the right of access to court, nor did they allow the arbitrary deprivation of property, especially given the clear purpose for the deprivation. The appeal was therefore dismissed.

Supplementary information:

Legal norms referred to:

- Sections 25, 34 and 165 of the Constitution, 1996;
- Regulations 2 and 3 of the Exchange Control Regulations promulgated in terms of Section 9 of the Currency and Exchanges Act 9 of 1933 (the Act).

Cross-references:

- *Dawood and Another v. Minister of Home Affairs and Others*;
- *Shalabi and Another v. Minister of Home Affairs and Others*;
- *Thomas and Another v. Minister of Home Affairs and Others*, *Bulletin* 2000/2 [RSA-2000-2-007];
- *De Lange v. Smuts NO and Others, Bulletin* 1998/2 [RSA-1998-2-004];
- *First National Bank of South Africa Ltd t/a Wesbank v. Commissioner, South African Revenue Service and Another;*
- *First National Bank of South Africa Ltd t/a Wesbank v. Minister of Finance, Bulletin* 2002/2 [RSA-2002-2-006].

Languages:

English.

Identification: RSA-2007-3-011

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 26.09.2007 / **e)** CCT 53/06; [2007] ZACC 18 / **f)** M v. The State (Centre for Child Law as *Amicus Curiae*) / **g)** www.constitutionalcourt.org.za/Archimages/11082.PDF / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
3.17 General Principles – **Weighing of interests**.
3.18 General Principles – **General interest**.
5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures**.
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

Keywords of the alphabetical index:

Accused, family member / Child, care and custody / Child, best interest / Child, right to care / Child, separation from imprisoned mother / Sentencing, circumstance, consideration / Conviction, criminal / Family, ties, break / Offence, criminal, repeated / Offender, rehabilitation, duty / Offender, re-integration / Parent, offender, best interests of child / Punishment, adaptation to personal circumstances of offender / Sentence, alternative form / Sentence, rehabilitative purpose / Sentence, tailoring to individual situation of perpetrator.

Headnotes:

While sentencing a primary care-giver of minor children, the sentencing process shall be informed by the best interests of the minor children, which are of paramount importance. A sentencing court must conduct a balancing exercise taking account of the circumstances of the primary care-giver, the minor children, the nature of the offence, and the interests of the society at large.

Summary:

The applicant was a 35-year-old single mother of three boys aged 16, 12 and 8. While released on bail for a conviction of fraud, she committed theft and further fraud to the amount of approximately ZAR 29 000. She was sentenced to four years' direct imprisonment by the Regional Magistrates' Court. On appeal, the High Court found that she had been wrongly convicted on one count of fraud and converted her sentence to one of imprisonment from which she could be released under correctional supervision after serving eight months. After unsuccessfully petitioning the Supreme Court of Appeal for leave to appeal against the order of imprisonment, she applied to the Constitutional Court for leave to appeal.

The majority judgment written by Sachs J held that it is necessary to give focused and informed attention to the interests of children during the sentencing of a

primary caregiver. To this end, Sachs J formulated a series of guidelines for sentencing courts to be used when faced with sentencing a primary care-giver. These guidelines adapt the traditional sentencing model which is based on the relationship between the accused, the crime committed, and the community as a means to determine an appropriate sentence, so as to assure where appropriate a consideration of the best interests of children of convicted persons.

The guidelines are summarised as follows:

a. The sentencing court must take steps to establish whether the convicted person is a primary caregiver. The court should be assisted in this enquiry by all parties before the court, and evidence can be led specifically to this end.

b. If on ordinary sentencing principles the matter demands a custodial sentence, the court must apply its mind to ensure that the child or children are adequately cared for while the primary caregiver is incarcerated.

c. If it is clear on ordinary sentencing principles that the appropriate sentence would be non-custodial, the court must include the best interests of the child or children in the process of determination of an appropriate sentence.

d. Should a range of sentencing options be available to the court, the best interests of the child or children must be used to determine which sentence ought to be imposed on the convicted primary caregiver.

Sachs J, in formulating the guidelines, considered the purpose and effect of correctional supervision as an appropriate non-custodial sentence. Sachs J emphasised that appropriately determined sentences of correctional supervision can achieve the purposes of restorative justice and provide for effective rehabilitation.

Sachs J concluded that the Regional Court Magistrate had passed sentence without following the approach above, as required by Sections 28.2 and 28.1.b of the Constitution. Though the High Court was not unsympathetic to the plight of the applicant and her children, it should have made appropriate enquiries and weighed the information gained.

Sachs J stressed the seriousness of the offences for which the applicant was convicted, and noted that nothing in the judgment should be construed as disregarding the hurt and prejudice to the victims of her fraud. Nevertheless, it was held that in the light of all the circumstances of the case the applicant, her children, the community and the victims who will be repaid from her earnings, stood to benefit more from her being placed under correctional supervision than from her being sent back to prison.

The appeal was accordingly upheld, and the High Court sentence was replaced with a sentence of four years' imprisonment backdated to take account of the three months she had already served. In applying the principles of restorative justice, and in an attempt to rehabilitate the applicant within her community, the sentence was suspended for four years on condition that she was not convicted of an offence of dishonesty during that period, and further on condition that she repaid her victims. In addition, she was placed under correctional supervision for three years, which included community service of ten hours per week for three years as well as counseling on a regular basis.

In a separate judgment, Madala J agreed with the reasoning of Sachs J in so far as it related to the best interests of the children in terms of Section 28.2 of the Constitution. He held, however, that the interests of the children could not be viewed in isolation and that a nuanced approach should be adopted when balancing the best interests of the children and the interests of society with regard to deterrence, punishment and retribution. He concluded that the appeal should be dismissed.

Supplementary information:

Legal norms referred to:

- Sections 28 and 36 of the Constitution, 1996;
- Sections 276.1.h-i and 276A.1 of the Criminal Procedure Act 51 of 1977;
- Sections 50, 51.2 and 52.1 of the Correctional Services Act 111 of 1998.

Cross-references:

- *De Reuck v. Director of Public Prosecutions (Witwatersrand Local Division) and Others, Bulletin* 2003/3 [RSA-2003-3-009];
- *Director of Public Prosecutions, KwaZulu-Natal v. P* 2006 (3) *South African Law Reports* 515 (SCA); [2006] 1 *All South African Law Reports* 446 (SCA); 2006 (1) *South African Criminal Reports* 243 (SCA);
- *Minister of Welfare and Population Development v. Fitzpatrick and Others, Bulletin* 2000/2 [RSA-2000-2-006];
- *S v. Howells* 1999 (1) *South African Criminal Reports* 675 (C); [1999] 2 *All South African Law Reports* 233 (C);

- *S v. R* 1993 (1) *South African Law Reports* 476 (A); 1993 (1) *South African Criminal Reports* 209 (A);
- *S v. Zinn* 1969 (2) *South African Law Reports* 537 (A);
- *Sonderup v. Tondelli and Another, Bulletin* 2001/1 [RSA-2001-1-002].

Languages:

English.

Identification: RSA-2007-3-012

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 02.10.2007 / **e)** CCT 86/06 / **f)** Schabir Shaik and Others v. The State / **g)** http://www.constitutionalcourt.org.za/Archimages/10913.PDF / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms**.
4.7.4.3.1 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Powers**.
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.

Keywords of the alphabetical index:

Accused, rights / Conviction, criminal / Criminal charge / Leave to appeal, scope / Prosecutor, powers / Sentence, criminal, penalty, mitigation / Sentence, minimum, constitutionality / Prosecution, participation in criminal investigation / Prosecution, offenders, joint trial, right.

Headnotes:

A prosecutor's failure to try an accused together with other persons allegedly complicit in the commission of the offence with which the accused is charged does not per se constitute a procedural irregularity sufficient to infringe the accused's right to fair trial. A prosecutor's alleged performance of both prosecutorial and investigative functions, in terms of powers conferred by law, does not render the accused's subsequent trial unfair.

Summary:

I. The first applicant, a businessman, was convicted in the Durban High Court of two counts of corruption and one count of fraud, and was sentenced to an effective fifteen years' imprisonment. Ten of his companies were also convicted of various counts of corruption and fraud, and were fined. The offences all related to payments the applicant and his companies had made to a senior politician for a period of about eight years, made to secure his political influence for the applicant's benefit. On application by the State, the High Court subsequently granted confiscation orders against certain property of the applicants that was considered to be proceeds of unlawful activity in terms of the Prevention of Organised Crime Act (POCA). The applicants later applied to the Constitutional Court for leave to appeal against, first, their convictions and sentences and, second, against the confiscation of their property. The Court considered only the preliminary question whether leave to appeal should be granted on either basis.

II. Concerning the convictions, the issue was whether the applicants' right to a fair trial was breached by:

i. the State's decision not to charge the applicants together with the politician concerned, or

ii. alleged misconduct by the lead prosecutor in that he performed both prosecutorial and investigative functions.

The Court unanimously held that the fair trial right was not breached on either ground. Trying persons accused of linked separately offences did not per se constitute an irregularity that rendered the trial unfair, while the lead prosecutor was held to have acted within the bounds of the National Prosecuting Act, which permits prosecutors some involvement with the investigation.

Concerning the sentences, the issues were:

i. whether the High Court failed to give proper consideration to the first applicant's personal and socio-economic background, in particular the fact that he was previously disadvantaged under apartheid, and

ii. whether the minimum sentence legislation in terms of which the first applicant was sentenced was properly applicable.

The Court unanimously held that the lower courts properly considered the applicant's circumstances, emphasising that suffering past discrimination was not a general excuse for committing crime after the dawn of democracy in South Africa. The minimum sentence legislation was also held to have been properly applied. There was therefore no reason to interfere with the imposed sentences.

Accordingly, the Court refused leave to appeal against the applicants' convictions and sentences. It went on to hold, however, that the applicants' arguments concerning the confiscation of their property in terms of POCA raised constitutional matters that could not be said to bear no reasonable prospects of success. Leave to appeal in that limited regard was therefore granted.

Supplementary information:

Legal norms referred to:

- Sections 12.1, 25, 35 and 179 of the Constitution, 1996;
- Section 1 of the Corruption Act 94 of 1992;
- Section 51 of the Criminal Law Amendment Act 105 of 1997;
- Section 322 of the Criminal Procedure Act 51 of 1997;
- Section 7 of the National Prosecuting Authority Act 32 of 1998;
- Sections 8 and 14 of the Prevention of Organised Crime Act 121 of 1998.

Cross-references:

- *S v. Jaipal* 2005 (4) *South African Law Reports* 581 (CC); 2005 (5) *Butterworths Constitutional Law Reports* 423 (CC);
- *S v. Shuma* 1994 (4) *South African Law Reports* 583 (E);
- *Xolo and Others v. Attorney-General of the Transvaal* 1952 (3) *South African Law Reports* 764 (N).

Languages:

English.

Identification: RSA-2007-3-013

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 03.10.2007 / **e)** CCT 01/07; [2007] ZACC 20 / **f)** Billy Lesedi Masetlha v. The President of the Republic of South Africa and Another / **g)** http://www.constitutionalcourt.org.za/Archimages/11040.PDF / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.5.6 Constitutional Justice – Jurisdiction – The subject of review – **Decrees of the Head of State**.
1.6.2 Constitutional Justice – Effects – **Determination of effects by the court**.
4.4.1.2 Institutions – Head of State – Powers – **Relations with the executive powers**.
5.4.5 Fundamental Rights – Economic, social and cultural rights – **Freedom to work for remuneration**.

Keywords of the alphabetical index:

Abuse of power / Confidence, profession / Employment, contract, termination, benefit, consequences / Decree, presidential, validity / Employment, contract, termination, conditions / Procedure, suspension / Employment, special relationship, termination / Security service, employment, termination.

Headnotes:

Section 209 of the Constitution confers the power upon the President of the Republic of South Africa to appoint the head of national security services. The President has also the power to terminate the applicant's employment under Section 209 of the Constitution, read with Section 3 of the Intelligence Services Act but the applicant is entitled to be placed in the same financial position he would have occupied had he served out his full term of office.

Summary:

The key legal issue was whether the Presidential decision to amend the applicant's terms of office, which resulted in the early termination of his contract of employment, was constitutionally permissible.

Section 209 of the Constitution confers the power upon the President to appoint the head of national security services. The section does not explicitly provide that the President may dismiss the head of security services. It was nevertheless concluded that the President had the power to terminate the applicant's employment under Section 209 of the Constitution, read with Section 3 of the Intelligence Services Act. As the decision amounted to executive

action and not administrative action, it was held to be reviewable only on the grounds of rationality and legality. This, however, did not mean that there were no legal consequences of the early termination of the underlying fixed term contract of employment. Under employment law, the State was obliged to place the applicant in the same position he would have occupied but for the premature termination of his employment.

As to the question of remedy, it was held that re-instatement was inappropriate in the circumstances of this case, given the unique constitutional relationship between the President and the applicant. Absent an order for re-instatement, however, the applicant was entitled to be placed in the same financial position he would have occupied had he served out his full term of office. The majority accordingly refused the applicant's appeal, but ordered that the President pay the applicant remuneration, allowances, pension and other benefits in order to place him in that position.

In a separate judgement Sachs J concurred in the majority's order, holding that given the loss of the trust that lay at the heart of the specific constitutionally-defined relationship between the President and the applicant, the termination of the appointment was lawful. However, the applicant was entitled to a fair labour practice, which in this case meant that the offer to pay him out for the balance of the period of his appointment should be characterised as compliance with a legal obligation, rather as an act of grace or compassion. In a minority judgment, Ngcobo J held that the President had a constitutional duty, based on the rule of law, to act with procedural fairness, and that that duty precluded him from unilaterally altering the applicant's terms of office.

Supplementary information:

Legal norms referred to:

- Sections 85.2.e, 197, 198.a and 209 of the Constitution, 1996;
- Section 3 of the Intelligence Services Act 65 of 2002;
- Sections 2, 3B, 12 and 37 of the Public Service Act 103 of 1994.

Cross-references:

- *Affordable Medicines Trust and Others v. Minister of Health and Another, Bulletin* 2005/1 [RSA-2005-1-002];
- *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others*, *Bulletin* 2000/1 [RSA-2000-1-003];
- *President of the Republic of South Africa and Others v. South Africa Rugby Football Union and Others, Bulletin* 1999/3 [RSA-1999-3-008].

Languages:

English.

Identification: RSA-2007-3-014

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 05.10.2007 / **e)** CCT 51/06; [2007] ZACC 21 / **f)** MEC for Education: Kwazulu-Natal and Others v. Navaneethum Pillay / **g)** http://www.constitutionalcourt.org.za/Archimages/10986.PDF / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin**.
5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion**.
5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities**.
5.4.20 Fundamental Rights – Economic, social and cultural rights – **Right to culture**.

Keywords of the alphabetical index:

Cultural diversity, national and regional / Discrimination, indirect / Heritage, cultural, protection / Minority, cultural activity / Religion, free exercise / Religion, right to practise, burden / Education, school, uniform, religion, right to express.

Headnotes:

The right to freedom from unfair discrimination by the State in Section 9.3 of the Constitution, as given effect to by the Equality Act, obliges public schools to take steps reasonably to accommodate the religious and cultural diversity of their learners. A public school's refusal to allow the respondent an exemption to the ordinary school uniform, in order that she could wear a nose stud as an expression of her Tamil Hindu culture and religion, amounted to unfair discrimination.

Summary:

I. The respondent returned from spring holiday to Durban Girls' High School, a government school, wearing a small nose stud. The school decided, after correspondence with her mother, that the respondent could not be permitted to wear the nose stud to school as it contravened the school's uniform Code. The respondent's mother sued the school and the provincial education minister in the Equality Court, alleging that they had unfairly discriminated against her daughter on religious and cultural grounds. The Equality Court held that the respondent had not been unfairly discriminated against. On appeal, the High Court overturned that decision, ruling in the respondent's favour. The school and provincial government then appealed to the Constitutional Court. By the time the matter was heard, the respondent had completed her school career.

II. The majority judgment, written by Chief Justice Langa, held that the stringent rule in the Uniform Code of the school prohibiting the wearing of certain jewellery had the potential to be indirectly discriminatory, because it allowed certain groups of learners to express their religious and cultural identity freely but potentially denied that freedom to others. The evidence before the Court showed that the wearing of a nose stud was a voluntary practice forming part of the respondent's South Indian Tamil Hindu culture, which itself was inseparably intertwined with Hindu religion. The Equality Act, which gives effect to the constitutional right to freedom from unfair discrimination, protects both voluntary and obligatory cultural and religious practices. The school, therefore, interfered with the respondent's culture and religion. That amounted to discrimination, because an equivalent burden was not imposed on other learners. What was important was not whether the practice was classified as religious or cultural, but its importance for the individual in question. Nor would it have been sufficient in the circumstances had the respondent been able to attend another school which would have allowed her to wear the stud. The Constitution requires the community to affirm and reasonably to accommodate difference, not merely to tolerate it as a last resort.

The majority acknowledged both that the school had taken meaningful steps to accommodate cultural and religious diversity amongst its learners, and that uniforms and school rules served important purposes in education. The case, however, did not concern the acceptability of uniforms in general, but rather whether or not a specific exemption to a uniform was constitutionally required. There was no evidence that permitting the requested exemption would imperil uniformity or school discipline in general. Moreover, that granting the exemption might encourage more learners to express their culture and religion was to be celebrated, not feared.

Accordingly, the majority held that the school's refusal to grant the respondent an exemption to the uniform regulations in order that she could wear a nose stud unfairly discriminated against her on cultural and religious grounds. The unfair discrimination flowed both from the school's refusal and from the fact that its Uniform Code did not provide for an exemption procedure. Accordingly, the school was ordered to provide, through consultation with learners, parents, and staff, for a procedure to ensure that the religious and cultural practices of its learners be reasonably accommodated in future. No further relief was necessary as the respondent had already completed her schooling.

A separate judgment was written by O'Regan J, in which she dissented in part from the Court order. She agreed that the absence of an exemption procedure in the Code was unfairly discriminatory and therefore that the school had to amend it. However, the proper remedy thereafter would have been to refer the matter back to the school for it to consider afresh the respondent's request for an exemption. This was no longer necessary as she had already left the school. The judgment also discusses in depth the relationship between religion and culture, and their place in public schools.

Supplementary information:

Legal norms referred to:

- Sections 9.3, 9.4 and 9.5, 15, 30, 36, 39.2 of the Constitution, 1996;
- Sections 1, 6, 13.2, 14 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000;
- Section 8.1 of the South African Schools Act 84 of 1996.

Cross-references:

- *The Affordable Medicines Trust and Others v. Minister of Health and Others, Bulletin* 2005/1 [RSA-2005-1-002];
- *Christian Education South Africa v. Minister of Education, Bulletin* 2000/2 [RSA-2000-2-010];
- *Doctors for Life v. Speaker of the National Assembly and Others, Bulletin* 2006/2 [RSA-2006-2-008];
- *Ferreira v. Levin NO and Others*;
- *Vryenhoek and Others v. Powell NO and Others, Bulletin* 1995/3 [RSA-1995-3-010];
- *Harksen v. Lane NO and Others, Bulletin* 1997/3 [RSA-1997-3-011];
- *Minister of Home Affairs and Another v. Fourie and Another*;
- *Lesbian and Gay Equality Project and Others v. Minister of Home Affairs and Others*, *Bulletin* 2005/3 [RSA-2005-3-014];
- *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others, Bulletin* 1998/3 [RSA-1998-3-009];
- *Prince v. President, Cape Law Society, and Others* 2001 (2) *South African Law Reports* 388 (CC); 2001 (2) *Butterworths Constitutional Law Reports* 133 (CC);
- *Prince v. President, Cape Law Society, and Others, Bulletin* 2002/1 [RSA-2002-1-001].

Languages:

English.

Spain
Constitutional Court

Important decisions

Identification: ESP-2007-3-001

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 15.02.2007 / **e)** 38/2007 / **f)** Statement of Aptitude to Teach Religion / **g)** no. 63, 14.03.2007 / **h)**.

Keywords of the systematic thesaurus:

3.7 General Principles − **Relations between the State and bodies of a religious or ideological nature**.
5.2.1.2.2 Fundamental Rights − Equality − Scope of application − Employment − **In public law**.
5.3.18 Fundamental Rights − Civil and political rights − **Freedom of conscience**.
5.4.1 Fundamental Rights − Economic, social and cultural rights − **Freedom to teach**.

Keywords of the alphabetical index:

Education, religious, recruitment of teachers / Church, role / Religion, religious neutrality of the state.

Headnotes:

Instruction in the Catholic religion in public schools, provided by teachers employed by the public authorities subject to a statement of aptitude to teach religion, is not a breach of the Constitution.

The statement of aptitude to teach religion, issued by the Catholic Church, depends on religious or ecclesiastical criteria.

The judicial authorities and where necessary the Constitutional Court must seek to determine criteria for establishing a balance, on a case-by-case basis, between the requirements of religious freedom (both individual and collective) and the principle of the religious neutrality of the state, in a spirit of respect for teachers' fundamental rights and professional freedoms.

Summary:

I. The Bishop of the Canary Islands withdrew the statement of aptitude to teach religion from Ms Galayo for the following reason: Ms Galayo was a teacher of religion, but was pursuing a romantic relationship with a man other than her husband, from whom she was separated. That was why she was not employed to teach the courses in question for the coming school year. She filed an application with the Social Affairs Court, claiming that the Agreement between the Spanish State and the Holy See of 3 January 1979 and Implementing Act no. 1/1990 of 3 October 1990, amended in 1998, regulating the education system, were unconstitutional.

II. The judgment first makes several general observations:

a. Religion is an integral part of the education system. It is based on the principle of co-operation between public authorities and religious institutions (Article 16.3 of the Constitution) and on parents' rights to ensure that their children receive religious and moral instruction that is in accordance with their own convictions (Article 27.3 of the Constitution);

b. the determination of those religious beliefs which are taught concerns the various churches and denominations, which are deemed free to define the content of textbooks and teaching materials; the education authorities are bound by the principle of religious neutrality and cannot intervene in this matter;

c. it is also for the religious institutions themselves to decide on the aptitude of the persons responsible for teaching their respective beliefs. The statement of aptitude does not have to be confined to knowledge of dogma or teaching skills alone, but may also include the actual conduct of teachers, insofar as personal example is one of the main components of the belief concerned. This statement of aptitude issued by the Church is a prerequisite in terms of capacity, enabling the person concerned to be employed by the public authorities as a teacher.

Thus, in the event of a dispute, the ordinary courts would rule on the different rights involved, without however making a religious judgment. The legislation in force in the matter provides that these teachers must be employed by the public authorities, not by the Church, as was the case at certain levels of education prior to 1998. However, the education authorities have a duty to employ only those persons holding a statement of aptitude issued by the ecclesiastical authorities.

