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).

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.

The Commission is grateful to liaison officers of constitutional and other equivalent courts, who regularly prepare the contributions reproduced in this publication. ***As such, the summaries of decisions and opinions published in the Bulletin do not constitute an official record of court decisions and should not be considered as offering or purporting to offer an authoritative interpretation of the law****.*

The Venice Commission thanks the ***International Organisation of the Francophonie*** *for their support in ensuring that contributions from its member, associate and observer states can be translated into French.*

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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T. **Markert**
Director, Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

The European Commission for Democracy through Law, better known as **the Venice Commission**, has played a leading role in the adoption of constitutions in Central and Eastern Europe that conform to the standards of Europe's constitutional heritage.

Initially conceived as an instrument of emergency constitutional engineering against a background of transition towards democracy, the Commission since has gradually evolved into an internationally recognised independent legal think-tank. It acts in the constitutional field understood in a broad sense, which includes, for example, laws on constitutional courts, laws governing national minorities and electoral law.

Established in 1990 as a partial agreement of 18 member states of the Council of Europe, the Commission in February 2002 became an enlarged agreement, comprising all 47 member States of the organisation and working with some other 14 countries from Africa, America, Asia and Europe.

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Strasbourg, June 2018

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There was no relevant constitutional case-law during the reference period 1 September 2017 – 31 December 2017 for the following countries:

Estonia, Kazakhstan, Norway, Romania, Sweden.

Argentina
Supreme Court

Important decisions

Identification: ARG-2017-3-002

a) Argentina / **b)** Supreme Court / **c)** / **d)** 12.12.2017 / **e)** CSJ 1870/2014/CS001 / **f)** Castillo, Carina Viviana and others v. Provincia de Salta – Ministerio de Educación de la Prov. de Salta v. *amparo* / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.7 General Principles − **Relations between the State and bodies of a religious or ideological nature**.
5.2.2.6 Fundamental Rights − Equality − Criteria of distinction − **Religion**.
5.3.18 Fundamental Rights − Civil and political rights − **Freedom of conscience**.
5.3.20 Fundamental Rights − Civil and political rights − **Freedom of worship**.
5.3.32 Fundamental Rights − Civil and political rights − **Right to private life**.
5.3.45 Fundamental Rights − Civil and political rights − **Protection of minorities and persons belonging to minorities**.

Keywords of the alphabetical index:

Secularism, education, public.

Headnotes:

The principle of secularism allows individuals to profess their faith freely (or not profess it) in educational institutions, It does not simply entail the absence of any preference for a particular religious position. It also involves the showing of tolerance towards all who wish to profess their faith at school.

Declaring a law null and void is a measure which should be deployed only when it has proved impossible for the law to stay in force in the legal system.

The principle of equality has been construed as a principle of non-discrimination, in the sense that all those in the same circumstances shall be treated equally. It should also be considered in the light of domestic constitutional law and several international treaty provisions introducing, on the one hand, legal mechanisms to promote positive action measures aimed at helping certain sectors, and, on the other, creating categories of persons who suffer discrimination in order to guarantee real equality of treatment for all.

Equality must be understood not only in the light of the principle of non-discrimination, but also from a structural perspective that considers an individual as part of a group, taking account of the social context in which legal provisions, public policies and the practices stemming from them are introduced, and their potential impact on disadvantaged groups. Courts need to apply stricter standards for judicial review than those generally applied when considering cases from a traditional approach.

To identify whether a difference in treatment has a legitimate aim, courts usually simply determine whether it has a reasonable basis and whether the distinction is suitable to achieve the purpose sought. However, when differences in treatment emerging from the regulations in force are based on categories which are 'explicitly prohibited' or 'suspect', courts should apply a more rigorous test, requiring them to start the analysis from a presumption of invalidity. The burden of proving the justification for the difference in treatment will then shift to the respondent.

A law which does not draw a distinction that might make those included in a certain group fall into a "suspect" category, but which appears neutral as it does not distinguish between groups with the aim of granting or denying rights may, nevertheless, in a particular social context, have a disproportionate impact on a specific sector. To eliminate potential discrimination against that sector, the court will need to examine how the legislation in question has been implemented, to assess its constitutionality.

Laws which deliberately exclude certain sectors represent a violation of the principle of equality; as do those which have discriminatory effects that have been proved in court.

A provision compelling parents to complete a form declaring whether they wish their children to receive 'religious education', and, if so, the religion in which they should receive instruction, which then remains on the student's personal file as part of the institution's records, constitutes a breach of the right to privacy and is unconstitutional. It involves interference with an individual's personal sphere, to the extent that they are required to reveal an aspect of their spiritual personality. To accept the concept

that someone may be compelled to reveal their religious beliefs amounts to opening a breach in the fundamental rights protection system.

Summary:

I. A group of mothers of public school students in the Province of Salta and the Civil Rights Association brought a collective *amparo* action against the Province of Salta (Ministry of Education) challenging the constitutionality of Article 27.ñ of Provincial Law of Education no. 7546 (hereinafter, the "Law").

Under this provision, religious education was to be included in the school curriculum and imparted during school hours, in accordance with the religious beliefs of the pupils' parents' and guardians. Parents and guardians would decide whether their children or wards should receive this instruction. The syllabus and the teaching would be approved by the religious authority concerned.

The applicants also asked the court to declare the unconstitutionality of Article 49 of the Provincial Constitution and Article 8.m of the Law, which gave parents or guardians the right to demand that their children or wards receive in public school religious education in accordance with their own convictions.

In the applicants' opinion, the teaching of Catholic doctrine and religious practices during school hours in public schools in Salta constituted a violation of constitutional rights, including freedom of worship, freedom of religion and conscience, the right to equality, the right to education free from discrimination, respect for ethnic and religious minorities and the right to privacy.

The Civil Rights Association, along with two other applicants, filed an extraordinary appeal for review of the decision of the provincial Supreme Court which upheld the earlier decision declaring the above provision to be constitutional.

II. The Supreme Court allowed the appeal and partially reversed the challenged decision, declaring the unconstitutionality of Article 27.ñ of the Law along with Regulation no. 45/09 adopted by the Department of Primary and Pre-school Education of the Province of Salta, thereby declaring the religious practices followed in public schools in this province unconstitutional.

Article 27.ñ of the Law, in providing that religious education would be imparted during school hours, included in the school curriculum and approved by the religious authority concerned, not only encourages discriminatory conduct towards those children who did not belong to the predominant religious group, but also constitutes an interference with an individual's personal sphere, protected by Article 19 of the Constitution.

Article 49 of the Provincial Constitution virtually replicates the text of the relevant international human rights law provisions on this issue. It does not modify the federal constitutional provisions, including the norms of international treaties which have been granted constitutional hierarchy. The Court therefore found that the article in question respected both the principle of secularism and the principle of equality and non-discrimination as interpreted in Article 75.19 of the Constitution.

III. Judge Rosatti, in a dissenting opinion, considered that freedom of religion neither could nor should be interpreted in a way that would exclude all religious elements from the school teaching environment. Neither could it make religious education of any kind compulsory.

The imparting of religious education in Sala during school hours and as part of the school curriculum did not violate the constitutional rights to the freedoms of religion and conscience or the rights to equality and privacy, provided it was not made compulsory for students not wishing to receive it.

The issue should be resolved not by declaring such legislation null and void, but by rendering the practices distorting it invalid.

Languages:

Spanish.

Armenia
Constitutional Court

Statistical data
1 September 2017 – 31 December 2017

- 71 applications were filed, including:
  - 10 applications filed by the President, concerning the constitutionality of obligations deriving from international treaties
  - 1 application by domestic judges concerning the constitutionality of legal provisions
  - 4 applications by the Human Rights Defender concerning the constitutionality of legal provisions
  - 56 applications filed as an individual complaint concerning the constitutionality of legal provisions
- 11 applications were admitted for review, including:
  - 1 application filed by domestic judges concerning the constitutionality of legal provisions
  - 4 applications filed by the Human Rights Defender concerning the constitutionality of legal provisions
  - 6 applications filed as individual complaints concerning the constitutionality of legal provisions
- 10 applications were considered by the Court, including:
  - 1 application filed by 1/5 of the deputies of the National Assembly concerning the constitutionality of legal provisions
  - 1 application filed by the General Prosecutor concerning the constitutionality of legal provisions
  - 1 application filed by domestic judges concerning the constitutionality of legal provisions
  - 7 applications filed as individual complaints concerning the constitutionality of legal provisions

Important decisions

Identification: ARM-2017-3-003

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 07.11.2017 / **e)** DCC-1383 / **f)** On the conformity with the Constitution of the provisions of the Law on Principles of Administrative Action and Administrative Proceedings / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

5.3.17 Fundamental Rights − Civil and political rights **− Right to compensation for damage caused by the State**.

Keywords of the alphabetical index:

Compensation, non-pecuniary damage, violation of fundamental rights.

Headnotes:

The right to compensation for damage – enshrined in the Constitution – includes damage caused by the violation of any of the fundamental rights prescribed by the Constitution and the international human rights treaties ratified by Armenia. The definition of the right to compensation for damage guarantees the right to compensation for damage (including non-pecuniary damage) caused by the violation of any such fundamental right.

Summary:

The applicant challenged Article 104.1 of the Law on Principles of Administrative Action and Administrative Proceedings of the Republic of Armenia (hereinafter, the “Law”). The applicant argued that there were the gaps in the law because Article 104.1 of the Law provides that compensation for non-pecuniary damage could be claimed for the violation of only some constitutional rights.

Pursuant to Article 104.1 of the Law, a person has the right to claim compensation for non-pecuniary damage caused by unlawful administrative actions in cases where there is a violation of the freedom of the person; the right to integrity; the right to the inviolability of the home; or the right to the inviolability of private and family life and of honour and reputation. Consequently, the right to claim compensation for non-pecuniary damage caused by unlawful administrative actions is envisaged for the violation of only a limited number of constitutional rights (Articles 23, 25, 27, 31 and 32 of the Constitution).

The Constitutional Court stated that, it follows from Article 62 of the Constitution that the term “damage” includes both pecuniary and non-pecuniary damage and the right to compensation for damage applies to pecuniary and non-pecuniary damage caused by the violation of constitutionally enshrined rights and freedoms of a person. Henceforth, in all cases in which the constitutionally enshrined rights and freedoms have been violated, a person shall have the unconditional right to claim compensation for the damage caused by those violations.

The Constitutional Court declared that, in the event that the legal possibility of claiming non-pecuniary damage caused by unlawful administrative actions is restricted to violations of a limited number of rights, and until the National Assembly has clarified the relevant legal regulations and has closed the legislative gap, the right to compensation for non-pecuniary damage caused by unlawful administrative actions shall be recognised as exercisable under both domestic and international law (*inter alia*, the Constitution) in cases where a person's rights have been violated.

As a result, the Constitutional Court declared Article 104.1 of the Law to be in accordance with the Constitution within the constitutional legal framework that implies that, until the National Assembly has clarified the relevant legal regulations and has closed the legislative gap, the possibility of compensation for non-pecuniary damage caused by unlawful administrative actions is ensured in cases of violation of any of the basic human and citizen rights enshrined in the Constitution and in the international human rights treaties ratified by Armenia.

The Constitutional Court also declared that the final judicial judgment rendered against the applicant is subject to review on the grounds of new circumstances, in accordance with the procedure provided for by law.

Languages:

Armenian.

Austria
Constitutional Court

Important decisions

Identification: AUT-2017-3-003

a) Austria / **b)** Constitutional Court / **c)** / **d)** 04.12.2017 / **e)** G 258/2017 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

5.2.2.11 Fundamental Rights − Equality − Criteria of distinction − **Sexual orientation**.
5.3.34 Fundamental Rights − Civil and political rights **− Right to marriage**.

Keywords of the alphabetical index:

Couple, same-sex / Discrimination, sexual orientation / Equality / Marriage, same-sex.

Headnotes:

Legislative provisions, according to which marriage may only be contracted by different-sex partnerships, whereas registered partnership is only available to same-sex couples, are discriminatory on the grounds of sexual orientation and accordingly not compatible with the principle of equality.

Summary:

I. The applicants, a female same-sex couple living in a registered partnership, requested the Vienna Office for Matters of Personal Status to proceed with the formalities to enable them to contract marriage. By a decision of August 2015, the Vienna Municipal Office refused the applicants' request. Referring to Article 44 of the Civil Code, it held that marriage could only be contracted between two persons of opposite sex. According to constant case-law, a marriage concluded by two persons of the same sex was null and void. Since the applicants were two women, they lacked the capacity to contract marriage.

The applicants lodged an appeal with the Vienna Administrative Court but to no avail. In its judgment, the Vienna Administrative Court confirmed the Municipal Office’s legal view.

In a constitutional complaint, the applicants alleged that the legal impossibility of their marrying constituted a violation of their right to respect for private and family life and of the principle of non-discrimination. They argued that the notion of marriage had evolved since the Civil Code came into force in 1812. In particular, the procreation and education of children no longer formed an integral part of marriage. According to present-day perceptions, marriage was rather a permanent union encompassing all aspects of life. There was no objective justification for excluding same-sex couples from concluding marriage.

II. Under Article 44 of the Civil Code, marriage can only be contracted between two persons of opposite sex. Therefore, a marriage concluded by two persons of the same sex is null and void. Article 44 provides that "under the marriage contract two persons of opposite sex declare their lawful intention to live together in indissoluble matrimony, to beget and raise children and to support each other". Same-sex couples have been provided with a formal mechanism for recognising and giving legal effect to their relationships by establishing a registered partnership. Under Article 2 of the Registered Partnership Act of 2009, a registered partnership may be formed "only by two persons of the same sex (registered partners). They thereby commit themselves to a lasting relationship with mutual rights and obligations".

The Constitutional Court pointed out that the Registered Partnership Act was intended to counter discrimination against homosexual women and men by giving same-sex couples the opportunity to obtain a legal status equal or similar to marriage in many respects. Over the past few years, same-sex registered partnerships have been equated to married couples even in regard of parental rights; in particular, they may adopt children and make use of artificial insemination on the same terms as different-sex partnerships.

However, keeping marriage and registered partnership separate still suggests that people with same-sex sexual orientation are not equal to people with heterosexual orientation although same-sex and different-sex partnerships are equal in nature and in terms of their significance for the individuals concerned. This distinction cannot therefore be maintained today without discriminating against same-sex couples. The discriminatory effect of this distinction is that whenever registered partners refer to their specific family status ("living in a registered partnership"), they cannot avoid disclosing their sexual orientation even where sexual orientation does not – and must not – matter at all, and run the risk of being discriminated against. Yet providing protection from such discriminatory effects is the core aim of the constitutional principle of equality as laid down in Article 7 of the Federal Constitutional Act.

The Constitutional Court therefore found that the provisions of the Civil Code and of the Registered Partnership Act stipulating that marriage may only be concluded by different-sex couples and that registered partnerships may only be established by same-sex couples are contrary to the principle of equality, and repealed them as unconstitutional. The Court set a time-limit for the legislator to the effect that the unconstitutional provisions would remain applicable until 31 December 2018.

Cross-references:

European Court of Human Rights:

- *Schalk and Kopf v. Austria*, no. 30141/04, 24.06.2010, *Reports of Judgments and Decisions* 2010.

Languages:

German.

Azerbaijan
Constitutional Court

Important decisions

Identification: AZE-2017-3-001

a) Azerbaijan / **b)** Constitutional Court / **c)** Plenum / **d)** 25.01.2017 / **e)** / **f)** Verification of conformity with Article 25.1 of the Constitution of some provisions of the Law on social security of children who have lost their parents and are deprived of parental care in a complaint by Javidan Gafarov / **g)** *Azerbaijan*, *Respublika*, *Khalg gazeti*, *Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiya Mehkemesinin Melumati* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.1.1.1.1 Constitutional Justice − Constitutional jurisdiction − Statute and organisation − Sources − **Constitution**.
5.3.44 Fundamental Rights − Civil and political rights − **Rights of the child**.
5.4.2 Fundamental Rights − Economic, social and cultural rights − **Right to education**.

Keywords of the alphabetical index:

Education, child, paid basis.

Headnotes:

Article 42 of the Constitution sets out that every citizen has the right to education. In accordance with Article 25.1 of the Constitution, in cases where fee-paying persons studying in state higher educational institutions lose parental support after 18 years of age for the reasons specified in Article 1.12 of the Law on the social security of children who have lost their parents and are deprived of parental care, the payments made by those persons during their education (up to 23 years of age) must be paid back to them under Article 38.3 of the Law on Education.

Summary:

Mr Javidan Gafarov applied to the Constitutional Court, requesting an examination of whether some provisions of the Law on the social security of children who have lost their parents and are deprived of parental care (hereinafter, the “Law”) are in conformity with Constitution.

The applicant is 21 years old and he is a fee-paying student of the Medical University. His father died on 19 May 2016, and his mother is a category 1 disabled person. Referring to his inability to pay for his education for those reasons, the applicant made a request to the administration of the Medical University that the privileges provided for by the Law be applied to his case. According to Article 5.1 of the Law, children who have lost their parents and are deprived of parental care, as well as other persons referred to in that Law, and studying at state higher educational institutions of all types at the master level in scientific organisations established by the relevant authority of the executive power, and also in municipal and private higher and secondary special educational institutions, shall be eligible for full state support until graduation from the relevant educational institution.

In a letter of reply, the Medical University explained to the applicant that, being a state higher educational institution, it was not authorised to exempt students from payment of education fees without legal justification, and that the Ministry of Education had been contacted with a view to clarifying this matter.

In turn, the Ministry of Education specified in a letter that, according to the Law, children who have lost their parents and are deprived of parental care or persons in an equivalent position (one parent, deceased; the other, a category 1 or 2 disabled person) are understood to be children up to 18 years of age. Therefore, the guarantees for education specified in Article 5 of the Law do not extend to persons who have lost both parents and are deprived of parental care during higher education (19-23 year old students in II-VI courses of study).

Articles 1 and 5 of the Law set out that persons who are no longer considered children may be entitled to such privileges, i.e. persons up to 23 years of age; however, these persons are entitled to such privileges only where they were 18 years old or under at the time they lost both parents and were deprived of parental care and are students in certain higher and secondary special educational institutions set out above.

According to the applicant, under the Law, using as a basis the deprivation of parental care at the age of 18 or under, the State provides children and persons mentioned in the Law with state social protection up to 23 years of age. The Law makes no provision for other persons who are 18-23 years old and in a similar situation.

The legal position of the Plenum of the Constitutional Court, mainly based on Article 42 of the Constitution, is that every citizen has the right to education. The State guarantees free compulsory secondary education. The system of education is under state control. The State guarantees continuation of education for most gifted persons.

These rights are also reflected in a number of international legal documents on human rights.

According to Article 2 Protocol 1 ECHR, no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The right to education has also been dealt with by the CESCR (Committee on Economic, Social and Cultural Rights) in General Comment no. 13: The Right to Education (Article 13 of the International Covenant on Economic, Social and Cultural Rights) adopted on 8 December 1999. It states, *inter alia,* that education is both a human right in itself and an indispensable means of realising other human rights.

The European Court of Human Rights stated that it could not overlook the fact that, unlike some public services, education is a right which enjoys direct protection under the European Convention on Human Rights. Education is one of the most important public services in a modern State which not only directly benefits those using it but also serves broader societal functions. In a democratic society, the right to education is indispensable to the furtherance of human rights and plays a fundamental role *(Ponomaryovi v. Bulgaria*, 21 June 2011, paragraph 55).

The Plenum of Constitutional Court noted that the principle of the social state provides for ensuring a fair social system as the legal commitment of the State. This principle stems from the Preamble to the Constitution, which declares the intention to provide adequate standards of living for everybody in accordance with fair economic and social norms. Effective social state policy ensures the establishment of peace and prosperity within society. In order for the State to be recognised as a social state, the Constitution contains the outlines and duties of social policy that are subject to the attention of the State. According to the provisions of the Constitution, the State undertook the commitment to establish a civil society and the social security of individuals by the State in the conditions of market economy, as well as to respect the principle of social justice by means of policy implemented in the field of social and economic rights.

Having regard to the legal positions set out above, the Plenum of the Constitutional Court held that the non-application of Article 1.12 of the Law on social security of children who have lost their parents and are deprived of parental care – to persons who were over 18 years old at the time they were deprived of maintenance by their parents and study at state higher educational institutions – is not in accordance with Article 25.1 of the Constitution. In this connection, the Court found it necessary to recommend to the *Milli Majlis* that it harmonise this norm with the legal position reflected in the descriptive and motivation part of this Decision. Until this issue is resolved by legislation – based on the requirements of Article 25.1 of the Constitution, in cases where fee-paying persons studying in the relevant state higher educational institutions lose parental support after they are 18 years old for the reasons specified in Article 1.12 of the Law, the payments made by those persons during their education (up to 23 years age) must be paid back to them under Article 38.3 of the Law on Education.

Cross-references:

European Court of Human Rights:

- *Ponomaryovi v. Bulgaria*, no. 5335/05, 21.06.2011, paragraph 55, *Reports of Judgments and Decisions* 2011.

Languages:

Azerbaijani, English (translation by the Court).

Identification: AZE-2017-3-002

a) Azerbaijan / **b)** Constitutional Court / **c)** Plenum / **d)** 26.05.2017 / **e)** / **f)** Verification of compliance with the Constitution of some regulatory legal acts in the appeal by Clark Gordon Morris / **g)** *Azerbaijan*, *Respublika*, *Khalg gazeti*, *Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiya Mehkemesinin Melumati* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.1.1.1.1 Constitutional Justice − Constitutional jurisdiction − Statute and organisation − Sources − **Constitution**.
5.3.6 Fundamental Rights − Civil and political rights − **Freedom of movement**.

Keywords of the alphabetical index:

Freedom of movement, temporary restriction, freedom to choose residence / Freedom of movement, temporary restriction, debtor.

Headnotes:

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his or her residence. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, or for the protection of the rights and freedom of others.

Summary:

A citizen of the United Kingdom of Great Britain and Northern Ireland, Mr Gordon Morris Clark brought an appeal before the Constitutional Court, requesting it to examine a judicial order temporarily restricting his right to leave the country and the measure of restriction on the right to leave the country, as well as the compliance of the relevant regulatory legal acts with the Constitution and the provisions of Protocol 4 ECHR.

By judgment of 14 August 2014 by the Baku City Sabail District Court, Ms R. Ahmadova's claim for alimony against Mr G. M. Clark was granted, and the claimant was awarded alimony in the amount of 1/2 of Mr G. M. Clark's earnings and other income. The court issued an enforcement order on 15 September 2014.

On 4 September 2015 – after the presentation by the executive officer of the Nasimi District Executive Office with respect to the temporary restriction of the right to leave the country in order to ensure satisfaction of the claim in the enforcement order – the Baku City Nasimi District Court took a decision to order a temporary restriction on the right of Mr G. M. Clark, the debtor, to leave the country.

In his appeal to the Constitutional Court, the applicant stated that the above-mentioned decision of the Baku City Nasimi District Court and the upholding of the measure of temporary restriction on his right to leave the country did not comply with the requirements of Articles 28.3 and 71.2 of the Constitution, and Article 2.3 and 2.4 of Protocol 4 ECHR.

The Plenum of the Constitutional Court noted that according to Article 28.3 of the Constitution, everyone legally on the territory of the Republic of Azerbaijan may travel without restrictions, choose the place of residence and leave the territory of the Republic of Azerbaijan. Those rights are important elements of human freedom and are essential for the development of a person. Unreasonable restriction of those rights can lead to a violation of other constitutional rights and freedoms of a person.

These rights are also reflected in a number of international and legal human rights documents.

In accordance the Article 12 of the International Covenant on Civil and Political Rights:

- everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence;
- everyone shall be free to leave any country, including his own;
- the above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant;
- no one shall be arbitrarily deprived of the right to enter his own country.

In accordance with Article 2 Protocol 4 ECHR, everyone lawfully within the territory of a State may, within that territory, move freely and choose his or her residence. Everyone may leave any country, including his or her own. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Constitutional Court also noted that in General Comment no. 27, adopted on 2 November 1999, on Article 12 (Freedom of Movement) of the International Covenant on Civil and Political Rights, the UN Human

Rights Committee states that restrictions which may be imposed on the rights provided for in that article should not nullify the principle of freedom of movement. In order for these restrictions to be considered reasonable, they should be provided for by the law and should be necessary to achieve the objectives mentioned in Article 12.3 of the Covenant in a democratic society and should be consistent with all other rights set out in the Covenant. States should always be guided by the principle that these restrictions must not impair the essence of the right under consideration when adopting laws providing for restrictions permitted by Article 12.3 of the Covenant. The restrictive measures should comply with the principle of proportionality; they should be appropriate to achieve the protective function; among all means which may lead to the desired results, they should be the least restrictive and should be proportionate to protected interests. The principle of proportionality should be respected not only in the legislation providing for the relevant restriction, but also in the administrative and judicial authorities within the framework of the application of that law.

The European Court of Human Rights has stated that any measure restricting the right of freedom of movement should be consistent with the law, should pursue one of the legitimate aims set out in Article 2.3 Protocol 4 ECHR, and should be necessary in a democratic society, that is to say, meet the criteria of proportionality (see the following judgments: *Battista v. Italy*, 2 December 2014, paragraph 37; *Stamose v. Bulgaria*, 27 November 2012, paragraph 30; *Bartik v. Russia*, 21 December 2006, paragraph 46).

Taking into consideration the above-mentioned legal positions, the Plenum of the Constitutional Court considered the grounds for the application of a temporary restriction on the right of a debtor to leave the country – as provided for in Article 84-1 of the Law on Execution and in Part 2 of the Instruction on the rules for the application by the executive of a temporary restriction on the right to leave the country, approved by the Decree of the Ministry of Justice of 22 April 2013 – to be in accordance with Articles 28.3 and 71.2 of the Constitution, as the constitutional principles of legal certainty and proportionality are satisfied.

Courts should pay particular attention to the reasoning that such a measure would serve the timely and proper execution of the court decision in a presentation by the executive officer on the temporary restriction on the right of a debtor to leave the country.

When considering such a presentation, the courts should thoroughly, fully and objectively investigate all circumstances of the lawsuit and justify the necessity of applying the restriction in a judicial order.

When the issue of the temporary restriction on the right of Mr G. M. Clark to leave the country is heard in judicial or administrative proceedings, the legal positions specified in the description and motivation part of the Decision of the Plenum of the Constitutional Court should be taken into account.

Cross-references:

European Court of Human Rights:

- *Battista v. Italy*, no. 43978/09, 02.12.2014, Paragraph 37, *Reports of Judgments and Decisions* 2014;
- *Stamose v. Bulgaria*, no. 29713/05, 27.11.2012, Paragraph 30, *Reports of Judgments and Decisions* 2012;
- *Bartik v. Russia*, no. 55565/00, 21.12.2006, Paragraph 46, *Reports of Judgments and Decisions* 2006-XV.

Languages:

Azerbaijani, English (translation by the Court).

Belarus
Constitutional Court

Important decisions

Identification: BLR-2017-3-003

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 11.07.2017 / **e)** D-1117/2017 / **f)** On the Conformity of the Law introducing Alterations and Addenda to the Law on Counteracting Monopolistic Practices and Developing Competition to the Constitution / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 4/2017; www.kc.gov.by / **h)** CODICES (Belarusian, Russian).

Keywords of the systematic thesaurus:

3.10 General Principles − **Certainty of the law**.
3.12 General Principles − **Clarity and precision of legal provisions**.
3.25 General Principles − **Market economy**.
5.4.6 Fundamental Rights − Economic, social and cultural rights − **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Administrative authority, discretionary power / Antitrust / Commercial freedom, restriction.

Headnotes:

When exercising their discretionary powers under legislation empowering the Government to prevent discriminatory conditions and to require that an undertaking (business) dominating the market provide equal access to goods, the competent authorities (including the antitrust authority when issuing orders on the commercial practice rules to be followed) should neither restrict the rights of persons provided by law nor regulate the operation of undertakings (businesses) unless such action is required to secure equal access to goods for all consumers.

Summary:

In an open court session, the Constitutional Court considered, in the exercise of obligatory preliminary review, the constitutionality of the Law introducing Alterations and Addenda to the Law on Counteracting Monopolistic Practices and Developing Competition (hereinafter, the "Law"). Obligatory preliminary review (i.e. abstract review) is required for any law adopted by Parliament before it is signed by the President.

1. The Law aims at improving the legal regulation of counteracting monopolistic practices and developing competition, as well as harmonising and unifying the provisions of the law with the rules of the relevant international legal acts constituting the Eurasian Economic Union law.

The Constitutional Court stated that the basic terminology and definitions in the Law, as well as the dominance criteria provided for product markets, are aimed at:

i. promoting competition at state level;
ii. providing the conditions for the efficiency of product markets; and
iii. preventing and suppressing monopolistic practices and unfair competition. Laid down and clarified in the Law, they comply with the constitutional provisions envisaging that the State regulate economic activities in the interests of the individual and society (Article 13.5); and that the exercise of the right to property not be contrary to social benefit and security, or infringe upon the rights and legally protected interests of others (Article 44.6).

2. The Law on Counteracting Monopolistic Practices prohibits the establishment of discriminatory conditions (Articles 18.1.1.10 and 23.2.2.9), indications being given to undertakings (businesses) of what products should be bought, and restrictions on the consumers' choice of companies supplying the product market (Article 23.2.2.5 and 23.2.2.8).

In the Constitutional Court's opinion, the prohibition of monopolistic practices is lawful, as they infringe upon the legal order in the area of fair competition and run counter to the interests of both companies and consumers, as well as those of the state and society as a whole.

The Constitutional Court added that, regardless of the grounds, the legal prohibitions in that area should secure a proper balance between constitutional rights, individual freedoms, and public interests of the state and society. Such prohibitions may therefore not be arbitrarily introduced by the legislator – they should be based upon the principles and rules of the Constitution. Only when the legislator meets the constitutional requirements is the rule of law guaranteed, as well as the upholding of its components, including legality, protection of constitutional rights, freedoms and legitimate interests of individuals, and rights and legitimate interests of organisations.

In emphasising the meaning of the prohibitions against monopolistic practices and unfair competition, the Constitutional Court held the rules of Article 1 of the Law, which specify the existing prohibitions and establish new ones, to be consistent with the provisions of Article 13.2 and 13.4 of the Constitution envisaging that economic, business and other activities may be prohibited by law in some instances.

3. Article 19 of the Law on Counteracting Monopolistic Practices aims at securing non-discriminatory access to goods. As Article 19 prescribes, where the antitrust authority finds a company to have abused its dominant position, the Council of Ministers may, in order to prevent discriminatory conditions, lay down rules securing equal access to goods that are produced and/or sold by the company dominating the market (that is to say, a company which is not a monopoly but has a share of over 70% of the relevant product market). The antitrust authority, with a view to securing equal access to those companies' products, may take some measures with respect to such companies, including issuing orders on the commercial practice rules to be followed. The antitrust authority defines the content of the rules and the procedure for their publication.

In reviewing the constitutionality of the above provisions of the Law, the Constitutional Court concluded that this legislative regulation is based upon the provisions of Article 107 of the Constitution empowering the Government:

i. to ensure a uniform economic, financial, credit and monetary policy, and state policy in the fields of science, culture, education, health care, ecology, social security and remuneration for labour;
ii. to take measures to secure the rights and freedoms of citizens, to safeguard the interests of the state, national security and defence, as well as the protection of property, and to maintain public order and to combat crime; and
iii. to exercise other powers entrusted to it by the Constitution, laws and acts of the President.

An analysis of the content of Article 19 of the Law on Counteracting Monopolistic Practices shows that the Law provides for neither the issues to be dealt with by the Council of Ministers when laying down the rules for equal access to goods, nor the requirements with respect to content that are to be met by the antitrust authority when laying down the commercial practice rules.

According to the Constitutional Court, in exercising their discretionary powers, the competent authorities should neither restrict the rights of persons provided by law nor regulate the operation of undertakings (businesses) unless such action is required to secure equal access to goods for all consumers. Nor should they infringe upon the very essence of commercial freedom. To that end, when exercising their powers to lay down the rules referred to in the Law on Counteracting Monopolistic Practices, the Council of Ministers and the antitrust authority should do so on the basis of the provisions of the Law and other legislative acts regulating relationships in this area. They should also act on the basis of the constitutional values and principles, and the stipulation specifically set out in Article 23.1 of the Constitution, which allows for restriction of personal rights and freedoms only where specified by law and in interests that are constitutionally significant.

The legal position of the Constitutional Court is built upon the constitutional provisions that lay down the following:

i. the Republic of Belarus shall be bound by the principle of supremacy of law (Article 7.1);
ii. the State and all the bodies and officials thereof shall operate within the confines of the Constitution and acts of legislation adopted in accordance therewith (Article 7.2);
iii. the State shall grant equal rights to all to conduct economic and other activities, except for those prohibited by law, and guarantee equal protection and equal conditions for development of all forms of ownership (Article 13.2);
iv. the State shall guarantee to all equal opportunities for free utilisation of abilities and property for entrepreneurial and other types of economic activities which are not prohibited by law (Article 13.4); and
v. the State shall regulate economic activities in the interests of the individual and society (Article 13.5).

The Constitutional Court recognised the Law introducing Alterations and Addenda to the Law on Counteracting Monopolistic Practices and Developing Competition to be in conformity with the Constitution.

Languages:

Belarusian, Russian, English (translation by the Court).

Identification: BLR-2017-3-004

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 27.12.2017 / **e)** D-1107/2017 / **f)** On the Conformity of the Law introducing Alterations and Addenda to the Budget Code to the Constitution / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 4/2017; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

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**.
4.10.2 Institutions − Public finances − **Budget**.

Keywords of the alphabetical index:

Administration, public finances / Budget / Budget Act.

Headnotes:

The Law introducing Alterations and Addenda to the Budget Code is in conformity with the Constitution.

That Law:

i. improves the uniform procedure for budgeting of state non-budgetary funds as enshrined in the Budget Code;
ii. clarifies the rules concerning the deficit (or the surplus) of the relevant budget and the procedure for its approval;
iii. introduces administrators of budget revenue and determines their powers;
iv. implements the principle of legal certainty in budgetary matters; and
v. aims at improving the relations between the actors in the budgetary process.

Summary:

In the exercise of obligatory preliminary review, the Constitutional Court, in an open court session, considered the constitutionality of the Law introducing Alterations and Addenda to the Budget Code (hereinafter, the "Law"). Obligatory preliminary review (i.e. abstract review) is required for any law adopted by Parliament before it is signed by the President.

1. Article 1.3 of the Law provides that the principle of budget transparency, as enshrined in Article 8 of the Budget Code (hereinafter, the "Code"), along with other budgetary principles of the Republic of Belarus, is supported by the principle of publicity.

The Constitutional Court considered that supporting budget transparency with openness, which is its most important component, meets the following constitutional requirements:

i. the Republic of Belarus shall be bound by the principle of supremacy of law (Article 7.1);
ii. normative acts of state bodies shall be published or promulgated by other means specified by law (Article 7.4);
iii. citizens of the Republic of Belarus shall be guaranteed the right to receive and disseminate complete, reliable and timely information on the activities of state bodies on economic life (Article 34.1);
iv. reports on implementation of the national and local budgets shall be published (Article 135.3); and
v. the Committee of State Control shall exercise state control over the implementation of the national budget, use of state property, and implementation of the acts of the President, the Parliament, the Government and other state bodies regulating state property relations and economic, financial and tax relations (Article 129).

2. In accordance with Article 1.7 of the Law, Chapter 5 of the Code is supplemented with Article 21^1, which defines indicators to be approved by legislation on the budget of a state non-budgetary fund.

This addendum is aimed at enshrining a uniform procedure for budgeting of state non-budgetary funds. According to Article 20.1 of the Code, state non-budgetary funds are to be based on the budgetary principles of the Republic of Belarus. Articles 89 and 93 of the Code prescribe indicators to be approved by the law on the national budget and the decision of the local Council of Deputies on the budget for the next financial year. The Constitutional Court analysed the above provisions and concluded that the above legal regulation is based on the following provisions of the Constitution: the financial and credit system of the Republic of Belarus shall include the budget system, as well as the financial resources of non-budgetary funds; a uniform fiscal, tax, credit and currency policy shall be pursued in the territory of the Republic of Belarus (Article 132); and, the procedure for drawing up, approving and implementing budgets and public non-budgetary funds shall be determined by law (Article 134).

3. Chapter 8 "Deficit (or surplus) of the national budget, local budgets, its approval" of the Code is set out in a new wording (Article 1.25 of the Law). The chapter lays down the rules concerning the maximum amount of the deficit (or minimum amount of the surplus) of the relevant budget and the procedure for its approval. It also refines the provisions of Articles 50 and 51, which provide, respectively, for the sources of financing the deficit (or ways of using the surplus) of the national and local budgets.

Article 50 of the Code provides that the sources of financing the deficit (or ways of using the surplus) of the national budget include incoming loan repayments, exchange rate differences determined in accordance with the law, etc.

The Constitutional Court considered the alterations and addenda set out above to be aimed at specifying charges from national taxes; laying down non-tax revenues established by legislation; and clarifying and determining expenditures financed from the corresponding budgets. The Court found the above legal regulation to be the implementation of the budgetary principles of the state as enshrined in Article 8 of the Code and to be consistent with the principles and rules of the Constitution.

4. The Law (Article 33.1) supplements Section VI "Actors in the budgetary process and their powers" of the Code with Article 79^1, which introduces administrators of budget revenue and determines their powers.

The Constitutional Court considered the above provisions of Article 79^1 to be aimed at improving the budget monitoring of, *inter alia*, revenue calculation and timeliness of budget revenues, and at providing more accurate monitoring of non-tax revenues, as well as conditions that enable financial authorities planning budget revenues to have access to information. Those provisions meet the principles and rules of the Constitution, including Article 133.2, according to which budget revenues are to be made up of taxes determined by law and other obligatory payments, as well as other receipts.

The Constitutional Court also drew attention to the provisions of Article 79^1 that set out that the functions and powers of administrators of budget revenues are to be exercised under the procedure established by the Government. The Government is to set out a list of administrators of budget revenues (state bodies and other state organisations subordinate to the President, national bodies of state power, other state organisations subordinate to the Government and other organisations), their powers, and the revenue sources of the national and local budgets assigned to them.

Unless otherwise established by the Government in accordance with paragraph 1.2 of that Article, the local executive and administrative bodies determine other administrators (structural units of local executive and administrative bodies, other organisations), their powers and the sources of local budget revenues assigned to them.

In its review of the constitutionality of those provisions, the Constitutional Court concluded that vesting the Government and local executive and administrative bodies with the said powers is consistent with constitutional rules, by virtue of which the Government directs the system of subordinate bodies of state administration and other executive bodies and ensures implementation of a uniform economic, financial, credit and monetary policy (Article 107.2 and 107.5); and local councils of deputies and executive and administrative bodies, within their competence, resolve issues of local significance, proceeding from national interests and interests of the people who reside in the corresponding territory, and implement decisions of higher state bodies (Article 120).

It thus follows from the constitutional and legal meaning of the Law that its rules are aimed at improving the relations between the actors in the budgetary process concerning different phases of the budget cycle with respect to the national budget, local budgets and budgets of state non-budgetary funds, as well as rights and obligations of the actors in the budgetary process – that is to say, the further constitutionalisation of such relations in the budgetary process.

The Constitutional Court recognised the Law introducing Alterations and Addenda to the Budget Code to be in conformity with the Constitution.

Languages:

Belarusian, Russian, English (translation by the Court).

Belgium
Constitutional Court

Important decisions

Identification: BEL-2017-3-008

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 12.10.2017 / **e)** 116/2017 / **f)** / **g)** *Moniteur belge* (Official Gazette), 22.01.2018 / **h)** CODICES (French, Dutch, German).

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**.
3.17 General Principles − **Weighing of interests**.
5.1.1.5.1 Fundamental Rights − General questions − Entitlement to rights − Legal persons − **Private law**.
5.3.13.23.1 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to remain silent − **Right not to incriminate oneself**.
5.3.35 Fundamental Rights − Civil and political rights − **Inviolability of the home**.

Keywords of the alphabetical index:

On-site inspection / Investigation, tax / Home, definition, business premises / Home, inviolability / Legitimate aim, law / Foreseeability, law / Balance, legally protected interests / Judicial review / Right not to incriminate oneself.

Headnotes:

The right to respect for the home applies not only to private households but also to premises used for professional or commercial purposes. Interference by the legislature may be more substantial, moreover, in the case of professional or business premises or activities.

On-site tax inspections of business premises and house searches in connection with criminal investigations have fundamentally different purposes. In order to strike a fair balance between, on the one hand, the rights of the taxpayers concerned and, on the other hand, the need to be able to carry out efficient audits or investigations concerning the levying of income tax or value added tax, the legislator must ensure that on-site inspections are accompanied by sufficient safeguards against abuse.

Summary:

I. Three companies applied to the Court of First Instance of East Flanders, Ghent division, to complain of an unannounced visit to their premises by the Special Tax Inspectorate. The Court asked the Constitutional Court whether the statutory framework for the right to perform on-site tax inspections provided sufficient safeguards regarding the right to respect for private life and the home.

II. Under Articles 15 and 22 of the Constitution and Article 8 ECHR, any interference by the authorities with the right to respect for private life and the home must be set out in a sufficiently precise legislative provision, correspond to a pressing social need and be proportionate to the legitimate aim pursued.

The Court considered firstly that the right to respect for the home applied not only to private households but also to premises used for professional or business purposes. Interference by the legislature could also be more substantial in the case of professional or business premises or activities. The Court referred here to the case-law of the European Court of Human Rights (14 March 2013, *Bernh Larsen Holding AS and Others v. Norway*, § 104; 27 September 2005, *Petri Sallinen and Others v. Finland*, § 70; 28 April 2005, *Buck v. Germany*, § 31; 16 December 1992, *Niemietz v. Germany*, §§ 30-31).

On-site tax inspections are intended to be a means to establish whether tax returns are in order and therefore ensure the collection of taxes necessary for the proper functioning of the authority and for the economic well-being of the country. The interference with the right to respect for the home had a legitimate purpose, therefore, within the meaning of Article 8.2 ECHR. The provisions at issue were also sufficiently clear for the litigants to know what to expect and thus met the requirement for foreseeability.

Since the on-site tax inspection involved gaining access to business premises as opposed to a private dwelling, no prior judicial authorisation was required in the instant case (see also: European Court of Human Rights, 14 March 2013, *Bernh Larsen Holding AS and Others v. Norway*, § 172). The Court further noted that the on-site inspection had been

accompanied by sufficient safeguards against abuse. On-site tax inspections and house searches in connection with criminal investigations had fundamentally different purposes. The competent officials had administrative powers of investigation which were related to a particular objective and which could be exercised only for the purpose of establishing that the tax returns relating to income tax or value added tax were in order. There did not have to be any suspicion of fraud in order to justify an on-site tax inspection. The officials had no judicial powers of investigation. The inspection must be conducted within the limits indicated in the statutory provisions with regard to the timing and object of the audit and the nature of the premises. If the competent officials overstepped the limits of their powers of investigation, they would be deemed to have committed a misuse or abuse of authority, which could result in the inspection being declared null and void. The court must consider whether the statutory requirements had been met and whether the inspection carried out had been proportionate to the aim pursued. The lawfulness of an on-site tax inspection and the evidence gathered could, therefore, be subjected to an effective judicial review.

The Court found that the legislature had struck a fair balance between, on the one hand, the rights of the taxpayers concerned and, on the other, the need to be able to carry out efficient audits or investigations concerning the levying of income tax or value added tax.

Lastly, the Court made it clear that taxpayers could not invoke either the right to remain silent or the right not to incriminate themselves in order to avoid their obligation to co-operate with the inspection. It was only if a charge, within the meaning of Article 6 ECHR, had been brought against them that taxpayers could invoke the right to remain silent or not to incriminate themselves. This right presupposed that the prosecution in a criminal case sought to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. The right not to incriminate oneself did not extend, however, to the use in criminal proceedings of material which could be obtained from the taxpayer through the use of compulsory powers but which had an existence independent of the will of the taxpayer. In this connection, the Court referred once again to the case-law of the European Court of Human Rights (25 February 1993, *Funke v. France*, Paragraph 44; 17 December 1996, *Saunders v. United Kingdom*, Paragraphs 68-69; 3 May 2001, *J.B. v. Switzerland*, Paragraph 64; 16 June 2015, *Van Weerelt v. Netherlands*, Paragraphs 55-56).

Cross-references:

Constitutional Court:

- no. 132/2015, 01.10.2015, *Bulletin* 2015/3 [BEL-2015-3-009].

European Court of Human Rights:

- *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, 14.03.2013;
- *Petri Sallinen and Others v. Finland*, no. 50882/99, 27.09.2005;
- *Buck v. Germany*, no. 41604, 28.04.2005, *Reports of Judgments and Decisions* 2005-IV;
- *Niemietz v. Germany*, no. 13710/88, 16.12.1992, Series A, no. 251-B;
- *Funke v. France*, no. 10828/84, 25.02.1993, Series A, no. 256-A;
- *Saunders v. United Kingdom,* no. 19187/91, 17.12.1996, *Reports* 1996-VI;
- *J.B. v. Switzerland,* no. 31827/96, 03.05.2001, *Reports of Judgments and Decisions* 2001-III;
- *Van Weerelt v. Netherlands,* no. 784/14, 16.06.2015.

Languages:

French, Dutch, German.

Identification: BEL-2017-3-009

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 23.11.2017 / **e)** 131/2017 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.2.2 Fundamental Rights − Equality − **Criteria of distinction**.
5.2.2.7 Fundamental Rights − Equality − Criteria of distinction − **Age**.
5.3.33 Fundamental Rights − Civil and political rights − **Right to family life**.
5.3.33.1 Fundamental Rights − Civil and political rights − Right to family life − **Descent**.

5.3.44 Fundamental Rights − Civil and political rights − **Rights of the child**.

Keywords of the alphabetical index:

Adoption, simple, age gap between adopter and adoptee.

Headnotes:

In introducing the requirement that there be a certain age gap between adopter and adoptee, the legislation seeks to secure the place of each generation within the family, so as to establish a close parallel between biological parentage and adoptive parentage. An age difference of fifteen years between adopter and adoptee is in principle appropriate in order to achieve this aim.

Having regard to the close personal ties which must be protected and secured if they point to the existence of an effective family life, there is no valid reason why the fifteen-year age gap rule should be an absolute bar to adopting a child in cases where there is a long-term emotional relationship between the prospective adopter and adoptee, with no opportunity for the judge to take into account the existing family relationship between the parties concerned.

Summary:

The French-speaking Brussels *tribunal de première instance* was asked to rule on an application for a simple adoption. The parties applying for adoption cited a long and deep attachment, formed since birth, between the godmother, who had assumed responsibility for her god-daughter's upbringing from the age of 11 because of the biological parents' failure to provide proper care, and the god-daughter, who was now an adult. The difference in age between the prospective adopter and adoptee was thirteen and a half years. Under Article 345 of the Civil Code, however, adoption was permitted only if there was an age gap of at least fifteen years. The *tribunal de première instance* accordingly sought the Constitutional Court's opinion on the compatibility of this provision with Articles 10 and 11 of the Constitution, on their own or in conjunction with Articles 8 and 14 ECHR, in that it stipulated a minimum age difference of ten years in the case of someone seeking to adopt the child of his or her spouse or cohabitant, even if deceased, and a minimum age difference of fifteen years in other cases, thereby constituting an impediment to adoption for the parties in the case.

The Court observed that the difference in treatment was based on an objective criterion, namely the fact of being a descendant in the first degree or an adopted child of the adopter's spouse or cohabitant or, since a change to the law on 20 February 2017, former partner, even if he or she were deceased.

The Court was required to further ascertain whether this criterion was reasonably justified. In this connection it noted that the purpose of the legislation being to secure the place of each generation within the family, a fifteen-year age difference between adopter and adoptee was appropriate and that it was likewise appropriate in relation to this objective that the legislator should have deemed a 10-year age difference to be sufficient if the adopter were the spouse, cohabitant or partner of the parent of the adoptee, given that the relationship thus established with the child's parent served to secure the place of each generation within the family.

The Court then considered whether the fact that adoption was automatically prohibited did not have a disproportionate impact in relation to the purpose of the legislation, bearing in mind the obligation to take into consideration the private and family life of those applying for adoption.

The Court referred here to Article 8 ECHR and to the case-law of the European Court of Human Rights on the right to respect for family life. It pointed out that, in order to be compatible with Article 8 ECHR, any interference by a public authority with the exercise of the right to respect for family life must be set out in a sufficiently clear legislative provision, intended for one or more of the legitimate aims set out in paragraph 2 of Article 9, and be "necessary in a democratic society" to achieve that aim. It concluded that, in the case at hand, having regard to the close personal ties that must be protected and secured if they pointed to the existence of an effective family life, there was no valid reason why the fifteen-year age gap rule laid down in the provision at issue should be an absolute bar to adopting a child in cases where there was a long-term emotional relationship between those applying for adoption and an age difference equivalent to the one prescribed for a person wishing to adopt a descendant in the first degree or an adoptive child of his or her spouse, cohabitant or former partner, even if deceased (ten years), with no opportunity for the judge to take into account the existing family relationship between the applicants.

The Court found that there had been a violation, to this extent, of Articles 10 and 11 of the Constitution, in conjunction with Article 22 of the Constitution and with Articles 8 and 14 ECHR.

Languages:

French, Dutch, German.

Identification: BEL-2017-3-010

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 21.12.2017 / **e)** 148/2017 / **f)** / **g)** *Moniteur belge* (Official Gazette), 12.01.2018 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.1.1.3 Fundamental Rights − General questions − Entitlement to rights − **Foreigners**.
5.1.1.3.1 Fundamental Rights − General questions − Entitlement to rights − Foreigners − **Refugees and applicants for refugee status**.
5.2.2 Fundamental Rights − Equality − **Criteria of distinction**.
5.3.5.1.4 Fundamental Rights − Civil and political rights − Individual liberty − Deprivation of liberty − **Conditional release**.
5.3.9 Fundamental Rights − Civil and political rights − **Right of residence**.

Keywords of the alphabetical index:

Foreigner, unlawful residence / Foreigner, unlawful residence, difference in treatment / Prison sentence, enforcement, parole / Prison, sentence, enforcement / Prisoner, parole / Prison sentence, enforcement method.

Headnotes:

In not allowing the authorities responsible for determining how sentences were to be executed to consider, in the light of the specific administrative, family and social circumstances of the foreign applicant, whether there was any justification for denying him his requested enforcement method on the ground that according to a notice from the Aliens Office, he was not authorised to remain in the country, the legislature had acted disproportionately.

Summary:

A number of individuals and various human rights associations together with the *Association syndicale des magistrats* and the *Ordre des barreaux francophone et germanophone* lodged applications with the Constitutional Court, asking it to abrogate certain provisions of the law of 5 February 2016 amending criminal law and criminal procedure and introducing various provisions relating to the justice system. The law seeks to improve and modernise criminal law and criminal procedure in order to make the administration of justice more efficient, speedy and cost-effective, without compromising the quality of the administration of justice or the fundamental rights of those who use the justice system.

The appellants asked the Court to abrogate numerous provisions of this law relating to the following issues: increased penalties for crimes that have been reduced to lesser offences and the extension of the possibility of prosecuting serious offences as lesser offences, the extension of the so-called mini-instruction to include searches, the abolition of the automatic nullity sanction for wiretap orders in which there is an irregularity, the restriction of the possibility of appealing, the introduction of the obligation to file, in appeal proceedings, a petition setting out the complaints, the removal of the possibility of immediately appealing on a point of law against certain decisions of the indictments chamber, changes to the time-frames for which pre-trial detention may be continued, the restriction of the right to immediately appeal on a point of law against pre-trial detention orders issued by the indictments chamber, the continuation of electronically monitored house arrest by a judge in chambers when concluding the pre-trial proceedings, the exclusion of persons without a residence permit from certain arrangements for the enforcement of sentences and the introduction of the possibility of assigning lawyers *(juristes de parquet)* certain powers and responsibilities enjoyed by the State Counsel's Office.

This contribution will deal merely with the exclusion of persons without a residence permit from certain arrangements for the enforcement of sentences.

Pursuant to the impugned provisions, foreign sentenced persons who did not have leave to remain in the country were not eligible for the enforcement arrangements applicable to other sentenced persons except for short-term leave which could be granted for a maximum period of sixteen hours for social, moral, legal, family, educational or professional reasons which required the individual's presence outside the prison or for a medical examination or medical treatment outside the prison.

The Court observed that the difference in treatment was based on the sentenced person's administrative residence status and that this distinguishing criterion was an objective one, and served the intended purpose of the legislation, namely to prevent persons who did not have leave to remain in the country from moving around outside the prison in which they were serving their sentence.

The Court was also required to consider, however, whether the measure which involved automatically denying, without an individual assessment, an entire category of sentenced persons the possibility of benefiting from certain arrangements for the enforcement of sentences was reasonably proportionate to the aim pursued, given the reasons for which the arrangements in question had been introduced. These arrangements were designed to facilitate sentenced persons' social rehabilitation, to enable them to maintain, while in detention, family, emotional and social ties and/or to allow them to attend to family matters of a serious and exceptional nature. The Court further observed that the decision to allow individuals to benefit from these arrangements was never automatic and was taken only after the competent authority had carefully considered, as the case may be, the rehabilitation plan to ensure that it was realistic and practicable, and any adverse effects relating in particular to the risk of reoffending, the risk of the individual bothering the victims and the risk of him or her absconding.

The Court noted that because of their absolute and automatic nature, the impugned provisions prevented the competent authority from considering a request from foreigners in the category concerned to be allowed to benefit from an arrangement that would help them to prepare for their reintegration into society or to maintain family, emotional or social ties. In not allowing the authorities responsible for determining how sentences were to be enforced to consider, in the light of the specific administrative, family and social circumstances of the foreign applicant, whether there was any justification for denying him his requested arrangement on the ground that according to a notice from the Aliens Office, he did not have leave to remain in the country, the legislature had acted disproportionately.

The Court accordingly decided to abrogate the impugned provisions. It pointed out that such abrogation did not prevent the legislature from assessing, in the case of each proposed sentence enforcement method, whether certain categories of foreigners without leave to remain in the country should be prohibited from benefiting from a particular arrangement, in accordance with the principle of proportionality.

Languages:

French, Dutch, German.

Bosnia and Herzegovina
Constitutional Court

Important decisions

Identification: BIH-2017-3-004

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 07.03.2017 / **e)** AP 10/17 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 25/17 / **h)** CODICES (Bosnian).

Keywords of the systematic thesaurus:

5.3.5.1 Fundamental Rights − Civil and political rights − Individual liberty − **Deprivation of liberty**.
5.3.13.2 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Effective remedy**.
5.3.13.3.2 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:

Custody, extension, notification.

Headnotes:

If, in the course of a review of detention measures, a decision was passed justifying further extension of custody but the decision was not served on the applicant's defence counsel, this will run counter to the Constitution and Article 5 ECHR and will result in the applicant being unable to avail themselves of an effective legal remedy.

Summary:

I. The Cantonal Court, in the course of a routine review of the justification for detention measures imposed on the applicant, concluded that circumstances still existed to justify extension of custody and extended it by a further two months. The ruling extending the measure was submitted to the applicant and his former *ex officio* attorney, who had been relieved of his duty two months before the ruling was issued. The applicant had been assigned another *ex officio* attorney but, despite her express request, the ruling extending the detention had not been delivered to her.

The applicant contended that the court's failure to issue a ruling on the extension of detention resulted in a breach of the Constitution and Article 5 ECHR and meant he was unable to exercise an effective legal remedy and to challenge the ruling.

II. The Constitutional Court noted in this context the provisions of Article 185.4 of the Criminal Procedure Code, which stipulate that the indictment and all the submissions must be delivered to the defendant's lawyer; the time limit for the submission of legal remedy begins to run on the date the indictment is submitted to the indicted person or their defence lawyer. In the Constitutional Court's view, it follows from the above provisions that the Cantonal Court was obliged, aside from the applicant, to deliver the ruling to his defence attorney *ex officio* so that they could exercise the right to legal remedy. This would have ensured prompt judicial control of the lawfulness of the detention imposed by the ruling in question. As this had not happened, the safeguards under Article 5.4 ECHR had not been ensured for the applicant in terms of creating conditions for prompt judicial control of lawfulness. His rights under Article II.3.d of the Constitution and Article 5.4 ECHR were therefore breached.

Languages:

Bosnian, Croatian, Serbian.

Identification: BIH-2017-3-005

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 07.03.2017 / **e)** AP 865/16 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 25/17 / **h)** CODICES (Bosnian).

Keywords of the systematic thesaurus:

5.3.13.25 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Right to be informed about the charges**.

Keywords of the alphabetical index:

Prosecutors' Office, questioning.

Headnotes:

If a defendant, during his examination before the Prosecutor's Office, was not aware of all the offences with which he was charged or informed of the rights he had, this amounts to a breach of the right to a fair trial.

Summary:

I. The applicant had been found guilty by a verdict of the Court of the criminal offence of illegal interceding (accepting a reward for interceding so that an official act is or is not performed). A prison sentence was imposed, which was subsequently replaced by a fine. In his appeal the applicant pointed out that he had not been immediately and thoroughly informed about the nature of the indictment and the reason for it. In particular, when he first came before the Prosecutor's Office for interrogation, he was not questioned in compliance with Article 78.1.c of the Criminal Procedure Code, or informed about the indictment in regard to paragraph 2 of the enacting clause of the challenged verdict. Nor was he presented with evidence in respect of which he could have given his own statement and structured his defence. Having examined the written record of the interrogation, the Appellate Panel noted that the applicant had not been informed about the indictment with regards to count no. 2 of the indictment (the challenged verdict) but that when he was interrogated, in the presence of his defence counsel, he gave a statement about the accusation which was the subject of count 2 of the above indictment and so the Criminal Procedure Code was not violated.

The applicant contended that the challenged verdict was unlawful; it was based on evidence on which, within the meaning of the legislative provisions, it should not have been based. Such a situation amounted to erroneously established facts and arbitrary application of the substantive law and thus a breach of the principle *in dubio pro reo*.

II. The Constitutional Court observed that its role was not to examine whether facts had been established incorrectly or whether the substantive law had been misapplied. Its task was to assess the fairness of the proceedings as a whole, including the way in which the evidence was obtained, within the meaning of Article 6 ECHR, and implicitly whether the rights of the defence were respected. Bearing in mind the relevant standards of the European Court of Human Rights and relevant domestic law in this context, the Constitutional Court concluded that in this case, the applicant had not been informed about the indictment regarding count no. 2 of the indictment, i.e. the challenged verdict. Therefore, the Appellate Panel's conclusion that he also gave a statement about this accusation when he was questioned in the presence of his defence counsel was an arbitrary one.

Although the Appellate Panel did not explicitly refer to this piece of evidence in the reasons for the challenged verdict, the Constitutional Court concluded that doubt had been cast over the lawfulness of the proceedings as a whole, in terms of the general safeguards of the right to a fair trial and that the applicant's right to a fair trial under Article 6.1 ECHR had been violated.

Languages:

Bosnian, Croatian, Serbian.

Brazil
Federal Supreme Court

Important decisions

Identification: BRA-2017-3-006

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 08.06.2016 / **e)** Extraordinary appeal 627189 (RE 627189) / **f)** Principle of precaution and electromagnetic fields / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 66, 03.04.2017 / **h)**.

Keywords of the systematic thesaurus:

5.4.19 Fundamental Rights − Economic, social and cultural rights − **Right to health**.
5.5.1 Fundamental Rights − Collective rights − **Right to the environment**.

Keywords of the alphabetical index:

Electricity, transmission / Energy company, energy, sector, regulation / Energy, sector, state control / Energy, security control / Environment, conservation / Environment, emissions trading / Health, protection, precaution, principle / Regulation, community, field of application / Regulation, economic and social repercussion / Regulation, executive, regulating statutory matters / World Health Organisation, standards.

Headnotes:

At the present stage of scientific knowledge, the existence of harmful effects of electric, magnetic and electromagnetic fields generated by electric power systems on individuals via occupational exposure and on the general population is uncertain. As such there is no reason why the Brazilian courts should adopt standards concerning such exposure set out in legislation from other countries, especially when its legislation was consistent with standards proposed by the World Health Organisation, according to Law 11934/2009.

Summary:

I. A company, Eletropaulo Metropolitana – Electricity of São Paulo S/A, filed an extraordinary appeal against a decision that ordered it to adopt measures to reduce the intensity of electromagnetic fields emitted from electric power transmission lines. The basis on which the order was made was that such radiation is potentially carcinogenic. The Court based its decision on the precautionary principle, which stems from the constitutional right to an ecologically balanced environment and healthy quality of life (Articles 5.caput and 225 of the Constitution). It further based its decision on the Swiss security standard, which is set at a lower level than the one provided for in Brazilian legislation.

II. The Supreme Court granted the extraordinary appeal. It stated that, at the present stage of scientific knowledge, the existence of harmful effects of occupational exposure and of the general population to electric, magnetic and electromagnetic fields generated by electric power systems is uncertain. Furthermore, due to the state of knowledge, there is no reason to apply standards set within legislation from other countries, especially when national rules comply with international standards proposed by the World Health Organisation (WHO).

The Court explained that the precautionary principle is provided for in the Federal Constitution (Article 225) and in several international environmental protection standards. It is a risk management criterion to be applied whenever there is scientific uncertainty about the possibility that a product, event or service harming the environment or affecting the health of citizens. This requires the government to analyse the risks, assess the costs of prevention measures and, in the end, take measures necessary to control them. These actions derive from universal, non-discriminatory, reasoned, coherent and proportionate decisions.

The Full Court held that the protection of the fundamental right to a balanced environment and to public health is a constitutional obligation, which is common to all the Federation's entities, to society, to those who carry out economic activity, and to those who provide public services, such as public-utility companies that generate electric power. Consequently, public policies that affect public health must be carried out with efficiency and prudence, in order to avoid risks to the population and to guarantee the fundamental right to health. In order to comply with these duties, electric power generating public-utility companies must act consistently with their constitutional obligations and with regulations and decisions issued by the competent regulatory agency, which in this case is the National Agency of Electric Power (ANEEL). The Court stated that there is no prohibition on judicial control of public policies regarding the precautionary principle's application. However, judicial review of and decisions concerning such policies can only deal with the formal analysis of

these parameters, and must respect discretionary choices made by the legislator and the Public Administration.

Regarding the levels of human exposure to electromagnetic fields that originate from power generation, transmission and distribution facilities, the Court highlighted that, during the course of this case, ANEEL issued Normative Regulation 616/2004. This document raised the maximum permanent limit of human exposure to electric and magnetic fields and in so doing provided a new interpretation to Law 11934/2009. This new standard was founded on values established in an official document of the International Commission on Non-Ionizing Radiation Protection (ICNIRP), which is a specialised body and one recognised by WHO for its excellence. Its guidelines are grounded on a careful analysis of scientific literature. They set limits that are within reasonable and acceptable risk margins for exposure that may cause an adverse effect to public health. Thus, the Court held that the limits collected by expert evidence were within the parameters required by the legal system and were compliant with international guidelines.

The Justice Rapporteur pointed out that studies developed by the WHO showed that there was no convincing scientific evidence that human exposure to electromagnetic fields above the limits established in Brazilian law caused harmful health effects. The definition of what is safe or not depends on the state of scientific knowledge on the subject. However, he stated that there is no evidence, or even indication, to establish that scientific progress in Switzerland or other countries that do not adopt WHO and ICNIRP standards, is more advanced than the scientific knowledge of those who adopt those standards.

In this context, the Court recognised that Brazil had taken necessary precautions, based on the constitutional principle of precaution. Furthermore, given that the Brazilian legal system is guided by international safety parameters, there were no legal or factual grounds to require the public-utility company to reduce the emissions from its electro-magnetic field of electric power transmission lines to a level below the legal limit.

The Court concluded that, in the future, if there are real scientific and/or political reasons for reviewing what was decided within the normative framework, further discussions and revision to of the approach and guidelines must take place.

Supplementary information:

- Articles 5.caput and 225 of the Federal Constitution;
- Law 11934/2009;
- Normative Regulation 616/2004;
- This case refers to Topic 479 of general application: the imposition of an obligation on the public-utility company to observe international safety standard.

Languages:

Portuguese, English (translation by the Court).

Identification: BRA-2017-3-007

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 17.08.2016 / **e)** Extraordinary appeal 898450 (RE 898450) / **f)** Selection for public office and tattoo ban / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 114, 31.05.2017 / **h)**.

Keywords of the systematic thesaurus:

5.3.19 Fundamental Rights − Civil and political rights − **Freedom of opinion**.
5.3.21 Fundamental Rights − Civil and political rights − **Freedom of expression**.
5.4.9 Fundamental Rights − Economic, social and cultural rights − **Right of access to the public service**.

Keywords of the alphabetical index:

Art, obscene / Civil service, examination, competitive / Civil servant, freedom of expression / Civil servant, recruitment / Civil service, requirement, specific / Discrimination, prohibition of incitement / Entrance examination / Legislator, discretionary power / Violence, prohibition of incitement.

Headnotes:

Requirements created by public notices for public service entrance exams are unconstitutional if there is no expressed legal provision.

Public notices of public service entrance examinations shall not establish restrictions on people with tattoos, unless in exceptional situations, when the content violates constitutional values.

Summary:

I. This case refers to an extraordinary appeal filed against a decision that excluded a candidate from a selection process for appointment as a soldier of the Military Police of the State of São Paulo. The plaintiff had a tattoo that was found, at a medical examination, to greater in size than permissible under the terms set in a public notice governing the process for the competitive selection of such public servants.

II. The Supreme Court, by a majority, granted the appeal. In doing so the Court restated the principle it had previously articulated it is unconstitutional to create requirements for appointment to public office, public service, or a public role by public notice concerning entrance exams for such appointments unless they are expressly provided for by law: see Article 37.I of the Constitution. The Court also affirmed that public notices may not establish restrictions on the appointment of individuals with tattoos, apart from in exceptional situations when the tattoo's content violates constitutional values.

The Court held that the legislator could not use a presumed discretion to create arbitrary barriers to access public services. Such barriers would reduce the number of potential applicants for appointment and thus make it impossible for the Administration to choose the best candidates. The Court pointed out that requirements and impediments provided by law concerning the exercise of a public office must be compatible with the nature and character of the activities to be performed. Restrictions that offend fundamental rights, violate the principle of proportionality, or are not related to the exercise of the particular form of public service in question are therefore unconstitutional.

The Court restated the fact that tattoos lost any negative connotations or stigma quite some time ago. Today, they are seen as artistic work; they are an authentic form of free manifestation of thought and expression for many diverse groups and for individuals of many different ages throughout society (Article 5.IV and 5.IX of the Constitution). It is a citizen's fundamental right to preserve their image as a reflection of their identity. Consequently, the State cannot discourage tattoos; such conduct would be in opposition to freedom of expression. On the contrary, the State should encourage the free exchange of opinions and ensure that minorities can express themselves freely in society. This includes the right to non-interference and respect for the right to choose.

Based on the principles of freedom and equality, the Full Court stated that there is no justification for Public Administration and society to see tattoos as indicating social marginality or inability to exercise certain public office. Therefore, the State cannot consider the simple fact that a person has tattoos, visible or not, as a valid factor to determine suitability for the pursuit of a career in public service: a tattoo, of itself, does not undermine an individual's personal honour, professionalism, competence or respect for institutions.

However, it went on to state that in exceptional cases, it was permissible to impose legal restrictions on entry into public service where the content of an individual's tattoo(s) violated institutional or constitutional values or was offensive to the nature of public office. In such a context, tattoos offensive to human dignity (such as hate speech), which contained symbolism that was unlawful or incompatible with public service, may properly be relied on to restrict access to public office. The same approach is taken where tattoos representing obscenities, terrorist or extremist ideologies, to those that incite violence, threats or criminality, to those that encourage discrimination based on race, creed, sex, origin or any other form of intolerance. Restrictions on access to public service on these grounds would appear to be neither unreasonable nor disproportionate.

In the present case, the Court established that there was no law in the local legal system that supported the imposition of the restriction that led to the plaintiff being excluded from taking the public service entrance examination. The disqualification was based solely on aesthetic grounds; the candidate was prevented from taking the examination simply because his tattoo would be visible when wearing his work uniform. The tattoo contained no symbolism that would offend against constitutional norms or the military institution. In addition to having no legal provision that would justify the restriction imposed, the Full Court also declared the public notice itself unconstitutional as the parameters adopted to select candidates were biased, discriminatory, and unreasonable. Thus, the Court concluded that this document breached one of the fundamental constitutional objectives of Brazil, i.e., the promotion of "the good of all, without prejudice of origin, race, sex, colour, age and any other forms of discrimination" (Article 3.IV of the Constitution).

Supplementary information:

- Articles 3.IV; 5.IV, 5.IX and 37.I of the Federal Constitution;
- This case refers to Topic 838 of general application: the constitutionality of the prohibition established by a public notice to take up a public office, service or role for candidates who have certain types of bodily tattoo;
- Competitive public examinations or selection processes for public offices are exams established by the Federal Constitution for the recruitment and admission of civil and military servants. They are a method to secure effective public administration on a merit-based appointment system. The requirements for the selection process, such as disciplines that will be evaluated on the exam, fees, date of exam, maximum age, etc., are pre-established in a public notice.

Languages:

Portuguese, English (translation by the Court).

Identification: BRA-2017-3-008

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 22.09.2016 / **e)** Appeal against a non-unanimous appellate decision as relief from judgment 1244 (AR 1244 EI) / **f)** Right of paternity recognition and the principle of human dignity / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 63, 30.03.2017 / **h)**.

Keywords of the systematic thesaurus:

5.3.1 Fundamental Rights − Civil and political rights − **Right to dignity**.
5.3.33.1 Fundamental Rights − Civil and political rights − Right to family life − **Descent**.

Keywords of the alphabetical index:

Child, establishment of descent from both parents / Civil law, descent / Descent, action challenging acknowledgement / Descent, interest of the child / Descent, legal presumption / Descent, legitimate / Descent, right to know, time-limit / Family member, interpretation / Human person, dignity.

Headnotes:

Given the importance of the fundamental right to search for genetic identity as an aspect of the right of personality and consistently with the principle of human dignity, every individual is entitled to have their paternity recognised at any time.

Summary:

I. This case concerns an appeal from the Court's decision to dismiss a paternity suit along with an inheritance claim.

The First Panel, adopting a literal reading of Articles 340 to 347 of the repealed Civil Code of 1916, held that it was impossible as a matter of law to determine paternity which resulted from adultery. The Panel stated that, according to the civil law, it was the husband's exclusive right to question a child's paternity when the child was born during marriage. It further stated that the wife's adultery and her confession concerning who was the child's biological father would not be sufficient evidence to rebut the legal presumption of paternity i.e., the presumption that a child's father is the man who is married to the child's mother when the child was conceived or born. As the couple's separation had not been proven and the husband did not contest paternity, the Court decided that it was not possible set aside the paternity of the individual who registered the child. Consequently, the presumption that the child was the husband's son prevailed.

The plaintiff alleged that there had been a mistake of fact at the trial, as the court had stated that the declarant on the plaintiff's birth certificate was his mother's husband. In fact, there were two birth certificates in the records in which the person named by the plaintiff as his biological father was the declarant. This implied an undisputable intention to recognise his paternity.

II. The Supreme Court accepted the appeal and decided to vacate the First Panel's decision. In reviewing the case, the Full Court acknowledged the mistake of fact that the qualification and legal assessment of the evidence produced in the case were erroneous.