Accordingly, the judgment states that, on the merits, the impugned rule complies with the various constitutional principles and rights relied on:

- the principles of equality, merit and ability (Articles 14 and 103.3 of the Constitution) do not prevent the churches, in the exercise of their religious freedom, from choosing persons considered to be suited to teaching their beliefs;

- the employment of these teachers does not confer an ideological or religious mission on the school authorities, provided that they confine themselves to observing the principle of co-operation with the churches;

- the rule pursues a reasonable aim, and Parliament has not introduced any arbitrary criteria;

- there is no infringement of teachers' religious freedom, or even of their right not to make statements regarding their beliefs (Article 16 of the Constitution), since their freedom is infringed only as necessary in order to make it compatible with the other constitutional provisions;

- it would be illogical for religion to be provided without regard for the teachers' religious beliefs.

The civil effects of the statement of aptitude to teach religion can be supervised by the civil courts. The appointment of the teacher by the public authorities is subject to judicial review. Although the statement of aptitude is issued by non-state authorities and is subject to the rules of canon law, it is not conferred with absolute freedom, since it remains limited by constitutional public policy

Cross-references:

- Agreement between the Spanish State and the Holy See of 03.01.1979, on education and cultural affairs, ratified by the Act of 04.12.1979, Sections III, VI and VII.

- Implementing Act no. 1/1990 of 03.10.1990, regulating the education system (amended by Implementing Act no. 50/1998 of 30.12.1998, on fiscal, administrative and social measures).

Concerning the principle of the neutrality of the state and the power to define the religious belief taught:

- SSTC no. 24/1982 of 13.05.1982;
- SSTC no. 340/1993 of 16.11.1993;
- SSTC no. 46/2001 of 15.02.2001.

Languages:

Spanish.

Identification: ESP-2007-3-002

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 28.03.2007 / **e)** 68/2007 / **f)** Urgent measures on unemployment / **g)** no. 100, 26.04.2007 / **h)**.

Keywords of the systematic thesaurus:

1.2.1.4 Constitutional Justice − Types of claim − Claim by a public body − **Organs of federated or regional authorities**.
1.3.5.5 Constitutional Justice − Jurisdiction − The subject of review − **Laws and other rules having the force of law**.
1.4.9.1 Constitutional Justice - Procedure - Parties - ***Locus standi***.
1.4.9.3 Constitutional Justice - Procedure - Parties - **Representation**.
3.4 General Principles − **Separation of powers**.
4.6.3.1 Institutions − Executive bodies − Application of laws − **Autonomous rule-making powers**.

Keywords of the alphabetical index:

Legislative decree / Legislation, urgent need / Social security / Unemployment, legislation, urgent need.

Headnotes:

The government cannot approve by legislative decree the reform of social security relating to unemployment benefit and training for the unemployed, unless there is deemed to be a situation of extraordinary and urgent need (Article 86.1 of the Constitution).

The Constitutional Court acknowledges that the political judgment of the authorities responsible for governing the state has an impact on the assessment of situations deemed to be of extraordinary and urgent need; but it can also reject the definition given by those same political authorities in the event of misuse or arbitrary use, since the constitutional provision is not a meaningless text.

The breakdown of negotiations between the government and the social partners or the calling of a general strike to express opposition to a reform cannot on any account justify an extraordinary situation of urgent need, which is the requirement established by the Constitution in order for the government to enact legislative decrees.

A legislative decree enacted in a situation which cannot be deemed to be one of extraordinary and urgent need is unconstitutional and entirely void.

Derogation from a legislative decree by a law enacted by the General Assembly on the basis of the text (Article 86.3 of the Constitution) does not prevent review of its constitutionality. However, the case pending before the Court no longer has a purpose because Parliament has substantially amended the rules governing the legal institutions.

An Autonomous Community is empowered to object to a state law, not only in order to uphold its own powers in the matter, but also to objectively improve the legal system, since the law may affect the exercise of its powers (Section 32.2 of the Implementing Act on the Constitutional Court).

The appeal against the law is lodged by the government of the Autonomous Community but on no account by the lawyers who filed the application.

Summary:

I. The judgment dealt with two applications to declare Royal Legislative Decree no. 5/2002 of 24 May 2002, on urgent measures to reform the system for protection of the unemployed and improvement of employment, unconstitutional. One of the applications was filed by Junta de Andalucía and the other by more than 50 members of the Assembly. The Court allowed these applications and declared the urgent legislative decree enacted at the time by the government entirely void, because of the lack of the factual circumstances required by Article 86.1 of the Constitution, namely a situation of extraordinary and urgent need enabling the government to legislate directly by legislative decree rather than tabling a bill in Parliament.

The Royal Legislative Decree of 2002 altered the social security benefits granted to the unemployed,

particularly to those who had been employed in the agricultural sector. The decree introduced measures concerning training and employment for the unemployed and altered the rights of dismissed workers, at a time when their disputes were in the preparatory stage before the Labour Court, particularly with regard to the compensation paid pending the outcome of the conciliation procedure.

II. The judgment draws attention to the Court's long line of decisions in the matter, although this had never resulted in the setting aside of a legislative decree owing to the lack of the factual circumstance of urgent need. The political authorities' definition of a situation of extraordinary and urgent need must be explicit and must state the reasons for it. There must also be a balance between the situation of urgent need and the measures adopted.

To verify whether these conditions are met, the Court examines the statement of the reasons for the legislative decree and the defence submitted by the government during the subsequent parliamentary debate, when the Congress of Deputies ratifies or derogates from the royal legislative decree.

In this particular case, the government provided no evidence of the factual circumstances required by Article 86.1 of the Constitution. The arguments adduced on this point in the preamble to the royal legislative decree are highly theoretical and overall preclude any assessment of the realities of the situation. They were also qualified – or indeed neutralised – by the perception of reality conveyed by the government during the parliamentary debate on ratification. In any event, the government did not at any time provide evidence of any obstacles to the law being dealt with through the parliamentary legislative procedure.

During the dialogue with the trade unions and professional organisations prior to the enactment of the decree, the Ministry of Labour and Social Affairs stated its wish to end the talks before the end of summer 2002 so that the measures might come into force on 1 January 2003. This schedule could have been observed through the parliamentary process, and the breakdown of negotiations with the social partners or the calling of a general strike to protest against the reforms cannot on any account serve as evidence of the urgent need required by the Constitution.

The express derogation from Royal Legislative Decree no. 5/2002 of 24 May 2002, after it had been tabled as a bill under the procedure provided for by Article 86.3 of the Constitution, by Act no. 45/2002 of 12 December 2002, does not preclude assessing the existence of a situation of urgent need. But the objections concerning the reasons for the legislative decree no longer have a purpose, since Act no. 45/2002 substantially amended the regulations, particularly as regards matters affected by a possible finding of unconstitutionality.

The Autonomous Community of Andalusia is fully empowered to challenge the procedure for enacting the royal legislative decree before the Constitutional Court, since its powers and the impugned reasons are closely related.

The decision of the Andalusia Government Council, as the body empowered by Article 162.1.a of the Constitution to lodge the said appeal, is entirely unequivocal. The authorisation given to its law office to draw up the application is merely a formal requirement which does not in any sense affect the prior lodging of an objection by the competent body (STC 42/1985).

Cross-references:

- SSTC no. 111/1983 of 02.12.1983;
- SSTC no. 29/1982 of 31.05.1982;
- SSTC no. 182/1997 of 20.10.1997;
- SSTC no. 137/2003 of 03.07.2003.

Languages:

Spanish.

Identification: ESP-2007-3-003

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 16.04.2007 / **e)** 69/2007 / **f)** María Luisa Muñoz Díaz v. National Institution for Social Security / **g)** no. 123, 23.05.2007 / **h)**.

Keywords of the systematic thesaurus:

5.2.1.3 Fundamental Rights − Equality − Scope of application − **Social security**.
5.2.2.3 Fundamental Rights − Equality − Criteria of distinction − **Ethnic origin**.
5.3.45 Fundamental Rights − Civil and political rights − **Protection of minorities and persons belonging to minorities**.

Keywords of the alphabetical index:

Marriage, roma / Widow, allowance / Pension, survivor / Social security, marriage, validity.

Headnotes:

The refusal to grant a woman a survivor's pension, because her marriage was celebrated according to Roma rites with a deceased worker registered with social security, is fully recognised by Spanish law. It does not result in any violation of persons' rights not to be discriminated against on account of race or social circumstance (Article 14 of the Constitution).

Racial and ethnic discrimination is contrary to Article 14 of the Spanish Constitution and Article 14 ECHR. The constitutional ban covers hidden or indirect discrimination as well as direct or implicit discrimination, but does not cover a right to unequal opportunities or a lack of distinction between unequal situations.

The fact that Parliament confines survivor's pensions to cases of institutionalised cohabitation such as that between spouses, excluding all other forms of union and cohabitation, does not in any sense imply discrimination of any kind on social grounds. Furthermore, recourse to the law is not the only possible remedy under the Constitution; it is therefore legitimate to challenge the idea that Parliament should extend the current survivor's pension to other types of union.

Parliament has substantial discretion as regards the organisation of the social security system and the assessment of socio-economic circumstances when decisions are taken on the provision of these resources, in order to meet social needs.

Summary:

I. Ms Muñoz Díaz applied to the Instituto Nacional de Seguridad Social for a survivor's pension. Her application was rejected because she was married to a deceased worker in accordance with Roma traditional rites but not under the procedures accepted and recognised by Parliament (religious or civil marriage), a requirement under social security legislation.

II. The Court dismissed the administrative appeal by a negative vote. It ruled that Article 14 of the Constitution was not breached in this case, since the requirement of matrimony for eligibility for the allowance, which precludes all other forms of union or cohabitation such as Roma marriage, does not imply any form of discrimination because the decision is part of Parliament's freedom to organise the social security system.

The statutory requirement of matrimony as a condition of eligibility for a survivor's pension, and the judicial interpretation implying that this statutory possibility can be assessed only where there are legally recognised forms of access to marriage, not to other forms of cohabitation, including unions contracted according to traditional Roma rites, have been complied with. This does not on any account imply regarding racial or ethnic circumstances as a reference point. On the contrary, it is a question of assessing a circumstance associated with the free and voluntary decision not to celebrate a marriage in accordance with the statutory provisions, which do not make civil or religious marriage in its legally recognised forms conditional on membership of a race, to the exclusion of others, or on the traditions and customs of a given ethnic group, to the detriment of others, and which cannot therefore imply a hidden form of discrimination against the Roma ethnic group.

Cross-references:

- Article 174 of Royal Legislative Decree no. 1/1994 of 20.06.1995, approving the text revising the General Act on Social Security.

- The negative vote is based on the Framework Convention for the Protection of National Minorities of 01.02.1995 (State Official Gazette of 23.01.1998).

Languages:

Spanish.

Identification: ESP-2007-3-004

a) Spain / **b)** Constitutional Court / **c)** First chamber / **d)** 16.04.2007 / **e)** 72/2007 / **f)** María Escudero Cuenca against the publishing company of the newspaper Diario 16 / **g)** no. 123, 23.05.2007 / **h)**.

Keywords of the systematic thesaurus:

3.17 General Principles − **Weighing of interests**.

5.3.21 Fundamental Rights − Civil and political rights − **Freedom of expression**.
5.3.22 Fundamental Rights − Civil and political rights − **Freedom of the written press**.
5.3.32 Fundamental Rights − Civil and political rights − **Right to private life**.

Keywords of the alphabetical index:

Photograph, use without consent / Police, officer, photograph, use without consent.

Headnotes:

The publication in a newspaper of a photograph of a municipal police officer participating in a court-ordered eviction and countering the violent resistance put up by the evictees in the street does not under any circumstances violate her right to her own image (Article 18.1 of the Constitution).

The right to one's image is neither absolute nor unconditional: its content is limited by other constitutional rights such as freedom of expression or information. The general rule is that the holder of this right should be the person who decides whether to allow third parties to capture and disseminate his/her image. This therefore means reconciling the right to one's image with the freedom of expression and information of third parties.

Summary:

The Constitutional Court dismissed the application lodged by a sergeant in the Madrid municipal police who had brought a claim for damages against the publishing company of the newspaper Diario 16, its director and a photographer for infringement of her right to her image. The ground adduced was the publication on the front page of the newspaper in question of a photograph taken during an eviction operation. The sergeant was clearly identifiable in the foreground, pinning a person to the ground. The front page carried in large type the headline "VIOLENT EVICTION".

The judgment dismissing the application states that the constitutional dimension of the right to one's image confers on holders of that right the power to control representations of their physical appearance enabling them to be identified. This presupposes in particular the right to prevent unauthorised third parties from obtaining, reproducing or publishing their image.

However, the capture and dissemination of a person's image may be allowed when that person's behaviour or the circumstances justify the lifting of these restrictions, in such a way that the interests of others prevail. This therefore makes it necessary to reconcile the interests at stake.

In the view of the Constitutional Court, the impugned judgment of the Supreme Court achieved an appropriate reconciliation between the conflicting rights: the latter argues that the right to freely communicate and receive accurate information must take precedence over the applicant's right to her image. The conclusion was thus reached that the factual circumstances did not by any means call for anonymity.

The document reproduces the image of a sergeant who was photographed while participating in a public operation, namely a court-ordered eviction which was assisted by officers of the municipal police owing to the violent resistance put up by the evictees in the streets of the city. It is also beyond doubt that the information published by the newspaper is public and accurate. Lastly, the photograph in question is purely secondary in relation to the information published, and under no circumstances does it show the applicant in a situation other than that of the normal performance of her duties.

Article 8.2 of Organic Law no. 1/1982 on civil protection of the right to honour, personal and family privacy and one's own image:

"In particular, the right to one's own image shall under no circumstances prevent:

a. its capture, reproduction or publication by any means in the case of persons who exercise a public function or a high-profile or publicly prominent profession and if the image is captured at a public event or in a place open to the public;

b. the use of caricature of those persons, in accordance with social usage;

c. graphic information concerning an incident or public event where the image of a particular person appears purely incidentally.

The exceptions provided for in sub-paragraphs a and b shall not apply in the case of authorities or persons exercising functions which, by their nature, require the person exercising them to remain anonymous".

Languages:

Spanish.

Identification: ESP-2007-3-005

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 05.11.2007 / **e)** 233/2007 / **f)** Elena Alconada Pérez v. Roceña de Turismos, S.L. / **g)** no. 295, 10.12.2007 / **h)**.

Keywords of the systematic thesaurus:

5.2.1.2.1 Fundamental Rights − Equality − Scope of application − Employment − **In private law**.
5.2.2.1 Fundamental Rights − Equality − Criteria of distinction − **Gender**.

Keywords of the alphabetical index:

Maternity leave, return, discrimination.

Headnotes:

A woman who suffers no real, measurable damage from an employer, no harassment in the workplace, no limitation of her rights and no hindrance to her financial and professional aspirations cannot be considered the victim of discrimination based on sex and maternity.

Summary:

After a period of maternity leave, an employee returned to work in the respondent company's sheet-metal workshop, taking up only some of the duties she had performed previously in workshop management. Accounting department duties continued to be assigned to an employee who had been recruited while she was on maternity leave.

The Constitutional Court dismissed the appeal against the industrial tribunal judgments dismissing her application alleging discrimination. The appeal argued that the public authorities must compensate for the real disadvantages suffered by women in starting or resuming a career, particularly when they have young children to care for. This puts them in a disadvantageous position compared with men in the same situation.

Article 14 of the Constitution does not glorify motherhood and childbirth, but, on the other hand, rules out, in these circumstances, any discrimination, unfair treatment or limitation of a woman's legitimate rights and aspirations in her professional career. This provision may be infringed if the rights granted by the law in relation to maternity are violated owing to the fact that the legitimate exercise thereof would entail adverse professional consequences.

The Constitutional Court finds no discrimination in the instant case as there was no deterioration of her working conditions, compared with those of her male colleagues, following her maternity leave and her resumption of work on a part-time basis. It would seem, moreover, that this employee earns more than the actual salary provided for under the relevant collective agreement and, in addition, is the only employee to have chosen her working hours.

After considering all the evidence supplied by the applicant, the Court found that the allegation of discrimination was not substantiated.

Cross-references:

- Article 46.3 of Royal Legislative Decree no. 1/1995 of 24.03.1995 approving the revised text of the Law on the Status of Workers.
- Judgment no. 182/2005 of 04.07.2005 on restriction of the rights associated with maternity.
- Judgment no. 38/1981 of 23.11.1981 on the importance of the distribution of the burden of proof.

Languages:

Spanish.

Identification: ESP-2007-3-006

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 07.11.2007 / **e)** 235/2007 / **f)** Denial or justification of crimes against humanity / **g)** no. 295, 10.12.2007 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice − Types of claim − **Referral by a court**.
5.1.4 Fundamental Rights − General questions − **Limits and restrictions**.

5.3.1 Fundamental Rights − Civil and political rights − **Right to dignity**.
5.3.21 Fundamental Rights − Civil and political rights − **Freedom of expression**.

Keywords of the alphabetical index:

Genocide, denial / Genocide, justification / Criminal law, level of intervention / Expression, tolerance.

Headnotes:

Conduct which presupposes an indirect incitement to the commission of such crimes as genocide or provokes in some way discrimination, hatred or violence may be punished by law with imprisonment. Criminal proceedings conducted on this basis do not violate the principle of freedom of expression (Article 20.1 of the Constitution).

Where there is a deliberate intent to deride or discriminate against individuals or groups for personal, ethnic or social reasons, constitutional protection may not be granted to the expression and dissemination of a certain understanding of history or a certain perception of the world.

The definition as a crime of denial of the crime of genocide entails violation of freedom of expression, given that it is a form of behaviour which does not constitute a potential danger to legally protected interests and which remains at a stage prior to the intervention of criminal law.

The constitutional regime of freedom of expression cannot be restricted on the sole ground that it is used to disseminate anti-constitutional ideas or opinions, provided constitutional rights are not actually violated.

Summary:

The judgment held Article 607.2 of the 1995 Criminal Code to be partly unconstitutional. This provision punishes the dissemination through any medium of ideas or doctrines denying or justifying certain crimes. Four different dissenting opinions agreed that no distinction can be made between “denial” of the crime (declared null and void) and its “justification” (the validity of which is accepted if it is interpreted in accordance with freedom of expression). A minority of judges argued that both forms of behaviour are punishable, and they therefore thought that the article complained of should have been declared constitutional.

The judgment ruled on an issue of constitutionality raised by the Barcelona “Audiencia Provincial”, which declared admissible an appeal lodged by the director of a bookshop dedicated to the distribution, dissemination and sale of all kinds of material denying the persecution and genocide suffered by the Jewish people during the Second World War and inciting discrimination and hatred towards that community. The director had been sentenced by the court to two years’ imprisonment for the continued crime of genocide; he was also sentenced to three years’ imprisonment for an offence of provoking discrimination, racial hatred and violence towards groups or associations on racist or anti-Semitic grounds.

The Constitutional Court held that, as well as being a basic individual freedom, freedom of expression was one of the basic elements of the democratic political system. The content of the principle of free dissemination of ideas and opinions includes freedom to criticise. That freedom applies to all opinions, whether they are considered erroneous or dangerous or challenge the democratic system itself.

However, freedom of expression, which makes tolerance a principle of democratic coexistence, is restricted when its manifestations entail an effective violation of other rights legally protected by the Constitution. Such opinions may even be the subject of criminal sanctions on the part of the state.

The Court argues that the rule in question must be envisaged in the context of other rules which, in the criminal-law framework, are consistent with Spain’s international commitments relating to the prevention and punishment of genocide. The criminal legislator’s freedom of decision is itself limited by law: the constitutional system does not allow the mere transmission of ideas to be categorised as an offence, even in the case of ideas that are contrary to human dignity.

Semantic analysis of the criminal rule enables a distinction to be drawn between two characteristic forms of behaviour, namely the denial and justification of genocide by the ideas or doctrines disseminated.

Denial may be understood as the mere expression of a point of view concerning specific facts, arguing that they did not take place in a way that allows them to be described as genocide. Denial of a crime does not constitute a potential danger to legally protected interests, which is why its inclusion in criminal law violates freedom of expression.

Justification, for its part, does not involve absolute denial of the existence of a given crime of genocide, but its relativisation, or denial of its criminal nature, while identifying to some extent with its perpetrators. However, public justification of genocide constitutes an offence where it incites or indirectly provokes the act in question. For this reason, the legislature may, within the limits of its freedom of decision, provide for prosecution and criminal punishment of such behaviour.

Article 607 of the Criminal Code reads:

"1. Whosoever, for the purpose of destroying wholly or partly a national, ethnic, racial or religious group, perpetrates one of the following acts, shall be punished by:

1. A prison sentence of fifteen to twenty years if a member of the group is killed. If two or more aggravating circumstances are added to the commission of the offence, the more severe degree of punishment shall prevail.
2. A prison sentence of fifteen to twenty years where a member of the group is sexually assaulted and any of the injuries set out in Article 149 are inflicted.
3. A prison sentence of eight to fifteen years where the group or any of its members is subjected to living conditions which would endanger their lives or seriously impair their health, or where injuries set out in Article 150 are inflicted.
4. The same sentence where the group or any of its members is forcibly displaced, where measures are adopted which seek to hinder their way of life or their reproduction, or where certain individuals are forcibly transferred from one group to another.
5. A prison sentence of four to eight years where injuries other than those specified in sub-paragraphs 2 and 3 above are inflicted.

2. The dissemination through any medium of ideas or doctrines denying or justifying the offences described in the preceding paragraph or seeking to rehabilitate regimes or institutions which harbour practices that generate offences of this kind shall be punished by a prison sentence of one to two years".

Languages:

Spanish.

Switzerland
Federal Court

Important decisions

Identification: SUI-2007-3-007

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 11.05.2007 / **e)** 1B_63/2007 / **f)** X. v. Public Prosecution Department and Indictments Chamber of the Cantonal Court of Vaud Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 133 I 168 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial**.

Keywords of the alphabetical index:

Detention, extradition / Detention, provisional, duration / Detention, provisional, effect on sentence.

Headnotes:

Personal freedom; proportionality; provisional detention and extradition detention. Article 10.2 of the Federal Constitution (personal freedom), Article 31.3 of the Federal Constitution (deprivation of liberty) and Article 5.3 ECHR.

The principle of proportionality is infringed where the duration of provisional detention very closely approaches the custodial penalty actually applicable. Special attention should be paid to this limit, since the trial court, in determining the sentence, may be prompted to take into consideration the duration of the provisional detention, which is to be deducted according to Article 51 of the Penal Code. Since extradition detention must accordingly be deducted from the sentence, it should normally be taken into account in assessing the duration of provisional detention in the light of the requirements inferred from Article 31.3 of the Federal Constitution.

Summary:

I. The investigating judge of Vaud Canton had instituted a criminal investigation in respect of X. who was arrested in France, held for extradition from 29 January 2002 to 29 July 2003, then discharged and placed under court supervision; he was finally declared by the French authorities to have absconded. He was rearrested on an international warrant in France and placed in custody for extradition on 8 July 2005 until surrender to the Swiss authorities on 25 September 2006. His provisional detention in Switzerland ran from that date.

X. was charged with professional fraud, fraudulent use of a computer, falsification of titles and forgery of certificates. He was also suspected of belonging to an organised gang in order to commit fraud.