The Court admitted that the previous decision accepted presumed paternity, although that finding was contrary to the documentary and testimonial evidence detailed in the record. It did so because the decision was based on a literal interpretation of an archaic and eminently sexist provision of the then-current civil law. In this way, the Panel placed too

great a weight on judicial procedure instead of on individual rights, thus preventing the child from having his true paternity recognised. Additionally, the decision breached the principles of reasonableness and human dignity, including the individual's right to formalise his filial relationship with his true parent, even if it stemmed from an adulterous relationship. The Panel would have forgotten that the goal of all judicial proceedings is to achieve justice that is the reason why the judicial procedures should be not only legal but also fair; settled case-law should not serve as a dogma to sustain a flagrant injustice.

The Full Court concluded by holding that given the importance of the fundamental right to search for genetic identity as an aspect of the right of personality and consistently with the principle of human dignity, every individual is entitled to have their paternity recognised at any time.

Supplementary information:

- Articles 340 to 347 of the Civil Code of 1916.

Languages:

Portuguese, English (translation by the Court).

Identification: BRA-2017-3-009

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 06.10.2016 / **e)** Direct Action for a declaration of unconstitutionality 4983 (ADI 4983) / **f)** Vaquejada and protection of the environment / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 87, 27.04.2017 / **h)**.

Keywords of the systematic thesaurus:

5.4.20 Fundamental Rights − Economic, social and cultural rights − **Right to culture**.
5.5.1 Fundamental Rights − Collective rights − **Right to the environment**.

Keywords of the alphabetical index:

Animal, protection / Animals, cruelty, prevention / Constitutional Court, judgment, declaration of unconstitutionality, effects / Cultural diversity, national and regional / Cultural heritage, protection / Culture, traditional / Declaration of unconstitutionality / Environment, conservation / Law, regional / Right to culture / Right to the environment.

Headnotes:

The state law that regulated the *vaquejada* as a sporting and a cultural practice was unconstitutional. Although the State is required to guarantee to all the full exercise of the right to culture, further to the fundamental right to environmental protection, cultural manifestations that subject animals to cruelty are prohibited.

Summary:

I. The Federal Prosecution filed a direct action of unconstitutionality against the law of the State of Ceará that regulated the *vaquejada* as a sporting and cultural practice (Law 15.299/2013) claiming that it subjected animals to ill and cruel treatment.

Vaquejada is an activity practiced in Brazilian rodeos, in which a pair of cowboys riding their horses, try to knock over a cow or a bull within a demarcated area by pulling it by the tail.

II. The Supreme Court allowed the claim and declared the law unconstitutional. It concluded that the State's obligation to guarantee to all the full exercise of cultural rights, encouraging the valorisation and the diffusion of popular cultural manifestations, must observe the fundamental right to environmental protection, which prohibits practices that subject animals to cruelty.

In the case, two constitutional norms arising from fundamental rights came into conflict: the protection of fauna and flora as an aspect of the right to a healthy and balanced environment; and, the right to cultural manifestation, as an aspect of social diversity (respectively, Articles 225.1.VII, and 215 of the Constitution). In such cases, the Court tends to privilege the collective interest, especially when there is a situation of unequivocal cruelty to animals. This was the position of the Court in the case of *Farra do Boi* (cattle spree) and of *Briga de Galo* (cockfighting). Although both practices were considered regional cultural manifestations, they subjected the animals to great cruelty and, for this reason, did not deserve constitutional protection. This demonstrates that the Court's overriding

concern is to maintain ecologically balanced conditions for a healthier and safer life for the benefit of today's and tomorrow's citizens.

According to the records, at the *vaquejada*, the animal is cloistered, flogged – including by way of electric shocks – and forced to escape rapidly when a gate is opened in order to create the conditions for its pursuit by cowboys. Chased by the competing horsemen across an arena, the bull is snatched by its tail in a sudden and violent way. The competitor twists and tugs its tail until the bull falls on the ground onto its backside so it is finally dominated. The prosecution attached technical reports to the court records that demonstrated how this was harmful to the animal's health. In addition to physical pain and mental suffering, it caused fractured limbs, ruptured ligaments and blood vessels, trauma to and displacement of the tail joint including its removal, which in turn could compromise the spinal cord and spinal nerves,. The prosecution also presented studies that indicated that the horses used in the activity also suffered injuries and irreparable harm.

There was no possibility that the animal would not suffer physical and mental violence when it was exposed to such treatment. Neither was it possible to create regulations capable of avoiding such intentionally inflicted suffering without altering the character of the activity itself. In addition to moral issues relating to entertainment at the expense of animal suffering, the Court has stated that the *vaquejada's* inherent cruelty could not permit of its cultural value being given pre-eminence. Thus, the Court stated that the meaning of the expression "cruelty" in the final part of item VII of Article 225.1 of the Constitution includes torture and ill-treatment of cattle.

Supplementary information:

- Articles 215 and 225.1.VII of the Federal Constitution;
- Law 15.299/2013 of the State of Ceará.

Languages:

Portuguese, English (translation by the Court).

Identification: BRA-2017-3-010

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 08.06.2017 / **e)** Direct action for a declaration of constitutionality 41 (ADC 41) / **f)** Competitive civil-service examination and racial quotas for black candidates / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 205, 17.8.2017 / **h)**.

Keywords of the systematic thesaurus:

4.6.9.1 Institutions − Executive bodies − The civil service − **Conditions of access**.
5.2.2.2 Fundamental Rights − Equality − Criteria of distinction − **Race**.
5.2.3 Fundamental Rights − Equality − **Affirmative action**.
5.4.2 Fundamental Rights − Economic, social and cultural rights − **Right to education**.

Keywords of the alphabetical index:

Entrance examination, entry to public service / Institution, higher education, autonomy / Minority, ethnic, protection, positive discrimination / Racial discrimination, protection, principle / Racism.

Headnotes:

Law 12.990/2014 is constitutional as it reserves 20% of positions offered in competitive civil service exams for appointment to offices in the Federal Government for black candidates.

Subsidiary criteria of hetero-identification are legitimate to combat false i.e., abusive or fraudulent, self-declarations, as long as they respect human dignity and guarantee an adversarial proceeding and the effective right to be heard.

Summary:

I. This case refers to a direct action filed by the Federal Council of the Brazilian Bar Association to declare constitutional Law 12.990/2014. This legal act reserved 20% of positions offered in competitive civil service examinations to offices in the Federal Government to black candidates.

The constitutionality of Law 12.990/2014 was questioned on the grounds that reserving positions for black candidates in civil service exams breached the right to equality and the prohibition of discrimination (Articles 5.caput and 3.IV of the Constitution), due to the creation of a discriminatory criterion – the candidate's race – as part of the selection process.

This affirmative action was also said to infringe the principles of open competition and efficiency (Article 37.caput and 37.II of the Constitution); since those candidates most qualified should be recruited regardless of their personal characteristics. Finally, the measure was said to violate the principle of proportionality, since the black population's difficulty in accessing public office stemmed from education, for which an affirmative action already existed, and not from the selection process to fill positions in the public sector.

II. The Supreme Court granted the declaratory claim and held Law 12990/2014 to be constitutional. The Court explained that the constitutional order rejected all forms of prejudice and discrimination, and imposed on the State the duty to act positively to combat racism and reduce social imbalances (Articles 3.III, 5.caput and 5.XLII, of the Constitution). In this context, the Court asserted that affirmative action are public policies, that seek to secure the right to equality, which prohibits unjustified disparities and hierarchies between individuals. Such action also repair historical, economic and social injustices, as well as impose respect for individual differences.

The Rapporteur Justice explained that, in the contemporary world, equality is expressed in three dimensions:

- Formal, which prevents the law from establishing discriminatory privileges and treatment;
- Material, which corresponds to the need to redistribute power, wealth and social well-being; and,
- Equality as recognition, meaning respect for minorities.

Accordingly, Law 12.990/2014 expressed equality in these three dimensions. The Justice when on to state that inequality established by this affirmative action is legitimate as it is consistent with the principle of equal protection. He also emphasised that the law is based on the need to overcome structural and institutional racism that still exists in Brazilian society, and in order to guarantee material equality among citizens through securing the better distribution of social assets and securing greater recognition of and black citizens.

While Brazil has significant multiracial population, co-existence between its white and black citizens was predominantly characterised in subaltern relations with black people being underrepresented among the richest in society and overrepresented among the poorest. In this scenario, reserving positions for black candidates in competitive civil service examinations has as its goal increased social inclusion through helping to secure these prestigious positions by a group historically neglected in the distribution of resources and power in society. As such it seeks to secure equality of opportunity for black and white citizens. Furthermore, this policy aims to overcome racial stereotypes, thereby increasing the black population's self-esteem, reducing prejudice and discrimination, enhancing pluralism and promoting diversity in public administration.

The Full Court dismissed the alleged infringement of the open competition principle. Reversing positions for black applicants did not exempt them from being approved for appointment via the public office selection process. Thus, it maintained free competition as the basis for access to public sector appointments, with equal opportunity for all candidates irrespective of their personal characteristics in the selection process. In addition, the incorporation of "race" as a selection criterion, instead of violating the principle of efficiency, helped to enhance it by creating a "representative" public service, which is then capable of ensuring that the opinions and interests of the entire population are considered in state decisions, while also reflecting the reality of the country's population.

Furthermore, the law did not breach the principle of proportionality. The existence of affirmative action for black citizens in public universities does not have an impact on the reservation of positions in competitive civil service examinations, nor does it generate a double advantage for its beneficiaries. This is because not all offices and public sector jobs require a college degree, nor will the beneficiary of affirmative action in the public service have necessarily benefited from quotas in public universities. In addition, other factors prevent black citizens from competing on an equal basis in selection processes for public offices e.g., lack of financial conditions for acquiring educational material, for attending preparatory courses or for dedicating themselves exclusively to study, as well as the persistence of prejudice. The Court also held that the proportion of 20% was reasonable as a significant proportion of available posts were to remain accessible via free competition. Moreover, the policy was moderate as: it had a transitional character (10 years); it established annual monitoring of results; and, it applied methods of ethnic-racial identification compatible with the principle of human dignity, as well as providing fraud control mechanisms.

The Justices considered that the use of subsidiary criteria for hetero-identification to combat fraud or other abuses in candidate's self-declarations was legitimate, as long as it respected human dignity and it guaranteed an adversary proceeding and the right to be heard e.g., a self-declaration made in-person

before the exam committee; the production of photographs; and candidate interviews to be carried out by examination boards with a diverse constitution.

In order to guarantee the affirmative action policy's efficacy, the Federal Government ought to apply the percentage reservation for all phases of, and positions offered in, public office selection processes, and not only those provided for in respect of those invited to take part in the competitive examination. In addition, available positions could not be divided according to a required specialisation in order to circumvent the affirmative action policy, which only applies when there are more than two openings. Finally, the order of classification obtained through the application of the criteria of alternation and proportionality in nominating approved candidates should take effect throughout the beneficiary's functional career, for instance, influencing any promotions and withdrawals.

Supplementary information:

- Articles 3.III, 3.IV, 5.caput, 5.XLII, 37.caput and 37.II of the Federal Constitution;
- Law 12.990/2014.

Languages:

Portuguese, English (translation by the Court).

Bulgaria
Constitutional Court

Important decisions

Identification: BUL-2017-3-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 13.10.2016 / **e)** 13/2015 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 83, 21.10.2016 / **h)** CODICES (Bulgarian, English).

Keywords of the systematic thesaurus:

3.9 General Principles − **Rule of law**.
5.2.2.9 Fundamental Rights − Equality − Criteria of distinction − **Political opinions or affiliation**.
5.3.13.1.3 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Scope − **Criminal proceedings**.
5.3.38.1 Fundamental Rights − Civil and political rights − Non-retrospective effect of law − **Criminal law**.

Keywords of the alphabetical index:

Criminal liability, limitation period / Penal prosecution, exclusion / Peace and humanity, crimes against.

Headnotes:

There is no mechanism within the Constitution which would prevent the legislator from enlarging the range of crimes to which the statute of limitations is not applicable, providing any such step is in line with the principle of a democratic state under the rule of law.

The principle of equality before the law, as a fundamental right which must be respected and applied in a non-discriminatory fashion by the legislation, is woven into the very fabric of the state committed to the rule of law. An amendment to the Criminal Code which resulted in the perpetrators of the crimes set out in it being treated in a different fashion on the grounds of the special social status of some of the perpetrators, and which also resulted in inequality between perpetrators of identical social status on the basis of the point in time when the crime was perpetrated, is not compliant with the Constitution. Conclusions of inequality between citizens on the basis of political affiliation or social

status in violation of Article 6 of the Constitution may also be drawn from the possibility opened up by the amendment of different treatment of the accomplices to these particular crimes.

Summary:

I. The Constitutional Court was asked by the Prosecutor-General, the applicant in this matter, to assess the constitutionality of paragraph 2 of the Act Amending the Criminal Code (AACC) (promulgated, DV, no. 74/26.09.2015), whereby subparagraph 2 was incorporated within Article 79.2 of the Criminal Code (promulgated, DV, no. 26/02.04.1968 with following supplements, DV, no. 47/21.06.2016), plus the Transitional and Concluding Provisions (TCP) in paragraphs 35 and 36 of the Act Amending the Criminal Code (promulgated, DV, no. 74/26.09.2015).

Article 79.2 of the Criminal Code is a codification of the rule that the statute of limitation does not apply to crimes against peace and humanity and (which is new) serious criminal offences under Sections I, II, IV and V of Chapter Two; Sections I, II and III of Chapter Three; Section III of Chapter Eleven of the Special Part of the Criminal Code, which were committed in the period from 9 September 1944 to 10 November 1989 by members of governing bodies of the Bulgarian Communist Party and by third parties who were assigned managerial or party functions.

The two transitional and concluding provisions – paragraphs 35 and 36 of the AACC – are consistent with Article 79.2 of the Criminal Code, as amended and supplemented. Under paragraph 35 of the AACC Transitional and Concluding Provisions, Article 79.2.2 of the Criminal Code will also apply to crimes in respect of which the limitation period has already elapsed. Paragraph 36 also allows for the re-opening of criminal cases for crimes under Article 79.2.2 which have concluded due to the expiry of the limitation period.

The applicant claimed that the exclusion from penal prosecution by the statutory limitations as codified in paragraph 2 of the AACC under Article 79.2.2 of the Criminal Code and the way in which the exclusion was reiterated by paragraphs 35 and 36 of the AACC Transitional and Concluding Provisions, were incompatible with the underlying principles as set forth in Chapter One of the Constitution.

II. The Constitutional Court declared unconstitutional Article 79.2.2 of the Criminal Code (promulgated, DV, no. 26/02.04.1968, amended, DV, no. 47/21.06.2016) and paragraphs 35 and 36 of the Transitional and Concluding Provisions of the Act Amending the Criminal Code (promulgated, DV, no. 74/26.09.2015).

Article 31.7 of the Constitution, in line with the international standard of limitation, approves the non-applicability of statutory limitations solely in respect of crimes against peace and humanity. There is no mechanism within the Constitution which would prevent the legislator from widening the range of crimes to which limitation did not apply, providing any such step was in line with the principle of a democratic state under the rule of law – a principle by which all constitutional democracies are bound.

The dispensation of justice in the transition is not an ultimate goal but rather a gear to achieve the goal – the rule of law. It is the rule of law that gives the feeling of morality and justice. It is the rule of law that changes the approach in justice by a shift of emphasis from sanction to prevention and deterrence of repetition. The rule of law should be understood in a broader way to encompass, along with the effective dispensation of justice, the safeguarding of the respect of fundamental rights such as fair trial, equality before the law, prohibition of discrimination and the exclusion of retroactive legislation.

Viewed as a whole, the Criminal Code amendment under dispute clashes with the principle of a state committed to the rule of law. It extends the non-applicability of the statutory limitation period, not only to crimes against peace and humanity and the exemption from prosecution and enforcement in regard to such crimes which is binding on the country as a result of the international instruments to which it is party and the express provision of Article 31.7 of the Constitution, but also to other serious crimes that were committed during the totalitarian rule of the state between 9 September 1944 and 10 November 1989. The amendment was also given retroactive effect in terms of crimes where the limitation period had elapsed.

The Constitutional Court found that the applicant's challenge of the constitutionality of Article 79.2.2 of the Criminal Code (in particular its non-compliance with Article 6 of the Constitution) was tenable. It upheld his reasoning and it also upheld its jurisprudence that there should be no legal curtailment of rights on the grounds of political affiliation or position held. The Constitutional Court could discern no reason to diverge from this view in the case under consideration.

Languages:

Bulgarian, English.

Canada
Supreme Court

Important decisions

Identification: CAN-2017-3-004

a) Canada / **b)** Supreme Court / **c)** / **d)** 02.11.2017 / **e)** 36664 / **f)** Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations) / **g)** *Canada Supreme Court Reports* (Official Digest), 2017 SCC 54, [2017] 2 S.C.R. 386 / **h)** http://scc-csc.lexum.com/scc-csc/en/nav.do; [2017] S.C.J. no. 54 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.20 Fundamental Rights − Civil and political rights − **Freedom of worship**.
5.5.5 Fundamental Rights – Collective rights – **Rights of aboriginal peoples, ancestral rights**.

Keywords of the alphabetical index:

Constitutional law, Canadian Charter of rights and freedoms, freedom of religion, beliefs, protection / Crown, duty to consult and accommodate.

Headnotes:

Section 2.a of the Canadian Charter of Rights and Freedoms (hereinafter, the "Charter") provides that everyone has the right to "freedom of conscience and religion". This right protects the freedom of individuals and groups to hold and manifest religious beliefs, but the state is not obliged to protect the object of beliefs or the spiritual focal point of worship.

Section 35 of the Constitution Act, 1982 provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed". Depending on the circumstances, Section 35 may require the Crown to consult and accommodate aboriginal interests, but does not give unsatisfied claimants a veto. Where adequate consultation has occurred, a project to use or develop lands may proceed without the consent of the aboriginal group concerned.

Summary:

I. The Ktunaxa are an aboriginal people whose traditional territories include a valley that they call Qat'muk. Qat'muk is a place of spiritual significance for them because it is home to Grizzly Bear Spirit, a principal spirit within Ktunaxa religious beliefs. The proponent Glacier Resorts sought provincial government approval to build a year-round ski resort in Qat'muk. The Ktunaxa were consulted and raised concerns. The resort plan was changed to add new protections for Ktunaxa interests. The Ktunaxa remained unsatisfied, but committed themselves to further consultation. Late in the process, the Ktunaxa adopted the position that accommodation was impossible because the project would drive Grizzly Bear Spirit from Qat'muk and therefore irrevocably impair their religious beliefs and practices. After efforts to continue consultation failed, the responsible provincial Minister declared that reasonable consultation had occurred and approved the project.

The Ktunaxa brought a petition for judicial review of the approval decision on the grounds that the project would violate their constitutional right to freedom of religion guaranteed by Section 2.a of the Charter, and that the Minister's decision breached the Crown's duty of consultation and accommodation under Section 35 of the Constitution Act, 1982. The chambers judge dismissed the petition, and the Court of Appeal affirmed that decision.

II. Seven judges of the Supreme Court dismissed the appeal, finding that the Minister's decision does not violate the right to freedom of religion, because the decision infringes neither the Ktunaxa's freedom to hold their beliefs nor their freedom to manifest those beliefs.

To establish an infringement of the right to freedom of religion, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief. In this case, the Ktunaxa sincerely believe in the existence and importance of Grizzly Bear Spirit. They also believe that permanent development in Qat'muk will drive this spirit from that place.

The Court was of the view, however, that the second part of the test is not met. The Ktunaxa are not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, they seek to protect the presence of Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it. This is a novel claim that would

extend Section 2.a beyond its scope and would put deeply held personal beliefs under judicial scrutiny. The state's duty under Section 2.a is not to protect the object of beliefs or the spiritual focal point of worship, such as Grizzly Bear Spirit. Rather, the state's duty is to protect everyone's freedom to hold such beliefs and to manifest them.

In addition, the Court concluded that the Minister's decision that the Crown had met its duty to consult and accommodate under Section 35 of the Constitution Act, 1982 was reasonable. The record here supports the reasonableness of the Minister's conclusion. The Ktunaxa spiritual claims to Qat'muk had been acknowledged from the outset. Negotiations spanning two decades and deep consultation had taken place. Many changes had been made to the project to accommodate the Ktunaxa's spiritual claims. At a point when it appeared all major issues had been resolved, the Ktunaxa adopted a new, absolute position that no accommodation was possible because permanent structures would drive Grizzly Bear Spirit from Qat'muk. The Minister sought to consult with the Ktunaxa on the newly formulated claim, but was told that there was no point in further consultation. The process protected by Section 35 was at an end.

Ultimately, the consultation was not inadequate. The Minister engaged in deep consultation on the spiritual claim. Moreover, the record does not establish that no accommodation was made with respect to the spiritual right. While the Minister did not offer the ultimate accommodation demanded by the Ktunaxa – complete rejection of the ski resort project – the Crown met its obligation to consult and accommodate. Section 35 guarantees a process, not a particular result. There is no guarantee that, in the end, the specific accommodation sought will be warranted or possible. Section 35 does not give unsatisfied claimants a veto.

III. In a concurring opinion, two judges also dismissed the appeal, but would have found that the Minister's decision infringed the right to religious freedom because it interferes with the Ktunaxa's ability to act in accordance with their religious beliefs or practices in a manner that is more than trivial or insubstantial. The Minister's decision is reasonable, however, because it reflects a proportionate balancing between the Ktunaxa's Section 2.a Charter right and the Minister's statutory objectives. The two judges were also in agreement with the majority judges that the Minister reasonably concluded that the duty to consult and accommodate the Ktunaxa under Section 35 of the Constitution Act, 1982.

Languages:

English, French (translation by the Court).

Identification: CAN-2017-3-005

a) Canada / **b)** Supreme Court / **c)** / **d)** 08.12.2017 / **e)** 37118 / **f)** R. v. Marakah / **g)** *Canada Supreme Court Reports* (Official Digest), 2017 SCC 59, [2017] x S.C.R. xxx / **h)** http://scc-csc.lexum.com/scc-csc/en/nav.do; [2017] S.C.J. no. 59 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

3.17 General Principles − **Weighing of interests**.
5.1.1 Fundamental Rights − General questions − **Entitlement to rights**.
5.3.13.17 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Rules of evidence**.
5.3.32.1 Fundamental Rights − Civil and political rights − Right to private life − **Protection of personal data**.
5.3.36.3 Fundamental Rights − Civil and political rights − Inviolability of communications − **Electronic communications**.

Keywords of the alphabetical index:

Constitutional right, violation / Canadian Charter of rights, search and seizure, standing to challenge search and admission of evidence, cellphone, text messages.

Headnotes:

Under Section 8 of the Canadian Charter of Rights and Freedoms (hereinafter, the "Charter") provides, "[e]veryone has the right to be secure against unreasonable search or seizure". An accused can, in some cases, have a reasonable expectation of privacy in a text message conversation recovered on an accomplice's mobile device and therefore standing to challenge the search and admission of that evidence under Section 8.

Summary:

I. The accused sent text messages to an accomplice regarding illegal transactions in firearms. The police seized the accused's BlackBerry and the accomplice's iPhone, searched both devices, and found incriminating text messages. The Crown charged the accused and sought to use the text messages as evidence against him. At trial, the accused argued that the messages should not be admitted against him because they were obtained in violation of his Section 8 Charter right. The application judge held that the text messages recovered from the accused's BlackBerry could not be used against him, but that the accused had no standing to argue that the text messages recovered from the accomplice's iPhone should not be admitted. The judge admitted the text messages and convicted the accused. A majority of the Court of Appeal dismissed the appeal.

II. A majority of four judges of the Supreme Court allowed the appeal, set aside the convictions and entered acquittals. The majority held that text messages that have been sent and received can, in some cases, attract a reasonable expectation of privacy and therefore can be protected against unreasonable search or seizure under Section 8. Whether a claimant had a reasonable expectation of privacy must be assessed in the totality of the circumstances. To claim Section 8 protection, claimants must establish that they had a direct interest in the subject matter of the search, that they had a subjective expectation of privacy in that subject matter and that their subjective expectation of privacy was objectively reasonable. Only if a claimant's subjective expectation of privacy was objectively reasonable will the claimant have standing to argue that the search was unreasonable.

A number of factors may assist in determining whether it was objectively reasonable to expect privacy in different circumstances, including:

1. the place where the search occurred whether it be a real physical place or a metaphorical chat room;
2. the private nature of the subject matter, that is whether the informational content of the electronic conversation revealed details of the claimant's lifestyle or information of a biographical nature; and
3. control over the subject matter.

Control is not an absolute indicator of a reasonable expectation of privacy, nor is lack of control fatal to a privacy interest. It is only one factor to be considered in the totality of the circumstances. Control must be analysed in relation to the subject matter of the search, which in this case was an electronic conversation. Individuals exercise meaningful control over the information that they send by text message by making choices about how, when, and to whom they disclose the information. An individual does not lose control over information for the purposes of Section 8 simply because another individual possesses it or can access it. Nor does the risk that a recipient could disclose an electronic conversation negate a reasonable expectation of privacy in an electronic conversation. Therefore, even where an individual does not have exclusive control over his or her personal information, only shared control, he or she may yet reasonably expect that information to remain safe from state scrutiny.

In this case, the accused had a reasonable expectation of privacy in the text messages recovered from the accomplice's iPhone. First, the subject matter of the alleged search was the electronic conversation between the accused and the accomplice. Second, the accused had a direct interest in that subject matter. He was a participant in that electronic conversation and the author of the particular text messages introduced as evidence against him. Third, he subjectively expected the conversation to remain private. Fourth, his subjective expectation was objectively reasonable; each of the three factors relevant to objective reasonableness in this case support this conclusion. Notably, the accused exercised control over the informational content of the electronic conversation and the manner in which information was disclosed. The risk that the accused could have disclosed it, if he chose to, does not negate the reasonableness of the accused's expectation of privacy. Therefore, the accused had standing to challenge the search and the admission of the evidence of the text messages recovered from the accomplice's iPhone.

On balance, the majority held that society's interest in the adjudication of the case on the merits did not outweigh the seriousness of the Charter-infringing conduct and its impact on the accused's interests. Therefore, the admission of the evidence would bring the administration of justice into disrepute and must be excluded under Section 24.2 of the Charter.

III. One judge agreed to allow the appeal, largely for the same reasons as the majority judges. Although he also shared the concerns raised by the dissenting judges, he held that those concerns did not arise on the facts of this case.

The two dissenting judges held that the accused did not have a reasonable expectation of personal privacy in his text message conversations with the accomplice, because of the accused's total lack of

control over them. Therefore, the accused did not have standing to challenge the search of the accomplice's phone under Section 8.

Supplementary information:

In the companion appeal*, R. v. Jones*, 2017 SCC 60, [2017] 2 S.C.R. 695, the accused sought to exclude at trial text messages records from a telecommunications service provider on the basis that obtaining them by means of a production order under the Criminal Code contravened his Section 8 Charter right. A majority of five judges of the Supreme Court held that the accused had a reasonable expectation of privacy in the text messages and thus standing under Section 8 to challenge the production order. However, the majority upheld the production order and therefore dismissed the accused's appeal.

Languages:

English, French (translation by the Court).

Identification: CAN-2017-3-006

a) Canada / **b)** Supreme Court / **c)** / **d)** 21.12.2017 / **e)** 37168 / **f)** R. v. Boutilier / **g)** *Canada Supreme Court Reports* (Official Digest), 2017 SCC 64, [2017] x S.C.R. xxx / **h)** http://scc-csc.lexum.com/scc-csc/en/nav.do; [2017] S.C.J. no. 64 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.3 Fundamental Rights − Civil and political rights − **Prohibition of torture and inhuman and degrading treatment**.
5.3.5.1 Fundamental Rights − Civil and political rights − Individual liberty − **Deprivation of liberty**.

Keywords of the alphabetical index:

Criminal law, sentencing / Dangerous offender, designation / Prison, sentence, indeterminate detention.

Headnotes:

Under Section 7 of the Canadian Charter of Rights and Freedoms (hereinafter, the "Charter") provides, "[e]veryone has the right to life, liberty and security of the person". Section 753.1 of the Criminal Code, which lists the statutory requirements that must be met before a court can designate an offender as dangerous, does not preclude a sentencing judge from considering future treatment prospects before designating an offender as dangerous and therefore is not overbroad under Section 7 of the Charter. Section 753.4.1 of the Criminal Code, which relates to the sentencing of a dangerous offender, is also not overbroad under Section 7 of the Charter, since it limits the availability of an indeterminate detention to a narrow group of offenders that are dangerous *per se*. In addition, Section 753.4.1 does not lead to a grossly disproportionate sentence, and therefore does not infringe Section 12 of the Charter, according to which "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment", since it does not presumptively impose indeterminate detention and does not prevent the sentencing judge from imposing a fit sentence.

Summary:

I. The accused pleaded guilty to six criminal charges arising out of a robbery. The prosecution brought an application seeking his designation as a dangerous offender and the imposition of a sentence of indeterminate detention. The accused challenged the constitutional validity of Section 753.1 and 753.4.1 of the Criminal Code under Sections 7 and 12 of the Charter. The sentencing judge found that Section 753.1 was unconstitutionally overbroad, but he suspended the declaration of invalidity. He then held that the accused was a dangerous offender and sentenced him to an indeterminate detention. The Court of Appeal held that the sentencing judge had erred in finding Section 753.1 to be overbroad, but agreed with the sentencing judge that Section 753.4.1 did not violate Sections 7 and 12 of the Charter.

II. In a majority decision, the Supreme Court dismissed the appeal. Section 753.1 of the Criminal Code does not violate Section 7 of the Charter. To obtain a designation of dangerousness resulting from violent behaviour, the prosecution must demonstrate beyond a reasonable doubt, *inter alia*, that the offender represents a threat to the life, safety or physical or mental well-being of other persons. Before designating a dangerous offender, a sentencing judge must be satisfied on the evidence that the offender poses a high likelihood of harmful recidivism and that his or her conduct is intractable. Through these two criteria, Parliament requires sentencing judges to conduct a prospective assessment of dangerousness. All of the evidence adduced during a dangerous

offender hearing must be considered at both the designation and penalty stages of the sentencing judge's analysis. At the designation stage, treatability informs the decision on the threat posed by an offender, whereas at the penalty stage, it helps determine the appropriate sentence to manage this threat. A prospective assessment of dangerousness ensures that only offenders who pose a tremendous future risk are designated as dangerous and face the possibility of being sentenced to an indeterminate detention. A provision imposing an indeterminate detention is therefore not overbroad if it is carefully confined in its application to those habitual criminals who are dangerous to others.

Section 753.4.1 of the Criminal Code does not infringe Section 7 of the Charter. It does not create a presumption that indeterminate detention is the appropriate sentence – the sentencing judge is under the obligation to conduct a thorough inquiry that considers all the evidence presented during the hearing in order to decide the fittest sentence for the offender.

Section 753.4.1 does not infringe Section 12 of the Charter. Properly read and applied, Section 753.4.1 does not impose an onus, a rebuttable presumption, or mandatory sanctioning. It provides guidance on how a sentencing judge can properly exercise his or her discretion in accordance with the applicable objectives and principles of sentencing. Sentencing principles and mandatory guidelines outlined in Section 718 to 718.2 of the Criminal Code apply to every sentencing decision. Parliament is entitled to decide that protection of the public is an enhanced sentencing objective for individuals who have been designated as dangerous. This does not mean that this objective operates to the exclusion of all others. Indeterminate detention is only one sentencing option among others: the sentencing alternatives listed in Section 753.4 encompass the entire spectrum of sentences contemplated by the Criminal Code. In order to properly exercise his or her discretion under Section 753.4, the sentencing judge must impose the least intrusive sentence required to achieve the primary purpose of the scheme. Nothing in the wording of Section 753.4.1 removes the obligation incumbent on a sentencing judge to consider all sentencing principles in order to choose a sentence that is fit for a specific offender.

In this case, although the sentencing judge committed an error of law, since he failed to consider the accused's treatment prospects before designating him as a dangerous offender, this error has not resulted in a substantial wrong or miscarriage of justice and does not change the sentencing judge's conclusion regarding the accused's dangerousness.

III. In a dissenting opinion on the issue of the constitutionality of Section 753.4.1, one judge is of the opinion that this provision should be declared to be of no force and effect as it violates Section 12 of the Charter and cannot be saved by Section 1.

By demanding a singular focus on public safety, Section 753.4.1 imposes indeterminate detention in cases where it is grossly disproportionate to the sentence mandated by the sentencing principles in the Criminal Code and the public protection objective of the dangerous offender scheme. Indeterminate detention is so excessive as to outrage standards of decency in cases where the offender's degree of responsibility and the gravity of the predicate offence are on the low end of the spectrum, especially where alternative measures, including lengthy sentences of incarceration with long term supervision orders, permit public safety concerns to be addressed.

Languages:

English, French (translation by the Court).

Costa Rica
Supreme Court of Justice

Important decisions

Identification: CRC-2017-3-003

a) Costa Rica / **b)** Supreme Court of Justice / **c)** Constitutional Chamber / **d)** 22.09.2017 / **e)** 2017-14918 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

5.3.18 Fundamental Rights − Civil and political rights − **Freedom of conscience**.
5.3.20 Fundamental Rights − Civil and political rights − **Freedom of worship**.
5.3.43 Fundamental Rights − Civil and political rights − **Right to self fulfilment**.

Keywords of the alphabetical index:

Personality, right to have and develop / Religion, wearing of the kippa, school.

Headnotes:

The use of the kippa is a constitutionally protected right under the freedom of worship and the right to have and develop a personality. These fundamental rights may only be restricted in accordance with:

i. Article 75 of the Constitution, which establishes the powers of the state to allow forms of worship "that do not contravene universal morality or good customs"; and
ii. Article 28, which establishes the right to have and develop a personality – it sets out, among other things: "[p]rivate actions that do not harm public morality or public order, or that do not cause damage to third parties, are outside the scope of the law".

The voluntary or mandatory use of certain objects that persons employ to profess and express to others a certain religious belief is part of the freedom of worship.

Any measure that restricts the freedom of worship must be legitimate and justified for the protection of the right of others.

Summary:

The plaintiff complained that the school authorities prohibited him from wearing a kippa on school premises.

The school regulations prohibit students from using or wearing items that are not part of the school uniform, such as piercings or expanders, rings, chains, laces, necklaces, bracelets, rosaries, as well as berets, caps and make-up. A teacher may prohibit these and other items where they are not part of the school uniform.

The plaintiff's mother formally questioned the school's restriction on her son's kippa. In reply, the school authorities requested to be informed of the days of religious observance of the use of the kippa. In accordance with the Hasidic movement of Orthodox Judaism, to which the plaintiff has converted, its use is mandatory at all times. The mother insisted that there could be no limit on its use, as it is part of his religious expression and Jewish identity. The plaintiff who is a minor, filed a writ of *amparo* before the Constitutional Chamber of the Supreme Court in order to protect his freedom of worship.

The Constitutional Chamber found that such limitations are a breach of Constitutional rights. Article 75 of the Constitution and the Chamber's precedents (Decisions of the Constitutional Chamber nos. 1996-3499 and 2017-00228) provide the individual with the requisite protection of the freedom of religion and worship; this includes the right to not be forced to abandon such religion or worship. Moreover, there is a right to profess such beliefs and to worship in accordance with one's creed, and to behave in accordance with such beliefs or creed in society.

The voluntary or mandatory use of certain objects that persons employ to profess and express a certain religious belief to others is part of the freedom of worship. The plaintiff, as a practising Hasidic Orthodox Jew, as a male and as part of his Jewish identity, must observe the usage of the kippa. The Court agreed on its importance after analysing the history of the kippa in the Jewish religion. For the Jewish community, the kippa is a form of worship and a religious symbol. Therefore, the Court held that, based on the freedom of worship and the freedom to develop a personality, the Jewish observance of the kippa is constitutionally protected. Moreover, The Court affirmed that its use stays within other limits laid down by the Constitution, as it does not affect the morality, the good customs, and other fundamental rights of third parties.

Furthermore, the Constitutional Chamber analysed the reasonableness of the school's measure as a measure for the protection of other students' fundamental rights. This analysis (based on the test set out in Decision no. 2013-1276) demonstrates the lack of legitimacy of the prohibition, as the kippa would not impinge on the morality, the good customs or the fundamental rights of other students.

In a note attached to the decision, Justice Hernández Gutiérrez argued that the case should strictly deal with the restrictions imposed by school authorities on the right of the plaintiff to use the kippa and whether or not this violated his Constitutional rights. In this context, the Court should protect the plaintiff, but only on such grounds.

Cross-references:

Supreme Court of Justice:

- Decision no. 1996-3499 establishes that the freedom of religion allows an individual to decide whether or not to manifest or express a religion, as well as to practise such beliefs, as long as it does not impinge on the moral and public order, or on the fundamental rights and liberties of others (Article 28 of the Constitution).
- Decision no. 2017-00228, similarly, establishes the following. Article 75 of the Constitution in its general meaning compounds a complex variety of powers. At the individual level, it holds the freedom of conscience to be the right to demand from the State restraint and protection against attacks from other persons or public agencies. An individual may follow his or her own beliefs, and cannot be forced to observe any practices that contradict them. The freedom provides, at the societal level, the right to manifest or display one's creed.
- Decision no. 2013-1276 interprets the elements of reasonableness of public measures. The decision states that certain standards must be met, such as legitimacy, suitability, necessity and proportionality. As to legitimacy, the intended purpose of the measure must, at least, not be legally prohibited.

Languages:

Spanish.

Croatia
Constitutional Court

Important decisions

Identification: CRO-2017-3-008

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 11.07.2017 / **e)** U-III-1816/2017 / **f)** / **g)** *Narodne novine* (Official Gazette), 98/17 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

5.3.13 Fundamental Rights − Civil and political rights − **Procedural safeguards, rights of the defence and fair trial**.
5.3.13.2 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Effective remedy**.
5.3.39 Fundamental Rights − Civil and political rights − **Right to property**.

Keywords of the alphabetical index:

European Court of Human Rights, judgment, execution.

Headnotes:

When judgments of the European Court of Human Rights are being enforced, individual measures are selected depending on the identified violation and the way in which the violation came about. The main objective of such measures is to put an end to the violation and to remedy its consequences, placing the applicant, to the extent possible, in the position in which he would have been had the requirements of the European Court of Human Rights been observed.

Summary:

In *Džinić v. Croatia*, the European Court of Human Rights found that a breach of Article 1 Protocol 1 ECHR had occurred, as a result of restraint measures issued in criminal proceedings which had prevented the applicant from alienating or encumbering his real property pending a judgment on his criminal culpability. Following the revocation of the restraint measure, the judgment of the European Court of Human Rights was enforced and the applicant was no longer a victim

of the violation, regardless of the legal basis for revoking the measure. The reopening of criminal proceedings that were completed with the final judgment of the competent court was neither a necessary nor an appropriate measure for enforcing the judgment in *Džinić v. Croatia*.

It does not follow from the European Court of Human Rights judgment that the criminal judgment completing the proceedings, the reopening of which has been requested by the applicant, was contrary on the merits to the European Convention on Human Rights, nor does it follow that the link between this judgment and the violation found was such that this violation could be rectified by reopening proceedings.

The applicant filed a constitutional complaint to protect his constitutional rights in proceedings for the enforcement of the judgment of the European Court of Human Rights in *Džinić v. Croatia* of 17 May 2016.

The applicant's complaint was filed against the ruling of the Supreme Court of 23 February 2017 (hereinafter, "second-instance ruling"), rejecting the applicant's appeal against the ruling of the competent County Court of 20 December 2016 (hereinafter, "first-instance ruling"), whereby, in the proceedings for the enforcement of the European Court of Human Rights judgment in *Džinić v. Croatia*, his request for the reopening of criminal proceedings completed by a final decision, submitted on 22 August 2016, had been rejected as unfounded.

The applicant maintained that his constitutional rights guaranteed by Article 29.1 of the Constitution in conjunction with Article 14.2 of the Constitution, Article 48.1 of the Constitution in conjunction with Article 1 Protocol 1 ECHR, and Article 13 in conjunction with Article 6.1 ECHR had been violated. He argued that the criminal proceedings needed to be reopened to remedy the consequences of the disproportionate measure imposed on him.

The competent court had adopted the measure within the framework of criminal proceedings conducted against the applicant in relation to several offences of economic crime, at the proposal of the state attorney's office. A restraint was placed on his property and he was prevented from alienating or encumbering it until a decision was handed down as to his criminal liability. The decision was taken so that, in the event of a conviction, the property could be used to secure enforcement of a confiscation order against unlawful pecuniary gain obtained by the commission of a criminal offence.

Meanwhile, the European Court of Human Rights in *Džinić v. Croatia*, found that a breach had occurred of the applicant's right to the peaceful enjoyment of his property under Article 1 Protocol 1 ECHR.

In the criminal proceedings completed by a final decision that followed, the applicant was found guilty of the criminal offence of misuse of the assets and facilities of a commercial company, and his pecuniary gain, obtained through the commission of a criminal offence in the amount of HRK 1,800,857.74 (about EUR 240,000.00), was seized. Further, in accordance with the provisions of the Confiscation of the Proceeds of Crime Act (hereinafter, "CPCA"), the restraint measure that was found to have violated his right to the peaceful enjoyment of his property further to the judgment in *Džinić v. Croatia* was also revoked.

II. The Constitutional Court noted that in its case-law to date, it had (in Decision no. U-III-3304/2011 of 23 January 2013) accepted the general stance of the European Court of Human Rights to the effect that one of the most significant individual measures for enforcing a judgment of the European Court of Human Rights is to enable the reopening of domestic court proceedings which have resulted in the violation of a right under the Convention.

The Constitutional Court held that the applicant's argument that the rejection of his request for an alteration of the domestic criminal judgment based on the judgment of the European Court in *Džinić v. Croatia* violated his right to a fair trial under Article 6 ECHR was inadmissible. The proceedings before the domestic courts regarding his request for an alteration of the domestic criminal judgment (through which he had been sentenced to a term of imprisonment) based on the above European Court judgment did not involve the determination of "any criminal charge against him" nor did it concern any violation of his "civil rights" within the meaning of Article 6.1 ECHR. They related to the question of whether the civil procedural rules for submitting a request for an alteration of a domestic criminal judgment were met. As the safeguards set out in Article 6 did not apply to these proceedings, the Constitutional Court dismissed the applicant's objection as inadmissible on the grounds of its non-conformity with Article 6.1 ECHR *ratione materiae*. The Constitutional Court found that, in view of the circumstances of the case, the rules of Article 29.1 of the Constitution were applicable.

In relation to the enforcement of the judgment in *Džinić v. Croatia*, the applicant lodged a request with the competent court seeking the reopening of criminal proceedings pursuant to Article 502 of the Criminal Procedure Act. The request was rejected at first

instance, while the appeal he filed against the ruling was rejected by the challenged second-instance ruling. The proceedings concerned the enforcement of the European Court judgment; the Constitutional Court found no justification in the applicant's contention that he did not have access to an effective legal remedy in the domestic legal system for the enforcement of the judgment within the meaning of Article 13, in conjunction with Article 46 ECHR.

As the applicant had requested the reopening of proceedings that were concluded by a final decision, pursuant to the judgment in the case of *Džinić v. Croatia* which had identified a breach of Article 1 Protocol 1 ECHR, the Constitutional Court also had to consider whether his rights under Article 1 Protocol 1 had been violated as a result of the rejection of the request for the reopening of the proceedings.

The applicant's request for an alteration of the final judgment was rejected as unfounded, since the competent courts found that the final judgment by which he had been found guilty in the previous criminal proceedings could not be altered on account of the findings of the European Court of Human Rights in the judgment in *Džinić v. Croatia*, (none of the conditions were met for an alteration of a final judgment under Article 502 of the Criminal Procedure Act.

In *Džinić v. Croatia*, the European Court of Human Rights had confirmed a violation of Article 1 Protocol 1 ECHR. This judgment was enforced by the revocation of the restraint measure and the applicant was no longer a victim of the violation, regardless of the legal basis for the revocation of the measure. The reopening of criminal proceedings concluded by the final judgment of the competent county court of 11 July 2014 was neither a necessary nor an appropriate measure for enforcing the European Court judgment.

It does not follow from the European Court of Human Rights judgment that the criminal judgment completing the proceedings, the reopening of which the applicant had requested, was contrary on the merits to the European Convention on Human Rights, nor does it follow that the link between this judgment and the violation was such that this violation could be rectified by reopening proceedings.

Regarding the applicant's contention that the proceedings needed to be reopened in order to remedy the consequences of a disproportionate restraint measure through compensation for material damage, the Constitutional Court pointed out that in the current case the reopening of the criminal proceedings concluded by the judgment of 11 July 2014 was not an appropriate measure for remedying the consequences of the violation established by the European Court of Human Rights; damage resulting from a restraint measure should instead be examined in proceedings as set out in Article 17 CPCA.

Therefore, the Constitutional Court did not find a repeated violation of the right guaranteed in Article 1 Protocol 1 ECHR or Article 48 of the Constitution.

Supplementary information:

In Ruling no. U-III-1055/2017 of 11 July 2017, the Constitutional Court also dismissed the constitutional complaint filed by the applicant against the ruling of the second-instance court by which his appeal against the ruling of the first-instance court was rejected as unfounded. In this ruling, the first-instance court revoked the restraint measure for securing confiscation of unlawful pecuniary gain against the applicant *ex officio*, pursuant to its powers under Article 16 CPCA, upon the expiry of sixty days from the date the criminal judgment became final. The Constitutional Court pointed out that the judgment of the European Court of Human Rights in *Džinić v. Croatia* was enforced by the revocation of the restraint measure; the applicant's property was no longer subject to restraint and he was no longer a victim of the breach established in the judgment. There was no need now to reopen the proceedings to enforce the judgment of the European Court of Human Rights.

Cross-references:

Constitutional Court:

- no. U-III-3304/2011, 23.01.2013, *Bulletin* 2013/1 [CRO-2013-1-003].

European Court of Human Rights:

- *Džinić v. Croatia*, no. 38359/13, 17.05.2016.

Languages:

Croatian.

Identification: CRO-2017-3-009

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 10.10.2017 / **e)** U-II-6111/2013 / **f)** / **g)** *Narodne novine* (Official Gazette), 105/17 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

1.1.4.4 Constitutional Justice − Constitutional jurisdiction − Relations with other Institutions − **Courts**.
1.3.5.11.2 Constitutional Justice − Jurisdiction − The subject of review − Acts issued by decentralised bodies − **Sectoral decentralisation**.
3.9 General Principles − **Rule of law**.
4.7.1.1 Institutions − Judicial bodies − Jurisdiction − **Exclusive jurisdiction**.
4.7.9 Institutions − Judicial bodies − **Administrative courts**.
4.8.3 Institutions − Federalism, regionalism and local self-government − **Municipalities**.

Keywords of the alphabetical index:

Constitutional Court, jurisdiction, exception / Street, re-naming.

Headnotes:

The Constitutional Court does not always delegate a request for a review of the constitutionality and legality of an act adopted by a local government body to the High Administrative Court. The Constitutional Court is under a positive obligation to conduct a general constitutional review where the fundamental values of a democratic state based on the rule of law and the protection of human rights may be at risk.

The rule of law means that all authorities are restricted in their activities by law and by the Constitution. When exercising their powers, both at state level and at local and regional government level, authorities must safeguard the values embedded in the constitutional principles that form the identity of the Croatian constitutional state. They have no choice over whether to respect the Constitution and its fundamental values.

Summary:

I. At the Government's request, the Constitutional Court instituted proceedings to review the conformity of Article I.1 of Decision/97, which changed the names of streets in the settlement of Slatinski Drenovac, adopted by the Municipal Council of the Municipality of Čačinci at its 27th session held on 11 April 1997 with the Constitution and law. This decision had resulted in the former name of the street, *ulice 21. novembar* [21st November Street], being changed to *ulice 10. travnja* [10th April Street].

This provision was, in the Government's view, contrary to the values and principles set out in the Historical Foundations and the constitutional and legal order under Articles 3 and 5 of the Constitution as well as the provisions of Article 8 of the Act on Settlements. Article 8 prescribes that settlements, streets, and squares may have names that refer to geographic or other terms and to names and dates connected with historical events or persons who have provided a significant contribution to social, cultural, and scientific development.

II. Decision/97 is a general act that was adopted by a local self-government body. Since 1st January 2012, the High Administrative Court has had the power to decide on the legality of general acts passed by local units, legal persons vested with public authority and legal persons performing public service. This was followed by the harmonisation of the Act on Local and Regional Self-government (hereinafter, "ALRSG") with established competences over the review of legality of general acts (in the remit of the High Administrative Court) and the review of constitutionality and legality of statutes passed by local units (in the remit of the Constitutional Court).

Until the end of February 2014, the Constitutional Court referred any proposal for the review of the legality of general acts which had been incorrectly submitted to it to the High Administrative Court. The Constitutional Court received the request for the review of the constitutionality and legality of the above provision on 18 December 2013. At that time, it was referring all submissions relating to general acts by local units to the High Administrative Court. However, although this was indisputably a general act by a local government body, the Constitutional Court did not refer the request to the High Administrative Court, having decided that there were constitutional reasons to examine whether the constitutionality of Decision/97 should be reviewed.

Article 2.1 of the Constitutional Act on the Constitutional Court (hereinafter, "CACC") expressly requires the Constitutional Court to guarantee compliance with and application of the Constitution. As its settled case-law shows, the Constitutional Court is under a positive obligation to conduct a general constitutional review if it finds that the fundamental values of a democratic state based on the rule of law and the protection of human rights are at risk.

The Constitutional Court held that the impugned provision, although included in a general act by a unit of local self-government, must be subject to review by the Constitutional Court. The Constitutional Court limited this finding to situations where the Government has asked for a review of the constitutionality of a general act of a unit of local self-government pursuant to Article 35.4 of the CACC in conjunction with Article 80 ALRSG (where a decision on the suspended application of a general act is made in the implementation of a review of the legality of general acts adopted by the representative bodies of municipalities, towns, and counties within their self-government remit and issues of significance to the identity of the Croatian constitutional state need examining).

The Constitutional Court asked the relevant municipalities for the reasons behind the decision to change the name of the street to 10th April Street. From the statements received, it appeared that the municipal authorities did not know what the date in the new name of the street (10th April) referred to. The Constitutional Court concluded that the name was related to 10th April 1941, the date of the establishment of the Independent State of Croatia (hereinafter, "ISC) which was also correctly noted by the Government in its request and which the Municipality of Čačinci did not dispute in its statement.

The Constitutional Court concurred with the position taken by the European Court of Human Rights in the case of *Ždanoka v. Latvia* [Vv] (Application no. 58278/00, judgment of 16 March 2006, paragraph 96) to the effect that it would abstain, as far as possible, from pronouncing on matters of purely historical fact, which are not within its jurisdiction; although it might accept certain well-known historical truths and base its reasoning on them.

The European Court of Human Rights presented a well-known historical truth in *Garaudy v. France* (Application no. 65831/01, decision on admissibility of 24 June 2003), in which it stated that denying the reality of clearly established historical facts, such as the Holocaust, does not constitute historical research akin to a quest for the truth. Considering that the Holocaust belongs to the category of clearly established historical facts, any denial or revision would constitute an abuse of rights within the meaning of the European Convention on Human Rights. It is also contrary to the fundamental values of the European Convention on Human Rights and cannot therefore avail itself of its protection.

It follows that neither the Constitution nor the European Convention on Human Rights may serve to protect the commemoration of 10th April 1941 as the date of the establishment of the ISC, in any way, including by assigning that date as the name of streets or squares. It is a well-known historical truth that the ISC was a Nazi and fascist creation and that as such it represented a complete negation of the legitimate yearning of the Croatian people for their own state and a serious historical abuse of such yearning. Therefore, in accordance with the Historical Foundations of the Constitution, the Republic of Croatia is not the successor of the ISC on any grounds.

The Constitutional Court emphasised that these constitutional law positions were not simply connected with the names of streets, settlements and symbols; they also represented the general position of the Constitutional Court concerning the character of the ISC as a negation of the fundamental values of the constitutional order of the Republic of Croatia.

In that regard, the Constitutional Court recalled its firm and established position that the Constitution is not neutral in terms of its values. Article 1.1 of the Constitution defines the Republic of Croatia as a democratic state. Article 3 of the Constitution proclaims equality, respect for human rights, and the rule of law as the highest values of the constitutional order and the basis for interpreting the Constitution. The Constitutional Court also noted Article 5.1 of the Constitution, which states that domestic laws must comply with the Constitution, and other regulations must comply with the Constitution and law.

All constitutional values are to be enjoyed without discrimination of any nature (Article 14.1 of the Constitution).

Accordingly, democracy based on the rule of law and the protection of human rights is the only political model acknowledged and embraced by the Constitution. Further, human rights and the rule of law in the context of the Constitution are prescribed in such a way that they are primarily intended to express moral commitment to the objective principles of a liberal democracy.

These constitutional principles set the structure and constitute the essence of the Croatian state. The Republic of Croatia can only remain what it is if none of the structural constitutional principles are quashed or amended.

Other structural constitutional principles include the principles of freedom, equal rights, national equality, peace-making, and respect for human rights.

Reviewing Decision/97 in this context, the Constitutional Court noted that the rule stipulated in Article 17 ECHR also applies to the Constitution: nothing in the constitutional order can be interpreted in such a way as to include the right to venture into an activity or perform an act with the purpose of nullifying a right or freedom guaranteed by the Constitution.

The provision of Decision/97, whereby one of the streets in the settlement of Slatinski Drenovac was named 10th April Street, has precisely that effect; the nullifying of the rights and freedoms guaranteed by the Constitution within the framework of a democratic state based on the rule of law.

The Constitutional Court concluded that the above provision was in direct conflict with the rule of law, jeopardising the identity of the Croatian constitutional state to an extent which could not be tolerated. The provision would therefore have to be repealed.

III. Justice Miroslav Šumanović attached his dissenting opinion to the majority decision.

Cross-references:

Constitutional Court:

- no. U-II-5157/2005 *et al.*, 05.03.2012, *Bulletin* 2012/1 [CRO-2012-1-004];
- no. U-VIIR-5292/2013, 28.10.2013, *Bulletin* 2013/3 [CRO-2013-3-015];
- no. U-VIIR-164/2014, 13.01.2014;
- no. U-VIIR-4640/2014, 12.08.2014, *Bulletin* 2014/2 [CRO-2014-2-011].

European Court of Human Rights:

- *Garaudy v. France*, no. 65831/01, 24.06.2003;
- *Ždanoka v. Latvia*, no. 58278/00, 16.03.2006, *Reports of Judgments and Decisions* 2006-IV.

Languages:

Croatian.

Identification: CRO-2017-3-010

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 21.11.2017 / **e)** U-III-1267/2015 / **f)** / **g)** *Narodne novine* (Official Gazette), 1/18 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

3.18 General Principles − **General interest**.
5.3.13.2 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Effective remedy**.
5.3.24 Fundamental Rights − Civil and political rights − **Right to information**.

Keywords of the alphabetical index:

Information, classified, access, denial.

Headnotes:

Where a detailed explanation has been provided of the legitimate reasons for denying access to information in the circumstances of a particular case (such as the vital interests of the state in the domain of international relations), such an encroachment on the right to access to information may be viewed as essential in a free and democratic society, proportionate to the aim sought and in line with the requirements of the Constitution and the European Convention on Human Rights.

Summary:

I. The applicant, a non-governmental organisation, claimed that a judgment of the High Administrative Court had violated its rights under Articles 16, 19.2, 29.1 and 38.4 of the Constitution and Articles 6.1, 10, 13 and 18 ECHR. It argued that in the statement of reasons of this judgment, unfounded allegations by the Government in the previous proceedings were repeated, without any statement as to the allegations of the Commissioner.

The applicant submitted a request to exercise the right of access to information. It sought from the Government copies of the contracts on the provision of services of legal counsel concluded between the Ministry of Justice and the Law Firm P. B. LLP, along with copies of the addenda to the contracts, regarding an appeal before the International Criminal Tribunal in *Prosecutor v. A. G. and M. M.* (hereinafter, the "Contract").

Article 15.2.1 of the Act on the Right of Access to Information (hereinafter, "ARAI") allows public authorities to restrict access to information where such information is classified under the level of "secret" under legislation governing data secrecy. Article 16.1 ARAI states that the holder of information referred to in Article 15.2.1 must, having obtained an opinion from the Office of the National Security Council, carry out the tests of proportionality and public interest.

The Government rejected the applicant's request within the meaning of Articles 15.2.1 and 16.1 ARAI. The applicant submitted an appeal against the Government's ruling. The Information Commissioner then resolved to overturn the ruling and to approve the release of a copy of the Contract to the applicant, on the basis that once the criminal proceedings had been concluded, the conditions for applying the provision of Article 15.6 ARAI were satisfied, the reasons for which the authority had restricted the right of access to information having ended.

The Government submitted a complaint against the Commissioner's ruling to the High Administrative Court, contending that the ending of the reasons for which the authority had restricted the right of access to information was not established in a legally prescribed manner and that the agreed offered price for the services of the law firm was published on the website of the Justice Department of the United States of America, which was known to the applicant and to the interested public. The Government pointed out that the need to protect the international relations of the Republic of Croatia still existed in relation to other parts of the Contract; the Conclusion of the Coordinating Committee for Internal Policy and State Property Management expressly states the reason for the classification of the Contract, namely that any unauthorised disclosure of its contents could harm the values under Article 6 of the Data Secrecy Act.

The High Administrative Court accepted the Government's statement of claim, overturned the Commissioner's ruling and rejected the applicant's appeal against the Government's ruling. The High Administrative Court observed that the information had been classified under an appropriate secrecy level in a process conducted in conformity with the relevant legislation and that the public authority, having applied proportionality and public interest tests, had found that the reasons behind the classification of the Contract under the level of "secret" still existed and unauthorised disclosure of its content might harm the values under Article 6 of the Data Secrecy Act. Therefore, the High Administrative Court found that the ruling rejecting the request for access to information included a sound statement of reasons and that the Commissioner, in evaluating the justifiability of the reasons for further classification of the requested data and by instructing the Government to de-classify it, had erroneously applied the provisions of ARAI which stipulate that the Commissioner is authorised to act further to an appeal in the administrative matter concerned.

II. The Constitutional Court held that the applicant's right of access to information in the possession of public authorities had been infringed (Article 38.4 of the Constitution). The content of contracts between public authorities and private entities, especially if the obligations stemming from these contracts are funded from the public budget, is undoubtedly a matter of public interest. Moreover, the applicant was involved in the process of gathering information in a matter of public importance, and the Government had, in the current case, interfered in the preliminary phase of the process, placing administrative obstacles in its way.

However, the question then had to be addressed as to whether the encroachment on the applicant's right was justified and compliant with the requirements of Article 38.4; whether it was stipulated by law and proportionate to the nature of the need for such interference in the case in point, whether it was necessary in a free and democratic society, and whether it served any of the legitimate purposes referred to in Article 16.1 of the Constitution.

The applicant had requested the information under ARAI, which regulates the right of access to information in the possession of public authorities (Article 1ARAI). The Government's ruling rejected the request, on the basis that Article 15.2.1 ARAI allows public authorities to restrict access to information where the information is classified under the level of "secret", in accordance with the legislation governing data secrecy. The High Administrative Court also presented this argument in the statement of reasons of the impugned judgment. The Constitutional Court accordingly found that the interference was "stipulated by law" within the meaning of Article 38.4 of the Constitution.

In terms of the legitimate aim, the Constitutional Court referred to the statement in the Government's ruling regarding the obtaining of the preliminary opinion of the Office of the national Security Council pursuant to Article 16.1 ARAI. It was stated in this opinion that the matter concerns a protected interest in proceedings before the International Criminal Tribunal which are still under way, the unauthorised disclosure of which might harm the values under Article 6 of the Data Secrecy Act. The Coordinating Committee for Internal Policy and State Property Management had also

concluded that disclosure of the content of the Contract could pose a risk to the values under Article 6, as the reasons for the classification of the Contract as “secret” still existed.

Following the annulment of the Government’s ruling by the Commissioner, the Government, in its complaint to the High Administrative Court, stated that the Conclusion of the Coordinating Committee for Internal Policy and State Property Management of 27 August 2013 expressly stated the reason for the classification of the contract in question, namely the risk posed by unauthorised disclosure of its content to the values under Article 6 of the Data Secrecy Act, the potential impact on the international relations of the Republic of Croatia and the fact that the reasons for its classification had been found still to exist. Keeping the document at this level of secrecy, in summary, would protect vital national interests, and any disclosure of the data in the contract could seriously damage said interests.

The High Administrative Court had also noted in the impugned judgment that Article 8 of the Data Secrecy Act stipulates that the secrecy level “confidential” is used to classify data that would, if disclosed without authorisation, harm the values referred to in Article 6 of the Data Secrecy Act, including the values referred to by the Government in its complaint to the High Administrative Court (vital interests of the state in the domain of international relations).

The Constitutional Court observed that detailed specification of the legitimate reasons for denying access to requested information in the specific circumstances of a particular case (such as the vital interests of the state in the domain of international relations) is pivotal to the issue of disclosing such protected information.

On that basis, the Constitutional Court held that the existing arguments used by the Government and the High Administrative Court regarding interference in the applicant’s right of access to information indicated the use of interference for a legitimate aim within the meaning of Article 38.4 of the Constitution, in conjunction with Article 16.1 of the Constitution and within the meaning of Article 10.2 ECHR.

Provided that the legitimate reasons for denying access to requested information are specified in the specific circumstances of a particular case, such interference would be “essential in a free and democratic society” and “proportionate to the nature of the need”.

Therefore, the Constitutional Court held that the rights of the applicant under the Constitution and the European Convention on Human Rights were not violated by the impugned judgment.

III. Justices Mato Arlović, Andrej Abramović, Lovorka Kušan i Goran Selanec attached dissenting opinions to the majority decision.

Languages:

Croatian.

Identification: CRO-2017-3-011

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 19.12.2017 / **e)** U-III-4029/2013 / **f)** / **g)** *Narodne novine* (Official Gazette), 10/18 / **h)** CODICES (Croatian).

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**.
5.3.39 Fundamental Rights − Civil and political rights **− Right to property**.

Keywords of the alphabetical index:

Damages, compensation / Civil proceedings, costs, reimbursement.

Headnotes:

A situation where, following the successful completion of civil proceedings for compensation relating to the confiscation and late return of his money, the applicant had to pay the state a sum in costs substantially in excess of the compensation awarded, resulted in a breach of the right to a fair trial and the right to property.

Summary:

I. A constitutional complaint was submitted regarding a judgment of the Supreme Court (hereinafter, the “impugned judgment”) which had rejected the

applicant's appeal on points of law as unfounded and had upheld the second-instance judgment. The second-instance judgment had partly upheld and partly altered the first-instance judgment in a legal matter concerning compensation for damages.

The civil proceedings that preceded the Constitutional Court proceedings were instituted by the applicant's claim for compensation for non-material damage as a result of mental anguish caused by unfounded deprivation of liberty (the criminal proceedings in respect of which thirty days of detention were imposed on him were suspended as of 5 June 1992) and for payment of legal default interest on the temporarily seized pecuniary funds (this occurred during the criminal proceedings in the amount of the then HRD 9,565,450.00) for the period from 5 June 1992 to 5 February 2004, together with procedural interest running with effect from 4 March 2004.

The applicant had asked for the confiscated funds to be paid back to him. They were paid on 5 February 2004 (at the time the amount was HRK 9,565.45), during the civil proceedings. He therefore withdrew the statement of claim in that part on 4 March 2004. In the second-instance judgment of 14 October 2008, a final decision was rendered concerning the part of the statement of claim relating to compensation of material damages and the part of the statement of claim for the payment of legal default interest on the funds in the sum of HRK 1,800.58 from 30 October 2002 to 5 February 2004.

The applicant did not submit a constitutional complaint against the second-instance judgment of 14 October 2008. However, this ruling overturned the part of the first-instance judgment of 22 December 2006 that concerned the applicant's request for the payment of interest on the confiscated monies and the request for compensation for procedural costs. That part of the case was remanded for retrial.

A question arose in the proceedings over the flow of interest on the funds that had been seized. The applicant had asked for payment of legal default interest for the period covering the point between the money being confiscated (6 June 1992) and the date the principal was paid to him (5 February 2004).

The subject-matter of the Constitutional Court proceedings was the decision rendered by the ordinary courts in the renewed proceedings.

The first-instance judgment instructed the respondent (the Republic of Croatia) to pay the applicant the amount of HRK 282.47 along with legal default interest with effect from 4 March 2004 until payment. The remainder of the applicant's claim, for the sum of HRK 2,217,872.00 together with legal default interest with effect from 4 March 2004 until payment, was rejected as unfounded.

The first-instance court found that the applicant was entitled to default interest from 24 August 2002, this being the date when the basis for holding the pecuniary funds lapsed, following the finality of the ruling on the suspension of the criminal proceedings. It also held that, pursuant to Article 154.2 of the Civil Procedure Act (hereinafter, "CPA"), each party should bear their own costs in the proceedings.

Upon the appeal of the respondent, the second-instance judgment altered the first-instance judgment in the decision on costs so that the applicant was instructed to pay the respondent the costs of the civil proceedings in the sum of HRK 150,904.05.

The impugned judgment upheld the second-instance judgment in full. The Supreme Court upheld the position of the lower courts that the applicant was entitled to legal default interest on the pecuniary funds from the point when the criminal proceedings were suspended until repayment because once the ruling became final the respondent became an acquirer of the seized funds, acting without good faith. The Supreme Court found that the second-instance court had decided correctly regarding the costs of the proceedings, in view of the qualitative and quantitative success of the parties to the dispute within the meaning of Article 154.2, in conjunction with Article 155.2 CPA.

The applicant claimed that the court decisions – both in terms of the merits and the costs of the proceedings – violated his constitutional rights under Articles 14.2, 25.4, 29.1 and 48.1 of the Constitution, and Articles 6.1 and 13 ECHR as well as Article 1 Protocol 1 ECHR, in that the fair equivalent value of the confiscated funds was not returned to him. Neither was the default interest recognised. He also contended that in this case, there were no presumptions to award any costs to the Republic of Croatia. The Supreme Court had failed to present sufficient and relevant grounds to support its decision on costs.

II. The Constitutional Court accepted the constitutional complaint in part. It overturned the decision on the costs of the civil proceedings and remanded that part of the case to the first-instance court. In the remaining part, however, the constitutional complaint was rejected.

The Constitutional Court examined the applicant's objections in terms of the decision on the main subject-matter from the aspect of a possible violation of the right to a fair trial.

The statement of reasons of the decisions handed down by the ordinary courts show that they did not accept the applicant's interpretation of default interest, on the basis that the right to payment of default interest on legally and temporarily seized funds was not recognised by relevant domestic law. Neither did they accept his theory about the existence of the presumption of the unlawfulness of temporary seizure of funds in cases where the criminal proceedings have not been completed with a conviction.

The impugned judgment upheld the position of the lower courts that the respondent became liable to start paying legal default interest at the point when it became an acquirer of temporarily seized money acting without good faith. That point, in this case, is the date when the ruling on the suspension of the criminal proceedings became final.

The Constitutional Court found that the ordinary courts had presented sufficient and relevant reasons as the basis for their assessment that the applicant was not entitled to legal default interest for the period requested in the complaint. His right to a fair trial was therefore not violated by the decision on the main subject-matter.

Regarding the applicant's argument that the decision on the costs of the proceedings was in breach of his right to a fair trial and the right to property, the Constitutional Court noted that it does not generally accept jurisdiction over decisions on the costs of proceedings made by ordinary courts. These are not considered, under its established case-law, to be individual acts within the meaning of Article 62.1 of the Constitutional Act on the Constitutional Court in respect of which it would have jurisdiction to provide Constitutional Court protection.

However, the Constitutional Court noted the stance the European Court of Human Rights had taken in *Klauz v. Croatia*, where it was established that the applicant, in view of the substantial reduction of an award of damages resulting from the duty to pay the costs of proceedings, could be regarded as a victim of a breach of Article 6.1 ECHR (a violation of the right to a fair trial in the aspect of the right of access to court), if such a decision were to result in a restriction that struck at the core of the applicant's right of access to court. The European Court of Human Rights embraced an identical legal position in *Cindrić and Bešlić v. Croatia*.

The Constitutional Court also referred to its position in Ruling no. U-I-3004/2014 of 6 June 2017; any arbitrary interpretation and application of the relevant provisions of the CPA on compensation of the costs of proceedings to the State Attorney's Office in cases where it acts as the representative of a party may be subject to Constitutional Court review in proceedings instituted by a constitutional complaint.

For these reasons, the Constitutional Court held that the applicant's objections were relevant in terms of constitutional law with respect to the decision on the costs of proceedings and merited scrutiny by the Constitutional Court as objections relating to a restriction of the right of access to court and the right of property.

With regard to the possible encroachment of the second-instance and impugned decision on the costs of proceedings upon the applicant's right to access to court, the Constitutional Court made reference to the rule referred to in Article 154.2 CPA. Under this provision, a party who is partly successful in a dispute will pay the costs of the counter-party pro rata to its success in the proceedings, where the amount of the costs depends on the amount of the statement of claim (Article 35 CPA.), This could, if the statement of claim is set too high, result in some of the costs which the party has to pay to the counter-party exceeding the amount of the compensation awarded. The application of this rule could result in a situation where the total financial benefit, despite the fact that the statement of claim was held to be founded, would still be on the side of the party which was unsuccessful in the proceedings. Such a situation could, in the Constitutional Court's view, be viewed as a restriction that hinders the right of access to court (see *Klauz v. Croatia* and *Cindrić and Bešlić v. Croatia*).

However, a restriction that affects the right of access to court is not irreconcilable with the right to a fair trial if it strives towards a legitimate aim, and if there is a reasonable degree of proportionality between the funds used and the legitimate aim pursued.

The Constitutional Court accepted that the rule according to which one party pays the costs and legal fees of the other party pro rata to its success in the proceedings is generally in pursuit of the legitimate goal of ensuring the proper operation of the judicial system and the protection of the rights of others, by avoiding frivolous litigation and unreasonably high costs of proceedings.

When it applied Article154.2 CPA, the second-instance court found that the applicant was only awarded 1% of the sum that was confiscated. This meant he ended up not only losing all the compensation he had been awarded, but also found himself liable to pay the costs of proceedings to the respondent in an amount that substantially exceeded

the amount of the compensation for damages for which the proceedings had been instituted in the first place.

In the opinion of the Constitutional Court, the statement of claim of the applicant could not be regarded as manifestly unreasonable. The respondent was the Republic of Croatia; this was not the usual type of civil law dispute between private parties. The applicant had approached the respondent before launching the proceedings, seeking an amicable settlement. The approach was unsuccessful. The funds were seized in June 1992 and were not returned to the applicant after the criminal proceedings during which they had been seized were concluded by a final judgment or after he submitted a request for a friendly resolution of the dispute; they were only returned on 5 February 2004. When the funds were confiscated, in June 1992, the sum amounted to HRD 9,565,450.00, the equivalent of DEM 85,026.22. The sum returned was HRK 9,565.45, which did not equate to the real value of the money seized. There was no evidence on the court file that the respondent would incur any extra costs during the proceedings because the applicant had set a high statement of claim.

In view of the above and having regard to the legitimate aim set out in Articles 154 and 163 CPA, the Constitutional Court found that in the applicant's case two of the main grounds used to justify the rule on costs were not directly applicable (avoiding frivolous litigation and unreasonably high costs of litigation).