X. made an application for release in March 2007. The investigating judge dismissed the application; having found a risk of absconding and a danger of reoffending, the judge held that remand in custody was in accordance with the principle of proportionality. The Indictments Chamber of the Vaud Cantonal Court, to which X. appealed, upheld the remand order. In particular, it considered that the term of detention, amounting to 38 months with the inclusion of the extradition detention, was not excessive in so far as X. faced an appreciably longer sentence.

In a criminal law appeal, X. asked the Federal Court to set aside the judgment of the Indictments Chamber and to order his provisional release, alleging firstly that the duration of his detention was disproportionate.

II. The Federal Court dismissed the appeal.

Under Article 31.3 of the Federal Constitution and Article 5.3 ECHR, anyone placed in provisional detention is entitled to be tried within a reasonable time or to be released. According to the case-law, the term of detention is significantly disproportionate and excessive where it exceeds or approaches the probable duration of the custodial sentence to be realistically expected in the event of conviction. Special attention should be paid to this limit, since the trial court, in determining the final sentence, may be prompted to take into consideration the duration of the provisional detention.

To assess the proportionality of the duration of detention in the instant case, the question arose whether detention for extradition should be taken into consideration. The Court held that the guarantee secured by Article 5.3 ECHR did not apply to extradition detention within the meaning of Article 5.1.f ECHR, but only to the detention specified by Article 5.1.c. Article 5.1.f ECHR nonetheless required the authorities to conduct the extradition procedure diligently, otherwise the detention would cease to be justified.

The Federal Constitution laid down no special rules on extradition detention. In so far as the Federal case-law established that the requirements inferred from Article 31.3 of the Federal Constitution tended to deter the trial court from passing an inordinate sentence so as to make it coincide with the detention to be credited, in general all periods of detention that enter into this reckoning should be considered. Likewise, Articles 51 and 110.7 of the Penal Code required the court to deduct from the sentence the "pre-trial detention" undergone by the culprit. Consequently, it was unjustifiable that extradition detention should be treated differently from the provisional detention ordered for the purposes of investigation or on grounds of security; thus extradition detention should normally be taken into consideration in assessing proportionality in the light of the requirements inferred from Article 31.3 of the Constitution.

Having regard to the circumstances of the case, the term of provisional detention so far undergone by the appellant was admittedly substantial but was still shorter than the sentence which he faced, so that the principle of proportionality was still observed. For that reason, the appeal was ill-founded.

Languages:

German.

Identification: SUI-2007-3-008

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 01.06.2007 / **e)** 2P.43/2006 / **f)** Halter-Durrer and associates v. Canton of Obwald / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 133 I 206 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review**.
1.4.9.1 Constitutional Justice – Procedure – Parties – ***Locus standi***.

1.4.9.2 Constitutional Justice – Procedure – Parties – **Interest**.
1.6 Constitutional Justice – **Effects**.
4.8.7 Institutions – Federalism, regionalism and local self-government – **Budgetary and financial aspects**.
4.10.7.1 Institutions – Public finances – Taxation – **Principles**.
5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens**.
5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

Keywords of the alphabetical index:

Region, autonomy, financial / Region, autonomy, fiscal / Economic capability, principle / Tax, diminishing contribution / Tax, increasing contribution / Tax, proportional contribution / Tax, direct / Wealth tax, calculation / Income tax, calculation / Tax, unequal treatment / Tax, rate.

Headnotes:

Constitutionality of the degressive taxation scales established in Obwald Canton; consequences of the unconstitutionality found. Article 8.1 of the Federal Constitution (right to equality) and Article 127.2 of the Federal Constitution (principle of taxation according to economic capability).

Capacity to contest the taxation scales by public law appeal (recital 2).

It is inadmissible to limit contestation to certain items or parts of the impugned scales (recital 3).

Autonomy of the cantons as to taxation rates (recital 5). Principles of taxation in Article 127.2 of the Federal Constitution and their importance for the cantons (recital 6).

Principle of taxation according to economic capability as a general concept to be hardened (recital 7.1 and 7.2); economic connotations of this principle (recital 7.3) and its application in the legal system (recital 7.4).

Progressive, degressive and proportional taxation scales (recital 8.1). Requirements, derived from the principle of economic capability, for establishing the scales, and the Federal Court's power of review in the matter (recital 8.2). Case of degressive scales (recital 8.3).

Obwald Canton's new income tax scale is contrary to the principles of equality and taxation according to economic capability (recital 9). Neither the grounds of fiscal competition (recital 10) nor other goals whether or not of a fiscal nature (recital 11) afford remedies to the unconstitutionality.

This assessment is also valid for Obwald Canton's new wealth tax scale (recital 12).

Consequences of the unconstitutionality found (recital 13).

Summary:

I. On 14 October 2005, the Grand Council of Obwald Canton promulgated a supplement to the law on direct cantonal tax of 30 October 1954; this was accepted at cantonal referendum on 11 December 2005. The supplement provides for a diminishing rate of payment of income tax from 300 000 SF upwards and of wealth tax from 5 000 000 SF upwards. At the same time, tax on low incomes was significantly reduced.

Section 38.1 (income tax) and Section 55.1 (wealth tax) of the supplement to the law on direct cantonal tax provide that income tax (for cantonal and municipal revenue) is assessed at a rate of 0.9% on income above 5 000 SF, rising progressively to 2.35% up to an income of 300 000 SF and thereafter decreasing to 1.65% on an income above 1 000 000 SF. The base rate of wealth tax is set at 0.35% for assets of up to 5 000 000 SF and thereafter decreases to 0.2% on the portion thereof exceeding this figure.

In a public law appeal, four citizens asked the Federal Court to set aside the part of the taxation scales covered by Sections 38.1 and 55.1 of the supplement embodying a diminishing rate, that is the part of the scale applicable from 300 000 SF of income and from 5 000 000 SF of assets upwards. In the alternative, they asked the Federal Court to find both taxation scales unconstitutional in the part providing for a diminishing rate. The appellants relied on the right to equality (Article 8.1 of the Constitution) and on the principle of taxation according to economic capability (Article 127.2 of the Constitution) and contended that the Constitution stipulated the application of a progressive scale of income tax and wealth tax.

II. The Federal Court allowed the appeal to the extent that it was admissible, and set aside the impugned provisions.

When an appeal is directed at a judgment with general effect, any person whose legally protected interests are tangibly affected by the impugned act or may one day be affected, has the capacity to bring an appeal within the meaning of Section 88 of the

Federal Judiciary Act. To challenge a judgment, it suffices that one's legally protected situation be potentially affected. This was true of those three appellants resident and taxable in Obwald Canton. The taxation scale formed an indivisible whole and must comply with the stipulations of the Constitution. For that reason, the Federal Court scrutinised the constitutionality of the scale in its entirety although the appellants only challenged the part of it relating to income and wealth in the upper range.

Cantons are sovereign in that their sovereignty is not limited by the Federal Constitution and they exercise all the rights that are not delegated to the Confederation. In particular, they enjoy financial autonomy. This comprises authority to levy tax and to determine the type and the extent of cantonal responsibilities. Cantons are nevertheless required to observe overriding Federal law. In particular, they must accommodate fundamental rights, especially the right to equal treatment and its fiscal corollaries such as the principle of taxation according to economic capability.

In tax matters, the principle of equality under Article 8.1 of the Federal Constitution is embodied in the principle of general and equal taxability and the principle of taxation according to economic capability within the meaning of Article 127.2 of the Federal Constitution. The principle of general taxability requires that every person or group of persons be taxed according to the same legal regulations. The principle of equal taxation requires that persons in the same situation be taxed in the same way and that persons be taxed differently where they are in situations involving wide substantive differences.

According to the principle of taxable capacity, everyone must contribute to covering government expenditure, taking into account his or her personal financial situation and in proportion to his or her means. As regards income tax, the principle of taxable capacity clearly stipulates that each person or group of people that has an identical income pays an equivalent amount of tax (horizontal equity). People with different incomes must be taxed differently. Prevailing legal opinion amply accepts that the principle of taxation according to economic capability is an objective, fundamental principle which governs direct taxes and corresponds to a general legal concept. The principle of contributory capability is understood as a fiscal principle which places a specific construction on the principle of equality, consistent with the fundamental social values embedded in the Constitution. In the legal theory of taxation, there is a broad consensus that an increasing rate of income tax best suits the principle of taxation according to economic capability. Taxes on a progressive scale are regarded as a means of achieving a fair distribution of income and wealth. The Federal Court has never delivered final judgment on a given method of taxation because it cannot be inferred from Article 8.1 of the Constitution. It has nonetheless emphasised that where direct taxation is concerned the legislator may accommodate the principle of contributory capability by means of a progressive scale. The principle of contributory capacity also sets limits the development of the taxation scale. Looking more closely at the normative content of the principle of taxable capacity reveals that there is a close relationship between equality and fiscal equity. Studies in economics are based on the so-called sacrifice theories and on the idea that, when income increases, the gain in utility of the additional income decreases, in other words, the marginal rate of utility shows a decreasing curve.

Moreover, the principle of taxable capacity – such as the concept of fiscal equity – constitute undefined legal concepts. It is not easy to determine by how much the tax must increase when the income increases by a given amount and to carry out a vertical comparison. Seen from this angle, one could not require much more than a regular evolution of the scale or curve of the tax burden. The creation of a tax scale, at least with regard to its progression, depends to a certain extent on political opinion.

In the instant case, Obwald Canton's new income tax scale was a scale graded by income brackets. According to Section 38.1 of the supplement, taxation commenced only above an exempted income bracket of 5 000 SF. The tax rate increased by stages to reach 2.35% from 70 000 SF, continuing up to 230 000 SF. The average rate of taxation increased progressively for this portion of income, and reached its maximum value of 2.234% for taxable income of 300 000 SF. The scale became a degressive one for the income brackets between 300 000 SF and 550 000 SF. The average rate of taxation decreased steadily and still amounted to 1.7967% on a taxable income of 550 000 SF. Beyond that, the average rate of taxation decreased in such a way that, in a range of 1.79% to 1.65%, it asymptotically approached the lowest value of 1.65% assigned to the marginal tax rate. The effective cantonal and municipal income tax was calculated according to these base rates multiplied by the appropriate coefficients for cantonal tax and municipal tax.

The new scale of cantonal tax rates became degressive only above a taxable income of 300 000 SF. It nevertheless had the effect of causing by no means insignificant tax differences for certain income brackets. Thus, the average tax burden (average rate of taxation) for a taxable income of 300 000 SF was 32.33% heavier than for a taxable income of 1 000 000 SF. For a taxable income of

200 000 SF, the average tax burden was 28.89% greater than for a taxable income of 1 000 000 SF. Even for a taxable income of 100 000 SF, the average tax burden was still 18.58% more than for a taxable income of 1 000 000 SF. Indeed, the average tax burden for an income of 1 000 000 SF was only comparable to a taxable income of 51 200 SF.

The differences in tax burdens noted above thus infringed the principles of equal taxation and of taxation according to economic capability. These principles required that the taxation of each income bracket should obey the same rules within the system and by comparison with the other brackets, be objectively founded, and keep to a reasonable ratio. Consequently, by instituting a lower average tax rate for high incomes than for low incomes, the contested income tax scale was contrary to the principle of taxation according to economic capability (Article 127.2 of the Federal Constitution) and the general right to equality (Article 8.1 of the Federal Constitution).

The specific considerations and circumstances pleaded by the cantonal authorities could not remedy the unconstitutionality of the income tax scale. Although the cantons enjoyed financial and fiscal autonomy, competed with each other in the field of taxation and could use income tax and wealth tax as an instrument for directing the economy towards the fulfilment of social policy goals or the like, a general taxation scale remained subject to the limits set by the principle of equal treatment and thus proved unconstitutional in providing for decreasing average rates of taxation.

These considerations concerning income tax were also applicable to wealth tax, which proved unconstitutional.

When a cantonal provision is deemed contrary to the Constitution, the Federal Court allows the appeal and sets aside the provision. It rests with the cantonal authorities to decide as to future action after the impugned provisions have been set aside. Thus the appeal was allowed to the extent admissible, and Sections 38.1 and 55.1 of the supplement on direct cantonal tax were set aside.

Languages:

German.

Identification: SUI-2007-3-009

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 07.08.2007 / **e)** 1P.7/2007 / **f)** Schmid and associates v. Council of State and Grand Council of Basel City Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 133 I 286 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.3.5.8 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by federal or regional entities**.
1.4.9.2 Constitutional Justice – Procedure – Parties – **Interest**.
3.6.3 General Principles – Structure of the State – **Federal State**.
3.17 General Principles – **Weighing of interests**.
4.8.8.2.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione materiae***.
5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial**.

Keywords of the alphabetical index:

Provisional detention / Primacy of federal law / Minor, detention, conditions.

Headnotes:

Separation of minors and adults in provisional detention; Basel City Canton law on criminal justice for minors, and Federal Act governing the status of minors in criminal law. Primacy of Federal law; Article 49.1 of the Federal Constitution, Article 10.2.b of the International Covenant on Civil and Political Rights and Article 37.c of the Convention on the Rights of the Child.

General considerations regarding the admissibility of the appeal against cantonal prescriptive acts (recital 2).

The cantonal law on criminal justice for minors, prescribing that in exceptional cases minors and adults be placed in provisional detention together, is not consistent with Federal criminal law on minors (recitals 3 and 4). The Federal Act concerning criminal law in respect of minors provides for no transitional period in which to effect the separation of minors and adults (recital 5).

Summary:

I. In preparation for the entry into force on 1 January 2007 of the revised Swiss Penal Code (CP) and of the Federal Act governing the status of minors in criminal law, the Parliament of Basel City Canton enacted the law on criminal justice for minors. This contains clause 23.4 under which minors in provisional detention may only exceptionally be put with adults, and solely to the extent that the purpose of the provisional detention cannot be achieved otherwise.

In a public law appeal, Jelscha Schmid asked the Federal Court to set aside this provision. She complained of a violation of the primacy of Federal law, of the International Covenant on Civil and Political Rights (UN Covenant II) and of the Convention on the Rights of the Child.

II. The Federal Court dealt with the appeal as a public law appeal within the meaning of Section 82.b of the Act on the Federal Court (LTF), allowed it, and set aside the impugned provision.

According to Section 82.b LTF, cantonal laws may be challenged before the Federal Court within thirty days of their promulgation. Persons particularly affected by the prescriptive act, or potentially affected, and who have an interest worthy of protection, have the capacity to lodge the appeal. This was true of the appellant, a minor, to whom the impugned provision might apply.

The principle of primacy of Federal law, laid down in Article 49.1 of the Federal Constitution, means that the cantons are not authorised to legislate in areas exhaustively regulated by Federal law. Elsewhere, they may issue legal rules not inimical to the meaning or spirit of Federal law and not impeding their fulfilment. In proceedings before the Federal Court, this principle of primacy of Federal law may be relied upon as a constitutional right. The question of the impugned provision's compatibility with the Federal criminal law provisions in respect of minors was therefore to be addressed from this angle.

The appellant also invoked the Convention on the Rights of the Child. This contains directly applicable (self-executing) provisions. According to Article 37.c, every child deprived of liberty shall be treated with humanity and the respect due to the dignity of the human person, and in a manner which takes into account the needs of persons of his or her age; in particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so. This stipulation applies both to provisional detention and to custodial sentences. Switzerland, however, made a reservation when signing the Convention to the effect that separation of young persons and adults deprived of liberty was not unexceptionally guaranteed. The reservation has not been withdrawn for the time being, although this is envisaged. Consequently, the appellant could allege a breach of the Convention on the Rights of the Child.

The appellant further invoked the UN Covenant II. Article 10.2.b of the International Covenant on Civil and Political Rights provides that accused juvenile persons shall be separated from adults and their case determined as speedily as possible. This provision, also directly applicable, concerns provisional detention only. Switzerland also entered a reservation to the effect that separation of young person charged with offences and adults was not unexceptionally guaranteed. With a view to the entry into force of the Federal Act concerning criminal law in respect of minors, this reservation was withdrawn.

According to Section 6.2 of the Federal Act concerning criminal law in respect of minors, during detention minors shall be placed in a special establishment or in a specific division of a remand prison where they are separated from the adult prisoners, the object being to safeguard the young people from the pernicious influences of adult prisoners. It followed from this provision that the Federal legislator did not intend any exception to the principle of separation of prisoners. UN Covenant II also precluded any exception.

Under the procedure of abstract review of cantonal legislative acts, the Federal Court considers whether and to what extent the impugned provision may be interpreted and applied in accordance with the Constitution. Only when this is not possible does it set aside a cantonal provision.

Paragraph 23.4 of the cantonal Code of Criminal Procedure in respect of minors was applicable to provisional detention of young people. Albeit only in exceptional cases, the provision afforded the possibility of young people being placed with adults. The relevant directives emphasised non-separation as being exceptional, and restricted it to young people over fifteen years of age. The authorities of Basel City Canton considered that imprisonment with adults could serve young people's interests better than isolation where there was danger of collusion. The impugned provision was thus founded on a weighing of interests and a case by case assessment. This weighing of interests, however, was not contemplated by the Federal provisions stipulating unexceptional separation of young people and adults.

For that reason, the impugned provision of the Code of Criminal Procedure in respect of minors was not in accordance with Federal criminal law on minors. Nor did Federal law grant the cantons any transitional period for effecting the separation of young people and adults. The Federal Court therefore allowed the appeal and set aside the impugned provision.

Languages:

German.

“The former Yugoslav Republic of Macedonia”
Constitutional Court

Important decisions

Identification: MKD-2007-3-009

a) “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 24.10.2007 / **e)** U.br.133/2005 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 134/2007, 06.11.2007 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.9 General Principles − **Rule of law**.
4.2.1 Institutions − State Symbols − **Flag**.
5.2.2.3 Fundamental Rights − Equality − Criteria of distinction − **Ethnic origin**.
5.3.45 Fundamental Rights − Civil and political rights − **Protection of minorities and persons belonging to minorities**.

Keywords of the alphabetical index:

Minority, cultural activity / Flag, display, regulation.

Headnotes:

Legislation on the use of flags by members of communities within the Republic of Macedonia allowed members of communities to use symbols based on their percentage representation within their local government area. This contravened Amendment VIII of the Constitution.

Other provisions of this legislation contravened the Constitution. They provided for the constant use of the flag of the communities in local government buildings, within the facilities of state institutions, public services and legal entities. They also allowed for constant use during undefined holiday periods and certain other occasions.

Summary:

Several citizens and political parties asked the Court to assess the constitutionality of the Law on the Use of the Flags of the Communities in the Republic of Macedonia ("Official Gazette of the Republic of Macedonia", no. 58/2005) both partially and as a whole. They alleged that any hoisting of another country's flag on the territory of the Republic of Macedonia violated its unitary character and sovereignty, as guaranteed by the Constitution.

The Court took account of Articles 1, 2.1, 5, 8.1.3.11, 9 and 118 of the Constitution and Amendments IV and VIII of the Constitution. It also considered Articles 5.1, 20 and 21 of the Framework Convention for the Protection of National Minorities and Article 29 of the Vienna Convention on Consular Relations, together with the provisions of the Law on the Use of the Flags of the Communities in the Republic of Macedonia and the Law on Local-Self Government.

It held as follows:

1. The choice of another state's flag, as a symbol of the identity and special characteristics of communities that do not form part of the majority in the Republic of Macedonia, does not breach the Constitution. Such a flag would not pose a threat to the sovereignty and territorial integrity of the Republic of Macedonia, if its use simply demonstrates the fact of "belonging" to a particular community. See Amendment VIII to the Constitution.

2. Legal provisions allowing community members to use symbols based on their percentage representation at local government level are not in accordance with the Amendment VIII of the Constitution. The Constitution bestows this right on community members irrespective of the percentage of their representation. The problem with the above provisions was that they put those citizens in the majority within a given local government area in a privileged position. This discriminates against those not in the majority.

3. Inside and outside local government facilities, the only flag that can be flown constantly is the municipal one. This demonstrates that citizens of the Republic of Macedonia live and work in that area, regardless of their national affiliation.

4. Inside and outside facilities of state institutions, public services, and legal entities, from a constitutional perspective it is permissible only to fly the state flag as an expression of state sovereignty, but not the flag of members of the communities as an expression of their identity and special characteristics.

5. A legal provision under which it is possible to hoist the flag of members of the communities on undefined infrastructural facilities, (apart from those set out in legislation) contravenes Article 8.1.3 of the Constitution and the principle of the rule of law as a fundamental value of the constitutional order of the Republic of Macedonia.

6. Where a legal provision sets out all possible holidays, such as state, municipal and religious ones, there is no constitutional justification for the phrase "and others" and the possibility that the flags of members of the communities can also be hoisted during undefined, undetermined holidays.

7. On the occasion of welcoming and bidding farewell to holders of highest state offices or during visits of foreign statesmen or top representatives of the international community, it is constitutionally justified to hoist only the state flag. This is because, on such occasions, only state sovereignty may be expressed; these are not the occasions to express and foster the identity of members of the communities.

8. There is no constitutional justification for the hoisting of a flag of the members of the communities at international political meetings or international political gatherings. The rationale is that under the Constitution, that right is exclusively within the competence of the state and its bodies, that is, within the competence of the President of the Republic of Macedonia, the Assembly and the Government. They will be taking part in and organising these international events, rather than members of the communities.

9. There is no constitutional justification for the use of the flag of members of the communities at an international sport event, where the state should be showing its state colours internationally, thereby expressing the identity and sovereignty of the Republic.

10. Members of the communities have an undisputed right to hoist their flag and that of the Republic of Macedonia at competitions or other meetings of a cultural, artistic or sporting nature, or those with the purpose of expressing, fostering and developing the identity of the members of the communities. The flags of the members of the communities will reflect their identity and special characteristics upon such occasions, and will enable distinction between them and other participants at such events, where the flags have a symbolic nature.

However, this does not apply to international political meetings, international competitions, international scholarly gatherings where the Republic of

Macedonia is represented or where the aim behind the event is to express, foster and develop the identity of the Republic as a sovereign state.

Languages:

Macedonian.

Turkey
Constitutional Court

Important decisions

Identification: TUR-2007-3-003

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 07.02.2007 / **e)** E.2005/47, K.2007/14 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 29.11.2007, 26715 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

4.6.6 Institutions – Executive bodies – **Relations with judicial bodies**.
4.7.4.1.2 Institutions – Judicial bodies – Organisation – Members – **Appointment**.
4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status**.
4.7.4.3.2 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Appointment**.

Keywords of the alphabetical index:

Judge, appointment, conditions / Judge, appointments board / Judge, probation / Judge, qualifications / Prosecutor, appointment, conditions / Prosecutor, probation.

Headnotes:

It is acceptable for the power to recruit candidates for the judiciary and the Public Prosecution Service to remain with the Ministry of Justice, provided that the candidates do not perform judicial functions. The introduction of an oral examination for the recruitment of candidates for the above does not contravene the Constitution. It may assist in determining some of the qualifications that candidates need. The Supreme Council of Judges and Public Prosecutors has power over judges and public prosecutors directly after they are appointed. The Ministry of Justice has power over them during their two-year probationary period.

Summary:

I. The case was concerned with the role of oral examinations during the recruitment process of judges and prosecutors, and the powers of the Ministry of Justice over candidates for these positions.

The Council of State (the Plenary Session of the Administrative Law Division) asked the Constitutional Court to rule upon the conformity with the Constitution of certain provisions of Articles 8 and 9 of Law no. 2802 on Judges and Public Prosecutors.

Under Article 8 of Law no. 2802, success both in written and oral examinations is a pre-requisite for appointment as a candidate judge or public prosecutor. The final paragraph of Article 9 states that the written and oral examination procedure and the candidates' traineeships are to be regulated by bye-laws.

The Council of State expressed concern about the role of the Ministry of Justice in the oral examinations. The recruitment process of judges and public prosecutors is bound up with judicial independence. Recruitment must be carried out objectively, and candidates' merits properly assessed. The Council of State suggested that the Ministry's oral examination conflicted with the security of tenure of judges and constituted interference by the executive branch into the judiciary. Moreover, judicial review of the oral examination was limited to its formal requirements.

II. The rationale behind judicial independence is that judges fulfil their duties according to the Constitution, the law and their personal convictions, free from external pressures (including pressure from the executive). To this end, various safeguards are to be found, in Articles 138, 139 and 140 of the Constitution.

The provisions under dispute state that those with the necessary qualifications, (as stipulated in Article 8 of Law no. 2802), and those who are successful in the written and oral examinations under the provisions of the by-law, shall be appointed as candidate judges and public prosecutors.

Under Article 7 of Law no. 2802, candidate judges and public prosecutors are not included within the ranks of judges and public prosecutors. They are, however, general civil servants within the remit of the Law on State Officials.

The fundamental principles relating to the judicial profession, the independence of the judiciary, and security of tenure for judges and prosecutors within the Constitution relate to judges and public prosecutors who have already been appointed by the Supreme Council of Judges and Public Prosecutors, admitted to those professions and currently working within those fields.

Under the current legal regulations, candidate judges and public prosecutors may not be regarded as judges and public prosecutors, as they do not perform judicial functions during their candidacy.

Success in the oral examination is a pre-requisite for acceptance to a candidacy. The nature of the professions of judge and public prosecutor dictates that candidates must have certain qualifications and attributes. The oral examination will reveal further information on those who are successful in the written examinations, such as general and physical appearance, understanding and comprehension. For these reasons, the legislator has the discretion to introduce an oral examination, to identify the most suitable candidates.

Because candidate judges and public prosecutors do not have the status of judges or public prosecutors, the Court did not find contrary to the Constitution the requirement that the oral examination procedure is to be regulated by means of by-law. The provisions under dispute were not found to be in breach of Articles 2, 138, 139, 140 and 159 of the Constitution. The Court also ruled that the contested provisions were not related to Article 10 of the Constitution.

Justice Kantarcioglu expressed a dissenting opinion.

Supplementary information:

In Turkey, ordinary and administrative candidate judges and public prosecutors are recruited by the Ministry of Justice. After two years of candidate status, they are appointed as judges and public prosecutors by the Supreme Council of Judges and Public Prosecutors, an independent body composed of the Minister of Justice, the Under Secretary of the Ministry of Justice, three members of the Court of Cassation and two members of the Council of State. During their two-year traineeship, candidates do not have the status of judge or public prosecutor. During this period, they fall within the remit of the Ministry of Justice. Once candidates have been appointed as judges or public prosecutors, they are under the auspices of the Supreme Council.

Languages:

Turkish.

Identification: TUR-2007-3-004

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 05.04.2007 / **e)** E.2004/107, K.2007/44 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 22.11.2007, 26708 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

4.5.10.2 Institutions – Legislative bodies – Political parties – **Financing**.
5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.

Keywords of the alphabetical index:

Political party, financing, foreign / Political party, funds, foreign, transfer from association / Association, membership / Association, financing, foreign.

Headnotes:

Associations may receive material aid from associations with similar goals, from professional organisations, political parties, trade unions and foundations in order to achieve the goals set out in their constitutions. They may additionally receive aid in cash or in kind from abroad. Under constitutional principles, political parties may not accept financial assistance from foreign states, international institutions and persons and corporate bodies. Under Turkish legislation, it is possible for associations to receive foreign aid in cash or in kind, but not to transmit aid to political parties. It is unconstitutional for associations to transmit material aid to political parties.

Associations may employ employees or volunteers in order to realise their goals, irrespective of their total membership. Taking into account the essence of the right to association, associations with less than one hundred members may also employ employees or volunteers.

Summary:

I. Several members of the Parliament and the President of the Republic asked the Constitutional Court to assess the compliance with the Constitution of Articles 10.1, 21 and 13.1 of the Law on Association no. 5253.

Under Article 10.1 of Law no. 5253, associations may receive material assistance from associations with similar aims, political party; trade unions and professional organisations in order to realise the goals set out in their statutes. They may also transmit material aid to those institutions. Article 21 of this law covers the issue of foreign aid for associations. Essentially, associations may receive aid in kind and cash from individuals, institutions and establishments situated abroad provided that they have informed their managers in advance. The form and the content of the aid are stipulated in by-laws. Assistance in cash form must be transmitted through banks.

The President and the deputies alleged that the effect of Articles 10.1 and 21 of the Law on Associations was that associations could receive foreign aid and then transmit that aid to political parties. However, Article 69.10 of the Constitution states that political parties must not accept financial assistance from foreign states, international institutions and persons and corporate bodies, under penalty of permanent dissolution. In view of this ban, therefore, associations should not be allowed to receive foreign aid or to transmit it to political parties. The petitioners also claimed that it is a fundamental principle that the setting up and *modus operandi* of political parties must be free from foreign pressures and influence. For this reason, there are different rules under the Constitution for political parties and associations. The provisions under scrutiny allow political parties to gain access to foreign aid courtesy of associations. Thus, Articles 10.1 and 21 of the Law on Associations are contrary to Articles 2, 11 and 69 of the Constitution.

II. Under Article 33.3 of the Constitution, restrictions on the freedom of association are only permissible by law in order to protect national security and public order, to prevent the perpetration of a crime, or to protect public morals or public health.

The original version of Article 33.4 of the Constitution prevents associations from pursuing political aims, engaging in political activities, supporting political parties and engaging in combined action with trade unions, professional organisations and foundations. However, this constitutional provision was abolished in 1995 by the constitutional amendments. Since then, associations have been able to engage in combined action with associations with similar goals, political parties, trade unions and professional organisations. Moreover, they may receive material aid from the mentioned organisations.

Therefore, the provision that “associations may receive material aid from associations with similar aims, political parties, trade unions and professional

organisations in order to realise the goals set out in their statutes" did not contravene the Constitution.

Justices Ozguldur and Apalak expressed dissenting opinions on this section of the judgment.

The Court examined the phrase "and [they] may transmit material aid to those institutions." This provision enables associations to transmit material aid to associations with similar aims, political parties; trade unions and professional organisations in order to realise the goals set out in their statutes.

Article 69 of the Constitution sets out the rules to which political parties must adhere. Under the tenth paragraph of the Article, political parties accepting financial assistance from foreign states, international institutions and persons and corporate bodies face permanent dissolution. Yet Article 21 of the Law on Associations permits associations to receive aid in cash and in kind from individuals, institutions and establishments situated abroad, provided they have informed their managers beforehand. The form and the content of the aid shall be arranged by a regulation and it is compulsory that the aid in cash be received by means of banks.

This means that there is nothing to stop associations receiving foreign aid from abroad transmitting foreign aid to political parties. Under Article 68.8 of the Constitution, the state shall provide political parties with adequate financial resources in an equitable manner. The type of financial assistance to be extended to political parties, and the procedures associated with the collection of membership dues and donations are regulated by law. It is accordingly clear that those drafting the Constitution intended political parties to be free from foreign influence.

Political parties receiving aid in cash or in kind from individuals and institutions abroad may be under the influence of those individuals and institutions, and they may be directed from abroad. The transmission of aid from associations to political parties is out of line with the Constitution even if its purpose is the realisation of the associations' goals, as set out in their statutes.

The Constitutional Court expunged the phrase "and [they] may transmit material aid to those institutions." It also dealt with the constitutionality of employment within associations. Under Article 13.1 of the Law on Associations, services to associations shall be fulfilled by volunteers or by employees, provided that the total membership of the association exceeds one hundred. The deputies objected to the phrase "… provided that the total members of the association are more than one hundred".

Under Article 13 of the Constitution, fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution. Article 33 sets out the circumstances where restrictions are permissible. Any such restrictions must be in line with the Constitution.

According to the provisions under scrutiny, if there are less than one hundred members, services are not to be provided by volunteers or employees. Under Article 2.1.a of the Law on Associations, the definition of "association" is "a group of individuals comprising at least seven real or corporate persons pooling their knowledge and experience in order to realise a legal, defined and common goal, without the motivation of profit. Associations have to carry out some activities in order to realise their common goals, and need to volunteers and employees to do so.

Insofar as Article 13 of the Law on Associations prevents associations with under one hundred members from employing workers or volunteers, this constitutes a restriction to the right to association. Any such restriction has to be justified by one of the reasons set out in Article 33 of the Constitution. As there was no such justification here, the Constitutional Court ordered the repeal of the provision.

Languages:

Turkish.

Identification: TUR-2007-3-005

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 18.10.2007 / **e)** E.2007/4, K.2007/81 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 08.12.2007, 26724 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.12 General Principles – **Clarity and precision of legal provisions**.
5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement**.
5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

Keywords of the alphabetical index:

Passport, right to receive / Passport agency, powers / Movement, restriction / Travel, ban / Fundamental right, restriction, definition.

Headnotes:

Any restrictions on the right to travel due to tax arrears and other debts to the State should be clearly defined within legislation. In the absence of such clear provision, the restriction will be in contravention of the Constitution.

Summary:

I. Several courts asked the Constitutional Court to assess the compliance with the Constitution of various provisions in Turkish legislation restricting the right to travel abroad.

Article 22 of the Law on Passport no. 5682 (which regulates foreign travel) stipulates that passports or documents akin to them will not be issued to persons in arrears with tax where Passport Office has received notification of the problem. Provisions within Laws nos. 4389 and 5411 dealt with the rights to foreign travel for those who owe debt to state-owned banks.

Under Article 2 of the above Law, Turkish nationals and foreigners must show a valid passport or a document of equivalent status when entering or leaving the country. Article 22 enumerates circumstances where passports will not be issued, such as individuals with tax arrears and those who owe debts to state-owned banks. The Passport Office will be informed about such persons, and will prevent them from travelling abroad. They will not issue passports or equivalent documents to them. Passports and equivalent documents can be withdrawn. If individuals subject to a travel ban are already abroad, their passports will not be renewed. Instead, they will receive a travel document which will enable them to return to their country.

The aim of the prohibition on leaving the country is to make sure that taxpayers comply with their obligations, the regular collection of taxes, and the timely collection of public revenues.

Article 22 of the Passport Law does not contain details of the prohibition, such as the type of tax, the minimum amount, whether or not financial obligations other than tax are included, and the capacity of legal representatives, and arrangements for informing the responsible authority. Taxes, duties and other financial obligations are assessed and collected by public institutions other than the Ministry of Finance and the Presidency of Revenue Administration. If the public administration does not inform the Passport Office, the prohibition cannot be applied. The Passport Law does not give any powers to the executive organ on administrative regulation. However, in practice, the Ministry of Finance and Under Secretary of Customs regulate this issue.

II. Article 13 of the Constitution provides that "fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be in conflict with the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular Republic and the principle of proportionality."

Restriction means tightening the scope of the area determined in the Constitution of certain fundamental rights or freedoms, so that usage of the fundamental right or freedom will continue after the restriction. Ceasing fundamental rights and freedoms will result in usage stopping for a certain period.

The principle of proportionality, the existence of a reasonable relation between aims and means contains three sub-principles, namely practicability, urgency and moderation.

The European Court of Human Rights has noted in one of its judgments *(Riener v. Bulgaria)* that in such cases the Court must determine whether the interference was lawful and necessary in a democratic society for the achievement of a legitimate aim. In the view of the European Court, there is a close link between the lawfulness of the travel ban, the foreseeability and clarity of the authorities' legal acts (especially the duration of the travel ban, the calculation of the debt and the issue of prescription), and the issue of proportionality. The purpose of such restrictions is the maintenance of public order and the protection of the rights of others.

Nonetheless, Article 23 of the Constitution does provide for legal restriction of freedom of residence in order to prevent offences, to promote social and economic development, to ensure sound urban growth, and to protect public property. There can be restrictions on freedom of movement for the purpose of the investigation and prosecution of an offence, and the prevention of offences. A national's freedom to leave the country may be restricted due to civil debts or criminal investigation or prosecution.

The provisions under scrutiny prevent individuals from leaving the State due to their debts to the State.

Foreign travel bans have the effect of claming down on the freedom of movement, which is a type of restriction under Article 13 of the Constitution. The payment of tax is a civil obligation under Article 73 of the Constitution. Public services can only operate and the rights of others can only be protected if people pay their taxes in full and on time, in order to defray public expenses. This constitutional obligation is one of the justifications for restriction under Article 23 of the Constitution. There is a legitimate aim behind the restriction within the challenged provision.

As the ban on foreign travel will apply to those about whom the Passport Office has received information, this restriction must be necessary for a democratic social order.

The aim of the ban on travel abroad is to ensure collection of taxes and the means is to prohibit foreign travel. In order for a rational relationship to exist between the aim and the means, there must be a connection between leaving the country and the difficulty or impossibility of collecting taxes. If a foreign travel ban comes about because of legislation which is connected with individual tax debts but which contains no conditions (not even the amount in question), there will not be a rational relationship and balance between the aim pursued and the means deployed.

The justifications for restriction within Article 23 of the Constitution (including the term “civic obligations”) have a general meaning, and it is an abstract concept. However, the legislator must make it a concrete one, where restrictive regulations are in question. Openness and clarity of definition are key components in the prevention of arbitrary administrative practices. Clarity is a requirement of the rule of law. Without it, it is difficult to review aims and means.

In the provisions under dispute, challenged provision, the aim and means are not stipulated in an open, clear and concrete form and there is no rational relationship between the aim and the means. The requirements of the principle of proportionality are not fulfilled. The Constitutional Court therefore directed the repeal of the challenged provision of the Passport Law. It also reviewed provisions of Law nos. 4389 and 5411, which resembled the provisions of the Passport Law, and directed their repeal as well.

Languages:

Turkish.

Ukraine
Constitutional Court

Important decisions

Identification: UKR-2007-3-007

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 09.10.2007 / **e)** 7-rp/2007 / **f)** Official interpretation of provisions of Article 94.4 of the Constitution / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review**.
1.3.3 Constitutional Justice – Jurisdiction – **Advisory powers**.
4.4.1.1 Institutions – Head of State – Powers – **Relations with legislative bodies**.
4.4.1.4 Institutions – Head of State – Powers – **Promulgation of laws**.
4.5.2 Institutions – Legislative bodies – **Powers**.
4.5.4.2 Institutions – Legislative bodies – Organisation – **President/Speaker**.
4.5.6 Institutions – Legislative bodies – **Law-making procedure**.

Keywords of the alphabetical index:

Law, promulgation.

Headnotes:

Seeking not an official interpretation of a norm of the Constitution, but rather, legal advice is not within the Court’s remit.

The Chairman of Parliament is subject to legislative procedure. This position is covered in Articles 88 and 94 of the Constitution. Even if the Chairman loses his or her office, he will remain subject to certain legislative procedures, with the result that actions carried out in his name continue to have legal significance, and will continue in force where necessary. Arguably, in this context, they will be binding on his successor.

Article 94.4 of the Constitution imposes an obligation on the Chairperson of the parliament to officially promulgate and to publish a law, adopted by the parliament by at least a two-thirds majority, without delay. Article 94.4 of the Constitution also imposes an obligation of the Chairperson of the parliament to accomplish a legislative procedure if the President has not signed it within 10 days. If this is the case, the official promulgation and publication must take place immediately, ahead of any other activity.

Summary:

Fifty-one "People's Deputies" presented a petition to the Constitutional Court, requesting an official interpretation of the provisions of Article 94.4 of the Constitution.

On 16 March 2006, the parliament gave repeated consideration to the Law "On temporary investigatory commissions, special temporary investigatory commissions and temporary special commissions of the parliament", which had been returned by the President. They then adopted it in its entirety with new wording, having taken account of the proposals the President made, as of 14 April 2006.

On 4 April 2006, the parliament gave repeated consideration to the Law "On introducing amendments to Article 20 of the Law on the Status of the People's Deputy", which had been returned by the Head of State, and surmounted the President's veto. The Chairman of the parliament of the 4th convocation signed both laws, and forwarded them to the President for signature.

Information submitted by the petitioners indicates that the President did not sign the laws within 10 days, but sent a letter substantiating his position to Parliament, outlining the unconstitutionality of their respective provisions.

Under Article 94.4 of the Constitution, where a law, during repeat consideration, is adopted by parliament by at least a two-thirds majority, the President is obliged to sign and officially promulgate it within ten days. If the President does not sign such a law, the Chairman of the parliament will officially promulgate it without delay, and publish it under his or her signature.

There was a question in the petition as to whether the above-mentioned issues, pending official promulgation and publication of legislation, should be regulated by the Rules of Procedure of the parliament or by other legislation, pursuant to the requirements of Articles 19.2 and 94.4 of the Constitution. However, the Constitutional Court pointed out that the petitioners were not, in fact, seeking an official interpretation of a norm of the Constitution, but rather, legal advice. This is not within the Court's remit.

Languages:

Ukrainian.

Identification: UKR-2007-3-008

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 16.10.2007 / **e)** 8-rp /2007 / **f)** On conformity to the Constitution (constitutionality) of the provisions of Article 23 of the Law On civil service, Article 18 of the Law On service in bodies of local self-government, Article 42 of the Law On diplomatic service (case on the boundary age for tenure in civil service and service in bodies of local self-government) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

2.1.1.3 Sources – Categories – Written rules – **Community law**.
2.1.1.4.9 Sources – Categories – Written rules – International instruments – **International Covenant on Economic, Social and Cultural Rights of 1966**.
5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age**.
5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work**.
5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession**.

Keywords of the alphabetical index:

Civil servant, rights and obligations / Diplomatic service, age limit / Civil servant, age limit for post / ILO, Convention no. 111 / ILO, Recommendation no. 162.

Headnotes:

The right to labour does not mean that the State guarantees employment for every individual, but that it provides them with equal opportunities to exercise this right.

Where the legislature has established, within the limits of its authority, upper age limits for civil servants and local government employees, this does not constitute a violation of the principle of equality.

Summary:

Forty-seven People's Deputies submitted a petition to the Constitutional Court, seeking clarification as to the compliance with the Constitution of the provisions of Article 23 of the Law on the Civil Service, Article 18 of the Law on Service within Local Government, and Article 42 of the Law on Diplomatic Service. These provisions stipulate that the upper age for tenure in the Civil Service, in local government and in the diplomatic service is sixty years of age for men and fifty-five for women.

Article 43.1 and 43.2 of the Constitution envisage a universal right to labour. This includes the possibility of earning a living through work that the individual has freely chosen or agreed to do. The State creates conditions for citizens to exercise their rights to labour to the full. It also guarantees equal opportunities in the choice of profession and the type of labour activity.

The constitutional right of citizens to labour means that they are all able to earn a living through labour, to freely choose their profession or area of specialisation according to their abilities and wishes, to work under a contract of employment for an employer or to supply themselves with work independently.

Civil service and service in local government are examples of citizens' labour activity.

Under Article 38.2 of the Constitution, citizens enjoy equal rights of access to the civil service and to service within local government. This norm of the Fundamental Law does not provide for the division of the civil service into legislative, executive and judiciary power. Under Articles 38.2 and 92.1.12 of the Constitution, the fundamental elements of the Civil Service are defined exclusively by legislation. It follows, therefore, that the Civil Service is unified by these fundamental elements. The institution of the Civil Service is regulated by the Law on Civil Service". Its status within the apparatus of separate bodies, particularly with regard to the staff of the diplomatic service and the state taxation service, is defined in the legislation governing those bodies.

Service in local government institutions, which, under the Constitution are not bodies of state power, is regulated by the "Law on Service in Local Government Institutions.

Age limits for employment within the Civil Service, the diplomatic service and local government, are determined by the tasks and functions of these bodies and the special nature of their activity.

The attainment of the upper age limit is one of the grounds for termination of employment in the Civil Service (Article 30.1.3 of the Law on Civil Service), within local government (Article 20.1.6 of the Law on Service within Local Government), and the diplomatic service (Article 41.2.3 of the Law on Diplomatic Service).

Some of the provisions of the above legislation allow for the possibility of prolongation of tenure in the Civil Service and the local government, taking into consideration the personal professional qualities and creative potential of those who are over the upper age limit.

Accordingly, where the legislature has established, within the limits of its authority, upper age limits for civil servants and local government employees, this does not constitute a violation of the principle of equality.

The content of Article 38.2 of the Constitution regarding the right of access to the Civil Service and to service within local government is based on the constitutional principle of equality of citizens.

Article 24.1 of the Constitution guarantees the equality of citizens before the law. However, it is important to recognise that there may be distinctions between privileges or restrictions within legislation that does not have the characteristics envisaged by Article 24.2 of the Constitution. In general, under the above-mentioned principle, the establishment of privileges or restrictions based on social or personal characteristics is inadmissible. It is not, however, absolute. Thus, bodies of state power, when implementing policies of an economical or social character, have a discretion to impose restrictions on some types of work in the light of special requirements, conditions and rules.

Article 24.1 of the Constitution guarantees equality of rights and freedoms of citizens and their equality before the law, and stipulates the inadmissibility of privileges or restrictions based on characteristics envisaged by paragraph 2 of this article. This does not preclude differences in the legal regulation of individuals working in different spheres of employment.

Concern was raised in the constitutional petition about placing age among "other characteristics" based on which there shall not be privileges or restrictions. The following observations were made.

Under Article 24.2 of the Constitution, age does not feature among the characteristics based on which there shall not be privileges or restrictions. Age cannot be placed among these "other characteristics". Age can be thought of as a "changeable category". Citizens proceed sequentially from one age group to the next, forfeiting the rights and privileges of one age group, and becoming subject to certain restrictions, but also acquiring different rights for their new age group. In this respect, all people are equal and differ only by age. Setting age limits should not, therefore, be considered as infringing the principle of equality before the law for all.

The upper age limit for civil servants and local government employees is *de facto* pension age for this category of workers.

When the legislator sets an upper age limit, this is a matter of social or economical expediency, based upon specific labour requirements. It does not constitute a restriction on the right to labour and the guarantee of equal possibilities in choosing a profession, or type of labour activity.

Under the International Covenant on Economic, Social and Cultural Rights of 1966, the State may only impose such limitations on these rights by legislation and only insofar as this is compatible with the nature of these rights, and solely for the purpose of promoting the general welfare in a democratic society (Article 4).

Article 1.2 of the Convention of the International Labour Organisation on Discrimination (Employment and Occupation) of 1958, no. 111 provides that "any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."

Chapter II.5 of the Recommendation of International Labour Organisation on Older Workers of 1980, no. 162 states that, in exceptional cases, age limits may be set because of special requirements, conditions or rules of certain types of employment.