The Constitutional Court held that both the second-instance court and the Supreme Court applied Article 154.2 CPA mechanically. Insufficient heed was paid to the fact that in this case the sanction for setting an excessive claim was too harsh and could not be justified from the aspect of a fair trial.

Therefore, the Constitutional Court held that the decision on the costs of proceedings before the second-instance court and the Supreme Court was not proportionate to the legitimate goal covered by the rule in Article 154.2 CPA and that its application to the present case resulted in a restriction that diminished the very essence of the applicant's right of access to court.

The Constitutional Court then examined whether the amount awarded to the applicant as compensation for damages in relation to the costs of proceedings that he must pay to the state violated his right to the peaceful enjoyment of property.

The Constitutional Court found that the applicant's claim in the present case could be regarded as concerning his "property" within the meaning of Article 48.1 of the Constitution and Article 1 Protocol 1 ECHR and that the reduction of his claim to the extent that he lost all the compensation he had been awarded because of having to pay the other party's costs was an infringement of his right to the peaceful enjoyment of his property.

Bearing in mind the basis on which a breach of the right to a fair trial had been identified, the Constitutional Court noted that the encroachment on the applicant's right of property was lawful to the extent that it strove towards a legitimate aim. However, it failed to strike a fair balance and an excessive burden was placed upon him, resulting in a violation of his right of ownership.

III. Justices Rajko Mlinarić, Andrej Abramović, Lovorka Kušan and Goran Selanec attached partly dissenting opinions to the majority decision.

Cross-references:

Constitutional Court:

- no. U-I-3004/2014, 06.06.2017.

European Court of Human Rights:

- *Klauz v. Croatia*, no. 28963/10, 18.07.2013;
- *Cindrić and Bešlić v. Croatia*, no. 72152/13, 06.09.2016.

Languages:

Croatian.

Czech Republic
Constitutional Court

Statistical data
1 September 2017 – 31 December 2017

- Judgments of the Plenary Court: 3
- Judgments of panels: 68
- Other decisions of the Plenary Court: 9
- Other decisions of panels: 1 293
- Other procedural decisions: 32
- Total: 1 405

Important decisions

Identification: CZE-2017-3-007

a) Czech Republic / **b)** Constitutional Court / **c)** First Panel / **d)** 19.09.2017 / **e)** I. ÚS 1041/17 / **f)** Balancing freedom of speech and personality rights / **g)** http://nalus.usoud.cz / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.17 General Principles − **Weighing of interests**.
4.7.16.2 Institutions − Judicial bodies − Liability − **Liability of judges**.
5.3.21 Fundamental Rights − Civil and political rights − **Freedom of expression**.
5.3.31 Fundamental Rights − Civil and political rights − **Right to respect for one's honour and reputation**.

Keywords of the alphabetical index:

Compensation, damage / Compensation, non-pecuniary damage / Conduct, dishonourable / Expression, artistic, freedom / Freedom of speech / Honour and dignity, defence / Media, defamation / Name and reputation of others / Opinion, statement / Personality, right to protection / Speech, political / Truthfulness / Value judgment.

Headnotes:

The right to honour and dignity is to be given greater weight than the right to freedom of speech where personal self-serving insults go beyond the limits of decency. Offensive language (vulgarity) must be distinguished from standard and acceptable value statements. The ordinary courts' attitude to vulgarity does not, generally, reach the constitutional-law dimension. As such, and subject to all relevant criteria, determining the level of non-pecuniary damage is a discretionary matter for the ordinary courts to determine, albeit excessive compensation cannot be awarded.

Summary:

I. The intervener, the former director of the National Gallery, claimed that his personality rights had been interfered with in respect of Czech Television's "Jindřich Chalupecký Award", and in which the complainant responded to the question why the intervener had had guards remove him from the National Gallery building by saying, "because he is a dick", "because he is a snobbish cripple dick". The intervener asked the complainant and Czech Television for an apology for that statement and for financial non-pecuniary damages (compensation). The Municipal Court in Prague ordered the complainant to apologise to the intervener. It, however, dismissed the claim for financial compensation. The High Court in Prague varied the Municipal Court's decision and required the complainant to pay the intervener CZK 100,000. Subsequently, the Supreme Court twice annulled the High Court's decision on the grounds that it, the High Court, failed to comply with the Supreme Court's case-law principles when determining the amount of financial compensation due to the intervener. Only after the court of appeal had taken all relevant case-law principles into account, was its decision concerning the level of financial compensation approved by the Supreme Court.

II. While this was a civil-law dispute over the protection of personality at the level of sub-constitutional legislation, there was undoubtedly a conflict between two subjective constitutional rights, namely freedom of speech and the right to protection of fundamental personality rights. The Constitutional Court did not doubt that the present interference with the complainant's freedom of speech was laid down by law and pursued a legitimate aim, I .e. the protection of the intervener's rights. It questioned, however, whether such intervention in a democratic society was necessary to achieve this legitimate aim. It therefore considered whether the interference with the complainant's freedom of speech was necessary not only in view of his obligation to compensate the intervener financially, but also in view of the obligation to apologise.

When assessing a conflict between freedom of speech and personality rights, the Constitutional Court identified the ordinary court's conclusions, according to which the complainant's statements had the character of a value judgment that cannot be tested for their

truthfulness or any factual basis. In terms of content, the statements were personal criticism, albeit they were made in respect of the intervener's work whilst serving as the National Gallery's director following his removal of the complaint from the National Gallery which resulted in the complainant having to accept the award on the pavement in front of the Veletržní Palace. The Constitutional Court did not regard the disputed statements as artistic expression that would enjoy increased protection, but rather as a form of self-presentation. The complainant's apparently indecent and vulgar words concerning the intervener could not be regarded as appropriate, even in the context of the television broadcast, the intervener's previous conduct, and disputes between the two of them. The complainant was neither confronted with the intervener nor asked about him, and he referred to events that had happened several years ago. Therefore, the statements could not be justified as a "counterattack" or as a direct response by the complainant to a verbal assault. Even if they could be understood in that way, that would not, however, outweigh the fact that the statements were insulting and disparaging. Furthermore, the objective underpinning what the intervener said could have been achieved without resort to vulgarity and insult. If the Constitutional Court took into account the fact that the complainant is a non-conformist artist, the complainant equally had to take into account the fact that his statements would be broadcast by television and, therefore, given publicity. In the premises, the Constitutional Court concluded that the complainant's statements differed from standard and acceptable value judgements due to the degree of vulgarity involved. As such there was no reason to interfere with the ordinary courts' decisions concerning the interference with his right to freedom of speech. Their conclusions could not be said to be unsustainable, excessive or otherwise unconstitutional.

In respect of the level of financial compensation, the Constitutional Court did not find the manner in which the court of appeal assessed the degree of seriousness and degree of unauthorised interference with the intervener's personal rights as impermissible or excessive. The High Court found that the complainant's conduct had significantly compromised the intervener's dignity and reputation within society. As such the conditions awarding non-pecuniary damages were made fulfilled. The court properly considered the degree, nature, and manner of the unauthorised interference, the nature and extent of the person affected, the duration and the extent of the response, and the effect of non-pecuniary damage incurred on the intervener's status and role within society. Even though the intervener had also referred to the complainant in a disparaging manner (but not in the form of grossly offensive insults), the complainant's intention was to offend and disparage him. In assessing the amount of non-pecuniary damages, the High Court took all relevant criteria into account and set its amount at CZK 100,000, which was the maximum amount claimed. Although the Constitutional Court was of the view that a lower amount would have been sufficient, both in compensatory and punitive terms, the sum awarded by the High Court could not be understood to be excessive. Moreover, the complainant did not argue that the sum awarded would have placed him excessive financial difficulty. The Constitutional Court rejected the constitutional complaint as manifestly ill-founded.

III. The judge-rapporteur was Ms Kateřina Šimáčková. No judge made a dissenting opinion.

Cross-references:

European Court of Human Rights:

- *Wingrove v. the United Kingdom*, no. 17419/90, 25.11.1996, *Reports* 1996-V;
- *Riolo v. Italy,* no. 42211/07, 17.07.2008;
- *Smolorz v. Poland,* no. 17446/07, 16.10.2012.

Languages:

Czech.

Identification: CZE-2017-3-008

a) Czech Republic / **b)** Constitutional Court / **c)** First Panel / **d)** 26.09.2017 / **e)** I. ÚS 741/17 / **f)** Compensation for damage caused by the unreasonable length of a suspended criminal prosecution / **g)** http://nalus.usoud.cz / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.20 General Principles − **Reasonableness**.
5.3.5.1.1 Fundamental Rights − Civil and political rights − Individual liberty − Deprivation of liberty − **Arrest**.
5.3.13.1.3 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Scope − **Criminal proceedings**.
5.3.13.2 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Effective remedy**.

5.3.13.6 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Right to a hearing**.
5.3.13.13 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Trial/decision within reasonable time**.
5.3.17 Fundamental Rights − Civil and political rights − **Right to compensation for damage caused by the State**.

Keywords of the alphabetical index:

Acquittal, effects / Compensation, non-pecuniary damage / Criminal procedure, hearing / Criminal prosecution / Judicial proceedings, suspension / Length of proceedings / Satisfaction, just.

Headnotes:

Where a criminal prosecution was suspended due to its unreasonable length without concluding whether or not the defendant committed the offence of which he was charged, where the prosecution was not suspended at the accused's request, and where the defendant had had no opportunity to insist on the matter being heard in court, the prosecution's suspension could not be considered to be compensation for the unreasonable length of the proceedings.

Summary:

I. The complainant has been subject to criminal proceedings for a number of offences since 1999. If convicted he would have faced a prison sentence of up to ten years. After over ten years without any substantive decision being made, the prosecution was suspended on grounds that the European Convention for the Protection of Fundamental Rights and Freedoms provides. The complainant did not request to have the criminal prosecution suspended and in accordance with the applicable legal regulation, he was not able to file a complaint against this decision or insist on the case being tried. The complainant asked the Ministry of Justice to pay him more than half a million crowns for non-pecuniary damage caused by the unreasonable length of the aforementioned criminal prosecution. The request was refused. His claim to have just satisfaction awarded was dismissed by the courts in its entirety on the grounds that, in the present case, the suspension of the criminal prosecution on the grounds of its unreasonable length was sufficient compensation for non-pecuniary harm suffered and that the complainant had failed to demonstrate the existence of any extraordinary circumstances that would justify the award of financial compensation.

II. The Constitutional Court stated that if criminal proceedings persisted for an unreasonably long period of time, what matters was not only the length of the criminal proceedings, but also the fact that the public were convinced of the defendant's guilt. This was all the more important a consideration if the defendant is deprived of the opportunity to be acquitted due to the criminal prosecution being suspended. The Constitutional Court departed from the Supreme Court's view that the reduction of the punishment was itself a sufficient remedy for the unreasonable length of the criminal proceedings. It pointed out that, in accordance with the case-law of the European Court of Human Rights, suspending proceedings can constitute adequate and sufficient compensation only if the person charged with an offence has avoided a conviction. It emphasised the fact that Article 6 ECHR does not guarantee the right to suspend an unreasonably long criminal prosecution, nor does it imply that the State party has the duty to proceed to such a suspension, and by virtue of its competence, neither can the European Court of Human Rights infer such an obligation under the Convention. The Constitutional Court therefore concluded that the situation in which the criminal prosecution was suspended due to its inappropriate length, without concluding whether or not the defendant committed the act, is different from the situation in which the defendant has been found guilty and has benefited from the sentence being reduced in the light of the unreasonable length of criminal proceedings. If the defendant did not request a suspension and had no opportunity to insist that the proceedings be heard, any suspension could not be understood to be compensation for the unreasonable length of the proceedings. In the present case, therefore, it was impossible to argue that the defendant obtained a benefit from the decision to suspend the prosecution as, unlike his co-defendants, he did not seek the suspension and which, as a consequence, prevented him from being cleared by means of an acquittal (unlike, for example, individuals who might be subject to a presidential amnesty and who had this option). In the Constitutional Court's view, even an acquittal would not be sufficient compensation for maladministration involving unreasonably lengthy proceedings. It would therefore be appropriate to award the complainant financial compensation for non-pecuniary damage without having to prove the exceptional circumstances justifying such compensation.

As the Supreme Court dismissed the complainant's application challenging the judgment of the Municipal Court as inadmissible, it violated the complainant's fundamental right to compensation for the damage caused by maladministration, as provided by Article 36.3 of the Charter. The Constitutional Court

therefore granted the constitutional complaint directed against the resolution of the Supreme Court and quashed the contested decision.

III. Kateřina Šimáčková served as the Judge Rapporteur. None of the Judges submitted a dissenting opinion.

Cross-references:

European Court of Human Rights:

- *Kudła v. Poland,* no. 30210/96, 26.10.2000, *Reports of Judgments and Decisions* 2000-XI;
- *Sprotte v. Germany*, no. 72438/01, 17.11.2005;
- *Apicella v. Italy,* no. 64890/01, 29.03.2006;
- *Vasilev and others v. Bulgaria*, no. 61257/00, 08.11.2007;
- *Ommer v. Germany* (no. 2), no. 26073/03, 13.11.2008;
- *Shishkovi v. Bulgaria*, no. 17322/04, 25.03.2010;
- *Dimitrov and Hamanov v. Bulgaria,* nos. 48059/06 and 2708/09, 10.05.2011;
- *Trūps v. Latvia*, no. 58497/08, 20.11.2012.

Languages:

Czech.

Identification: CZE-2017-3-009

a) Czech Republic / **b)** Constitutional Court / **c)** First Panel / **d)** 17.10.2017 / **e)** II. ÚS 1398/18 / **f)** Arguability of a claim of ill-treatment during the police intervention in the Villa Milada / **g)** *Sbírka nálezů a usnesení* (Court's Collection); http://nalus.usoud.cz / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

4.7.2 Institutions − Judicial bodies − **Procedure**.
5.3.3 Fundamental Rights − Civil and political rights − **Prohibition of torture and inhuman and degrading treatment**.
5.3.5.1 Fundamental Rights − Civil and political rights − Individual liberty − **Deprivation of liberty**.
5.3.13.1.4 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Scope − **Litigious administrative proceedings**.
5.3.13.17 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Rules of evidence**.
5.3.39.3 Fundamental Rights − Civil and political rights − Right to property − **Other limitations**.

Keywords of the alphabetical index:

Bodily injury / Burden of proof, presumption affecting / Burden of proof, reversal / Defendant, burden of proof / Ill-treatment, by police / Order, police / Personal integrity, treatment, essence / Police force, duty / Recording, audio, video / Squatter, eviction.

Headnotes:

Where an individual raises an arguable claim that their personal liberty has been restricted as a result of being subjected to ill-treatment by the police, the burden of proof shifts to the state. In such circumstances the state comes under an obligation to submit a convincing explanation of how any injuries said to have arisen from the ill-treatment were caused. Any other approach could lead to a violation of the prohibition of ill-treatment under Article 3 ECHR and Article 7.2 of the Charter of Fundamental Rights and Freedoms. An arguable claim cannot, however, be considered to be a proven fact.

Summary:

I. The complainants, together with other persons, took part in an event organised to mark the third anniversary of the eviction of squatters from the squat Milada. At first the event took place near the building, then in the evening the participants decided to continue inside the villa, which they entered by force. The tenant of the villa demanded that the police expel the squatters. The police negotiated in vain with the squatters to clear out of the building. Police intervention then took place; what occurred is disputed, as it was not recorded by the police cameraman. The complainants claim that the police beat them, while the police deny this claim. After the intervention, the police sent several lightly injured persons for medical care. The complainants defended themselves against the police intervention in the administrative courts through an "intervention complaint". They sought a determination that the intervention was unlawful. They submitted medical reports documenting their injuries, accusing the police of failing to secure a video recording of the police intervention, even though a police cameraman was present. The municipal court denied the complaint, but the Supreme Administrative Court (the SAC) annulled that decision. In doing so the SAC emphasised that where a claim that the right not to be subjected to torture and other inhuman and degrading

treatment is raised, this has an effect on the distribution of the burden of proof. Complainants must prove that ill-treatment occurred, and the police must then prove that the complainants caused their injuries themselves, that they occurred in other ways, or that they were the result of an authorised use of coercive means. If the police fail to discharge the burden of proof, they are responsible for the injuries. After supplementary evidence, the municipal court again denied the complaint. It concluded that the police met their burden of proof; none of the evidence indicated that they caused the complainants' injuries. The SAC subsequently denied the complainants' cassation complaint. In respect of the complainants' injuries and the shifting of the burden of proof, it stated that the complainants failed to prove that the injuries occurred at a time when they were "in the power" of police officers, and therefore the burden of proof did not shift. In their constitutional complaint, the complainants claimed, above all, that the burden of proof regarding the facts of the intervention inside the villa should have shifted to the state.

II. The Constitutional Court referred to the case-law of the European Court of Human Rights and stated that the complainants met the minimal necessary degree of probability of their claim that the police subjected them to ill-treatment, in order for those claims to be considered arguable. On this issue it did not agree with the SAC's evaluation of the matter. However, despite this finding, the Constitutional Court did not find grounds to annul the contested decisions. After very detailed presentation of evidence, the municipal court determined that the complainants' injuries could have occurred in many ways, and they did not necessarily occur as a result of the disproportionate use of force. According to the court, the nature of injuries did not correspond to alleged beating with a baton. Therefore, with reference to the municipal court's conclusions, the Constitutional Court concluded that despite the existence of an arguable claim by the complainants, the police provided a sufficient and convincing explanation of how their injuries were caused. Regarding the lack of a video recording, the Constitutional Court accepted that the events at the villa ought to have been video recorded for evidential purposes, but in the present context, this was not an error that would cause the steps taken by the police to be unconstitutional. In any event, the police officers' concerns that the cameraman might be in danger were confirmed, because two police officers were injured.

The Constitutional Court noted out that the adjudicated matter concerned the question of whether the burden of proof shifted to the police, and if it did, whether the police met that burden. The complainants did not question the proportionality and necessity of the intervention itself, and therefore the Constitutional Court did not address these questions.

The Constitutional Court also stated that in similar cases, where the police intervene to prevent rights being violated (the unauthorised entry into the Villa Milada and subsequent failure to respect calls to leave it), consideration must be given to the fact that an individual's freedom does not merely mean the ability to do anything that he or she considers to be good or right, it also means that they are responsible for their own actions. In the present case, the individuals who entered the Villa Milada illegally had consciously prepared for a conflict with the police and refused to leave the villa peacefully when called upon to do so by the police. This situation is, thus, considerably different from cases where an individual comes into the power of the police, e.g. after being detained or otherwise having his personal liberty limited, because in those cases he or she cannot choose to avoid a potential interference in their rights.

Therefore, the Constitutional Court concluded that neither the general courts nor the police violated the prohibition of ill-treatment under Article 3 ECHR and Article 7.2 of the Charter. For those reasons the Constitutional Court denied the constitutional complaint.

III. The judge rapporteur in the case was Vojtěch Šimíček. Judge Ludvík David filed a dissenting opinion. Judge David disagreed with the verdict of the judgment and with several supporting reasons in the reasoning. In his opinion, the SAC's decision should have been quashed, as it erred by rejecting the conclusion that the complainants' claims were arguable, which would have meant shifting the burden of proof to the state. The claims, supported by medical reports on injuries sustained by two participants in the event against whom the police acted, were arguable. The cassation court's opinion must be considered to be surprising. According to the cassation court, because the burden of proof did not shift, "there was also no room to weigh against the defendant" the fact that the police were not able to submit a complete video recording of how the intervention took place. The SAC excluded the incomplete video recording from its formal review of the evaluation of the evidence, although at the same time it reviewed its content. The dissenting judge did not claim that in the adjudicated matter the way in which the evidence was evaluated could not stand even if the lack of a complete video recording was taken account of. However, there was a failure to take a proper account of certain matters during the evidentiary proceeding. That failure could be summarised in the following questions: is it or is it not permissible (to what degree), when evaluating

evidence, to take into account the fact that one of the parties, bearing its part of the burden of proof, did not take the opportunity to submit a (complete) piece of evidence which, in view of the nature of the evidence, has greater evidentiary force (evidentiary value) than another piece of evidence, e.g. witness testimony? And in the case of at least a partly positive answer to that question, to what degree should one (not) take into account the facts that led to the non-submission of the evidence?

Cross-references:

European Court of Human Rights:

- *Ribitsch v. Austria,* no. 18896/91, 04.12.1995, Series A, no. 336;
- *Sharomov v. Russia,* no. 8927/02, 15.01.2009;
- *Dedovskiy and others v. Russia,* no. 7178/03, 15.05.2008, *Reports of Judgments and Decisions* 2008 (extracts);
- *Popandopulo v. Russia,* no. 4512/09, 10.05.2011;
- *Gäfgen v. Germany,* no. 22978/05, 01.06.2010, *Reports of Judgments and Decisions* 2010;
- *Boacă and others v. Romania,* no. 40355/11, 12.01.2016;
- *Bouyid v. Belgium*, no. 23380/09, 28.09.2015, *Reports of Judgments and Decisions* 2015;
- *Đurđević v. Croatia,* no. 52442/09, 19.07.2011, *Reports of Judgments and Decisions* 2011 (extracts);
- *Jeong v. the Czech Republic*, no. 34140/03, 13.02.2007;
- *Balogh v. Hungary*, no. 47940/99, 20.07.2004;
- *Mindadze and Nemsitsveridze v. Georgia*, no. 21571/05, 01.06.2017;
- *Altay v. Turkey*, no. 22279/93, 22.05.2001;
- *Rehbock v. Slovenia*, no. 29462/95, 28.11.2000, *Reports of Judgments and Decisions* 2000-XII;
- *Serikov v. Ukraine*, no. 42164/09, 23.07.2015;
- *Klaas v. Germany*, no. 15473/89, 22.09.1993, Series A, no. 269;
- *Fyodorov and Fyodorova v. Ukraine,* no. 39229/03, 07.07.2011;
- *R.L. and M.-J.D. v. France,* no. 44568/98, 19.05.2004;
- *Kopylov v. Russia,* no. 3933/04, 29.07.2010.

Languages:

Czech, English.

Finland
Supreme Administrative Court

Important decisions

Identification: FIN-2017-3-001

a) Finland / **b)** Supreme Administrative Court / **c)** Third Chamber / **d)** 20.04.2016 / **e)** 1503 / **f)** / **g)** Yearbook *KHO*,2016:53; Register no. 1581/1/15 / **h)**.

Keywords of the systematic thesaurus:

5.1.1.3.1 Fundamental Rights − General questions − Entitlement to rights − Foreigners − **Refugees and applicants for refugee status**.
5.3.3 Fundamental Rights − Civil and political rights − **Prohibition of torture and inhuman and degrading treatment**.
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:

Asylum, application, examination / Dublin III, presumption, deviation, threshold.

Headnotes:

The Supreme Administrative Court was to determine whether the principle of non-refoulement under provisions on basic rights and human rights and Section 147 of the Aliens Act prevented the transfer of an Afghan citizen to Hungary which, by virtue of the Regulation (EU) no. 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast Regulation, so-called Dublin III Regulation), was responsible for processing the asylum application and which had given its approval to the transfer of the appellant.

Summary:

The Supreme Administrative Court stated that the Common European Asylum System is based on mutual confidence between the Member States and

the presumption that, in principle, the country responsible for the examination of an asylum application under the Dublin III Regulation respects the asylum seeker's basic rights so that he can be returned to the said country without a substantive examination of the asylum application by the returning country. However, this presumption is not rebuttable but, under Article 3.2 of the Dublin III Regulation, it must be deviated from if there are justified grounds for believing that the asylum procedure and asylum seekers' reception conditions in the originally responsible Member State included systemic deficiencies referred to in the afore-mentioned provision.

Although the threshold for deviating from the aforementioned principle, i.e. the transfer of an asylum seeker as specified in the said Regulation, was high, the legal practice of other Member States and other material taken into account in the Supreme Administrative Court's decision strongly suggested that systemic deficiencies referred to in Article 3.2 of the Regulation could be identified in Hungary. Considering also the benefit of the doubt principle, which is significant in the evaluation of proof under refugee law, and the principle of interpretation of the law in favour of basic rights and human rights, in this uncertain situation the case had to be resolved in the appellant's favour. Considering the latest country information available at the time of the decision, it was not possible to reliably ascertain that the appellant's return to Hungary did not breach Article 4 of the Charter of Fundamental Rights of the European Union or Article 3 ECHR.

The Supreme Administrative Court stressed that the situation concerning the return to Hungary could be evaluated otherwise, particularly insofar as new information may be obtained regarding the question of whether to consider Serbia as a safe country, following possible changes in the application of Hungary's asylum legislation, through decisions of the European Court of Human Rights, or otherwise.

According to Article 3.2 of the Dublin III Regulation, the appellant's application concerning international protection had to be processed in Finland.

Supplementary information:

- Regulation (EU) no. 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (recast Regulation, so-called Dublin III), Articles 3.1-3.3 and 17.1;
- Constitution of Finland, Section 9.4;
- Aliens Act, Section 147;
- Charter of Fundamental Rights of the European Union, Articles 4, 18 and 19;
- European Convention on Human Rights, Article 3.

Cross-references:

Court of Justice of the European Union:

- C-394/12 [GC], *Shamso Abdullahi v. Bundesasylamt*, 10.12.2013;
- C-695/15, PPU, *Shiraz Baig Mirza v. Bevándorlási és Állampolgársági Hivatal*, 17.03.2016.

European Court of Human Rights:

- *Halimi v. Austria and Italy*, no. 53852/11, 18.06.2013;
- *Mohammadi v. Austria*, no. 71932/12, 03.07.2014;
- *Tarakhel v. Switzerland*, no. 29217/12, 04.11.2014, *Reports of Judgments and Decisions* 2014 (extracts).

Languages:

Finnish, Swedish.

France
Constitutional Council

Important decisions

Identification: FRA-2017-3-012

a) France / **b)** Constitutional Council / **c)** / **d)** 08.09.2017 / **e)** 2017-752 DC and 2017-753 DC / **f)** Law on confidence in political life and organic law on confidence in political life / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 16.09.2017, texts nos. 5 and 4 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.4 General Principles − **Separation of powers**.
4.5 Institutions − **Legislative bodies**.
5.3.32 Fundamental Rights − Civil and political rights − **Right to private life**.

Keywords of the alphabetical index:

Political life, transparency / Political life, accountability / Parliamentary reserve, abolition / Parliament, member, family, employment, prohibition / Conflict of interest / Ministerial reserve / Legislative rider.

Headnotes:

The organic provisions abolishing the practice of maintaining a "parliamentary reserve", whereby the government is unable to exercise its powers in relation to budgetary implementation until the parliamentary scrutiny process is complete, are compatible with the Constitution. The provisions in question cannot be construed as limiting the government's right to introduce amendments in financial matters.

Article 15 of the organic law abolishing the practice of maintaining a "ministerial reserve", which is solely a matter for the government, is not compatible with the Constitution, however, not least because it undermines the principle of separation of powers.

The provisions of Articles 11, 14, 15, 16 and 17 of the ordinary law on confidence in political life, prohibiting public officials, in particular MPs, from employing family members or requiring them to declare any staff recruited from among family members to the office and body in charge of parliamentary ethics in the assembly to which they belong, are compatible with the Constitution.

Summary:

In its Decisions nos. 2017-753 DC and 2017-752 DC of 8 September 2017, the Constitutional Council ruled on the organic law and the ordinary law on confidence in political life, having been requested to do so firstly by the Prime Minister under Articles 46 and 61.1 of the Constitution and, secondly, by more than sixty MPs under Article 61.2 of the Constitution.

These two laws contain several packages of measures designed to improve transparency in political life, to strengthen the requirement for elected officials to behave with integrity and in an exemplary manner, to increase voters' confidence in their representatives and to modernise the system of political financing.

As well as the 27 articles of the organic law to be examined under the Constitution, the Constitutional Council reviewed the 13 articles of the ordinary law that had been challenged by the MPs. It also examined two articles of this law *ex officio*.

1° Regarding the organic law

The Constitutional Council held that the provisions of the organic law requiring presidential candidates to submit a declaration of interests and activities to the Council, to be published at least fifteen days prior to the first round of the presidential election, were compatible with the Constitution. The same applied to the provisions requiring the declaration of assets drawn up prior to the expiry of the French President's term of office to be made public, together with an opinion from the Supreme Authority for Transparency in Public Life, assessing any changes in the President's asset situation while he or she was in office.

The Constitutional Council held that the organic provisions instituting a procedure to ensure that MPs' tax affairs were in order, which might lead the Council, under certain circumstances, to ban MPs who had failed to meet their obligations from standing in any elections for up to 3 years and to declare them as having resigned *ex officio* from office, were constitutional.

It ruled that the organic law-makers could, without disproportionately interfering with the right to respect for private life, add to the list of items to be included in

MPs' declarations of interests and activities, any direct or indirect holdings that gave them control over an entity whose activity consisted mainly in providing consultancy services.

It held that the need to protect voters' freedom of choice and the independence of elected representatives against the risk of confusion or conflict of interest justified, in view of the specific risks of conflicts of interest associated with these activities, the organic law-makers' decision to prohibit MPs from working as lobbyists and to restrict their ability to work as consultants.

While finding the organic provisions abolishing the practice of maintaining a "parliamentary reserve", whereby the government was unable to exercise its powers in relation to budgetary implementation until the parliamentary scrutiny process was complete, to be compatible with the Constitution, the Constitutional Council held that these provisions could not be construed as limiting the government's right to introduce amendments in financial matters. It did, however, censure, on the ground that it undermined the principle of separation of powers, Article 15 of the organic law abolishing the practice of maintaining a "ministerial reserve" which, in the Constitutional Council's view, was solely a matter for the government.

2° Regarding the ordinary law

The Constitutional Court held that Article 1 of the ordinary law introducing a mandatory additional penalty of ineligibility for anyone found guilty of a crime or one of the offences listed in the same article infringed neither the rule that offences and punishment must be defined by law nor the principle of individualisation of penalties. It conceded that this provision was necessary in order to achieve the aim of the legislation, namely to strengthen the requirement for elected officials to behave with integrity and in an exemplary manner and to increase voters' confidence in their representatives. It also held, however, that these provisions could not be construed as automatically meaning that persons who had committed lesser offences were prohibited from holding public office. In addition, it criticised the provisions in Article 1 stipulating that persons guilty of certain press offences which carried prison sentences must be disqualified.

With regard to the conditions governing the employment and appointment of staff of the President of the Republic, members of the government, MPs and holders of local executive positions, the Constitutional Council held that Articles 11, 14, 15, 16 and 17 of the ordinary law prohibiting the public office holders concerned from employing family members or requiring them to declare any staff recruited from among family members to the Supreme Authority mentioned above or, in the case of MPs, to the office and body in charge of parliamentary ethics in the assembly to which they belonged, were compatible with the Constitution.

Referring to the decision whereby it had expressed a reservation concerning the interpretation of the transparency in public life legislation of 11 October 2013, the Constitutional Council did, however, criticise, not least because they violated the principle of separation of powers, the provisions authorising the Supreme Authority to issue the individuals concerned with a public injunction, terminating their appointments if there was a conflict of interest.

In matters relating to political financing, the Constitutional Court ruled that Article 30 of the ordinary law authorising the government to adopt by ordinance the necessary measures so that candidates, political parties and groupings could, from 1 November 2018 and in the event of a recognised market failure in the banking sector, obtain the loans, advances or guarantees required to fund national or European election campaigns, the purpose and sphere of intervention of the proposed measures, *inter alia*, having been clearly defined by the legislator, was compatible with the requirements of Article 38 of the Constitution.

The Constitutional Council did, however, censure as being contrary to the principle of separation of powers Article 23 of the law requiring the Prime Minister to adopt a decree on the coverage of MPs' entertainment expenses.

It also censured the provisions of the organic law and the ordinary law giving the Supreme Authority for Transparency in Public Life a right – previously held by the tax authorities – to communicate certain material or information, on the ground that the disclosure of connection data permitted under these provisions, which was liable to interfere with the privacy of the individual concerned, was not accompanied by sufficient safeguards.

3° Referring to them as "legislative riders", the Constitutional Council also censured, on the ground that they had no connection, even indirect, with the provisions of the original draft law, Article 2 of the organic law on the period of time for which a former member of the government could receive an allowance, the provisions of Article 16 of the organic law relating to the declaration of assets of members of the High Council for the Judiciary, Article 23 of the same law on local referendums and Article 7 of the

ordinary law calling for a report on the repayment of allowances received by certain officials in the course of their education to be submitted to parliament.

Languages:

French.

Identification: FRA-2017-3-013

a) France / **b)** Constitutional Council / **c)** / **d)** 27.10.2017 / **e)** 2017-670 QPC / **f)** Mr Mikhail P. [Early erasure of personal data from criminal record files] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 29.10.2017, text no. 38 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice − Effects − **Determination of effects by the court**.
1.6.5.5 Constitutional Justice − Effects − Temporal effect − **Postponement of temporal effect**.
5.3.13.2 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Effective remedy**.
5.3.32.1 Fundamental Rights − Civil and political rights − Right to private life − **Protection of personal data**.

Keywords of the alphabetical index:

Personal data, erasure / Crime records, file.

Headnotes:

In depriving accused persons in criminal proceedings, other than in cases where it has been decided to acquit or discharge the individual concerned, not to bring a prosecution or to discontinue the proceedings against them, of any possibility of having their personal data erased from the criminal record file, the first subparagraph of Article 230-8 of the Code of Criminal Procedure, as worded pursuant to Law no. 2016-731 of 3 June 2016, constitutes a disproportionate interference with the right to respect for private life.

Summary:

I. On 1 August 2017, the Court of Cassation asked the Constitutional Council for a priority preliminary ruling on the issue of constitutionality with regard to the first subparagraph of Article 230-8 of the Code of Criminal Procedure, as worded pursuant to Law no. 2016-731 of 3 June 2016 reinforcing the fight against organised crime, terrorism and the financing thereof and to enhance the efficacy and guarantees of criminal procedure.

The Code of Criminal Procedure allows the national police and the national gendarmerie, under the supervision of the public prosecutor in the relevant jurisdiction, to create files from personal data gathered during inquiries or investigations carried out under judicial instruction. The first subparagraph of Article 230-8 of the Code states that in the event of a final decision to discharge or acquit, the accused person's personal data are to be erased from these files, unless the public prosecutor orders them to be kept. The public prosecutor may likewise order personal data to be erased if it is decided not to bring a prosecution or to discontinue the proceedings. The provisions in question, however, do not allow the accused, other than in cases where they have been acquitted or discharged, or where it has been decided not to bring a prosecution or to discontinue the proceedings against them, to have their data erased.

The applicant argued that the provisions in question violated the right to respect for private life in that they did not allow all accused persons to have their personal data removed from the criminal record files at an early stage.

II. In its ruling, the Constitutional Council pointed out that the freedom enshrined in Article 2 of the 1789 Declaration of the Rights of Man and of the Citizen implied the right to respect for private life. Pursuant to established case-law, it followed that the collection, recording, conservation, consultation and disclosure of personal data must be justified by general-interest considerations and implemented in a manner that was appropriate and proportionate to this objective.

In the case in point, the Constitutional Council held that in allowing, firstly, the creation of personal data processing operations recording individuals' criminal history and, secondly, access to these processing operations by authorities vested with judicial police powers by law and by certain staff vested with administrative police powers, the legislature had intended to provide them with a tool to assist in carrying out judicial investigations and certain administrative inquiries. It thus served the

constitutional objectives of bringing offenders to justice and preventing breaches of public order.

In providing that criminal record files could contain information gathered during an inquiry or investigation concerning a person against whom there was strong and concordant evidence making it plausible that he or she might have been involved in the commission of certain offences, however, the legislature had allowed some very sensitive data to be included in the files in question. Criminal record files, furthermore, were liable to concern a large number of individuals insofar as they contained information about everyone who had been accused of a crime, offence or various class 5 minor offences. Also, there was no statutory maximum period for which information in a criminal record file could be retained. Lastly, the information in question could be consulted not only for the purposes of establishing infringements of criminal law, gathering evidence of these infringements and pursuing the perpetrators, but also for other purposes related to administrative policing.

For all these reasons, the Constitutional Court concluded that in depriving accused persons in criminal proceedings, other than in cases where it had been decided to acquit or discharge the individual concerned, not to bring a prosecution or to discontinue the proceedings against them, of any possibility of having their personal data erased from the criminal record file, the impugned provisions constituted a disproportionate interference with the right to respect for private life.

Pointing out that it did not have general discretionary powers like those of parliament, the Constitutional Council noted that it could not indicate the changes that needed to be made in order to remedy the unconstitutionality found. The immediate abrogation of the impugned provisions would have a paradoxical effect as it would deprive everyone whose name appeared in a criminal record file of the possibility of having their personal data erased, including those who were currently entitled to do so. The Constitutional Council therefore postponed the date of abrogation of the first subparagraph of Article 230-8 of the Code of Criminal Procedure to 1 May 2018.

Languages:

French.

Identification: FRA-2017-3-014

a) France / **b)** Constitutional Council / **c)** / **d)** 01.12.2017 / **e)** 2017-674 QPC / **f)** Mr Kamel D. [House arrest of a foreign national subject to an exclusion order or deportation order] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 02.12.2017, text no. 75 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.6.5.5 Constitutional Justice − Effects − Temporal effect − **Postponement of temporal effect**.
5.3.6 Fundamental Rights − Civil and political rights − **Freedom of movement**.
5.3.9 Fundamental Rights − Civil and political rights − **Right of residence**.
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**.

Keywords of the alphabetical index:

House arrest, duration.

Headnotes:

The legislator is entitled to refrain from setting a maximum time frame for house arrest in order to allow the administrative authorities to exercise supervision over the foreign national concerned, given the threat to public safety that he or she represents or in order to ensure enforcement of a court decision.

However, the fact that the legislator had failed to stipulate that beyond a certain time frame the authorities would need to demonstrate the existence of special circumstances requiring the house arrest to be extended for the purpose of executing the exclusion order amounted to a disproportionate interference with the freedom to come and go.

Summary:

I. On 20 September 2017 the *Conseil d'État* asked the Constitutional Council for a priority preliminary ruling on the issue of constitutionality with regard to the last sentence of the eighth subparagraph and the third sentence of the ninth subparagraph of Article L. 561-1 of the Code on the Entry and Residence of Foreigners and the Right of Asylum, as worded pursuant to Law no. 2016-274 of 7 March 2016 on the rights of foreign nationals in France.

The last sentence of the eighth subparagraph of Article L. 561-1 allows the administrative authorities to place under house arrest, without any time limit, a foreign national subject to an exclusion order or a deportation order, until there is a reasonable prospect of carrying out the expulsion measures in question. The third sentence of the ninth subparagraph of the same article also allows these authorities to establish, anywhere on French territory, the location for the house arrest of the foreigners in question or those subject to an administrative exclusion order, no matter where those foreigners are located.

The applicant, who was joined in the proceedings by the association Gisti and by the League of Human Rights, criticised the provisions on the ground, *inter alia*, that they did not set a time limit for such house arrest and failed to provide either for a periodic review of the foreign national's situation or for an effective remedy against the house arrest decision. This, they argued, would result in an infringement of the freedom to come and go, the right to respect for private life and the right to lead a normal family life. The applicant and the above-mentioned associations further contended that the fact that the location where the foreign national was to be held under house arrest could be changed at the authorities' discretion amounted to a violation of the right to respect for private life and the right to lead a normal family life. They also argued that, because of the indefinite duration of the house arrest and the terms and conditions thereof, the impugned provisions impinged on individual freedom in a way that was incompatible with Article 66 of the Constitution.

II. In its ruling, the Constitutional Council noted from its established case-law that no principle or indeed any constitutional rule afforded foreign nationals general and absolute rights to enter and remain on French territory. The conditions governing their entry and stay could be restricted by administrative policing measures granting the public authorities extensive powers based on specific rules. It was the legislature's responsibility to ensure a balance between, on the one hand, preventing breaches of public order and, on the other hand, respecting the rights and freedoms granted to all those who resided on French soil. Among these rights and freedoms was the freedom to come and go, which was part of the personal freedom enshrined in Articles 2 and 4 of the 1789 Declaration of the Rights of Man and of the Citizen, the right to respect for private life protected under Article 2 of this declaration and the right to lead a normal family life, as established in the tenth subparagraph of the Preamble to the Constitution of 27 October 1946.

Drawing on this case-law, the Constitutional Council noted, in the instant case, that in providing that foreign nationals subject to a deportation order or exclusion order may be placed under house arrest, without any time limit, the legislature had specifically sought to prevent persons who not only did not have the right to remain in the country but had also been found guilty of an offence or whose presence constituted a serious threat to public order from moving freely around the national territory. The measure in question was thus justified, on two counts, by public order considerations.

The Constitutional Council accordingly held that it was open to the legislature not to set a maximum time frame for house arrest in order to allow the administrative authorities to exercise supervision over the foreign national concerned given the threat to public order that he or she represented or in order to ensure the enforcement of a court decision.

It noted that the fact that a deportation order was in place, and had not been revoked, indicated that the foreign national posed a continuing threat to public order. Placing a person under house arrest after they had been banned from French territory could always be justified on the ground that it was necessary in order to carry out the sentence handed down in respect of the foreigner concerned. Because, however, the legislature had not stipulated that beyond a certain time, the authorities must show that there were special circumstances requiring the house arrest to be extended for the purpose of executing the exclusion order, the Constitutional Council held that the words "in 5° of this article" in the last sentence of the eighth subparagraph of Article L. 561-1, which referred to the case of a foreign national who had been banned by a court from French territory, amounted to a disproportionate interference with the freedom to come and go.

As to the other impugned provisions, applicable to foreign nationals against whom deportation orders had been issued, the Constitutional Court expressed two reservations as to interpretation. Firstly, it was the responsibility of the administrative authorities to establish the conditions and location for the house arrest having regard, in terms of the constraints that they imposed on the individual concerned, to the time spent under this regime and the individual's family and personal relationships. Secondly, the time for which an individual may be required to remain at home, in the context of house arrest, could not exceed twelve hours per day. Otherwise, the measure would amount to a custodial one, contrary to the requirements of Article 66 of the Constitution, in the absence of any action by the relevant court.

With regard to the temporal effects of its partial finding of unconstitutionality, the Constitutional Council pointed out that it did not have general discretionary powers like those of parliament and that it could not indicate the changes that needed to be made in order to remedy the unconstitutionality found. Given the manifestly unreasonable consequences that immediate abrogation would have, the Constitutional Council postponed the date of abrogation of the words “in 5° of this article” which appeared in the last sentence of the eighth subparagraph of Article L. 561-1 of the Code on the Entry and Residence of Aliens and the Right of Asylum to 30 June 2018.

Languages:

French.

Identification: FRA-2017-3-015

a) France / **b)** Constitutional Council / **c)** / **d)** 01.12.2017 / **e)** 2017-677 QPC / **f)** League of Human Rights [identity checks, baggage searches and vehicle inspections during states of emergency] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 02.12.2017, text no. 77 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.17 General Principles − **Weighing of interests**.
4.18 Institutions − **State of emergency and emergency powers**.
5.3.6 Fundamental Rights − Civil and political rights − **Freedom of movement**.
5.3.13.2 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Effective remedy**.
5.3.32 Fundamental Rights − Civil and political rights − **Right to private life**.

Keywords of the alphabetical index:

State of emergency, vehicle, search.

Headnotes:

Article 8-1 of Law no. 55-385 of 3 April 1955 on states of emergency stipulated that in areas where a state of emergency had been declared, the prefect could authorise, by means of a reasoned decision, senior officers in the criminal police and, under their supervision, officers and certain assistant officers in the criminal police, to carry out identity checks, visual inspections and searches of bags and also inspections of vehicles being driven, stopped or parked on the public highway or in areas accessible to the public. It was incompatible with the Constitution due to its failure to ensure a balance between, on the one hand, the constitutional objective of safeguarding public order and, on the other hand, the freedom to come and go and the right to respect for private life.

Summary:

I. On 25 September 2017, the *Conseil d'État* asked the Constitutional Council for a priority preliminary ruling on the issue of constitutionality with regard to Article 8-1 of Law no. 55-385 of 3 April 1955 on states of emergency, as worded pursuant to Law no. 2016-987 of 21 July 2016 extending the application of Law no. 55-385 of 3 April 1955 on states of emergency and on strengthening counter-terrorism measures.

Pursuant to the first subparagraph of Article 8-1 of the law of 3 April 1955, in areas where a state of emergency has been declared, the prefect may authorise, by means of a reasoned decision, senior officers in the criminal police and, under their supervision, officers and certain assistant officers in the criminal police, to carry out identity checks, visual inspections and searches of bags and also inspections of vehicles being driven, stopped or parked on the public highway or in areas accessible to the public.

The League of Human Rights criticised these provisions for allowing such measures to be carried out, without the decision to have recourse to them being conditional on there being specific circumstances or threats and without any possibility of subjecting the measures to effective judicial review. The result, according to the association, was an infringement of the freedom to come and go, the right to respect for private life, the principle of equality before the law and the right to an effective legal remedy, and a disregard by the legislature for its own competence that was likely to affect these rights and freedoms.

II. In its ruling, the Constitutional Court pointed out that the Constitution did not preclude the possibility for the legislature to provide for states of emergency. It was the legislature's responsibility, in this context, to ensure a balance between, on the one hand, preventing breaches of public order and, on the other hand, respecting the rights and freedoms granted to all those who resided on French soil. Among these rights and freedoms was the freedom to come and go, which was part of the personal freedom enshrined in Articles 2 and 4 of the 1789 Declaration of the Rights of Man and of the Citizen, and the right to respect for private life protected under the same Article 2.

Examining the impugned provisions in the light of these constitutional rules, the Constitutional Council noted that, while the latter required the prefect to specifically designate the areas affected by these operations and their duration, which could not exceed twenty-four hours, and while, under the provisions in question, some of the safeguards applicable to inspections and searches carried out in a judicial context also applied to operations of this type, the latter could nevertheless be carried out, in the areas designated in the prefect's decision, against any person, whatever his or her behaviour and without his or her consent.

The Constitutional Council held that, while it was open to the legislature to stipulate that the operations implemented in this context may not be related to the person's behaviour, the use of these operations in a widespread and discretionary manner would be incompatible with the freedom to come and go and the right to respect for private life. In providing that these operations could be authorised in any area where a state of emergency applied, however, the legislature had made it possible for them to be carried out without them necessarily being justified by particular circumstances establishing that there was a risk to public order in the areas in question. Because the legislature had failed to ensure a balance between, on the one hand, the constitutional objective of safeguarding public order and, on the other hand, the freedom to come and go and the right to respect for private life, the Constitutional Council concluded that Article 8-1 of the law of 3 April 1955 was unconstitutional.

With regard to the temporal effects of its finding of unconstitutionality, the Constitutional Council pointed out that it did not have general discretionary powers like those of parliament and that it could not indicate the changes that needed to be made in order to remedy the unconstitutionality found. It noted that, in the instant case, if a state of emergency were declared, the immediate abrogation of the impugned provisions would have the effect of depriving the administrative authorities of the power to authorise identity checks, bag searches and vehicle inspections and would thus have manifestly unreasonable consequences. It therefore postponed the date of abrogation of the impugned provisions to 30 June 2018, giving the parliament time to adopt new provisions in keeping with the constitutional requirements, where necessary.

Languages:

French.

Identification: FRA-2017-3-016

a) France / **b)** Constitutional Council / **c)** / **d)** 08.12.2017 / **e)** 2017-680 QPC / **f)** Union syndicale des magistrats [Independence of public prosecutors] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 09.12.2017, text no. 186 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.4 General Principles − **Separation of powers**.
4.7.4.1 Institutions − Judicial bodies − Organisation − **Members**.
4.7.4.3.6 Institutions − Judicial bodies − Organisation − Prosecutors / State counsel − **Status**.

Keywords of the alphabetical index:

Magistrate, independence / Prosecutor, independence.

Headnotes:

Under Article 5 of Decree no. 58-1270 of 22 December 1958, prosecutors are placed "under the direction and supervision of their superiors and under the authority of the Keeper of the Seals, the Minister of Justice. In hearings, they shall speak freely". These provisions ensure a reasonable balance between the principle of an independent judicial authority and the prerogatives granted to the government by Article 20 of the Constitution. They do not breach the principle of the separation of powers.

Summary:

I. On 27 September 2017, the *Conseil d'État* asked the Constitutional Council to give a priority preliminary ruling in relation to the constitutionality of Article 5 of Decree no. 58-1270 of 22 December 1958 on the organic law relating to the status of members of the judiciary. Under this article, "prosecutors are placed under the direction and supervision of their superiors and under the authority of the Keeper of the Seals, the Minister of Justice. In hearings, they shall speak freely".

The *Union syndicale des magistrats* (magistrates' trade union), along with several other parties, alleged that these provisions violated the principle of an independent judicial authority provided for by Article 64 of the Constitution, on the ground that they make prosecutors subordinate to the Minister of Justice, even though they are part of the judiciary and therefore should, along with judges, be protected by the constitutional guarantee of independence. For the same reason, the union also alleged that Article 5 breached the principle of the separation of powers in a manner that affected the principle of an independent judicial authority.

II. The ruling delivered by the Constitutional Council referred to the constitutional framework in force. It cited Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789, under which, "any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution". It stated that under Article 20 of the Constitution, it was the Government which determined and conducted the policy of the nation, particularly with regard to the prosecution service's sphere of action. Citing the first paragraph of Article 64 of the Constitution, under which, "the President of the Republic shall be the guarantor of the independence of the Judicial Authority", the Constitutional Council held that the independence of the judiciary, to which prosecutors belong, gives rise to the principle whereby the public prosecutor freely exercises its action before the courts in seeking to protect the interests of society. Lastly, the ruling cited the provision of Article 64 of the Constitution which states that "judges shall be irremovable from office", in addition to paragraphs four to seven of Article 65 of the Constitution on the respective conditions for appointing judges and prosecutors, and the exercise of disciplinary power against them.

The Constitutional Council held that through all these provisions, the Constitution provided for the independence of prosecutors, giving rise to the free exercise of their action before the courts, that this independence had to be reconciled with the government's prerogatives and that it was not protected by the same safeguards as those applicable to judges.

In the constitutional framework as outlined here in line with previous case-law, the Constitutional Council's ruling reviewed the way in which the law implemented the requirement for balance between the principle of independent prosecutors and the Government's prerogatives, in defining the relationship between the Minister of Justice and prosecutors.

Firstly, the Minister of Justice's authority over prosecutors may be seen in particular through the exercise of their power regarding appointments and disciplinary measures. Under Article 28 of the Decree of 22 December 1958, decrees appointing prosecutors are issued by the President of the Republic based on the Minister of Justice's recommendations, following consultation of the competent section of the High Council of the Judiciary. Under Article 66 of the same decree, a decision to take disciplinary measures against a prosecutor is made by the Minister of Justice after consulting the competent section of the High Council of the Judiciary. In addition, under paragraph 2 of Article 30 of the Code of Criminal Procedure, the Minister of Justice may issue general instructions of criminal policy to public prosecutors, in light of the need to ensure the equality of citizens before the law nationwide. In line with the provisions of Articles 39-1 and 39-2 of the said Code, the public prosecutor is required to follow these instructions.

Secondly, also under Article 30 of the Code of Criminal Procedure, the Minister of Justice is not allowed to issue any instructions to prosecutors in individual cases. Under Article 31 of the above Code, public prosecutors prosecute and enforce the application of the law, respecting the duty of impartiality. As required by Article 33, they freely give oral submissions which they believe are in the interest of justice. Article 39-3 gives public prosecutors the responsibility of ensuring that criminal police investigations have the aim of establishing the truth and are conducted in favour of and against the plaintiff and the suspect, while respecting the rights of the victim. Under Article 40-1 of the Code of Criminal Procedure, the public prosecutor is free to decide whether to proceed with prosecutions.

For all these reasons, the Constitutional Council held that the impugned provisions of Article 5 of Decree no. 58-1270 of 22 December 1958 ensured a reasonable balance between the principle of an independent judicial authority and the prerogatives granted to the government by Article 20 of the Constitution. In addition, they did not breach the separation of powers.

Languages:

French.

Identification: FRA-2017-3-017

a) France / **b)** Constitutional Council / **c)** / **d)** 15.12.2017 / **e)** 2017-682 QPC / **f)** M. David P. (Offence of habitually accessing terrorist websites II) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 16.12.2017, text no. 90 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.3.21 Fundamental Rights − Civil and political rights − **Freedom of expression**.
5.3.23 Fundamental Rights − Civil and political rights − **Rights in respect of the audiovisual media and other means of mass communication**.
5.3.24 Fundamental Rights − Civil and political rights − **Right to information**.

Keywords of the alphabetical index:

Terrorism, website, accessing, disciplinary measure / Terrorism, intention.

Headnotes:

The provisions of Article 421-2-5-2 of the Criminal Code, as worded pursuant to Law no. 2017-258 of 28 February 2017 on public security, reinstating with new wording the offence of habitually accessing terrorist websites, are an unnecessary infringement of the freedom of communication.

These provisions established a two-year prison sentence simply for accessing an online public communication service on several occasions, with no terrorist intent required on the part of the person accessing the site.

Summary:

I. On 9 October 2017, the *Conseil d'État* asked the Constitutional Council to give a priority preliminary ruling on the issue of constitutionality with regard to Article 421-2-5-2 of the Criminal Code, as worded pursuant to Law no. 2017-258 of 28 February 2017 on public security.

These provisions reinstated with new wording the offence of habitually accessing terrorist websites, which the Constitutional Council had censured as initially worded in decision no. 2016-611 QPC of 10 February 2017. With the new wording, Article 421-2-5-2 of the Criminal Code provided for a two-year prison sentence and a fine of 30 000 euros for the act of habitually accessing, without legitimate reason, an online public communication service defending or inciting the commission of terrorist acts, including images or representations of deliberate harm to life. The offence aimed to prevent the indoctrination of individuals who may then commit such acts.

In particular, it was maintained that the freedom of communication had been breached by these provisions since the infringement by the impugned provision was neither necessary, given the legal measures already in effect, nor appropriate or proportional.

II. In its decision, the Constitutional Council referred to its established case-law, concluding, from Article 11 of the Declaration of the Rights of Man and of the Citizen of 1789, that with the current state of communication methods and with regard to the general development of online public communication services, in addition to the importance of these services for participating in democratic life and the expression of ideas and opinions, freedom of communication implies freedom to access such services. Pursuant to Article 34 of the Constitution, it falls to the law to lay down rules to reconcile the exercise of the right to free communication and the freedom to speak, write and print with the aim of combating the incitement and encouragement of terrorism in online public communication services, which pertains to the constitutional aim of safeguarding public order and preventing offences. However, the freedom of expression and communication is all the more precious in that the exercise thereof is a condition of democracy and one of the guarantees that other rights and freedoms are respected. Infringement of the exercise of this freedom must be necessary, appropriate and proportional to the aim pursued.

With regard to the conformity of the impugned provisions with the principle of the necessity of penalties, the Constitutional Council noted, as it did in the aforementioned decision of 10 February 2017, that firstly, the law included a set of criminal offences other than the one impugned and of specific criminal procedural provisions that aimed to prevent the

commission of terrorist acts and, secondly, the law also invested the administrative authorities with many powers in order to prevent the commission of terrorist acts. In addition to the list of legislative provisions in force already included in its February decision and those reiterated in paragraphs 7 to 11 of the present decision, the Constitutional Council stated that, since the entry into force of the impugned provisions, parliament had supplemented the authorities' powers by adopting new individual measures for administrative control and surveillance for the purposes of preventing the commission of terrorist acts through Law no. 2017-1510 of 30 October 2017 reinforcing domestic security and the fight against terrorism. It came to the conclusion that, with regard to the requirement for infringements of the freedom of communication to be necessary, even before the draft was implemented, the administrative and judicial authorities already had numerous powers, aside from the impugned article, not only to monitor online public communication services inciting or defending terrorism and to punish those posting the relevant material, but also to monitor a person accessing such services, take them in for questioning and punish them when their accessing of these sites was accompanied by conduct demonstrating terrorist intent.

With regard to appropriateness and proportionality requirements in terms of the infringement of the freedom of communication, the Constitutional Council noted that, while the impugned provisions required proof of adherence to the ideology expressed in addition to accessing these sites for the offence they introduced to be recognised, accessing these sites and adherence to the ideology were not sufficient on their own to establish the existence of a willingness to commit terrorist acts. These provisions therefore established a two-year prison sentence simply for having accessed an online public communication service several times, without requiring terrorist intent on the part of the person accessing them. In addition, while the law excluded punishment for accessing a site "on legitimate grounds", the applicability of this exemption could not be established in this case, since a person adhering to the ideology expressed by these sites was not likely to fall into one of the categories of legitimate grounds outlined by the law. Therefore there was uncertainty regarding the legality of accessing certain online public communication services and, consequently, the use of the internet for searching for information.

In light of all the above, the Constitutional Council held that the impugned provisions were an infringement of the freedom of communication that was not necessary, appropriate or proportional. It declared them unconstitutional with immediate effect.

Languages:

French.

Identification: FRA-2017-3-018

a) France / **b)** Constitutional Council / **c)** / **d)** 28.12.2017 / **e)** 2017-758 DC / **f)** Finance Law for 2018 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 31.12.2017, text no. 11 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.8.3 Institutions − Federalism, regionalism and local self-government − **Municipalities**.
4.8.7 Institutions − Federalism, regionalism and local self-government − **Budgetary and financial aspects**.
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:

Housing tax / Tax, on wealth.

Headnotes:

The replacement of the wealth tax with the property wealth tax, the housing tax reform, the introduction of a single flat-rate levy of 30% on income from savings and the housing assistance reform are in conformity with the Constitution.

With particular regard to housing tax, "by adopting an upper limit on income determined by the family income assessment scale as the criterion of eligibility for the new tax relief, the law is based on an objective and rational criterion related to its purpose".

Summary:

In its Decision no. 2017-758 DC of 28 December 2017, which comprised 146 paragraphs, the Constitutional Council ruled on the Finance Law for 2018, which had been challenged in three referrals,

two of which were initiated by a group of over 60 members of the National Assembly and the third by a group of over 60 senators.

In particular, the Constitutional Council gave its opinion on the complaints made in two of the three challenges to Article 5 of the law, which introduces a new tax relief, covered by the State, for the housing tax collected by local authorities and their public inter-municipal co-operation establishments with their own tax powers. The rate of the tax relief, entitlement to which is conditional upon taxpayer incomes, is set at 30% of the total housing tax due in 2018, 65% in 2019 and 100% thereafter. From 2020, approximately 20% of taxpayers will still be subject to this tax.

Firstly, with regard to respect for equality in the payment of public dues, the Constitutional Council noted that, through the impugned provisions, which were presented to the parliament as the first steps towards a more general reform of local taxes, the law intends to reduce housing tax for the majority of the population. Although this does not reduce all the disparities in situations between taxpayers that have emerged as the scheme has evolved since its introduction, by setting an upper limit on income determined by the family assessment scale as the eligibility criterion for the new tax relief, the law is based on an objective and rational criterion related to its purpose.

The Constitutional Council's decision on this point is to be understood, as it states, without prejudice to the possibility of it re-examining these issues, particularly depending on the manner in which taxpayers remaining subject to housing tax are treated as part of a planned reform of local taxes.

Secondly, with regard to respect for the financial autonomy of local and regional authorities, the Constitutional Council noted that, under Article 72-2 of the Constitution in conjunction with O.L. 1114-2 of the General Code of Local and Regional Authorities, the proceeds of all types of taxes fall into the category of the "own resources" of local and regional authorities in line with Article 72-2 of the Constitution, not only when the authorities are authorised by statute to determine the base, rate and tariff or when the rate or a local share of the base for each authority is determined by statute, but also when these tax revenues are distributed by statute within a category of local or regional authorities.

The Constitutional Council noted that in the instant case, the impugned tax relief is covered entirely by the State on the basis of overall rates of housing tax applicable in 2017. It does not affect the base for this tax or call into question the authority of local government in this regard. Local authorities may continue to set a different housing tax rate; beneficiaries of this tax relief would still be liable to pay for the portion exceeding the rate applicable in 2017.

However, in its decision, the Constitutional Council held that, although it appeared that the share of "own resources" in all local authority resources fell below the minimum threshold of own resources outlined in Article O.L. 1114-3 of the General Code of Local and Regional Authorities, due to changing circumstances, and, in particular, through the effect of a change to the impugned provisions, potentially combined with other factors, it would fall to the finance act for the second year following this finding to determine the appropriate measures in order to restore the degree of financial autonomy of local authorities to the level laid down by organic law.

The Constitutional Council also gave its opinion on several provisions of Article 28, which, from 1 January 2018, submits investment income, capital gains and certain income from life insurance policies, home purchase savings and employee shareholdings to a single flat-rate levy. In setting this rate at 12.8%, the impugned provisions bring the overall tax rate on such income to 30%, taking into consideration the increase in social security contributions on property income and investment income included in the social security finance act for 2018.

With regard to the complaints concerning the infringement of the principles of equality before the law and in the payment of public dues, the Constitutional Council noted that by aiming to reduce marginal taxation rates on income from capital and to make it easier for individuals to understand and predict the taxes applicable to them, parliament could treat income from capital now subject to the new proportional tax relief differently from other categories of income remaining subject to sliding-scale income tax, without breaching the Constitution. As the other types of income previously subject to this scale will remain so at the end of the reform, the impugned provisions do not call into question the progressive nature of overall personal income tax.

The Constitutional Council held that several of the provisions of Article 31 of the law, which abolishes the wealth tax and establishes a property wealth tax, are in conformity with the Constitution.

It noted that this new tax, the basis of which is composed of all real estate assets, falls into the category of "all types of taxes" mentioned in Article 34 of the Constitution. The legislature is responsible for determining the rules concerning the base, rate and

methods of collection of these taxes, with the proviso that these must respect constitutional principles and rules. In establishing this tax, parliament was seeking to increase budgetary revenues by introducing a specific tax on real estate assets other than those used by the owners for their own professional purposes. Consequently, it was able to include assets contributing to business financing in the basis for the new tax and exclude assets classified as "unproductive" in the appeals, without breaching the Constitution.

Although it held that several aspects of the property wealth tax scheme were in conformity with the Constitution, the Constitutional Council censured the second indent of paragraph IX-A of Article 31, which treated persons granted usufruct under Article 757 of the Civil Code differently depending on when usufruct was granted. It held that this difference in treatment was not justified by either a difference in situation or a reason of general interest.

The other provisions held by the Constitutional Council to be in conformity with the Constitution include Article 126 reforming housing assistance and the rules determining rent in the social housing sector and Article 142 ending state funding of a fraction of the statutory increase in certain life annuities paid to clients by insurance and mutual insurance companies.

However, the Constitutional Council censured Article 85 cancelling the full transfer of resources carried out under Article 89 of the Finance Law for 2016 in the sole case of metropolitan Lyon and the Auvergne-Rhône-Alpes region, stating that the law was contrary to the principle of equality in the payment of public dues, as it was not based on objective or rational criteria related to its intended purpose.

Articles 32, 127, 145, 150, 152 and 153 were also censured on the ground that they did not relate to the field of finance laws.

Languages:

French.

Germany
Federal Constitutional Court

Important decisions

Identification: GER-2017-3-018

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 19.09.2017 / **e)** 2 BvC 46/14 / **f)** Scrutinity of elections, supplementary contingent vote / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** *Die Öffentliche Verwaltung* 2017, 1004 (Headnotes); *Niedersächsisches Ministerialblatt* 2017, 1360 (Headnotes); CODICES (German).

Keywords of the systematic thesaurus:

3.3.1 General Principles − Democracy − **Representative democracy**.
4.5.10 Institutions − Legislative bodies − **Political parties**.
4.9.3.1 Institutions − Elections and instruments of direct democracy − Electoral system − **Method of voting**.
4.9.8.1 Institutions − Elections and instruments of direct democracy − Electoral campaign and campaign material − **Campaign financing**.
4.9.13 Institutions − Elections and instruments of direct democracy − **Judicial control**.
5.2.1.4 Fundamental Rights − Equality − Scope of application − **Elections**.
5.3.41.1 Fundamental Rights − Civil and political rights − Electoral rights − **Right to vote**.

Keywords of the alphabetical index:

Bundestag, elections / Equal suffrage, restrictions / Election, threshold / *Bundestag*, members, use of financial resources, accountability / Political party, equal opportunities / Election, scrutiny.

Headnotes:

Constitutional law does not require that the electoral system allow for a supplementary contingent vote *(Eventualstimme)* in case the primary vote was cast for a political party that failed to receive the minimum share of votes necessary to pass the 5% election threshold.

Summary:

I. The applicant challenged the validity of the 2013 *Bundestag* election in proceedings for the scrutiny of elections pursuant to Article 41.2 of the Basic Law in conjunction with § 13 no. 3, § 48 of the Federal Constitutional Court Act. His electoral complaint was directed against the statutory 5% clause establishing an election threshold (first sentence of § 6.3 of the Federal Elections Act – *Bundeswahlgesetz*); the legislative decision to refrain from introducing a so-called contingent vote (*Eventualstimme*); and the "concealed financing of electoral campaigns by way of channelling state funding to political parties represented in the *Bundestag* via their parliamentary groups, the staff working for members of the *Bundestag* and the political foundations affiliated with the respective parties". The applicant claimed a violation of the principles of equal suffrage and of equal opportunities for political parties, submitting that this has had a significant impact on the 2013 election and violated his "fundamental right to electoral equality".

II. The Federal Constitutional Court found the electoral complaint to be inadmissible to the extent that it was directed against state funding available to political foundations and parliamentary groups. For the rest, the electoral complaint was held to be unfounded.

The Court based its decision of inadmissibility on the following considerations:

As regards activities of political foundations in relation to the 2013 election, the applicant failed to substantiate specific circumstances establishing any potential influence on the electoral process or results. The applicant's arguments are rooted in the generalised assumption that political parties and the foundations affiliated with them ought to be viewed as a "unit by virtue of cooperation". This view, however, disregards the Court's established case-law according to which political foundations, in principle, carry out their statutory tasks with sufficient independence from political parties in terms of organisational structure and personnel. Consequently, general grants benefitting political foundations do not amount to "concealed party financing".

To the extent that the applicant challenged state funding available to parliamentary groups of the *Bundestag*, especially for the purposes of public relations works, he similarly failed to substantiate any specific circumstances with a potential bearing on the 2013 election. In this respect, the mere allegation that such funding constituted concealed party financing does not suffice; the applicant's arguments do not sufficiently take into account that parliamentary groups are subject to strict requirements that their financial means be used exclusively for the exercise of the functions assigned to parliamentary groups "as building blocks of organised statehood".

The Court's decision that the electoral complaint is, for the rest, unfounded was based on the following considerations:

Neither the principle of equal suffrage (first sentence of Article 38.1 of the Basic Law) nor the guarantee of equal opportunities for political parties (Article 21.1 of the Basic Law) were violated in a manner that had any significant bearing on the distribution of seats in the 2013 election.

The principles of equal suffrage and equal opportunities for political parties do not mandate an absolute prohibition to differentiate. Nevertheless, the legislator has but limited latitude to differentiate due to the potential impact on political competition and the fact that decisions of the parliamentary majority in this area are inherently linked to its own interests. Given the risk that electoral legislation, in particular, is susceptible to being influenced by the majority's interest of keeping the ruling parties in power, rather than by considerations pertaining to the common good, electoral laws are subject to a strict review incumbent upon the Federal Constitutional Court.

Based on these standards, the Court concluded that no significant violation of electoral principles enshrined in the Basic Law resulted from the statutory election threshold, the lack of a contingent vote, or the activities carried out by staff working for members of the *Bundestag* in connection with the 2013 election. According to established case-law, the statutory election threshold, which limits the distribution of seats in the *Bundestag* to political parties that win at least 5% of votes, is compatible with the Basic Law under the current factual and legal conditions. In particular, the election threshold serves the legitimate aim to safeguard Parliament's ability to function. The resulting interference with electoral equality is proportionate, at least where the statutory threshold does not exceed a quorum of 5%.

The fact that the application of the election threshold in the 2013 election resulted in 15,7% of votes being disregarded in the distribution of parliamentary seats does not qualify as a relevant change in factual circumstances that would call into question the justification of the statutory threshold under constitutional law. The Court's case-law on the unconstitutionality of a 5% or, respectively, 3% threshold in elections to the European Parliament

does also not merit a different assessment. In the relevant decisions, the Court expressly emphasised that its findings and considerations do not apply accordingly to federal elections due to inherent differences in the status, mandate and functions of the European Parliament.

Moreover, the requirement that precedence be given to less-restrictive means does not necessitate an abolishment or lowering of the election threshold. It is incumbent upon the legislator to decide on the design of the electoral system within the limits set by the Constitution. Contrastingly, it is not the task of the Federal Constitutional Court to substitute decisions of the legislator with the Court's own considerations of expediency. As regards the introduction of contingent votes into the electoral system – as suggested by the applicant – such mechanism cannot necessarily be considered less restrictive in light of the principles of equal suffrage and equal opportunities for political parties. Allowing for a contingent vote, which would be counted only in the event that the primary vote was cast for a party that failed to pass the election threshold, would add to the complexity of the electoral system and furthermore increase the risk of irregularities. Moreover, contingent voting itself interferes with the principles of equal suffrage and direct elections. It is thus not ascertainable that allowing a contingent vote were indeed a less restrictive albeit equally effective means to ensure the functioning of Parliament. It is for the legislator to weigh potential advantages and disadvantages in order to decide whether to alter the design of the electoral system in this regard.

As regards state allowances provided to members of the *Bundestag* for the reimbursement of staff costs (§ 12.3 of the Members of the *Bundestag* Act – *Abgeordnetengesetz*), there is no evidence that the relevant staff resources have actually been misappropriated on a large scale, at least not to an extent significant enough to have influenced the outcome of the 2013 election. Yet, even though the electoral complaint was held to be unfounded in this respect, the Court acknowledged that the use of staff resources by members of the *Bundestag* lacks transparency and public accountability. The guarantee of equal opportunities for political parties would be violated if staff employed by members of the *Bundestag* were assigned tasks that fall within the area of political campaigning rather than the exercise of the respective parliamentary mandate. In this context, the inevitable overlap between constituency work of members of the *Bundestag* and their involvement in electoral campaigns creates ample opportunities for misappropriation. The current legal framework governing the allowances and resources allocated to members of the *Bundestag* does not sufficiently address this risk. In view of this, the Federal Constitutional Court emphasised the responsibility of the *Bundestag* to introduce, by means of additional regulations, more effective safeguards against the misuse of staff resources on the part of members of the *Bundestag* during electoral campaigns and to subject members of the *Bundestag* to stricter oversight with regard to the use of state-funded resources.

Cross-references:

Federal Constitutional Court:

- 2 BvE 4/12, 15.07.2015, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 140, 1 <32 *et seq.*>, ECLI:DE:*BVerfG*:2015:es20150715.2bve000412;
- 2 BvE 2, 5, 6, 7, 8, 9, 10, 12/13, 2 BvR 2220, 2221, 2238/13, 26.02.2014, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 135, 259 <280 *et seq.*>, ECLI:DE:*BVerfG*:2014:es20140226.2bve000213, *Bulletin* 2014/1 [GER-2014-1-008], English translation available on the Court's website;
- 2 BvC 4/10, 2 BvC 6/10, 2 BvC 8/10, 09.11.2011, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 129, 300 <316 *et seq.*>, ECLI:DE:*BVerfG*:2011:cs20111109.2bvc000410, *Bulletin* 2011/3 [GER-2011-3-019], press release available in English on the Court's website;
- 2 BvC 1/07, 2 BvC 7/07, 03.07.2008, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 121, 266 <294 *et seq.*>, ECLI:DE:*BVerfG*:2008:cs20080703.2bvc000107, *Bulletin* 2008/2, [GER-2008-2-013], press release available in English on the Court's website;
- 2 BvK 1/07, 13.02.2008, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 120, 82 <104 *et seq.*>, ECLI:DE:*BVerfG*:2008:ks20080213.2bvk000107, *Bulletin* 2008/1, [GER-2008-1-003], press release available in English on the Court's website;
- 2 BvC 3/96, 10.04.1997, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 95, 408 <417 *et seq.*>;
- 2 BvF 1/95, 10.04.1997, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 95, 335 <365 *et seq.*>;
- 2 BvE 1/90, 2 BvE 3/90, 2 BvE 4/90, 2 BvR 1247/90, 29.09.1990, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 82, 322 <337 *et seq.*>.

Languages:

German.

Identification: GER-2017-3-019

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 28.09.2017 / **e)** 1 BvR 1510/17 / **f)** Decision by the presiding judge alone in expedited proceedings / **g)** / **h)** *Anwaltsblatt* 2017, 1235; *Europäische Grundrechtezeitschrift* 2017, 716; *Neue Juristische Wochenschrift* 2018, 40; CODICES (German).

Keywords of the systematic thesaurus:

4.7.2 Institutions − Judicial bodies − **Procedure**.
4.7.4.1 Institutions − Judicial bodies − Organisation − **Members**.
5.3.13.3.1 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Access to courts − **"Natural judge"/Tribunal established by law**.

Keywords of the alphabetical index:

Judge, lawful / Judge, lawful, right to.

Headnotes:

1. As a subjective right, the right to one's lawful judge according to the second sentence of Article 101.1 of the Basic Law entitles persons seeking justice to a decision on their legal dispute by their lawful judge. However, not each case of overstepping the limits set for the regular courts constitutes a violation of the second sentence of Article 101.1 of the Basic Law.

2. The second sentence of § 155.2 of the Act on Social Courts (*Sozialgerichtsgesetz*; hereinafter, the "Act") is an exception provision that must, due to the right to the lawful judge according to the second sentence of Article 101.1 of the Basic Law, be applied diligently, moderately and with respect to the case at hand.

3. When the Court decided on the appeal concerning the grant for professional training, by applying the second sentence of § 155.2 of the Act accordingly, it violated the right to the lawful judge according to the second sentence of Article 101.1 of the Basic Law because urgent circumstances within the meaning of the second sentence of § 155.2 of the Act were neither evident nor have they been established.

Summary:

I. The applicant filed an application at the Federal Employment Agency (*Bundesagentur für Arbeit*, hereinafter, the "Agency") in order to receive a grant for his professional training. As the Agency did not consider the applicant eligible for the grant, the application was rejected as was the protest lodged against the rejection. The applicant took legal action against the Agency's decisions and applied for preliminary relief. The Social Court *(Sozialgericht)* ordered the Agency to pay the grant for the professional training until the matter was decided in the main proceedings. The Higher Social Court *(Landessozialgericht)* reversed the order of the Social Court and denied the application for preliminary relief. The decision was made by the presiding judge of the senate "applying the second sentence of § 155.2 of the Act accordingly" which allows for a decision by the presiding judge alone in expedited proceedings due to urgent circumstances. Reasons for applying the provision accordingly were not given. Rather, the issue as to why the applicant was not eligible to receive a grant for professional training was addressed. The applicant challenged the order of the Higher Social Court and claimed violations of the right to his lawful judge according to the second sentence of Article 101.1 of the Basic Law, his right to effective legal protection according to Article 19.4 of the Basic Law as well as the general guarantee of the right to equality according to Article 3.1 of the Basic Law.

II. The Federal Constitutional Court decided that the Higher Social Court's decision violates the applicant's right to his lawful judge. Therefore, a decision on the violation of other fundamental rights, as claimed by the applicant, was not necessary.

The decision was based on the following considerations:

The right to one's lawful judge constitutes an objective constitutional principle that safeguards the rule of law with respect to court proceedings. The court, the adjudicating bodies, and the judges to whom the decision on an individual case will be assigned have to be specified in advance. The courts are bound by these provisions; they must not disregard them, but rather ensure adherence to them. Persons seeking justice may claim that the specification of competences is adhered to and, if they are disregarded, challenge that as a violation of

the right to their lawful judge, which is a right that is equivalent to fundamental rights.

According to the standards set forth in the case-law of the Federal Constitutional Court, the applicant was denied his lawful judge by the order of the Higher Social Court. The requirements for expedited proceedings, which allow for a decision by the presiding judge alone instead of the regular composition of the Court consisting of the presiding judge and two other professional judges, are neither evident nor have they been established.

When the challenged order was decided, the relevant information had already been available to the court. It should have been discussed with the other professional judges or their deputies during the two weeks prior to the order. It is inconceivable why it should have been impossible to include them in the decision-making process.

The presiding judge could have ordered the preliminary stay of the enforcement of the order of the Social Court according to the Agency's application. That is a decision which he is competent to make on his own. Thereby he could have allowed for the option of a decision by the Court in its regular composition.

Cross-references:

Federal Constitutional Court:

- 2 BvR 42/63, 24.03.1964, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 17, 294 <299>;
- 1 PBvU 1/95, 08.04.1997, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 95, 322 <329>;
- 2 BvR 581/03, 16.02.2005, Third Chamber of the Second Panel;
- 2 BvR 2023/16 and 2 BvR 2011/16, 2 BvR 2034/16, 23.12.2016 and 16.01.2017, Second Chamber of the Second Panel; *Bulletin* 2017/1 [GER 2017-1-002].

Languages:

German.

Identification: GER-2017-3-020

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 10.10.2017 / **e)** 1 BvR 2019/16 / **f)** Third gender / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** *Neue Juristische Wochenschrift* 2017, 3643; *Gesundheitsrecht* 2017, 805; *Neue Zeitschrift für Familienrecht* 2017, 1141*; Europäische Grundrechtezeitschrift* 2017, 702; CODICES (German).

Keywords of the systematic thesaurus:

5.2.2.1 Fundamental Rights − Equality − Criteria of distinction − **Gender**.

Keywords of the alphabetical index:

Discrimination, gender / Gender identity / Gender, difference, biological / Personality, right, general / Sexual identity, self-determined, recognition.

Headnotes:

1. The general right of personality (Article 2.1 in conjunction with Article 1.1 of the Basic Law) protects gender identity. It also protects the gender identity of those who cannot be assigned either the gender "male" or "female" permanently.

2. The first sentence of Article 3.3 of the Basic Law also protects persons who do not permanently identify themselves as male or female in the context of discrimination based on gender.

3. Both of these fundamental rights of persons who do not permanently identify themselves as male or female are violated if civil status law requires that the gender be registered but does not allow for a further positive entry other than male or female.

Summary:

I. The complainant filed a request with the competent registry office for correcting the complainant's birth registration by deleting the previous gender entry "female" and replacing it with "inter/diverse", alternatively only with "diverse". The registry office rejected the request and pointed out that under German civil status law a child needs to be assigned either the female or the male gender in the birth register, and emphasised that – if this is impossible – no gender entry is made (§ 21.1 no. 3, § 22.3 of the Civil Status Act, hereinafter, the "Act"). The request for correction filed thereupon with the Local Court *(Amtsgericht)* was rejected; the complaint filed against this decision was unsuccessful.

With the constitutional complaint, the complainant claims a violation of the general right of personality (Article 2.1 in conjunction with Article 1.1 of the Basic Law) and discrimination based on gender (first sentence of Article 3.3 of the Basic Law).

II. The Federal Constitutional Court decided that the provisions of civil status law are incompatible with the Basic Law's requirements to the extent that § 22.3 of the Act does not provide for a third option – besides the entry "female" or "male", allowing for a positive gender entry. The general right of personality (Article 2.1 in conjunction with Article 1.1 of the Basic Law) also protects the gender identity of those who cannot be assigned either the gender "male" or "female" permanently. In addition, the current civil status law also violates the ban on discrimination (Article 3.3 of the Basic Law) to the extent that it rules out the registration of a gender other than "male" or "female". The legislator has to enact new provisions by 31 December 2018. Courts and public authorities may not apply the provisions at issue insofar as they impose an obligation on persons to state their gender if those persons' gender development deviates from female or male gender development and thus do not permanently identify as male or female.

The decision is based on the following considerations:

The general right of personality also protects gender identity, which is a regular constituent element of an individual's personality. The assignment of gender is of paramount importance for individual identity; it usually plays a key role both for a person's self-conception and for the way this person is perceived by others. The gender identity of persons who can be assigned neither male nor female gender is also protected under this right.

Current civil status law interferes with this right. It requires a gender entry, but does not allow the complainant, who permanently identifies as neither male nor female, an entry corresponding to this gender identity. Even if this person chose the option "no entry", it would not reflect that the complainant does not see themself as a genderless person, but rather perceives themself as having a gender beyond male or female. This specifically threatens the self-determined development and protection of the individual's personality. Civil status is not a marginal issue; rather, it is the "position of a person within the legal system", as stated by the law. Civil status defines the central aspects of the legally relevant identity of a person. Therefore, denying individuals the recognition of their gender identity in itself threatens their self-determined development.

The interference with fundamental rights is not justified under constitutional law. The Basic Law does not require that civil status be exclusively binary in terms of gender. It neither requires that gender be governed as part of civil status, nor is it opposed to the civil status recognition of a third gender identity beyond male and female.

The interests of third parties cannot justify that current civil status law does not offer a third gender option, allowing for a positive entry. The mere possibility of entering a further gender does not oblige anyone to assign themselves to this third gender. In a regulatory system that requires information on gender, the existing options for persons with deviating gender development to be registered as male, female or without gender entry certainly need to be preserved. Additional bureaucratic or financial burdens or organisational interests of the state cannot justify the denial of a third standardised positive entry option either. A certain additional effort will have to be accepted. However, the general right of personality does not grant a claim to the entry of random gender-related identity features as civil status information. Furthermore, allowing a positive entry for a third gender with a standardised third designation does not result in any assignment difficulties that do not already exist under current law anyway. In the case that a further positive gender option is allowed for, the questions to be clarified are the same that already arise when opting for no gender entry, which is possible under the current legal situation.

In addition, § 21.1 no. 3 in conjunction with § 22.3 of the Act violate the first sentence of Article 3.3 of the Basic Law. According to this fundamental right, gender may generally not serve as a basis for unequal legal treatment. The first sentence of Article 3.3 of the Basic Law also protects persons against discrimination who do not identify as male or female, since the purpose of the first sentence of Article 3.3 of the Basic Law is to protect persons from being disfavoured that belong to groups structurally prone to being discriminated against. Yet § 21.1 no. 3 in conjunction with § 22.3 of the Act disadvantages persons who are neither male nor female precisely because of their gender, given that they cannot – unlike men and women – be registered in accordance with their gender.

Due to the violations of the Constitution, § 21.1 no. 3 in conjunction with § 22.3 of the Act are declared incompatible with the Basic Law, because the legislator has several options to correct these violations. For instance, the legislator could generally dispense with information on gender in civil status. Alternatively, it could also create the possibility for the persons concerned to choose another positive

designation of a gender that is not male or female. In this respect, the legislator is not limited to choosing one of the designations put forward by the complainant in the proceedings before the regular courts.

Languages:

German; English press release is published on the Court's website.

Identification: GER-2017-3-021

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 22.10.2017 / **e)** 1 BvR 1822/16 / **f)** Refusal of admission to the legal profession / **g)** / **h)** *BRAK-Mitteilungen* 2017, 301; *Neue Juristische Wochenschrift* 2017, 3704; CODICES (German).

Keywords of the systematic thesaurus:

3.16 General Principles − **Proportionality**.
3.17 General Principles − **Weighing of interests**.
3.18 General Principles − **General interest**.
4.7.15.1 Institutions − Judicial bodies − Legal assistance and representation of parties − **The Bar**.
5.4.4 Fundamental Rights − Economic, social and cultural rights − **Freedom to choose one's profession**.

Keywords of the alphabetical index:

Jurisdiction, constitutional subject of review, acts issued by bar association / Freedom to choose one's profession, restriction, prohibition to practise / General interest, importance, paramount / Legal profession, admission, refusal, reasons / Misconduct, legal profession / Public interest, administration of justice / Public interest, legal profession, integrity.

Headnotes:

1. Refusal of admission to the legal profession *(Rechtsanwaltschaft)* constitutes a serious interference with the fundamental right to freely choose one's profession (first sentence of Article 12.1 of the Basic Law). It is only permissible for the purpose of protecting a common good of paramount importance while fully respecting the principle of proportionality.

2. A refusal on the grounds that the person concerned appears unworthy of practising as a lawyer is contingent upon a case-by-case assessment, requiring that the interests protected by fundamental rights of the person concerned be balanced against conflicting public interests, most notably the interest in ensuring a functioning administration of justice.

Summary:

I. The constitutional complaint proceedings concerned a refusal of admission to the legal profession. The applicant claims a violation of her fundamental rights deriving, in particular, from the first sentence of Article 12.1 of the Basic Law.

The applicant completed the two-year judicial preparatory training *(Referendariat)* by taking the second state exam, a prerequisite for holding judicial office or entering the legal profession in Germany (cf. § 5.1 of the German Judiciary Act – *Deutsches Richtergesetz*; § 4 no. 1 of the Federal Lawyers' Act – *Bundesrechtsanwaltsordnung*). During the course of a mandatory training stage at the public prosecution office, the applicant and the prosecutor supervising her training had several verbal altercations due to differing personal and professional views. In the official appraisal of the training stage, the supervisor gave the applicant the grade "satisfactory". In response, the applicant contacted her former supervisor via email in February 2011 and included various remarks of an insulting nature in her communication, including the following excerpt:

> "You are nothing but a redneck prosecutor who never made it out of his backwater town where he's now rotting away. Your worldview is that of a model citizen living in 1940s Germany. You're about as happy with your life as the hole in a shithouse.
>
> You turned green with envy when I stood before you, and your hatred for me was palpable. You would have loved to toss me in a gas chamber if this kind of thing weren't frowned upon these days. Instead, you resorted to the only means available to you in your limited position: you provided me with an appraisal full of confused rambling and completely out of touch with reality. Well, I congratulate you on your glorious victory, please savour the moment and enjoy it to the fullest – for it is but a minor nuisance to me (one that irritates my sense of justice, admittedly), whereas for YOU it will be the highlight of your life. You won't experience any greater joy than this during your miserable existence."

Following this incident, the prosecution authorities opened an investigation into the matter. In another email addressed to the prosecutor in charge of the investigation, the applicant accused the latter of unlawful conduct and called her intellectual abilities into question. The applicant was eventually convicted of insult charges (§ 185 of the Criminal Code – *Strafgesetzbuch*) and ordered to pay a fine.

In 2014, the applicant applied for admission to the legal profession with the competent regional bar association *(Rechtsanwaltskammer)*. The application was rejected on the grounds that the applicant had been found guilty of conduct that makes her appear unworthy of practising as a lawyer in accordance with § 7 no. 5 of the Federal Lawyers' Act. Legal recourse sought by the applicant before the competent higher lawyers' court *(Anwaltsgerichtshof)* was unsuccessful and leave to appeal to the Federal Court of Justice *(Bundesgerichtshof)* was denied.

II. The Federal Constitutional Court held that the decisions of the bar association and the higher lawyers' court violated the applicant's fundamental right protected under the first sentence of Article 12.1 of the Basic Law.

The decision was based on the following considerations:

The refusal of admission to the legal profession severely interferes with the fundamental right to freely choose one's profession. The refusal of admission amounts, at least temporarily, to a prohibition to practise. Specifically, it restricts access to a profession on the basis of subjective requirements *(subjektive Berufszugangsregelung)*. Such restriction requires a statutory basis and is only permissible if it is necessary for protecting a common good of paramount importance and satisfies the principle of proportionality. In light of the constitutionally protected freedom to choose one's profession, the provisions governing refusal of admission based on unworthiness pursuant to § 7 no. 5 of the Federal Lawyers' Act must be interpreted in a restrictive manner. A person may not be considered "unworthy" of entering the legal profession solely because his or her conduct is met with disapproval in society or in the professional environment. Rather, it is generally required that the misconduct in question potentially impairs public confidence in the integrity of the legal profession, as relating to a functioning administration of justice, and that the resulting impairment outweighs the interests protected by the fundamental rights of the person concerned.

The challenged decisions did not fully meet these requirements.

Nevertheless, the evaluation of the specific circumstances, both favourable and unfavourable, that were taken into account in the assessment of the applicant's overall personality, was unobjectionable in the case at hand. Specifically, it was well justifiable to reproach the applicant for her refusal to acknowledge any fault on her part, and to draw negative conclusions based thereon. It is true that the significance of proven past misconduct may diminish over longer or shorter periods of time, as the case may be, to the point where it were no longer relevant or sufficient for refusing admission to the legal profession. Yet, if the person concerned persistently refuses to acknowledge any fault or blame, insisting instead that the conduct in question were justified and unobjectionable, this may be taken into account to the detriment of the person seeking admission to the legal profession. This is due to the fact that such behaviour is a relevant factor in the prognosis determining the decision on refusal of admission.

It was not ascertainable in the present case, however, that the challenged decisions sufficiently balanced the constitutionally protected interests of the applicant against conflicting public interests that could possibly preclude admission to the legal profession. The assessment carried out with regard to the applicant's personality, which found her to be unacceptable as a member of the legal profession without substantiating further reasons, fails to satisfy constitutional requirements. The decision rendered by the higher lawyers' court already lacks the required prognosis determining potential impairments of conflicting interests that could preclude admission to the legal profession. Most notably, it would have been incumbent upon the court to specify whether and on what basis it must be presumed that the applicant, if admitted as a practising lawyer, would act in a manner that could impair public confidence in the integrity of the legal profession, especially as regards the public interest in a functioning administration of justice; to this end, relevant considerations include the risk that courts might be prevented from resolving legal disputes in a focused and expedient manner or that persons seeking legal assistance might be unable to obtain reliable advice or representation from practising lawyers. Moreover, it is not manifestly evident in the present case that the interests of the applicant are outweighed by conflicting public interests. Therefore it would have been necessary to specify the relevant findings and considerations supporting any such conclusion.

Languages:

German.

Identification: GER-2017-3-022

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 07.11.2017 / **e)** 2 BvE 2/11 / **f)** Parliamentary right to information / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** *Wertpapiermitteilungen* 2017, 2345; CODICES (German).

Keywords of the systematic thesaurus:

3.20 General Principles − **Reasonableness**.
4.5.7.1 Institutions − Legislative bodies − Relations with the executive bodies − **Questions to the government**.

Keywords of the alphabetical index:

Information, confidential, protection / Duty to supervise / Information, access, limits / Information, access, reasonable / Information, confidential, access / Parliament, controlling function / Parliament, enquiry, guarantee / Parliament, member, supervision of government authorities / Parliament, parliamentary groups, rights / Parliament, right to be informed / Secret, information, disclosure.

Headnotes:

1. The parliamentary right to receive information under the second sentences of both Article 38.1 and Article 20.2 of the Basic Law requires that public answers be given to queries. In cases where legitimate secrecy interests arise, applying the *Bundestag's* Rules on Confidentiality when responding to parliamentary queries may constitute a suitable means for striking an appropriate balance between the right to ask questions afforded members of the *Bundestag* and other conflicting legal interests.

2. The parliamentary right to ask questions and receive information guaranteed under the Basic Law is subject to limitations which, insofar as they are set out in statutory law, must be rooted in constitutional law. Contractual or statutory confidentiality obligations as such are not a suitable means for limiting the right to ask questions and receive information.

3. The parliamentary interest in receiving information, which derives from the principle of democracy, is a manifestation of the Federal Government's accountability to Parliament. This interest can only pertain to matters that fall within the Government's scope of responsibility. Within the context of democratic legitimation, the responsibility of the Government extends to all activities involving companies incorporated under private law of which the Federation is the majority or sole owner. In this regard, the Federal Government's responsibility is not limited to exercising the oversight and intervention rights afforded it statutorily.

4. The Federal Government's scope of responsibility for the *Deutsche Bahn AG* [national railway corporation] relates both to the exercise of its shareholder duties as well as its regulation of the federal state authorities and the proper carrying out of its duties to guarantee services pursuant to Article 87e of the Basic Law. Furthermore, the business activities of the *Deutsche Bahn AG* also fall within the Federal Government's scope of responsibility. Article 87e of the Basic Law does not cancel these responsibilities.

5. The Federal Government may not refuse to answer specific parliamentary queries on the grounds that the fundamental rights of the *Deutsche Bahn AG* are affected. As a legal person controlled entirely by the state, the *Deutsche Bahn AG* does not exercise any rights of any individual holders of fundamental rights, nor can it invoke fundamental rights. Finally, Article 87e of the Basic Law does not grant the *Deutsche Bahn AG* any defensive rights against state influence on its management (on the basis of the welfare of the state).

6. The *Bundestag's* right to ask questions is subject to limitations resulting from the welfare of the Federation or a *Land* (welfare of the state), which could be threatened if classified information were to be disclosed.

a. The fiscal interests of the state in protecting confidential information relating to companies in which it holds stakes do constitute constitutionally recognised matters of welfare of the state.

b. Ensuring the functioning of state supervision of banks and other financial institutions, the stability of the financial market and the success of support measures adopted by the state during the financial crisis constitute interests pertaining to the welfare of the state, which may set limits to the Federal Government's duty to give answers to parliamentary queries.

7. The *Bundestag's* constitutional right to ask questions and receive information and the corresponding duty of the Federal Government to

give answers constitute a sufficient basis for a violation of the fundamental right relating to the provision of information. Insofar, a more detailed statutory provision is not required.

8. The parliamentary right to information is subject to the limits of reasonableness. The Federal Government is under an obligation to provide all information at its disposal or which can be obtained through reasonable efforts. It is required to exhaust all available means of obtaining the requested information.

9. It follows from the Federal Government's constitutional general duty to fulfil the *Bundestag's* requests for information that it must state reasons in case it refuses to provide the requested information. The Federal Government has a specific duty to substantiate its actions in the event that it does not provide answers in a publicly accessible *Bundestag* document, but rather makes the information available to the *Bundestag* in the form of a classified document filed at the Secret Records Office of the *Bundestag*.

Summary:

I. In 2010, members of the *Bundestag* as well as the parliamentary group BÜNDNIS 90/DIE GRÜNEN (hereinafter, the "applicants") submitted several parliamentary queries relating to the *Deutsche Bahn AG* as well as financial market supervision. The applicants primarily requested information on discussions and agreements between the Federal Government and the *Deutsche Bahn AG* regarding investments into the rail network, on an expert opinion commissioned by the Federal Government concerning an economic feasibility assessment of the "Stuttgart 21" railway project, as well as on delays in train operations and their causes. Additional questions submitted by the applicants to the Federal Government related to regulatory measures of the Federal Financial Supervisory Authority directed at various financial institutions during the years 2005 to 2008. In the applicants' opinion, the Federal Government did not sufficiently respond to any of the relevant queries. By way of *Organstreit* proceedings (disputes between constitutional organs), the applicants therefore sought a declaration that the Federal Government, on grounds that are untenable under constitutional law, refused to provide the requested information, or did so insufficiently, and that the Federal Government thereby violated the rights of the applicants and of the *Bundestag* under the second sentences of both Article 38.1 and Article 20.2 of the Basic Law.

II. The Second Panel of the Federal Constitutional Court decided that the Federal Government failed to fulfil its duty to give answers in response to parliamentary queries relating to the *Deutsche Bahn AG* and financial market supervision, and thereby violated the rights of the applicants and of the *Bundestag*. Without sufficiently substantiating why, the Federal Government provided incomplete answers or refused to respond altogether to the questions in dispute concerning agreements between the Federal Government and the *Deutsche Bahn AG* on investments into the rail network; an expert opinion on the "Stuttgart 21" railway construction project; delays in train operations and their causes; as well as regulatory measures of the Federal Financial Supervisory Authority directed at various financial institutions during the years 2005 to 2008.

The decision is based on the considerations set out in the headnotes.

Languages:

German (English translation by the Court is prepared for the Court's website); English press release is available on the Court's website.

Identification: GER-2017-3-023

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 08.11.2017 / **e)** 2 BvR 2221/16 / **f)** Telephone rates for prisoners / **g)** / **h)** *Neue Juristische Wochenschrift* 2018, 144; CODICES (German).

Keywords of the systematic thesaurus:

5.1.1.4.3 Fundamental Rights − General questions − Entitlement to rights − Natural persons − **Detainees**.
5.3.1 Fundamental Rights − Civil and political rights − **Right to dignity**.
5.3.32 Fundamental Rights − Civil and political rights − **Right to private life**.

Keywords of the alphabetical index:

Prison, detainee, rights / Prisoner, communication / Prisoner, reintegration / Reintegration, fundamental right, status.

Headnotes:

1. Disregarding the economic interests of prisoners is incompatible with the obligation under constitutional law to reintegrate them into society. Accordingly, the prison's obligation to provide for the welfare of prisoners requires protecting their financial interests.

2. Telecommunications services do not have to be offered free of charge. However, this does not justify charging prisoners significantly more for these services than is usual outside prisons, if it is not necessary due to requirements or conditions of the penal system making them more expensive.

3. If the prison has, in the context of statutory obligations, a private company provide services on which the prisoners depend without any alternatives that can be freely chosen within the framework of market conditions, it will have to ensure that the private service provider charges fair market prices.

4. In that respect, the contractual obligation of the prison to the provider is not decisive. A long contract period with the provider – even if it is common in the context of prisons – must not lead to the result that market developments of prices do not have, in the longer term, any impact on the prices the prisoners have to pay.

5. In the present case, the Higher Regional Court should not have explicitly left open the question whether the telephone rates were reasonable; the claim to adjust the telephone charges should not have been denied based on the contractual obligation with the telecommunications provider.

Summary:

I. The prison in which the applicant has been serving his sentence offers a telephone service to the prisoners. The telephone system is operated by a private telecommunications provider (hereinafter, "provider") on the basis of a contract. The contract period is 15 years and the contract was signed in 2005. The prisoners do not have any other alternative to this telephone service.

In June 2015, the provider changed the rates and conditions. In particular, the provider did not continue to offer the so-called "Flexoption" that provided the possibility to pay certain monthly amounts and reduce the costs per telephone unit by up to 50%. In July 2015, the applicant filed an application to the prison and requested that the telephone rates be adjusted to those outside of prison and that the prison protect his financial interests. The prison rejected his application. Recourse to the regular courts was also unsuccessful; the Higher Regional Court rejected his protest on points of law as unfounded. In particular, the court explicitly left unanswered the question whether the providers' rates were unreasonably expensive because the prison was, as the court held, bound by the contract with the provider and thus unable to lower the telephone rates.

II. The Federal Constitutional Court decided that the decision of the Higher Regional Court violated the applicant's fundamental right under Article 2.1 in conjunction with Article 1.1 of the Basic Law. The requirements to protect the financial interests of prisoners resulting from the aim of reintegrating them into society were not sufficiently accounted for.

It has been established in the context of the case-law of regular courts that it is part of the prisons' responsibilities towards the prisoners to protect their economic interests. This also corresponds to the principle that disregarding prisoners' economic interests is incompatible with constitutional requirements.

As the Higher Regional Court left the question of reasonable telephone rates unanswered, it disregarded the prisoner's financial interests and thus violated his fundamental right to reintegration into society. In doing so, the court did not recognise that the contractual obligation to the provider does not constitute a sufficient justification for denying the adjustment of the telephone rates. Abiding by the contract that has been negotiated by the *Land* Ministry of Justice and knowingly signed for a period of 15 years and that will not be terminated earlier does not prevent the prison from charging reasonable telephone rates or from offering alternatives to the current telephone system. The challenged court decision was based on the violation of fundamental rights. It cannot be ruled out that the Higher Regional Court reaches a different decision when taking into consideration the constitutional requirements under Article 2.1 in conjunction with Article 1.1 of the Basic Law.

Cross-references:

Federal Constitutional Court:

- 2 BvL 17/94, 01.07.1998, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 98, 169 <203>; *Bulletin* 1998/2 [GER-1998-2-007].

Languages:

German.

Identification: GER-2017-3-024

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 13.11.2017 / **e)** 2 BvR 1381/17 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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:

Asylum, application, examination / Asylum, application, rejection / Asylum, request, assessment / Extradition, assurance by receiving state / Extradition, proceedings / Persecution, country of origin / Persecution, risk.

Headnotes:

In extradition matters, courts violate the fundamental right to effective judicial protection set out in the first sentence of Article 19.4 of the Basic Law if they fail to adequately investigate the relevant facts and independently assess the matter if there is reason to assume that a risk of political persecution exists in the event of extradition.

If an asylum application filed by the person concerned by extradition proceedings has previously been refused in a primarily competent state, the court deciding about the extradition request must – if evidence suggests that a risk of political persecution exists – generally make serious efforts to access the files from the asylum proceedings and, if that fails, clarify the facts by other means, for example by conducting a personal hearing of the person concerned.

Summary:

I. The complainant, a Russian citizen of Chechen origin, is accused in Russia of having attempted to kill the victim of a sexual offence after having served a prison sentence imposed for that crime. He claims that both the charges of sexual assault and those of the attempted homicide are false accusations, made with the aim of putting him under pressure to disclose the names of insurgents.

Asylum applications filed by the complainant in Poland in 2015 were rejected; he filed a complaint against this decision but left Poland before a decision had been made. Once in Germany, he again applied for asylum. The asylum application was rejected as inadmissible on the grounds that Poland was responsible for the asylum proceedings. In addition, the German court ordered deportation to Poland. The complainant's claims brought before the administrative court against the rejection of asylum were dismissed.

Meanwhile, due to the alleged attempted homicide, Russian authorities had applied for an international arrest warrant upon which the complainant was arrested in Leipzig in 2016. Since then he is held in custody.

In the proceedings, the Higher Regional Court *(Oberlandesgericht)* had asked the Public Prosecution Office to clarify the circumstances underlying the asylum application in Poland and the complainant's submission before Polish authorities, and to request access to those asylum decisions that had already been adopted.

In April 2017, the Dresden Higher Regional Court declared the extradition admissible. Case files from the Polish asylum proceedings were not consulted. Accessed information comprised only a printout of e-mail communication that had taken place between the Dresden public prosecution office, the Federal Agency of Migration and Refugees and the Saxonian State Ministry of Justice. This printout referred to a statement made by a Polish liaison officer, who had allegedly stated that the complainant's application for refugee protection in Poland had been "rejected entirely". On that basis, the court, without performing its own substantive examination, considered that the extradition obstacle of an impending political persecution in the country of destination did not preclude the complainant's extradition. Subsequently, the complainant unsuccessfully applied to the Higher Regional Court for a renewed admissibility decision under § 33.1 of the German Act on International Cooperation in Criminal Matters. The constitutional complaint is directed against both decisions of the Higher Regional Court.

II. Upon the complaint, the Federal Constitutional Court decided that the challenged decisions violate the first sentence of Article 19.4 of the Basic Law. The Higher Regional Court did not adequately investigate and examine whether the complainant is at risk of being politically persecuted in the country of destination.

The first sentence of Article 19.4 of the Basic Law contains a fundamental right to effective and – as far as possible – exhaustive judicial protection against acts of public authorities. The guarantee of effective legal protection generally implies the duty of the courts to re-examine contested administrative acts as to the underlying facts and the law.

Thus, in order to comply with the requirement of effective legal protection, the regular court may refrain from exhausting all means of accessing information only if evidence is inadmissible, entirely unsuitable, inaccessible or irrelevant to the decision. In the context of judicial admissibility proceedings in anticipation of extradition this means that the competent courts are obliged to investigate the facts of the case and examine exhaustively whether there are legal and factual obstacles to extradition. This also applies to the question of whether the person to be extradited is at risk of becoming a victim of political persecution in the country of destination.

The purpose of judicial examination of admissibility is to provide preventive legal protection of the persecuted person. Judicial admissibility proceedings and the assessment as to whether there exists such a risk of political persecution aim to prevent state interferences with constitutionally protected interests of the person to be extradited. If extradition is carried out despite the fact that there is such a risk of political persecution, this infringes the first and second sentence of Article 2.2 of the Basic Law. Any interpretation and application of extradition regulations by higher regional courts must take this into account and ensure effective judicial review. Even if an asylum entitlement in Germany cannot be derived from Article 16a.1 of the Basic Law, the provision's underlying idea, namely to provide protection from political persecution in the country of destination, must be taken into account. Insofar as it seems likely that such political persecution will take place, the court must thus declare the requested extradition inadmissible. The court must analyse independently whether the prerequisites of this extradition obstacle are met. To comply with the first sentence of Article 19.4 of the Basic Law, the courts must, in the case of a risk of political persecution, take all available measures to investigate the relevant circumstances and must evaluate the facts independently. They make serious efforts to access the files from the foreign country's asylum proceedings unless it is clear that this will not lead to any new findings. This ensures that the asylum seeker's submission and all already existing factual investigations as to a risk of political persecution are taken into account and that contradictions are clarified and provisions made if necessary. Insofar as case files are not available, the court must mention this in its admissibility decision. In such a case, the court's investigation duties must be satisfied by other measures, usually by conducting a personal hearing of the person concerned.

The Higher Regional Court failed to comply with this duty. It decided the case without having obtained the information requested from Poland and without having personally heard the complainant; it relied solely on a printout of e-mail communication that had taken place between different authorities (see above) and in which reference was made to a statement made by a Polish liaison officer, who had allegedly stated that the complainant's application for refugee protection in Poland had been rejected entirely.

Even if the Higher Regional Court's conduct in the proceedings were to be regarded as a serious attempt to gain access to the Polish case files, the Higher Regional Court – in order to comply with the first sentence of Article 19.4 of the Basic Law – should have conducted a personal hearing of the complainant and independently appraised his statements to determine whether there is a risk of political persecution. This duty is independent of any examination that may have been carried out during the Polish asylum proceedings.

Furthermore, the Higher Regional Court was not allowed to refrain from performing its own examination on the grounds that the Russian Federation had assured that the extradition request did not serve the purpose of persecution on grounds of race, religion, ethnicity or political conviction and that the complainant would be prosecuted only for the offence for which extradition was requested. Such an assurance under international law does not release the court from its duty to examine indications suggesting that a risk of political persecution in the country of destination exists. In doing so, the court must appreciate the complainant's submission in a comprehensible and non-arbitrary manner, even if it comes to the conclusion that it does not follow this submission.

Languages:

German.

Identification: GER-2017-3-025

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 19.12.2017 / **e)** 2 BvR 424/17 / **f)** Detention Conditions in Romania / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** CODICES (German).

Keywords of the systematic thesaurus:

2.1.1.1.1 Sources − Categories − Written rules − National rules − **Constitution**.
2.1.1.3 Sources − Categories − Written rules − **Law of the European Union/EU Law**.
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**.
2.1.3.2.2 Sources − Categories − Case-law − International case-law − **Court of Justice of the European Union**.
2.2.1.6 Sources − Hierarchy − Hierarchy as between national and non-national Sources − **Law of the European Union/EU Law and domestic law**.
2.3.1 Sources − Techniques of review − **Concept of manifest error in assessing evidence or exercising discretion**.
5.3.1 Fundamental Rights − Civil and political rights − **Right to dignity**.
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:

Court of Justice of the European Union, preliminary ruling, duty of referral / Criminal justice system, function, EU Member States / Detention conditions, prison, personal space / European arrest warrant / Extradition, assurances, receiving state / Lawful judge, right, violation / Mutual legal assistance, EU Member States / Mutual recognition, EU Member States / Mutual trust, EU Member States / Regular courts, margin of appreciation, limits.

Headnotes:

1. Where doubts arise regarding the application or interpretation of European Union law, regular courts are required, under Article 101.1 of the Basic Law, to refer the relevant questions to the Court of Justice of the European Union in accordance with Article 267.3 of the Treaty on the Functioning of the European Union (TFEU).

2. Failure to comply with the duty of referral incumbent upon regular courts under European Union law does not always violate the guarantee of the second sentence of Article 101.1 Basic Law. The right to one's lawful judge is violated, however, if an issue is not yet fully resolved in the case-law of the Court of Justice and a regular court exceeds, in an untenable manner, the margin of assessment, which it is necessarily afforded when interpreting and applying European Union law.

3. A regular court certainly exceeds its margin of assessment if it draws on case-law of the Court of Justice as required under Article 52.3 of the Charter of Fundamental Rights (hereinafter, the "Charter"), but does so only selectively while adding other considerations and thereby develops European Union law on its own authority.

Summary:

I. Until September 2017, the applicant served a prison sentence in Hamburg for criminal offences committed in Germany. He was then kept in extradition detention *(Auslieferungshaft)* due to a European arrest warrant issued against the applicant on the basis of a national arrest warrant issued by a Romanian court on suspicion of document fraud and other fraud-related offences. His constitutional complaint is directed against the orders of the Hamburg Higher Regional Court authorising his extradition to Romania. The applicant claims that the detention conditions in Romania would violate the guarantee of human dignity under Article 1.1 of the Basic Law.

The Higher Regional Court held that while there were indeed strong indications of systemic deficiencies of detention conditions in the Romanian prison system, the applicant did not face a "real risk" of inhuman or degrading treatment. According to the Higher Regional Court, the Romanian authorities had provided an assurance that the applicant would be guaranteed at least 3 m^2 of personal space (including furniture) in case the sentence was served full time in closed detention, and 2 m^2 in case the sentence was served in semi-open or open detention. Based on an "overall assessment", the Higher Regional Court

concluded that, even though prison overcrowding remains at alarmingly high levels, detention conditions in Romania improved significantly; moreover, it should be considered that the insufficient space available within the prison cell were considerably mitigated by other factors.

II. The Second Panel of the Federal Constitutional Court held that the challenged decisions violate the applicant's right to his lawful judge (second sentence of Article 101.1 of the Basic Law), a right equivalent to fundamental rights.

In the event that doubts arise regarding the application or interpretation of European Union law, regular courts must, first of all, refer the relevant questions to the Court of Justice in accordance with Article 267.3 TFEU. The Court of Justice is the lawful judge in these cases. In this regard, the Federal Constitutional Court limits its review to whether the allocation of jurisdiction set out in Article 267.3 TFEU is interpreted and applied in a manner that does not seem comprehensible when critically appraising the Basic Law's central notions and would therefore be considered manifestly untenable. This is the case, *inter alia*, if a court against the decisions of which no judicial remedy is available renders a decision in principal proceedings with regard to an issue that is not yet fully resolved in the case-law of the Court of Justice and thereby untenably exceeds the margin of assessment necessarily afforded to regular courts in such cases. In this respect, it is incumbent upon the regular court to sufficiently research the relevant substantive European Union law. Where case-law of the Court of Justice is applicable to the case at hand, it must be analysed and reflected in the decision rendered by the regular court. On this basis, the regular court must reach the reasonable conclusion that the applicable legal standards are either clear from the outset *("acte clair")* or clarified beyond reasonable doubts in the case-law of the Court of Justice *("acte éclairé")*.

The Court of Justice did indeed clarify that executing a European arrest warrant must not result in inhuman or degrading treatment of the person concerned in the receiving Member State. Accordingly, whenever there is evidence of systemic deficiencies in the prison system of the receiving state, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that in the event of surrender, the person concerned will be exposed to the real risk of inhuman and degrading treatment because of the conditions of detention envisaged in the relevant Member State. The Court of Justice has not yet clarified, however, the decisive issue determining the outcome of the present case: namely, which minimum requirements relating to detention conditions derive from Article 4 of the Charter, and which standards apply to the review of detention conditions in accordance with the fundamental rights of European Union law.

The Higher Regional Court untenably exceeded its margin of assessment in relation to its duty of referral, and thereby violated the applicant's right to his lawful judge. In the challenged decisions, the Higher Regional Court assessed, independently, the standards of review deriving from fundamental rights under the Basic Law, European Union law and the European Convention on Human Rights, without establishing a connection to the specific requirements deriving from Article 4 of the Charter. In this respect, it failed to substantiate whether and in how far the minimum requirements deriving from the Charter are either fully clarified in the case-law of the Court of Justice or are so manifestly clear that clarification would be unnecessary. The Higher Regional Court did base its review on the twofold test established by the Court of Justice, and in assessing the real risk of inhuman or degrading treatment even acknowledged that the assurances provided by Romania fall short of the minimum requirements of personal space set out by the European Court of Human Rights with regard to guaranteeing prisoners detention conditions compatible with Article 3 ECHR. Nevertheless, the Higher Regional Court concluded that the deficient prison conditions did not constitute a relevant risk of inhuman and degrading treatment under European Union law. In this regard, the Higher Regional Court considered the case-law of the European Court of Human Rights only in a selective manner and, by way of an "overall assessment", added further considerations, which it believed capable of disproving the risk of inhuman or degrading treatment in the applicant's case. According to the case-law of the European Court of Human Rights, failure to provide at least 3 m² of personal space per prisoner in a multi-occupancy cell gives rise to the strong presumption that Article 3 ECHR is violated. This presumption would normally only be rebutted where reductions in the required minimum personal space were short, occasional and minor; they were accompanied by sufficient freedom of movement outside the cell and out-of-cell activities; and the prisoner was held in an appropriate facility where no other aggravating conditions exist. There is a strong indication that these three conditions must be fulfilled cumulatively in order to compensate the lack of personal space if that area fell below 3 m².

Furthermore, the Higher Regional Court included factors such as improved heating systems as well as better sanitary facilities and hygiene conditions in its overall assessment: while these have indeed been regarded as compensatory factors by the European Court of Human Rights, it remains unclear whether

they would suffice to rebut the strong presumption that the restricted personal space resulted in a violation of the ECHR. Doubts are warranted in this respect, not least because insufficient sanitary, heating facilities and hygiene conditions as such may already result in a violation of Article 3 ECHR.

By submitting that the Romanian prison system has strengthened opportunities for prison leave, the admission of visitors, the washing of private laundry and the purchase of personal items, the Higher Regional Court relied on considerations that, to date, have not been expressly referred to in the case-law of the European Court of Human Rights for the purpose of rebutting the presumed violation of Article 3 ECHR that follows from the provision of insufficient living space to prisoners. Moreover, the Higher Regional Court based its decision on additional considerations, such as the maintenance of intergovernmental mutual legal assistance, the functioning of the criminal justice system within the European Union as well as the principles of mutual recognition and mutual trust, the potential impunity for suspects resulting from non-extradition and the creation of a "safe haven". While some of these considerations have indeed been referred to in the case-law of the Court of Justice, specifically in relation to the interpretation of Member State obligations arising under the Framework Decision on the European arrest warrant, the question of whether these considerations are equally relevant for determining the scope of the absolute guarantees set out under Article 4 of the Charter or Article 3 ECHR respectively has, however, not yet been resolved in the case-law of the Court of Justice or the European Court of Human Rights.

Cross-references:

Federal Constitutional Court:

- 2 BvR 2735/14, 15.12.2015, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 140, 317, ECLI:DE:*BVerfG*:2015:rs20151215.2bvr273514, *Bulletin* 2016/1 [GER-2016-1-003], English translation available on the Court's website;
- 1 BvR 1916/09, 19.07.2011, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 129, 78, ECLI:DE:*BVerfG*:2011:rs20110719.1bvr191609, *Bulletin* 2011/3 [GER-2011-3-015], English translation available on the Court's website;
- 2 BvR 2661/06, 06.07.2010, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 126, 286, ECLI:DE:*BVerfG*:2010:rs20100706.2bvr266106, *Bulletin* 2010/2 [GER-2010-2-010], English translation available on the Court's website.

European Court of Human Rights:

- *Muršić v. Croatia*, no. 7334/13, 20.10.2016, *Reports of Judgments and Decisions* 2016;
- *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, 10.01.2012.

Court of Justice of the European Union:

- C-404/15 and C-659/15 PPU, 05.04.2016, *Aranyosi and Căldăraru v. Higher Regional Court of Bremen*, EU:C:2016:198.

Languages:

German (English translation is prepared by the Court); English press release is available on the Court's website.

Identification: GER-2017-3-026

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 19.12.2017 / **e)** 1 BvL 3/14, 1 BvL 4/14 / **f)** *Numerus clausus* / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** CODICES (German).

Keywords of the systematic thesaurus:

4.6.8.1 Institutions − Executive bodies − Sectoral decentralisation − **Universities**.
5.2 Fundamental Rights − **Equality**.
5.4.4 Fundamental Rights − Economic, social and cultural rights − **Freedom to choose one's profession**.

Keywords of the alphabetical index:

University, admission, equality.

Headnotes:

1. Pursuant to the first sentence of Article 12.1 in conjunction with Article 3.1 of the Basic Law, every applicant for university admissions is entitled to equal participation in the range of public study programmes and thus to equality-based admission to the study programme of their choice.

2. Rules on restricted university admissions must, in principle, follow the criterion of aptitude. Parliament must also consider the public interest and take into account the social state principle. The criteria applicable to restricted admissions must reflect the diversity of the potential considerations for assessing aptitude.

3. Parliament must itself regulate the essential questions pertaining to restricted admissions to medical studies. In particular, it must define the selection criteria, in regard of their nature, by itself. However, it may leave a certain leeway to the universities for specifying these selection criteria.

4. Relying on the average *Abitur* grade (German equivalent to A-levels) in the context of key quotas is unobjectionable under constitutional law. However, giving priority, within the admissions procedure, to the indicated location preferences, as well as only allowing six university locations to be indicated on applications for admission is not justifiable, within the context of the quota of best *Abitur* graduates, under constitutional law.

5. The statutory provisions on university admissions are unconstitutional to the extent that:

- Parliament leaves the universities the right to define their own admissions criteria;
- the aptitude assessments of the universities themselves are not conducted in a standardised and structured manner;
- in addition to statutory aptitude-related criteria, the universities may also unrestrictedly weigh the criterion of the candidate's freely chosen ranking of location preference in their own admissions decisions;
- *Abitur* grades can be taken into account in university admissions procedures, without providing a mechanism for balancing their limited comparability across the federal *Laender;*
- for a sufficient number of admissions, no other selection criteria of significant weight are taken into account apart from the average *Abitur* grade.

6. The establishment of a waiting-period quota is permissible under constitutional law, although it is not required. It may not exceed the current 20% of university admissions. The duration of the waiting period must be limited.

7. Should the *Laender* wish to deviate from federal law within the framework of Article 125b of the Basic Law (paragraph 1, sentence 3), they must enact new legislation or a substantive provision with a direct connection to already existing state law. Editorial changes alone are not sufficient. The express declaration of the intent to deviate is not required.

Summary:

I. The *Gelsenkirchen* Administrative Court referred the question whether the provisions on university admissions to medical studies set forth in the Framework Act for Higher Education and in the *Laender* provisions on the ratification and implementtation of the State Treaty on the Establishment of a Joint Centre for University Admissions are compatible with the Basic Law to the Federal Constitutional Court for decision.

Pursuant to the challenged provisions, restricted university admissions to medical studies were made on the basis of various key quotas. Some of the criteria that universities were allowed to autonomously apply to decisions relating to the quotas take into account factors that are not aptitude-related.

II. The First Panel of the Federal Constitutional Court held that the legal provisions of the Federation and the *Laender* on university admissions procedures at public universities are, to the extent that they concern the admission to medical studies, partly incompatible with the Basic Law. Both the challenged federal framework provisions and the legal provisions of the *Laender* on university admissions to medical studies violate university applicants' entitlement, deriving from fundamental rights, to equal participation in the range of public study programmes. In addition, the legal provisions of the *Laender* on university selection procedures partly fail to meet the standards resulting from the requirement of a statutory provision. New provisions must be enacted within the timeframe set down by the Court.

The legal provisions of the Federation and the *Laender* on university admissions to medical studies, which is a study programme subject to admission restrictions throughout Germany, are incompatible with the first sentence of Article 12.1 in conjunction with Article 3.1 of the Basic Law, to the extent that they restrict the number of location preferences that may be indicated for applicants falling within the quota of the best *Abitur* graduates and give these priority over the *Abitur* grade for admissions; they allow the universities to unrestrictedly weigh the criterion of location preference in their own admissions procedures; they dispense with a balancing mechanism for rendering *Abitur* grades from different *Laender* sufficiently comparable in university admissions procedures; they do not require the universities to consider, in addition to the *Abitur* grade, at least one further compulsory selection criterion for determining aptitude for studies that is not based on school grades; and, they do not temporally limit the duration of waiting periods within the waiting-period quota. The setup of the universities' selection procedures does not meet the standards of the

requirement of a statutory provision to the extent that it is not ensured by law that the universities' own procedures for assessing aptitude for studies nor the selection based on previous professional training and experience are conducted in a standardised and structured manner. The fact that Hamburg and Bavarian *Land* laws enable universities to autonomously define further selection criteria is also not compatible with the requirement of a statutory provision.

The right to participate in the existing range of study programmes, which were created by the state from public means, results from the freedom to choose one's training and one's profession (Article 12.1 first sentence GG) in conjunction with the general guarantee of the right to equality (Article 3.1 GG). Persons fulfilling the subjective requirements for admission hold a right to equal participation in range of public study programmes and thus an entitlement to equality-based admission to the study programme of their choice. Given that the question of calculating the number of available education places is, however, subject to decision by the democratically legitimated legislator, the right to equal opportunity in admission to university studies only exists within the framework of actually available education capacities.

It results from the requirement of equality-based treatment that the rules on university admissions must, in principle, follow the criterion of aptitude. The type of aptitude relevant to the allocation of admissions is determined by the requirements of the specific study programme and the professional activities that usually follow. The legislator is not constitutionally bound to using a defined criterion of aptitude or a defined combination of criteria. However, the criteria must, in their entirety, guarantee a sufficient predictive value.

Languages:

German (English translation by the Court is prepared for the Court's website); English press release available on the Court's website.

Identification: GER-2017-3-027

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 21.12.2017 / **e)** 2 BvR 2772/17 / **f)** Postponement of the execution of a prison sentence / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.16 General Principles − **Proportionality**.
3.17 General Principles − **Weighing of interests**.
5.1.1.4.3 Fundamental Rights − General questions − Entitlement to rights − Natural persons − **Detainees**.
5.3.2 Fundamental Rights − Civil and political rights − **Right to life**.
5.3.4 Fundamental Rights − Civil and political rights − **Right to physical and psychological integrity**.

Keywords of the alphabetical index:

Prisoner, state of health / Sanction, criminal, enforcement.

Headnotes:

1. The state's right to punish crimes is limited by the fundamental right to life and physical integrity of convicted persons according to Article 2.2 of the Basic Law. The conflicting interests have to be balanced in accordance with the principle of proportionality.

2. The state's duty to enforce its right to punish, on the one hand, and the convicted persons' interest in the protection of their health, on the other hand, are reflected in § 455 of the Code of Criminal Procedure (hereinafter, the "Code").

Summary:

I. By way of final judgment, the *Lüneburg* Regional Court *(Landgericht)* sentenced the 96-year-old applicant to four years in prison for aiding and abetting murder in 300,000 legally connected cases in the context of his activities as an SS member in the Auschwitz concentration camp. The applicant filed an application for postponement of the execution of his sentence based on substantial health impairments (§ 455.3 of the Code). Upon receiving the report of the official medical officer as well as an additional psychiatric assessment, the public prosecution office dismissed the application. The Regional Court rejected the application for judicial decision directed against the decision of the public prosecution office; the immediate complaint to the Higher Regional Court *(Oberlandesgericht)* was also unsuccessful. With his constitutional complaint, the complainant claims a violation of his fundamental right to life and physical integrity (Article 2.2 first sentence of the Basic Law).

II. The Federal Constitutional Court did not admit the constitutional complaint for decision based on the following considerations. The state's duty to protect the

security of the public and confidence in the proper functioning of state institutions generally requires that the state's right to punish crimes be enforced. In the event of impending health risks for the convicted person, however, the obligation to enforce the state's right to punish comes into conflict with the convicted person's fundamental right under the first sentence of Article 2.2 in conjunction with Article 1.1 of the Basic Law. Therefore, the conflicting interests must be balanced in accordance with the principle of proportionality. Even very old age of the convicted does not preclude the execution of a prison sentence.

In light of the requirement that prison sentences be executed humanely convicted persons must, in principle, be given a realistic prospect of regaining freedom even if their guilt was found to be particularly serious. In the event that convicted persons face an imminent danger to life or serious threats to their health, the sentence may not be executed. By contrast, it is not necessary to defer the state's right to punish crimes if sufficient means are available to ensure proper medical care and avert acute health risks. In that respect, it is an essential requirement of proceedings in accordance with the rule of law that decisions concerning the deprivation of liberty be based on sufficient judicial investigation of the circumstances of the case and have a sufficient factual basis commensurate with the significance of the constitutional guarantee of liberty.

The Court held that the challenged decisions satisfy these standards:

On the basis of the medical reports and expert opinions, the public prosecution office and the regular courts were in the position to determine, without further investigation, the complainant's state of health and then balance the state's obligation to enforce its right to punish against the fundamental rights of the complainant. It is not discernible that the challenged decisions are based on an insufficient investigation of facts.

In addition, it is not discernible that, when balancing the public interest in enforcing the state's right to punish and the complainant's fundamental rights, the challenged decisions disregarded the significance and scope of the complainant's fundamental rights. It is unobjectionable under constitutional law to assume that the complainant's old age as such is not a sufficient reason for deferring enforcement of the state's right to punish. At the same time, it must be taken into account that the complainant has been found guilty of aiding and abetting murder in 300,000 legally connected cases. This lends particular importance to enforcing the state's right to punish.

According to the findings of the regular courts, it also cannot be assumed that executing the sentence would be disproportionate for other reasons. On the basis of the expert opinions concerning the complainant's state of health – and considering, in particular, the statutory possibilities to partly suspend the sentence under an operational period of probation – it is not apparent that serving a four-year prison term would deprive the complainant of the chance to regain freedom from the outset, or reduce the outlook on his remaining life to spending it in sickness and on the brink of death. The assessment of the public prosecution office and the regular courts that there were no serious threats to health or an imminent risk of death barring the execution of the complainant's prison sentence under the principle of proportionality is also not objectionable under constitutional law. Rather, existing health impairments can be accommodated by providing the necessary medical care. If the complainant's state of health were to considerably deteriorate in prison, the situation could be addressed by interrupting the execution of the sentence (§ 455.4 of the Code).

Finally, it is unobjectionable under constitutional law that the public prosecution office and the regular courts found that, even with regard to the complainant's existing psychological impairments, there was no imminent risk of death or serious threat to his health resulting from the execution of his sentence. The Higher Regional Court thoroughly examined the expert opinions and, ultimately, held that there was no strong probability of risk of death as a result of imprisonment, nor an imminent danger to life. This assessment is not objectionable under constitutional law, even if the conditions in prison differ from the complainant's current social environment.

Cross-references:

Federal Constitutional Court:

- 2 BvR 1060/78, 19.06.1979, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 51, 324 <343 and 344>.

Languages:

German; Press release available in English on the Federal Constitutional Court's website.

Hungary
Constitutional Court

Important decisions

Identification: HUN-2017-3-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 14.11.2017 / **e)** 30/2017 / **f)** On annulling Section 1.4a, b, Section 1.4b, 1.4f and 1.4g of Act CVI of 2011 on Public Employment and on the Amendment of Acts Connected to Public Employment / **g)** *Magyar Közlöny* (Official Gazette), 2017/185 / **h)** CODICES (Hungarian).

Keywords of the systematic thesaurus:

5.2.1.2 Fundamental Rights − Equality − Scope of application − **Employment**.
5.2.2.5 Fundamental Rights − Equality − Criteria of distinction − **Social origin**.
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**.
5.3.35 Fundamental Rights − Civil and political rights − **Inviolability of the home**.

Keywords of the alphabetical index:

Public employment programme, conditions.

Headnotes:

Requiring those taking part in a public employment programme to keep their living space tidy as a condition of participation constitutes an indirect violation of the principle of general equality and discrimination relating to the right to private life.

Summary:

I. Under Article 24.2.e of the Fundamental Law and by Article 24.1 of Act CLI of 2011 on the Constitutional Court, the Commissioner for Fundamental Rights (hereinafter, the "Commissioner") requested the Constitutional Court to annul several sections and provisions of Act CVI of 2011 on public employment and on the amendment of Acts connected to public employment (hereinafter, "PEA"). Under these regulations, public employees would be excluded from the public employment programme for a period of three months if they did not comply with their obligation to keep their living environment (such as the garden and yard) tidy as required by local government decree.

The Commissioner argued that participation in the public employment programme, despite the fact that it had some social-political aims, should be considered as regular employment. In such cases, as a general rule, the Act I of 2012 on the Labour Code must be applied. In his opinion, the requirement by the PEA imposed on those who might apply for the public employment programme constituted a violation of Article XV.2 of the Fundamental Law (prohibition of non-discrimination). It imposed discrimination on public employees with no reasonable and constitutionally justifiable aim, by comparison to those employed under other legal relations.

In addition, the requirements imposed by the PEA established a violation of Article XV.2 of the Fundamental Law in relation to Article VI.1 of the Fundamental Law (right to private life, family life and respect of home) since such a core element of privacy had no connection with the aims of the public employment.

II. The Constitutional Court noted firstly that the legal status of the public employment programme, viewed in the light of the provisions of the Fundamental Law, seemed from its content to be a particular and atypical form of employment with a function that might be linked to the social care system. However, it should still be viewed as a form of employment not as a social benefit.

The Constitutional Court then considered whether it was justifiable to cause discrimination in the case of that group of jobseekers wishing to enter into public employment through the imposition of other conditions outside the scope of work. Those participating in the public employment programme tended to be in a difficult financial situation and to belong to the most vulnerable layer of the society, with remuneration even lower than the minimum wage. The Constitutional Court found that there was no reasonable justification whatsoever to prescribe a specific set of rules of conduct for this group of jobseekers. The challenged regulations resulted in practical hidden discrimination within this group, as the law actually only applied to those who lived in a disadvantageous and precarious material situation, making them comply with conditions that were bore no relevance to their work. The regulations were therefore contrary to Article XV.2 of the Fundamental Law (prohibition of discrimination).

Lastly, Article XV.2 of the Fundamental Law was also found to have been breached in relation to Article VI.1 of the Fundamental Law, which safeguards the right to private and family life and respect for home life, communications and good reputation. The Constitutional Court, based on its case-law, stated that the notion of privacy, the area protected by Article VI.1 of the Fundamental Law was closely connected to Article II of the Fundamental Law (the right to human dignity). The Constitutional Court found that requiring the jobseekers to keep their living space tidy under the PEA impinged on their rights under Article VI.1 of the Fundamental Law. Although Article XII.1 of the Fundamental Law prescribes that everyone should contribute to the performance of state and community tasks according to their abilities and possibilities, no conditions could be prescribed that violated individuals' freedom and fundamental rights without constitutionally justified ground. The conduct demanded by the PEA was not related at all to the content of the work and so this requirement was regarded as an unacceptable restriction of Article VI.1 of the Fundamental Law.

III. Justice Ágnes Czine attached a concurring reasoning and Justice István Balsai, Justice Egon Dienes-Oehm, Justice Béla Pokol, Justice László Salamon, Justice Mária Szívós and Justice András Zs. Varga attached a dissenting opinion to the decision.

Languages:

Hungarian.

Identification: HUN-2017-3-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 11.12.2017 / **e)** 34/2017 / **f)** On annulling Judgment Pfv.IV.20.624/2016/9 of the *Kúria* and on a constitutional requirement stemming from Article IX.2 of the Fundamental Law / **g)** *Magyar Közlöny* (Official Gazette), 2017/208 / **h)** CODICES (Hungarian).

Keywords of the systematic thesaurus:

5.3.22 Fundamental Rights − Civil and political rights − **Freedom of the written press**.
5.3.23 Fundamental Rights − Civil and political rights − **Rights in respect of the audiovisual media and other means of mass communication**.

Keywords of the alphabetical index:

Press conference, report / Rumour spreading.

Headnotes:

Publishing a true report on a press conference about issues of public events should not render the press liable for denigration.

Summary:

I. In accordance with Article 24.2.d and with Section 27 of Act CLI of 2011 on the Constitutional Court (hereinafter, "ACC") the publisher of an internet news portal (the applicant in this matter) lodged a constitutional complaint against Judgment Pfv.IV.20.624/2016/9. of the *Kúria* (Curia of Hungary).

The applicant had been taken to task in civil court proceedings for violation of personality rights. The action against him stemmed from a published report about a press conference on the issue of tobacco shop competitions which was held by a Member of the National Assembly, also a member of a political party.

In this judgment, which was based on well-established case-law from the civil courts on the interpretation of the former Act IV of 1959 on the Civil Code, the applicant was found liable for false statement of facts, injuring the reputation of another politician, which had been communicated at the press conference. The *Kúria* underlined, that well-established practice stipulated that such a communication was to be considered as rumour-spreading, an objective criteria for violating the personality rights of the person concerned.

The applicant contended in his constitutional complaint that the judgment itself violated his rights enshrined in Article IX.1 of the Fundamental Law (freedom of speech) and in Article IX.2 of the Fundamental Law (freedom of the press). He observed that the *Kúria* had not taken into consideration the circumstances of the whole case (namely that it was a report on a press conference and that his intention had been to inform the citizens on a public issue whilst complying with all the relevant legislation.) In his view, the objective liability should not have been applied. The applicant added that in situations such as press conferences, journalists were not in a position to check the validity of the statements expressed. The *Kúria's* judgment gave the impression that the press would be better-advised not to inform the public on certain issues, to avoid possible charges.

II. The Constitutional Court found that although the interpretation of the *Kúria* on rumor-spreading, on which the applicant's liability had been established, was in line with established practice, it was in fact incompatible with the constitutional requirements stemming from Article IX.2 of the Fundamental Law (the freedom of press).

Imparting information to the public about events of public interest was an essential element of press activity and played a central role in forming democratic public opinion. The communication of information of public interest, including the statements made and the positions taken by public figures, was the primary constitutional duty of the press. Nobody should be condemned for performing their duty under the Fundamental Law. Accurate disclosure of what had been stated at the press conference in line with the actual news was in the essential interest of public debate. The Constitutional Court therefore held that the challenged judgment of the *Kúria* violated Article IX.2 of the Fundamental Law (freedom of the press).

The Constitutional Court also noted that the *Kúria* delivered its judgment in line with the legal regulations in force during the proceedings. The Constitutional Court, in line with Section 46.3 of the ACC, formulated a constitutional requirement stemming from Article IX.2 of the Fundamental Law (freedom of the press) to the effect that rumour-spreading would not be established and objective liability would not be applied, when a report was published in the press on a press conference about the public affairs of public figures, if the person or entity reporting gave an accurate account of what had been presented there, without adding its own assessment, by clearly indicating the sources of information, and by offering those who were affected by the statements of fact and whose reputation might have been tarnished the opportunity to publish a reply or rebuttal.

III. Justice István Balsai, Justice Ágnes Czine, Justice Egon Dienes-Oehm, Justice László Salamon, Justice Péter Szalay and Justice Mária Szívós attached a dissenting opinion to the decision.

Languages:

Hungarian.

Ireland
Supreme Court

Important decisions

Identification: IRL-2017-3-004

a) Ireland / **b)** Supreme Court / **c)** / **d)** 30.11.2017 / **e)** SC 31 and 56/16 / **f)** NHV v. Minister for Justice and Equality / **g)** [2017] IESC 82 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4 General Principles − **Separation of powers**.
5.1.1.3.1 Fundamental Rights − General questions − Entitlement to rights − Foreigners − **Refugees and applicants for refugee status**.
5.2.1.2 Fundamental Rights − Equality − Scope of application − **Employment**.
5.4.3 Fundamental Rights − Economic, social and cultural rights − **Right to work**.

Keywords of the alphabetical index:

Asylum, process, delay / Asylum, seeker, employment, gainful, right to engage in, foreigner / Equality before the law / Equality, categories of person, comparison / Fundamental right, application / Fundamental right, entitlement / Fundamental rights, nature / Right to work, freedom to work for remuneration / Non-citizen, rights and guarantees.

Headnotes:

The general rule is that, upon a finding by the Court that legislation is unconstitutional, the Court should immediately make a declaration of unconstitutionality and thereby render it of no continuing legal affect. The circumstances in which it would be appropriate for the Court not to follow this general rule must be exceptional, such as in the present case, but even in such cases the Court has no role in any approval or discussion as to the merits of the choices the State has made or the choices available to the State.

Summary:

I. In a judgment delivered in this case on 30 May 2017 in *NHV v Minister for Justice* [2017] IESC 35, the absolute prohibition in Section 9.4 of the Refugee Act 1996 (now in Section 26.3 of the International

Protection Act 2015) on the seeking of employment by a person waiting for a final determination of his or her application for refugee status is, in principle, contrary to the constitutional right to seek employment. In an exceptional approach, the Supreme Court did not take the normal course of immediately declaring the relevant legislative provisions unconstitutional, and therefore with no continuing legal effect. Rather, the Court recognised that there were steps to be taken by the legislature in respect of how to address the matter.

II. The Supreme Court, in this *ex tempore* judgment, emphasised that the general rule is that, upon a finding by a Court that legislation is unconstitutional, the Court should immediately make a declaration of unconstitutionality and thereby render it inoperative under the terms of the Constitution. The Court made clear that the circumstances in which it would be appropriate for the Court not to follow this general rule must be exceptional. The Court identified that this case came within such exceptional circumstances. The Supreme Court expressed the view that there are significant limitations on the appropriate scope of further interaction between the Court and the parties. The Court noted that the State had not sought that the Court should involve itself in any approval or discussion as to the merits of the choices the State has made or the choices which were available to the State at the time when the Court delivered its judgment. However, the Court emphasised that the whole point of giving the State a period of time was to allow the Legislature to make decisions which it must make, and the Court has no role in such matters.

The issue for consideration by the Supreme Court was the appropriate course of action to adopt in light of the fact that Counsel for the State had indicated that a decision had been made in relation to how the matter was to be approached and that plans were in progress to take the necessary legislative measures for the opting in of Ireland to Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast). The Court indicated that while the Court appreciated that the State had taken measures to use the time which the Court gave, it did not wish to become involved in the question of monitoring even the speed of the progress of the matter as it was not its function under the Constitution. Accordingly, the Court was of the view that, in all the circumstances, the balance of justice would be met by affording the State a relatively brief period to take whatever measures it considers necessary prior to the making of a declaration of inconsistency with the Constitution. However, the Court strongly emphasised that what is envisaged is that there will not be any further hearing, sitting consideration of submissions, receipt of letter or the like. The Court stated that it will sit again in this matter on Friday, 9 February and on that date will make a declaration of unconstitutionality. The Court indicated that this was simply an indication of what would occur on that date and that the matter was not being adjourned for any further consideration. It stated that it was for the State to take whatever measures it considered appropriate prior to that date, but that the declaration of unconstitutionality will be made.

Cross-references:

Supreme Court:

- *NHV v. Minister for Justice* [2017] IESC 35.

Languages:

English.

Identification: IRL-2017-3-005

a) Ireland / **b)** Supreme Court / **c)** / **d)** 12.12.2017 / **e)** SC 37/16 / **f)** Crayden Fishing Company Limited v. Sea Fisheries Protection Authority and others / **g)** [2017] IESC 74 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.5.2.2 Constitutional Justice − Jurisdiction − The subject of review − Law of the European Union/EU Law − **Secondary legislation**.
5.3.13.6 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Right to a hearing**.

Keywords of the alphabetical index:

Fisheries, stocks protection / Delegation, legislative power, scope / Delegation of powers / Sanction, administrative / Sanction, criminal / Secondary EU legislation, constitutionality / Complaint, constitutional / Law making, constitutional rules / Fair procedures.

Headnotes:

The minimal procedures within the European (Common Fisheries Policy) (Point System) Regulations SI3/2014, which in effect set up a single decision making process with the onus of disproof on the licence holder, fall short of the requirement of fair procedure.

Summary:

I. This case concerned the European (Common Fisheries Policy) (Point System) Regulations 2014 (SI3/2014) (hereinafter, the "2014 Regulations") which were also the subject matter of the companion case of *O'Sullivan v. Sea Fisheries Protection Authority & others* [2017] IESC 74, which was heard at the same time as this case. In the immediate aftermath of the decisions of the High Court in *O'Sullivan* and in this case, the Minister for Agriculture, Food and the Marine, introduced the European Union (Common Fisheries Policy) (Point System) Regulations 2016 (SI 125/2016) which among other things, revoked the 2014 Regulations in their entirety. In this appeal, the respondent was the owner of a vessel, 'Anders Neel' and the holder of a sea fishing licence. The Anders Neel was boarded by two officers of the Sea Fisheries Protection Authority (hereinafter, "SFPA") and carried out an inspection. The findings would have constituted a breach amounting to illegal unreported and unregulated fishing (hereinafter, "IUU") under the Common Fisheries Policy, and could result in the procedure for the allocation of points to the fishing licence under domestic provisions implementing provisions of Council Regulation (EC) 1224/2009 (hereinafter, the "Control Regulation"). The respondent was subsequently furnished with a copy of the inspection report and informed by the SFPA that a determination panel for the assignment of points had met, examined the evidence and assessed the gravity of the infringements against specified criteria. It determined that the infringement was serious in nature and that it was proposed to assign 12 points to the licence holder. The respondent was advised that an appeal could be registered by writing to an appeals officer within 21 days and if no such appeal was brought or if any appeal brought was withdrawn, points would be notified and applied.

Crayden Fishing Company Limited lodged an appeal, but before the hearing of the appeal sought and obtained a stay. It contended that the process before the determination panel of the SFPA was required to be carried out in accordance with fair procedures. In particular, it was argued that the respondent had been given no opportunity to make representation on its own behalf or to test or challenge the evidence produced by the SFPOs. In addition, reasons had not been given for the decision. The State authorities contended that fair procedures were required in relation to the proceedings of the determination panel in isolation, and the question of fair procedures depended upon all the facts and circumstances of the case. It was argued that, as the 2014 Regulations provided that nothing could happen to the respondent and no points could be allocated as a result of the determination panel process unless the licence holder did not lodge an appeal or an appeal was withdrawn, the proceedings should be viewed as a unitary process, and fair procedures. Therefore, fair procedures were provided before any points were assigned and before adverse consequences were suffered by the licence holder, which is all that is required by natural justice.

Crayden Fishing Company Limited argued that the case should be viewed as two distinct processes of first instance determination and appeal, each of which required to be conducted in accordance with fair procedures.

II. The High Court found that the proceedings before the determination panel did require fair procedures and at a minimum the right to make representations and to have reasons for the decision. The Supreme Court reviewed the authorities on the right to a hearing before a determination panel and distinguished the factual circumstances, where the law requires the right to a hearing and where it is not necessary. Indicating that it was not "appropriate, necessary or indeed possible at this stage to offer a single bright line rule", O'Donnell J stated that "the default position is that a person conducting a preliminary investigation which itself does not lead directly in law to a binding and adverse decision, is not normally under an obligation to comply with a requirement of a fair hearing. However, the right to a fair hearing may be "seen as an integral and necessary part of a process which could terminate in an action adverse to the interests of the person claiming to be heard". In the circumstances in this case, the Court dismissed the appeal and concluded that the minimal procedures which the Regulations of 2014 provide, which sets up in effect a single decision making process with an onus of disproof on the licence holder, falls short of the requirement of fair procedures. Accordingly, it upheld the conclusion of the trial judge, but on a narrower basis than the reasoning of the High Court.

Cross-references:

Supreme Court:

- *O'Sullivan v. Sea Fisheries Protection Authority and others* [2017] IESC 74, *Bulletin* 2017/3 [IRL-2017-3-006].

Languages:

English.