The same approach was applied by the Council of the European Union in Article 6 of the Council's Directive no. 2000/78/EC of 27 November 2000 which sets the general framework of equal treatment during employment and in labour activity. The Directive stipulates that Member States may define that difference in treatment based on the age characteristic shall not constitute discrimination if, in the context of domestic law, such a difference is objectively and rationally grounded by lawful aim, including a legitimate policy in the sphere of employment, labour market and vocational training objectives, provided the means of achieving such an aim are due and necessary.

Accordingly, international law allows for the possibility of setting, within national legislation, some age restrictions on the exercise of particular types of labour activity.

Languages:

Ukrainian.

Identification: UKR-2007-3-009

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 16.10.2007 / **e)** 9-rp/2007 / **f)** On the official interpretation of provisions of Article 11.6 of the Law " On political parties in Ukraine" (a case about establishing and registration of party organisations) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.5.2 Institutions – Legislative bodies – **Powers**.
4.5.10.1 Institutions – Legislative bodies – Political parties – **Creation**.

Keywords of the alphabetical index:

Political party, registration / Political party, regional representation.

Headnotes:

Article 92.1.11 of the Constitution provides that the principles of the establishment and the activity of political parties are determined exclusively by the laws of Ukraine. A question about the quantity of party organisations needed at district level falls within the remit of Parliament.

Summary:

Under Article 133.2 of the Constitution, Ukraine is composed of 27 administrative-territorial units of oblast and entities that are on an "oblast level", namely twenty-four oblasts, the Autonomous Republic of Crimea, and the Cities of Kyiv and Sevastopol.

In its decision of 12 June 2007, no. 2-rp/2007, *Bulletin* 2007/2 [UKR-2007-2-002] in a case regarding the establishment of political parties in Ukraine, the Constitutional Court recognised all the listed administrative-territorial units as having equal status and rights over the establishment of political parties. The provisions of Article 11.6 of the Law on Political Parties in the Ukraine, which required all political parties to establish party organisations in the Autonomous Republic of Crimea, were pronounced to be unconstitutional.

Article 11.6 of the Law also requires political parties to establish and register, in accordance with the Law, their oblast organisations in the majority of the oblasts, the Cities of Kyiv and Sevastopol and the Autonomous Republic of Crimea. This should be interpreted as an obligation on a political party to establish and to register oblast party organisations, and those equated to oblast, in no less than 14 out of 27 administrative-territorial units listed in Article 133.2 of the Constitution.

Under the above legislation, the relevant officials of the Ministry of Justice should only register oblast party organisations and those of oblast status after the political party registration by the Ministry of Justice (Article 11.7). There are provisions within the political party statutes as to the order in which they are to be established (Article 8).

In summary, in the Ukraine, each political party may establish twenty-four oblast party organisations and (ones of equivalent status), including the republican party organisation of the Autonomous Republic of Crimea and the city party organisations of the Cities of Kyiv and Sevastopol. Under Article 24 of the Law, the presence of oblast organisations and those of equivalent status in less than fourteen of the listed administrative-territorial units would be grounds for the annulment of a political party certificate.

Having examined the provisions of Article 11.6 of the Law in the context of other legislation, the Constitutional Court concluded that there was insufficient regulation within this and other provisions of the Law of party organisation at district level.

The establishment of the structure of political organisations lies at the heart of their activity. Article 92.1.11 of the Constitution provides that the principles of the establishment and the activity of political parties are determined exclusively by the laws of Ukraine. A question about the quantity of party organisations needed at district level falls within the remit of Parliament. Based on Article 45.3 of the Law on the Constitutional Court, the constitutional proceedings as to the official interpretation of Article 11.6 of the Law should be terminated. The issue arising from the constitutional petition does not fall under the jurisdiction of the Constitutional Court.

Languages:

Ukrainian.

Identification: UKR-2007-3-010

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 25.10.2007 / **e)** 10-rp/2007 / **f)** On the official interpretation of the provisions of Article 50.4 of the Law “On Public Prosecutor’s Office” / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces**.
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

Keywords of the alphabetical index:

Insurance, social, mandatory / Army, personnel, status / Prosecutor’s office, social security.

Headnotes:

The guarantee of mandatory state insurance covers all employees of the public prosecution service, irrespective of the category into which they fall. In particular, the Ukrainian legislation on this subject covers military personnel working as prosecutors within the public prosecution service.

Summary:

I. Citizen Mnyshenko S.K. asked the Constitutional Court for an official interpretation of the applicability of various provisions of Article 50.4 of the Law on the Public Prosecutor’s Office, referred to here as “the Law”, to employees of military prosecutor’s offices. This legislation provides for mandatory state life and health insurance for employees of the Prosecution Office. The respective budgets have provision for this.

The Cabinet of Ministers establishes the conditions for insurance.

Article 46 of the Constitution sets out citizens' rights to social protection, including provision in the event of total, partial or temporary loss of ability to work. This right is guaranteed by mandatory state social insurance, funded by insurance contributions, and by insurance payments under mandatory insurance in accordance with Article 999 of the Civil Code.

Mandatory state life and health insurance for employees of the public prosecution service forms part of their social protection (Article 50.4 of the Law). The procedure and conditions for this insurance can be found in Resolution no. 486 of the Cabinet of Ministers on this subject, dated 19 August 1992, referred to here as "Resolution no. 486".

By virtue of Article 121 of the Constitution, and Articles 6 and 13 of the Law, military prosecution offices belong to a unified system of public prosecution offices. Systematic analysis of Articles 15, 16, 46, 46-1, 50, and 50-1 of the Law would suggest that the personnel of public prosecution offices also constitute a unified system. For instance, military personnel of military prosecution offices may hold the office of public prosecutors (Article 56 of the Law), while investigators at public prosecution offices are employees of the public prosecution office.

II. Having examined the provisions of Article 50 of the Law, the Constitutional Court observed that the State had set out the same guarantees of life and health insurance for all individuals holding the office of public prosecutors and working as investigators at the public prosecution office, including military personnel. The probability of claims under the insurance, the possibility of damages and the extent of an insurer's liability are also connected with the holding by Ukrainian citizens of the post of public prosecutor. Under Paragraph 3 of Resolution no. 486, the General Prosecution Office is one of the insurers. The norms of the Law and subordinate legislation contain no exceptions to the above obligations on the part of the General Prosecution Office concerning any category of public prosecutors.

Article 46-1.2 of the Law makes reference to the fact that the military personnel of military prosecution offices operate according to the Law on the Social and Legal Protection of Military Personnel and their Family Members, dated 20 December 1991, no. 2011–XII (referred to here as Law no. 2011-XII). They also operate under other legislation, setting out legal and social guarantees, pension, medical and other types of provision relating to the officer cadre of the Armed Forces. Some of this does not apply to other employees in the public prosecutor's office. Examples would include the holding of officer rank and the way this is conferred, provision for rations and clothing, uniform and certain privileges and compensation.

The Constitutional Court took note of Article 17.5 of the Constitution, Article 16 of Law no. 011-XII and Article 1 of the Conditions approved by Resolution no. 488 of the Cabinet of Ministers as at 19 August 1992. These deal with mandatory state personal insurance for military personnel and those liable for conscription into the military service, and the procedure for paying insurance sums to them and their families. The above legislation covers military personnel who serve as public prosecutors only where insurance events occur during their performance of military duties. Such cases fall within another category of insurance payments, and various legislation will apply, depending on the circumstances surrounding the insurance events.

The Constitutional Court accordingly concluded that the provisions of Article 50.4 of the Law applied to all public prosecutors, particularly those serving as military personnel at military prosecution offices.

Languages:

Ukrainian.

Identification: UKR-2007-3-011

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 11.12.2007 / **e)** 11-rp/2007 / **f)** On the official interpretation of the provisions of Article 129.3.8 of the Constitution, Article 383.2 of the Code of Criminal Procedure / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

Keywords of the alphabetical index:

Criminal proceedings, refusal to initiate, cassation complaint.

Headnotes:

There is a link between provisions in the Ukrainian Constitution and Code of Criminal Procedure. They should be interpreted as allowing for the possibility of an examination into the cassation of decisions by local and appeal courts on rulings arising from the refusal to initiate criminal proceedings.

Summary:

I. Citizen Kasyanenko B.P. asked the Constitutional Court for an official interpretation of the provisions of Article 129.3.8 of the Constitution, and Article 383.2 of the Code of Criminal Procedure.

He suggested that an official interpretation was needed because the Supreme Court was applying the norms differently when examining cassation applications against decisions by local and appeal courts, in cases arising from the refusal to initiate criminal proceedings.

II. The Constitutional Court concluded that decisions by local and appeal courts in cases of public and private prosecution which left unanswered complaints on rulings on refusal to initiate criminal proceedings, posed a problem. They obstructed future proceedings, in that they precluded the possibility of conducting pre-trial inquiries and consideration by a court. The only exception would be where an appeal court overturned a local court's decision and referred the case for a fresh trial.

Article 129.3.8 of the Constitution states that a basic tenet of the judiciary is the guarantee of the possibility of review of court decisions upon appeal and at cassation. Article 383.2 of the Code of Criminal Procedure enshrines the possibility of an examination in cassation of rulings that hinder further proceedings in a case and appeal court decisions on those rulings. Article 384 of the Code of Criminal Procedure sets out a list of subjects with the right to complain in cassation or to submit a cassation application as to the mentioned courts' decisions. There is a link between all three provisions. The Constitutional Court accordingly concluded that, leaving aside those who are entitled to submit cassation applications pursuant to Article 384.4 of the Code of Criminal Procedure, anybody who has launched a judicial appeal against a ruling on refusal to initiate criminal proceedings also has the right to submit a cassation complaint.

Languages:

Ukrainian.

Identification: UKR-2007-3-012

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 11.12.2007 / **e)** 12-rp/2007 / **f)** On the official interpretation of the provisions of Article 85.1.12 of the Constitution in the context of the provisions of Articles 114.4, 115.2 and 115.3 of the Constitution (case on the procedure of termination of the authority of the members of the Cabinet of Ministers) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

2.3.5 Sources – Techniques of review – **Logical interpretation**.
2.3.8 Sources – Techniques of review – **Systematic interpretation**.
3.4 General Principles – **Separation of powers**.
4.4.1 Institutions – Head of State – **Powers**.
4.6.4.3 Institutions – Executive bodies – Composition – **End of office of members**.

Keywords of the alphabetical index:

Government, member, dismissal from office, approval by President.

Headnotes:

The phrase "dismissal of the mentioned persons from office" of the provisions of the Ukrainian Constitution for dismissal of Cabinet Ministers embraces the dismissal of a number of officials. These include members of the Cabinet of Ministers, the Prime Minister, the Minister of Defence, the Minister for Foreign Affairs, the Chairman of the Anti-Monopoly Committee, the Chairman of the State Committee on Television and Radio Broadcasting, and the Chairman of the Fund of State Property.

Parliament does not need a submission from the President, in order to exercise its authority to dismiss from office the Prime Minister, Minister of Defence, and the Minister for Foreign Affairs.

Summary:

Forty six People's Deputies applied to the Constitutional Court for an official interpretation of the provisions of Article 85.1.12 of the Constitution in the context of the provisions of Articles 114.4, 115.2 and 115.3 of the Constitution.

The Constitutional Court observed that various methods of interpretation of Article 85.1.12 were needed, in order to provide a response on the necessity of the President's submission to Parliament to dismiss from office the Prime Minister, Minister of Defence and Minister for Foreign Affairs.

A grammatical and logical interpretation of Article 85.1.12 of the Constitution does not, *per se,* justify the President's submission to Parliament to carry out the above dismissals. There is no syntactic connection between the words "upon the submission of the President" and "dismissal of the mentioned persons from office, resolution of the issue of the resignation of the Prime Minister or members of the Cabinet of Ministers".

Under Article 106.1.10 of the Constitution, the President makes a submission to Parliament on the appointment of the Minister of Defence, and the Minister for Foreign Affairs. However, there is no stipulation amongst the President's authorities in this and other articles of the Fundamental Law for the introduction of a submission to Parliament on dismissal from office or on resignation of members of the Cabinet of Ministers.

When carrying out a systematic interpretation of Article 85.1.12 of the Constitution, one should view it against the background of Articles 85.1.12-1, 85.1.18 and 85.1.21 of the Constitution. Under these provisions, there is no need for the President to make a submission to Parliament for the dismissal of the Prime Minister, Minister of Defence and Minister for Foreign Affairs from office or to resolve issues surrounding their resignation. However, the norms of Articles 85.1.12-1, 85.1.18 and 85.1.21 of the Constitution differ from those of Article 85.1.12, in that they clearly determine Parliament's authority to appoint and to dismiss from office the Chairman of the Security Service, the Chairman of the National Bank, and members of the Central Election Commission, upon the submission of the President.

Where Parliament is exercising its constitutional authority in dismissing the Prime Minister, Minister of Defence and the Minister for Foreign Affairs without a submission by the President, this is not in conflict with the constitutional and legal principle of the separation of powers in Ukraine, as set out in Article 6.1 of the Constitution.

Judges V.D. Bryntsev and M.A. Markush submitted dissenting opinions.

Supplementary information:

After the People's Deputies had lodged this constitutional petition with the Constitutional Court, the Law "On the Cabinet of Ministers" came into force. It regulates the very issues raised by the Deputies, such as the necessity of a submission from the President or the Prime Minister when dismissals from the Cabinet of Ministers are taking place, whether dismissal from office of the Prime Minister would entail dismissal of the Cabinet of Ministers as a whole, and the procedure for dismissing Cabinet members.

Languages:

Ukrainian.

Identification: UKR-2007-3-013

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 20.12.2007 / **e)** 13-rp/2007 / **f)** On the official interpretation of the provisions of Article 14.2 of the Law on Cinematography (case on distribution of foreign films) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

2.1.1.4.16 Sources – Categories – Written rules – International instruments – **Framework Convention for the Protection of National Minorities of 1995**.
4.3.1 Institutions – Languages – **Official language(s)**.
4.3.4 Institutions – Languages – **Minority language(s)**.
5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication**.
5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities**.

Keywords of the alphabetical index:

Language, film, dubbing, obligatory / Language, regional or of minority, Charter / Media, audiovisual, film, dubbing.

Headnotes:

The Constitutional Court concluded that the obligation to respect the provisions of the Article 14.2 of the Law governing compulsory dubbing, post-synchronising or sub-titling into the state language of foreign films before their distribution in Ukraine does not violate the rights of national minorities to use their languages in the cinematographic field.

Summary:

This constitutional petition raised questions over the Ukrainian law on cinematography, and the dubbing, post-synchronisation or sub-titling of foreign films into the state language. The Constitutional Court ruled that the relevant provisions of this legislation should be understood as meaning that it will not be possible to distribute and show foreign films in the Ukraine, unless they have been dubbed, post-synchronized or sub-titled. The central executive body responsible for cinematography has no right to grant the subjects of cinematography the right to distribution and demonstration of such films and to issue a respective state licence.

Under Article 1 of the Constitution, Ukraine is a sovereign and independent, democratic, social, legal state. Human rights and freedoms and their guarantees determine the content and orientation of the activity of the state (Article 3.2 of the Constitution). The state language in Ukraine is the Ukrainian language; the state ensures its comprehensive development and functioning in all spheres of public life throughout the territory of Ukraine (Article 10.1 and 10.2 of the Constitution). The free development, use and protection of Russian and other languages of national minorities in Ukraine is guaranteed (Article 10.3 of the Constitution). The State promotes the consolidation and development of the Ukrainian nation, its historic consciousness, traditions and culture, as well as development of modern ethnic, cultural, linguistic and religious identities of all indigenous peoples and national minorities in Ukraine (Article 11 of the Constitution).

Under Article 6 of the Law on Cinematography, the role of languages from the perspective of cinematography is covered in Article 10 of the Constitution.

In its Decision of 14 December 1999 no. 10-rp/99, which was a case on the use of the Ukrainian language, the Constitutional Court gave an interpretation of Article 10 of the Constitution. The judgment states that the public spheres in which the State language shall be used include, primarily, the spheres of the realisation of the authorities by bodies of legislative, executive and judicial power, other state bodies and bodies of local self-government (language of work, acts, records and documentation, language of interrelations between these bodies, etc.). Articles 10.5 and 92.1.4 of the Constitution state that the spheres of application of the state language are determined by law.

Under Article 6 of the Law on the Fundamentals of National Security of Ukraine, one of the main priorities of Ukrainian national interest is the guarantee of the development and functioning of the Ukrainian language as the state language in all spheres of public life throughout the territory of Ukraine, as well as the free development, use and protection of Russian and other languages of national minorities. The relevant legislation here is the Law on Languages in the Ukrainian SSR as of 28 October 1989 (effective according to item 1 Chapter XV “Transitional Provisions” of the Constitution in that part that does not contradict the Fundamental Law). Here, the State guarantees the functioning of the Ukrainian language and other national languages in the sphere of cultural life. In order to improve its citizens’ knowledge of the achievements of the world culture, it provides translations into Ukrainian and other national languages and publishing of fiction, political, scientific and other literature. It also provides translation into Ukrainian and public demonstration of films and other audiovisual works.

The legal basis for state activity in the realms of cinematography and the regulation of production, distribution, storage and demonstration of films are determined by Law. In fact, the procedure for the application of state languages and national minority languages in the sphere of cinematography can be found in Articles 10 and Article 92.1.4 of the Constitution, in the legal position of the Constitutional Court in the Decision mentioned above, and in Articles 6 and 14 of the Law on Cinematography. Under Article 2 of the Law on Cinematography, this procedure extends to legal entities regardless of their forms of property, and individuals with a professional involvement in cinematography in Ukraine.

Article 14.2 of the Law stipulates that prior to distribution in Ukraine, foreign films must be dubbed, post-synchronised or sub-titled into the state language. They may also be dubbed, post-synchronised or sub-titled into national minority languages.

Logic and grammatical analysis of the content of the norm lead to the conclusion that the legislature placed an obligation upon all those involved in cinematography to dub, post-synchronise or sub-title foreign films into Ukrainian before their distribution in

Ukraine. The combination of words “in the obligatory manner” used by the legislator with the words “they also” testifies to this. Unless the requirements set out in Article 14.2 of the Law are met, the subject of cinematography has no right to obtain permission to distribute and demonstrate foreign films in Ukraine. Foreign films may also be dubbed, post-synchronised or sub-titled into national minority languages.

Article 3 of the Law on Cinematography contains the notion of “film distribution” (release). This entails the production of copies of a film (replication), and selling and transferring them upon release to legal entities and individuals. The term “film demonstration” (public show, public notification and public demonstration,) means professional cinematographic activity consisting of the demonstration of a film to viewers in special premises (movie theatres, other cinema institutions), on video-sets, as well as on TV-broadcasting channels. The document that confirms the right to distribution and demonstration of national and foreign films on all types of image carriers and establishes the terms of distribution and demonstration, is the state licence to the right to distribute and demonstrate films. This is given to the subjects of cinematography by a central executive body with responsibility for cinematography (Article 15 of the Law).

Analysis of the above provisions leads to the conclusion that the provisions of Article 14 of the Law on Cinematography as to the mandatory dubbing or post-synchronising or sub-titling into the state language before their distribution in Ukraine apply to all copies of a film that are distributed in Ukraine, including those used for demonstration of such films. If these provisions are not observed, the central executive body with responsibility for cinematography has no right to issue a state licence bestowing rights to distribution and demonstration of foreign films to such subjects.

The free development, use and protection of Russian and other national minority languages is guaranteed under Article 10.3 of the Ukrainian Constitution.

On 9 December 1997, Ukraine ratified the Framework Convention on the Protection of National Minorities of February. This Convention obliges signatory states to create all necessary conditions for individuals belonging to national minorities to be able to maintain and develop their languages (Article 5.1).

A law dated 15 May 2003 ratified the European Charter for Regional or Minority Languages. This law stipulates that “the Charter’s provisions shall apply to the languages of the following national minorities of Ukraine: Belarusian, Bulgarian, Gagauz, Greek, Jewish, Crimean Tatar, Moldavian, German, Polish, Russian, Romanian, Slovak and Hungarian (Article 2). Article 12 of the above Charter imposes an obligation upon Ukraine to promote access for regional languages or languages of national minorities to works which are created in other languages, supporting and developing the activity in the sphere of translation, dubbing, post-synchronising or sub-titling (sub-item “c” item 1).

The Constitutional Court analysed Article 10 of the Constitution and other relevant legislation, including international legal acts ratified by Ukraine, regulating the issue of the application of state languages and languages of national minorities, the Constitutional Court concluded that the obligation to respect the provisions of the Article 14.2 of the Law governing compulsory dubbing, post-synchronising or sub-titling into the state language of foreign films before their distribution in Ukraine does not violate the rights of national minorities to use their languages in the cinematographic field.

Languages:

Ukrainian.

United Kingdom
House of Lords

Important decisions

Identification: GBR-2007-3-001

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 31.10.2007 / **e)** / **f)** Secretary of State for the Home Department v. JJ & Others / **g)** [2007] *UKHL* 45 / **h)** [2007] 3 *Weekly Law Reports* 642; CODICES (English).

Keywords of the systematic thesaurus:

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures**.

Keywords of the alphabetical index:

Terrorism, prevention, control order / Terrorism, suspect.

Headnotes:

The imposition of control orders under Section 1.2.a of the Prevention of Terrorism Act 2005, which involved no derogation from the obligation imposed by Article 5 ECHR, were so restrictive that they amounted to a deprivation of liberty. They therefore unlawfully infringed the Article 5 ECHR right and were nullities. The Court had no option but to quash them.

Summary:

I. This was the first of four conjoined appeals arising from a decision by the Secretary of State to impose control orders on a number of individuals. He did so as there were said to be reasonable grounds for suspecting them of involvement in activities relating to terrorism. None of the individuals had however been charged with any terrorism offences. The orders were believed to be necessary for the protection of the public. They required the individuals to: wear an electronic tagging device at all times; except for the period between 10.0 and 16.0 hours each day, to remain within a specified residence; to permit the police to search the specified residence at any time, and to remain within a restricted specified area during the period when they were not confined to the specified residence. They also prohibited the individuals from either meeting anyone whilst outside the specified residence or having visitors at the specified residence without obtaining prior approval from the Home Office. Finally, they prevented the individuals concerned from possessing or using communication devices other than a single, permitted and monitored fixed phone line. The order was quashed at first instance. An appeal to the Court of Appeal by the Secretary of State was dismissed. The appeal was renewed before the House of Lords.

It was common ground between the parties that the Article 5 ECHR prohibition on the deprivation of liberty had to be given an autonomous meaning. The UK courts were to be guided by the principles set out in the jurisprudence of both the European Commission and the European Court of Human Rights (the Strasbourg Court) as to that meaning. That jurisprudence recognised a distinction between the deprivation of liberty, which contravened Article 5 ECHR, and a restriction on movement, which did not: see *Engel v. The Netherlands* (no. 1) 1 *European Human Rights Reports* 647 and *Guzzardi v. Italy* (1980) 3 *European Human Rights Reports* 333 (*Guzzardi*). It also established that 24-hour house arrest was to be regarded as a deprivation of liberty given its close analogy to physical imprisonment. It was, however, recognised that an individual could be deprived of his liberty in a way that fell foul of Article 5 ECHR, due to constraints being imposed that differed from imprisonment. In assessing whether or not a deprivation of liberty had taken place, a court had to look at the particular circumstances in which the complainant had been placed. In making that assessment the Strasbourg Court had held that a number of factors had to be considered e.g., the nature, duration, effects and manner of execution of the penalty or measure imposed on the complainant as well as its implementation.