Identification: IRL-2017-3-006

a) Ireland / **b)** Supreme Court / **c)** / **d)** 12.12.2017 / **e)** SC 50/16 / **f)** O'Sullivan v. Sea Fisheries Protection Authority and others / **g)** [2017] IESC 74 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.5.2.2 Constitutional Justice − Jurisdiction − The subject of review − Law of the European Union/EU Law − **Secondary legislation**.
3.4 General Principles − **Separation of powers**.

Keywords of the alphabetical index:

Fisheries, stocks protection / Delegation, legislative power, scope / Delegation of powers / Sanction, administrative / Sanction, criminal / Secondary EU legislation, constitutionality / Complaint, constitutional / Law making, constitutional rules / Fair procedures.

Headnotes:

The matters dealt with in the European Union (Common Fisheries Policy) (Point System) Regulations were incidental, supplemental and consequential to the provisions of the relevant European Regulations and accordingly did not contravene Article 15.2.1 of the Constitution, which provides that the sole and exclusive power of making law is vested in Parliament *(Oireachtas)*. However, the Regulations were invalid on the grounds that they did not comply with fair procedures.

Summary:

I. The Supreme Court is the final court of appeal under the Constitution. It hears appeals from the Court of Appeal and in certain exceptional circumstances directly from the High Court. The decision of the Supreme Court summarised here is a direct appeal pursuant to Article 34.5.4 of the Constitution from a decision of the High Court in which the High Court found that the European Union (Common Fisheries Policy) (Point System) Regulations (SI3/2014) made by the Minister for Agriculture, Food and the Marine (hereinafter, the "2014 Regulations") were invalid having regard to Article 15.2.1 of the Constitution, which provides that the sole and exclusive power of making law is vested in Parliament *(Oireachtas)*.

II. The Supreme Court noted that this case raised important questions in relation to the interaction between European law and the Constitutional provisions relating to the making of law. The 2014 Regulations created a standalone system for the application of points to licences for sea fishing. The Sea Fisheries Protection Authority (hereinafter, "SFPA") was the designated competent authority and was obliged to propose the assignment of points to the holders of an Irish licence in the event of the detection of a serious infringement of fisheries rules by a sea fisheries protection officer and notify the holder of the licence of the proposed assignment. The 2014 Regulations provided that the notification was to inform the licence holder of the entitlement to appeal within 21 days to an independent appeals officer. In the event of no appeal or an unsuccessful appeal, the points were applied. In an appeal, the onus was on the holder of the licence to demonstrate, on the balance of probabilities, that the incident did not occur, did not involve the vessel, and occurred prior to the Regulations came into force, or was not serious. An appeal to the High Court on a point of law was provided for and such an appeal was final and conclusive.

In 2008, the European Council adopted Council Regulation (EC) 1005/2008, which required that dissuasive measures be adopted against fishing vessels carrying out illegal, unreported and unregulated fishing (hereinafter, "IUU fishing") and introduced a system of European-wide sanctions for IUU fishing, including a series of enforcement measures, sanctions and accompanying sanctions for serious infringements, including IUU fishing. Article 44 provides for the possibility of administrative or criminal sanctions or both. In 2009, Council Regulation (EC) 1224/2009 (hereinafter, the "Control Regulations") was introduced which gives rise to the obligation to establish a point system leading to the suspension and ultimately withdrawal of a fishing licence which is at issue in this case. It requires the introduction of "administrative sanctions in combination with a points system for serious infringements" (emphasis added). Article 92 of the Control Regulations obliges member States to establish a points system applicable to IUU fishing providing for suspension of licences for increasing lengths of time as points are accumulated,

culminating in withdrawal of a licence on a fifth contravention. The Commission implementing Regulations of 2011 (EC) 404/2011 sets out the point system for serious infringements, specifying the headings deemed serious infringements in order of seriousness and the applicable points running from three points to seven points. The member States are to establish a system for the allocation of points to licences but the only substantive decision to be made by the member State is whether the infringement is a serious one, the criteria for which are prescribed by the IUU Regulations.

In this case, Sea Fisheries Protection Officers boarded a vessel, the "Tea Rose" and, following inspection and weighing of the fish on board, a member of *An Garda Síochána* (policeman) cautioned the Master of the Vessel and brought him before the District Court to be charged with the under recording of fish in contravention of the 2014 Regulations. The conduct would, of itself, amount to a serious infringement and a contravention of the IUU Regulations and if determined a serious infringement, a matter for which three points are to be assigned for serious infringements under the Commission Implementing Regulations. The applicants, the holders of the fishing licence, challenged the validly of the 2014 Regulations.

The High Court found that the 2014 Regulations were invalid and contravened Article 15.2.1 of the Constitution which provides that the sole and exclusive power of law making is vested in Parliament *(Oireachtas)*. The High Court judge found the effect of a number of features of the 2014 regulations taken together was to bring the Regulations outside of the permissible range of provisions that could be introduced by statutory instrument, which is delegated legislation. The Irish courts have found that delegated legislation is permissible if the principles and policies have been set out in the primary act and the delegated legislation merely gives affect to the principles and policies of the primary measure (*Cityview Press v. An Comhairle Oiliúna* [1980] IR 381, *Meagher v. Minister for Agriculture* [1994] 1 R 329).

On appeal the Supreme Court considered whether it is permissible under the European Regulations to have a standalone points system unconnected to, and not dependent or consequent upon, the system of sanctions for serious infringements of the Regulations. If so, the next question for consideration was whether the decision to introduce a standalone system is an issue of policy which means that it could only be introduced by primary legislation. Ireland had adopted criminal law as a method to enforce the IUU Regulations. The Supreme Court (O'Donnell J.) noted that "the entire concept of subordinate regulation depends upon and contemplates decisions being made between a range of options. Any decision involved consideration of what the decision-maker considers to be the best solution in the circumstances". The question therefore, was "the scope of the decision making left to the subordinate rule maker". The Court found that here "the most striking feature of the legislative scheme [was] not just the regulatory straitjacket that applies to member States, but the detailing on the garment". The matters dealt with in the 2014 Regulations were incidental, supplemental and consequential to the provisions of the European Regulations and accordingly, the Court did not consider that in principle the establishment of procedures under the 2014 Regulations contravened Article 15.2.1 of the Constitution.

However, the Court considered the features of the regime in the context of the fair procedures required by the Constitution. The Court noted that the Regulations were limited in scope for domestic regulation and limited in scope for decision making in the individual case. Once a fisheries officer detected a breach, the only matter for the SFPA to consider was whether it was a 'serious' breach by reference to the criteria set out in the European Regulation. The Court found that the Regulations "appear almost to represent an exercise in determining the absolute minimum that can be afforded by way of fair procedures". The Court held that the procedures under the 2014 Regulations taken cumulatively did not afford fair procedures, in particular by providing for an onus on the licence holder to initiate the hearing process and to carry the burden in what was effectively a single decision making process. It upheld the declaration of the High Court that the 2014 Regulations were invalid, but on the grounds that they did not comply with fair procedures.

Cross-references:

Supreme Court:

- *Cityview Press v. An Comhairle Oiliúna* [1980] IR 381;
- *Meagher v. Minister for Agriculture* [1994] 1 R 329.

Languages:

English.

Italy
Constitutional Court

Important decisions

Identification: ITA-2017-3-012

a) Italy / **b)** Constitutional Court / **c)** / **d)** 03.04.2017 / **e)** 164/2017 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 29, 19.07.2017 / **h)** CODICES (Italian, English).

Keywords of the systematic thesaurus:

4.7.16.2 Institutions − Judicial bodies − Liability − **Liability of judges**.
5.3.13.2 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Effective remedy**.
5.3.13.3.1 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Access to courts − **"Natural judge"/Tribunal established by law**.
5.3.13.13 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Trial/decision within reasonable time**.
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**.
5.3.17 Fundamental Rights − Civil and political rights − **Right to compensation for damage caused by the State**.

Keywords of the alphabetical index:

Liability, civil liability of judges, claim for damages, "filter of admissibility", legislative discretion / Judge, independence, autonomy, impartiality / Principle of a court established by law / "Principle of equivalence", European Union law, judgments of the Court of Justice of the European Union / "Principle of effectiveness", European Union law, judgments of the Court of Justice of the European Union.

Headnotes:

It is not necessary to provide for a preliminary assessment of the admissibility of a claim brought against the State for compensation for damage resulting from a judicial ruling as an indispensable instrument for protecting the autonomy and independence of the judiciary.

The fact that proceedings for damages are pending against the State does not constitute a reason for the judge that adopted the relevant measure to recuse himself or to be recused.

Summary:

In this case, the Constitutional Court was requested to rule on a complex body of questions of constitutionality, all relating to the rules concerning the civil liability of judges following the amendments introduced by Law no. 18 of 27 February 2015 (Provisions on the civil liability of judges) to the previously applicable provisions of Law no. 117 of 13 April 1988 (Compensation for damage caused in the exercise of judicial functions and the civil liability of judges). Not having been raised within liability proceedings against a judge, most of those questions were ruled to be inadmissible by the Court on the ground of irrelevance. The sole question deemed to be relevant was ruled unfounded, essentially on the grounds that the requirement to protect the autonomy and independence of the judiciary could be satisfied in various ways, and that the specific choice regarding this matter fell to Parliament.

More specifically, the referring court raised several doubts concerning the constitutionality of Article 3.2 of Law no. 18 of 2015, that is to say, the provision that abolished the "admissibility filter" for claims for damages brought against the State.

The Constitutional Court started by observing that a strong impetus in favour of the reform introduced by Law no. 18 of 2015 came from the principles of equivalence and effectiveness set out by the Court of Justice of the European Union in relation to the obligation of the Member States to compensate individuals for damage caused to them by violations of Community law committed by national judicial bodies (including courts of last resort). The principle of equivalence requires that the conditions laid down under national legislation on claims for damages against the State on grounds of civil liability resulting from the violation of European law by a court ruling must not be "less favourable" than those governing similar claims relating to domestic matters, that is, other "normal" actions for damages which may be

brought by individuals against the State in relation to other matters. The principle of effectiveness requires that the procedural mechanisms under national law must not be structured in such a way as to make it impossible or excessively difficult to obtain compensation. Whilst the setting out of these principles did not directly and specifically require the abolition of the admissibility filter, it inevitably ended up inspiring and permeating the reform enacted by Law no. 18 of 2015.

In the area under examination, a delicate balance needs to be struck between two countervailing interests: on the one hand, the interest of the individual who has been unlawfully harmed by a court ruling in obtaining redress for the detriment suffered; on the other hand, the need to safeguard the judiciary against potential conditioning in order to protect its independence and impartiality. This balance has been struck by Law no. 18 of 2015, which enacted the reform, fundamentally by drawing a clearer distinction between the civil liability of the State towards the injured party – of which the European institutions emphatically urged the extension – and the civil liability of the individual judge. The legislator considered it necessary to extend the scope of the former regardless of the more limited boundaries of the latter. The legislative choice to abolish the "admissibility filter" was made within that context of a new legislative balance. In fact, it is not necessary to provide for a preliminary assessment of the admissibility of the claim brought against the State as an indispensable instrument for protecting the autonomy and independence of the judiciary. This requirement may in fact be satisfied by the legislator through other means, such as by the enactment of Law no. 18 of 2015, which: first, maintained the prohibition on direct actions against judges and clearly separated the two forms of liability (that of the State and that of the judge); second, laid down self-standing and more restrictive prerequisites for establishing the liability of the individual judge, to which recourse may be had only in cases where the State has been unsuccessful in an action for damages; and third, maintained a limit on the extent of such recourse. This suffices to counter the possible danger that the abolition of the procedural mechanisms under examination may undermine the "peace of mind of the judge", along with a drift towards a "defensive jurisprudence", namely that the court may relinquish its position of independence and impartiality and take the decisions that appear to it to be less "risky". In the light of the above, the Court considered the questions raised with reference to the principles of the independence and autonomy of the judiciary and the independence and impartiality of the judge to be unfounded.

As regards the purported unreasonableness inherent in the abolishing of the admissibility filter and the violation of the principle of equality (Article 3 of the Constitution) vis-à-vis "simplified inadmissibility rulings", it is not sufficient to establish a parallel on a normative level between simplification measures intended to avoid litigation which have been created by the legislator in the area of civil appeals and the repealed mechanism of the admissibility filter. The legislature observed the limit imposed on it, that is to say, there is no manifest unreasonableness in the case under examination.

As regards the objection that Article 3.2 of Law no. 18 of 2015 violates the principle of a court established by law (Article 25 of the Constitution), it is sufficient to note that, according to the case-law of the Court of Cassation, the fact that proceedings for damages are pending against the State does not constitute a reason for the judge that adopted the relevant measure to recuse himself or to be recused.

Finally, the question concerning Article 111 of the Constitution, regarding the breach of the principle of the reasonable length of trials, is also unfounded, since the doubt raised in that question should apply to all ordinary civil proceedings unless they are preceded by preliminary mechanisms for assessing the claim similar to the one contemplated under the repealed Article 5 of Law no. 117 of 1988.

Cross-references:

Court of Justice of the European Union:

- C-224/01, 30.09.2003, *Gerhard Köbler v. Austria*, [2003] *European Court Reports* I-10239;
- C-173/03, 13.06.2006, *Traghetti del Mediterraneo SpA v. Italy*, [2006] *European Court Reports* I-05177;
- C-524/04, 13.03.2007, *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue,* [2007] *European Court Reports* I-02107;
- C-429/09, 25.11.2010, *Günter Fuß v. Stadt Halle*, [2010] *European Court Reports* I-12167;
- C-379/10, 24.11.2011, *European Commission v. Italy*, [2011] *European Court Reports* I-00180;
- C-160/14, 09.09.2015, *João Filipe Ferreira da Silva and Brito and others v. Portugal,* EU:C:2015:565.

Languages:

Italian.

Identification: ITA-2017-3-013

a) Italy / **b)** Constitutional Court / **c)** / **d)** 20.06.2017 / **e)** 166/2017 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 29, 19.07.2017 / **h)** CODICES (Italian, English).

Keywords of the systematic thesaurus:

2.1.3.2.1 Sources − Categories − Case-law − International case-law − **European Court of Human Rights**.
5.3.39 Fundamental Rights − Civil and political rights − **Right to property**.
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**.
5.4.18 Fundamental Rights − Economic, social and cultural rights − **Right to a sufficient standard of living**.

Keywords of the alphabetical index:

Pension, calculation, social security contributions paid in Switzerland / European Court of Human Rights, judgment / Law, retroactive.

Headnotes:

The *Stefanetti* judgment of the European Court of Human Rights does not change the position previously adopted by the Constitutional Court in the area of statutory interpretation of legislation governing the calculation of pensions. The *Stefanetti* judgment does not indicate a threshold below which reductions of pensions would be excessive. Such a task falls to the legislature (although prolonged inertia in adopting a solution would not be tolerable).

Summary:

In this case, the Constitutional Court heard a referral order objecting to legislation laying down a statutory interpretation of legislation governing the calculation of pensions, under which the pension entitlement of certain Italian workers who had worked and paid social security contributions in Switzerland had been significantly reduced. The Court ruled the question to be inadmissible. In the *Stefanetti and Others v. Italy* judgment, the European Court of Human Rights did not contradict or otherwise venture beyond the finding made in its previous *Maggio and Others v. Italy* judgment that the retroactive rule of 2006 was compatible with Article 1 Protocol 1 ECHR in the context of pensions that had been reduced by less than half. Rather, it expressly confirmed that such a reduction was "reasonable and commensurate". In the *Stefanetti* judgment, the violation of the Convention resulted from the specific circumstances of the individual cases (the applicants had been subject to a reduction of approximately two-thirds of their pension), in relation to which the overall assessment of the specific factual circumstances highlighted the "disproportionate" sacrifice imposed on the applicants as a consequence of the adjustment of their pensions. In the light of the above, the Constitutional Court held that the *Stefanetti* judgment does not reveal any incompatibility with Article 1 Protocol 1 ECHR that affects or could affect the national provision under examination in terms of entailing – by virtue of an interposed principle – the provision's contrast – in its entirety – with Article 117.1 of the Constitution.

On the other hand, a more restricted class of situations exists in which the adjustment of the remuneration earned in Switzerland in accordance with the contested retroactive national provision may conflict with the European Convention of Human Rights principles invoked, and accordingly with the principles laid down by Articles 3 and 38 of the Constitution. However, the *Stefanetti* judgment does not indicate in general terms the threshold below which the reduction of "Swiss pensions" will violate the workers' right to life "benefit" consisting in their pension credit. The European Court of Human Rights rather refers to a reduction entailing a loss of approximately two-thirds of the pension. In any event, it is necessary for a threshold (whether fixed or proportional) and a definitive limit on the reduction of "Swiss pensions" to be set and for a suitable and sustainable remedy that is capable of safeguarding the essential core of the right infringed to be established. These presuppose that a choice be made between a range of solutions, which as such falls within the discretion of the legislator. The Court added that prolonged inertia in adopting a solution would not be tolerable.

Cross-references:

European Court of Human Rights:

- *Maggio and Others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, 31.05.2011;

- *Stefanetti and Others v. Italy (Merits)*, nos. 21838/10, 21849/10, 21852/10, 21855/10, 21860/10, 21863/10, 21869/10 and 21870/10, 15.04.2014;
- *Stefanetti and Others v. Italy (Just Satisfaction)*, nos. 21838/10, 21849/10, 21852/10, 21855/10, 21860/10, 21863/10, 21869/10 and 21870/10, 01.06.2017.

Languages:

Italian.

Japan
Supreme Court

Important decisions

Identification: JPN-2017-3-001

a) Japan / **b)** Supreme Court / **c)** Grand Bench / **d)** 15.03.2017 / **e)** (A)442/2016 / **f)** / **g)** *Minshu* (Official Gazette), 71-3 / **h)** *Hanreitaimuzu* 437; *Hanreijiho* 2333; CODICES (English).

Keywords of the systematic thesaurus:

5.3.32 Fundamental Rights − Civil and political rights − **Right to private life**.

Keywords of the alphabetical index:

Criminal proceedings, investigation / Global Positioning System / Warrant, judicial.

Headnotes:

Global Positioning System investigation, in the course of which information as to a vehicle's location is retrieved and monitored by secretly attaching a terminal to the vehicle without its user's consent, is a compulsory measure which must not be carried out without a warrant as it is a method of investigation that enables investigators to invade an individual's private sphere against his or her reasonably inferred will by secretly attaching to his or her belongings devices that enable encroachment on his or her privacy.

Summary:

The inference can reasonably be drawn that the target of the protection given by Article 35 of the Constitution includes an individual's right not to have their "private sphere" invaded, which equates to "homes, papers and effects". Global Positioning System investigation (hereinafter, "GPS") inevitably involves the continuous, comprehensive monitoring of a person's activities and may well encroach on personal privacy. GPS investigation should also be considered to entail invasion by public authorities of the private sphere as it is conducted by secretly attaching devices which enable this sort of intrusion. GPS investigation should therefore be understood as

a compulsory measure which must not be conducted without a warrant since it violates material legal interests guaranteed by the Constitution.

On this basis, it might appear necessary for various conditions to be met in order for a judge to issue a warrant. However, from a practical perspective, permitting a compulsory disposition that can only be approved if the judge in charge of examining the request for a warrant selects the appropriate conditions on a case-by-case basis would not be in line with the intention of the proviso of Article 197.1 of the Code of Criminal Procedure. Assuming that GPS is a useful method of investigation that will continue to be commonly used in the future, it is desirable that legislative action should be taken that will conform to the principles of the Constitution and the Code of Criminal Procedure by focusing on the characteristics of GPS.

Supplementary information:

This judgment refers to interpretation of Article 35 of the Constitution and Article 197.1 of the Code of Criminal Procedure.

Cross-references:

The Third Petty Bench of the Supreme Court of Japan:

- no. (A)146/1975, *Keishu* 30-2, 16.03.1976.

Languages:

Japanese, English (translation by the Court).

Korea
Constitutional Court

Important decisions

Identification: KOR-2017-3-005

a) Korea / **b)** Constitutional Court / **c)** / **d)** 30.06.2016 / **e)** 2013Hun-Ka1 / **f)** Barring Journalists from Election Campaigns / **g)** 28-1(2), *Korean Constitutional Court Report* (Official Digest), 413 / **h)**.

Keywords of the systematic thesaurus:

3.13 General Principles − **Legality**.
3.16 General Principles − **Proportionality**.
4.9.8 Institutions − Elections and instruments of direct democracy − **Electoral campaign and campaign material**.
5.3.41 Fundamental Rights − Civil and political rights − **Electoral rights**.

Keywords of the alphabetical index:

Electoral campaign, prohibition, journalist / Journalist, public interest, social responsibility / Rule against blanket delegation / Election, fairness / Electoral campaign, using media outlets.

Headnotes:

The provision in Article 60.1.5 of the former Public Official Election Act prohibiting journalists from engaging in election campaigns, as well as the provision under Article 255.1.2 of the above Act laying down the punishment for journalists who engaged in election campaigns, violated the Constitution, in that:

i. the class or category of journalists as prescribed in the provisions was too broad; and
ii. a total prohibition was not needed to achieve the legislative purpose of those provisions.

Summary:

I. The requesting petitioners were charged with engaging in election campaigns on many occasions, despite being journalists and thus prohibited from doing so.

The provision which reads “a person who falls under Article 53.1.8” in Article 60.1.5 of the former Public Official Election Act prohibited journalists from engaging in election campaigns. The provision which reads “a person who falls under Article 53.1.8 in Article 60.1.5” in Article 255.1.2 of the above Act laid down the punishment for journalists who engaged in election campaigns.

While the petitioners’ trial was pending, they filed a motion for a request to be made for constitutional review of the provision concerning Article 53.1.8 in Article 60.1.5 of the above Act, which prohibited journalists from engaging in election campaigns. The court granted that motion and requested a constitutional review of this case.

II.1. The provision prohibiting journalists from participating in elections merely referred to “a journalist as prescribed by presidential decree” and, aside from the word “journalist”, did not restrict the scope of what was to be defined by presidential decree. In this connection, the Constitutional Court observed that, even from an examination of the related provisions, it was difficult to foresee:

i. which kinds of media outlets (from among the various sources including broadcasting, newspapers, news agencies, etc.) would be relevant; and
ii. to what extent a person had to be involved in the work to be called a journalist.

Therefore, the provision prohibiting journalists from engaging in election campaigns violated the rule against blanket delegation.

2. It was on the basis of the influence of the press on public official elections, as well as the high degree of social responsibility with which journalists should act and the extent to which journalists should act in the public interest, that the provisions in Article 60.1.5 and Article 255.1.2 of the above Act (hereinafter, the “impugned provisions”) prohibited journalists from intervening in and exercising biased influence on elections. Ultimately, the aim of the impugned provisions was to secure the fairness and equity of elections – they thus had a legitimate purpose. Moreover, uniformly prohibiting journalists belonging to a certain class or category from engaging in election campaigns is an appropriate means for achieving the above purpose.

However, the problems that might arise from the intervention of journalists in elections would be related to activities using media outlets – in other words, activities using or based on a journalist’s status. It is therefore unnecessary to completely prohibit a journalist from engaging in election campaigns as an individual when media outlets are not involved. The legislative purpose of the impugned provisions could be fully achieved by regulating journalists belonging to a certain class or category with respect to problems that could occur from activities using media outlets. However, given the dramatic rise in media outlets (including internet newspapers), in which it is usual for citizens to participate actively in the press, the class or category of “journalists” as prescribed in the impugned provisions was excessively broad. Furthermore, the law already prescribes the responsibilities of press with respect to fair reporting, and sufficiently regulates this in various ways with respect to media-outlet activities that can undermine the fairness of elections, such as reports and comments in media outlets, activities involving press members, activities involving specific candidates outside the press, etc. Therefore, the impugned provisions infringed on the freedom to engage in election campaigns.

III. Dissenting Opinion of Two Justices

1. In line with progress in technology, press agencies, to which journalists belong, are gradually expanding their domain, and the spectrum of the human resources involved is also diverse. Thus, the two justices recognised the need for delegation. Moreover, they found it sufficiently predictable that, in the light of the related provisions and purpose of the above Act, the class or category of journalists prescribed by presidential decree could:

i. initially be defined by the standard of whether they engage in work related to the shaping of public opinion on elections – such as the work of operating or managing press agencies, or that of editing, writing, reporting, etc. at press agencies including broadcasting and newspapers, or at similar media outlets; and
ii. then be further specified. Therefore, the provision laying down the prohibition did not violate the rule against blanket delegation.

2. The impugned provisions set the minimum standard for barring journalists from election campaigns, and it cannot be said that journalists working with internet newspapers may act less in the public interest or with less social responsibility than journalists working with newspapers or broadcasting enterprises, etc. The two justices added that, meanwhile, the responsibility of the press to issue fair reports under the above Act was only subject to the deliberation and measures of the relevant deliberative committee; no provision punished related violations. Consequently, it was difficult to say that such measures, alone, had the power to deter election

campaigns from using internet media channels in particular. Therefore, the impugned provisions did not infringe upon the freedom to engage in election campaigns.

Languages:

Korean, English (translation by the Court).

Identification: KOR-2017-3-006

a) Korea / **b)** Constitutional Court / **c)** / **d)** 29.09.2016 / **e)** 2014Hun-Ka9 / **f)** Involuntary Hospitalisation of Mentally Ill Patients / **g)** 28-2(1), *Korean Constitutional Court Report* (Official Digest), 276 / **h)**.

Keywords of the systematic thesaurus:

3.16 General Principles − **Proportionality**.
5.3.4 Fundamental Rights − Civil and political rights − **Right to physical and psychological integrity**.

Keywords of the alphabetical index:

Involuntary hospitalisation, mentally ill / Arbitrary decision / Involuntary hospitalisation system, abuse / Legal vacuum / Rule against excessive restriction.

Headnotes:

Article 24.1 and 24.2 of the Mental Health Act – which allow for the involuntary hospitalisation of a mentally ill person with the consent of two persons responsible for protecting him or her and a diagnosis by one neuropsychiatrist – violate the rule against excessive restriction and thus infringe upon physical freedom.

Summary:

I. Article 24 of the Act prescribes involuntary hospitalisation where two persons responsible for protecting a mentally ill person give consent and a neuropsychiatrist determines that hospitalisation or admission (hereinafter, "hospitalisation") is necessary, thus allowing that a mentally ill person be forcibly hospitalised in a medical mental health institution or a mental health sanatorium (hereinafter, "medical mental health institution").

The requesting petitioner was hospitalised in a medical mental health institution, with the consent of her two children, who were responsible for her protection, and the diagnosis of a neuropsychiatrist approving her hospitalisation. Claiming that she was forcibly hospitalised, and that, at the time of hospitalisation, she had posed no harm to her own health and safety or the safety of others, and had been suffering not from a mental illness requiring treatment through hospitalisation at a medical mental health institution, but merely from menopausal depression, the requesting petitioner filed a petition for *habeas corpus* under the *Habeas Corpus* Act with the District Court.

While the *habeas corpus* petition was pending, the requesting petitioner filed for a review of the constitutionality of Article 24 of the Act – which allows for the hospitalisation of a mentally ill person with the consent of two persons responsible for protecting him or her and a diagnosis of a neuropsychiatrist – claiming that it infringed upon her physical freedom. The District Court, which was the original trial court, granted the above petition, and requested a constitutional review of this case with respect to Article 24.1 and 24.2 of the Act (hereinafter, the "impugned provisions").

II. 1. The impugned provisions serve a legitimate purpose, for they aim to provide swift and appropriate treatment to mentally ill persons, and to protect the safety of mentally ill persons as well as that of society. They also provide an appropriate means, in that the involuntary hospitalisation in a medical mental health institution and subsequent treatment of a mentally ill person, with the consent of two persons responsible for protecting him or her and a diagnosis by a neuropsychiatrist, can to a certain extent contribute to achieving the legislative purpose of the provisions.

Involuntary hospitalisation restricts the physical freedom of a mentally ill person to a level on par with bodily confinement; therefore, the process should:

i. minimise the deprivation of physical freedom;
ii. prevent any possibility of the system being misused or abused; and
iii. not be used as a means to isolate or exclude mentally ill persons from society against their will.

However, the involuntary hospitalisation system currently in force does not provide specific criteria as to what types of mental illnesses require hospitalised treatment and care. It does not sufficiently prevent conflict of interests between a mentally ill person and the two persons who are responsible for his or her

protection and give their consent for involuntary hospitalisation. It entrusts a single neuropsychiatrist with the determination of whether hospitalisation is necessary, thus leaving open the possibility of his or her making an arbitrary decision or abusing authority. The system is in greater danger of being abused where the neuropsychiatrist colludes with the two persons responsible for protecting the mentally ill person or where the neuropsychiatrist abets in or tolerates any questionable action. There are frequent cases in which private emergency transfer services illegally transfer, confine or assault mentally ill persons. The initial term for involuntary hospitalisation is set at six months, which is not only a long term, but also one that may be continuously extended – this gives rise to concerns that involuntary hospitalisation may be used for the purpose of isolation rather than treatment. There is no procedure for protecting the rights of the mentally ill person in the process of involuntary hospitalisation. It is hard to say that deliberation by the Basic Mental Health Deliberative Committee or a *habeas corpus* petition under the *Habeas Corpus* Act provides sufficient protection against illegal or unjustified involuntary hospitalisation. In the light of all these facts, the impugned provisions violate the rule of minimum restriction.

The impugned provisions aim at providing swift and appropriate treatment for mentally ill persons, and seek to serve the public interest of ensuring the safety of the mentally ill person and that of society. However, they also impose excessive restrictions on fundamental rights by failing to provide appropriate measures to minimise the infringement on the physical freedom of mentally ill persons. Thus, the impugned provisions do not ensure the balance of interests.

Therefore, the impugned provisions deprive persons of their physical freedom by violating the rule against excessive restriction.

2. Simply declaring the unconstitutionality of the impugned provisions would remove the legal basis for involuntary hospitalisation, and would thus create a vacuum in the law, making it impossible to proceed with involuntary hospitalisation, even where necessary. Therefore, the Constitutional Court found it advisable to deliver a decision that the impugned provisions are not in accordance with the Constitution, but to order that the provisions be applied until they have been amended.

Languages:

Korean, English (translation by the Court).

Identification: KOR-2017-3-007

a) Korea / **b)** Constitutional Court / **c)** / **d)** 29.12.2016 / **e)** 2013Hun-Ma142 / **f)** Overcrowded Detention Centres / **g)** 28-2(1), *Korean Constitutional Court Report* (Official Digest), 652 / **h)**.

Keywords of the systematic thesaurus:

1.4.9.2 Constitutional Justice − Procedure − Parties − **Interest**.
5.3.1 Fundamental Rights − Civil and political rights − **Right to dignity**.

Keywords of the alphabetical index:

Detention centre, space / Detention, conditions, overcrowding, correctional institutions / Sentence, expiration / Justiciable interest / Confinement, space available per person / Authority, punish crime, limitations.

Headnotes:

The act of confining convicted prisoners in detention centre rooms that do not provide the minimum space required by a person infringes upon human dignity and worth, and thus violates the Constitution.

Summary:

I. The complainant was sentenced to pay a fine of 700 000 won for the crime of interfering with business, but was ordered to be confined in a workhouse for refusing to pay the fine. He was consequently confined in Room 14 on the ground level of Building 13 at the Seoul Detention Centre (8.96 m^2, 6 persons, hereinafter, the “room at issue”) from approximately 16:00 on 8 December 2012, to 13:00 on 18 December 2012, after which the complainant was released on the expiration of his sentence.

On 7 March 2013, the complainant filed a constitutional complaint on the grounds that the conduct of the respondent, the warden of the Seoul Detention Centre, of confining the complainant from 16:00 on 8 December 2012, to 13:00 on 18 December 2012, in the room at issue infringed upon the complainant’s fundamental rights, including his human dignity and worth.

II.1. The Constitutional Court noted that the complainant had already been released on the expiration of his sentence, and thus the complainant's rights could not be restored even if the Court accepted the request for adjudication of his case. However, there were concerns that the problem at issue, overcrowding in correctional institutions, could continue. Since this problem involved an important issue regarding the basic treatment of convicted prisoners and thus required constitutional clarification, the Constitutional Court accepted that there were, as an exception, justiciable interests in this case.

2. As regards the exercise of the state's authority to punish crime, the human dignity and worth guaranteed by Article 10 of the Constitution prohibit treating people as mere objects of state action or imposing inhumane, cruel punishment, and, in the case of the administration of criminal justice, prohibit confining people in facilities that lack the basic requirements for human survival. Although it may be inevitable for the fundamental rights of a convicted prisoner to be restricted to the minimum extent necessary to achieve the purpose of confinement, under no circumstances may the state harm the human dignity and worth of a convicted prisoner.

3. In judging whether the complainant's human dignity and worth had been infringed by his confinement in correctional facilities lacking the basic requirements for human survival, it was necessary to consider, in addition to the confinement space available per person, various circumstances such as the overall operation of the confinement facilities, the number of convicted prisoners and prison wards, the period of confinement, and national budget issues.

However, if the confinement space provided per person in correctional facilities is excessively small, so as to make it difficult for a convicted prisoner's basic needs as a human being to be met, then this exceeds the limitations on the exercise of a state's authority to punish and is, in itself, an infringement of the human dignity and worth of the convicted prisoner.

In this case, the space that was available for use per person during the time the complainant, an adult male, was confined in the room at issue was 1.06 m^2 for two days and 16 hours, and 1.27 m^2 for six days and five hours. Such space is insufficient for a Korean adult male of average height to comfortably stretch his limbs, and is so small that he must lie on his side to sleep. Thus, even considering the overall circumstances, such as the period the complainant was confined in the room at issue, and the time he spent outside of the room at issue for visits and exercise, it is highly probable that the complainant experienced severe distress in the room at issue in the form of deterioration of physical or mental health, or deprivation of the requirements needed for the basic activities of a human being. Therefore, the confinement, which took place in a space that was so overcrowded that the complainant could not maintain his minimum dignity as a human being, infringed upon the human dignity and worth of the complainant.

III. Concurring Opinion of Four Justices

In the light of Article 10 of the Constitution, which prescribes the inviolable dignity and worth of humans, the Administration and Treatment of Inmates in Correctional Institutions Act, the Basic Rules for Legal Facilities, and the Guidelines on Separate Confinement, Transfer and Recording, etc. that aim at guaranteeing a minimum basic treatment of convicted prisoners, and the relevant international norms and judicial precedents in other countries, the state, in order to protect the convicted prisoner's human dignity and worth during confinement, should secure a confinement space of at least 2.58 m^2 per each convicted prisoner within the correctional facilities. Nevertheless, considering the practical difficulties in enlarging correctional facilities, the four justices called for improvements to be made in line with the aforementioned criteria within a certain period (at the latest, within five to seven years).

Languages:

Korean, English (translation by the Court).

Kosovo
Constitutional Court

Important decisions

Identification: KOS-2017-3-003

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 18.07.2017 / **e)** KO 142/16 / **f)** The Appellate Panel of the Special Chamber of the Supreme Court on Privatisation Agency Related Matters – Constitutional review of Articles 10 and 40.1.5 of the Annex to Law no. 04/L-034 on the Privatisation Agency / **g)** *Gazeta Zyrtare* (Official Gazette), 20.07.2017 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

5.3.39.4 Fundamental Rights − Civil and political rights − Right to property − **Privatisation**.

Keywords of the alphabetical index:

Constitutional review, admissibility / Privatisation agency, affairs / Right to property, rights of third parties.

Headnotes:

Legislative provisions stating that court actions or proceedings involving a socially owned enterprise which was the subject of a liquidation decision would be suspended once the relevant court had been notified of the decision were in line with the Constitution; they did not impinge on the right to judicial protection or the rights of third parties to protection of their property.

Summary:

I. Article 113.8 of the Constitution allows courts to refer questions which have arisen during judicial proceedings over the constitutionality of a law to the Constitutional Court, where the referring court is uncertain over the compatibility of the law with the Constitution and its decision in this matter will hinge on the constitutionality of the law.

The referring court in this matter submitted a referral pursuant to Article 113.8, challenging the constitutionality of Articles 10 and 40.1.5 of the Annex to Law no. 04/L-034 on the Privatisation Agency.

It had been suggested that these provisions impinged on the property rights of third parties (such as creditors), because all court proceedings involving a socially-owned enterprise or its assets would be suspended once the referring court had been notified by the Liquidation Authority of a liquidation decision. In this context, the referring Court alleged violation of Article 46 of the Constitution (Protection of Property), in conjunction with Article 1 Protocol 1 ECHR.

II. The Court found unanimously that the referring court met all of the admissibility criteria in proceedings entailing the incidental review of norms, namely that the referring court should have the case under review; the challenged law was to be directly applied by the referring court with regard to a pending case and its decision would hinge on the question of constitutionality and finally that the referring court should specify the provisions of the challenged law which were deemed incompatible with the Constitution.

The Court, by majority, found the challenged legal provisions to be compatible with the Constitution; the Court implicitly availed itself of the 'constitutional compatibility technique', a legal technique which implies that a court, before referring a question to the Constitutional Court, must make an effort to interpret the challenged legislation in conformity with the Constitution.

The Court concluded that Articles 10 and 40.1.5 of the Annex to the Law on the Privatisation Agency did not infringe the essence of the right to judicial protection and the rights of creditors to the protection of their property; the limitation had been foreseen in legislation adopted by the Assembly and was objective and reasonable because it prevented the creation of confusion arising from the conduct of parallel proceedings before the referring court and the Liquidation Authority. Furthermore, the principle of proportionality had been applied because after the initial conduct of proceedings before the Liquidation Authority, in order to avoid parallel proceedings, procedural safeguards are offered to challenge the decisions of the Liquidation Authority before the Special Chamber of the Supreme Court (in two instances within this Chamber).

Finally, the Court concluded that the legal restrictions on the rights of third parties did not impair the essence of such rights and accordingly did not automatically violate their interests.

Languages:

Albanian, Serbian, English (translation by the Court).

Kyrgyz Republic
Constitutional Chamber

Important decisions

Identification: KGZ-2017-3-001

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 18.10.2016 / **e)** 5 / **f)** Kubandykova S.K. / **g)** *Official website and Bulletin of Constitutional Chamber* 2016 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

1.4.3.2 Constitutional Justice − Procedure − Time-limits for instituting proceedings − **Special time-limits**.

Keywords of the alphabetical index:

Pardon, repeated application.

Headnotes:

A legislative norm imposing time-limits on the ability of those convicted of crime to make a repeated application for pardon does not pose a restriction on their right to petition for clemency.

Summary:

I. Under Article 20.1 of the Law on General Principles of Amnesty and Pardon, where the application for pardon of a person who has been convicted of a particularly serious crime has been rejected, a repeated application in the absence of new, noteworthy circumstances may be made after one year from the date the earlier application was rejected; ten years for somebody sentenced to lifetime imprisonment or six months for those convicted of other crimes.

The applicant contended that this norm, to the extent that it sought to define time-limits for those convicted of crimes to file repeated petitions for pardon, was unconstitutional. Pardon is the exclusive prerogative of the President of the country, an act of the supreme authority, wholly or partially exempting the person convicted from punishment or replacing the sentence prescribed by the court with a more lenient one, and removing previous convictions from persons serving their sentences.

II. The Constitutional Chamber noted that pardon is indeed the prerogative of the President and is carried out in compliance with the requirements of exclusivity, whether it applies to one individual, due to the exceptional nature of his circumstances or to many persons convicted under a similar article of the criminal law. Sufficient grounds must exist to initiate the procedure for a pardon; the application must be backed up by appropriate evidence and circumstances. Respect for the priorities and interests of the individual must be the basis for applying the pardon.

The Constitutional Chamber observed that there are no time limits on making the first application for pardon or commutation of sentence. The time limits only come into play in cases of repeated application for pardon.

The legislator's concretisation of the mechanism for implementing the President’s constitutional powers in respect of pardon by imposing time-limits in cases of repeated application cannot be perceived as limiting the constitutional right of a convicted person to a petition for clemency.

As an additional guarantee, the legislator has provided that all convicted persons may repeatedly apply for a pardon, in the presence of new and noteworthy circumstances and this right can be realised without a deadline being set.

Languages:

Russian.

Identification: KGZ-2017-3-002

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 02.11.2016 / **e)** 6 / **f)** Manukyan S.M / **g)** *Official website and Bulletin of Constitutional Chamber* 2016 / **h)** CODICES (Russian).

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**.

5.3.13.27 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Right to counsel**.

Keywords of the alphabetical index:

Organised crime / Police database.

Headnotes:

Legislation introducing new measures to combat organised crime which may restrict rights and freedoms should not be perceived to be unconstitutional insofar as elements of the appeal process such as the participation of a lawyer and access of certain parties to the case materials are not expressly regulated. The measures are permissible; they protect the interests of the state and society as a whole.

Summary:

I. Article 15.5 of the Law on Opposition to Organised Crime allows for an appeal against a decision to place somebody on a preventive register with the various police agencies by the person against whom it was made. Article 21.3, 21.5 and 21.7 of this Law indicate that an application for fixed duties assigned by the court will be reviewed by the court with the participation of the person concerned and an official of the relevant authority. Those participating in the consideration of such an application have the right to present evidence to the court, and the court has the right to be informed about all materials submitted by the official from the authority in question. The person in respect of whom duties have been assigned and the official may appeal against the decision in the manner set out in the legislation.

The applicant contended that the above norms were incompatible with the norms of the Constitution, as they contained no provision for a person to bring a lawyer to court, when the question of their being placed on the register was under review. Furthermore, the person concerned would be unable to structure their application to contest the judicial act (and subsequently appeal it) if the facts and circumstances on the basis of which the court will make its decision were concealed.

II. The Constitutional Chamber noted that in order to meet the challenges of ensuring the safety of the individual, society and the state against the background of numerous and increasing criminal threats, the legislator has the power to take measures to create legal mechanisms to counteract organised crime. One such mechanism has been the adoption of the Law on Opposition to Organised Crime, which provides for restrictive measures against those involved in organised crime. Such measures are used to protect society and its members from dangerous encroachments; they cannot be perceived as a penalty under criminal law. They may restrict certain rights and freedoms but their aim is to prevent the perpetration of crime. Organised crime encroaches on the security of the state and public order and poses an increased level of danger for citizens. The restrictive measures in the above law are thus permissible and constitutionally compliant.

The absence in the Law of express provision for the participation of a lawyer when the court is considering the application of preventive measures does not stop the person affected enlisting assistance from a lawyer. The establishment of the universal right within the Constitution to qualified legal assistance does not link the provision of assistance from a lawyer with a formal confession from somebody who is a suspect or an accused. The right to qualified legal assistance is guaranteed to everyone, irrespective of their formal procedural status, when the authorities have taken measures that restrict freedom and personal integrity.

Restricting access to case materials by parties to the proceedings is permissible because it is aimed at ensuring national security, public order, the rights and freedoms of others, morality and public health. Divulging materials containing information on state secrets could cause irreparable damage to the state's interest in countering organised crime.

The possibility of appealing a court decision on being entered on a police register is an extra safeguard of the rights of a person who is the subject of such an order. However, the legislator did not regulate the order of proceedings when such a category of material is being considered or the process of appealing against a judicial act on the formulation of a police register and the type of duties imposed by the court. This should be regarded as a gap in legislation which the legislator must now address. The absence of legal regulation in this area cannot serve as a basis for finding the norm under challenge to be unconstitutional.

Languages:

Russian.

Lithuania
Constitutional Court

Important decisions

Identification: LTU-2017-3-005

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 15.12.2017 / **e)** KT19-N9/2017 / **f)** On providing the spouse of a deceased President of the Republic with housing under a loan-for-use agreement / **g)** *TAR* (Register of Legal Acts), 20254, 15.12.2017, www.tar.lt / **h)** www.lrkt.lt; CODICES (Lithuanian).

Keywords of the systematic thesaurus:

3.9 General Principles − **Rule of law**.
4.4.5.4 Institutions − Head of State − Term of office − **End of office**.
5.2.2.5 Fundamental Rights − Equality − Criteria of distinction − **Social origin**.
5.4.13 Fundamental Rights − Economic, social and cultural rights − **Right to housing**.

Keywords of the alphabetical index:

Status, Head, State / Constitutional, status, President, Republic / Residential, premises.

Headnotes:

The laws of the Republic cannot establish a right for the President's or a former President's spouse to receive state property under a loan-for-use agreement for temporary gratuitous management and use. A law which purported to introduce such a right was held to be incompatible with the Constitution. The Constitution prohibits the granting of privileges to individuals on the basis of their social status of a person. It was also incompatible with the constitutional principle of a state under the rule of law.

Summary:

I. The Constitutional Court declared unconstitutional a provision of the Law on the President, which provided the spouse of the President whilst in office, the spouse of a former President, or the spouse of a serving President who dies in office, with a right, if they so desired, to be provided with housing under a loan-for-use agreement.

II. The Constitutional Court noted that the status of the Head of State is acquired for the period established in the Constitution only by one person, i.e. the President, who is elected by citizens of the Republic. The legal status of the President as the Head of State is an individual one and it differs from the legal status of all other citizens and state officials. The constitutional status of the Head of State includes constitutional social guarantees, which are indivisible from the office itself.

The Constitutional Court noted that Article 90 of the Constitution, which provides for the financing of the President and the President's residence to be established by law, consolidates the constitutional guarantee that such financing be given. The purpose of this guarantee is to ensure that the President is able to properly perform their duties, which include, among other things, representing the State properly.

This constitutional guarantee means that the legislature is under a duty to establish by law financing necessary to enable the President to perform his or her duties. This duty includes the financing of the activities and residence of an incumbent President. It also includes providing for proper financing, i.e., that which is in line with the dignity and exceptional legal status of the President as the Head of State, for a former President.

The Constitutional Court emphasised that the unique constitutional status of the President as the Head of State implies the necessity of exceptional material and social guarantees. These guarantees differ from those granted to other state officials and all citizens. Furthermore, this constitutional status necessitates a prohibition on equating any other person with an incumbent or former President in respect of those material and social guarantees. The Constitutional Court also noted that the Constitution neither protects nor defends any such rights acquired by a person that are privileges in terms of their content.

According to the Constitutional Court, the impugned provision by establishing a legal basis for equating the President's spouse with that of a President of former President in terms of material and social provision. This was in conflict with the unique constitutional status of the President as Head of State. The provision was thus in conflict with Article 90 of the Constitution.

The Constitutional Court held that the mere fact that a person is the widow(er) of a person who belonged to a group of people with a certain social status (the distinction of which is objectively justified) and who, by virtue of that status, acquired the right to receive social assistance (a pension) is not in itself a ground

to justify objectively a legal regulation that would consolidate the right of the widow(er) to receive social assistance (a pension) that would differ in substance from that ensured for the widow(er)s of other individuals. The deceased's social status alone was not in itself a constitutionally justified ground for providing the widow(er) of that person social assistance of a much larger amount than that provided for other widow(er)s.

Languages:

Lithuanian.

Identification: LTU-2017-3-006

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 19.12.2017 / **e)** KT20-I1/2017 / **f)** On the actions of *Seimas* member Kęstutis Pūkas / **g)** *TAR* (Register of Legal Acts), 20413, 19.12.2017, www.tar.lt / **h)** www.lrkt.lt; CODICES (Lithuanian).

Keywords of the systematic thesaurus:

1.3.4.7.4 Constitutional Justice − Jurisdiction − Types of litigation − Restrictive proceedings − **Impeachment**.
4.5.9 Institutions − Legislative bodies − **Liability**.
4.5.11 Institutions − Legislative bodies − **Status of members of legislative bodies**.
5.2.2.1 Fundamental Rights − Equality − Criteria of distinction − **Gender**.
5.2.2.5 Fundamental Rights − Equality − Criteria of distinction − **Social origin**.
5.3.1 Fundamental Rights − Civil and political rights − **Right to dignity**.
5.3.13.1.5 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Scope − **Non-litigious administrative proceedings**.

Keywords of the alphabetical index:

Constitutional status, member, parliament / Sexual harassment / Inviolability, human person / Oath, breach / Constitution, violation / Human dignity, protection.

Headnotes:

Requirements, arising from the oath of a member of parliament and from the constitutional status of members of parliament, to respect and uphold the Constitution and laws, to perform the duties of a representative of the Nation honestly, to act in the interests of the Nation and the State, and to refrain from conduct degrading parliament's reputation and authority parliament, also determine the duty to respect those human rights entrenched in the Constitution and the duty not to use the constitutional status of members of parliament to violate the constitutional rights and freedoms of others.

Summary:

I. The Constitutional Court assessed the constitutionality of the actions of a member of parliament *(Seimas)*, Kęstutis Pūkas, against whom an impeachment case had been instituted. It examined and evaluated conduct set out in the conclusion of the Special Investigation Commission of the *Seimas* viz., that the member of parliament had: degraded the dignity of his secretary assistants and of inividuals who applied for those positions; interfered with their private life; and, subject them to discriminatory behaviour. The Constitutional Court held that, by these actions, the member of parliament had grossly violated the Constitution and breached the oath of office.

II. The Constitutional Court noted that in a democratic state under the rule of law all state institutions and officials must follow the Constitution and law. To secure this it is necessary to provide for public democratic control over the activity of state officials, who must be accountable to society. One form of such public democratic control, and accountability, is the constitutional institution of impeachment.

The Constitution contains a prohibition on humiliating human dignity. It also places a duty one the state to ensure the protection and defence of human dignity, which is an inalienable human characteristic and has the greatest social value. Every member of society has innate dignity. Under the Constitution, the protection of human dignity is inseparable from the protection of an individual's private life. The guarantee of the inviolability of private life must be regarded as one of the elements of the constitutional protection of human dignity.

One of the forms of discrimination (including the degradation of human dignity), prohibited under Article 29 of the Constitution, is harassment. This is understood as offensive, unacceptable, or unwanted

conduct that has the purpose or effect of violating a person's dignity, or of creating an intimidating, hostile, humiliating, or offensive environment for him or her on the grounds of gender, race, nationality, language, origin, social status, belief, convictions, or views, as well as other attributes such as disability, age, or sexual orientation. Thus, harassment violates the human rights: to the protection of dignity; of the inviolability of the human person; and, to a private life.

Harassment based on gender is understood as unacceptable or unwanted conduct related to a person's gender, which is expressed by physical, verbal, or non-verbal actions (by means of touch or gestures, verbally, in writing, or by means of pictures) and which, among other things, has the purpose or effect of violating a person's dignity, or of creating an intimidating, hostile, humiliating, or offensive environment for him or her. The characteristic feature of sexual harassment, which is one of the forms of harassment based on gender, is conduct of a sexual nature seen as unwanted by a harassed person.

It was emphasised that conduct by a member of parliament that can be considered to be harassment inevitably undermines parliament's reputation and authority, representation of the Nation, as well as discrediting state authority. It does so irrespective of whether such conduct is related to the member of parliament's parliamentary activity or use of their constitutional status. Conduct by a member of parliament that is discriminatory, degrades human dignity, and can also be regarded as harassment based on gender, as well as sexual harassment, should be considered to be a gross violation of the Constitution.

Having evaluated the evidence, the Constitutional Court held that the member of parliament member interacted in an uncivil and disrespectful manner with his female secretary assistants at work and with the persons applying for these positions during job interviews. When talking to them, he did not refrain from picking intimate, disturbing, sex-related, and other exclusively personal topics, which were unrelated to the responsibilities of a member of parliament's secretary assistant, but were connected, among other things, with the private life of these individuals. He commented on their appearance and physical characteristics and emphasised that his own social status was higher than that of other employees and of the women applying for the position of secretary assistant. He made humiliating and degrading comments to the women. He only invited young women for job interviews for the position of secretary assistant, preferring unmarried female candidates who were not in a personal relationship at the time. In addition to meeting them in his workplace, he also met candidates applying for the position of his secretary assistant in his living quarters at the hotel of the parliament.

In the premises, the Constitutional Court held that the member of parliament, Kęstutis Pūkas, had disregarded the requirements, arising from the oath of a member of parliament and from the constitutional status of a member of parliament, to respect and uphold the Constitution and laws. He had failed to act in the way that the oath required and had discredited parliament's the reputation and authority.

Cross-references:

European Court of Human Rights:

- *Jersild v. Denmark*, no. 15890/89, 23.09.1994, Series A, no. 298;
- *Axel Springer v. Germany,* no. 39954/08, 07.02.2012;
- *Steel and Morris v. United Kingdom,* no. 68416/01, 15.02.2005, *Reports of Judgments and Decisions* 2005-II;
- *Bédat v. Switzerland,* no. 56925/08, 29.03.2016, *Reports of Judgments and Decisions* 2016;
- *Barthold v. Germany,* no. 8734/79, 31.01.1986, Series A, no. 98;
- *Haldimann and others v. Switzerland*, no. 21830/09, 24.02.2015, *Reports of Judgments and Decisions* 2015.

Other Courts:

- Constitutional Court of Spain, no. 224/1999, 13.12.1999;
- Supreme Court of Canada, no. 20241, 04.05.1989.

Languages:

Lithuanian.

Identification: LTU-2017-3-007

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 22.12.2017 / **e)** KT22-I2/2017 / **f)** On the actions of *Seimas* member Mindaugas Bastys / **g)** *TAR* (Register of Legal Acts), 60, 02.01.2018, www.tar.lt / **h)** www.lrkt.lt; CODICES (Lithuanian).

Keywords of the systematic thesaurus:

1.3.4.7.4 Constitutional Justice − Jurisdiction − Types of litigation − Restrictive proceedings − **Impeachment**.
4.5.9 Institutions − Legislative bodies − **Liability**.
4.5.11 Institutions − Legislative bodies − **Status of members of legislative bodies**.
4.11.3 Institutions − Armed forces, police forces and secret services − **Secret services**.
5.3.13.1.5 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Scope − **Non-litigious administrative proceedings**.

Keywords of the alphabetical index:

Constitutional status, member, parliament / Oath, breach / Constitution, violation / Classified information / State secrets.

Headnotes:

A member of parliament is under a duty to provide state institutions that are responsible for making decisions concerning the right to handle or access classified information with all such information as required and do so in a fair manner. A failure to fulfil this duty can form grounds for doubting the member of parliament's integrity. It can provide a basis to doubt whether they are acting in the Nation and the State's interest and their respect for the Constitution and laws. It can thus form the basis of doubting their loyalty to the Republic, raising the question whether they pose a threat to the protection of state secrets and to the values consolidated and protected under the Constitution.

Summary:

I. The Constitutional Court assessed the constitutionality of the actions of a member of parliament, Mindaugas Bastys, against whom impeachment proceedings had been instituted. It held that he had grossly violated the Constitution and breached his parliamentary oath. He had done so in respect of answers given to the Questionnaire for candidates to obtain authorisation to access classified information. Specifically, in his answers to the question "Do you know (did you know) any persons who are working (worked) in the intelligence or security services or related institutions of other states? If so, provide information in this regard", he had failed to disclose his relationship with a former KGB official. By acting in this way he had violated the requirement, laid down in the Law on State Secrets and Official Secrets, to provide information about relationships affecting a decision to grant an authorisation to handle or access classified information, and had done so in bad faith. Upon obtaining this authorisation, due to his relationships, he could pose a threat to the protection of state secrets.

II. The Constitutional Court noted that one of the forms of public democratic control is the constitutional institution of impeachment. The oath and constitutional status of a member of parliament places a duty upon them to be loyal to the Republic, respect and observe its Constitution and laws, conscientiously perform their duties as a representative of the Nation, and act in the Nation and the State's interests. These constitutional duties also lead to the duty to protect those state secrets that the member of parliament comes to know in the course of performing their duties as a representative of the Nation. This duty, as well as the requirement for a member of parliament to act in good faith, gives rise to the duty to provide state institutions that make decisions regarding the right of access information constituting state secrets with all requisite information, including information about relationships with other persons with whom communication can affect the protection of state interests and state secrets. Failure to fulfil this duty can provide grounds for doubting the member of parliament's integrity, their ability to act in the Nation and the State's interests, their respect for the Constitution and laws, and thus their loyalty to the Republic. Improper provision of information to those state institutions that make decisions regarding the right to handle or access information constituting state secrets can also lead to a situation where a person who is neither reliable nor loyal to the State will be able to access such secrets and thereby pose a threat to their protection and, thus, also to the values consolidated and protected under the Constitution.

Assessing the explanation provided by the member of parliament that while completing the Questionnaire, he had, purportedly, forgotten to indicate his relationship with a former KGB official, the Constitutional Court drew attention to the fact that the member of parliament knew him rather well, had maintained a rather close communication with him, and had been aware of his activities in the KGB.

In view of all the above circumstances, the Constitutional Court concluded that the member of parliament, Mindaugas Bastys, in his replied to the Questionnaire, had concealed his relationship with the former KGB official while seeking, in bad faith, to obtain authorisation to handle or access information classified as "Top Secret".

The Constitutional Court recognised that by acting in this way, the member of parliament had failed to fulfil the duty to provide those state institutions that make decisions concerning the right to access information constituting state secrets with all the required information, including information about relationships with other persons with whom communication can affect the protection of state interests and state secrets.

The Constitutional Court noted that information classified as "Top Secret" means information constituting a state secret. Such information requires the highest level of protection, as its loss or unauthorised disclosure may harm fundamental constitutional values, may pose a threat to the sovereignty or territorial integrity of the Republic, may lead to particularly serious consequences for the interests of the state, or endanger human life. Improper provision of information to state institutions that make decisions regarding the right to handle or access information constituting state secrets can lead to individuals who are not reliable or loyal to the State being able to access state secrets and, thereby, pose a threat to the protection of those secrets and, thus, also to the values consolidated and protected under the Constitution.

In the premises, the Constitutional Court declared that the member of parliament, Mindaugas Bastys, had grossly violated the Constitution and, at the same time, had breached his oath.

Languages:

Lithuanian.

Luxembourg
Constitutional Court

Important decisions

Identification: LUX-2017-3-002

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 17.03.2017 / **e)** 00128 / **f)** / **g)** *Mémorial* (Official Gazette), A, no. 353, 03.04.2017 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.2.1 Fundamental Rights − Equality − **Scope of application**.
5.4.6 Fundamental Rights − Economic, social and cultural rights − **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Trade, freedom / Trade, rules and regulations / Opening hours, principle.

Headnotes:

The restriction on the selling of bakery products during legal shop-opening hours compared to the situation pertaining to petrol stations, which can sell bakery products twenty-four hours a day, creates a disparity between traders to the detriment of the former. The disparity is not based on objective criteria and is not rationally justified.

Summary:

I. Under Luxembourg law, the rules governing the closing of trade and crafts retail shops are set out in a law, the latest version of which (the law of 21 July 2012) stipulates that closing hours are to be understood as follows:

> "- before 6 a.m. and after 7 p.m. on Saturdays and on days preceding public holidays, with the exception of the days preceding the national holiday, Christmas and New Year's day, when closing time is fixed at 6 p.m.;
> - before 6 a.m. and after 8 p.m. on other days; however, once a week, shops may close as late as 9 p.m."

Another provision of this law stipulates that these regulations do not apply to:

> "- Shops selling bakery products (…), pastry products or confectionery (…) within railway stations;
> (…)
> - petrol stations with regard to the following services: motor vehicle towing-away services, and the sale of fuel, lubricants, spare parts, accessories or car maintenance products that are essential to the smooth running of vehicles or for vehicle recovery as well as the sale of foodstuffs and other essential products – provided that the area for selling such products is located near the cash desk and does not exceed 20 m²."

A company running a bakery and pastry shop lodged an appeal with the administrative courts asking that a decision issued by the Ministry of Economy of 23 July 2015 be declared null and void. The decision concerned the refusal to exempt it from the legal opening hours that applied to its bakery and pastry shop. It claimed that as a result of the regime introduced by the amended law of 19 June 1995 governing the closing hours of retail shops in the field of trades and crafts, it was treated in an unequal and discriminatory fashion compared to petrol stations, which were not subject to the restricted hours set out in the said law, provided that their sales area did not exceed 20m²; it claimed to be in a situation comparable to that of the neighbouring petrol stations, which competed with it in selling the same type of bakery and pastry products without being subjected, as it was, to restricted opening hours. This difference in treatment was not objective or rationally justified, appropriate, or proportionate to its aim but contrary to paragraph 1 of Article 10*bis* of the Constitution and possibly Article 111 of the Constitution.

The administrative court submitted a preliminary question to the Constitutional Court, which read as follows:

> "Are the provisions of the amended Law of 19 June 1995 governing the closing hours of trade and crafts retail shops currently in force following the enactment of the Law of 21 July 2012 amending the amended Law of 19 June 1995 governing the closing hours of retail shops in the field of trades and crafts, which revoked former Article 5 of amended Law of 19 June 1995 governing the closing hours of trade and crafts retail shops, in keeping with paragraph 1 of Article 10*bis* of the Constitution, given that they result in a difference of treatment with regard to the closing hours to be respected by bakery and pastry shops and petrol stations, both of which sell bakery and pastry products?"

II. The Constitutional Court considered that the applicant and petrol stations were in comparable situations and in competition with each other, that the bakery shop was restricted in its sale of bakery and pastry products by the closing hours stipulated in the Law of 2012, whereas petrol stations are not subject to these restrictions as they were not covered by the scope of application of the law with regard to the sale of essential foodstuffs, which includes bakery and pastry products, provided that the area for selling such products was located near the cash desk and did not exceed 20 m².

It therefore held that the legal provisions governing the closing hours of retail shops in the field of trades and crafts, insofar as they related to the sale of bakery and pastry products by artisan bakeries and petrol stations, were not in keeping with paragraph 1 of Article 10*bis* of the Constitution, which concerns the principle of equality.

Languages:

French.

Moldova
Constitutional Court

Statistical data
1 January 2017 – 31 December 2017

Pending complaints in 2017 (including those lodged in 2016): 200

By object:

- Exceptions of unconstitutionality: 154
- Review of constitutionality: 27
- Interpretation of the Constitution: 7
- Confirmation of the results of elections and validation of MP mandates: 7
- Request of opinion on an initiative to revise the Constitution: 5

Pending complaints in 2017: 200

By object (from legal perspective):

- Criminal law: 43%
- Social, economic and cultural rights: 23%
- Civil law: 16%
- Administrative law: 9%
- Socio-political rights: 6%
- Political rights: 3%

Judgments delivered in 2017: 172

By type:

- Inadmissibility decisions: 125
- Judgments: 40
- Opinions: 5
- Restitution letters: 2

Judgments delivered in 2017: 40

By object:

- Settlement of exceptions of unconstitutionality: 19
- Review of constitutionality of acts: 10
- Validation of MP mandates: 7
- Interpretation of the Constitution: 3
- Approval of the Report on Constitutional Jurisdiction in 2016: 1

Important decisions

Identification: MDA-2017-3-006

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 17.10.2017 / **e)** 28 / **f)** On interpreting the provisions of Article 98.6 in conjunction with Articles 1, 56, 91, 135 and 140 of the Constitution (in the part related to the failure of the President to carry out constitutional duties) / **g)** / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

4.4.2 Institutions − Head of State − **Temporary replacement**.
4.4.3.2 Institutions − Head of State − Powers − **Relations with the executive bodies**.
4.6.4.1 Institutions − Executive bodies − Composition − **Appointment of members**.

Keywords of the alphabetical index:

President, duty of office, violation / President, suspension / President, vacancy / Presidential power / President, powers, limits, parliamentary regime / President, *ad interim* office / Oath, president, effect.

Headnotes:

A deliberate refusal by the President of the State to execute part of their constitutional duties in respect of a Government reshuffle affected the proper functioning of the Government and Government Ministries.

The President's intentional failure to discharge the constitutional duty to appoint certain members of the Government, following repeated recommendations for appointment by the Prime Minister, amounted to a violation of that duty. This failure justified the use of the constitutional power to suspend the President on a temporary basis. An interim President would act in the President's place, with the holder of that temporary office being, in the given order, the Speaker of the Parliament or the Prime Minister.

Summary:

I. An application was lodged with the Constitutional Court by the Government. It sought an interpretation of Article 98.6 of the Constitution. It specifically asked the Court to interpret that part of the article which concerns a failure by the President to carry out their constitutional duties.

II. The Court found that the institutional deadlock created following the refusal of the President of the Republic of Moldova to swear in a minister after the Prime Minister had repeatedly proposed their appointment, resulted from deliberate action by the President and from the failure to enforce one of its earlier judgments in which it had held the President to be under an obligation to appoint the candidate for such an appointment where the Prime Minister repeatedly makes the same proposal.

The Court noted that, within the parliamentary regime, a deliberate refusal by the President to fulfil the constitutional duty to appoint the person repeatedly proposed by the Prime Minister represented a serious infringement of their constitutional duties and oath of office. Such circumstances justified Parliament initiating the applicable procedure to suspend the President from office. The Court further held that use of the procedure to dismiss the President from office was a matter for Parliament to determine. In determining whether to invoke that process it was necessary, however, for Parliament to take account of the fact that the removal process was complex and lengthy and, as such, is unable to provide a prompt means of ensuring that the fundamental institutions of State, whose functioning had been deliberately obstructed by the President, could return to full functionality.

The exceptional situation created by the President's deliberate refusal to fulfil the office's constitutional duties rendered it necessary to identify an exceptional solution. The Court held that, in order to establish the genuine will of the constituent legislator, it was necessary to apply a functional interpretation to the Constitution, it being a "living instrument" that was to be interpreted in the light of current social and political realities. Through such an approach it would be able to guarantee both the continuous and effective functioning of State Institutions.

Articles 90 and 91 of the Constitution identify two ways in which it may be impossible for the President to exercise their office:

a. temporary impossibility. Where this arises an interim office will be instituted without having to make the office of President vacant. In such a case the President may resume their office;
b. permanent impossibility, other than death. In this situation the President cannot exercise their office for more than 60 days. This renders the office vacant. Presidential elections must subsequently take place, with an interim office being instituted during the interregnum.

The Court held that Presidential inaction arising from a deliberate failure to exercise the office's constitutional functions gave rise to deadlock amongst the other State institutions. This was the case whether the failure to act arose on "objective" or "subjective" grounds. The Court noted that, in cases of a deliberate refusal to execute constitutional duties, the President had removed him or herself from the exercise thereof. It further held that deliberate inaction by the President constituted a situation of temporary impossibility to exercise the office's functional competences and that this justified an interim office being established. The interim office was held, according to the given order, by the Speaker of the Parliament or by the Prime Minister.

Supplementary information:

Legal norms referred to:

- Articles 90, 91 and 98.6 of the Constitution.

Languages:

Romanian, Russian (translation by the Court).

Identification: MDA-2017-3-007

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 12.12.2017 / **e)** 35 / **f)** On the control of the constitutionality of certain provisions of Article 112.2 of the Electoral Code / **g)** / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

4.4.4.2 Institutions − Head of State − Appointment − **Incompatibilities**.

Keywords of the alphabetical index:

President, arbitrator / Incompatibility of public offices / Political incompatibility / Political neutrality / Duty of ingratitude.

Headnotes:

The constitutional right of citizens to freely associate in parties and other social-political organisations is not absolute. It may be made subject to restrictions as provided by law.

The Electoral Code prohibits the President of the Republic of Moldova from holding membership of a political party. Its aim is to prevent the President from promoting party political interests. Within the constitutional architecture, the President is a neutral arbiter between state powers, society and political parties. As such the President is obliged to act in the interests of Society as a whole and not for the benefit of only a part of it.

Summary:

I. A Member of Parliament lodged a complaint with the Constitutional Court concerning the constitutionality of the prohibition, under certain provisions of Article 112.2 of the Electoral Code, on party political membership by the President of the Moldova.

II. The Court noted that the limitations imposed on the right to associate in political parties are governed expressly by constitutional provisions that refer to the purposes, or activity, of political parties and the characteristics of individuals capable of acquiring party membership.

The Court also relied on those provisions of the European Convention on Human Rights that allow freedom of association to be restricted for members of the:

1. armed forces;
2. police force; and
3. state administration.

In this respect, the European Court of Human Rights has recognised the legitimacy of restricting political activity by certain public authorities, taking into account the need to ensure their political neutrality and the proper fulfilment of their obligations in an impartial manner in order to secure the equal and fair treatment of all citizens.

The Court underlined the fact that the Head of State plays the role of a neutral arbiter, or a neutral power. The restriction imposed on the President was not aimed at suppressing freedom of association. It is of benefit to this office as it contributes to the establishment of a favourable framework for the exercise of constitutional powers through "being detached from political parties". The President is an important element of the political system; however, he or she should not be politically partisan.

The Court held that the obligation placed on the President to relinquish political party membership is derived from the "duty of ingratitude" towards the party that supported him or her in the elections. Permitting the President to maintain party membership, through enabling a political party to use the fact of membership and the image and office of Head of State for political reasons, would ultimately result in the presidential institution being associated with that political party.

The Court noted that different categories of elected officials, including the President, are in different legal situations. The criterion of "political neutrality" cannot be applied to Members of Parliament and members of the Government in the same manner as it is applied to the President. The former two elected categories of elected official, by definition, cannot be politically neutral.

The Court therefore held that the President is bound to act in the interests of the whole of Society rather than for those of a specific part of it, or those of a political group or a party. For these reasons, the President cannot hold membership in any political party and cannot, in any way, promote the interests of a political party.

Thus, the Court held that the prohibition on holding party political membership that is imposed on the President of the Republic of Moldova falls within the permissible limits of the restriction on the right to associate in political parties. It is therefore compatible with Article 41.1 and 41.7 of the Constitution.

Supplementary information:

Legal norms referred to:

- Article 41.1 and 41.7 of the Constitution;
- Article 112.2 of the Electoral Code, no. 1381, 21.11.1997;
- Article 11.2 ECHR.

Cross-references:

European Court of Human Rights:

- *Ždanoka v. Latvia,* no. 58278/00, paragraph 117, 16.03.2006, *Reports of Judgments and Decisions* 2006-IV.

Languages:

Romanian, Russian (translation by the Court).

Montenegro
Constitutional Court

Important decisions

Identification: MNE-2017-3-003

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 29.09.2017 / **e)** U-I br. 22/15 / **f)** *Službeni list Crne Gore* (*OGM*) (Official Journal), no. 76/17 / **g)** / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

3.9 General Principles − **Rule of law**.
3.10 General Principles − **Certainty of the law**.
3.13 General Principles − **Legality**.
3.18 General Principles − **General interest**.
3.22 General Principles − **Prohibition of arbitrariness**.
5.3.39 Fundamental Rights − Civil and political rights − **Right to property**.

Keywords of the alphabetical index:

Prohibition of discrimination / Enforced collection of a bill of exchange / Right to equal protection of rights and freedoms / Enforcement procedure − securing claims / Legal security / Right to peaceful enjoyment of property.

Headnotes:

Montenegro is a civil, democratic, ecological State committed to social justice, which is based on the rule of law. Constitutionality and legality are protected by the Constitutional Court. Its law must be in compliance with the Constitution and any ratified international agreements. Other regulations must also be in compliance with the Constitution and law.

The Constitution guarantees the right to property (Article 58.1), which is also guaranteed by Article 1 Protocol 1 ECHR. The Law on Bills of Exchange (*Official Gazette of the Republic of Montenegro*, no. 45/05) governs the law relating to and method of conducting business using bill of exchange.

The Law on Notaries (*Official Gazette of the Republic of Montenegro*, no. 68/05; *Official Gazette of the Republic of Montenegro*, nos. 49/08 and 55/16)

regulates notarial work as a public service, establishes its organisation, powers, working method, stipulates for which legal transactions notarial processing is mandatory for the them to be legal valid, and other important issues concerning notarial work in Montenegro. According to Articles 55, 56.4 and 75.1.3 of the Law, a notary is authorised to certify factual matters relevant to the validity of legal transactions and the consequent fulfilment of obligations arising from them i.e., offer, reminder, cancellation, termination of a contract. Notaries may also, through taking notarial minutes, take statements of witnesses which may be a condition necessary for the enforcement of a settlement; take statements on filing a challenge to a bill and cheque, in compliance with the law, and to maintain the register of such challenges. The Law on Enforcement and Securing of Claims systemically regulates enforcement procedures and the procedure through which it is secured. Public enforcement officers are in charge of ruling on and conducting the enforcement process, pursuant to Article 3.1 of the Law, except in the cases for which the law prescribes the jurisdiction of a court. In the enforcement process the court and the public enforcement officer issue the writ of execution, against which objection may be filed (Articles 7.1 and 8.1 of the Law). Enforcement is ordered on the basis of an order for payment or a verbatim record, unless the law prescribes otherwise. Enforcement in order to realise a monetary claim can also be ordered on the basis of a bill of exchange and cheque, which are verbatim records (Articles 17, 25.1 and 2.1 of the Law). Objections to a writ of execution may be filed on the basis of a verbatim record for reasons prescribed in Article 58 of the Law. An objection filed against a writ of execution which has been issued on the basis of a bill of exchange does not defer enforcement of the writ and, therefore, it may be enforced prior to its legal validity having been established by way of injunction and payment from funds in the enforcement debtor's account (Articles 60.5, 61.2, 136.4 and 136.5 of the Law).

According to the European Court of Human Rights, a law must sufficiently clearly establish the scope of a competent authority's discretionary powers as well as the manner in which such rights are to be exercised. Furthermore, the law must establish the scope of any discretionary right afforded to an authorised authority and be formulated with sufficient precision so as to provide adequate protection against the arbitrary exercise of any such discretionary right.

The principle of the rule of law, as the highest value of Montenegro's constitutional order, is implemented by applying and protecting the principle of legislative conformity. This requires that law must be in compliance with the Constitution, with any ratified and published international agreements, and with other Constitutional and legal provisions. Regularity is not required only as a matter of legal formality. It is also required in terms of the substantive law, and its contents. A law must be clear and precise. It must be singularly focused on the matter it regulates. In this way arbitrary interpretation and application of the law is prevented. Furthermore, it eliminates any uncertainty as to whom the legal norm applies to and as to their ultimate effect. Legal provisions that allow uncertainty with respect to their ultimate effect, according to the Constitutional Court, cannot be deemed to be provisions based on the principle of the rule of law, or those that establish the principle of legal certainty and predictability. According to Article 145 of the Constitution, legislative conformity implies either the mutual harmonisation of all of Montenegro's legislation or that the legal order demonstrates its conformity by regulating social relations through ensuring that all the acts and norms which constitute it, are harmonised to the same end such that they provide proper protection for the fundamental rights and interests of individuals and for the protection and realisation of the interests of the society as a whole.

Summary:

I. On a motion of five MPs in the Parliament of Montenegro the procedure for assessing the constitutionality of the provisions of Article 218.a of the Law of the Law on Enforcement and Securing of Claims (*Official Gazette of Montenegro*, nos. 36/11, 28/14, 20/15 and 22/17) was instituted.

The motion stated that provisions in Article 218.a of the Law were not compliant with Articles 8, 19, 20, 58.1, 58.2 and 139 of the Constitution and Article 1 Protocol 1 ECHR. Those provisions guarantee the prohibition of discrimination, the right to equal protection of rights and freedoms, the right to a legal remedy, the right to property and to the established principles of the economic system. Furthermore, the motion stated that the legislator had acted beyond its authority when, in addition to the procedure for decision-making in enforcement and in respect of the manner in which bills of exchange are enforced by way of verbatim record prescribed by the Law on Enforcement and Securing of Claims, it had introduced via Article 218.a of the Law. That provision was said to impermissibly enabling an enforcement creditor to request the enforced collection of a bill of exchange by submitting a request for enforcement directly to the Central Bank of Montenegro, without instituting the enforcement process and without notifying the bill debtor that they would thus be deprived of their property. It was said to be impermissible because: the legislator had not

established a public interest justifying the provisions in the Article; the provisions were a gross violation of the right to property; the provisions were discriminatory in their effect such that legal entities and entrepreneurs were not treated on an equal legal footing with natural persons.

II. In reaching its decision, Constitutional Court also took account of the constitutional principle of conformity of the legal order, specified in Article 145 of the Constitution, which implies the mutual harmonisation of all legislative provisions in Montenegro.

In the procedure further to the motion for execution based on a bill of exchange, as a verbatim record, a public enforcement officer by way of writ of execution, requires the enforcement debtor to settle the claim within three days, as of the date of submission of the writ, together with the established costs and orders enforcement for the purpose of enforced collection of such claims. Enforcement may be conducted prior to the legal validity of the writ of execution being established. It is implemented by way of an injunction and payment from funds in the enforcement debtor's bank account. As such the writ is first submitted to the bank. The bill debtor is only then informed of the writ after the bank notifies the public enforcement officer that the injunction has been imposed.

The contested provisions in Article 218.a of the Law on Enforcement and Securing of Claims, in addition to the procedure prescribed by Articles 25, 41, 44 and 60 of that Law, prescribe a special procedure for collecting debts under a bill of exchange. According to this procedure, the bill creditor is authorised to submit a request for enforcement of the bill of exchange directly to the organisation in charge of enforcing collection of the debt. They may do so if they have not previously secured payment of the bill of exchange in a commercial bank, but instead the bank, on the back of the bill of exchange or on a separate document, has recorded that collection of the debt due was not effected or that it was only partially effected. In such circumstances, the bill creditor is then obliged to indicate in a request for enforcement, amongst other things, that: they are submitting the bill of exchange with the bank's statement; and that the organisation in charge of enforcing collection of the debt is acting upon the request for enforcement pursuant to Articles 205 to 218 of the Law, in those cases where the bill debtor is a legal entity or entrepreneur.

Therefore, the Constitutional Court found that the challenged provisions of Article 218.a of the Law failed to satisfy both the requirements for legal security and the rule of law referred to in the Constitution and those of the European Court of Human Rights with respect to the quality of law. They did so because they are not in sufficiently technical language, are imprecise and are accordingly ambiguous in meaning in various ways. The Constitutional Court therefore held that the provisions of Article 218.a of the Law that derogate from the enforcement procedure based on a bill of exchange, neither prescribe the process of supervision or control of data specified in the request, nor the legal remedy by which the bill creditor's request can be challenged if: the bill of exchange is not in a valid legal form; the claim has not arisen; the contents of the bill of exchange are false; liability has not become due; or, liability has been settled or otherwise terminated.

Having considered this, the Constitutional Court found that collecting a basic debt under a bill of exchange under the enforcement procedure provided for by Article 218.a of the Law deviated from the rules concerning enforcement based on a bill of exchange set out in stipulated in Articles 25, 41, 44 and 60 of the Law, and did so without reasonable and objective justification. As such it rendered the enforcement procedure unacceptably arbitrary.

The Constitutional Court found that the provisions of Article 218.a of the Law also violated constitutional principles concerning limitations that can properly be placed on human rights and freedoms and on the protection of property rights, as provided for in Articles 24, 58.1 and 58.2 of the Constitution and Article 1 Protocol 1 ECHR.

According to the European Court of Human Rights, Article 1 Protocol 1 ECHR stipulates that State interference with the right to peaceful enjoyment of property is permissible only if three requirements are met cumulatively:

1. it must be prescribed by law (i.e. legal);
2. it must be in the public or general interest (i.e. legitimate); and
3. it is necessary in a democratic society, or it is "reasonable" and "proportionate" to the goal that is desired to be achieved thereby.

As the provisions of the Law under challenge did not satisfy the public interest test, the Constitutional Court did not go on to consider the other tests.

Bearing in mind that the contested provisions of Article 218.a of the Law were a flagrant limitation of the right to property guaranteed by the Constitution, and given the protection of that right provided by the Constitution and the European Convention as well as the approach taken by the European Court with respect to the conditions under which States may interfere with the right to peaceful enjoyment of

property, the Constitutional Court found that the contested provisions of Article 218.a of the Law, for the reason set out above, were not compliant with the provisions of Articles 24 and 58.2 of the Constitution and Article 1 Protocol 1 ECHR.

The Constitutional Court therefore abolished the contested provisions of Article 218.a of the Law.

Cross-references:

European Court of Human Rights:

- *The Sunday Times (no. 1) v. United Kingdom*, no. 6538/74, 26.04.1979, Series A, no. 30;
- *Malone v. United Kingdom*, no. 8691/79, 02.08.1984, Series A, no. 82;
- *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, no. 38433/09, 07.06.2012, *Reports of Judgments and Decisions* 2012;
- *Iatridis v. Greece*, no. 31107/96, 25.03.1999, *Reports of Judgments and Decisions* 1999-II;
- *James and Others v. United Kingdom*, no. 8793/79, 21.02.1986, Series A, no. 98-B, pp. 29-30, paragraph 37.

Languages:

Montenegrin, English.

Peru
Constitutional Court

Important decisions

Identification: PER-2017-3-001

a) Peru / **b)** Constitutional Court / **c)** Plenary / **d)** 24.09.2012 / **e)** 1126-2011-HC/TC / **f)** Native community v. Security division of the national police force of Peru with a centre Tambopata / **g)** / **h)**.

Keywords of the systematic thesaurus:

5.3.39 Fundamental Rights − Civil and political rights − **Right to property**.
5.5.5 Fundamental Rights – Collective rights – **Rights of aboriginal peoples, ancestral rights**.

Keywords of the alphabetical index:

Indigenous, community, territory, entry / Communal autonomy, constitutional legitimacy.

Headnotes:

The Judiciary has to decide on access to communal territory of indigenous peoples on the basis of constitutional rights of communal autonomy and territorial ownership of the communities.

Summary:

I. Notwithstanding the native community of Three Islands decision made several years ago, when it obtained autonomy, to prevent the entry of strangers to their territory, their community has suffered illegal logging that deforested the area, deteriorated their environment, destroyed the *aguajales*, plants, fish, birds and animals of the mountain. All due to activity of artisanal mining developed by unauthorised people with no environmental control, nor any supervision. Also these activities generated a general deterioration in their health and work conditions.

The Jungle of the Amazon was included in 2015, by the World Wildlife Fund (WWF), in the list of the main regions in danger of deforestation. The Peruvian Amazon has as main cause of its deforestation illegal logging, affecting nearly 1 100 square miles (2 849 km^2) which are deforested every year and

almost 80% of it in an illegal way. All this ends affecting not only the Peruvian fauna, but also causes half of the emissions of gases of the global warming at a national level (Data taken from *La deforestación en el Perú* by Julian Smith and Jill Schwartz, 2015, Editorial Nicolas Villaume).

II. The Constitutional Court declared well-founded the petition for *habeas corpus* filed by the native community of Three Islands (located in Tambopata, Madre de Dios, Peru) against the writ issued by the Appeals Chamber. This annulled the judicial resolution that allowed the entry of persons outside the native community into its territory. The Court argued that the judgment questioned did not recognise that by allowing such income was violating communal autonomy and territorial ownership of the native community.

In this sense the Court considered the constitutional legitimacy of the native community of Three Islands, in its virtue exists the capacity to regulate who enters their territory. This consideration will be taken into account not only by private persons but also by the judiciary and the Attorney General, even when in the past these had not done so.

Supplementary information:

This sentence constitutes a paradigmatic advance in the matter of indigenous rights taking into account the jurisprudence line of the Constitutional Court. It makes enforceable rights that were enshrined in the Political Constitution of 1993 and International Law, but had no practical application. It integrates sources of indigenous people's rights interpreting from a progressive perspective and allowing resolving conflicts between norms that recognise rights and others that deny or restrict them.

Languages:

Spanish.

Identification: PER-2017-3-002

a) Peru / **b)** Constitutional Court / **c)** Plenary / **d)** 08.09.2016 / **e)** 1423-2013-PA/TC / **f)** Andrea Celeste Álvarez Villanueva v. Ministery of Defense, General of the Peruvian Air Force, Director of the School of Officers / **g)** / **h)**.

Keywords of the systematic thesaurus:

4.11.1 Institutions − Armed forces, air forces − **Armed forces**.
5.2.1.2.2 Fundamental Rights − Equality − Scope of application − Employment − **In public law**.
5.2.2 Fundamental Rights − Equality − **Criteria of distinction**.
5.2.2.1 Fundamental Rights − Equality − Criteria of distinction − **Gender**.

Keywords of the alphabetical index:

Army, school, student, pregnancy, dismissal / Pregnancy, dismissal / Student, pregnancy, dismissal.

Headnotes:

The protection of women is not limited to their biological condition during and after pregnancy, but also extends to the different types of relationships that can be established in an educational and occupational society. The prohibition of access to education or expulsion of a student because of her pregnancy constitutes direct discrimination based on sex as can be for example the refusal to hire a pregnant woman or when a worker perceives lower remuneration than a male employee that does the same work.

Summary:

The judgment declared inapplicable, because of unconstitutionality, Articles 42.c and 49.f of the Supreme Decree on the basis of which the appellant was dismissed from the School of officers of the Peruvian Air Force.

The majority decision of the Magistrates (Judges of the Constitutional Court) Miranda Canales, Ledesma Narvaez, Urviola Hani, Blume Fortini, Ramos Nuñez, and Espinoza-Saldaña Barrera held that this was a manifestation of direct discrimination because there was no possibility to objectively justify the reasonableness and the proportionality of the measure.

All judges who have pending lawsuits applying the challenged act's legal provisions referred to Article 138 of the Constitution, are under the responsibility to exercise diffuse control observing the interpretation made by the Constitutional Court in the present case.

The separate vote of the Magistrate Sardon argues that the appellant voluntarily requested her dismissal but then claimed to have been coerced. Therefore this situation should have been verified through an ordinary judicial way. It requires a complex evidentiary activity which is not possible in the a*mparo* process.

Languages:

Spanish.

Identification: PER-2017-3-003

a) Peru / **b)** Constitutional Court / **c)** Plenary / **d)** 08.11.2016 / **e)** 6040-2015-PA/TC / **f)** Ana Romero Saldarriaga v. Reniec, Attorney general / **g)** / **h)**.

Keywords of the systematic thesaurus:

2.1.3.1 Sources − Categories − Case-law − **Domestic case-law**.
2.1.3.2 Sources − Categories − Case-law − **International case-law**.
5.2.2.11 Fundamental Rights − Equality − Criteria of distinction − **Sexual orientation**.

Keywords of the alphabetical index:

Transsexualism, legal recognition, adequacy / Doctrine, jurisprudential, charge.

Headnotes:

Transsexuals cannot fully integrate into society because their fundamental rights as personal identity, and part of it is a constitutionally protected right, meaning, gender identity, are constantly violated by not having adequate legal recognition. Being the categories sexual orientation and gender identity protected by the American Convention on Human Rights as has been established by the Inter-American Court, any discriminatory norm, act or practice based on this categories is outlawed by the Convention. Consequently no rule, decision or practice of domestic law either by state authorities or by individuals may diminish or restrict in any way the rights of a person on the basis of their sexual orientation.

Summary:

I. Rodolfo Enrique Romero Saldarriaga, the plaintiff, identifies himself as Ana Romero Saldarriaga, is a transgender person who sued by process of *amparo* against the Attorney General Reniec to change his name and his sex on his birth certificate and on his ID. The second instance court that saw this case declared inadmissible the demand based on the capacity of another process, more suitable to the request. The Court understood as not possible or too unlikely to exist a suitable process because of the inexistence of a precedent, and the fact that the Constitutional Court had established as jurisprudential doctrine that sex was an immutable element and that transsexualism was a mental pathology.

II. The majority of the Magistrates (judges of the Constitutional Court) Miranda Canales, Ledesma Narvaez, Ramos Nuñez and Espinoza-Saldaña Barrera held that such a conception was erroneous, sharing the criteria of scientific institutions such as the American Psychological Association considering transsexualism a gender dysphoria and not a pathology. The same way the Inter-American Court of Human Rights, the European Court of Human Rights and the UN Human Rights Council ratified this new understanding.

The judgment declared the claim well-founded, for having accredited affected the right of access to justice, so there for the last courtroom is in due to emit a sentence that considers the arguments used in the sentence.

III. Judges Oscar Uriviola, Ernesto Blume and Jose Luis Sardón issued a dissenting vote to his colleagues considering from their perspective to maintain the jurisprudence doctrine given.

They explained that the protection of minorities was not adequately regulated at the time the Constitution was written, nor in the last years of the Constitutional Court's jurisdiction, therefore, in the field of the rights of transsexual people the previous sentences can be explained by considering their situation as a pathological medical question.

Even with this background, the Constitutional Court decided to leave without effect this past jurisdiction, considering that its role of interpretation was not static, but on the contrary evolves with society, their needs and their truths. On the other hand the dissenting opinions are a small example of the conservative thought that is still maintained by our society reflected in some magistrates not only of the Constitutional Court, but also of the judicial system.

Languages:

Spanish.

Identification: PER-2017-3-004

a) Peru / **b)** Constitutional Court / **c)** Plenary / **d)** 08.11.2016 / **e)** 02744-2015-PA/TC / **f)** Jesus de Mezquita Oliviera and others v. Ministry of Foreign Affairs / **g)** / **h)**.

Keywords of the systematic thesaurus:

5.1.1.3 Fundamental Rights − General questions − Entitlement to rights − **Foreigners**.
5.3.33 Fundamental Rights − Civil and political rights − **Right to family life**.
5.3.44 Fundamental Rights − Civil and political rights − **Rights of the child**.

Keywords of the alphabetical index:

Foreigner, territory, irregularity / Foreigner, family, ties, expulsion / Child, best interest.

Headnotes:

A decision regarding the separation of the child from its parents or its family, from the State, must be exceptional, temporary and justified in its best interest.

Summary:

I. Jesús de Mezquita Oliviera filed an application for protection in order to disapply Directorate Resolution 00000065-2013-IN-MIGRACIONES, which imposed the sanction of mandatory exit from Peru, with the impediment of re-entry. He alleged the violation of the right to protection of the family, the best interests of the child, marriage, the duty and right of parents to feed, educate and provide security for their children, as well as the right to due process and defence.

II. Legally, migrants can be classified into two categories, those whose stay is regular and those who due to not respecting the rules of income or exceeding the authorised time and are in an irregular or undocumented legal situation. The General Assembly of the United Nations in the Resolution about the Protection of Migrants (General Assembly of the United Nations. Resolution on the Protection of Migrants, A/RES/54/166, 24 February 2000, Preamble) made it clear that the last ones have a special vulnerability because they face various social and economic barriers, being exposed to becoming victims of violence, xenophobia and other forms of discrimination or degrading treatment, and despite this avoid contact with authorities for fear of eventual deportation.

In view of the hostile relationship between national authorities and irregular migrants, the General Assembly of the United Nations, on the Report of the Special Rapporteur, on the human rights of migrants, issued on 2 April 2012, stressed that:

> "[...]] irregular entry or residence should never be considered an offense, since they do not in themselves constitute crimes against persons, property or national security [...] Criminalising illegal entry into the territory of a State transcends the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary arrests".

The regulations at the time did not set out the minimum guarantees of due process for migrants in an irregular situation. Despite having a referral clause to the Immigration Regulations, this was never used by the competent authority. Thus, the Court considers that the formal guarantees of its right to due process had been violated, because the regulations did not identify an item with the minimum guarantees of foreigners; such as the communication of the sanctioning resolution to the interested party, its due motivation, the possibility of challenge a resolution, among others.

At the date of the Court's decision, the applicant had a Peruvian daughter under the age of eight, born from a first commitment, and, on the other hand, a conjugal relationship with Ms Sherley Bocangel Farfán, also a Peruvian woman. The Collegiate understands that the sanction imposed produced an irreparable distance between the youngest of the

mentioned girl and her father, as well as between Ms Sherley Bocangel Farfán and her husband. It was noted that the defendant did not obtain the documentary instrument that proves the existence of reasons of public interest that make mandatory the compulsory departure of the appellant.

The Court considered that the factual situation of the case is part of a reality that concerns more subjects than the parties involved in the process, so it is necessary to resort to the technique of declaring the state of unconstitutional things in order to provide a general expansive effect to the considerations made on this occasion.

With this, the lawsuit is well founded, the resolution is null and void, the unconstitutional state of affairs, the lack of a legal norm or regulation that regulates a procedure that specifies the formal and material guarantees of migrants.

Languages:

Spanish.

Identification: PER-2017-3-005

a) Peru / **b)** Constitutional Court / **c)** Plenary / **d)** 07.11.2017 / **e)** 00853-2015-PA/TC / **f)** Marleni Fernández and Elita Cieza Fernández v. Local educational project unit of Utcubamba / **g)** / **h)**.

Keywords of the systematic thesaurus:

5.2.2.7 Fundamental Rights − Equality − Criteria of distinction − **Age**.
5.4.2 Fundamental Rights − Economic, social and cultural rights − **Right to education**.

Keywords of the alphabetical index:

Right to education, access, legal age / Educational institution, access, age / Educational institution, alternative.

Headnotes:

In order to respect the freedom of education in accordance with the Constitution, the State had to provide access to educational institutions to the whole population.

Summary:

I. Through the *amparo* process, the claimants requested that the Educational Management Unit of Utcumbamba (UGEL of Utcubamba) recognise their right to study in the first grade of secondary education in the Educational Institution 16957 Jesus Divino Maestro, from the *caserio* La Flor, Cumba District Utcubamba, Province of Amazonas. Their right had been denied because of their age. They had been told that being of legal age (in Peru the legal age is eighteen, both sisters exceeded such), they could only study in an alternative basic educational institution, they were forced to so.

The trouble was that where they live there was no alternative basic educational institution, trying to get to the closet one took more than four hours. They concluded that this was not materially possible in light of the time it took to get there and the cost that this incurred.

II. The Constitutional Court found that the right to education was violated and ordered to the site to recognise the registration of the applicants as students of the first grade of secondary education. At the same time, it declared an unconstitutional state of affairs in the case of availability and accessibility to the education of people of extreme poverty in rural areas. Indicated that to respect the freedom of education in accordance to the Constitution the State needed to establish and finance the necessary amount for educational institutions at the service of the whole population, dedicating resources to improve the infrastructure and technological advance-ment and the situation in which teachers and administrations carry out their work.

To this end, the Court ordered the Ministry of Education to design a proposal to implement of an action plan that in a maximum period of four years (July of 2021) would ensure the availability and accessibility to education of children, adolescents and adults of extreme poverty in rural areas, starting with the departments of Cajamarca, Amazonas, Ayacucho and Huancavelica. The instruction was given to the Ministry of Education to report to the Constitutional Court every six months on the implementation of this judgment.

Supplementary information:

The State has to protect, in particular, people who belong to the rural area and find themselves in extreme poverty. This is because they face more obstacles to access a series of necessary systems of society such as the political system, the health system, the educational system, among others. If the State, as one complete entity, does not take the necessary protective actions, then the state of vulnerability of the aforementioned social group continues, the lack of adaptation of the judicial system eventually leads to greater claims and in consequence an unconstitutional state of affairs takes over, where an individual or a group cannot exercise their rights for reasons beyond their control.

Languages:

Spanish.

Russia
Constitutional Court

Important decisions

Identification: RUS-2017-3-007

a) Russia / **b)** Constitutional Court / **c)** / **d)** 26.10.2017 / **e)** 25 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), no. 259, 16.11.2017 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

5.1.1.4 Fundamental Rights − General questions − Entitlement to rights − **Natural persons**.
5.3.13.1.2 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Scope − **Civil proceedings**.
5.3.36.3 Fundamental Rights − Civil and political rights − Inviolability of communications − **Electronic communications**.

Keywords of the alphabetical index:

Disclosure of information to a third party / Email / Privacy of correspondence, effectiveness.

Headnotes:

Email providers cannot be considered the owners of data contained in users' personal messages.

Summary:

I. The applicant petitioned the Court for a review of the constitutionality of Article 2.5 of the Federal Law "On information, information technologies and protection of information".

In 2016, the applicant had been dismissed from his post as head of the legal department at Stroytransgaz for disclosing legally protected secrets. Even though he was familiar with the company's rule on the confidentiality of information, which was part of his employment contract, the applicant sent internal documents, corporate regulatory instruments and personal details about his colleagues from his office email account to his private one. The operation was carried out via the server of Mail.ru, a limited liability company which provides telecommunication services and owns the server in question.

When challenging his dismissal in court, the applicant referred to the functions of the postal operator as a representative of communication services that protects the confidentiality of correspondence. The courts, however, ruled that the company providing email services is the owner of the information sent by users as, under the terms of the User Agreement with the client, Mail.ru can both restrict and allow access to information contained in the email inboxes of subscribers who disclose confidential information to a third party.

The applicant contended that the contested provision of Article 2.5 of the Federal Law "On information, information technologies and protection of information", which defines the term "information holder", is not compatible with Articles 19.1, 23.2 and 55.3 of the Constitution of the Russian Federation as it grants providers of telecommunication services the right to access information contained in emails received or sent by subscribers.

II. In response, the Constitutional Court of the Russian Federation ruled that email service providers do not own the information contained in the emails, for the Constitution of the Russian Federation guarantees everyone the right to freely seek, receive, transmit, produce and distribute information by any lawful means.

As regards the right to privacy of telephone conversations, the Constitutional Court of the Russian Federation had earlier ruled that any information transmitted via telephone is considered to be protected by the Constitution. Accessing such information requires a court order. This applies to the legal regulation of privacy not only of telephone conversations but also of correspondence, postal, telegraphic and other communication.

The fact that there is no legislation requiring internet service providers to ensure privacy does not mean that no such obligation exists, and the fact that an entity has been granted access to information does not mean that it becomes the owner of that information. The terms and conditions of the user agreement, moreover, cannot be construed as conferring on the internet service provider the right (in violation of Article 23.2 of the Constitution of the Russian Federation) to allow or restrict access to information, i.e. to consider itself the owner of that information.

Sending information to a private email account, however, creates conditions for the future uncontrolled use of that information.

If the applicant violated the terms and conditions of the user agreement with the company, including notably the one prohibiting him from sending confidential information to a private email account, this situation must be interpreted as violating the rights of the owner of the information, whether it has been disclosed to a third party or not.

Consequently, the impugned provision is not contrary to the Constitution of the Russian Federation because:

- it cannot be considered as granting email service providers ownership of the information contained in users' personal messages;
- under that provision, sending such information to a private email account can be construed as a violation of the rights of the owner of the information if the owner of the information in question has taken all the necessary measures to prevent third parties from accessing it and has prohibited any disclosure by means of a regulatory instrument which has been brought to the user's attention.

The judgments in the applicant's case have been referred for review in the light of this interpretation.

Languages:

Russian.

Identification: RUS-2017-3-008

a) Russia / **b)** Constitutional Court / **c)** / **d)** 07.11.2017 / **e)** 26 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), no. 259, 16.11.2017 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

5.1.1.5.1 Fundamental Rights − General questions − Entitlement to rights − Legal persons − **Private law**.
5.3.13.1.2 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Scope − **Civil proceedings**.
5.3.39.2 Fundamental Rights − Civil and political rights − Right to property − **Nationalisation**.

Keywords of the alphabetical index:

Immovable property / Admission of new constituent entities / Ownership rights, guarantees.

Headnotes:

The Constitution of the Russian Federation guarantees everyone judicial protection for their rights and freedoms. The mere fact that a property has been included in the Special List of assets now considered as belonging to the Republic of Crimea is not sufficient to justify a court in refusing to review the legality of its inclusion in the List.

Summary:

I. The limited liability companies Diving Centre Solarius, FORMAT-IT and Promholding requested a review of the constitutionality of various provisions of the law of the Republic of Crimea "On specific features of the regulation of property and land in the Republic of Crimea" and of the resolution issued by the Council of State of the Republic of Crimea "On matters relating to the administration of property of the Republic of Crimea".

Under the contested legislation, owners retain the title to any property which they had before the Republic of Crimea and the city of Sevastopol joined the Russian Federation, unless otherwise stipulated in regulatory instruments of the Russian Federation and the Republic of Crimea. It is further provided that the title of former owners to immovable property shall lapse as from the date on which the property is included in the Special List of assets considered to be the property of the Republic of Crimea.

The Court of Arbitration of the Republic of Crimea dismissed the applications lodged by Diving Centre Solarius and FORMAT-IT challenging the decision of the Council of State of the Republic of Crimea to include a number of assets belonging to the former state enterprise of the Ukrainian Ministry of Defence in the Special List of assets now considered to be the property of the Republic of Crimea.

Promholding was unable to mount a challenge in the Arbitration Court of the Republic of Crimea against the refusal by Crimea's State Committee for Land Registration and Cadastre to register Promholding's title to one of the facilities of the company Krymavtotrans, in the city of Simferopol. Pursuant to the decision of the Council of State of the Republic of Crimea, this facility was likewise included in the Special List.

The applicants were subsequently unable to defend their ownership rights to these properties in court.

The applicants contended that the contested provisions allow arbitrary exceptions to be made to the general rule on retention of ownership rights to immovable property which arose before the entry into force of the law creating two new constituent entities of the Russian Federation. As interpreted by case-law, these provisions allow owners to be stripped of their property by non-judicial means and without any compensation. The Council of State of the Republic of Crimea, moreover, has given an undertaking to resolve matters relating to the termination of private property rights, yet it has no authority to do so. The applicants therefore asked the Court to declare the contested provisions incompatible with Articles 8, 34.1, 35.1 to 35.3, 53, 55.2, 55.3 and 64 of the Constitution of the Russian Federation.

II. The Constitutional Court of the Russian Federation drew attention to the need for full judicial protection for the rights of natural persons and legal entities when establishing ownership rights in Crimea. Under the Constitution of the Russian Federation, the right to private property is protected by law, and no one may be deprived of his or her property without a court order.

Accordingly, the constitutional guarantees related to the protection of private property must apply in the new constituent entities as from the date of their admission to the Russian Federation and also during the transition period which was put in place to resolve the problems associated with their integration into the Russian Federation's economic, financial, legal and credit system.

On the basis of this regulation, the Special List was to include property in respect of which there was a reasonable assumption that it belonged to Ukraine, due, for example, to the lack of proper documentation confirming that such property was owned by other persons or was ownerless, or to the absence of grounds for excluding the property in question from state ownership. The granting to the Crimean authorities of the right to proceed in this manner during the transition period is conditional, however, on compliance with the constitutional guarantees concerning the protection of private property.

Because the Constitution of the Russian Federation guarantees everyone judicial protection for their rights and freedoms, the mere fact that a property has been included in the Special List is not sufficient to justify a court refusing to review the legality of its inclusion in the List. The courts' examination of such matters must not be merely formal: they are required to

investigate the actual circumstances of the case, bearing in mind the economic restructuring that has taken place and changes to property rights in respect of the assets in question.

The contested provisions of the Law of the Republic of Crimea are compatible, therefore, with the Constitution of the Russian Federation.

The judgments in the applicants' cases have been referred for review in the light of this interpretation.

Languages:

Russian.

Identification: RUS-2017-3-009

a) Russia / **b)** Constitutional Court / **c)** / **d)** 08.12.2017 / **e)** 39 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), no. 291, 22.12.2017 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

5.1.1.4 Fundamental Rights − General questions − Entitlement to rights − **Natural persons**.
5.3.13.1.3 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Scope − **Criminal proceedings**.
5.3.42 Fundamental Rights − Civil and political rights − **Rights in respect of taxation**.

Keywords of the alphabetical index:

Tax arrears / Tax evasion / Debt collection.

Headnotes:

The tax arrears of legal entities cannot be collected from natural persons accused of tax fraud until the legal entity in question has been officially deregistered or until a court establishes that it is effectively dormant and no debt can be collected from it.

Summary:

I. Three individuals petitioned the Constitutional Court of the Russian Federation for a review of the constitutionality of certain provisions of the Civil Code, the Tax Code, the Criminal Code and the Code of Criminal Procedure of the Russian Federation.

The former CEO and the former accountant of a distillery were ordered by the courts dealing with tax disputes to pay 8.2 and 2.7 million roubles respectively as compensation for damage caused by them in the commission of crimes (tax evasion and concealment of company funds or property). The criminal case against the former accountant ended when an amnesty was granted, while the case against the former CEO of the company was initially dropped following an amnesty, but later reopened. The former CEO was then found guilty of tax evasion committed at the time when he was head of the company. The court ordered him to pay damages in the amount of 142.5 million roubles.

The applicants argued that the contested provisions allow the courts to order individuals charged with tax offences to provide redress for damage caused to the state by tax evasion committed by the company that employed them. Because of the legal uncertainty surrounding the term "damage", moreover, the provisions also make it possible to equate the amount owed by the company in unpaid taxes to the damage caused by the individual. The applicants therefore asked the court to declare the impugned provisions incompatible with the Constitution of the Russian Federation, in particular Articles 1.1, 2, 15.1, 15.2, 17.3, 18, 19.1, 34.1, 35.1, 35.3, 45, 46.1, 46.2, 47.1, 49, 50.2, 50.3, 55.1, 55.2, 55.3, 64 and 118.2.

II. The Constitutional Court of the Russian Federation explained the legislative provisions which apply in cases where a legal entity's tax arrears are collected from former employees. As a legal entity, the company is indirectly involved in any fiscal wrong-doing committed by its officers, usually the CEO and an accountant. It is these individuals who, acting in their own interests, as well as in the interests of the entity, commit an offence and incur administrative or criminal liability. In such cases, the perpetrators of the tax offences, whose unlawful actions led to the non-payment of taxes, are not exempt from the obligation to make good the pecuniary damage caused by them.

The provisions of Articles 15 and 1064 of the Civil Code and Article 31.1.14 of the Tax Code, taken in conjunction, are not incompatible with the Constitution of the Russian Federation.

They imply that the prosecutor and the tax authorities may order individuals who have committed tax offences to make good the damage thus caused in an amount equal to the sums not collected by the authorities. The individuals concerned are not liable for any penalties incurred by the taxpaying entity.

The fact that the criminal proceedings against the individuals have been discontinued or have resulted in a conviction cannot be construed by the courts as proof of their guilt with regard to the pecuniary damage caused.

The tax arrears of legal entities cannot be collected from natural persons accused of tax fraud until the legal entity in question has been officially deregistered or until a court finds that it is effectively dormant and no debt can be collected from it. This rule does not apply in cases where the legal entity merely serves as a "cover" for the wrongdoings of the individual who controls it.

In determining the individual's liability, the court may consider his or her financial status, the extent to which he or she gained financially from the tax offences, the extent of his or her guilt, the penalty for such offences and other material circumstances.

The judgments in the applicants' cases have been referred for review in the light of this interpretation.

Languages:

Russian.

Serbia
Constitutional Court

Important decisions

Identification: SRB-2017-3-003

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 26.10.2017 / **e)** IUz-48/2016 / **f)** / **g)** web site of the Constitutional Court / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

5.3.4 Fundamental Rights − Civil and political rights − **Right to physical and psychological integrity**.
5.4.19 Fundamental Rights − Economic, social and cultural rights − **Right to health**.

Keywords of the alphabetical index:

Vaccination, obligatory.

Headnotes:

Obligatory vaccination represents an interference with an individual's right to physical integrity. It is prescribed by law and serves the legitimate goal of the protection of health. It is justified with the reasons of public health and the need to keep the spreading of communicable diseases under control.

The State has a margin of appreciation with respect to health-care measures for the protection of the population against communicable diseases.

Summary:

The Constitutional Court considered several initiatives with regard to the constitutionality and the conformity with certain international agreements ratified by Serbia of certain provisions of the Law on Protection of the Population against Communicable Diseases (hereinafter, the "Law"), in particular, with respect to obligatory vaccination of persons of certain ages (children) and other persons designated by the Law.

As regards obligatory vaccination, which represents, to a certain extent, an interference with the right to physical integrity, the Constitutional Court reiterated that the right to the protection of physical and mental health is a universal right of all citizens which, at the

same time, also implies an obligation of the State to take certain measures for the protection of the population as a whole in order to secure that right. This also means that an individual right may not be exercised in a manner which would jeopardise the same right of others.

According to Article 26 of the Convention on Human Rights and Biomedicine, which has been ratified by Serbia and has thus become an integral part of the legal order of Serbia, certain rights set out by this Convention, including the right to consent to a medical intervention, may be limited by law, where the limitations are necessary in a democratic society for the protection of public health or for the protection of the rights and freedoms of others. As any medical intervention essentially represents an interference with a person's physical integrity, it follows that, according to the above-mentioned provision, a person's right to physical integrity may be limited under the terms prescribed by this Convention.

In view of the fact that – based on the provisions of the Law on Public Health and the Law on Protection of the Population from Communicable Diseases – it is indisputable that vaccination is a preventive measure of protection taken in the area of public health for the protection of the population as a whole against communicable diseases and their prevention in the public interest, the Constitutional Court found that, in the instant case, the requirements laid down by the Convention – that is that the measure of limitation be prescribed by law and be taken for the purpose of the protection of public health – had been met.

As to the third condition of the Convention, when examining whether the measure taken was necessary in a democratic society, the Constitutional Court took into account that, according to the data of the Institute of Public Health of Serbia "Dr. Milan Jovanović Batut", the 2015 immunisation records show the lowest vaccination rate in ten years for the vaccines in the immunisation schedule. This increases the risk of epidemics of communicable diseases which have for decades been prevented by vaccination, because a high level of collective immunity is needed to prevent an outbreak of an epidemic. This means that more than 95% of a certain population must be vaccinated against those diseases. The Constitutional Court bore in mind the above, as well as the obligation of every individual to respect the public interest and not jeopardise the health of others, and held that also the third condition of the Convention, concerning the necessity of the prescribed measure, had been met.

As regards the allegations put forward in the initiatives that vaccination was not compulsory in a great number of western European countries, the Constitutional Court referred to Recommendation of the Parliamentary Assembly of the Council of Europe 1317 (1997), which states: "[t]he Assembly considers that efforts to improve the immunisation level should not be concentrated solely on the plight of the countries undergoing transition. The immunisation level of populations in western Europe has been steadily declining in recent years. The low percentage of fully vaccinated people, coupled with outbreaks of infectious diseases in the same geographic area, raises fears of major epidemics in western Europe too"; and "[t]he Assembly therefore recommends that the Committee of Ministers invite member states: […] to devise or reactivate comprehensive public vaccination programmes as the most effective and economical means of preventing infectious diseases, and to arrange for efficient epidemiological surveillance".

The Constitutional Court also considered the allegations put forward in the initiatives in relation to position of the European Court of Human Rights, in particular, in the context of the cases of *Carlo Boffa and 13 Others v. San Marino, Acmanne and Others v. Belgium,* and *Solomakhin v. Ukraine.*

As regards the allegations that, as compared to children who have been vaccinated, children who have not been vaccinated were discriminated against because they were deprived of their constitutionally guaranteed right to education, the Constitutional Court found that the fact that children's attendance in educational institutions is conditional on their having been vaccinated, could not be brought into a constitutional legal relationship with discrimination in respect of the right to education. The reason for this is that all children in certain age groups are subject to vaccination, except for those where it is, for health reasons, contraindicated. As that obligation, in accordance with the principle of equality of all before law, equally refers to all persons who are included in a group, anyone who refuses vaccination, that is to say, does not fulfil the prescribed obligation, may not be considered discriminated against in relation to those persons who have fulfilled the obligation, because they are not in the same or a similar situation.

Cross-references:

European Court of Human Rights:

- *Carlo Boffa and 13 Others v. San Marino,* no. 26536/95, 15.01.1998, D.R. no. 92-B, p. 27;
- *Acmanne and Others v. Belgium,* no. 10435/83, 10.12.1984, D.R. no. 40, p. 255;
- *Solomakhin v. Ukraine,* no. 24429/03, 15.03.2012.

Languages:

English, Serbian.

Slovakia
Constitutional Court

Important decisions

Identification: SVK-2017-3-003

a) Slovakia / **b)** Constitutional Court / **c)** First Senate / **d)** 06.12.2017 / **e)** I. ÚS 549/2015 / **f)** / **g)** / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

4.4.3.1 Institutions − Head of State − Powers − **Relations with legislative bodies**.
4.7.4.1.2 Institutions − Judicial bodies − Organisation − Members − **Appointment**.
5.3.29 Fundamental Rights − Civil and political rights − **Right to participate in public affairs**.

Keywords of the alphabetical index:

Judge, Constitutional Court, appointment by President.

Headnotes:

When appointing judges to the Constitutional Court, the President is bound by the pre-selection made by Parliament and may not dismiss a candidate by introducing criteria other than those expressly specified in the Constitution for that position.

Summary:

I. Various constitutional complaints had been filed against the President of the Republic by candidates who had been unsuccessful in their application for the position of judges of the Constitutional Court.

The crux of the matter was the scope of appreciation the President of the Republic enjoys when appointing judges to the Constitutional Court.

When constitutional judges are being appointed, Parliament selects a pool of candidates, with two candidates for each vacancy. The President then chooses the required number of judges from this pool. It was undisputed that the President was unlimited in his choice between the two candidates for each position. However, the President and

Parliament disagreed on whether the President had the right to dismiss more than half of the candidates and require new ones from the Parliament if he deemed that those put forward were insufficiently qualified.

The dispute had arisen from the Court's decision PL. ÚS 4/2012, where the Court delivered a binding interpretation of Article 150 of the Constitution, which merely stated that the President of the Republic appoints and recalls the Prosecutor General upon Parliament's proposal. It was not clear from the wording, and from the present imperfective verb form used, whether the President was obliged to appoint the candidate selected by Parliament. The Court decided that for certain serious reasons (defined more precisely in the operative part of that decision) the President did indeed have the right to dismiss a candidate and require a new one.

Article 134.3 of the Constitution sets out the requirements for the position of a judge of the Constitutional Court, namely Slovak nationality, at least forty years old, parliamentary eligibility, a university degree in law, and at least fifteen years of work experience in a legal profession.

The President had taken the view that decision PL. ÚS 4/2012 was fully applicable to the case of constitutional judges (which would broaden his margin of appreciation considerably) Parliament had the opposite opinion. The applicability of this decision was pivotal to the case before the court.

In July 2014, the terms of office of three constitutional judges ended and Parliament selected six candidates for those vacancies. However, the President only appointed one judge and claimed that the other five candidates were not competent enough, referring to the *rationes decidendi* of decision PL. ÚS 4/2012. The rejected candidates filed complaints at the Constitutional Court.

The complaints by three of those candidates were decided jointly by the Third Senate in decision III. ÚS 571/2014, in which the candidates' fundamental right to access to public offices under equal conditions was found to have been breached. The complaints by the other two candidates were admitted for further proceedings in rulings II. ÚS 718/2014 and II. ÚS 719/2014 but they subsequently withdrew their complaints.

Following these decisions, the President asked the Court to deliver a binding interpretation of the relevant articles of the Constitution, which resulted in decision PL. ÚS 45/2015. In it, the Court stated that the *rationes decidendi* found in decision PL. ÚS 4/2012 were not applicable to the case of constitutional judges and that all five complainants from the previous proceedings remained candidates for constitutional judges.

In February 2016, the term of office of another judge ended and Parliament selected two candidates for this vacancy. The President did not appoint either of them. He did not appoint the previous five candidates either.

In September 2016, five of the now seven candidates filed complaints. The other two did not. Thus, the present proceedings commenced.

Section 6 of the Law on the Constitutional Court stipulates that if a Senate of the Court arrives at a conclusion that differs from one pronounced by another Senate, that Senate is bound to submit this preliminary question to the Plenum to be settled and for the conflicting opinions to be harmonised. The President requested that the Senate submit a preliminary question to the Plenum concerning the applicability of *rationes decidendi* pronounced in decision PL. ÚS 4/2012, and justified this request on these grounds:

1. The Second Senate had expressed the opinion in decisions II. ÚS 718/2014 and II. ÚS 719/2014 that those *rationes decidendi* were applicable to the present case.

2. The First Senate had expressed a similar opinion in decision I. ÚS 397/2014, which concerned a complaint by a candidate rejected for the office of Prosecutor General, namely that the aforesaid *rationes decidendi* also applied to the President's other powers of appointment.

3. The Third Senate expressed the same opinion on the applicability of the aforesaid *rationes decidendi* in March 2015, when pronouncing decision III. ÚS 571/2014 at the public hearing. Furthermore, when the written version of this decision was delivered in May 2015, the reasoning was different in that the applicability of the aforesaid *rationes decidendi* was excluded.

4. Decision PL. ÚS 45/2015 was not a decision on the merits and therefore not binding.

II. The Court responded as follows to the President's arguments:

1. The Second Senate did not state in decisions II. ÚS 718/2014 and II. ÚS 719/2014 that the *rationes decidendi* in question applied to the case of constitutional judges. It merely stated that conclusions contained in decision PL. ÚS 4/2012

were "relevant from the point of view of the applicability to the complainant's case" and that "they may be of great importance for the decision on the merits". It did not consider the complaints (in the parts where they claimed non-applicability of the above *rationes decidendi*) as manifestly unfounded, as the President claimed. Moreover, these were procedural decisions which did not contain any argument over the merits of the case. Therefore they did not have the effects of a precedent.

2. Decision I. ÚS 397/2014 is based on decision PL. ÚS 4/2012 and therefore the applicability of the former depends on the applicability of the latter.

3. Following the adoption of decision PL. ÚS 45/2015 there may be no doubt that the aforesaid *rationes decidendi* are not applicable to this case.

4. While decision PL. ÚS 45/2015 is formally not a decision on the merits, it is a "quasi-meritorial" decision and therefore binding on both the President and the Constitutional Court.

For these reasons, the Court found no reason to file the preliminary question with the Plenum. The Court fully accepted the conclusions of decisions III. ÚS 571/2014 and PL. ÚS 45/2015 and reiterated that the *rationes decidendi* found in decision PL. ÚS 4/2012 were not applicable to the present case.

Having established the inapplicability of the *rationes decidendi*, the Court divided further argumentation among three groups of candidates, since these three groups were formally in different positions, although, as the Court recalled, their material situation remained essentially the same.

1. The first group consisted of three of the candidates selected in 2014, whose rights had been found to have been breached in decision III. ÚS 571/2014, and one new candidate selected in late 2015, all of whom filed complaints in September 2016.

The Court noted that the President may not stand above the Constitution and must abide by it as any other state body. The Court's decisions are also binding on the President. It went on to say that it did not follow from any of the President's decisions in this case that he would contest the fact that all the candidates fulfilled the requirements stipulated in Article 134.3 of the Constitution.

The Court observed that in its previous decisions (most notably PL. ÚS 45/2015) it had concluded on the inapplicability of the *rationes decidendi* found in decision PL. ÚS 4/2012 and that by applying these to the present case, the President had acted ultra vires. The Court emphasised that the President was bound by Parliament's pre-selection of candidates and that he was only allowed to select the judges from among those candidates.

2. The second group consisted of one of the candidates who had withdrawn their complaints in 2015. This candidate was formally in a different situation since the President's 2014 decision not to appoint him had never formally been annulled.

The Court stated that the President's decision was, due to his having acted ultra vires when issuing it, null and void. It added that the rule of law understood in the material sense required that protection be afforded also to this candidate and the only way to afford this protection was to find violation of this candidate's fundamental right to access to public offices under equal conditions and to order the President to consider this applicant as a candidate for the position of constitutional judge.

3. The third group consisted of the other of the two candidates selected in 2014 who had withdrawn their complaints and of one new candidate selected in late 2015. However, neither of these two candidates filed a complaint in 2016 and therefore they were not formally a party to these proceedings.

The Court recognised the existence of a conflict between the subjective and objective levels. It recalled that this situation with judicial nominations concerned the whole Court as an institution and had a negative effect on its functioning. Disruption of the Court's functioning could signal "the beginning of the end of the rule of law". It reiterated that all other attempts to resolve this situation had failed and that in this exceptional case the objective factors outweighed the individual interests of those candidates who had chosen not to file a complaint. The Court therefore decided also to extend the effects of its decision to those two candidates who had not filed a complaint.

By doing so, the number of candidates remained seven, which was a sufficient number for the President to be able to choose three Constitutional Court judges from among them. The Court ordered the President to decide again and to consider all seven as candidates for the three judicial vacancies. The President was not allowed to apply the *rationes decidendi* found in decision PL.ÚS 4/2012 when appointing the judges.

Languages:

Slovak.

Slovenia
Constitutional Court

Statistical data

1 September 2017 – 31 December 2017

During this period, the Constitutional Court held 26 sessions – 14 plenary and 12 in panels: 5 in the civil, 3 in the administrative and 4 in the criminal panel. It received 63 new requests and petitions for the review of constitutionality/legality (U-I cases) and 330 constitutional complaints (Up cases).

During the same period, the Constitutional Court decided 82 cases in the field of the protection of constitutionality and legality, as well as 404 cases in the field of the protection of human rights and fundamental freedoms.

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

However, the judgments and decisions are published and made available as follows:

- In an official annual collection (Slovenian full text versions, including dissenting and concurring opinions, and English abstracts);
- In the *Pravna Praksa* (Legal Practice Journal) (Slovenian abstracts of decisions issued in the field of the protection of constitutionality and legality, with full-text version of the dissenting and concurring opinions);
- On the website of the Constitutional Court (full text in Slovenian, English abstracts and a selection of full texts): http://www.us-rs.si;
- In the IUS-INFO legal information system on the Internet, full text in Slovenian, available at http://www.ius-software.si;
- In the CODICES database of the Venice Commission (a selection of cases in Slovenian and English).

Important decisions

Identification: SLO-2017-3-004

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 29.05.2014 / **e)** Up-1082/12 / **f)** / **g)** *Uradni list RS* (Official Gazette), 43/14 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

4.6.10.1 Institutions − Executive bodies − Liability − **Legal liability**.
5.3.2 Fundamental Rights − Civil and political rights − **Right to life**.
5.3.12 Fundamental Rights − Civil and political rights − **Security of the person**.
5.3.17 Fundamental Rights − Civil and political rights − **Right to compensation for damage caused by the State**.
5.3.32 Fundamental Rights − Civil and political rights − **Right to private life**.

Keywords of the alphabetical index:

State, criminal offences, duty to investigate.

Headnotes:

In order to safeguard the constitutional rights to safety and physical integrity, the state must ensure that the investigation, prosecution and trial of criminal offences against the life, limb, and health of individuals are conducted in an expeditious, diligent, effective and professional manner. The positive obligations of the state in the area of the prosecution of criminal offences increase in line with the importance of the value affected.

Summary:

I. After the applicant's life was endangered, when he was attacked and severely beaten in 1999, the prosecution authorities and the criminal judiciary authorities had, in his view, failed to diligently and assiduously perform their duties in terms of the investigation and consideration of the criminal offence. They had unlawfully refrained from carrying out their statutorily determined duties. This, he alleged, was a breach of his right to life. The applicant's lawsuit against the state, seeking compensation, was rejected by the Higher Court on the basis that the authorities of the state cannot be taken to task for acting unlawfully and so the prerequisites of the right to compensation from the state set out in Article 26 of the Constitution were not fulfilled.

II. The Constitutional Court clarified that in order to safeguard the human rights to safety and physical integrity contained in Articles 34 and 35 of the Constitution, the state must ensure an expeditious, diligent, effective, and professional investigation, prosecution, and trial where criminal offences have been committed against the life, limb, and health of individuals. Deficiencies in the investigation of criminal offences that undermine the state's ability to establish the cause of death or other harmful personal consequences or to identify and apprehend the perpetrator jeopardise not only the objective of the investigation itself, but also the trust of the public in the functioning of a state governed by the rule of law.

The Constitutional Court also clarified that the positive obligations of the state in the area of prosecution of criminal offences increase in line with the importance of the affected value protected under criminal law. The substantive criteria that determine the standard of the work of state authorities in this field are, in instances concerning the investigation of criminal offences that seriously interfere with the physical integrity and safety of individuals, guaranteed by Articles 34 and 35 of the Constitution. The failure of the state to fulfil its duty regarding the investigation of criminal offences may thus entail a violation of the procedural aspect of the human rights determined by Articles 34 and 35. The Constitutional Court added that, if in a certain case all other mechanisms for the protection of human rights fail, the Constitution ensures protection through the awarding of damages, provided the prerequisites for the restitution of damage to an individual in accordance with Article 26 of the Constitution are fulfilled. Courts must not, therefore, adopt positions that would be contrary to other human rights in actions for damages against the state.

The Constitutional Court held that the criteria for assessing whether the concrete procedural steps of the police and the prosecution in the case at issue fulfilled the required standards are defined by criminology experts and the accumulated experientially developed rules of good police work, and by the requirement that investigators are meticulous, conscientious, and diligent. The requirement to ensure an effective investigation includes the duty to carry out the necessary and reasonably possible actions that would lead to obtaining sufficient evidence about the perpetrator and the circumstances surrounding the perpetration of the offence, including witness testimonies and forensic evidence. The applicant was a victim of a criminal offence against life and limb. The Police should have considered it especially seriously.

The stance of the Higher Court that the state could only be responsible for failure to carry out an effective investigation if the Police had behaved in a way that clearly ran counter to the regulations governing the conduct of police operations was, in the Constitutional Court's view, erroneous. Such a stance disregards the fact that the regulations governing police work are often merely general guidelines within the framework of which an investigation must be carried out diligently, assiduously, and in conformity with the usual methods of police work. In this particular case, the police procedure was distinctly slow; the prosecution authorities had for some reason postponed the performance of important and easily realisable investigative actions. Such behaviour by the investigative authorities created the impression of incompetence and was not in conformity with the applicable standard of how a good investigator should act. As the Higher Court failed to examine the police procedure against this standard, in a case involving serious violence against an individual, the applicant's rights under Articles 34 and 35 of the Constitution were violated. The Constitutional Court added that the applicant's right to compensation under Article 26 of the Constitution was also violated, as courts must not adopt positions inconsistent with other human rights when deciding on the existence of the prerequisites for the liability of the state for damages. The Constitutional Court overturned the Higher Court's judgment and remanded the case for new adjudication.

III. The decision was adopted unanimously.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-2017-3-005

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 11.12.2014 / **e)** U-I-12/12 / **f)** / **g)** *Uradni list RS* (Official Gazette), 92/14 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

3.16 General Principles − **Proportionality**.
5.3.5 Fundamental Rights − Civil and political rights − **Individual liberty**.
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:

Fine, non-payment, imprisonment.

Headnotes:

Imprisonment for the enforcement of fines imposed on perpetrators of minor offences represents an encroachment on the constitutional right to personal liberty. Such interference can only be justified if it pursues a constitutionally admissible objective and passes the proportionality test. The principle of proportionality must be observed not only at legislative level, but also in individual court proceedings.

Summary:

I. Under the Minor Offences Act, a perpetrator who does not, within the time limit set, pay a fine levied on him by a final judgment, is liable to imprisonment. The rationale behind these provisions is to coerce perpetrators into paying their fines voluntarily. Imprisonment in such instances is not meant to be a substitute form of punishment for the minor offence for which the fine remains unpaid; it does not represent a conversion of the fine into a prison sentence. It is intended to serve as an incentive for the payment of fines; the obligation to pay the fine will continue to exist even after the imprisonment. The Ombudsman for Human Rights challenged these provisions.

II. The Constitutional Court held that imprisonment for the enforcement of fines entails an interference with the right to personal liberty determined by Article 19.1 of the Constitution. This form of imprisonment is intended to ensure the observance of final judicial decisions. It plays an important role in the implementation of the principles of a state governed by the rule of law as mentioned in Article 2 of the Constitution and thus pursues a constitutionally admissible objective.

However, the measure did not pass the test of proportionality. The Constitutional Court noted that the legislature must observe the general principle of proportionality when determining interferences with human rights and in determining the manner of implementation of the principle of proportionality in individual cases. If a regulation requires a concrete justification of the admissibility of the interference in each individual case, the regulation must also enable

the competent authority, such as a court, to take into account the constitutional principle of proportionality in each individual case when applying statutory law that regulates measures that interfere with human rights. A regulation that does not enable such assessment by the court or even prevents it is not an appropriate measure for achieving the objective mentioned and entails a violation of the right determined by Article 19.1 of the Constitution.

In instances such as the case at issue, perpetrators were sentenced to perform community service on the grounds of their weak financial situation and the resulting inability to pay a fine. If they then did not perform the community service, the Minor Offences Act required courts to dismiss their objections against the imposition of imprisonment for the enforcement of fines, even though their inability to pay the fine had already been established by a court. Therefore, in this part the challenged regulation was not an appropriate means to achieve its objective and is inconsistent with the right determined by Article 19.1 of the Constitution.

In addition the Constitutional Court found that the Minor Offences Act excluded the possibility of courts to consider the amount of the imposed and unpaid fine when determining the length of imprisonment for its enforcement. Such a regulation is therefore inconsistent with the requirement to ensure a proportionate balance between the weight of the consequences of the interference with personal liberty and the benefits that would ensue because of it. Therefore, it was also inconsistent with the right determined by Article 19.1 of the Constitution in this regard.

The Constitutional Court further clarified that a regulation that allows courts to impose imprisonment for the enforcement of fines without giving the perpetrator an opportunity to state reasons against such, interferes with the right to an impartial court and the right to be heard. As imprisonment for the enforcement of a fine interferes with personal liberty, the sole purpose of ensuring payment discipline does not suffice to justify this measure. Consequently, the Constitutional Court held that the challenged regulation was also inconsistent with Articles 22 and 23.1 of the Constitution.

The Constitutional Court abrogated the unconstitutional provisions of the Minor Offence Act and determined the manner in which the Decision would be implemented.

III. The decision was adopted unanimously.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-2017-3-006

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.12.2014 / **e)** U-I-76/14 / **f)** / **g)** *Uradni list RS* (Official Gazette), 23/14 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

4.9.2 Institutions − Elections and instruments of direct democracy − **Referenda and other instruments of direct democracy**.
5.3.29 Fundamental Rights − Civil and political rights − **Right to participate in public affairs**.

Keywords of the alphabetical index:

Referendum, date of voting.

Headnotes:

Scheduling of the date of voting in a referendum generally entails regulation of the manner of the exercise of the right to vote in a referendum However, in certain circumstances, it can also entail a limitation of that right.

Summary:

I. The applicant, a deputy of the National Assembly, challenged a Decree whereby the National Assembly had determined the date of the referendum on the Act Amending the Protection of Documentary and Archival Material and Archival Institutions Act. The Assembly had set the date immediately after a national holiday and school holidays. The applicant alleged that holding the referendum then would significantly impede early voting as well as voting on the actual day of the referendum.

II. The Constitutional Court clarified that the right to vote in a referendum determined by Article 90.3 of the Constitution is constitutionally protected as a human right by Article 44 of the Constitution (participation in

the management of public affairs). Therefore, the principles and rules determined by Article 15 of the Constitution (the exercise and limitation of rights) apply as regards the regulation of the implementation of this right and its possible limitations.

When scheduling the date of a referendum, the National Assembly must respect two fundamental constitutional starting points. Firstly, it must respect the effective exercise of the right to vote in a referendum as a positive right (Article 5.1 of the Constitution), in the context of which the constitutional regulation of referendum on rejecting legislation by a rejection quorum is important (Article 90.4 of the Constitution). Secondly, it must establish rules and ensure their application in a manner that will enable a fair referendum process where voters can freely exercise their right to vote (Article 90.3 of the Constitution).

As a general rule, scheduling the date of voting on the basis of statutory provisions entails regulation of the manner of the exercise of the right to vote in a referendum. However, in the circumstances of this particular case, scheduling the date of the referendum immediately after a national holiday and school holidays renders the participation of voters in the referendum difficult, thus also affecting the effective exercise of the right to vote in a referendum. This is even more so in light of the new constitutional regulation of referenda, which introduced stricter conditions for rejecting a law in a referendum (a rejection quorum). As the National Assembly had other possibilities available, such scheduling of the day of the referendum could cast doubt on the fairness of the referendum process and thus destabilise the legitimacy of the decision adopted in the referendum. The scheduling of the day of the referendum in the Decree therefore exceeded the determination of the manner of the exercise of the right to vote in a referendum, and already represented interference with this right.

The Constitutional Court annulled the Decree and required the National Assembly to adopt a new act on calling the referendum within seven days of the publication of the decision.

III. The decision was adopted unanimously.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-2017-3-007

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 19.02.2015 / **e)** U-I-201-14, U-I-202-14 / **f)** / **g)** *Uradni list RS* (Official Gazette), 19/15 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

5.4.6 Fundamental Rights − Economic, social and cultural rights − **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Bank, rescue by state / Banking secrecy / Confidentiality.

Headnotes:

The right to business secrecy and bank secrecy are derived from the right to free economic initiative under the Constitution. Banks and companies cannot entirely prevent the state and the public from accessing information on business operations and transactions by relying on business secrecy. However, any interference in this regard must pursue an admissible constitutional objective and be proportionate.

Summary:

I. Certain provisions of the Access to Public Information Act required banks that benefited from state aid to publish information on the internet regarding loans of defaulters (“bad loans”.) Information on bad loans included a multitude of information which the applicants claimed to be protected by bank secrecy. Failure to publish such data was punished as a minor offence. The applicants alleged that the statutory regulation excessively interfered with the right of banks and their debtors to free economic initiative determined by Article 74.1 of the Constitution.

II. The Constitutional Court noted that the right to business secrecy and, in the banking sphere, bank secrecy, are derived from Article 74 of the Constitution. This allows business entities to decide freely as to who may have access to information regarding their business operations. Without being entitled to

conceal information regarding their internal business sphere from the outside world, business entities would be unable fully to enjoy the other entitlements that form the human right to free economic initiative such as free choice of commercial activity, freedom to decide on the manner of winning market share or the choice of business partners. The constitutional protection of business secrecy refers to information of a business nature that concerns the business operations or the activity of a business entity that is not publicly known, and the content of which is such that that the probability exists that its free accessibility, particularly to a business competitor, would cause significant damage to the business entity.

The Constitutional Court then clarified that companies cannot entirely prevent the state and the public from accessing information on business operations and transactions by relying on business secrecy. Article 74.1 of the Constitution authorises the legislature to determine the conditions for establishing economic entities, by which the manner of exercise of this human right is determined. On the basis of Article 74.2 of the Constitution, which expressly prohibits the pursuit of economic activities in a manner contrary to the public interest, the legislature can also limit certain forms of business ventures. The question of whether a particular legislative measure in the field of commercial activities entails the manner of exercise of free economic initiative or a limitation thereof cannot be resolved by a general rule, but must be decided in the light of each individual constitutional review of the regulation at issue.

In the case at hand, the Constitutional Court accepted that the public interest in limiting bank secrecy is justified by the aim of reducing the risk of corruption and increasing the efficiency of bank management, both of which are connected with greater transparency for taxpayers, who financed the reorganisation of the banking system. However, the Constitutional Court established that the interference at issue was not proportionate. The challenged provisions required the widely accessible publication of essential business information regarding concrete business relations between banks and debtors. They did so in an indiscriminate manner that did not allow for a distinction to be drawn between loans that became “bad” due to possible malfeasance on the one hand, or coincidence or a general change in economic circumstances on the other. Such publication cannot be an appropriate measure for reducing the risk of corruption and ensuring better bank management. The Constitutional Court thus concluded that the publication of information pertaining to bank secrets on banks’ websites was devised in a distinctly generalised and thus manifestly excessive manner, resulting in a violation of the right determined by Article 74.1 of the Constitution. It abrogated the challenged provisions of the Access to Public Information Act.

III. The decision was adopted unanimously.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-2017-3-008

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 03.12.2015 / **e)** U-II-2/15 / **f)** / **g)** *Uradni list RS* (Official Gazette), 98/15 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

4.9.2 Institutions − Elections and instruments of direct democracy − **Referenda and other instruments of direct democracy**.

Keywords of the alphabetical index:

National security / Referendum / Referendum, legislative / Referendum, restriction / Referendum, statutory.

Headnotes:

A law providing the basis for the implementation of urgent measures for ensuring public security that could not be carried out without a law corresponds to the notion of a law on urgent measures referred to within the Constitution. It may not be decided on in a referendum.

Summary:

I. Voters filed a petition for the calling of a post-legislative referendum regarding an amendment to the Defence Act adopted with regard to the refugee and migrant crisis. This amendment allowed, following a special procedure and under certain conditions, for the armed forces to be granted additional, exceptional powers when protecting the

state border together with the police. The National Assembly dismissed the petition to call the referendum, on the basis that the petition referred to a law concerning which, in accordance with the first indent of Article 90.2 of the Constitution, a referendum is not admissible. Proceedings were lodged before the Constitutional Court regarding the admissibility of the referendum.

II. In 2013 the constitutional provisions on legislative referenda were amended. Article 90.2 of the Constitution now determines that a referendum may not be called, *inter alia*, on laws on urgent measures to ensure the defence of the state, security, or the elimination of the consequences of natural disasters.

The Constitutional Court established that the statutory regulation that the applicant in this matter sought to put to a referendum entails the basis for the implementation of urgent measures for ensuring security that could not be carried out without a law. The authority competent to assess the urgency of measures to ensure security due to which a law has to be adopted is the National Assembly. The Constitutional Court may only assess whether the National Assembly demonstrated reasonable grounds for the assessment that it adopted. In the case at issue, the Constitutional Court agreed with the National Assembly's argument that the large number of refugees and migrants entering the Republic of Slovenia daily exceeded the capacities of the authorities in charge of processing them and that arrangements had to be made to enable the quick activation of additional personnel and thus to ensure public security. The Constitutional Court therefore found that the amendment of the Defence Act corresponded to the notion of a law on urgent measures referred to in the first indent of Article 90.2 of the Constitution. It held that the challenged Order by which the National Assembly dismissed the petition to call a referendum was not inconsistent with the Constitution, which consequently entailed that it was not admissible for the legislative referendum to be held.

III. The decision was adopted unanimously.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-2017-3-009

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 09.06.2016 / **e)** Up-1006/13 / **f)** / **g)** *Uradni list RS* (Official Gazette), 51/16 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

5.3.13.18 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Reasoning**.
5.3.32 Fundamental Rights − Civil and political rights − **Right to private life**.
5.3.35 Fundamental Rights − Civil and political rights − **Inviolability of the home**.

Keywords of the alphabetical index:

Evidence, exclusion / Privacy, search, warrant / Reasoning, insufficient / Search, order / Search, premises.

Headnotes:

A decision to order a search of premises represents a decision to interfere with an individual's constitutional right to the inviolability of dwellings or spatial privacy. Searches will only be consistent with the Constitution if they are ordered by a prior judicial decision with a reasoning to the effect that reasonable grounds exist to suspect that a specific person committed a criminal offence and that it is likely that the search will result in the suspect being apprehended or evidence either of the criminal offence itself or of significance to the criminal proceedings being found.

Summary:

I. The applicant had been convicted of a criminal offence. He challenged the judgment in which he was convicted, contending that evidence about the criminal offence should have been excluded as it was obtained during a search of premises that was performed on the basis of a court order that contained no reasoning and was therefore illegal and unconstitutional.

II. The Constitutional Court stated that the decision to order a search of premises (and the search that follows) represent a decision to encroach on an individual's right to the inviolability of their home or spatial privacy as set out in Article 36.1 of the Constitution. Stringent requirements govern the issue of a search order and the searching of premises.

Disregard of these requirements, which include the issue of a prior written order, may result in the exclusion of the evidence found.

The Constitutional Court explained that an order authorising a search of premises must substantiate in its reasoning that reasonable grounds exist to suspect that a specific person committed a criminal offence and that he or she will probably be apprehended during the search or evidence either of the criminal offence itself or of significance to the criminal proceedings will be found. The judge must already have stated in the search order the reasons or circumstances forming the basis for authorising the search in a concrete and definitive manner, i.e. before the interference with the individual's rights. The reasoning has to be such as to convince a reasonable person that the conditions for a search of premises have been met. In so doing, the judge fulfils his or her role of guardian of defendants' rights and supervisor of the work of the prosecution and the police.

The reasoning of a court order is intended to enable a review of the judge's assessment as to whether the conditions for interference with the right to the inviolability of dwellings determined by Article 36.1 of the Constitution are fulfilled and thus enable subsequent control, including from the perspective of the right to appeal determined by Article 25 of the Constitution. However, the requirement of a prior reasoned judicial decision cannot be substituted by subsequent judicial control; this does not provide adequate protection against potential abuse and could pave the way to arbitrary interference, which explicitly contradicts the procedure determined by law.

The Constitutional Court abrogated the challenged judgments and remanded the case.

III. The Constitutional Court adopted the Decision by five votes against two. Judges Jadek Pensa and Pogačar voted against. Judge Jadek Pensa submitted a dissenting opinion.

Languages:

Slovenian, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-2017-3-004

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 11.05.2017 / **e)** CCT 50/16 / **f)** Yolanda Daniels v. Theo Scribante and Another / **g)** www.saflii.org/za/cases/*ZACC*/2017/13.html / **h)** [2017] *ZACC* 13; CODICES (English).

Keywords of the systematic thesaurus:

5.1.2 Fundamental Rights − General questions − **Horizontal effects**.
5.3.1 Fundamental Rights − Civil and political rights − **Right to dignity**.
5.3.39.3 Fundamental Rights − Civil and political rights − Right to property − **Other limitations**.
5.4.13 Fundamental Rights − Economic, social and cultural rights − **Right to housing**.

Keywords of the alphabetical index:

Housing, occupiers, rights / Housing, improvements to dwellings / Housing, repair, landowner, consent.

Headnotes:

Occupiers under the Extension of Security of Tenure Act have a right to make improvements to their dwelling without the consent of the landowner.

There is no constitutional bar to the imposition of a positive duty on a private individual, but whether a duty may be imposed depends on a variety of factors.

Summary:

I. The applicant, Ms Yolanda Daniels, resided as a lawful occupier under the Extension of Security of Tenure Act (hereinafter, "ESTA") in a dwelling on a farm managed and owned by the respondents. The dwelling required improvements that were no more than basic human amenities, including installation of an indoor water supply and a ceiling. The applicant was to carry the costs of the improvements. The respondents were notified. Receiving no response, she enlisted a builder but then the respondents

objected. Ms Daniels sought a declarator that she was entitled to make the improvements without the owner's consent.

Both the Stellenbosch Magistrates' Court and the Land Claims Court reasoned that ESTA sets out the rights of occupiers and that the right asserted was not one of those rights. Aggrieved, the applicant unsuccessfully sought leave to appeal from the Supreme Court of Appeal.

In the Constitutional Court, Ms Daniels argued that the improvements were meant to bring the dwelling to a level consonant with human dignity. Based on the right to human dignity in Section 5 of ESTA, she was entitled to make the improvements. She argued that this right is not a drastic intrusion into the common law rights of property owners.

The respondents contended that, in terms of Section 25.6 of the Constitution, ESTA occupiers enjoy rights specified in an Act of Parliament. That Act was ESTA and nowhere does ESTA provide that an occupier may make improvements. Therefore, the right does not exist. In addition, because in terms of Section 13 of ESTA an owner may be ordered to compensate an occupier for improvements that the occupier made, affording an occupier the asserted right would effectively impose a positive duty on an owner to finance the improvements. The respondents contended that our constitutional jurisprudence did not allow a positive duty to be imposed on a private individual.

II. The first judgment written by Madlanga J (Cameron J, Froneman J, Khampepe J, Mbha AJ and Musi J) (majority judgment) held that ESTA affords an occupier the right to make improvements to her dwelling without the consent of the property owner. However, meaningful engagement of the owner is required. This is because the exercise of the occupier's right has the potential to intrude on an owner's property right under Section 25 of the Constitution and the right to human dignity in Section 5 of ESTA.