On appeal, the Secretary of State submitted that the judge at first instance and the Court of Appeal in upholding the decision that the control orders amounted to an unlawful deprivation of liberty had made five errors of principle. The judge and the Court of Appeal were said to have given too broad an interpretation to the meaning of liberty, which they interpreted as an individual's freedom to do as he wished. They were also said to have wrongly taken account of the extent of the interference by the orders in the individuals' everyday life, to have wrongly taken account of other rights protected by the European Convention on Human Rights, to have wrongly given

a wider interpretation of liberty than justified by the Strasbourg court's judgment in *Guzzardi*, and to have given too great a weight to the individual and idiosyncratic features of the orders imposed.

II. By a majority, the House of Lords rejected the Secretary of State's appeal. The approach adopted by the judge and the Court of Appeal was the correct approach. A court assessing whether there was a deprivation of liberty had to consider the factors set out by the Strasbourg Court. It was clear that when considering the actual life the individuals were required to lead under the regime imposed by the control orders that the restriction on liberty imposed amounted to a deprivation of liberty. The starting point was the 18 hour curfew imposed. When looked at in combination with the severe restrictions on freedom imposed by those aspects of the orders which dealt with the 6 hour non-curfew period it was plain that every aspect of their lives was substantially and substantively controlled. As Baroness Hale observed, in several respects the control imposed by the orders was more severe than that which would be expected by a prison inmate.

Lords Hoffman and Carswell delivered dissenting judgments. Lord Hoffman dissented on the basis that Article 5 ECHR was concerned with literal physical restraints imposed on liberty. Unlike Articles 8 and 2 Protocol 1 ECHR, which were engaged by the control orders, Article 5 ECHR was an unqualified right. Only Article 5 ECHR was in issue. Article 5 ECHR was not infringed by restrictions placed on liberty in a broad sense i.e., through the imposition, as in this case, of restrictions on the right to communicate with others or the right to movement. Those rights are protected by other aspects of the European Convention on Human Rights and not Article 5 European Convention on Human Rights. Article 5 protects individual liberty in the sense that it protects an individual's personal autonomy and dignity. Deprivation of liberty requires an individual to be made entirely subject to the will of another. The Court ought to maintain a clear distinction between the unqualified right to liberty and the qualified rights to movement, communication and association within the European Convention on Human Rights. Lord Carswell concurred with Lord Hoffman and emphasised what he understood to be the limited range of application which the framers of the European Convention on Human Rights intended Article 5 to have. That limited range necessitated incorporating the other, qualified, rights referred to by Lord Hoffman, into the European Convention on Human Rights There was therefore no need for a purposive interpretation of Article 5 which would in effect extend it to cover rights protected by other aspects of the European Convention on Human Rights.

Cross-references:

- *Secretary of State for the Home Department v. E.* [2007] UKHL 47, [2007] 3 *Weekly Law Reports* 720, *Bulletin* 2007/3 [GBR-2007-3-003];
- *Secretary of State for the Home Department v. MB & Another* [2007] UKHL 46, [2007] 3 *Weekly Law Reports* 681, *Bulletin* 2007/3 [GBR-2007-3-002].

Languages:

English.

Identification: GBR-2007-3-002

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 31.10.2007 / **e)** / **f)** Secretary of State for the Home Department v. MB & Another / **g)** [2007] *UKHL* 46 / **h)** [2007] 3 *Weekly Law Rep*orts 681; CODICES (English).

Keywords of the systematic thesaurus:

2.1.3.1 **Sources** – Categories – Case-law – Domestic case-law.
2.1.3.2.1 **Sources** – Categories – Case-law – International case-law – European Court of Human Rights.
5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.

Keywords of the alphabetical index:

Terrorism, suspect, freedom, depriving, measure.

Headnotes:

A non-derogating control order made under the Prevention of Terrorism Act 2005 (the 2005 Act) did not breach Article 5 ECHR. The purpose of such control

orders was preventative rather than punitive or retributive. They did not amount to criminal charges, nor did their imposition amount to the determination of a criminal charge. They did however fall under the civil limb of Article 6.1 ECHR. A court had to ensure that an individual who wished to challenge such an order obtained a level of procedural justice commensurate to the gravamen of the order's consequences. The use of material within proceedings arising out of the imposition of such an order which was not made available for national security or similar reasons to individuals made subject to such orders (closed material) was permissible. The court's role was to ensure that the proceedings as a whole were fair. The provision of special advocates could mitigate procedural imbalances generated by the use of closed material. The 2005 Act and the related procedural rules had however to be read so as to ensure that the irreducible core of the Article 6.1 ECHR right was not infringed.

Summary:

I. This was the third of four conjoined appeals arising from a decision by the Secretary of State to impose control orders.

There was a material difference between the control order which was the subject of appeal in this case and those imposed in *Secretary of State for the Home Department v. JJ & Others* [2007] UKHL 45; [2007] 3 *Weekly Law Reports* 642 [GBR-2007-3-001]. The control order in this case imposed a 10 hour curfew and a number of other restrictions on movement and association. The Lords held that the level of restriction imposed by the curfew was not sufficient to amount to a deprivation of liberty.

The justification for imposing the control orders subject to this appeal lay in closed material, which had not been disclosed to the individuals subject to the orders or their representatives. Both appellants challenged the orders on the ground that this lack of disclosure of infringed their Article 6.1 ECHR right. The Secretary of State accepted that control orders fell under the protection afforded by the civil limb of Article 6.1 ECHR. One of the two appellants however pressed the contention that proceedings arising out of the imposition of control orders were criminal proceedings for the purposes of Article 6.1 ECHR.

II. The Lords rejected the argument. While it was noted that there were strong arguments in support of the contention, most notably those advanced by the House of Lords' Joint Committee on Human Rights in their 12th Report (2005 – 2006) and those evidenced by the difficulties which the Strasbourg Court had encountered in drawing a distinction between disciplinary and criminal proceedings (*Engel v. The Netherlands* (no. 1) (1976) *European Human Rights Reports* 647) control order proceedings could not properly be classified as criminal proceedings.

While there was UK jurisprudence on the distinction, the starting point for assessment was the Strasbourg court's decision in *Engel*. This was because Article 6.1 ECHR is to be given an autonomous meaning applicable to all Council of Europe member states irrespective of their domestic jurisprudence. Convention jurisprudence preferred substance to form. The appellant submitted that control orders involved, in substance, a charge or accusation of criminal conduct. The Lords accepted that there was force in this argument. It was, however right to say, as the Secretary of State did, in his submissions, that there was no criminal charge involved when a control order was imposed. The Secretary of State also submitted that the imposition of a control order exposed an individual to no punishment and gave rise to no risk of conviction. A further distinction could be drawn between measures that, on the one hand, were preventative and those that on the other hand were punitive, retributive or aimed at deterrence. Such a distinction had been drawn in a number of Strasbourg authorities.

The Lords held that Parliament had been careful to ensure that the control order regime did not involve criminal proceedings. The orders were preventative and could go no further than necessary in serving that preventative purpose; they did not involve the determination of any criminal charge. They did not give rise to the identification of any specific criminal offence; they were simply based on the suspicion of criminal conduct. That being said, they clearly did fall under the civil limb of Article 6.1 ECHR and is so doing those subject to such orders were entitled to a level of procedural protection appropriate to the gravamen of their potential consequences.

The Lords then looked at whether it was permissible to rely on closed material in control order proceedings. It was well-established that the right to be heard was a fundamental aspect of natural justice and Article 6.1 ECHR. It was also well-established that Article 6.1 ECHR was not an absolute right. In a number of cases the Strasbourg Court had held trials to be unfair due to material being relied on by the decision-maker which was not made available to one of the parties: *Feldbrugge v. The Netherlands* (1986) 8 EHRR 425. Strasbourg had however not examined a case such as the present one. The use of special advocates provided a measure of procedural justice that, when the Court looked at the procedure as a whole, enabled the Lords to hold that it did not give rise to an injustice significant enough to breach Article 6.1 ECHR. However, this would not necessarily be the case in all circumstances. There

was an irreducible core to Article 6.1 ECHR. Where either statute or the court's procedure could not ensure that that core was not impinged upon, there would be a breach of the right and of the rule of law. Absent derogation from the Article 6.1 ECHR right, the Court had to ensure that the right's central core was protected.

Cross-references:

- *Secretary of State for the Home Department v. JJ & Others* [2007] UKHL 45, [2007] 3 *Weekly Law Reports* 642, *Bulletin* 2007/3 [GBR-2007-3-001];
- *Secretary of State for the Home Department v. E.* [2007] UKHL 47, [2007] 3 *Weekly Law Reports* 720, *Bulletin* 2007/3 [GBR-2007-3-003].

Languages:

English.

Identification: GBR-2007-3-003

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 31.10.2007 / **e)** / **f)** Secretary of State for the Home Department v. E. / **g)** [2007] *UKHL* 47 / **h)** [2007] 3 *Weekly Law Reports* 720; CODICES (English).

Keywords of the systematic thesaurus:

2.1.3.1 Sources – Categories – Case-law – **Domestic case-law**.
2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures**.

Keywords of the alphabetical index:

Terrorism, prevention, freedom, depriving, measure.

Headnotes:

A 12 hour curfew did not result in a deprivation of liberty contrary to Article 5 ECHR. It was not a condition precedent to the making of a non-derogating control order under Section 1.2.a of the Prevention of Terrorism Act 2005 (the 2005 Act) that there was no realistic prospect of a criminal prosecution of the subject of such an order. The 2005 Act did however place a continuing duty upon the Secretary of State to review the decision to impose such control orders upon individuals who were reasonably suspected of being involved in terrorism-related activities. The Secretary of State was under a duty to take reasonable steps to ensure that such a review was meaningful and to ensure that the police were provided with such material in his possession which was or might be relevant to a decision to prosecute the individual subject to the control order. It was implicit in the regime introduced by the 2005 Act that where there was evidence sufficient to justify bringing a criminal prosecution that such would be brought against an individual. In such circumstances, it would be inappropriate to impose a control order.

Summary:

I. This was the second of four conjoined appeals arising from a decision by the Secretary of State to impose control orders on a number of individuals suspected of involvement in terrorism-relate activities.

II. The Lords held that there were material differences in the restrictions incorporated in the control order imposed on the individual (E.) which formed the subject matter of this appeal and those imposed in the control orders which were the subject of the appeal in *Secretary of State for the Home Department v. JJ & Others* [2007] *UKHL* 45; [2007] 3 *Weekly Law Reports* 642 [GBR-2007-3-001]. The curfew period in this case only lasted 12 hours per day. The subject of the order was able to live at home with his family. He was not subject to any geographical restriction on his movement during non-curfew hours. He could attend a mosque of his choice and was not barred from associating with named individuals, although he was required to obtain the Secretary of State's permission before having visitors at home and before meeting people outside the home.

The curfew period was the starting point for assessing the legality of the control order. The 12-hour period was not a sufficiently stringent restriction to amount to an unlawful deprivation of liberty. Following the imposition of the control order, the Belgian Court handed down judgments which implicated E. in terrorism-related activities. The Secretary of State received copies of those judgments prior to his decision to renew the control order. Before taking that decision the police and prosecuting authorities informed the Secretary of

State that there was insufficient evidence to prosecute E. Neither authority had copies of the Belgian judgments.

The Lords stated that there could be no doubt that it was a fundamental aspect of the power to make control orders under the 2005 Act that where there were realistic prospects of an individual being prosecuted for terrorism-related activities, criminal proceedings would be pursued. In such circumstances it was impermissible to impose a control order because, as Lord Bingham stated, the power to make such orders was not intended to be an alternative to the ordinary processes of criminal justice.

E. argued, however, that it was a condition precedent to making a control order, in circumstances where an individual was suspected of involvement in the commission of a terrorism-related offence, that the Secretary of State had complied with the duty imposed by Section 8.2 of the 2005 Act. That section required the Secretary of State to consult the chief police officer as to whether there was evidence that was realistically available for prosecution purposes. The Lords held that given the statutory language it could not be said that compliance with the Section 8.2 duty was a condition precedent to the making of a control order; relevant conditions precedent were set out in Section 2.1 of the 2005 Act. The Secretary of State would however be expected to have complied with the Section 8.2 duty or, in the absence of compliance, to be in a position to provide a court with convincing reasons justifying non-compliance.

The Lords also rejected a submission from E. that before a control order could be made the Secretary of State had to be informed by the chief police officer that it was not feasible to bring a criminal prosecution which had a reasonable prospect of success. The Lords held that there was nothing in the 2005 Act to justify that submission being correct. To interpret the 2005 Act in this way would be to emasculate it and render the procedure it laid down ineffective. The UK Parliament could not be understood to have intended to introduce an ineffective procedure.

E. submitted that the Secretary of State failed to take proper steps to ensure that the decision to impose the control order was kept under review. The Court below had held it to be implicit in the 2005 Act that this duty was imposed upon the Secretary of State and that in discharging that duty he must take such steps as he reasonably could to ensure the continuing review was meaningful: *Secretary of State for the Home Department v. MB* [2007] QB 415 at paragraph 44 and *Secretary of State for the Home Department v. E.* [2007] 3 *Weekly Law Reports* 1 (Court of Appeal). The Secretary of State conceded that those statements of principle were correct. They were endorsed by the Lords, who held that, while it was regrettable that the Secretary of State had not informed the relevant authorities of the existence and nature of the Belgian court judgments, that did not justify a finding in this case that the Secretary of State had breached his continuing duty of review.

Cross-references:

- *Secretary of State for the Home Department v. JJ & Others* [2007] UKHL 45, [2007] 3 *Weekly Law Reports* 642, *Bulletin* 2007/3 [GBR-2007-3-001];
- *Secretary of State for the Home Department v. MB & Another* [2007] UKHL 46, [2007] 3 *Weekly Law Reports* 681, *Bulletin* 2007/3 [GBR-2007-3-002].

Languages:

English.

Identification: GBR-2007-3-004

a) United Kingdom / **b)** Privy Council / **c)** / **d)** 12.12.2007 / **e)** / **f)** Spiers (Procurator Fiscal) v. Ruddy (Scotland) / **g)** [2007] *UKPC* D 2 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.3.1 Sources – Categories – Case-law – **Domestic case-law**.
2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time**.

Keywords of the alphabetical index:

Criminal procedure, delay, compensation / Criminal procedure, delay, effects.

Headnotes:

Delay in the conduct of criminal proceedings did not amount to a continuing breach of Article 6.1 ECHR. Where there had been such a breach so that criminal proceedings had not been determined within a reasonable time, a court could award such redress as appropriate in light of relevant Strasbourg authorities. Because such a breach did not amount to a continuing breach of Article 6.1 ECHR, if a fair trial could still take place, the failure to determine the proceedings in a reasonable time did not preclude the authorities from continuing to prosecute the case against the defendant.

Summary:

I. The appellant was convicted in 1999 of driving whilst disqualified. On conviction he was sentenced to a further three year period of disqualification. In March 2002, he challenged the legality of that decision, on the grounds that it was made by a part-time judge (temporary sheriff), who was not therefore an independent tribunal as required by Article 6 ECHR. In May 2002, the appellant was again arrested for driving whilst disqualified. On arraignment, he challenged the legality of the charge brought against him on the grounds that the original (1999) conviction had been imposed by a part-time judge. The Privy Council dismissed that challenge in February 2006. The appellant subsequently issued proceedings before the Privy Council, in which he contended that his right to be tried within a reasonable period in respect of the May 2002 offence had been breached, and therefore the prosecuting authority had no power to continue those proceedings against him.

The appellant argued that because the criminal charge brought against him had not been determined within a reasonable time, a breach of his Article 6 ECHR right had taken place. He submitted that as a result, the criminal charges could not now lawfully be prosecuted, since the Lord Advocate, in whose name the prosecution was brought, was required by section 57.2 of the Scotland Act 1998 (the 1998 Act) not to act incompatibly with any rights set out within the ECHR.

II. The Privy Council refused to rule on the issue as to whether the criminal charges had been determined within a reasonable time. It stated that whether or not that was the case was a matter for the Scottish trial court.

The Privy Council observed that the substantive issue (whether it was incompatible with Article 6.1 ECHR to continue to determine a criminal prosecution where a fair trial was still possible following the lapse of a reasonable time) was complicated by the existence of two conflicting judgments of high authority. These were *R v. HM Advocate* [2002] *UKPC* D3; [2004] *Appeal Cases* 462, a decision of the Privy Council; and *Attorney General's Reference* (no. 2 of 2001) [2003] *UKHL* 68; [2004] 2 *Appeal Cases* 72, a decision of the House of Lords. The former decision held by a majority that where proceedings had not been determined in reasonable time any further steps to prosecute them would amount to a continuing breach of Article 6.1 ECHR. The latter decision held that, on the contrary, once proceedings had not been determined in reasonable time they could only be stayed if a fair trial was no longer possible or there was a compelling reason as to why it would be unfair to try the defendant. It therefore implicitly held that to continue to prosecute the proceedings would not give rise to a continuing breach of Article 6.1 ECHR.

The Privy Council held that the two decisions could not be reconciled; it had therefore to choose between them. Its decision was assisted by a body of Strasbourg jurisprudence that had arisen since both of the earlier decisions had been made.

It held that the Strasbourg jurisprudence demonstrated that where a breach of the right to trail within a reasonable period could give rise to a number of remedies, such as financial compensation, the reduction in a sentence arising out of a criminal conviction. The jurisprudence did not establish that such a breach amounted to a continuing breach which could only be cured by bringing the proceedings to an end prior to determination on their merits. It could be cured by the relevant court awarding such redress as would be effective in each individual case.

The Privy Council therefore went on to hold that the House of Lords' decision in *Attorney General's Reference (*no. 2 of 2001) was to be preferred to its own previous decision in *R v. HM Advocate*. The Lord Advocate would not therefore act incompatibly with his duty under Section 57.2 of the 1998 Act in continuing to prosecute the criminal case against the appellant even if the appellant's Article 6.1 right had been breached through unreasonable delay.

Languages:

English.

Identification: GBR-2007-3-005

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 12.12.2007 / **e)** / **f)** R (Al-Jedda) v. Secretary of State for Defence / **g)** [2007] *UKHL* 58 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.1 Sources – Categories – Written rules – International instruments – **United Nations Charter of 1945**.
2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.

Keywords of the alphabetical index:

Terrorism / Detention, without trial / Armed forces, use, abroad / Armed forces, use, within NATO / United Nation, Security Council, resolution.

Headnotes:

UK armed forces in Iraq were not there at the United Nation's behest. They were not mandated to operate under its auspices. They were not under its effective command and control. Their status was not analogous to that of NATO forces in Kosovo. UK armed forces' actions were not therefore attributable to the UN but, rather, to the UK. The UK was, however, required by various UN Security Council Resolutions ("UNSCRs") to intern without trial individuals in Iraq where it was necessary to do so for imperative security reasons. Article 25 of the UN Charter required member states to accept and carry out UNSC decisions. Article 103 of the UN Charter established that in the event of a conflict between that obligation and a member state's obligation under any other international agreement, the former took precedence. The Article 103 UN duty is unqualified. It prevails over the Article 5 ECHR prohibition on internment. The UK could thus lawfully intern without trial where it was necessary to do so for imperative security reasons pursuant to UNSC Resolution 1546. However, it was required to ensure that, in exercising the power to intern, it did not infringe a detainee's rights under Article 5 ECHR any more than was inherent in such detention.

Summary:

I. The appellant, a citizen of both the UK and Iraq, has been detained without trial by UK forces in Iraq since October 2004. He has not been charged with any criminal offence, and is unlikely to stand trial in the foreseeable future. However, he is suspected of involvement in a large number of terrorist activities in Iraq. His detention was justified on the grounds that it was necessary for imperative reasons of security.

II. The House of Lords dealt with three issues, the first two of which questioned the relationship between the European Convention on Human Rights and the UN Charter and UNSCR. The first issue arose as a consequence of the decision of the Strasbourg court's Grand Chamber in *Behrami v. France, Saramati v. France, Germany v. Norway* (Application nos. 71412/01 and 78166/01), 2 May 2007. The issue was whether the actions taken by UK forces against the appellant were, in law, attributable to the UN and thus outside the scope of the European Convention on Human Rights. The second issue was whether the duty imposed on the UK by Article 5 ECHR was in any way qualified or displaced by the legal regime established by the UN Charter and a number of UNSCRs (Resolutions 1483/2003, 1511/2003, 1446/2004, 1637/2005 and 1723/2003).

The first issue was resolved by an assessment of whether or not the UK armed force's conduct in Iraq was attributable to the UN. It rested on an assessment of whether or not the UK forces were in law a subsidiary organ of the UN. Did the UN maintain effective command and control of the UK forces? The Secretary of State relied on the decision in *Behrami* and argued that the UK forces, by analogy with NATO forces in Kosovo, were exercising powers lawfully delegated by the UN. As such their actions were directly attributable to the UN. The Lords rejected the Secretary of State's argument. There was no genuine analogy between the UK forces in Iraq and NATO forces in Kosovo. As Lord Bingham put it, the analogy broke down at 'almost every point.' The UK forces were not sent to Iraq by the UN; neither did they occupy it under UN mandate. The UNSC did not delegate its power to the UK forces, it gave them authority to promote peace and stability in order for them to carry out acts it could not itself perform. The UK forces were not under the UN's effective command or control. This was in stark contrast to NATO forces in Kosovo which were there at the express request of the UN and which were a subsidiary organ of the UN under its effective control.

The second issue required the court to resolve the nature of the relationship between Article 5 ECHR and Article 103 UN Charter. The Secretary of State submitted that the UN Charter and various UNSCRs required the UK to detain the appellant and that this requirement overrode its obligations under Article 5 ECHR. The appellant submitted that the UNSCRs only authorised the UK, at best, to take action to detain him but did not require it do so. The appellant therefore submitted that Article 103 was not therefore engaged. The Lords rejected the appellant's argument that Article 103 was not engaged. Lord Bingham identified three reasons why this was the case. First, the UK was required to take necessary measures to protect the public in those areas which it effectively occupied. Article 43 of the Hague Regulations 1907 and Articles 41, 42 and 78 of the 4th Geneva Convention showed that an occupying power could intern individuals where it considers it necessary for imperative security reasons. Secondly, there was a strong body of academic opinion that Article 103 was engaged where the UN had authorised conduct just as well as when it required conduct. Such a purposive interpretation of Article 103 was consistent with the UN's and its member states' practice over 60 years and was appropriate given the context of the UN Charter's other provisions. Thirdly, Article 103 should not be given a narrow contract-based meaning; especially where the promotion of peace and security in the world could not be exaggerated. While the UK was not required to detain the appellant in particular, it was required to exercise its power to detain where it was necessary to do so. If it did not it would fail to give effect to the UNSC's decisions.