The majority judgment held that there was no constitutional bar to the imposition of a positive duty on a private individual. Whether a duty may be imposed depends on a variety of factors. In this matter, the duty was imposed because of the importance of the asserted right and the tenuous nature of the duty. The duty was tenuous because an owner might or might not be ordered to compensate an occupier, depending on the court's discretion.

III. In a concurring judgment (the second judgment), Froneman J held that before we can make substantial and lasting progress in realising the ideals of the Constitution at least three things must happen:

a. an honest and deep recognition of past injustice;
b. a re-appraisal of our conception of the nature of ownership and property; and
c. an acceptance, rather than obfuscation, of the consequences of constitutional change. In its exposition of certain relevant parts of South African history, the judgment shows that, historically, poor white rural people benefited tremendously from concentrated social and political effort. The burning injustice, namely that this corrective action was not extended to black and "coloured" people, must and can be rectified.

In a judgment that concurs with Madlanga J and Froneman J (the third judgment), Cameron J cautioned that courts should tread carefully in expressing their views of history. Despite acknowledging that neither judgment's historical account could be taken as other than partial and incomplete reflections of South Africa's fractured past, Cameron J noted the pressing need to give that historical account voice and hence concurred in both judgments.

In a separate concurring judgment (the fourth judgment), Jafta J (Nkabinde ACJ concurring) disagrees with the first judgment on only one issue. This is whether the Constitution imposes a positive obligation on a private person to enable bearers of rights guaranteed by the Bill of Rights to enjoy those rights. Jafta J holds that while Section 8.2 of the Constitution illustrates that the rights in the Bill of Rights are not enforced only vertically but also horizontally, this provision cannot be read as being a source of any obligation, let alone a positive obligation borne by a private person. This matter concerns the interference of the enjoyment of Ms Daniels' right of residence and this is the interference from which she seeks protection, which is based on the negative content of the right of access to adequate housing. Therefore the case was not concerned with the right of access to land or restoration of a lost right in land.

In a separate judgment (the fifth judgment) Zondo J held that whether the applicant was entitled to effect the improvements without the respondents' consent depended upon considerations of justice and equity when a balance is struck between the rights of the landowner and those of the occupier. He held that, in the circumstances of this case, when such a balance is struck, considerations of justice and equity dictated that the applicant is entitled to effect the improvements without the respondents' consent.

Languages:

English.

Identification: RSA-2017-3-005

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 22.06.2017 / **e)** CCT 89/17 / **f)** United Democratic Movement v. Speaker of the National Assembly and Others / **g)** www.saflii.org/za/cases/*ZACC*/2017/21.html / **h)** [2017] *ZACC* 21; CODICES (English).

Keywords of the systematic thesaurus:

2.3.10 Sources − Techniques of review − **Contextual interpretation**.
3.3.1 General Principles − Democracy − **Representative democracy**.
3.4 General Principles − **Separation of powers**.
4.4.5.4 Institutions − Head of State − Term of office − **End of office**.
4.4.6.1.2 Institutions − Head of State − Status − Liability − **Political responsibility**.
4.5.4.2 Institutions − Legislative bodies − Organisation − **President/Speaker**.
4.5.7.2 Institutions − Legislative bodies − Relations with the executive bodies − **Questions of confidence**.
4.5.7.3 Institutions − Legislative bodies − Relations with the executive bodies − **Motion of censure**.

Keywords of the alphabetical index:

President, motion of no confidence, voting / Secret ballot / President / President, accountability / Parliament, Speaker, powers.

Headnotes:

The Speaker of the National Assembly has the power to declare that a vote of no confidence in the President of South Africa be by secret ballot.

Summary:

I. The United Democratic Movement made an application against the Speaker of the National Assembly and the President of the Republic of South Africa. Some political parties joined the proceedings and four institutions that promote democratic principles joined as friends of the Court.

The question was whether the Constitution requires, permits or prohibits that voting in a motion of no confidence in the President be conducted by a secret ballot.

The request for the scheduling of the motion of no confidence was allegedly necessitated by the removal from office of the former Minister of Finance and his Deputy. This was said to have led to serious economic consequences for South Africa with threats of dismissal and physical violence against those known to have voted in favour of the motion of no confidence. Hence it was alleged that members of the National Assembly would not be able to vote "with their conscience" if the voting process exposed their identity.

Those in support of the secret ballot argued that Sections 86 and 102.2 of the Constitution read with Item 6 of Part A of Schedule 3 to the Constitution and Rules 6, 103, 104 and 129 of the Rules of the National Assembly require that, just as the President is elected by a secret ballot, the same process should apply when he is sought to be removed from office. At the very least, the Speaker has the discretion to order that the ballot be secret.

The President argued that Members of Parliament must follow the decisions of their parties; party discipline is not intimidation. The constitutional values of accountability and transparency trump all others.

The Speaker averred that she was open to persuasion that voting be conducted by secret ballot. Her difficulty was that neither the Constitution nor the rules of the National Assembly allow her to do so.

II. In a unanimous judgment, penned by Mogoeng CJ, the Constitutional Court held that the Speaker does have the power to prescribe under appropriate circumstances that a motion of no confidence in the President be conducted by secret ballot. This is because the Constitution prescribes voting by secret ballot in the general elections and in the election of the Speaker, Deputy Speaker and the President, though it is silent on the procedure for their removal. This leaves it to the National Assembly to determine the voting procedure in terms of which a motion of no confidence would be conducted in terms of Section 57. Rules 102, 103 and 104 of the National Assembly also empower the Speaker to prescribe a method of voting on a motion of no confidence in the President that is situation-specific.

When the Speaker determines the appropriate voting procedure, several factors have to be taken into account, including:

a. whether the chosen voting procedure would allow Members of the National Assembly to vote according to their conscience and in the furtherance of the best interests of the people;
b. whether the prevailing circumstances are calm and peaceful or toxified and potentially dangerous or harmful;
c. the imperative of the Speaker's impartiality must be consciously factored into the decision;
d. the effectiveness of a motion of no confidence as an accountability and consequence-management tool must be enhanced by the chosen voting procedure;
e. the possibility of corruption or bribes in the event of a secret ballot must be considered;
f. the need for the value of transparency to find expression in the passing of the motion must be taken into account;
g. the decision must be rationally connected to the purpose of a motion of no confidence.

Supplementary information:

Legal norms referred to:

- Sections 1.d,19, 34, 42.3, 47.3, 48, 51, 52, 57.1, 62, 64, 86, 87, 89, 92, 93, 95, 102, 174, 177, 178 of the Constitution of the Republic of South Africa, 1996;
- Sections 27 and 57.A of the Electoral Act 73 of 1998.

Cross-references:

Constitutional Court:

- *Mazibuko v. Sisulu,* 27.08.2013, *Bulletin* 2013/2 [RSA-2013-2-021] at para 35;
- *Bruce v. Fleecytex Johannesburg,* CC [1998] *ZACC* 3; 1998 (2) *SA* 1143 (CC); 1998 (4) *BCLR* 415 (CC) at paras 7-9;
- *Investigating Directorate: Serious Economic Offences v. Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v. Smit NO* [2000] *ZACC* 12; 2001 (1) *SA* 545 (CC); 2000 (10) *BCLR* 1079 (CC) (*Hyundai*) at para 21.

Languages:

English.

Identification: RSA-2017-3-006

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 29.08.2017 / **e)** CCT 283/16, CCT 293/16, CCT 294/16 / **f)** Chantelle Jordaan and Others v. City of Tshwane Metropolitan Municipality and Others / **g)** www1.saflii.org/cgi-bin/disp.pl?file=za/cases/*ZACC*/2017/31.html& query =jordaan / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.2.2 Sources − Categories − Unwritten rules − **General Principles of law**.
2.2.2.2 Sources − Hierarchy − Hierarchy as between national Sources − **The Constitution and other sources of domestic law**.
2.3.2 Sources − Techniques of review − **Concept of constitutionality dependent on a specified interpretation**.
2.3.10 Sources − Techniques of review − **Contextual interpretation**.
3.12 General Principles − **Clarity and precision of legal provisions**.
3.20 General Principles − **Reasonableness**.
5.3.39.3 Fundamental Rights − Civil and political rights − Right to property − **Other limitations**.

Keywords of the alphabetical index:

Property, charge / Property, common law, meaning / Real rights, limited / Property, right not to be deprived of, arbitrarily / Property, municipal, new owner, debt transfer.

Headnotes:

A statute providing, without more, that a claim for a specified debt is a "charge" upon immovable property does not transmit that debt to successors in title of the property. Public formalisation of the charge is required (e.g. registration in the Deeds Registry) to give notice of its creation to the world.

The Bill of Rights prohibits arbitrary deprivation of property, which would occur if debts without historical limit are imposed on a new owner of municipal property on the basis of a statutory provision that provides merely that a claim for them is a "charge" upon immovable property.

Summary:

I. The High Court declared Section 118.3 of the Local Government: Municipal Systems Act, 2000 constitutionally invalid. This section provides that an amount due for municipal services rendered on any property is a charge upon that property and enjoys preference over any mortgage bond registered against the property.

This declaration of constitutional invalidity was granted because the City of Tshwane and Ekurhuleni municipalities suspended, or refused to contract for the supply of, municipal services to the applicants' properties. The suspension or refusal was on the basis that the applicants, who were relatively recent transferees of municipal properties, owed the municipalities for municipal services rendered to these properties before transfer. In other words, the municipalities required these new owners to pay historical municipal debts.

The matter came before the Constitutional Court for confirmation of the High Court declaration of constitutional invalidity in terms of Section 167.5 of the Constitution, whilst the municipalities appealed against the order.

Arguments before and conclusions of the Constitutional Court

In the Constitutional Court, the municipalities contended that a proper construction of Section 118.3 was that the charge survives transfer. They argued that for municipalities to properly fulfil their constitutional duties of service delivery, in the greater good, they needed extra-ordinary debt collecting measures. This meant burdening new owners with the responsibility for historical debts.

The municipalities conceded that nothing prevented them from enforcing their claims for historical debts against those who incurred them, namely the previous owners. The municipalities conceded further that their powers included interdicting any impending transfer to a new owner by obtaining an interdict against the old, indebted owner, until the debts were paid.

TUHF Ltd (hereinafter, "TUHF"); a social housing organisation, and The Banking Association of South Africa (hereinafter, "BASA") and the Johannesburg Attorneys Association (hereinafter, "JAA") were admitted as *amici curiae* (friends of the court). TUHF and BASA associated themselves with the applicants. They advanced further arguments including that Section 118.3 permitted arbitrary deprivation of not just the new owner's property rights, but of real security rights the new owner confers on any mortgagee who extends a fresh loan on the security of the property post-transfer. The JAA focused on a conveyancer's duties and ethical position should the Constitutional Court hold that the Section 118.3 right survives transfer.

II. In a unanimous judgment, penned by Cameron J, the Constitutional Court weighed the historical, linguistic and common law factors bearing on how the provision should be understood, plus the need to interpret it compatibly with the Bill of Rights.

The Court held that the language of the provision is well capable of meaning that the charge does not survive transfer. Indeed, it must be so interpreted. The Court held that a mere statutory provision, without more, that a claim for a specified debt is a "charge" upon immovable property does not without more make that charge transmissible to successors in title. Public formalisation of the charge is required (e.g. registration in the Deeds Registry) so as to give notice of its creation to the world.

Section 118 does not require this public formalisation process. In any event, 25.1 of the Bill of Rights prohibits arbitrary deprivation of property. This would occur if debts without historical limit are imposed on a new owner of municipal property. Therefore, to avoid unjustified arbitrariness, the Court held that Section 118.3 must be interpreted so that the charge it imposes does not survive transfer to a new owner.

In the result, the Court held that, because Section 118.3 can properly and reasonably be interpreted without constitutional objection, it was not necessary to confirm the High Court's declaration of constitutional invalidity. For clarity, the Court, however, granted the applicants a declaration that the charge does not survive transfer.

Supplementary information:

Legal norms referred to:

- Sections 25 and 27 of the Constitution of the Republic of South Africa, 1996;
- Section 118.3 of the Local Government: Municipal Systems Act 32 of 2000.

Cross-references:

Constitutional Court:

- *S v. Mhlungu* [1995] *ZACC* 4; 1996 (3) *SA* 867 (CC); 1995 (7) *BCLR* 793 (CC);

- *Investigating Directorate: Serious Economic Offences v. Hyundai Motor Distributors (Pty) Ltd* [2000] *ZACC* 12; 2001 (1) *SA* 545 (CC); 2000 (10) *BCLR* 1079 (CC);
- *First National Bank of South Africa Ltd t/a Wesbank v. Commissioner, South African Revenue Services* [2002] *ZACC* 5; 2002 (4) *SA* 768; 2002 (7) *BCLR* 702;
- *University of Stellenbosch Legal Aid Clinic v. Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v. University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v. University of Stellenbosch Legal Aid Clinic* [2016] *ZACC* 32; 2016 (6) *SA* 596 (CC); 2016 (12) *BCLR* 1535;
- *City of Johannesburg v. Kaplan N.O.* [2006] ZASCA 39; 2006 (5) *SA* 10 (CC)*;*
- *Chagi v. Special Investigating Unit* [2008] *ZACC* 22; 2009 (2) *SA* 1 (CC); 2009 (3) *BCLR* 227 (CC);
- *City of Cape Town v. Real People Housing (Pty) Ltd* [2009] ZASCA 159; [2010] 2 All *SA* 305 (SCA); 2010 (5) *SA* 196 (SCA);
- *City of Tshwane Metropolitan Municipality v. Link Africa (Pty) Ltd* [2015] *ZACC* 29; 2015 (6) *SA* 440 (CC); 2015 (11) *BCLR* 1265 (CC);
- *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* [2011] *ZACC* 33; 2012 (2) *SA* 104 (CC);
- *My Vote Counts NPC v. Speaker of the National Assembly* [2015] *ZACC* 31*;*
- *Daniels v. Scribante* [2017] *ZACC* 13; 2017 (4) *SA* 341 (CC); 2017 (8) *BCLR* 949 (CC).

Languages:

English.

Identification: RSA-2017-3-007

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 19.09.2017 / **e)** CCT 200/16 / **f)** Mtokonya v. Minister of Police / **g)** www.saflii.org/za/cases/ZACC/2017/33.html / **h)** [2017] *ZACC* 21; CODICES (English).

Keywords of the systematic thesaurus:

3.10 General Principles − **Certainty of the law**.
4.11.2 Institutions − Armed forces, police forces and secret services − **Police forces**.
5.3.5.1 Fundamental Rights − Civil and political rights − Individual liberty − **Deprivation of liberty**.
5.3.13.2 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Effective remedy**.
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:

Administrative act, judicial review, prescription / Prescription period, starting point / Police, detention, compensation, claim, prescription.

Headnotes:

The date on which a claim prescribes through extinctive prescription is calculated from when a creditor has knowledge of the identity of the debtor and of the facts giving rise to the debt. This does not require under Section 12.3 of the Prescription Act that the creditor knows that a claim or a legal remedy exists.

Summary:

I. On 27 September 2010, Mr Mtokonya was arrested and detained for five days by members of the South African Police Service (hereinafter, “SAPS”). He claimed that both his arrest and detention were unlawful. Mr Mtokonya, who is illiterate and lives in a rural area, did not institute proceedings to recover damages from the respondent until April 2014. By then, more than three years had elapsed from the date of his release from detention. The police accordingly pleaded that the claim had prescribed. In response, Mr Mtokonya contended that he had not known that the conduct of the police was wrongful until July 2013 when his neighbour (who happened to be a lawyer) told him he had a claim. For that reason, prescription only started running then.

The dispute was whether the prescription period should be calculated from the date of his release from detention in 2010 or from July 2013 when he realised he had a claim. The question was whether a claimant is required to have knowledge that a respondent’s conduct was wrongful and gives rise to a debt before prescription can start running.

By way of an agreed statement the parties agreed upon the relevant facts, the nature of dispute and what the High Court had to decide. That Court held that knowledge that the conduct of the other party is wrongful is not a requirement for prescription to start running. Prescription thus started running after Mr Mtokonya's release from detention. Since three years had elapsed by the time action was initiated, the claim had prescribed.

II. In a majority judgment by Zondo J (Cameron J, Froneman J, Khampepe J, Madlanga J, Mhlantla J and Pretorius AJ concurring), the Court upheld the High Court's decision that a claimant need not know that the respondent's conduct is wrongful before prescription starts to run. This is because whether or not someone's conduct is wrongful is a conclusion of law and not fact. Moreover, Section 12.3 of the Prescription Act 68 of 1969 merely requires a claimant to have knowledge of the identity of the other party (debtor) and the facts giving rise to the debt before prescription can start running. Section 12.3 does not refer to knowledge of any legal conclusions.

The matter could not be decided on the bases that Mr Mtokonya did not know that the Minister of Police was a co-debtor or that he had no knowledge of the existence of the debt because neither of these points were in issue and fell outside the stated case the parties agreed. The Court granted Mr Mtokonya leave to appeal but dismissed the appeal with no order as to costs.

III. The minority judgment, by Jafta J (Nkabinde ADCJ and Mojapelo AJ concurring), interpreted the legal questions arising from the special case more broadly. It held that the case need not be decided on issues narrowly contained in the agreed statement. The question was, generally speaking, whether the applicant's claim had prescribed. There was nothing in the agreed statement that suggested that the applicant knew that he had a cause of action, or that the respondent could be vicariously liable for the conduct of the SAPS members. The statute should not be interpreted as allowing prescription to commence if a claimant was not aware of the existence of the debt. Doing so would deny uneducated or impoverished members of society the protection of the Constitution. The minority judgment concluded that the applicant's claim had not prescribed.

Supplementary information:

Legal norms referred to:

- Section 12.3 of the Prescription Act.

Cross-references:

Constitutional Court:

- *Claasen v. Bester* [2011] ZASCA 197; 2012 (2) *SA* 404 (SCA);
- *Van Staden v. Fourie* [1989] ZASCA 36; 1989 (3) *SA* 200 (A);
- *Minister of Finance v. Gore N.O.* [2006] ZASCA 98; 2007 (1) *SA* 111 (SCA);
- *Truter v. Deysel* [2006] ZASCA 16; 2006 (4) *SA* 168 (SCA);
- *National Union of Metalworkers of SA on behalf of Fohlisa v. Hendor Mining Supplies*, *Bulletin* 2014/3 [RSA-2014-3-017];
- *Myathaza v. Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus* [2016] *ZACC* 49; (2017) 38 ILJ 527 (CC); 2017 (4) *BCLR* 473 (CC);
- *Links v. Department of Health, Northern Province, Bulletin* 2016/1 [RSA-2016-1-007];
- *Mighty Solutions t/a Orlando Service Station v. Engen Petroleum Ltd* [2015] *ZACC* 34; 2016 (1) *SA* 621 (CC); 2016 (1) *BCLR* 28 (CC).

Languages:

English.

Identification: RSA-2017-3-008

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 31.10.2017 / **e)** CCT 20/17 / **f)** MEC, Health and Social Development, Gauteng v. DZ / **g)** www.saflii.org/za/cases/*ZACC*/2017/37.html / **h)** 2017 (12) *Butterworths Constitutional Law Reports* 1528; CODICES (English).

Keywords of the systematic thesaurus:

2.2.2.2 Sources − Hierarchy − Hierarchy as between national Sources − **The Constitution and other sources of domestic law**.
5.3.4.1 Fundamental Rights − Civil and political rights − Right to physical and psychological integrity − **Scientific and medical treatment and experiments**.
5.3.13.2 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Effective remedy**.

5.3.17 Fundamental Rights − Civil and political rights − **Right to compensation for damage caused by the State**.
5.4.19 Fundamental Rights − Economic, social and cultural rights − **Right to health**.

Keywords of the alphabetical index:

Delictual damages / "Once and for all" rule / Medical negligence, alleged / Medical expenses, future / Damages, form of payment / Damages, lump sum award / Common law, development.

Headnotes:

The common-law rule that damages due in law must be paid in money rather than in services stands.

In a delictual claim, a plaintiff must claim in one action all damages flowing from one cause of action and courts are obliged to award these damages in a single lump sum.

Defendants in delict may show that public medical services of the same or higher standard, at no or lesser cost than private medical care, will be available to a plaintiff in future. If that evidence is sufficiently cogent, the plaintiff will not succeed in a claim for greater future medical expenses.

South African common law does not currently allow damages to be ordered by way of periodic payments; however, the law might be developed to allow this if appropriate factual evidence is adduced.

Summary:

I. WZ developed cerebral palsy because of a hospital's negligence during birth. The defendant accepted in the High Court, the Supreme Court of Appeal (hereinafter, "SCA") and the Constitutional Court that WZ's condition was caused by the hospital's negligence as well as liability in the sum of R23 272 303, of which most was for future medical expenses.

Belatedly, the defendant wished to satisfy the future medical expenses by an undertaking to pay service providers directly as and when the need might arise. She contended that the common law allows this and that, if not, the common law ought to be developed in terms of Sections 39.2 and 173 of the Constitution.

The High Court, and subsequently the SCA, dismissed the defendant's amended plea. The SCA considered that the common law precludes a defendant from satisfying an award of delictual damages in respect of future medical expenses in the manner sought by the Gauteng MEC. It declined to develop the common law in terms of Section 39.2 on the ground that there was no evidence before that the development was necessary to promote the spirit, purport and objects of the Bill of Rights. It also cautioned that the legislature, rather than the judiciary, ought to be the primary engine of law reform.

In the Constitutional Court, the defendant repeated the arguments she had advanced in the lower courts.

The Members of the Executive Committee for Health in the Eastern Cape Province and Western Cape Province made submissions as *amici curiae*. The Eastern Cape MEC sought to ensure that she was not precluded from raising two particular defences in pending trials. The Western Cape MEC also sought to preserve certain mechanisms to fulfil claims against public healthcare providers for alleged negligence.

II. In a judgment penned by Froneman J – in which Zondo DCJ, Cameron J, Kollapen AJ, Kathree-Setiloane AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ concurred – the Constitutional Court held that in this case it would be inappropriate for the common law to be developed because the Gauteng MEC failed to adduce facts for the development. But future possible development when appropriate evidence was presented was not excluded.

The Constitutional Court confirmed that it is currently open to defendants who wish to dispute a claim for future medical expenses to adduce evidence that it would be reasonable for a plaintiff to obtain less expensive medical services. If that evidence were to be accepted, a claimant would not succeed in proving the damages claimed.

In the result, leave to appeal was granted but the appeal was dismissed with costs.

III. Jafta J concurred in the order.

He considered that South African common law does not prohibit periodic payments of delictual damages. In particular, the common law does not govern how payment of a judgment debt is to be executed once final judgment is given: that is, instead, governed by Section 173 of the Constitution, which grants all superior courts the power to regulate their own processes. Thus, although damages are ordinarily payable in a lump sum, a superior court may grant an order allowing for periodic payments where it is in the interests of justice to do so.

Supplementary information:

- Sections 8, 12, 27, 36, 39.2, 165, 172 and 173 of the Constitution of the Republic of South Africa, 1996;
- Section 66 of the Magistrates' Courts Act 32 of 1994.

Cross-references:

Constitutional Court:

- *Mokone v. Tassos Properties CC* [2017] *ZACC* 25; 2017 (5) *SA* 456 (CC); 2017 (10) *BCLR* 1261 (CC);
- *University of Stellenbosch Legal Aid Clinic v. Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v. University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v. University of Stellenbosch Legal Aid Clinic* [2016] *ZACC* 32; 2016 (6) *SA* 596 (CC); 2016 (12) *BCLR* 1535 (CC);
- *Mighty Solutions t/a Orlando Service Station v. Engen Petroleum Ltd* [2015] *ZACC* 34; 2016 (1) *SA* 621 (CC); 2016 (1) *BCLR* 28 (CC);
- *Paulsen v. Slip Knot Investments 777 (Pty) Ltd* [2015] *ZACC* 5; 2015 (3) *SA* 479 (CC); 2015 (5) *BCLR* 509 (CC);
- *H v. Fetal Assessment Centre* [2014] *ZACC* 34; 2015 (2) *SA* 193 (CC); 2015 (2) *BCLR* 127 (CC);
- *MM v. MN* [2013] *ZACC* 14; 2013 (4) *SA* 415 (CC); 2013 (8) *BCLR* 918 (CC);
- *Gundwana v. Steko Development CC* [2011] *ZACC* 14; 2011 (3) *SA* 608 (CC); 2011 (8) *BCLR* 792 (CC);
- *Head of Department, Mpumalanga Department of Education v. Hoërskool Ermelo* [2009] *ZACC* 32; 2010 (2) *SA* 415 (CC); 2010 (3) *BCLR* 177 (CC);
- *Van der Merwe v. Road Accident Fund* [2006] *ZACC* 4; 2006 (4) *SA* 230 (CC); 2006 (6) *BCLR* 682 (CC);
- *K v. Minister of Safety and Security* [2005] *ZACC* 8; 2005 (6) *SA* 419 (CC); 2005 (9) *BCLR* 835 (CC);
- *Jaftha v. Schoeman; Van Rooyen v. Stoltz* [2004] *ZACC* 25; 2005 (2) *SA* 140 (CC); 2005 (1) *BCLR* 78 (CC);
- *S v. Thebus* [2003] *ZACC* 12; 2003 (6) *SA* 505 (CC); 2003 (10) *BCLR* 1100 (CC);
- *Khumalo v. Holomisa* [2002] *ZACC* 12; 2002 (5) *SA* 401 (CC); 2002 (8) *BCLR* 771 (CC);
- *Carmichele v. Minister of Safety and Security (Centre for Applied Legal Studies intervening)* [2001] *ZACC* 22; 2001 (4) *SA* 938 (CC); 2001 (10) *BCLR* 995 (CC);
- *Chief Lesapo v. North West Agricultural Bank* [1999] *ZACC* 16; 2000 (1) *SA* 409 (CC); 1999 (12) *BCLR* 1420 (CC);
- *Fose v. Minister of Safety and Security* [1997] *ZACC* 6; 1997 (3) *SA* 786 (CC); 1997 (7) *BCLR* 851 (CC);
- *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa,* 1996 [1996] *ZACC* 26; 1996 (4) *SA* 744 (CC); 1996 (10) *BCLR* 1253 (CC).

Languages:

English.

Switzerland
Federal Court

Important Decisions

Identification: SUI-2017-3-004

a) Switzerland / **b)** Federal Court / **c)** First Court of Public Law / **d)** 21.03.2017 / **e)** 1B_115/2016 / **f)** Solothurn Prosecution Service v. A. / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 143 I 292 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.13 General Principles − **Legality**.
3.16 General Principles − **Proportionality**.
5.1.4 Fundamental Rights − General questions − **Limits and restrictions**.
5.3.5 Fundamental Rights − Civil and political rights − **Individual liberty**.
5.3.13.17 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Rules of evidence**.
5.3.13.23.1 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to remain silent − **Right not to incriminate oneself**.
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**.
5.3.35 Fundamental Rights − Civil and political rights − **Inviolability of the home**.

Keywords of the alphabetical index:

Conversation, recording / Right to remain silent / Fundamental right, essence / Fundamental right, core / Listening, device, surveillance / Recording, audio, video / Residence, audio surveillance / Offence, criminal, seriousness / Measure of constraint / Evidence, obtained legally, admissibility / Evidence, lawfulness / Evidence, admissibility / Criminal procedure / Suspicion, particularly strong / Audio surveillance, home.

Headnotes:

Articles 113.1, 280 and 281 in conjunction with Articles 269 *et seq.* of the Swiss Code of Criminal Procedure (hereinafter, "CCP"); Articles 10.2, 13.1 and 36 of the Federal Constitution; Article 8 ECHR; technical surveillance devices.

Technical surveillance measures were used on parents accused of having inflicted grievous bodily harm on their small children, resulting in one child's death. The measure was proportionate and did not harm the essence of the defendants' fundamental rights (recital 2).

Summary:

I. The Solothurn Prosecution Service (hereinafter, the "public prosecutor") initiated criminal proceedings against A. and B., a couple suspected of killing their first child and inflicting grievous bodily harm on the second. As part of pre-trial criminal investigations, a listening device was installed in the home of the defendants. At a later stage, the public prosecutor informed the couple that they had been under surveillance. In A.'s appeal, the Solothurn Cantonal Court held that listening in had been unlawful and ruled that the information collected in this manner could not be used. In an appeal by the Solothurn public prosecutor, the Federal Court set aside the cantonal decision.

II. Placing a listening device in the home of the defendants constituted a violation of their personal freedom (Article 10.2 of the Constitution), interference in their private and family life and a violation of their right to respect for the home (Article 13.1 of the Constitution and Article 8 ECHR). For such a surveillance measure to be lawful, it had to respect the conditions set out in Article 36 of the Constitution. It was therefore necessary to make sure that it had a legal basis, did not violate the essence of the relevant fundamental rights and respected the principle of proportionality.

Articles 280 and 281 CCP – in conjunction with Articles 269 to 279 CCP – constituted a sufficient legal basis for the impugned measure. The afore-mentioned provisions placed very specific requirements on the use of technical surveillance devices. In the instant case, the Federal Court considered that the audio surveillance had met all the conditions set out by criminal procedural law. It held that there had been strong enough suspicions of the commission of a crime to warrant the impugned surveillance measure.

The inviolable core of personal freedom is respected when a listening device is used in a residence, as the free will of the person under surveillance is not affected. It is, however, violated by the use of lie detectors, drug testing and truth serums. These

practices diminish or eliminate the free will of the individual. In this connection, the Federal Court noted that parliament had provided for only a single case in which the essence of the right to personal freedom and the right to the protection of the private sphere prevented the defendant from being placed under surveillance using technical devices: under Article 281.3.a CCP, it was not possible to record the behaviour of a defendant in custody for evidential purposes. In the Federal Court's opinion, it could be assumed that the inviolable core of a defendant's fundamental rights is respected in all other circumstances and, in particular, when a listening device is placed in their home.

The contested act of audio surveillance also complied with the principle of proportionality. The Federal Court took into consideration the fact that the couple had been under serious suspicion and that there had been no evidence to suspect anyone else. It also took into account the seriousness of the offences committed. In addition, it mentioned that the impugned measure had targeted solely A. and B., both charged with the same offence. Moreover, the Federal Court noted that audio surveillance was less intrusive than video surveillance and that the duration of the impugned measure had not seemed excessive in the instant case. The Federal Court concluded its review of proportionality by indicating that A. was not able to use the right to remain silent as an argument when challenging the lawfulness of the use of audio surveillance in their home. While Article 113.1 CCP did grant the defendant the right to refuse to testify or co-operate, it also required him to consent to the measures of constraint provided for by law. Since audio surveillance was a measure of constraint, its use did not violate the right to remain silent, even when the defendant refused to testify.

In conclusion, the contested audio surveillance should be considered as lawful and the information collected as part of the measure may be used by the criminal authorities. The Federal Court therefore allowed the public prosecutor's appeal.

Languages:

German.

Identification: SUI-2017-3-005

a) Switzerland / **b)** Federal Court / **c)** First Court of Public Law / **d)** 18.04.2017 / **e)** 1B_34/2017 / **f)** A. and B. v. Lucerne Public Prosecution Service / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 143 I 241 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.13 General Principles − **Legality**.
3.16 General Principles − **Proportionality**.
5.1.1.4.3 Fundamental Rights − General questions − Entitlement to rights − Natural persons − **Detainees**.
5.1.4 Fundamental Rights − General questions − **Limits and restrictions**.
5.3.5 Fundamental Rights − Civil and political rights − **Individual liberty**.
5.3.5.1.3 Fundamental Rights − Civil and political rights − Individual liberty − Deprivation of liberty − **Detention pending trial**.
5.3.13.22 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Presumption of innocence**.
5.3.33 Fundamental Rights − Civil and political rights − **Right to family life**.

Keywords of the alphabetical index:

Couple, unmarried / Prisoner, visit / Prisoner, family, contact / Prisoner, visit, limitation / Family, right.

Headnotes:

Articles 10.2, 14, 32.1 and 36 of the Federal Constitution; Articles 220.2, 235 and 236 of the Swiss Code of Criminal Procedure (hereinafter, "CCP"); right of a partner to visit during pre-trial or preventive detention.

Fundamental rights affected by the visitation rights of partners; preventive detention and early execution of a sentence as types of detention when awaiting judgment; legal rules and practice with regard to the execution of pre-trial or preventive detention, in addition to visitation rights. Unless precluded by an overriding public interest, prisoners in pre-trial or preventive detention also have the right to regular and appropriate contact with their family, which also includes unmarried partners. This is especially the case when pre-trial or preventive detention lasts a long time and there is no longer the risk of collusion (recital 3). Specific arrangements when two prisoners in pre-trial or preventive detention, or subject to early commutation of sentence, ask to visit each other; relations between the two systems in question. In the instant case, the cantonal authorities had to

guarantee the prisoner's right to appropriate visits in the institution where his female partner and co-defendant was being held (recital 4).

Summary:

I. A. and B. were a couple who had lived together for approximately 15 years. They were accused of having jointly committed several armed robberies. The Lucerne Public Prosecution Service requested custodial sentences of 18 and 15 years respectively. The pair had been detained in different institutions since July 2015. B. was subject to early commutation of sentence from April 2016, whereas A. was still in detention awaiting judgment.

In October 2016, A. took steps to be granted the right to visit his partner and have regular telephone contact with her. The criminal court of first instance refused his request. Therefore B. made a similar request to obtain the right to visit her partner at least once a month. Her request was also refused by the court of first instance. A. and B. brought the case before the Lucerne Cantonal Court, which also refused to grant visitation rights. The prisoners appealed and the Federal Court set aside the cantonal judgment.

II. The Federal Court made a distinction between detention awaiting judgment, which covered pre-trial and preventive detention (under Article 220 CCP), and the early commutation of sentences (under Article 236 CCP).

The Federal Court held that the aim of the detention had to be taken into account when assigning prisoners to detention systems. The conditions in detention awaiting judgment could be more restrictive than those for the early execution of a sentence when the risks of escape, collusion or reoffending were higher than those applicable to the early commutation of sentence or when order and security in the prison were particularly at risk (in particular, the safety of staff and prisoners). However, this was the case when the length of detention was short. When detention awaiting judgment was longer, the conditions of detention had to meet higher standards. With regard to the early execution of a sentence, the Federal Court held that it was a measure which essentially was halfway between criminal proceedings and the execution of a sentence. In principle, it was subject to the system for detention awaiting judgment, even if it took place in a prison.

After pointing out that all individuals were presumed innocent until they had been found guilty by a legally enforceable judgment (Article 32.1 of the Constitution), the Federal Court explained that the presumption of innocence applied both to persons placed in detention awaiting judgment and to prisoners subject to the early execution of a sentence.

The Federal Court listed the fundamental rights concerned in the instant case: the right to personal freedom (Article 10.2 of the Constitution), the right to respect for private and family life (Article 13.1 of the Constitution) and the right to a family (Article 14 of the Constitution). These rights allowed prisoners to have contact with family members, either through visitation rights or through the right to have telephone conversations.

The Federal Court noted that Article 235 CCP – which governed the execution of detention – provided the *legal basis* for restricting the defendants' visitation rights. In addition, this provision set out the general principle of *proportionality* by stating that the freedom of defendants could not be more strictly limited than was required for the purpose of detention or for order and security in the detention centre. The same provision also specified that all contact between the prisoner and other persons required authorisation from the director of proceedings. The Federal Court stated that prisoners in pre-trial or preventive detention had the right to regular and appropriate contact with their family, a term which included unmarried partners, unless this was precluded by an overriding public interest. This was especially true when there was a long period of detention before trial and there was no longer the risk of collusion.

The decision highlighted that prisoners serving their sentences also had visitation rights and the right to release on temporary licence to cultivate relations with the outside world (Article 84 of the Swiss Criminal Code). The outright prohibition of all visitation rights between the applicants restricted their fundamental rights extremely severely. In order for interference with these rights to be lawful, it had to respect the conditions set out under Article 36 of the Constitution, in other words, have a legal basis, be in the public interest, respect the principle of proportionality and not violate the essence of the fundamental rights concerned.

In the instant case, the Federal Court held that the impugned judgment violated the principle of proportionality. There was no justification for prohibiting the applicants from having any visits for several years. The defendant therefore had to be granted the right to an appropriate visit in his partner's prison, particularly since there was no longer a risk of collusion between the couple and the organisation of the requested visits would not involve an excessive workload for the relevant authorities. Therefore the Federal Court allowed the appeal, set

aside the judgment in question and referred the case back to the cantonal authority for a new decision.

Languages:

German.

Identification: SUI-2017-3-006

a) Switzerland / **b)** Federal Court / **c)** Criminal Law Court / **d)** 05.05.2017 / **e)** 6B_294/2016 / **f)** X. v. Vaud Public Prosecution Service / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 143 I 284 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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:

Lawyer, inept / Lawyer, representation, mandatory / Harm, irreparable / Defendant / Rescheduling, claim, deadline, condition.

Headnotes:

Articles 94 and 130 of the Swiss Code of Criminal Procedure (hereinafter, "CCP"); rescheduling of a deadline missed due to a serious error by the court-appointed defence lawyer.

As a general rule, an error committed by a lawyer does not constitute a no-fault impediment justifying the rescheduling of a deadline under Article 94 CCP, as the lawyer's mistake is attributable to their client (recital 1). However, when defence lawyers are court appointed, the right of the defendant to practical and effective criminal defence, under Article 6.3.c ECHR, Article 14.3.d of the UN Covenant and Article 32.2 of the Federal Constitution, may, in exceptional circumstances, prevent the serious error committed by defence counsel from being attributed to the defendant. Circumstances which were accepted in the instant case, taking into account the fact that the mistake of lodging the appeal the day after the deadline expired exposed the defendant to significant and irreparable harm (recital 2).

Summary:

I. The first instance court handed down a thirteen-month prison sentence, suspended for three years, and a fine for a serious drug offence. X. submitted a notice of appeal against the decision. The following day, the first instance court served a full copy of the decision on X. and gave him a twenty-day time limit to lodge the appeal. The day after the deadline given, X., through his lawyer, requested a rescheduling of the deadline to lodge an appeal with the court of appeal. The request was accompanied by the appeal. The president of the court of appeal informed X. that his request to reschedule the deadline had been dismissed, as no credible reason for the impediment had been given, and also that the appeal could be considered inadmissible and that he had been given a time limit to decide on the admissibility of the appeal. X. presented submissions on the day of the deadline that had been extended at his request, which he subsequently supplemented by post. The court of appeal declared the appeal lodged by X. inadmissible. In substance, it held that the appeal had been lodged too late, as it was posted the day after the deadline had expired. X.'s explanation that there had been confusion in the defence lawyer's office concerning who was supposed to take the letter in question to the post office was not a credible reason for the impediment. Consequently, there were no grounds for rescheduling the deadline, which meant that the appeal, lodged after the deadline, was inadmissible.

X. appealed to the Federal Court, which had to determine whether the lawyer's error should have been attributed to the applicant.

II. Under Article 93 CCP, a party is in default if it does not complete a procedural act within the time limit. Article 94.1 CCP specifies that a new deadline may be scheduled if the party was prevented from observing the original one and that this entailed significant and irreparable harm. The party must credibly show that they were in no way at fault for the mistake.

According to Federal Court case-law, excluding cases of gross errors by a lawyer, particularly one that is court appointed, erroneous behaviour on the part of the latter is attributable to their client. Generally, a fault in the lawyer's internal organisational arrangements does not constitute a no-fault impediment that would warrant rescheduling a deadline.

The Federal Court pointed out that, under Article 6.3.c ECHR, anybody charged with a criminal offence has the right to defend themselves in person or through legal assistance of their own choosing or, if they have insufficient means to pay for legal assistance, to be given it free when the interests of justice so requires. These safeguards aimed to provide a practical and effective defence given the pre-eminent role of the right to a fair trial within a democratic society. Article 14.3.d of the UN Covenant guaranteed the right to legal assistance for a person charged with a criminal offence. This provision established the same safeguard as provided for in Article 6.3.c ECHR. Similarly, under Article 32.2 of the Constitution all accused persons must be given the opportunity to assert their rights to a proper defence.

Under the case-law of the European Court of Human Rights and the Federal Court, the rights of the defence may be undermined when the authorities allow a representative's non-compliance with a deadline to cause significant harm to the defendant when the lawyer has been court appointed. Legal doctrine generally excludes the court-appointed lawyer's error from being attributed to their client, particularly when the former misses a deadline. Otherwise, the right of the defendant to a practical and effective defence would be violated. The court-appointed lawyer's mistake is not attributable to their client when the former's behaviour involves serious negligence, is completely wrong or even goes completely against professional rules, and when the harm suffered may not be made good by a damages claim, which is not the case when the defendant faces a mere fine or financial penalties and does not then receive a criminal record. In addition, the client must not know about the error. More generally, the latter has to credibly show that they did not commit an error of their own, without which the mistake would not have happened. When the client themselves is at fault, there is no need to decide whether the blame is attributable to the defendant.

In the instant case, non-compliance with the deadline for the appeal due to the reason given clearly constituted gross negligence by the lawyer. In addition, the lower court had not found the applicant to be at fault in any way. Lastly, the harm suffered by the applicant due to the missed deadline was significant; even though he denied the charges against him, the mistake made by his lawyer had deprived him of his right to take the case to the court of appeal, resulting in the entry into force of the court of first instance's judgment, which included a suspended thirteen-month prison sentence for a serious drug offence. In addition, the consequences of this negligence were not likely to be made good through a liability claim by the applicant against his representative, or by any other means.

In consideration of the above, the Federal Court held that the applicant's right to an effective criminal defence in line with Article 6.3.c ECHR, Article 14.3.d of the UN Covenant and Article 32.2 of the Constitution prevented the court-appointed lawyer's mistake from being attributed to the defendant, taking into account the fact that the error in the instant case, namely lodging the appeal the day after the deadline, exposed the defendant to significant and irreparable harm. In the absence of any mistake made by the applicant, the lower court had violated Article 94 CCP by dismissing his request to reschedule the deadline.

Consequently, the Federal Court allowed X.'s appeal.

Languages:

French.

"The former Yugoslav Republic of Macedonia"
Constitutional Court

Important decisions

Identification: MKD-2017-3-005

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 16.11.2017 / **e)** U.br. 167/2016 / **f) / g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 170/2017, 27.11.2017 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.4 General Principles − **Separation of powers**.
3.9 General Principles − **Rule of law**.
3.10 General Principles − **Certainty of the law**.
3.22 General Principles − **Prohibition of arbitrariness**.
4.7.8.2 Institutions − Judicial bodies − Ordinary courts − **Criminal courts**.

Keywords of the alphabetical index:

Evidence, free evaluation, principle / Penalty, determination, individualisation, principle, calculation criteria / Penal policy.

Headnotes:

The Law on the Determination of the Type and the Severity of Penalties is not in accordance with the constitutional principles of the rule of law, separation of powers and the independence of the judiciary, because it establishes rules and criteria for sentencing that reduce the role of the judge in sentencing to performing simple mathematical operations and does not allow for the individualisation of punishment on the basis of the facts and circumstances of each individual case.

Summary:

I. The Law on the Determination of the Type and the Severity of Penalties ("Official Gazette of the Republic of Macedonia", no. 199/2014) (hereinafter, the "Law"), adopted by the Assembly in 2014, was brought before the Constitutional Court for constitutional review. The aim of the Law was to harmonise penal policy and sentencing by prescribing objective criteria for determining the type and the severity of penalties. It also established the Commission for Harmonisation of Penal Policy.

Under the Law, the objective categorisation of the criminal offence and the previous life of the perpetrator are to be considered as objective criteria for sanctioning and imposing penalties in individual cases. The Law categorises the offences set out in the Criminal Code and other substantive laws into 55 horizontal categories according to the type and severity of the criminal sanction, and sets out the criteria for determining the previous life of the perpetrator in vertical categories.

The Law stipulates that aggravating and mitigating circumstances be taken into account by way of adding points to or subtracting points from the starting point, that is to say, the mean value of the determined severity of the penalty in each vertical category according to the table in Annex 1 of the Law.

Annex 1 contains a table for calculating the minimum and maximum penalties that could be imposed on the perpetrator. Annex 2 contains a table of mitigating and aggravating circumstances, and an individual score for each circumstance. Annexes 3, 4 and 5 contain the worksheets to be used by judges in calculating the aggravating and mitigating circumstances, and in determining the type and the severity of the penalty.

II. The applicant contended that the Law in whole was contrary to the constitutional principle of autonomy and independence of the courts, since it required judges to adjudicate not on the basis of their free judicial conviction, but on the basis of the tables and points set out in the Law. Moreover, the principles and rules for sanctioning laid down by the Law ran counter to the constitutional principle of the separation of powers, as well as the criminal-law principle of the individualisation of punishment.

III. The Court first noted that the rule of law and the separation of state powers into legislative, executive and judicial powers are the fundamental values of the constitutional order of the Republic.

The Court then analysed the relevant provisions of the Law on Courts, the Criminal Code, and the Criminal Procedure Code which define the principle of the free assessment of evidence, under which judges in court proceedings act and decide on the basis of their free judicial conviction.

The Court noted that the principle of the free assessment of evidence derives from the theory of the free assessment of evidence, according to which a judge, based on the assessment of each piece of evidence separately and in conjunction with other pieces of evidence, freely and independently determines which pieces of evidence are considered relevant for deciding the case. In this process, judges are not accountable for how they form their conviction, since there are no rules that determine the completeness and sufficiency of the evidence. The essence of the free assessment of evidence consists in the right of the court to assess the existence of facts according to its own findings, and this assessment is neither bound nor limited by special formal probative rules.

The Court further noted that the national criminal law has accepted a system of relatively determined penalties based on a combination of the legal determination of the penalty (for each criminal offence, the Criminal Code specifies the type of sentence and the framework of the sentence) and the judicial determination of punishment within the legally prescribed limits. This system leaves the judge room in each individual case to independently select and impose a sentence within the statutory framework.

The Court stated that, with the adoption of the Law and the amendments to the Criminal Code in 2014 (Official Gazette, no. 199/2014), the concept of judicial imposition of sentences had been abandoned, because judges no longer impose punishment on the basis of their free judicial conviction, but according to special rules laid down by the Law. The predetermined rules and criteria for sentencing lead to the formalisation of the principle of the free judicial conviction as the role of judges in sentencing has been reduced to performing simple mathematical operations of scoring and calculating scoring differences in the scores (by adding or subtracting points set out by the Law) of the mitigating and aggravating circumstances.

The Constitutional Court noted that the Law does not guarantee an objective individualisation of the penalty for the perpetrators of criminal offences. This is not in the spirit of the principle of the individualisation of punishment, the essence of which is to adapt the type and severity of the penalty to the offender's personality. The Court thus found the Law to be in violation of Amendment XXV to the Constitution, which guarantees the independence and autonomy of the courts in criminal cases.

The Court found the establishment of the Commission for Harmonisation of Penal Policy – whose members are elected by the Assembly of the Republic and which could influence the courts in sentencing – to constitute an interference of the legislative power in the judicial power, which is contrary to the constitutionally guaranteed principle of the division of state powers into legislative, executive and judicial powers, as a fundamental value of the constitutional order under Article 8.1.4 of the Constitution, as well as contrary to Article 101 of the Constitution, which lays down that the Supreme Court, as the highest court in the Republic, is responsible for the uniform application of the laws by the courts.

The Constitutional Court found that the rules governing commutation of penalties in the Law depart from those in the Criminal Code. This situation leaves room for arbitrariness in sentencing, which violates the principles of the rule of law and legal certainty of citizens with respect to proper and objective individualised punishment.

The Court underlined that, while the legislator's aim in adopting the Law could not, *per se*, be regarded as contrary to the Constitution, the Law as an instrument for achieving that aim is not constitutional in terms of the established fundamental constitutional values of the rule of law and the independence of the courts, as well as the basic legal principles underlying modern penal law. Accordingly, the Court struck down the Law on the Determination of the Type and the Severity of Penalties.

The Court, on its own initiative, struck out Article 39.3 of the Criminal Code as it obliged the courts to apply the Law on the Determination of the Type and the Severity of Penalties.

Languages:

Macedonian, English (translation by the Court).

Turkey
Constitutional Court

Important decisions

Identification: TUR-2017-3-004

a) Turkey / **b)** Constitutional Court / **c)** Second Section / **d)** 13.09.2017 / **e)** 2014/11855 / **f)** *Gürkan Kaçar ve diğerleri* / **g)** *Resmi Gazete* (Official Gazette), 27.10.2017, 30223 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

5.3.2 Fundamental Rights − Civil and political rights − **Right to life**.
5.3.17 Fundamental Rights − Civil and political rights − **Right to compensation for damage caused by the State**.

Keywords of the alphabetical index:

Safety, measures, minors, mentally disabled, protection.

Headnotes:

The state's duty to protect the lives of individuals must not be interpreted in a way that places an impossible burden on the state, given the unpredictability of human conduct. Nonetheless, the public authorities must consider children, mentally disabled person and others in need of protection when carrying out hazardous acts and take the necessary administrative measures.

Summary:

I. Gürkan Kaçar, one of the applicants in this matter, touched a high voltage power line whilst playing on a railway which was separated from the street in front of his house by a derelict wall. As a result, he was exposed to electric shock and seriously injured. He is mentally disabled and was a minor at the relevant time. The Chief Public Prosecutor's Office launched an investigation. The report prepared at the scene by police officers confirmed the way in which he had been injured and also noted that several grounding cables were out of order. The medical report issued by the hospital indicated that the applicant was placed in life-threatening danger by the incident and his injuries would prevent him from performing his daily activities for fifteen days.

However, the public prosecutor carried out an examination of the scene of the accident more than five months after the incident and found out that the grounding cable was operating and that there were iron guardrails on both sides of the railway, which constituted a barrier between the street and the railway. The report issued by an expert, who accompanied the public prosecutor, indicated that the applicant Gürkan Kaçar was at complete fault in the incident.

The report obtained by the criminal court from the academic experts also pointed out that the applicant Gürkan Kaçar was found to be completely at fault in the incident. At the end of the trial, the court acquitted the accused, and the judgment was upheld by the Court of Cassation.

The applicants unsuccessfully sought compensation for injuries before the administrative court. The appeal before the Council of State was also unsuccessful.

The applicants maintained that; Gürkan Kaçar was injured when he touched the cables because the protecting walls near the railway lines had been demolished and the necessary security measures had not been taken, there was a neglect of duty on the part of the administration and their action for damages was dismissed following unreasonably lengthy proceedings. In this respect, the applicants alleged that their son's right to life safeguarded by Article 17 of the Constitution was violated, and they requested compensation for non-pecuniary damages.

II. The Constitutional Court emphasised that it was unclear from the information available whether an assessment had been made as to whether the security measures observed during the site inspection, which occurred more than five months after the incident, were in place when the accident happened. The inspection report provided insufficient explanation as to how the applicant Gürkan Kaçar had entered the place where the incident occurred and how he was exposed to electric shock.

During the action for damages, it was acknowledged; that the applicant had entered the scene from a derelict part of the wall surrounding the railway, that one of the electric cables there was broken or cut off and picked up to play, that it then touched the catenary line on the railway and this was how the applicant received his injury. The action for damages was then dismissed for lack of causal link between the damage and the administrative act.

The Constitutional Court observed that the State's obligation to protect the lives of individuals must not be interpreted in such a way as to impose an excessive burden on the public authorities, having particular regard to the unpredictability of human conduct. However, the public authorities must consider children, mentally disabled persons and other persons in need of protection in their prediction of human conduct while carrying out hazardous acts and they must put into practice the appropriate administrative measures in due time.

In the action for damages brought by the applicants, due regard was not paid to the fact that the administration failed to take the necessary measures for people in need of protection, and that the failure in supervision by the applicant's family did not eliminate the responsibility of the administration to do so. The applicant was found in the action to be totally at fault, due to his careless conduct. However, this conclusion did not comply with the principles concerning the obligation to protect life.

There were no difficult aspects to the case or other factors which might have stood in the way of the proceedings and it was not sufficiently complex in nature to necessitate the prolonging of proceedings for an unreasonable period of nine years. It was found that the case was not concluded in a reasonable time, which could have jeopardised the significant role the current judicial proceedings could have played in preventing similar breaches of the right to life.

Consequently, the Constitutional Court found a violation of the right to life of the applicant Gürkan Kaçar, safeguarded by Article 17 of the Constitution.

Languages:

Turkish.

Identification: TUR-2017-3-005

a) Turkey / **b)** Constitutional Court / **c)** Plenary / **d)** 18.10.2017 / **e)** 2014/11028 / **f)** Bizim FM Radyo Yayıncılığı ve Reklamcılık A.Ş. / **g)** *Resmi Gazete* (Official Gazette), 19.12.2017, 30275 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

5.3.21 Fundamental Rights − Civil and political rights **− Freedom of expression**.
5.3.23 Fundamental Rights − Civil and political rights **− Rights in respect of the audiovisual media and other means of mass communication**.

Keywords of the alphabetical index:

Radio broadcasting, frequency auction / Media, pluralism.

Headnotes:

The failure of the administration to hold a frequency auction deters new radio stations from entering the broadcasting field and creates inequality between existing radio stations and candidate radio stations, thus violating the freedoms of expression and press.

Summary:

I. In Turkey, private radio broadcasting gained a legal basis through the changes made to Article 133 of the Constitution in 1993. Under the legislative and secondary regulations, existing radio stations that satisfied the criteria set by the Radio and Television Supreme Council (hereinafter, "RTÜK") were allowed to continue broadcasting until a frequency auction was held. However, despite the provisions of the relevant laws, no auction has hitherto been organised by the administration. The current terrestrial radio stations either began broadcasting before 1995 or were granted broadcast permission by certain administrative or judicial orders after that date. Since 1995, no radio station has started broadcasting upon allocation of channel and frequency through a frequency auction.

The applicant company voluntarily suspended its broadcasting which was taking place under a licence issued in 1995. It then requested an (R3) licence from the RTÜK to allow it to transmit a local radio broadcast. Its request was rejected with no justification. The applicant contested the rejection before the administrative court and the Council of State but this was unsuccessful.

The applicant pointed out that the administration had not held a frequency auction since 1995 and a date had yet to be set for a future auction. This led to unequal practices between pre-existing radio stations and new companies wishing to enter the radio broadcasting business, thereby restricting the right to broadcast. The applicant alleged that its rights under Articles 2, 5, 10, 26, 36 and 138 of the Constitution were violated and in this regard it requested a retrial.

II. The freedoms of expression and press are pivotal to the proper functioning of democracy. The State is expected to provide the highest safeguards in this area and is under an obligation, by virtue of Article 28.3 of the Constitution, to take the necessary measures to ensure these freedoms. The phrases "subjecting broadcasts to a system of licensing" and "regulatory provisions concerning the use of means to disseminate information and thoughts" set out in Article 26.1 of the Constitution allow the State to organise the press and broadcasting and to monitor them through licencing. They also make it incumbent on the State to maintain order in this sector and to remove and eliminate any obstacles which make the enjoyment of the freedoms of expression and the press difficult or impossible.

In this context, the obligation of the State to ensure pluralism in the sector of radio and television broadcasting is underlined in the reasoning of the amendment made to Article 133 of the Constitution in 1993 which states that "radio and television stations shall be established and operated freely in conformity with rules to be determined by law". The reasoning also states that if pluralism could not be provided, there could be no mention of democracy. The rationale behind the constitutional amendment and the legal arrangements in this regard is clearly to develop the freedoms of expression and press in Turkey. It cannot be argued that the present transition period is meant to be permanent, under these constitutional and legal provisions.

The rejection of the applications for radio broadcasts due to the lack of a frequency auction constitutes a structural problem that adversely affects the right to broadcast, which is an important means of ensuring the transmission and dissemination of thoughts. Even if it can be accepted that there were a few legal and technical difficulties over licencing and regulation in the early days of private radio broadcasting, it has not been asserted either by the administration or the courts that such an obligation would impose an unfair burden on the State. Nor has any other reason has been submitted to justify the failure of frequency allocation. The current situation poses major problems in many respects.

Firstly, the continuation of the transition period that commenced in 1995 has led to unequal practices between broadcasting companies which have been broadcasting from the beginning of this period and those that wish to start broadcasting. This situation is still on going. Secondly, the date when a radio frequency will be allocated to the applicant for broadcasting is indefinite in terms of legislation and practice. Thirdly, the administration and the courts have failed to provide adequate safeguards against the arbitrariness which has arisen due to non-enforcement of the laws with respect to the applicant and other parties wishing to begin radio broadcasting. Fourthly, the current situation may also lead to problems in terms of competition in the radio broadcasting sector. It is clear that the lack of measures to maintain pluralism in the national media for such a lengthy period (twenty-four years) has prejudiced the freedoms of expression and press which are of vital importance in a democratic society.

The above points indicate that the State has not met its obligation to put the necessary legal and administrative framework in place to ensure effective pluralism in the media and to safeguard the freedom of press and information, neither has it met its obligation to enforce the existing legislation effectively. Consequently, the Constitutional Court found a violation of the freedoms of expression and press.

Languages:

Turkish.

Identification: TUR-2017-3-006

a) Turkey / **b)** Constitutional Court / **c)** Plenary / **d)** 21.12.2017 / **e)** 2016/25189 / **f)** Selahattin Demirtaş / **g)** *Resmi Gazete* (Official Gazette), 01.02.2018, 30319 / **h)** CODICES (English, Turkish).

Keywords of the systematic thesaurus:

3.16 General Principles − **Proportionality**.
4.5.11 Institutions − Legislative bodies − **Status of members of legislative bodies**.
5.3.5.1.3 Fundamental Rights − Civil and political rights − Individual liberty − Deprivation of liberty − **Detention pending trial**.
5.3.21 Fundamental Rights − Civil and political rights − **Freedom of expression**.

Keywords of the alphabetical index:

Terrorist propaganda / Mass violence, call.

Headnotes:

Calls to support terrorist organisations and for mass violence constitute sufficient grounds for detention, irrespective of the fact that the accused is a member of parliament. Being a member of parliament does not automatically confer protection from detention. Courts would, however, need to apply a higher standard of scrutiny in assessing the existence of strong indications that the person concerned was going to commit an offence of this nature, if there was a distinct possibility that his or her actions fell within the scope of the right to participate in political activity.

Summary:

I. The applicant is currently a member of the Parliament and the Co-Chairperson of the People's Democratic Party (hereinafter, "HDP"). He was the subject of several investigations concerning offences allegedly committed when he was a member of parliament. Motions were drawn up with a view to lifting his parliamentary immunity.

Meanwhile, a provisional article was added to the Constitution for the temporary suspension of parliamentary immunity, to the effect that it would not apply to existing motions submitted to competent authorities by 20 May 2016. Because the investigation files against the applicant fell within the scope of this provision, the necessary steps were taken for prosecution, and he was detained on remand for his alleged membership of a terrorist organisation and public incitement to commit crimes.

The applicant maintained that his detention was unlawful and that his right to liberty and security had been breached. He contended that the acts committed by him fell within the scope of freedom of expression and the right to carry out political activities, particularly in view of the fact that he was a prominent political figure.

II. In Article 19.1 of the Constitution, it is stated in principle that everyone has the right to personal liberty and security. Article 19.2 and 19.3 of the Constitution stipulate the reasons for deprivation of liberty, with the condition of due process of law. Any interference with the right to liberty and security must also comply with Article 13 of the Constitution in which the criteria with respect to the restriction of fundamental rights and freedoms are laid down. This article requires that restrictions must be prescribed by law and on the basis of the reasons specified in the relevant articles of the Constitution, and be proportionate.

Under Article 19.3 of the Constitution, detention measures may only be applied to "individuals against whom there is a strong indication of guilt". Thus, the prerequisite for detention is the existence of a strong indication that the individual has committed an offence. An assessment must therefore be made in each concrete case as to whether this prerequisite has been fulfilled before the other requirements of detention are examined. A strong indication of guilt will only appear in cases where the accusation is supported with convincing evidence likely to be regarded as strong.

In the present case, the investigation authorities found that when an armed conflict erupted in Kobani between the PYD (considered to be the PKK's Syrian wing) and DAESH during the Syrian civil war, a call was made on 5 October 2014 through a social media account associated with the PKK to provoke people to defend Kobani and to occupy cities in Turkey in support of this cause. The next day, a public statement was made through the HDP's social media account that its Central Executive Board had convened with the agenda of Kobani events. In this statement people were also called to take immediate action and to take to the streets to support those who had been already fighting to protect regions. It was also stated therein "Everywhere is Kobani from now on. We call on you to RESIST FOR AN INDEFINITE PERIOD OF TIME". In the meantime and thereafter, continuous announcements and calls were made through a website operating under the PKK's guidance urging people to rise up and engage in armed conflicts on the streets with security forces. Following these calls, many violent acts took place, creating great public disturbance and resulting in many casualties and deaths, and the vandalising of public and private property. They began on 6 October 2014, lasted for days and spread to many regions of the country. The applicant did not denounce this call or state that it was made outside his will. On the contrary, he stated that he stood behind it.

Furthermore, during the period when the terrorist events known as "ditch events" occurred, the PKK tried to gain dominance over some parts of the provinces located in the east and south-eastern regions of Turkey. To that end, the PKK dug ditches, constructed barricades and planted bombs and explosives in these barricades. During this period, the applicant made speeches, generally in places where those events intensified. The applicant used expressions affirming the terrorist activities caused by the PKK. Given the applicant's political position and the content, time, and place of his speeches, it cannot be said that the assessment of these speeches by the investigation authorities as a strong indication of guilt was unfounded.

Lastly, regard being had to the contents of the phone conversations alleged to have taken place between Sabri Ok, one of the high-level heads of the PKK terrorist organisation and K.Y., who is stated to be a head of the terrorist organisation, and between the applicant and K.Y., and in view of some other evidence, the opinion of the relevant authorities that the applicant has acted in accordance with the instructions of the heads of the terrorist organisation cannot be said to be devoid of factual basis.

The Prosecutor's Office summoned the applicant on several different occasions in order to take his statement but he failed to comply with these summonses. Accordingly, the grounds to detain the applicant due to the risk of his absconding had factual basis.

There is no constitutional provision to the effect that members of parliament cannot be detained on remand in the event that parliamentary immunity is lifted or if a constitutional exception has been introduced in this regard. Contrary to the applicant's submission, the Constitutional Court did not state in previous judgments that members of parliament could not be detained. The mere fact of being a member of parliament does not represent protection against detention. Nevertheless, in cases where there are serious allegations that actions imputed to members of parliament fall within the scope of the right to carry out political activities, the courts ordering detention must apply a higher scrutiny in determining the existence of a strong indication of guilt.

The Constitutional Court therefore declared this part of the application inadmissible for being manifestly ill-founded.

Languages:

Turkish.

Ukraine
Constitutional Court

Important decisions

Identification: UKR-2017-3-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 23.11.2017 / **e)** 1-rp/2017 / **f)** Conformity of the provisions of the third sentence of Article 315.3 of the Code of Criminal Procedure with the Constitution (constitutionality) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

5.3.5.1.1 Fundamental Rights − Civil and political rights − Individual liberty − Deprivation of liberty − **Arrest**.
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**.

Keywords of the alphabetical index:

Preventive measure / Criminal proceedings, measures, ensuring / Restriction, rights, freedom / House arrest, custody.

Headnotes:

The third sentence of Article 315.3 of the Code of Criminal Procedure – under which, where no party to the criminal proceedings (the prosecutor) submits a request, the preventive measures of house arrest and detention imposed at the pre-trial investigation stage are deemed to be automatically continued at the stage of judicial proceedings – is not in conformity with the Constitution, in particular, with its Article 29.2, which lays down:

> "No one shall be arrested or held in custody other than pursuant to a substantiated court decision and only on the grounds and in accordance with the procedure established by law."

Summary:

Restriction of the constitutional right to freedom and personal inviolability must be exercised in compliance with the constitutional guarantees of the protection of human and citizen's rights and freedoms.

The following are mandatory requirements for lawful arrest or detention:

i. arrest or detention should be carried out solely on the basis of a duly substantiated court decision; and
ii. the grounds and procedure for the application of preventive measures should be prescribed in the law and should be consistent with the constitutional guarantees of a fair trial and the principle of the rule of law.

The Code of Criminal Procedure (hereinafter, "CCP") provides for measures to ensure criminal proceedings, including preventive measures (Articles 131, 176, 181 and 183). Preventive measures are personal obligation, personal guarantee, bail, house arrest and detention (Article 176.1 CCP). House arrest and detention are special preventive measures as they restrict the constitutional right of a person to freedom and personal inviolability.

House arrest implies restriction of the freedom of movement of a suspect or an accused; the period of detention of a person under house arrest may not exceed two months – if necessary, it may be extended at the request of the prosecutor during pre-trial investigation (Article 181.1, 181.2 and 181.6 CCP).

Article 183.1 CCP states that detention is an exceptional preventive measure which is applied only if the prosecutor proves that none of the less severe preventive measures can avoid the risks set out in Article 177 CCP. These risks include attempts by the suspect or the accused: to abscond; to tamper with evidence; to interfere with or illegally influence the victim, a witness, another suspect, another accused, an expert, or a specialist in the same criminal proceedings; to impede the criminal proceedings in another way; and to commit further criminal offences.

The investigating judge or the court must refuse a request for a preventive measure, if the prosecutor does not show that: there is a reasonable suspicion that the suspect or the accused has committed a criminal offence; there are sufficient grounds to believe that at least one of the risks stipulated by Article 177 CCP exists; and less severe preventive measures cannot avoid a risk or risks mentioned in the request (Article 194.1 and 194.2 CCP).

Therefore, the substantiation for the application of preventive measures restricting the right to freedom and personal inviolability, in particular house arrest and detention, should be subject to judicial review at specific, periodic intervals by an objective and impartial court for the purpose of examining whether or not the risks which imply application of such preventive measures still exist, including at the time that the pre-trial investigation ends, when some risks may no longer exist.

Pursuant to Article 315.3 CCP, during the preliminary court hearing, at the request of the participants in the court proceedings, the court has the right to impose, alter or revoke the measures for ensuring criminal proceedings, including the preventive measures (first sentence); in the absence of such a request from the parties to the criminal proceedings, the measures for ensuring criminal proceedings imposed during the pre-trial investigation are deemed to be extended (the third sentence).

However, the continuation of measures to ensure criminal proceedings, namely the preventive measures of home arrest and detention, imposed during pre-trial investigation, without a court examination of the substantiation of the grounds for their application, contradicts the requirements of compulsory periodic judicial review of the application of preventive measures restricting a person's right to freedom and personal inviolability, enshrined in Article 29.2 of the Constitution, according to which "No one shall be arrested or held in custody other than pursuant to a substantiated court decision and only on the grounds and in accordance with the procedure established by law".

When, under Article 291 CCP, an indictment is transferred to and received by a court, the change in the procedural status of a person from suspect to accused (defendant) and the beginning of the stage of judicial proceedings at the court of first instance preclude the automatic continuation of the application of preventive measures imposed on that person at the stage of pre-trial investigation as a suspect. Consequently, in the absence of a substantiated decision of the court, which permits the deprivation of freedom for a period determined by that court decision, that person should be immediately released.

Preventive measures (home arrest and detention) which restrict the right to freedom and personal inviolability guaranteed by Article 29.1 of the Constitution may be imposed by the court at the stage of judicial proceedings in the court of first instance, in particular, during the preliminary court hearing, if the prosecutor submits a request (Article 176.4 CCP).

Other participants in criminal proceedings, together with the prosecutor, are empowered to submit a request, in particular, regarding the application of other, including less severe, preventive measures, their modification or revocation.

The provisions of the third sentence of Article 315.3 CCP allow the court, in a preliminary court hearing, to extend the validity of the preventive measures (home arrest and detention), where there are no requests by the parties.

The Constitutional Court considered that bodies of state power and their officials should take into account the constitutional norms, principles and values when applying any provisions of the Code of Criminal Procedure.

According to Article 55.1 of the Constitution, the rights and freedoms of a person shall be protected by a court. The most important feature of the court is its independence and impartiality, and one of the main principles of legal proceedings is the equality of all participants in the trial before the law and the court (Article 129.2.1 of the Constitution).

The Constitutional Court considered that the continuation by a court during the preliminary court hearing of the application of measures to ensure criminal proceedings, namely the preventive measures of house arrest and detention, in the absence of a request submitted by the prosecutor, violates the principle of equality of all participants in the trial, as well as the principle of independence and impartiality of the court, as the court sides with the prosecution in determining the existence of risks under Article 177 CCP. Where a judge, in cases where there are no requests by the parties (the prosecutor), initiates the continuation of detention of the accused or house arrest, he or she goes beyond the judicial function and sides with the prosecution – which is a violation of the principles of independence and impartiality of the judiciary.

Thus, the Court held the third sentence of Article 315.3 CCP not to be in conformity with the Constitution (unconstitutional).

Languages:

Ukrainian.

Identification: UKR-2017-3-002

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 20.12.2017 / **e)** 2-rp/2017 / **f)** Conformity of the provisions of Article 42.2.7 of the Law on Higher Education with the Constitution (constitutionality) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.9 General Principles − **Rule of law**.
3.13 General Principles − **Legality**.
4.5.11 Institutions − Legislative bodies − **Status of members of legislative bodies**.

Keywords of the alphabetical index:

Education, higher / Education, institution, head / Voting, dictatorial laws, appointment, position / Rule of law / Parliamentary immunity, violation, essence.

Headnotes:

Article 42.2.7 of Law no. 1556-VII of 1 July 2014 on Higher Education, as amended, (according to which a person who voted for dictatorial laws on 16 January 2014 may not be elected or appointed as the head or acting head of an institution of higher education), taken in conjunction with clause 2 of Section II of Law no. 415 (which provides for the automatic dismissal of such a person executing the duties of such a position), violates the essence of parliamentary immunity, laid down by Article 80.2 of the Constitution.

Summary:

The Constitution proclaims that Ukraine is a law-based state in which the principle of the rule of law is recognised and effective (Articles 1 and 8.1 of the Constitution).

The principle of legal certainty requires definiteness, clarity and consistency of legal provisions, in particular, their predictability and stability.

Under Law no. 1556-VII, 1 July 2014 on Higher Education (hereinafter, “Law no. 1556”), the direct management of an institution of higher education is carried out by its head, who has the relevant powers (the first sentence of Article 34.1 and 34.3).

The first paragraph of Article 42.1 of Law no. 1556 sets out special requirements (*inter alia*, those regarding language, education and work experience) for a

candidate for the position of head of an institution of higher education. The second paragraph of Article 42.1 of Law no. 1556 sets out that a person may not hold the position of head of the relevant institution of higher education for more than two terms.

Article 42.2 of Law no. 1556 stipulates that certain persons may not be elected or appointed to a position of head of an institution of higher education (including acting head). Article 42.2.7 states that one such person is a person who, *inter alia*, "voted for dictatorial laws of 16 January 2014".

The Constitutional Court noted that Article 42.2 of Law no. 1556, in particular, Article 42.2.7, establishes a restriction of a legal and organisational nature regarding election or appointment of a person to the office of head of an institution of higher education (including acting head), which extends to legal relations that will arise in future during such election or appointment.

From the content of Article 42.2.7, it follows that the persons who voted for "dictatorial laws of 16 January 2014" are the People's Deputies, as the laws adopted by the Parliament of Ukraine *(Verkhovna Rada)* on that day are known as "Dictatorial laws of 16 January 2014". It is implied in Article 42.2.7 that the only feature of the above-mentioned laws is their adoption on 16 January 2014. All laws adopted on that day have that feature; therefore, it is impossible to determine unequivocally which of those laws fall into the category of "dictatorial".

The Constitutional Court found it necessary to consider the circumstances, which considerably complicate the determination of which laws adopted on 16 January 2014 fall into that category.