Finally, the Lords held that the Strasbourg Court had on a number of occasions accepted that the European Convention on Human Rights had to be interpreted in the light of and in conformity with the principles that govern international law. See *Loizidou v. Turkey* (1996) 23 *European Human Rights Reports* 273 513; *Fogarty v. UK* (2001) 34 *European Human Rights Reports* 273 302; *Al-Adsani v. UK* (2001) 34 *European Human Rights Reports* 273; and *Behrami*. It was now generally accepted that binding UNSC decisions under Chapter VII of the UN Charter took precedence over all other treaty commitments.

Languages:

English.

Inter-American Court of Human Rights

Important decisions

Identification: IAC-2007-3-004

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 25.11.2006 / **e)** Series C 160 / **f)** Miguel Castro Castro Prison v. Peru / **g)** / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

4.11 Institutions – **Armed forces, police forces and secret services**.
5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Prisoners**.
5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.
5.3.2 Fundamental Rights – Civil and political rights – **Right to life**.
5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

Keywords of the alphabetical index:

Detainee, rights / Detainee, woman, sexual violence / Detention, excessive force / Detention, conditions / Torture, in police custody / Investigation, effective, requirement / Obligation, positive, duty to protect fundamental rights and freedoms.

Headnotes:

States have the power and even the obligation to guarantee security and maintain public order, especially within prisons, using force if necessary. However, State policies and actions must conform to applicable human rights norms, limited and pursuant to the procedures that permit both the preservation of public security as well as the fundamental rights of human beings.

Compliance with the American Convention on Human Rights, not only presupposes that no person shall be arbitrarily deprived of their life, but also requires that

the State adopt all appropriate measures to protect and preserve the right to life (Article 4), pursuant to the obligation to guarantee the full and free exercise of the rights and freedoms of all persons (Article 1). This positive obligation not only involves a State's legislative body, but the entire State institution, including police and armed forces.

The State is responsible for guaranteeing the right to humane treatment of any individual in its custody.

The State has the duty to provide detainees with adequate medical care and treatment whenever necessary.

Sexual violence consists of acts of a sexual nature committed against a person without their consent, which in addition to the physical invasion of the body, may also include acts that do not involve penetration or any physical contact whatsoever.

Female detainees submitted to prolonged periods of nudity and forced to use the bathroom under the watch of male State policemen, are victims of sexual violence in violation of their right to humane treatment. Moreover, the digital penetration of a female inmate's vagina during a so-called "inspection" by multiple guards is rape constituting torture.

A prolonged elapse of time without initiating evidentiary and serious, impartial and effective investigative actions regarding alleged violations of the right to life and humane treatment constitutes a violation of the right of access to justice of both the victims and their next of kin.

Summary:

I. From 6-9 May 1992, police and other State security forces executed "Operation Transfer 1" at Miguel Castro Castro Prison, to relocate inmates accused or convicted of terrorism and treason. The Operation involved explosives, indiscriminate shooting, and gases that caused asphyxia and contained chemicals which penetrated human tissue. Women were primarily targeted as the attack started in the only pavilion occupied by female inmates, including the pregnant and elderly. Over several days, captured inmates were beaten and denied food, water and medical attention. Their next of kin witnessed the attack from outside the prison walls and were forced to search in morgues for their relatives. Transferred and relocated inmates were forced to endure the following: overcrowded cells; precarious feeding conditions; lack of adequate medical attention; a severe regimen of solitary confinement; lack of attention to women's pre and post natal health needs; and collective punishments including *falanga* beatings and application of electrical shocks.

On 9 September 2004, the Inter-American Commission on Human Rights (hereinafter, "the Commission") filed an application against the State of Peru in which it asked the Court to decide whether the State is responsible for the violation of the rights to life (Article 4 ACHR), humane treatment (Article 5 ACHR), a fair trial (Article 8 ACHR), and judicial protection (Article 25 ACHR), enshrined in the American Convention, in relation to the general obligation to respect and guarantee human rights, established in Article 1.1 ACHR, to the detriment of the 41 deceased, 175 injured and 322 inmates and their next of kin during and in the aftermath of "Operation Transfer 1" at the Miguel Castro Castro Prison. The Commission also relied on relevant provisions of the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women. The State partially acknowledged its international responsibility for the events of 6-9 May 1992.

II. The Court admitted this partial acknowledgment of international responsibility and held that the State of Peru violated the right to life of the 41 deceased inmates; the right to humane treatment of the 41 deceased inmates identified and of the surviving inmates, as well as of their next of kin; and the right to a fair trial and judicial protection of the next of kin of the 41 deceased inmates identified, of the surviving inmates, and of the next of kin of the inmates.

The Court ordered the State, *inter alia*, to compensate the victims and their next of kin, including payment of pecuniary and non-pecuniary damages, investigation of the facts and identification, prosecution and punishment of those responsible, a public act of acknowledgment of responsibility in amends to the victims, medical and psychological assistance, and human rights education programs for State police on the international standards applicable to matters regarding treatment of inmates in situations regarding public order in penitentiary centres.

Languages:

Spanish.

Identification: IAC-2007-3-005

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 29.11.2006 / **e)** Series C 162 / **f)** La Cantuta v. Peru / **g)** / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

4.7.11 Institutions – Judicial bodies – **Military courts**.
4.11 Institutions – **Armed forces, police forces and secret services**.
5.3.2 Fundamental Rights – Civil and political rights – **Right to life**.
5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.
5.3.13.3.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – ***Habeas corpus***.

Keywords of the alphabetical index:

Disappearance, forced / Execution, extrajudicial / Detention, arbitrary / Torture / Treatment, cruel, inhumane, degrading / Military tribunal, competent jurisdiction.

Headnotes:

When a detention is not ordered by a competent authority and its aim is not to bring a person before a judge or another official authorised by law to rule on the legality of the arrest, but to execute them or force their disappearance, the detention is of an obvious illegal and arbitrary nature in violation of Article 7 ACHR (personal liberty).

A prompt, serious, impartial and effective *ex officio* investigation is a fundamental and conditioning element for the protection of certain rights that are otherwise affected or annulled by such violations as the right to life, personal liberty and personal integrity.

The jurisdiction of military criminal courts must be restrictive and exceptional, and they must only judge military men for the commission of crimes or offences that due to their nature may affect any interest of a military nature. When the military courts assume jurisdiction over a matter that should be heard by the ordinary courts, the right to the appropriate judge is violated, as is, *a fortiori*, due process, which, in turn, is intimately linked to the right of access to justice.

Double jeopardy does not apply where a person is prosecuted by a court that has no jurisdiction, is not independent or impartial and fails to meet the requirements for competent jurisdiction.

Continued deprivation of the truth regarding the fate of a disappeared person constitutes cruel, inhuman and degrading treatment against close next of kin.

The *habeas corpus* remedy constitutes one of the most indispensable judicial guarantees.

Summary:

I. In the predawn hours of 18 July 1992, a professor and nine students were abducted by members of the Peruvian army from their university campus, and subsequently summarily executed or disappeared. Systematic and generalised practices of illegal and arbitrary detentions, torture, extra-legal executions and forced disappearances took place during the time of the facts. An investigation was undertaken in the common criminal court, but the Supreme Military Justice Tribunal soon took jurisdiction over the investigation and from 1994-2002, criminal courts were prevented from hearing the case and next of kin were prevented from taking part in the investigations. The petitions for *habeas corpus* filed by the next of kin were ineffective.

On 14 February 2006, the Inter-American Commission on Human Rights (hereinafter, “the Commission”) filed an application against the State of Peru in which it asked the Court to decide whether the State is responsible for the violation of the rights to life (Article 4 ACHR), judicial personality (Article 3 ACHR), humane treatment (Article 5 ACHR), personal liberty (Article 7 ACHR), judicial guarantees (Article 8 ACHR) and judicial protection (Article 25 ACHR), in relation to the general obligation to respect and guarantee human rights established in Article 1.1 ACHR.

The State acknowledged its international responsibility for the violation of Articles 4, 5, 7, 8.1 and 25 ACHR, but did not make the same acknowledgement with respect to the victims’ next of kin.

II. The Court recalled that in cases involving forced disappearances, the violation of the right to mental and moral integrity of the victims’ next of kin is, precisely, a direct consequence of that event, which causes them suffering and is made worse by the continued refusal of State authorities to supply information on the victim’s whereabouts or to conduct an effective investigation to elucidate facts. Consequently, the Court found that the State violated the right to humane treatment of the victim’s next of kin. The Court did not find a violation of Article 3

ACHR. The Court also held that the State did not comply with its obligation to give domestic legal effect to the provisions of the American Convention, in violation of Article 2 ACHR, during the time when the amnesty laws were applied in the present case. The Court did not find a violation of Article 2 ACHR after said time, as the State has since adopted certain measures to eliminate the effect of the amnesty laws.

The Court ordered the State, *inter alia*, to pay compensation to the victims and their next of kin; adopt all measures necessary for the effective completion, within a reasonable time, of the investigations and judicial proceedings initiated before regular criminal courts, and to take all measures necessary to determine and, where appropriate, sanction those responsible for the facts denounced in this case; adopt all measures necessary to find the mortal remains of the deceased victims, and, if found, return them to their next of kin for a proper burial; incorporate the names of the victims in the national monument called "The Eye that Cries"; publish certain parts of the Judgment in an official gazette and in another newspaper; provide free health care to the victims' next of kin; and implement human rights education programs within the intelligence, military, and police forces.

Languages:

Spanish.

Identification: IAC-2007-3-006

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 11.05.2007 / **e)** Series C 163 / **f)** La Rochela Massacre v. Colombia / **g)** / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

4.7.11 Institutions – Judicial bodies – **Military courts**.
4.11 Institutions – **Armed forces, police forces and secret services**.
5.3.2 Fundamental Rights – Civil and political rights – **Right to life**.
5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**..
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State**.

Keywords of the alphabetical index:

Responsibility, international, State / Execution, extrajudicial / Detention, arbitrary / Truth, right / Treatment, cruel, inhumane, degrading / Military tribunal, competent jurisdiction.

Headnotes:

The international responsibility of the State results from the acts or omissions of any of its bodies or agencies, which are in violation of the American Convention on Human Rights. It is sufficient to prove that public officials have provided support to or shown tolerance of the violation of rights, that their omissions have enabled the commission of such violations, or that the State has failed to comply with any of its duties.

Due to the nature of the crime and the rights and freedoms violated, the military criminal jurisdiction is not the competent jurisdiction to investigate, prosecute and punish the perpetrators of human rights violations. When the military justice system assumes jurisdiction over a matter that should be heard by the ordinary justice system, the right to have a case tried by the appropriate judge is affected.

A disciplinary procedure can complement but not entirely substitute the role of criminal courts in cases of grave human rights violations.

In order to comply with the obligation to investigate within the framework of due process guarantees, a State must take all necessary measures to protect judicial officers, investigators, witnesses and the next of kin from harassment and threats which are designed to obstruct the proceedings, prevent a clarification of the events of the case, and prevent the identification of those responsible for such events.

The Court recognised that the right to truth is subsumed within Articles 8 and 25 ACHR, which provides for the right of the victim or the victims´ next of kin to obtain a State determination of the truth of the events and corresponding responsibility through an investigation and trial. The satisfaction of the collective dimension of the right to truth requires a legal analysis of the most complete historical record possible, including a description of the patterns of joint action and should identify all those who participated in the violations.

Comprehensive reparation of the violation of a right protected by the Convention cannot be reduced to the payment of compensation to the next of kin. Adequate redress, understood within the framework of the Convention, includes measures of rehabilitation and satisfaction and guarantees of non-repetition.

Summary:

I. On the morning of 18 January 1989, 15 members of a Judicial Commission investigating the responsibility of civilian and army personnel for gross violations of human rights were ambushed and detained by 40 armed men belonging to the "Los Masetos" paramilitary group. They were subsequently locked up and guarded in a small room for hours. They were then tied up, forced into vehicles, and driven to another location where the armed men got out and fired indiscriminately and continuously on the vehicles carrying members of the Judicial Commission. The paramilitaries proceeded to give a "finishing shot" to victims showing any signs of life. Twelve were killed in the massacre, while three survived the attack.

On 10 March 2006, the Inter-American Commission on Human Rights (hereinafter, "the Commission") filed an application against the State of Colombia in which it asked the Court to decide whether the State is responsible for the violation of the rights to life (Article 4 ACHR), humane treatment (Article 5 ACHR), a fair trial (Article 8 ACHR) and judicial protection (Article 25 ACHR), in relation to the general obligation to respect and guarantee human rights established in Article 1.1 ACHR. In addition, the representatives of the victims and their next of kin alleged the State is responsible for the violation of the right to personal liberty (Article 7 ACHR), and the right to the truth; as well as non-compliance with Article 2 ACHR.

The State recognised that the Rochela Massacre was carried out by members of the paramilitary group "Los Masetos" with the cooperation and acquiescence of State agents, and also recognised that it incurred an omission regarding the protection of the Judicial Commission, which took place in a context of risk for judicial officers in the performance of their duties.

II. The Court held that the right to life also applied with regard to the three survivors, taking into account the force employed, the intent and objective of the use of this force, and the situation in which the victims found themselves. It considered that the intention of the perpetrators was to execute the members of the Judicial Commission and they did everything they considered necessary to fulfil this objective. The Court considered the fact that three of them were only injured and not killed was merely fortuitous.

The Court found that Colombia violated the rights to personal liberty, humane treatment, and life enshrined in the American Convention, in relation to Article 1.1 ACHR, to the detriment of the deceased and surviving victims of the Rochela Massacre, and the right to humane treatment of their next of kin. The Court considered that the criminal proceedings had not been conducted within a reasonable time and have not constituted an effective recourse to ensure the rights to judicial access, the determination of the truth of the events, and reparation for the alleged victims and their next of kin. During 18 years of investigations and compelling evidence, only seven paramilitaries and one soldier (sentenced to one year) had been convicted.

The Court ordered the State, *inter alia*, to pay compensation to the victims and their next of kin; adopt all measures necessary for the effective completion, within a reasonable time, of the investigations and judicial proceedings initiated before regular criminal courts, and to take all measures necessary to determine and, where appropriate, sanction those responsible for the facts denounced in this case; publish the results of said investigations so that Colombian society may know the truth about the facts of this case; guarantee that judicial personnel, prosecutors, investigators and other personnel of the justice system may have adequate protection and security so that they may carry out their work with due diligence, particularly regarding the investigation of the facts of the present case; provide free health and psychological treatment to the survivors and the victims' next of kin; and continue to implement and develop human rights education programs within the armed forces.

Languages:

Spanish.

Court of Justice of the European Communities and Court of First Instance

Important decisions

Identification: ECJ-2007-3-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** Second Chamber / **d)** 10.01.2005 / **e)** T-357/03 / **f)** Gollnisch e.a. v. Parliament / **g)** *European Court Reports* II-1 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file**.
5.3.25 Fundamental Rights – Civil and political rights – **Right to administrative transparency**.
5.3.25.1 Fundamental Rights – Civil and political rights – Right to administrative transparency – **Right of access to administrative documents**.

Keywords of the alphabetical index:

European Union, institution, legal opinion, production before the Court.

Headnotes:

It would be contrary to public policy, which requires that the institutions be able to receive the advice of their legal service given in full independence, to allow such internal documents to be produced, in a dispute before the Court of First Instance, by persons other than the services at whose request they were prepared, unless their production has been authorised by the institution concerned or ordered by the Court (see paragraph 34).

Summary:

In this case the applicants, members of the European Parliament, requested the annulment of the Bureau of the European Parliament's decision of 2 July 2003 amending the regulations governing use of appropriations on budget line 3701 of the general budget of the European Union.

In the course of the proceedings the European Parliament had requested that its legal department's opinion be removed from the case-file, as it deemed that this opinion was a confidential document, that its distribution might have prejudicial consequences for the proper functioning of the institutions and that, in any case, in the light of the case-law of the Court of Justice, its production required the Parliament's permission or an order of the Court of First Instance. In addition, the Parliament drew attention to the fact that the Community legislators had expressly ruled out public access to such opinions under Article 4.2.2 of Regulation (EC) no. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, p. 43). The applicants conversely argued that the opinion whose production had been contested was not of a confidential nature, notably in view of the fact that the legal department had raised no objection to its distribution to Members of Parliament who had effectively so requested. They also maintained that the case-law relied on by the Parliament concerned situations different from that at issue in the instant case and, lastly, that respect for fundamental principles in matters of publication, transparency, protection of legal certainty and the stability of Community law could not restrict the applicants' access to opinions issued by the institution's legal department.

The Court dismissed the applicants' arguments and granted the European Parliament's request to have its legal department's opinion removed from the case-file.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

Identification: ECJ-2007-3-002

a) European Union / **b)** Court of Justice of the European Communities / **c)** Plenary / **d)** 18.01.2005 / **e)** C-257/01 / **f)** Commission v. Council / **g)** *European Court Reports* I-345 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

4.17.3 Institutions − European Union − **Distribution of powers between institutions of the Community**.

Keywords of the alphabetical index:

European Union, institution, acts / European Community, Council, implementing powers reserved, condition.

Headnotes:

In accordance with Article 202 EC and Article 1.1 of Decision no. 1999/468 laying down the procedures for the exercise of implementing powers conferred on the Commission (Second Comitology Decision), when measures implementing a basic instrument need to be taken at Community level, it is the Commission which, in the normal course of events, is responsible for exercising that power. The Council must properly explain, by reference to the nature and content of the basic instrument to be implemented or amended, any exception to the rule.

In that regard, in the preamble to Regulations nos. 789/2001 and 790/2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications and the carrying-out of border checks and surveillance at the external borders respectively, the Council specifically referred to the enhanced role of the Member States in respect of visas and border surveillance and to the sensitivity of those areas, in particular as regards political relations with non-member States. It could reasonably consider itself to be concerned with a specific case and thus it duly stated the reasons, in accordance with Article 253 EC, for its decision to reserve to itself, on a transitional basis, power to implement a series of a provision exhaustively listed in the Common Consular Instructions and in the Common Manual, which set out the rules concerning the crossing of external borders and visas, contained in the Convention implementing the Schengen Agreement.

Assessed in their proper context, such considerations, although general and laconic, are such as to show clearly the grounds justifying the reservation of powers to the Council and to allow the Court to exercise its power of review (see paragraphs 49-53, 59).

Summary:

In the present case the Commission sought the annulment of Council Regulation (EC) no. 789/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications (OJ 2001 L 116, p. 2) and Council Regulation (EC) no. 790/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance (OJ 2001 L 116, p. 5, Judgment, point 1).

The Commission put forward two pleas in law in support of its action. The first alleged infringement of Article 202 EC and Article 1 of the second comitology decision in that, in Article 1 of each of the contested regulations, the Council reserved the right to exercise implementing powers itself, improperly and without giving adequate reasons for doing so. The second plea alleged infringement of Article 202 EC in that Article 2 of the contested regulations conferred power on the Member States to amend, first, certain parts of the Common Consular Instructions for diplomatic missions and consular posts (the CCI) and certain Executive Committee decisions supplementing the CCI and, second, parts of the Common Manual as regards border checks (OJ 2002, C 313, p. 1, Judgment, points 10 and 33).

The Court dismissed the action. It found that, since in the preamble to Regulations nos. 789/2001 and 790/2001, reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures respectively for examining visa applications and for carrying out border checks and surveillance, the Council specifically referred to the enhanced role of the Member States in respect of visas and border surveillance and to the sensitivity of those areas, in particular as regards political relations with non-member states, the Council could reasonably have considered itself to be concerned with a specific case, in accordance with Article 202 EC and Article 1.1 of the second comitology decision, and had duly stated the reasons, in accordance with Article 253 EC, for its decision to reserve to itself, on a transitional basis, power to implement a series of provisions exhaustively listed in the CCI and the Common Manual, which determined the practical procedures for applying the rules concerning the crossing of external borders and visas, as laid down in the Convention implementing the Schengen Agreement (Judgment, points 49-53, 59).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

Identification: ECJ-2007-3-003

a) European Union / **b)** Court of Justice of the European Communities / **c)** Second Chamber / **d)** 18.01.2005 / **e)** T-93/02 / **f)** Confédération nationale du Crédit mutuel v. Commission / **g)** *European Court Reports* II-143 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

4.17.1.2 Institutions − European Union − Institutional structure − **Council**.
4.17.4 Institutions − European Union − **Legislative procedure**.

Keywords of the alphabetical index:

Commission, collegiality, principle, scope / Decision, statement of reasons, alteration after adoption.

Headnotes:

The operative part and the statement of reasons of a decision – which must be reasoned under Article 253 EC – constitute an indivisible whole, with the result, if its adoption falls within the powers of the College of Commissioners, that it is for the latter alone, in accordance with the principle of collegiate responsibility, to adopt both the one and the other, since any alternation to the statement of reasons going beyond simple corrections of spelling or grammar is its exclusive province. It follows that the arguments presented by the Commission's agents before the Court cannot make good the insufficiency of the contested decision's reasoning (see paragraphs 124, 126).

Summary:

On 25 January 1991 a complaint was made to the Commission concerning the aid granted by the French Republic to Crédit Mutuel in respect of the *"Livret bleu"*, a regulated savings product, aimed at the general public, for which Crédit Mutuel had been granted exclusive distribution rights by the authorities.

By letter of 6 February 1998, the Commission informed the French authorities that it had decided to initiate the investigation procedure laid down in Article 88.2 EC.

On 15 January 2002 the Commission adopted a decision concerning the *"Livret bleu"* system, in which it considered that it was a form of State aid not eligible for any of the derogations provided for in Article 87.2 and 87.3 EC.

In the present case, the applicant, Confédération du Crédit Mutuel, contested the Commission's decision, *inter alia* on the ground that it failed to state reasons.

The Court accepted the applicant's arguments and annulled the Commission's decision, pointing out that the Commission could not make good the insufficiency of the contested decision's reasoning after it had been adopted.

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

Identification: ECJ-2007-3-004

a) European Union / **b)** Court of Justice of the European Communities / **c)** Third Chamber / **d)** 11.07.2005 / **e)** T-294/04 / **f)** Internationaler Hilfsfonds eV v. Commission / **g)** *European Court Reports* II-2719 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

4.12 Institutions – **Ombudsman**.
4.12.9 Institutions − Ombudsman − **Relations with judicial bodies**.

Keywords of the alphabetical index:

Ombudsman, european, alternative to an action before the Community judicature.

Headnotes:

In the institution of the European Ombudsman, the Treaty has given citizens of the Union an alternative remedy to that of an action before the Community Court in order to protect their interests. That alternative non-judicial remedy meets specific criteria and does not necessarily have the same objective as judicial proceedings.

Moreover, as is clear from Article 195.1 EC and Article 2.6 and 2.7 of Decision no. 94/262 on the regulations and general conditions governing the performance of the Ombudsman's duties, the two remedies cannot be pursued at the same time. Although complaints submitted to the Ombudsman do not affect time-limits for appeals to the Community Court, the Ombudsman must nonetheless terminate consideration of a complaint and declare it inadmissible if the citizen simultaneously brings an appeal before the Community Court based on the same facts. It is therefore for the citizen to decide which of the two available remedies is likely to serve his interests best (see paragraphs 47-48).

Summary:

In this case the applicant was a non-governmental organisation (NGO) governed by German law which provided support to refugees and to war or disaster victims. Between 1993 and 1997 it had submitted six applications for the co-financing of activities to the Commission (Order, point 6).

When considering the initial applications, the Commission's services had concluded that the applicant was not eligible for the aid granted to NGOs as it did not satisfy the general conditions for the co-financing of projects. The applicant had been informed of this by letter. The Commission had set out the principal reasons which had led it to determine that the applicant could not be regarded as an eligible NGO (Order, point 7).

The applicant had then submitted a new project to the Commission. An amended version of that project was submitted to the Commission under a fresh application. However, the Commission did not rule on these new applications for co-financing since it considered that its decision that the applicant was ineligible remained valid (Order, point 8).

The applicant had then lodged three complaints with the European Ombudsman, one in 1998 and the other two in 2000. These complaints essentially related to two matters, the applicant's access to the file and the question whether the Commission had considered the applicant's requests fairly and objectively (Order, point 9).

Concerning access to the file, the Ombudsman had found that the list of documents which the Commission had provided to the applicant for consultation was incomplete, that the Commission had held back certain documents without cause and that, consequently, the Commission's conduct could constitute maladministration. He had proposed that the Commission authorise suitable access to the file. That access had been provided in the Commission's offices. The Ombudsman had also found an instance of maladministration in the fact that the applicant had not been given the opportunity of a formal hearing on the information received by the Commission from third parties, which had been used in taking a decision against the applicant (Order, point 10).

As regards fair and objective assessment of the applications, the Ombudsman had concluded in connection with the Commission's consideration of information received from third parties that the Commission had failed to deal with the matter fairly and objectively. Further, the Ombudsman had criticised the fact that the Commission had allowed an excessively long period of time to elapse before providing in writing the reasons which had led it in 1993 to conclude that the applicant was ineligible. Lastly, with regard to the fact that the Commission had failed to take a formal decision on the applications submitted by the applicant in December 1996 and September 1997, the Ombudsman had recommended that the Commission should come to a decision on those applications before 31 October 2001 (Order, point 11).

In order to comply with the Ombudsman's recommendation, the Commission had sent the applicant a letter rejecting the two projects submitted in December 1996 and September 1997 on the ground that the applicant was ineligible for co-financing.

The applicant had brought an action against this letter. In its judgment of 18 September 2003 in Case T-321/01 *Internationaler Hilfsfonds v. Commission* (ECR II-3225), the Court of First Instance had annulled the Commission's decision refusing the applications for co-financing made by the applicant in December 1996 and September 1997 and ordered the defendant to pay the costs (Order, point 12).

The applicant had also claimed in its application that the defendant should reimburse the costs it had incurred in the proceedings before the Ombudsman. In its judgment, the Court of First Instance had held that the costs relating to proceedings before the Ombudsman could not be regarded as expenses necessarily incurred within the meaning of Article 91.b of the Rules of Procedure of the Court of First Instance and were therefore not recoverable (Order, point 14).

It was on this ground that the applicant lodged the present application for compensation for damage allegedly suffered, comprising the lawyers' fees incurred in three sets of proceedings before the European Ombudsman (Order, title).

The Court nonetheless dismissed it as manifestly unfounded (Order, point 57).

Cross-references:

- Order of the Court of First Instance (Third Chamber) of 14 09.2005, *Adviesbureau Ehcon BV v. Commission* (T-140/04, *Reports*. II-03287, points 83-84)

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

Identification: ECJ-2007-3-005

a) European Union / **b)** Court of First Instance / **c)** Grand Chamber / **d)** 12.07.2005 / **e)** C-154/04 and C-155/04 / **f)** Alliance for Natural Health e.a / **g)** *European Court Reports* I-6451 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 General Principles − **Proportionality**.
3.18 General Principles − **General interest**.
5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
5.3.32 Fundamental Rights − Civil and political rights − **Right to private life**.
5.3.33 Fundamental Rights − Civil and political rights − **Right to family life**.
5.3.39 Fundamental Rights − Civil and political rights − **Right to property**.
5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Approximation of laws / Food, supplement / Supplement, food containing certain vitamins or certain mineral, prohibition on marketing / Consumers, failure to respect the private and family life.

Headnotes:

1. The fact that Articles 3, 4.1 and 15.2.b of Directive no. 2002/46 relating to food supplements may deprive people of the right to consume food supplements which do not comply with that directive cannot be regarded as amounting to a breach of respect for their private and family life within the meaning of Article 8 ECHR (see paragraphs 123-124).

2. The right to property, and likewise the freedom to pursue an economic activity, from part of the general principles of Community law. However, those principles are not absolute but must be viewed in relation to their social function. Consequently, the exercise of the right to property and the freedom to pursue an economic activity may be restricted, provided that any restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.

In that respect, the prohibition on marketing and placing on the Community market food supplements which do not comply with that directive, which arises from the provisions of Articles 3, 4.1 and 15.2.b of Directive no. 2002/46 relating to food supplements, in no way calls property rights into question. No economic operator can claim a right to property in a market share, even if it held it at a time before the introduction of a measure affecting the market, since such a market share constitutes only a momentary economic position exposed to the risk of changing circumstances.

Conversely, that prohibition is capable of restricting the freedom of manufacturers of food supplements to carry on their business activities. However, in the light

of the public interest objective of the protection of human health pursued by the prohibition, such a restriction cannot be found to constitute a disproportionate impairment of the right to exercise the business of these manufacturers (see paragraphs 126-129).

Summary:

I. In the present joined cases the references for a preliminary ruling concerned the validity of Articles 3, 4.1 and 15.2.b of Directive no. 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements (OJ L 183, p. 51, Judgment, point 1).

The references were made following applications brought respectively by the National Association of Health Stores and Health Food Manufacturers Ltd (Case C-155/04) and by the Alliance for Natural Health and Nutri-Link Ltd (Case C-154/04) seeking leave to apply for judicial review of the Food Supplements (England) Regulations 2003 and the Food Supplements (Wales) Regulations 2003. These two sets of regulations transpose Directive 2002/46 into the law of England and Wales (Judgment, point 2).

The claimants in Case C-154/04 were, firstly, a Europe-wide association of manufacturers, wholesalers, distributors, retailers and consumers of food supplements and, secondly, a small specialist distributor and retailer of food supplements in the United Kingdom (Judgment, point 19).

The claimants in Case C-155/04 were two trade associations representing around 580 companies, the majority of which are small firms which distribute dietary products in the United Kingdom (Judgment, point 20).

All these claimants in the main actions maintained that the provisions of Article 3, in conjunction with those of Article 4.1 and Article 15.2.b of Directive no. 2002/46, which the Food Supplements Regulations had transposed into national law and which prohibited, with effect from 1 August 2005, the marketing of foodstuffs that did not comply with the directive, were incompatible with Community law and must consequently be declared invalid (Judgment, point 21).

The High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), had granted permission to apply for judicial review and decided to stay the proceedings and to refer to the Court the question of the validity of the above provisions of Directive no. 2002/46.

II. The Court held that the examination of the question referred to it had revealed no factor of such a kind as to affect the validity of Articles 3, 4.1 and 15.2.b of Directive no. 2002/46/EC (Judgment, operative provisions).

Whereas the national court had asked it, *inter alia*, whether Articles 3, 4.1 and 15.2.b of Directive no. 2002/46 were invalid by reason of infringement of Article 6.2 EU, read in the light of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and Article 1 Protocol 1 to the Convention, and of the fundamental right to property and/or the right to carry on an economic activity, as the claimants had maintained, [Judgment, points 120-121], the Court held in particular that the prohibition, resulting from Articles 3, 4.1 and 15.2.b of the food supplements Directive no. 2002/46, on the marketing and placing on the Community market of food supplements which do not comply with the directive in no way called into question either the right to respect for private and family life or the right to property (Judgment, points 123-128).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

Identification: ECJ-2007-3-006

a) European Union / **b)** Court of First Instance / **c)** Grand Chamber / **d)** 22.11.2005 / **e)** C-144/04 / **f)** Werner Mangold v. Rüdiger Helm / **g)** *European Court Reports* I-6451 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.26 General Principles − **Principles of Community law**.
5.2.2.7 Fundamental Rights − Equality − Criteria of distinction − **Age**.

Keywords of the alphabetical index:

Community law, principles, equal treatment / National court, duty.

Headnotes:

It is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, which is a general principle of Community law, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are effective, setting aside any provision of national law which may conflict with that law, even where the period prescribed for transposition of a directive based on that general principle, such as Directive no. 2000/78 establishing a general framework for equal treatment in employment and occupation, has not yet expired (see paragraphs 75, 77, operative part 2).

Summary:

This case arose from a reference for a preliminary ruling concerning the interpretation of Clauses 2, 5 and 8 of the Framework Agreement on Fixed-Term Work, concluded on 18 March 1999, put into effect by Council Directive no. 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ L 175, p. 43), and of Article 6 of Council Directive no. 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, p. 16, Judgment, point 1).

The reference had been made in the course of proceedings before the *Arbeitsgericht München* (Munich Labour Court) brought by Mr Mangold against Mr Helm concerning a fixed-term employment contract between them (Judgment, point 2).

Mr Mangold, then aged 56, had concluded this contract with Mr Helm, who practises as a lawyer. The contract took effect on 1 July 2003 and stipulated a termination date of 28 February 2003 (Judgment, points 20 and 21).

Under the terms of the contract, the fixed duration of the employment relationship was based on the combined provisions of German labour law aimed at making it easier to conclude fixed-term employment contracts with older workers, since the employee was more than 52 years old (Judgment, point 21).

Mr Mangold ultimately considered, however, that this provision, inasmuch as it limited the duration of his contract, was, although such a limitation was in conformity with labour law, incompatible with the Framework Agreement and Directive no. 2000/78 (Judgment, point 22).

Mr Helm argued that Clause 5 of the Framework Agreement required the Member States to introduce measures to prevent abuse arising from the use of successive fixed-term contracts of employment, in particular, by requiring objective reasons justifying the renewal of such contracts, or by fixing the maximum total duration of such fixed-term employment relationships or contracts, or by limiting the number of renewals of such contracts or relationships. He contended that, even if labour law did not expressly lay down such restrictions in respect of older workers, there was in fact an objective reason, within the meaning of Clause 5.1.a of the Framework Agreement, that justified the conclusion of a fixed-term contract of employment, which was the difficulty those workers have in finding work having regard to the features of the labour market (Judgment, points 23-24).

Doubtful as to whether the provisions on which the impugned contractual clause was based were compatible with Community law, the *Arbeitsgericht München* had decided to stay the proceedings and to refer a number of questions to the Court of Justice for a preliminary ruling (Judgment, points 25 and 31).

Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

European Court of Human Rights

Important decisions

Identification: ECH-2007-3-006

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 30.08.2007 / **e)** 44302/02 / **f)** J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford) Land Ltd. v. the United Kingdom / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

Property, title / Property, possession / Statute of limitations / Adverse possesion / Limitation period.

Headnotes:

The loss of land as a result of the operation of generally applicable rules on limitation periods for actions for the recovery of land constitutes a "control of use" rather than a "deprivation".

A limitation period for actions for the recovery of land pursues a legitimate aim in the general interest, and there is also a general interest in the extinguishment of title at the end of that period. Even where title to real property is registered, it has to be open to the legislature to attach more weight to lengthy, unchallenged possession than to the formal fact of registration.

The extinction of title to land by virtue of 12 years' adverse possession, when the original owner was aware of the legislation and could have taken steps to interrupt the running of the period, does not upset the fair balance between the demands of the general interest and the interest of the individuals concerned, irrespective of the value of the land.

Summary:

I. The second applicant company was the registered owner of a plot of 23 hectares of agricultural land with development potential that was occupied by a farmer and his wife under a grazing agreement. In December 1983, the farmer was instructed to vacate the land as the grazing agreement was about to expire. However, he remained in occupation without permission and continued to use the land for grazing. In 1997, the farmer registered cautions at the Land Registry against the applicant companies' title, on the ground that he had obtained title by adverse possession. The applicant companies applied to the High Court for cancellation of the cautions and repossession of the land. The farmer contested their claims under the Limitation Act 1980, which provided that a person could not bring an action to recover land after the expiration of 12 years of adverse possession by another, and under the Land Registration Act 1925, which provided that after the expiry of the 12-year period the registered owner held the land in trust for the adverse possessor. The High Court found in favour of the farmer, holding that the applicant companies had lost their title to the land under the 1980 Act and that the farmer was entitled to be registered as the new owner. Although the Court of Appeal reversed that decision on the ground that the farmer did not have the necessary intention to possess the land, the House of Lords restored the order of the High Court. The value of the land was disputed but on any estimate came to several million pounds sterling. The Land Registration Act 2002 – which does not have retroactive effect – now enables a squatter to apply to be registered as owner after ten years' adverse possession and requires that the registered owner be notified of the application. The registered proprietor is then required to regularise the situation (for example, by evicting the squatter) within two years, failing which the squatter is entitled to be registered as the owner.

In their application to the Court, the applicant companies complained that the loss of title to their land was a disproportionate interference with their right to peaceful enjoyment of their possessions. They relied on Article 1 Protocol 1 ECHR.

II. Nature of the interference: The applicant companies had lost their land as a result of the operation of the generally applicable rules on limitation periods for actions for the recovery of land. The statutory provisions were part of the general land law and were concerned to regulate, among other things, limitation periods in the context of the use and ownership of land as between individuals. It followed that the applicant companies were affected not by a "deprivation of possessions", but by a "control of use" of the land.

Aim of the interference: The 12-year limitation period for actions for the recovery of land in itself pursued a legitimate aim in the general interest. However, there also existed a general interest in the extinguishment of title at the end of that period. The States had a wide margin of appreciation in this sphere as it concerned the implementation of social and economic policies and the Court would only interfere if the legislature's judgment as to what was in the public interest was manifestly without reasonable foundation. That was not the case here: a large number of member States possessed similar mechanisms, while the fact that the statutory amendments introduced in 2002 had not abolished the relevant provisions of the earlier legislation showed that the traditional general interest remained valid. Moreover, even where, as here, title to real property was registered, it had to be open to the legislature to attach more weight to lengthy, unchallenged possession than to the formal fact of registration. To extinguish title where the former owner was prevented, as a consequence of the application of the law, from recovering possession of the land could not be said to be manifestly without reasonable foundation.

Fair balance: As to whether a fair balance had been struck between the demands of the general interest and the interest of the individuals concerned, the relevant rules had been in force for many years before the applicants acquired the land and it was not open to them to say that they were not aware of the legislation, or that its application to their case had come as a surprise. While no clear pattern had emerged from the comparative materials as regards the length of limitation periods, the fact was that very little action would have been required on the applicant companies' part to stop time running: for example, they could have requested rent or other payment or brought an action for recovery of the land.

Nor was the absence of compensation relevant as:

a. the Court's case-law on compensation for the deprivation of possessions was not directly applicable to cases concerning the control of their use and

b. a requirement for compensation would sit uneasily alongside the concept of limitation periods, whose aim was to further legal certainty by preventing parties from pursuing an action after a certain date.

The applicant companies had not been without procedural protection (they could have brought an action for repossession or sought to show that the occupiers had not as a matter of law been in "adverse possession"). Although (by requiring notice of an application for adverse possession to be given by the squatter) the 2002 Act had now put registered owners in a better position than the applicant companies had been, legislative changes in complex areas such as land law took time to bring about and judicial criticism of legislation could not of itself affect the conformity of the earlier provisions with the Convention. Likewise, while it was not disputed that the land concerned would have been worth a substantial amount, limitation periods, if they were to fulfil their purpose, had to apply regardless of the size of the claim, so that the value of the land was not of any consequence. In sum, the requisite fair balance had not been upset and there had not been a violation of Article 1 Protocol 1 ECHR.

Cross-references:

- *James and Others v. the United Kingdom*, Judgment of 21.02.1986, Series A, no. 98;
- *AGOSI v. the United Kingdom*, Judgment of 24.10.1986, Series A, no. 108;
- *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, Judgment of 23.02.1995, Series A, no. 306-B;
- *Air Canada v. the United Kingdom*, Judgment of 05.05.1995, Series A, no. 316-A;
- *Stubbings and Others v. the United Kingdom*, Judgment of 22.10.1996, *Reports of Judgments and Decisions* 1996-IV;
- *Papachelas v. Greece* [GC], no. 31423/96, ECHR 1999-II;
- *Immobiliare Saffi v. Italy* [GC], no. 22774/93, ECHR 1999-V;
- *Beyeler v. Italy* [GC], no. 33202/96, ECHR 2000-I;
- *The Former King of Greece and Others v. Greece* [GC], no. 25701/94, ECHR 2000-XII;
- *Vgt Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, ECHR 2001-VI;
- *C.M. v. France* (dec.), no. 28078/95, ECHR 2001-VII;
- *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, ECHR 2002-IX;
- *Pla and Puncernau v. Andorra*, no. 69498/01, ECHR 2004-VIII;
- *Kopecký v. Slovakia* [GC], no. 44912/98, ECHR 2004-IX;
- *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, ECHR 2005-VI;
- *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, ECHR 2007.

Languages:

English, French.

Systematic thesaurus (V19) *

* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

1 This chapter – as the Systematic Thesaurus in general – should be used sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.

2 Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

3 For example, rules of procedure.

4 For example, age, education, experience, seniority, moral character, citizenship.

5 Including the conditions and manner of such appointment (election, nomination, etc.).

6 Including the conditions and manner of such appointment (election, nomination, etc.).

7 Vice-presidents, presidents of chambers or of sections, etc.

8 For example, State Counsel, prosecutors, etc.

9 (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

10 For example, assessors, office members.

11 (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

12 Including questions on the interim exercise of the functions of the Head of State.
13 Referrals of preliminary questions in particular.
14 Enactment required by law to be reviewed by the Court.
15 Review *ultra petita*.
16 Horizontal distribution of powers.
17 Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.
18 Decentralised authorities (municipalities, provinces, etc.).
19 For questions other than jurisdiction, see 4.9.
20 Including other consultations. For questions other than jurisdiction, see 4.9.

21 Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).
22 As understood in private international law.
23 Including constitutional laws.
24 For example, organic laws.
25 Local authorities, municipalities, provinces, departments, etc.
26 Or: functional decentralisation (public bodies exercising delegated powers).
27 Political questions.
28 Unconstitutionality by omission.
29 Including language issues relating to procedure, deliberations, decisions, etc.
30 For the withdrawal of proceedings, see also 1.4.10.4.

31 Pleadings, final submissions, notes, etc.
32 May be used in combination with Chapter 1.2. Types of claim.
33 For the withdrawal of the originating document, see also 1.4.5.
34 Comprises court fees, postage costs, advance of expenses and lawyers' fees.

35 For questions of constitutionality dependent on a specified interpretation, use 2.3.2.
36 Only for issues concerning applicability and not simple application.
37 This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

[38] Including its Protocols.

39 Presumption of constitutionality, double construction rule.
40 Including the principle of a multi-party system.
41 Includes the principle of social justice.
42 See also 4.8.
43 Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.
44 Including maintaining confidence and legitimate expectations.
45 Principle according to which sub-statutory acts must be based on and in conformity with the law.
46 Prohibition of punishment without proper legal base.

47 Including compelling public interest.
48 Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).
49 Including questions of treason/high crimes.
50 Including prohibition on monopolies.
51 For the principle of primacy of Community law, see 2.2.1.6.
52 Including the body responsible for revising or amending the Constitution.

53 For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.
54 For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.
55 For example, the granting of pardons.
56 For regional and local authorities, see chapter 4.8.
57 Bicameral, monocameral, special competence of each assembly, etc.
58 Including specialised powers of each legislative body and reserved powers of the legislature.
59 In particular, commissions of enquiry.
60 For delegation of powers to an executive body, see keyword 4.6.3.2.
61 Obligation on the legislative body to use the full scope of its powers.
62 Representative/imperative mandates.
63 Presidency, bureau, sections, committees, etc.
64 Including the convening, duration, publicity and agenda of sessions.

65 Including their creation, composition and terms of reference.
66 State budgetary contribution, other sources, etc.
67 For the publication of laws, see 3.15.
68 For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.
69 For local authorities, see 4.8.
70 Derived directly from the Constitution.
71 See also 4.8.
72 The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.
73 Civil servants, administrators, etc.
74 Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

[75] Other than the body delivering the decision summarised here.
[76] Positive and negative conflicts.
[77] Notwithstanding the question to which to branch of state power the prosecutor belongs.
[78] For example, Judicial Service Commission, *Conseil supérieur de la magistrature*.
[79] Comprises the Court of Auditors in so far as it exercises judicial power.

80 See also 3.6.
81 And other units of local self-government.
82 See also, keywords 5.3.41 and 5.2.1.4.
83 Organs of control and supervision.
84 Including other consultations.
85 For questions of jurisdiction, see keyword 1.3.4.6.
86 Proportional, majority, preferential, single-member constituencies, etc.
87 For example, Panachage, voting for whole list or part of list, blank votes.
88 For aspects related to fundamental rights, see 5.3.41.2.
89 For the creation of political parties, see 4.5.10.1.
90 For example, names of parties, order of presentation, logo, emblem or question in a referendum.
91 Tracts, letters, press, radio and television, posters, nominations, etc.

92 Impartiality of electoral authorities, incidents, disturbances.
93 For example, signatures on electoral rolls, stamps, crossing out of names on list.
94 For example, in person, proxy vote, postal vote, electronic vote.
95 For example, Auditor-General.
96 Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.
97 For example, Court of Auditors.
98 The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also, 4.6.8.
99 *Staatszielbestimmungen*.

100 Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.
101 Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.
102 Positive and negative aspects.
103 For rights of the child, see 5.3.44.
104 The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in chapter 3.
105 Includes questions of the suspension of rights. See also 4.18.
106 Taxes and other duties towards the state.
107 Universal and equal suffrage.

108 According to the European Convention on Nationality of 1997, ETS no. 166, "'nationality' means the legal bond between a person and a state and does not indicate the person's ethnic origin" (Article 2) and "… with regard to the effects of the Convention, the terms 'nationality' and 'citizenship' are synonymous" (paragraph 23, Explanatory Memorandum).

109 For example, discrimination between married and single persons.

110 This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

111 Detention by police.

112 Including questions related to the granting of passports or other travel documents.

113 May include questions of expulsion and extradition.

114 Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also, keyword 4.7.12.

115 This keyword covers the right of appeal to a court.

116 Including the right to be present at hearing.
117 Including challenging of a judge.
118 Covers freedom of religion as an individual right. Its collective aspects are included under the keyword “Freedom of worship” below.
119 This keyword also includes the right to freely communicate information.
120 Militia, conscientious objection, etc.
121 Aspects of the use of names are included either here or under “Right to private life”.

122 Including compensation issues.
123 This keyword also covers “Freedom of work”.
124 Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

Keywords of the alphabetical index *

* The précis presented in this *Bulletin* are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

Page numbers of the alphabetical index refer to the page showing the identification of the decision rather than the keyword itself.

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