On the basis of the above, the Constitutional Court found the disputed provision of Law no. 1556 to be unclear, since it is unclear from its content what criterion should be used in determining whether a law adopted by the parliament on 16 January 2014 is "dictatorial".

Thus, Article 42.2.7 of Law no. 1556 does not meet the requirement of legal certainty; this situation allows for the arbitrary interpretation of that Article in law enforcement practice and may lead to arbitrariness.

People's Deputies are guaranteed parliamentary immunity (Article 80.1 of the Constitution).

Article 80.3 of the Constitution provides for parliamentary immunity – the People's Deputies of Ukraine cannot be prosecuted, detained or arrested without the consent of the parliament.

Article 80.2 of the Constitution establishes that the People's Deputies shall not be legally liable for the results of voting or for statements made in Parliament and in its bodies, with the exception of liability for insult or defamation.

The Constitutional Court noted that the essence of parliamentary immunity in Ukraine is to protect the People's Deputy from persecution for statements and voting while performing parliamentary duties in Parliament and exercising his or her right to defend his or her position in the consideration of any issues in the parliament or its bodies.

Thus, the Constitution recognises and guarantees the right to parliamentary immunity, and therefore, establishes additional guarantees of inviolability of the representative of the Ukrainian people, as compared to the personal inviolability of an individual.

The Constitutional Court stressed that no one, including the parliament, may hold the People's Deputy responsible for his or her statements and voting in Parliament and its bodies.

Parliamentary immunity is perpetual in nature, which excludes the possibility of prosecuting the People's Deputy in the future, even if his or her parliamentary powers are terminated.

The Constitutional Court noted that parliamentary immunity in Ukraine is not absolute, since Article 80.2 of the Constitution provides for the liability of a People's Deputy for insult or defamation.

However, the Constitution does not establish any other reservations regarding the voting of the People's Deputy in Parliament and its bodies. The right of free speech of the People's Deputy in the parliament and its bodies is absolute; therefore, he or she cannot be held legally liable for the results of voting.

Clause 2 of Section II "Final Provisions" of Law no. 415 stipulates that "the person executing the duties of the head of an institution of higher education, who on the day of the entry into force of this Law falls within the scope of Article 42.2, shall be released by the founder (or founders) or by the body (or person) who authorised him or her to execute those duties, within two weeks from the date of entry into force of this Law".

Article 42.2.7 of Law no. 1556, in conjunction with clause 2 of Section II "Final Provisions" of Law no. 415, provides for the automatic release of a person who "voted for dictatorial laws of 16 January 2014".

The Constitutional Court found that Article 42.2.7 of Law no. 1556 introduced the legal liability of a People's Deputy for the results of voting in the past, namely, for the support of "dictatorial laws of 16 January 2014", in that where he or she is appointed as acting head of an institution of higher education, he or she shall be dismissed within two weeks from the date of entry into force of Law no. 415.

The legislative regulation set out above violates the essence of parliamentary immunity established by Article 80.2 of the Constitution, which is perpetual in nature, that is, it excludes the possibility of prosecuting the People's Deputy in the future, even if his or her parliamentary powers are terminated, and is absolute with respect to the impossibility of holding a People's Deputy legally liable for the results of voting in Parliament and its bodies, except for liability for insult or defamation.

Based on the foregoing, the Constitutional Court held Article 42.2.7 of Law no. 1556, taken in conjunction with clause 2 of Section II "Final Provisions" of Law no. 415, to be incompatible with Article 80.2 of the Constitution.

III. Judges of the Constitutional Court M. Melnuk, V. Moisyk and I. Slidenko attached a dissenting opinion.

Languages:

Ukrainian.

Identification: UKR-2017-3-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 21.12.2017 / **e)** 3-rp/2017 / **f)** Conformity with the Constitution (constitutionality) of Articles 61.9 and 105.3 of the Law on Elections of the People's Deputies; paragraph 3 of Chapter II "Final and Transitional Provisions" of the Law amending the Law on Elections of the People's Deputies "regarding the exclusion of candidates for People's Deputies from election party lists in the multi-member constituency" (the case on the exclusion of candidates for People's Deputies from election party lists in the multi-member constituency) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.5.3.1 Institutions − Legislative bodies − Composition − **Election of members**.
4.9.3 Institutions − Elections and instruments of direct democracy − **Electoral system**.
4.9.7.2 Institutions − Elections and instruments of direct democracy − Preliminary procedures − **Registration of parties and candidates**.
4.9.7.3 Institutions − Elections and instruments of direct democracy − Preliminary procedures − **Ballot papers**.
5.3.41.2 Fundamental Rights − Civil and political rights − Electoral rights − **Right to stand for election**.

Keywords of the alphabetical index:

Election, people's, deputies / Election, list, party, multi-member, constituency / Election, candidate, exclusion / Electoral rights, restriction.

Headnotes:

Legislative provisions – allowing political parties to exclude a candidate considered unselected from, or change the order of such candidates within, the electoral party lists of candidates for People's Deputies after the elections but before the Central Election Commission declares such a candidate elected – are unconstitutional. Such provisions, *inter alia*:

i. violate the right of citizens to freely elect and be elected to bodies of state power and of local government (Article 38.1 of the Constitution);
ii. make it possible for the party not to accept the political will embodied in the results of the voting in elections; and
iii. are contrary to the principles of the constitutional system.

Summary:

According to Article 61.9 of Law no. 4061-VI of 17 November 2011 on Elections of the People's Deputies, as amended (hereinafter, "Law no. 4061"), "where a party adopts a decision envisaged by Article 105.3 of this Law in respect of a candidate for Deputy before adoption of a decision by the Central Election Commission declaring him or her elected, the Central Election Commission takes a decision to exclude that candidate from the election party list". According to Article 105.3 of Law no. 4061, the party that nominated candidates for deputies included in its election list and took part in the distribution of deputy mandates may take a decision to exclude a candidate

for deputy who, according to the results of elections pursuant to Article 98.10 of this Law, is considered unselected, from their election list at any time after the day of the elections, before the Central Election Commission declares him or her elected. Such a decision adopted in accordance with the party's statute by its congress (assembly or conference) signed by the Head and with the party seal, together with an extract from the protocol of the congress (assembly or conference) signed by the chairperson, shall be forwarded to the Central Election Commission within five days of its adoption.

Within five days of receipt of those documents, the Central Election Commission shall decide on the exclusion from the election party list of the candidate named in the decision. Paragraph 3 of Chapter II "Final and Transitional Provisions" of Law no. 1006-VIII of 16 February 2016 amending the Law on Elections of the People's Deputies (regarding the exclusion of candidates for People's Deputies from election party lists in the multi-member constituency) (hereinafter, "Law no. 1006") sets out "the scope of this Law covers the election lists of candidates for People's Deputies of political parties that were the subjects of the electoral process in the early elections of People's Deputies on 26 October 2014".

The results of free elections of People's Deputies, which are carried out on the basis of universal, equal and direct suffrage by secret ballot, are binding on state authorities and local self-government bodies, and on subjects of the electoral process, including parties and voters. Since the results of the elections of People's Deputies are determined solely by the voting of voters, the party has no right, at its discretion, to change these results by adopting decisions that result in the exclusion from its election list of one or more candidates for People's Deputies or changing their order within the list. Such exclusion after the elections is incompatible with the principles of democracy, free elections and a democratic state.

Moreover, such exclusion on the initiative of the party and at its discretion distorts the results of the people's will expressed through the elections of People's Deputies, and leads to unreasonable and disproportionate restrictions on the voting rights of Ukrainian citizens. This makes the results of the expression of the people's will dependent on the decision of the relevant supreme governing body of the party.

The possibility of excluding candidates for People's Deputies from the election list from the party after the determination of the results of elections of People's Deputies is contrary to the essence of democratic elections and the constitutional right of citizens to freely elect and be elected to bodies of state power and local self-government.

By exercising his or her electoral right, the voter supports all candidates for People's Deputies in the election list of one party or does not support any of them. The composition of the election party list and the order of candidates for People's Deputies affect the formation of the political will of voters. The exclusion by the party from its election list of one or more candidates upon the results of elections changes the order of candidates for People's Deputies on this list and is actually the revision of the results of elections of People's Deputies.

The Constitutional Court concluded that, when deciding on the nomination of a specific person as a candidate for People's Deputies as a part of its election list, the party must act with awareness of political responsibility for the activities of this person both as a candidate for People's Deputy and as a People's Deputy.

The possibility of excluding candidates for People's Deputies from the election party list after the establishment of the results of the elections of People's Deputies also causes legal uncertainty regarding the acquisition of the status of a People's Deputy by candidates for People's Deputies. The exclusion of candidates for People's Deputies from the election party list violates the principle of legitimate expectations of both voters and candidates for People's Deputies.

While the early termination of deputy powers is possible only on the basis of grounds set out in the Constitution, the exclusion of candidates for People's Deputies from the election party list after the establishment of the results of elections of People's Deputies is allowed on any grounds recognised by the party as sufficient or without grounds. The possibility of excluding candidates for People's Deputies from the election party list after the establishment of the results of elections of People's Deputies by a decision of the congress (assembly or conference) of the party creates a danger of excessive dependence on parties of such candidates.

The Constitutional Court concluded that the exclusion of candidates for People's Deputies from the election party list by the party after the establishment of the results of elections of People's Deputies by the decision of its congress (assembly or conference), as provided for by Articles 61.9 and 105.3 of Law no. 4061, is contrary to: the principles of democracy; legal certainty and legitimate expectations as the components of the principle of the rule of law;

freedom of political activity; and free elections and the free expression of the will of voters, as well as the free deputy mandate (Articles 5.2, 8.1, 15, 71, 79-81 and 84 of the Constitution). The above-mentioned provisions of Law no. 4061 violate the right of citizens to freely elect and be elected to the bodies of state power and of local self-government (Article 38.1 of the Constitution), make it possible for the party not to accept the political will embodied in the results of voting in the elections of People's Deputies, and are contrary to the principles of the constitutional system of Ukraine.

III. Judges of the Constitutional Court M. Hultai, M. Zaporozhets, I. Slidenko and N. Shaptala attached a dissenting opinion.

Languages:

Ukrainian.

Court of Justice of the European Union

Important decisions

Identification: ECJ-2017-3-010

a) European Union / **b)** Court of Justice of the European Union / **c)** First Chamber / **d)** 14.09.2017 / **e)** C-184/16 / **f)** Ovidiu-Mihaita Petrea v. Ypourgou Esoterikon kai Dioikitikis Anasygrotisis / **g)** ECLI:EU:C:2017:684 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.6 Fundamental Rights − Civil and political rights − Freedom of movement.
5.3.9 Fundamental Rights − Civil and political rights − Right of residence.

Keywords of the alphabetical index:

European Union, citizen, status, rights conferred by / Expulsion, procedure / Public order, threat / Imprisonment / Public safety, danger.

Headnotes:

The grant of a residence permit to a national of a Member State is to be regarded, not as a measure giving rise to rights, but as a measure by a Member State serving to prove the individual position of a national of another Member State with regard to provisions of European Union law. In this context, such a declaratory character attaches, therefore, also to the registration certificate, with the result that the issue of that document cannot, in itself, give rise to a legitimate expectation on the part of the person concerned in his right to stay on the territory of the Member State concerned.

Moreover, according to Article 27.1 of Directive 2004/38/EC, Member States have the possibility to restrict the freedom of movement and residence of a Union citizen or a member of his family, irrespective of nationality, on grounds of public policy, public security or public health. It follows from the very nature of an exclusion order that it remains in force as long as it has not been lifted and that the mere finding

that it has been infringed allows those authorities to adopt a new removal decision against the person concerned.

Summary:

I. In 2011, the Greek administration issued an expulsion order with a ban to a Romanian national, on the grounds that he constituted a serious threat to public order and the public security. In 2013, he returned to Greece and applied for a certificate of registration as a citizen of the Union, which had been issued to him. After discovering that he was still inadmissible, the Greek authorities had decided to withdraw the certificate and order his return to Romania again. This decision had been attacked by the interested person.

The *Dioikitiko Protodikeio Thessalonikis* (Administrative Court of First Instance, Thessaloniki, Greece) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling upon to clarify the scope of the procedural safeguards and protective measures set out in Directive 2004/38/EC when a second decision is taken to remove a Union citizen even though he was already the subject of a final exclusion order.

II. The Court of Justice of the European Union recalled that, the principle of effectiveness precludes a legal practice according to which a national of a Member State who is subject to a return order in circumstances such as those in the main proceedings may not rely, in support of an action against that order, on the unlawfulness of the exclusion order previously adopted against him. In that regard, in the absence of EU rules, the Member States are responsible for designating the courts having jurisdiction and for determining the rules of procedure governing actions for safeguarding rights which individuals derive from European Union law. However, those rules must not be such as to render virtually impossible or excessively difficult the exercise of rights. In this particular, EU law in no way precludes national legislation from providing that it is not possible to rely, against an individual measure, such as a return decision, on the unlawfulness of an exclusion order which has become final, either because the time limit for bringing an action against that order expired, or because the action brought against it was dismissed. However, the Court clarified that the interested person must have had the possibility to effectively contest in good time the original exclusion order and to rely on the provisions of Directive 2004/38/EC.

Finally, with regard to the question of whether Article 30 of Directive 2004/38/EC requires a decision adopted under Article 27.1 of that directive to be notified to the person concerned in a language he understands, although he did not bring an application to that effect, the Court has indicated that the Member States should take every appropriate measure with a view to ensuring that the person concerned understands the content and implications of a decision adopted under Article 27.1 of that directive but that it does not require that decision to be notified to him in a language he understands or which it is reasonable to assume he understands, although he did not bring an application to that effect.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.

Identification: ECJ-2017-3-011

a) European Union / **b)** Court of Justice of the European Union / **c)** Second Chamber / **d)** 27.09.2017 / **e)** C-73/16 / **f)** Peter Puškár v. Finančné riaditeľstvo Slovenskej republiky; Kriminálny úrad finančnej správy / **g)** ECLI:EU:C:2017:725 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4.18 Sources − Categories − Written rules − International instruments − **Charter of Fundamental Rights of the European Union of 2000**.
4.10.7.1 Institutions − Public finances − Taxation − **Principles**.
5.3.32.1 Fundamental Rights − Civil and political rights − Right to private life − Protection of personal data.

Keywords of the alphabetical index:

Data, personal, collecting, processing / Data, personal, deletion, right / Tax fraud, combating / Private life, database.

Headnotes:

Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter, the “Charter”), must be interpreted as meaning that it does not preclude national legislation, which makes the exercise of a judicial remedy by a person stating that his right to protection of personal data guaranteed by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, has been infringed, subject to the prior exhaustion of the remedies available to him before the national administrative authorities, provided that the practical arrangements for the exercise of such remedies do not disproportionately affect the right to an effective remedy before a court referred to in that article. It is important, in particular, that the prior exhaustion of the available remedies before the national administrative authorities does not lead to a substantial delay in bringing a legal action, that it involves the suspension of the limitation period of the rights concerned and that it does not involve excessive costs.

Besides, Article 47 of the Charter must be interpreted as precluding that a national court rejects, as evidence of an infringement of the protection of personal data conferred by Directive 95/46/EC, a list, such as the contested list, submitted by the data subject and containing personal data relating to him, if that person had obtained that list without the consent, legally required, of the person responsible for processing that data, unless such rejection is laid down by national legislation and respects both the essential content of the right to an effective remedy and the principle of proportionality.

Thus, in order to assess the proportionality of a rejection of the disputed list as evidence, the referring court must examine whether its national legislation limits, in relation to the data included in the list, information and access rights laid down in Articles 10 to 12 of Directive 95/46/EC and if such a limitation is, where appropriate, justified. Moreover, even where that is the case and there is evidence to support a legitimate interest in the possible confidentiality of the contested list, the national courts must determine on a case-by-case basis whether this takes precedence over interest in the protection of the rights of the individual and whether, in the proceedings before that court, other means exist to ensure that confidentiality, in particular as regards the personal data of other natural persons included on that list.

Finally, Article 7.e of Directive 95/46/EC must be interpreted as not precluding the processing of personal data by the authorities of a Member State for the purpose of collecting tax and combating tax fraud such as that effected by drawing up of a list of persons such as that at issue in the main proceedings, without the consent of the data subjects, provided that, first, those authorities were invested by the national legislation with tasks carried out in the public interest within the meaning of that article, that the drawing-up of that list and the inclusion on it of the names of the data subjects in fact be adequate and necessary for the attainment of the objectives pursued and that there be sufficient indications to assume that the data subjects are rightly included in that list and, second, that all of the conditions for the lawfulness of that processing of personal data imposed by Directive 95/46/EC be satisfied.

Summary:

By an action lodged before the *Najvyšší súd Slovenskej republiky* (Supreme Court of the Slovak Republic) on 19 November 2014, Mr Puškár sought a decision prohibiting the Finance Directorate, all tax offices under its control and the Financial Administration Criminal Office from including him in the list of natural persons (no. 1 227, according to his statement) who, according to the public authorities, constitute ‘*biele kone*’ (‘white horses’, a commonly used colloquial term for persons who purport to act, as ‘fronts’, as company directors). That list, as a general rule, associates a legal person or persons (of which there are 3 369, according to the claimant’s statement) with a natural person, who supposedly has acted on their behalf, together with the latter’s national ID number, the tax identification number of the taxable entity for which the latter acts and his term of office. The claimant also asked that these authorities delete his name from that list or any similar list and that it be deleted from the Financial Administration information system. The claimant is of the opinion that the action of the Financial Directorate and the Financial Administration Criminal Office is unlawful, primarily because his inclusion in the abovementioned list infringes his personal rights, specifically the right to the protection of his good name, dignity and good reputation. The Supreme Court of the Slovak Republic has dismissed as unfounded the actions brought by Mr Puškár and two other persons included on the contested list on procedural grounds, namely the fact that those applicants had not exhausted the remedies before the national administrative authorities, or on substantive grounds.

Following the subsequent constitutional appeals lodged by Mr Puškár and those two other persons, the Constitutional Court of the Slovak Republic, relying in particular on the case-law of the European Court of Human Rights, held that, in so doing, the Supreme Court of the Slovak Republic had infringed several of those applicants' fundamental rights, namely, *inter alia*, the right to a fair trial, the right to privacy as well as the right to the protection of personal data. Consequently, the Constitutional Court of the Slovak Republic set aside all of the judgments at issue of the Supreme Court of the Slovak Republic and referred the cases back to that court so that it would rule again, reminding it that it was bound by the case-law of the European Court of Human Rights on the protection of personal data.

In those circumstances, the referring court asks, whether:

a. Article 47 of the Charter must be interpreted as precluding national legislation, which makes the exercise of a judicial remedy by a person stating that his right to protection of personal data guaranteed by Directive 95/46 has been infringed, subject to the prior exhaustion of the remedies available to him before the national administrative authorities;
b. the contested list may be excluded as evidence due to the fact that it came into the possession of Mr Puškár without the consent of the competent authorities;
c. rights to privacy and data protection and the Data Protection Directive prohibit a Member State from creating a list of personal data for the purposes of tax collection without the consent of the persons concerned; and
d. a national court may follow the case-law of the Court of Justice of the European Union where this conflicts with the case-law of the European Court of Human Rights.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.

Identification: ECJ-2017-3-012

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 17.10.2017 / **e)** C-194/16 / **f)** Bolagsupplysningen OÜ and Ingrid Ilsjan v. Svensk Handel AB / **g)** ECLI:EU:C:2017:766 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.1.1.5.1 Fundamental Rights − General questions − Entitlement to rights − Legal persons − **Private law**.
5.3 Fundamental Rights − **Civil and political rights**.

Keywords of the alphabetical index:

Information, false, internet site / Damage, compensation / Legal person, personality rights.

Headnotes:

Article 7.2 of Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that a legal person claiming that its personality rights have been infringed by the publication of incorrect information concerning it on the internet and by a failure to remove comments relating to that person can bring an action for rectification of that information, removal of those comments and compensation in respect of all the damage sustained before the courts of the Member State in which its centre of interests is located.

When the relevant legal person carries out the main part of its activities in a different Member State from the one in which its registered office is located, that person may sue the alleged perpetrator of the injury in that other Member State by virtue of it being where the damage occurred. As regards a legal person pursuing an economic activity, such as the applicant in the main proceedings, the centre of interests of such a person must reflect the place where its commercial reputation is most firmly established and must, therefore, be determined by reference to the place where it carries out the main part of its economic activities. While the centre of interests of a legal person may coincide with the place of its registered office when it carries out all or the main part of its activities in the Member State in which that office is situated and the reputation that it enjoys there is consequently greater than in any other Member State, the location of that office is, not, however, in itself, a conclusive criterion for the purposes of such an analysis.

In circumstances where it is not clear from the evidence that the Court must consider at the stage when it assesses whether it has jurisdiction that the economic activity of the relevant legal person is carried out mainly in a certain Member State, so that the centre of interests of the legal person which is claiming to be the victim of an infringement of its personality rights cannot be identified, that person cannot benefit from the right to sue the alleged perpetrator of the infringement pursuant to Article 7.2 of Regulation no. 1215/2012 for the entirety of the compensation on the basis of the place where the damage occurred.

Summary:

I. Bolagsupplysningen, a company incorporated under Estonian law, and Ms Ilsjan, an employee of that company, brought an action against Svensk Handel, a company incorporated under Swedish law which is a trade association, before the Estonian Courts. The applicants in the main proceedings asked these Courts to require Svensk Handel to rectify incorrect information, published on its website, pertaining to Bolagsupplysningen and to delete the comments appearing there, to pay to Bolagsupplysningen the amount of EUR 56 634.99 as compensation for harm sustained and to pay to Ms Ilsjan fair compensation for non-material damage.

According to the application, Svensk Handel had included Bolagsupplysningen in a 'blacklist' on its website, stating that the company carries out acts of fraud and deceit. The application states that on the discussion forum on that site there are approximately 1 000 comments, a number of which are direct calls for acts of violence against Bolagsupplysningen and its employees, including Ms Ilsjan. Svensk Handel refused to remove Bolagsupplysningen from the list and to delete the comments, allegedly paralysing Bolagsupplysningen's business activities in Sweden with the result that the company suffers material damage on a daily basis.

The inferior Courts held that the action was inadmissible. According to these Courts, it was not possible to apply Article 7.2 of Regulation no. 1215/2012, since it did not appear from the application that the damage had occurred in Estonia. The information and comments at issue were published in Swedish and, without a translation, they were incomprehensible to persons residing in Estonia.

In those circumstances, the *Riigikohus* (Supreme Court, Estonia) asks, in essence, whether Article 7.2 of Regulation no. 1215/2012 must be interpreted as meaning that a legal person claiming that its personality rights have been infringed by the publication of incorrect information concerning it on the internet and by a failure to remove comments relating to that person can bring an action for rectification of that information, removal of those comments and compensation in respect of all the damage sustained before the courts of the Member State in which its centre of interests is located and, if that is the case, what are the criteria and the circumstances to be taken into account to determine that centre of interests.

II. The Court found that Article 7.2 of Regulation no. 1215/2012 must be interpreted as meaning that a person who alleges that his personality rights have been infringed by the publication of incorrect information concerning him on the internet and by the failure to remove comments relating to him cannot bring an action for rectification of that information and removal of those comments before the courts of each Member State in which the information published on the internet is or was accessible.

Indeed, in the light of the ubiquitous nature of the information placed online on a website and the fact that the scope of their distribution is, in principle, universal, such an application only be made before a court with jurisdiction to rule on the entirety of an application for compensation for damage pursuant.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.

Identification: ECJ-2017-3-013

a) European Union / **b)** Court of Justice of the European Union / **c)** First chamber / **d)** 18.10.2017 / **e)** C-409/16 / **f)** Ypourgos Ethnikis paideias kai Thriskevmaton and Ypourgos Esoterikon v. Maria-Eleni Kalliri / **g)** ECLI:EU:C:2016:767 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.2.1.2 Fundamental Rights − Equality − Scope of application − **Employment**.

5.2.2.1 Fundamental Rights − Equality − Criteria of distinction − **Gender**.

Keywords of the alphabetical index:

Employment, height, minimum, equality / Police, employment, height, minimum, equality.

Headnotes:

The provisions of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, must be interpreted as precluding a law of a Member State, such as that at issue in the main proceedings, which makes candidates' admission to the competition for entry to the police school of that Member State subject, whatever their sex, to a requirement that they are of a physical height of at least 1.70 meters, since that law works to the disadvantage of a far greater number of women compared with men and that law does not appear to be either appropriate or necessary to achieve the legitimate objective that it pursues, which it is for the national court to determine.

In that regard, while it is true that the exercise of police functions involving the protection of persons and goods, the arrest and custody of offenders and the conduct of crime prevention patrols may require the use of physical force requiring a particular physical aptitude, the fact remains that certain police functions, such as providing assistance to citizens or traffic control, do not clearly require the use of significant physical force.

Furthermore, even if all the functions carried out by the Greek police required a particular physical aptitude, it would not appear that such an aptitude is necessarily connected with being of a certain minimum height and that shorter persons naturally lack that aptitude.

In any event, the aim pursued by the law at issue in the main proceedings could be achieved by measures that are less disadvantageous to women, such as a preselection of candidates to the competition for entry into Schools for Police Officers and Policemen based on specific tests allowing their physical ability to be assessed.

Summary:

I. By decision of the Chief of the Greek Police, a competition notice for enrolment in the Greek police school was published for the academic year 2007/2008. That notice cited a provision of Greek law which provided that all candidates, irrespective of their sex, must be of a height of at least 1.70 metres. Ms Marie-Eleni Kalliri's application to participate in the competition for entry into the police school was refused on the ground that she was not of the height required. Ms Kalliri therefore lodged an action before the Administrative Court of Appeal, Athens, Greece *(Dioikitiko Efeteio Athinon)* against that decision, considering that she had suffered discrimination on grounds of sex. The Administrative Court of Appeal, Athens, Greece annulled that decision, declaring that the Greek law was contrary to the constitutional principle of equality between men and women.

The Greek Minister for the Interior *(Ypourgos Esoterikon)* and the Greek Minister for Education and Religious Affairs *(Ypourgos Ehtnikis Paideias kai Thriskevmaton)* lodged an appeal against that decision before the Council of State *(Symvoulio tis Epikratias)*. That court asks the Court of Justice in essence, whether the provisions of Directives 76/207/EEC and 2006/54/EC must be interpreted as precluding a law of a Member State, such as that at issue in the main proceedings, which makes candidates' admission to the competition for entry to the police school of that Member State subject, whatever their sex, to a requirement that they are of a physical height of at least 1.70 meters.

II. The Court established first of all that, by providing that persons who are of a height of less than 1.70 meters cannot be admitted to the examination for entry to the Greek police school, the law at issue in the main proceedings affects those workers' recruitment conditions and must, therefore, be regarded as laying down rules relating to access to employment in the public sector within the meaning of Article 3.1.a of Directive 76/207/EEC.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.

Identification: ECJ-2017-3-014

a) European Union / **b)** Court of Justice of the European Union / **c)** Fifth Chamber / **d)** 19.10.2017 / **e)** C-531/15 / **f)** Elda Otero Ramos v. Servicio Galego de Saúde and Instituto Nacional de la Seguridad Social / **g)** ECLI:EU:C:2016:789 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.2.2.1 Fundamental Rights − Equality − Criteria of distinction − **Gender**.

Keywords of the alphabetical index:

Health, risk / Employment, health, protection, workplace / Breastfeeding, mother, protection at the workplace.

Headnotes:

Article 19.1 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation must be interpreted as applying to a situation such as that at issue in the main proceedings in which a breastfeeding worker challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work in so far as she claims that the assessment was not conducted in accordance with Article 4.1 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

In that regard, the point must be made that, for the purposes of Article 2.2.c of Directive 2006/54/EC, discrimination includes, *inter alia*, 'any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC'.

The objective pursued by the rules of EU law governing equality between men and women is, with regard to the rights of pregnant women and women who have given birth and breastfeeding mothers, to protect those women before and after they give birth.

Furthermore, it is clear from Recital 14 and Article 8 of Directive 92/85/EEC that 'the vulnerability of pregnant workers, workers who have recently given birth or who are breastfeeding makes it necessary for them to be granted the right to maternity leave of at least 14 continuous weeks, allocated before and/or after confinement, and renders necessary the compulsory nature of maternity leave of at least two weeks, allocated before and/or after confinement'. Thus maternity leave is intended to protect pregnant workers, workers who have recently given birth or who are breastfeeding.

It follows that, the condition of a breastfeeding woman being intimately related to maternity, and in particular 'to pregnancy or maternity leave', workers who are breastfeeding must be protected on the same basis as workers who are pregnant or have recently given birth.

Accordingly, any less favourable treatment of a female worker due to her being a breastfeeding woman must be regarded as falling within the scope of Article 2.2.c of Directive 2006/54/EC and therefore constitutes direct discrimination on grounds of sex.

On a proper construction of Article 19.1 of Directive 2006/54/EC, in a situation such as that at issue in the main proceedings, it is for the worker in question to provide evidence capable of suggesting that the risk assessment of her work had not been conducted in accordance with the requirements of Article 4.1 of Directive 92/85:EEC and from which it can therefore be presumed that there was direct discrimination on grounds of sex within the meaning of Directive 2006/54/EC, which it is for the referring court to ascertain. It would then be for the defendant to prove that that risk assessment had been conducted in accordance with the requirements of that provision and that there had, therefore, been no breach of the principle of non-discrimination.

Summary:

Ms Otero Ramos is employed as a nurse in the accident and emergency unit of the *Centro Hospitalario Universitario de A Coruña* (University Hospital of A Coruña, Spain; 'the University Hospital'), which is a public hospital within the Health Service for the Autonomous Region of Galicia. On 22 December 2011, Ms Otero Ramos gave birth to a child who was then breastfed. On 19 March 2012, Ms Otero Ramos informed her employer that she was feeding her child on breast milk and that the tasks required by her work were liable to have an adverse effect on that milk and expose her to health and safety risks, due *inter alia* to a complex shift rotation system, ionising radiation, healthcare-associated infections and stress. She therefore lodged a request for her working conditions to be adjusted and for preventative measures to be put in place.

On 10 April 2012, the management of the University Hospital issued a report stating that Ms Otero Ramos's work did not pose any risk to breastfeeding her child and rejecting the request lodged by Ms Otero Ramos. On 8 May 2012, Ms Otero Ramos requested, for the purposes of the grant of a financial allowance in respect of risk during breastfeeding, a medical certificate from the *Dirección Provincial del Instituto Nacional de la Seguridad Social de A Coruña* (Provincial Directorate of the INSS of A Coruña, Spain) stating that there was a risk to the breastfeeding of her child.

The INSS took the view, by decision of 10 May 2012, that it had not been shown that Ms Otero Ramos's work posed a risk for the breastfeeding of her child and therefore rejected her request. On 11 July 2012, Ms Otero Ramos challenged that decision before the *Juzgado de lo Social no. 2 de A Coruña* (Social Court no. 2, A Coruña, Spain) on the ground that her work posed a risk to breastfeeding her child. She provided, in support of her claim, a letter signed by her line manager, namely, the senior consultant of the University Hospital's accident and emergency unit stating, in essence, that the work of a nurse in that unit posed physical, chemical, biological and psychosocial risks to a breastfeeding worker and to her child.

In those circumstances, *Tribunal Superior de Justicia de Galicia* (High Court of Justice of Galicia, Spain) asks, in essence, whether the rules on the burden of proof laid down in Article 19 of Directive 2006/54 may be applied in order to prove that there is a situation of risk during breastfeeding within the meaning of Article 26.3 of Law 31/1995, which transposed Article 5.3 of Directive 92/85/EEC into national law.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.

Identification: ECJ-2017-3-015

a) European Union / **b)** Court of Justice of the European Union / **c)** Eighth Chamber / **d)** 07.12.2017 / **e)** C-636/16 / **f)** Wilber López Pastuzano v. Delegación del Gobierno Central en Navarra / **g)** ECLI:EU:C:2017:949 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.6 Fundamental Rights − Civil and political rights − Freedom of movement.
5.3.9 Fundamental Rights − Civil and political rights − Right of residence.

Keywords of the alphabetical index:

Expulsion, procedure / Public order, threat / Imprisonment, expulsion, subsequent / European Union, third country national, resident, long-term, expulsion / Public safety, danger.

Headnotes:

Article 12 of Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, must be interpreted as precluding legislation of a Member State which, as interpreted by some of the courts of that Member State, does not provide for the application of the requirements of protection against the expulsion of a third-country national who is a long-term resident to all administrative expulsion decisions, regardless of the legal nature of that measure or of the detailed rules governing it.

It should be noted that, according to the case-law of the Court, the principal purpose of Directive 2003/109/EC is the integration of third-country nationals who are settled on a long-term basis in the Member States.

Furthermore, Article 12.3 of that directive states that, before taking a decision to expel a third-country national who is a long-term resident, Member States are to have regard to the duration of residence in their territory, the age of the person concerned, the consequences for the person concerned and family members and links with the country of residence or absence of links with the country of origin. It is therefore irrelevant whether such a measure has been delivered in the form of an administrative penalty or whether it is the result of a criminal conviction. The adoption of such a measure may not be ordered automatically following a criminal conviction, but rather requires a case-by-case assessment which must, in particular,

have regard to the elements mentioned in Article 12.3 of Directive 2003/109. Consequently, a decision to expel may not be adopted against a third-country national who is a long-term resident for the sole reason that he or she has been sentenced to a term of imprisonment of more than one year in duration.

Summary:

Mr López Pastuzano, a Colombian national, was granted, on 13 October 2013, a long-term residence permit in Spain. On 29 April 2014, he was sentenced to two prison sentences, one of twelve months and one of three months. On 27 January 2015, he was imprisoned in the *Centro Penitenciario Pamplona no. 1* (Pamplona Prison no. I, Spain). Subsequently, administrative expulsion proceedings were initiated against him. After conducting the administrative expulsion proceedings, the Government Delegation in Navarra adopted its decision of 29 June 2015. That decision was accompanied by a ban on entry into Spain for a period of five years and the withdrawal of Mr López Pastuzano's long-term residence permit.

On 28 September 2015, Mr López Pastuzano initiated judicial proceedings against that decision before the *Juzgado de lo Contencioso-Administrativo no. 1 de Pamplona* (Administrative Court no. 1, Pamplona, Spain). In those circumstances, the referring court asks, in essence, whether Article 12.3 of Directive 2003/109/EC must be interpreted as precluding legislation of a Member State which, as interpreted by some of the courts of that Member State, does not provide for the application of the requirements of protection against the expulsion of a third-country national who is a long-term resident to all administrative expulsion decisions, regardless of the legal nature of that measure or of the detailed rules governing it.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.

European Court of Human Rights

Important decisions

Identification: ECH-2017-3-005

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 05.09.2017 / **e)** 61496/08 / **f)** Bărbulescu v. Romania / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 General Principles − **Proportionality**.
3.19 General Principles − **Margin of appreciation**.
5.1.3 Fundamental Rights − General questions − **Positive obligation of the state**.
5.3.32 Fundamental Rights − Civil and political rights − **Right to private life**.
5.3.36.1 Fundamental Rights − Civil and political rights − Inviolability of communications − **Correspondence**.

Keywords of the alphabetical index:

Private life, interference, proportionality / Private life, internet, employee, place of work / Secret surveillance, measure / Surveillance, secret, measure.

Headnotes:

Monitoring of an employee's use of the Internet at his place of work and use of data collected to justify his dismissal

Notwithstanding the respondent State's wide margin of appreciation, the domestic authorities do not afford adequate protection of an applicant's right to respect for his private life and correspondence (Article 8 ECHR) and do not strike a fair balance between the interests at stake where they do not ascertain, in particular, whether the applicant had received prior notice from his employer of the possibility that his communications via a messaging service might be monitored, and do not have regard either to the fact that he had not been informed of the nature or the extent of the monitoring carried out, or to the degree of intrusion into his private life and correspondence;

and also where they fail to determine, firstly, the specific reasons justifying the introduction of the monitoring measures; secondly, whether the employer could have used measures entailing less intrusion into the applicant's private life and correspondence; and thirdly, whether the contents of the communications might have been accessed without his knowledge.

Summary:

I. The applicant was dismissed by his employer, a private company, for using the company's internet network during working hours in breach of the internal regulations, which prohibited personal use of company computers. Over a certain period of time, his employer had monitored his communications on a Yahoo Messenger account which he had been asked to set up for the purpose of responding to customers' enquiries. The records produced during the domestic proceedings showed that he had exchanged messages of a strictly private nature with other people.

In the Convention proceedings, the applicant argued that the termination of his contract had been based on a breach of his right to respect for his private life and correspondence and that the domestic courts had failed to protect that right

II.a. Applicability – The kind of internet instant messaging service at issue was a form of communication enabling individuals to lead a private social life. In addition, the notion of "correspondence" covered the sending and receiving of communications, even on an employer's computer.

The applicant had certainly been informed of the ban on personal internet use laid down in his employer's internal regulations. However, he had not been informed in advance of the extent and nature of his employer's monitoring activities, or of the possibility that the employer might have access to the actual contents of his communications.

It was open to question whether the employer's restrictive regulations had left the applicant with a reasonable expectation of privacy. Be that as it may, an employer's instructions could not reduce private social life in the workplace to zero. Respect for private life and for the privacy of correspondence continued to exist, even if these could be restricted in so far as necessary.

The applicant's communications in the workplace were therefore covered by the concepts of "private life" and "correspondence". Accordingly, Article 8 ECHR was applicable in the present case.

b. Merits – In the light of the particular circumstances of the case, having regard to the conclusion concerning the applicability of Article 8 ECHR and to the fact that the applicant's enjoyment of his right to respect for his private life and correspondence had been impaired by the actions of a private employer, the complaint had to be examined from the standpoint of the State's positive obligations.

Few member States had explicitly regulated the question of the exercise by employees of their right to respect for their private life and correspondence in the workplace. The Contracting States should therefore be granted a wide margin of appreciation in assessing the need to establish a legal framework governing the conditions in which an employer could adopt a policy regulating electronic or other communications of a non-professional nature by its employees in the workplace.

However, proportionality and procedural guarantees against arbitrary action were essential. In that context, the domestic authorities should treat the following factors as relevant: whether the employee had been notified of the possibility that the employer might take measures to monitor correspondence and other communications, and of the implementation of such measures; the extent of the monitoring by the employer and the degree of intrusion into the employee's privacy; whether the employer had provided reasons to justify monitoring the employee's communications; whether it would have been possible to establish a monitoring system based on less intrusive methods and measures than directly accessing the content of the employee's communications; the consequences of the monitoring for the employee subjected to it; and whether the employee had been provided with adequate safeguards, especially when the employer's monitoring operations had been of an intrusive nature. Lastly, the domestic authorities should ensure that employees whose communications had been monitored had access to a remedy before a judicial body with jurisdiction to determine, at least in substance, how the criteria outlined above had been observed and whether the impugned measures had been lawful.

The domestic courts had correctly identified the interests at stake – by referring explicitly to the applicant's right to respect for his private life – and also the applicable legal principles of necessity, purpose specification, transparency, legitimacy, proportionality and security set forth in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data The domestic courts had also examined whether the disciplinary proceedings had been

conducted in an adversarial manner and whether the applicant had been given the opportunity to put forward his arguments.

The applicant did not appear to have been informed in advance of the extent and nature of his employer's monitoring activities, or of the possibility that the employer might have access to the actual content of his messages. The domestic courts had omitted to determine whether the applicant had been notified in advance of the possibility that the employer might introduce monitoring measures, and of the scope and nature of such measures. To qualify as prior notice, the warning from the employer had to be given before the monitoring activities were initiated, especially where they also entailed accessing the contents of employees' communications.

The question of the scope of the monitoring and the degree of intrusion into the applicant's privacy had not been examined by any domestic court, even though the employer appeared to have recorded all the applicant's communications during the monitoring period in real time, accessed them and printed out their contents.

The domestic courts had not carried out a sufficient assessment of whether there had been legitimate reasons to justify monitoring the applicant's communications. In addition, neither the County Court nor the Court of Appeal had sufficiently examined whether the aim pursued by the employer could have been achieved by less intrusive methods than accessing the actual contents of the applicant's communications.

Moreover, neither court had considered the seriousness of the consequences of the monitoring and the subsequent disciplinary proceedings. In this regard, the applicant had received the most severe disciplinary sanction, namely dismissal.

The domestic courts had not determined whether, when the employer had summoned the applicant to give an explanation for his use of company resources, in particular the internet, it had in fact already accessed the content of the communications in issue. The national authorities had not established at what point during the disciplinary proceedings the employer had accessed that content. Accepting that the content of communications could be accessed at any stage of the disciplinary proceedings ran counter to the principle of transparency (Recommendation CM/Rec(2015)5 of the Committee of Ministers to member States on the processing of personal data in the context of employment).

That being so, the domestic courts had failed to determine, in particular, whether the applicant had received prior notice from his employer of the possibility that his communications on Yahoo Messenger might be monitored; nor had they had regard either to the fact that he had not been informed of the nature or the extent of the monitoring, or to the degree of intrusion into his private life and correspondence. In addition, they had failed to determine, firstly, the specific reasons justifying the introduction of the monitoring measures; secondly, whether the employer could have used measures entailing less intrusion into the applicant's private life and correspondence; and thirdly, whether the communications might have been accessed without his knowledge.

Thus, notwithstanding the respondent State's wide margin of appreciation, the domestic authorities had not afforded adequate protection of the applicant's right to respect for his private life and correspondence and had consequently failed to strike a fair balance between the interests at stake.

The Court therefore found a violation of Article 8 ECHR.

Cross-references:

European Court of Human Rights:

- *Amann v. Switzerland* [GC], no. 27798/95, 16.02.2000, *Reports of Judgments and Decisions* 2000-II;
- *Axel Springer AG v. Germany* [GC], no. 39954/08, 07.02.2012;
- *Fernández Martínez v. Spain* [GC], no. 56030/07, 12.06.2014, *Reports of Judgments and Decisions* 2014 (extracts);
- *Roman Zakharov v. Russia* [GC], no. 47143/06, 04.12.2015, *Reports of Judgments and Decisions* 2015;
- *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, 07.02.2012, *Reports of Judgments and Decisions* 2012.

Languages:

English, French.

Identification: ECH-2017-3-006

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 05.09.2017 / **e)** 78117/13 / **f)** Fábián v. Hungary / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.39 Fundamental Rights − Civil and political rights − **Right to property**.

Keywords of the alphabetical index:

Deprivation of property, public necessity / Discrimination, private and public employers / Discrimination, prohibition / Possession, confiscation / Possession, right to respect for.

Headnotes:

Suspension of State pension for pensioner employed in the civil service

Difference in entitlement to continued payment of State pension for pensioners employed in civil service and pensioners employed in private sector: pensioners employed in private sector.

As employers, the State and its organs were not in a comparable position to private-sector entities either from the perspective of the institutional framework they operated under or in terms of the financial and economic fundamentals of their activities; the funding bases were radically different, as were the options available for taking measures to counter financial difficulties and crises.

Summary:

I. In 2012 the applicant, who was already in receipt of an old-age pension, took up employment as a civil servant. In 2013 an amendment to the Pension Act 1997 entered into force suspending the payment of old-age pensions to persons simultaneously employed in certain categories of the public sector. The amendment did not apply to pensioners working in the private sector. As a consequence, the payment of the applicant's pension was suspended. His administrative appeal against that decision was unsuccessful. In the Convention proceedings, the applicant complained of an unjustified and discriminatory interference with his property rights.

II.1. The lawfulness of the interference was not in dispute and the Court found no reason to doubt that the prohibition on the simultaneous disbursement of salaries and pensions to which the applicant was subjected served the general interest of the protection of the public purse. The question was whether the interference struck a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights.

In examining whether the national authorities had acted within their margin of appreciation, the Court had to have particular regard to the factors which its case-law relating to the reduction, suspension or discontinuance of social-security pensions had identified as being of relevance, namely the extent of the loss of benefits, whether there was an element of choice, and the extent of the loss of means of subsistence.

The case at hand did not concern the permanent, complete loss of the applicant's pension entitlements, but rather the suspension of his monthly pension payments. The suspension was of a temporary nature and was resumed when the applicant left State employment. It did not therefore strike at the very substance of his right and the essence of the right was not impaired. Once the legislation at issue had entered into force, the applicant was able to choose between discontinuing his employment in the civil service and continuing to receive his pension, or remaining in that employment and having his pension payments suspended. He opted for the latter. It was clear that when the applicant's old-age pension payments were suspended he continued to receive his salary. The suspension of his pension payments by no means left him devoid of all means of subsistence.

A fair balance had thus been struck between the demands of the general interest of the community and the requirements of the protection of the applicant's fundamental rights and he had not been made to bear an excessive individual burden.

The Court therefore found no violation of Article 1 Protocol 1 ECHR.

2. The first issue was whether the applicant, as a person in receipt of an old-age pension subsequently employed in the civil service, was in an analogous or relevantly similar situation compared with a person in receipt of an old-age pension subsequently employed in the private sector. The elements which characterised different situations, and determined their comparability, had to be assessed in the light of the subject-matter and purpose of the measure which made the distinction in question.

Three of the elements to be taken into account had been widely reflected in a long-standing line of the Court's case-law recognising a distinction between civil servants and private employees. Firstly, Contracting Parties, by necessity, enjoyed wide latitude in organising State functions and public services, including such matters as regulating access to employment in the public sector and the terms and conditions governing such employment. Secondly, for institutional and functional reasons, employment in the public sector and in the private sector was typically subjected to substantial legal and factual differences, not least in fields involving the exercise of sovereign State power and the provision of essential public services. Thirdly, it could not be assumed that the terms and conditions of employment, including the financial ones, or the eligibility for social benefits linked to employment, would be similar in the civil service and in the private sector, nor could it therefore be presumed that those categories of employees would be in relevantly similar situations in that regard. The applicant's case revealed a need to take a fourth factor into account, namely the role of the State when acting in its capacity as employer. In particular, as employers, the State and its organs were not in a comparable position to private-sector entities either from the perspective of the institutional framework under which they operated or in terms of the financial and economic fundamentals of their activities; the funding bases were radically different, as were the options available for taking measures to counter financial difficulties and crises.

Both State and private sector employees were affiliated to the compulsory social-security pension scheme to which they contributed in the same way and to the same extent. Nevertheless, that was not in itself sufficient to establish that they were in relevantly similar situations. Following the amendment to the Pensions Act 1997, it was the applicant's post retirement employment in the civil service that entailed the suspension of his pension payments. It was precisely the fact that, as a civil servant, he was in receipt of a salary from the State that was incompatible with the simultaneous disbursement of an old-age pension from the same source. As a matter of financial, social and employment policy, the impugned bar on simultaneous accumulation of pension and salary from the State budget had been introduced as part of legislative measures aimed at correcting financially unsustainable features in the pension system of the respondent State. That did not prevent the accumulation of pension and salary for persons employed in the private sector, whose salaries, in contrast to those of persons employed in the civil service, were funded not by the State but through private budgets outside the latter's direct control.

The applicant had not demonstrated that, as a member of the civil service whose employment, remuneration and social benefits were dependent on the State budget, he was in a relevantly similar situation to pensioners employed in the private sector.

The Court therefore found no violation of Article 14 ECHR in conjunction with Article 1 Protocol 1 ECHR.

Cross-references:

European Court of Human Rights:

- *Béláné Nagy v. Hungary* [GC], no. 53080/13, 13.12.2016, *Reports of Judgments and Decisions* 2016;
- *Heinisch v. Germany*, no. 28274/08, 21.07.2011, *Reports of Judgments and Decisions* 2011 (extracts);
- *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, 24.01.2017, *Reports of Judgments and Decisions* 2017;
- *Panfile v. Romania* (dec.), no. 13902/11, 20.03.2012;
- *Stec and Others v. United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, 12.04.2006, *Reports of Judgments and Decisions* 2006-VI;
- *Valkov and Others v. Bulgaria*, no. 2033/04, 25.10.2011;
- *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, 19.04.2007, *Reports of Judgments and Decisions* 2007-II.

Languages:

English, French.

Identification: ECH-2017-3-007

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 19.09.2017 / **e)** 35289/11 / **f)** Regner v. the Czech Republic / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.13 Fundamental Rights − Civil and political rights − **Procedural safeguards, rights of the defence and fair trial**.
5.3.13.1.4 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Scope − **Litigious administrative proceedings**.
5.3.13.17 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Rules of evidence**.
5.3.13.19 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Equality of arms**.
5.3.13.20 Fundamental Rights − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − **Adversarial principle**.

Keywords of the alphabetical index:

Document, confidentiality / Evidence, administrative, principle / Evidence, administrative right / Judicial review, scope, limits.

Headnotes:

Inability to have sight of decisive evidence, classified as confidential information, on judicial review of an administrative decision

Inability to have sight of decisive evidence, classified as confidential information, on judicial review of an administrative decision did not result in a violation of Article 6.1 ECHR as the domestic courts had duly exercised their powers of scrutiny both regarding the need to preserve the confidentiality of the classified documents and regarding the justification for the administrative decision, giving reasons for their decisions with regard to the specific circumstances of the present case.

However, an explanation, if only summarily, of the extent of the review and the accusations against the complainant was desirable to the extent compatible with the preservation of confidentiality and proper conduct of the investigations.

Summary:

I. In September 2006, the National Security Authority decided to revoke the applicant's security clearance, issued to him to enable him to carry out his duties as deputy to a vice-minister of Defence, on the grounds that he posed a national security risk. The decision did not, however, mention the confidential information on which it was based, which was classified "restricted" and could not therefore legally be disclosed to the applicant.

On an appeal by the applicant, the director of the Authority confirmed the existence of a risk. Subsequently an application for judicial review of that decision was dismissed by the municipal court, which had been sent the documents in question by the Authority. The applicant and his lawyer were not allowed to consult them. Subsequent appeals by the applicant were unsuccessful.

Relying on Article 6.1 ECHR, the applicant complained that the administrative proceedings had been unfair because he had been unable to have sight of decisive evidence, classified as confidential, which had been made available to the courts by the defendant.

II.a. Applicability: The applicant's ability to carry out his duties had been conditional on authorisation to access classified information. The revocation of his security clearance had therefore made it impossible for him to perform his duties in full and adversely affected his ability to obtain a new post in the civil service. In those circumstances the link between the decision to revoke the applicant's security clearance and the loss of his duties and his employment had been more than tenuous or remote. He had therefore had a right to challenge the lawfulness of that revocation before the courts.

The employment relationship between the applicant and the Ministry of Defence had been based on the provisions of the Labour Code, which had not contained any specific provisions applicable to functions performed within the State administration, so that at the material time there had been no civil service, in the traditional sense of the term, conferring on public servants obligations and privileges outside the scope of the ordinary law. As employment disputes concerned civil rights within the meaning of Article 6.1 ECHR, the decision revoking the applicant's security clearance and the subsequent proceedings had affected his civil rights.

That being so, even assuming that the applicant were to be regarded as having been a civil servant, he had been able to seek judicial review in the administrative courts of the National Security Authority's decision. It followed that Article 6 ECHR applied to the present case under its civil limb.

Accordingly, the applicant could claim to have victim status for the purposes of Article 34 ECHR.

The Court therefore rejected the preliminary objections.

b. Merits: In accordance with the requirements of Czech law in the event of legal proceedings challenging a decision refusing to issue or revoking security clearance, the proceedings brought by the applicant had been restricted in two ways with regard to the rules of ordinary law guaranteeing a fair trial: first, the classified documents and information had not been available either to him or to his lawyer, and second, in so far as the decision revoking security clearance had been based on those documents, the grounds for the decision had not been disclosed to him.

The Court noted the powers conferred on the domestic courts. They had unlimited access to all the classified documents on which the Authority had based itself in order to justify its decision; power to carry out a detailed examination of the reasons relied on by the Authority for not disclosing the classified documents; and were able to order disclosure of documents that they considered did not warrant that classification. Moreover, they were empowered to assess the merits of the Authority's decision revoking security clearance and to quash, where applicable, an arbitrary decision. Their jurisdiction had encompassed all the facts of the case and had not been limited to an examination of the grounds relied on by the applicant, who had been heard by the judges and had also been able to make submissions in writing.

The courts had duly exercised the powers of scrutiny available to them in this type of proceedings, both regarding the need to preserve the confidentiality of the classified documents and regarding the justification for the decision revoking the applicant's security clearance, giving reasons for their decisions with regard to the specific circumstances of the present case.

Thus, the Supreme Administrative Court had considered, having regard to the need to preserve the confidentiality of the classified documents, that their disclosure could have had the effect of disclosing the intelligence service's working methods, revealing its sources of information or leading to attempts to influence possible witnesses. It had explained that it was not legally possible to indicate where exactly the security risk lay or to indicate precisely which considerations underlay the conclusion that there was a security risk, the reasons and considerations underlying the Authority's decision originating exclusively in the classified information. Accordingly, there was nothing to suggest that the classification of the documents in question had been carried out arbitrarily or for a purpose other than the legitimate interest indicated as being pursued.

The Supreme Administrative Court had also held that it was unequivocally clear from the classified documents that the applicant had no longer satisfied the statutory conditions for being entrusted with secrets. His conduct had posed a national security risk. In March 2011 the applicant had been prosecuted for participation in organised crime; aiding and abetting abuse of public power; complicity in illegally influencing public tendering and public procurement procedures; and aiding and abetting breaches of binding rules governing economic relations. It was understandable that where such suspicions existed the authorities considered it necessary to take rapid action without waiting for the outcome of the criminal investigation, while preventing the disclosure, at an early stage, of suspicions affecting the persons in question, which would run the risk of hindering the criminal investigation.

Nonetheless, it would have been desirable – to the extent compatible with the preservation of confidentiality and proper conduct of the investigations concerning the applicant – for the national authorities, or at least the Supreme Administrative Court, to have explained, if only summarily, the extent of the review they had carried out and the accusations against the applicant. In that connection the Court noted with satisfaction the positive new developments in the Supreme Administrative Court's case-law.

Having regard to the proceedings as a whole, to the nature of the dispute and to the margin of appreciation enjoyed by the national authorities, the restrictions curtailing the applicant's enjoyment of the rights afforded to him in accordance with the principles of adversarial proceedings and equality of arms had been offset in such a manner that the fair balance between the parties had not been affected to such an extent as to impair the very essence of the applicant's right to a fair trial.

The Court therefore found no violation of Article 6.1 ECHR.

Cross-references:

European Court of Human Rights:

- *Fitt v. the United Kingdom* [GC], no. 29777/96, 16.02.2000, *Reports of Judgments and Decisions* 2000-II;
- *Miryana Petrova v. Bulgaria*, no. 57148/08, 21.07.2016;
- *Schatschaschwili v. Germany* [GC], no. 9154/10, 15.12.2015, *Reports of Judgments and Decisions* 2015;

- *Ternovskis v. Latvia*, no. 33637/02, 29.04.2014.

Languages:

English, French.

Identification: ECH-2017-3-008

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 06.11.2017 / **e)** 43494/09 / **f)** Garib v. the Netherlands / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.6 Fundamental Rights − Civil and political rights − **Freedom of movement**.
5.3.10 Fundamental Rights − Civil and political rights − **Rights of domicile and establishment**.

Keywords of the alphabetical index:

Residence, freedom of choice / Residence, right to choose.

Headnotes:

Policy imposing length-of-residence and type of income conditions on persons wishing to settle in inner-city area of Rotterdam

It was not possible to apply the same test under Article 2.4 Protocol 4 ECHR as under Article 8.2 ECHR, the interrelation between the two provisions notwithstanding. Article 8 ECHR could not be construed as conferring a right to live in a particular location. In contrast, freedom to choose one's residence was at the heart of Article 2.1 Protocol 4 ECHR which provision would be voided of all significance if it did not in principle require Contracting States to accommodate individual preferences in that matter. Accordingly, any exceptions to that principle had to be dictated by the public interest in a democratic society.

Summary:

I. The Inner City Problems (Special Measures) Act, which entered into force on 1 January 2006, empowered a number of named municipalities, including Rotterdam, to take measures in certain designated areas including the granting of partial tax exemptions to small business owners and the selecting of new residents based on their sources of income. In 2005, the applicant moved to the city of Rotterdam and took up residence in a rented property in the Tarwewijk district. Following the entry into force of the Inner City Problems (Special Measures) Act, Tarwewijk became a designated area under a Rotterdam by-law. After being asked by her landlord to move to another property he was letting in the same district, the applicant applied for a housing permit as required by the new legislation. However, her application was rejected on the grounds that she had not been resident in the Rotterdam Metropolitan Region for the requisite period and did not meet the income requirement. Her subsequent appeals were unsuccessful. In 2010, the applicant moved to the municipality of Vlaardingen, which was also part of the Rotterdam Metropolitan Region.

II. In an area as complex and difficult as that of the development of large cities, the State enjoyed a wide margin of appreciation in order to implement their town-planning policy. The margin extended, in principle, to both the decision to intervene in the subject area and, having intervened, to the detailed rules laid down in order to achieve a balance between the competing interests of the State and those directly affected by the legislative choices.

a. Legislative and policy framework – The domestic authorities had found themselves called upon to address increasing social problems in inner-city areas of Rotterdam resulting from impoverishment caused by unemployment and a tendency for gainful economic activity to be transferred elsewhere. They sought to reverse those trends by favouring new residents whose income was related to gainful economic activity of their own. The intention was to foster diversity and counter the stigmatisation of particular inner-city areas as fit only for the most deprived social groups. The Inner City Problems (Special Measures) Act did not deprive a person of housing or force any person to leave their dwelling. The measures only affected relatively new settlers: residents of the Rotterdam Metropolitan Region of at least six years' standing were eligible for a housing permit whatever their source of income. In the circumstances, that waiting time did not appear to be excessive.

The legislative history of the Act showed that the legislative proposals had been scrutinised by the Council of State, whose concerns had been addressed by the Government, and that Parliament itself had been concerned to limit any detrimental effects. The entitlement of individuals unable to find suitable housing had been recognised. The restriction in issue remained subject to temporal as well as geographical limitation. The competent Minister was required by the Act to report to Parliament every five years on the effectiveness of the Act and its effects in practice. The individual hardship clause allowed derogation from the length-of-residence requirement in cases where strict application of it would be excessively harsh. Procedural safeguards comprised of the availability of administrative objection proceedings and of judicial review before two levels of jurisdiction, both before tribunals invested with full competence to review the facts and the law and which met the requirements of Article 6 ECHR.

b. The applicant's individual case – It was undisputed that the applicant was of good behaviour and constituted no threat to public order. Nonetheless, her personal conduct could not be decisive on its own when weighed in the balance against the public interest which was served by the consistent application of legitimate public policy. The system of the Inner City Problems (Special Measures) Act was not called into question by the mere fact that it did not make an exception in respect of persons already residing in a designated area, such as the applicant. The applicant had been resident in a dwelling in Vlaardingen let to her by a Government-funded social housing body since 27 September 2010. She had not explained her reasons for choosing to move to Vlaardingen instead of remaining in the dwelling in Tarwewijk for the final eight months needed to complete six years' residence in the Rotterdam Metropolitan Region. Nor had she suggested that her dwelling in Vlaardingen was inadequate for her needs or in any way less congenial or convenient than the one she had hoped to occupy in Tarwewijk. In addition, it had not been stated that the applicant had expressed the wish to move back to Tarwewijk. The information submitted did not allow the Court to find that the consequences for the applicant of the refusal of a housing permit amounted to such disproportionate hardship that her interest should outweigh the general interest served by the consistent application of the measure in issue. An unspecified personal preference for which no justification was offered could not override public decision-making.

The Court therefore found no violation of Article 2 Protocol 4 ECHR.

Cross-references:

European Court of Human Rights:

- *Codona v. United Kingdom* (dec.), no. 485/05, 07.02.2006;
- *Noack and Others v. Germany* (dec.), no. 46346/99, 25.05.2000;
- *Ward v. the United Kingdom*, (dec.). no. 31888/03, 09.11.2004.

Languages:

English, French.

Identification: ECH-2017-3-009

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 28.11.2017 / **e)** 72508/13 / **f)** Merabishvili v. Georgia / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.5.1.3 Fundamental Rights − Civil and political rights − Individual liberty − Deprivation of liberty − **Detention pending trial**.

Keywords of the alphabetical index:

Restriction, unauthorised purposes.

Headnotes:

Holding the leader of an opposition party in pre-trial detention with the main aim of obtaining information about matters other than the offence of which he was suspected

A restriction could be compatible with the substantive Convention provision authorising it, if it pursued one of the aims permissible under that provision, and at the same time be incompatible with Article 18 ECHR because it was chiefly meant for

another purpose; conversely, if the aim prescribed by the Convention was the main one, the restriction did not run counter to Article 18 ECHR even if it also pursued another purpose. In continuing situations it could not be excluded that the predominant purpose could vary over time. Regarding the application of Article 18 ECHR, there was no reason for the Court to restrict itself to direct proof or to apply a special standard of proof.

Summary:

I. The applicant, a former Prime Minister, was the leader of the chief opposition party (hereinafter, the "UNM") at the material time. Between 2012 and 2013, shortly after the coalition "Georgian Dream" had won the general elections in October 2012, criminal proceedings were brought against him for abuse of official authority and other offences. Having been held in pre-trial detention up until his trial, the applicant complained that he had thus been removed from the political scene. He also alleged that on one night in December 2013 he had been covertly removed from his cell for questioning by the Chief Public Prosecutor about the death of a former Prime Minister in 2005 and the financial activities of the former Head of State. In 2014, he was convicted of most of the charges against him.

II. The Court considered it necessary to clarify its case-law as follows.

a. Preliminary points – interplay between Article 18 ECHR and the other clauses of the Convention – For the purposes of consistency, use of the words "independent" and "autonomous" in the context of Article 18 ECHR should be aligned with their use in the context of Article 14 ECHR.

Firstly, in a similar way to Articled 14 ECHR, Articled 18 ECHR had no independent existence. It could only be applied in conjunction with an Article of the Convention or the Protocols thereto which set out or qualified one of the rights and freedoms guaranteed.

That rule derived both from the wording of Article 18 ECHR, which complemented that of clauses such as the second sentence of Article 5.1 ECHR and the second paragraphs of Articles 8 ECHR to 11 ECHR, and from its place in the Convention at the end of Section I, which contained the Articles that defined and qualified the rights and freedoms guaranteed.

However, Article 18 ECHR did not serve merely to clarify the scope of those restriction clauses. It also expressly prohibited restrictions on the rights and freedoms enshrined in the Convention for purposes not prescribed by the Convention itself, and to this extent it was autonomous. Therefore, as was also the position in regard to Article 14 ECHR, there could be a breach of Article 18 ECHR even if there was no breach of the Article in conjunction with which it applied.

It further followed from the terms of Article 18 ECHR that a breach could only arise if the right or freedom at issue was subject to restrictions permitted under the Convention. The mere fact that a restriction of a Convention right or freedom did not meet all the requirements of the clause that permitted it did not necessarily raise an issue under Article 18 ECHR. Separate examination of a complaint under that Article was only warranted if the claim that a restriction had been applied for a purpose not prescribed by the Convention appeared to be a fundamental aspect of the case.

b. In the event of a plurality of purposes – Where a restriction pursued several aims, that restriction could be compatible with the substantive Convention provision which authorised it because it pursued an aim permissible under that provision, but still infringe Article 18 ECHR because it was chiefly meant for another purpose that was not prescribed by the Convention – in other words, if that other purpose was predominant. Conversely, if the prescribed purpose was the main one, the restriction did not run counter to Article 18 ECHR even if it also pursued another purpose.

That interpretation was consistent with the case-law of the Contracting States' national courts and of the Court of Justice of the European Union, which the Court could take into account when interpreting the Convention, and was especially appropriate in this case, since the preparatory works to the Convention clearly showed that Article 18 ECHR was meant to be its version of the administrative-law notion of "misuse of power".

Which purpose was predominant in a given case depended on all the circumstances of the case, particularly the nature and degree of reprehensibility of the alleged ulterior purpose. In continuing situations, it could not be excluded that the assessment of which purpose was predominant could vary over time. It also had to be borne in mind that the Convention had been designed to maintain and promote the ideals and values of a democratic society governed by the rule of law.

c. Proof – In order to establish whether there had been an ulterior purpose and whether it had been the predominant one, the Court could, and should, adhere to its usual approach to proof rather than follow special rules. There were three aspects to that approach:

i. the burden of proof was not borne by one or the other party and the Court could, *inter alia*, have regard to the difficulties that applicants might encounter and, conversely, draw conclusions if the respondent Government failed or refused to communicate information without providing a satisfactory explanation;
ii. the standard of proof applicable was "beyond reasonable doubt"; and
iii. the Court was free to assess not only the admissibility and relevance but also the probative value of each item of evidence before it.

In sum, there was no reason for the Court to restrict itself to direct proof in relation to complaints under Article 18 ECHR or to apply a special standard of proof to such allegations.

According to the applicant, the authorities had used pre-trial detention for two ulterior purposes. The Court examined in turn whether one of the purposes had been predominant.

i. Alleged aim to remove the applicant from the political scene – there was no right as such under the Convention not to be criminally prosecuted. The Court was thus chiefly concerned with the purpose underlying the pre-trial detention. The Court did not consider the following to be sufficient proof:

- the fact that criminal proceedings had been brought against a number of former ministers and other high-ranking officials from UNM (first, members of a previous government could not be held to account while in power; second, and above all, nothing in the case indicated that the courts which had ruled on the pre-trial detention had lacked independence);
- the place of the proceedings, which nothing suggested was redolent of forum shopping (it had not been alleged that this had been in breach of domestic law);
- the shortcomings of the court decisions regarding the requirements of Article 5.3 ECHR;
- the fact that courts of other member States had turned down requests for the extradition of other UNM officials on the basis that the criminal prosecutions against them had been politically motivated (first, the facts of the cases had not been identical and second, those courts had in essence been assessing a future risk, whereas the Court was concerned with past facts; that coloured their respective assessment of inconclusive contextual evidence). The same considerations applied to the decisions of Interpol in relation to the former President.

ii. Alleged aim to pressurise the applicant in order to obtain information unconnected with the grounds for the detention

a. Proof of that aim: The Court was sensitive to its subsidiary role and recognised that it must be cautious in taking on the role of a primary finder of fact. Yet, it could take into account the quality of domestic investigations and any possible flaws in the decision-making process.

The applicant's account had been detailed and specific, had remained consistent throughout and there were several indirect elements which tended to corroborate his assertions. His account had partly lent itself to verification of his allegations by objective means (identity parade, mobile telephone records and cell tower data, video recordings) or by gathering evidence from third parties. Those leads had not been explored however.

For their part, the evidence put forward by the Government was not sufficiently persuasive:

- from a general perspective, the two investigations carried out had to be approached with caution: the first had been carried out by ministry officials against a backdrop of firm denials by their minister; the second had only been opened following the Chamber judgment in this case;
- following a specific examination, there were several elements casting doubt on the claim that footage from the surveillance cameras had been automatically deleted after twenty-four hours; the exact method used to examine other footage (to which the applicant's lawyer had not had access); the various statements produced (which had been made either by subordinates of the alleged perpetrators or by persons whose own conduct risked being called into question); and the evidential value of the data from the prosecuting authorities' document-management system during the night of the incident;
- the absence of entries in the relevant prison logs attesting to the applicant's removal from his cell was in line with the covert nature of the alleged operation.

Drawing inferences from those considerations and from the authorities' conduct, the Court was satisfied that the applicant had been covertly removed from his prison cell.

b. Predominance of that purpose: Having regard to the restriction of the applicant's right to liberty as a whole, it was hard to regard the attempt to obtain information about the former Prime Minister's death and the former President's bank accounts as its chief purpose. Indeed, there was no evidence that the applicant's pre-trial detention had been used for that purpose during the first seven months.

However, the restriction in question amounted to a continuing situation. The following factors led the Court to conclude that the initial aim had later been supplanted by another one: whilst in the beginning it had been an investigation based on a reasonable suspicion that the applicant had committed offences, it had subsequently become an attempt to obtain information about the death of a former Prime Minister and the bank accounts of the former Head of State.

Some of those factors related to the time of the incident: the reasons for keeping the applicant in pre-trial detention appeared to have receded; the former President, who had become the target of several criminal investigations, had just left Georgia following the end of his term of office; the investigation into the former Prime Minister's death had apparently not made significant progress.

Other elements showed that the topic of both those men had been of considerable importance for the authorities. The Government had stated at the hearing before the Grand Chamber that there was still a "huge question" for the applicant to answer in that connection. The prosecuting authorities had had the power to drop all charges against the applicant and had promised to do so if he provided the requested information, with the consequence that the courts would have had to discontinue the criminal proceedings. The applicant had been taken in a covert and apparently irregular manner, in a clandestine operation carried out in the middle of the night, to meet with a person who had been appointed to his post three weeks previously. The authorities' initial reaction to the applicant's allegations in that respect had been to issue firm denials, and the ensuing investigations had been marred by a series of omissions from which it could be inferred that the authorities had been eager that the matter should not come to light: the main protagonists had not been interviewed during the inquiry but only in the course of the investigation nearly three years after the events, and the crucial evidence in the case – the footage from the prison surveillance cameras – had not been recovered.

The Court therefore found a violation of Article 18 ECHR in conjunction with Article 5.1 ECHR.

Cross-references:

European Court of Human Rights:

- *Beyeler v. Italy* [GC], no. 33202/96, 05.01.2000, *Reports of Judgments and Decisions* 2000-I;
- *Cebotari v. Moldova*, no. 35615/06, 13.11.2007;
- *Cyprus v. Turkey* [GC], no. 25781/94, 10.05.2001, *Reports of Judgments and Decisions* 2001-IV;
- *El-Masri v. "the former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, 13.12.2012, *Reports of Judgments and Decisions* 2012;
- *Gusinskiy v. Russia*, no. 70276/01, 19.05.2004, *Reports of Judgments and Decisions* 2004-IV;
- *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 22.05.2014;
- *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, 21.10.2013, *Reports of Judgments and Decisions* 2013;
- *Kafkaris v. Cyprus* [GC], no. 21906/04, 12.02.2008, *Reports of Judgments and Decisions* 2008;
- *Khodorkovskiy v. Russia*, no. 5829/04, 31.05.2011;
- *Lebedev v. Russia*, nos. 11082/06 and 13772/05, 25.07.2013;
- *Lutsenko v. Ukraine*, no. 6492/11, 03.07.2012;
- *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, 06.07.2005, *Reports of Judgments and Decisions* 2005-VII;
- *Öcalan v. Turkey* [GC], no. 46221/99, 12.05.2005, *Reports of Judgments and Decisions* 2005-IV;
- *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, 20.09.2011;
- *Perinçek v. Switzerland* [GC], no. 27510/08, 15.10.2015, *Reports of Judgments and Decisions* 2015 (extracts);
- *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], no. 41340/98 and 3 others, 13.02.2003, *Reports of Judgments and Decisions* 2003-II;
- *Tahsin Acar v. Turkey* [GC], no. 26307/95, 08.04.2004, *Reports of Judgments and Decisions* 2004-III;
- *Tchankotadze v. Georgia*, no. 15256/05, 21.06.2016;
- *Tymoshenko v. Ukraine*, no. 49872/11, 30.04.2013.

Languages:

English, French.

Identification: ECH-2017-3-010

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 19.12.2017 / **e)** 56080/13 / **f)** Lopes de Sousa Fernandes v. Portugal / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.2 Fundamental Rights − Civil and political rights − **Right to life**.

Keywords of the alphabetical index:

Negligence, medical treatment.

Headnotes:

Alleged medical negligence resulting in patient's death

In the very exceptional circumstances described below, the responsibility of the State under the substantive limb of Article 2 ECHR may be engaged in respect of the acts and omissions of health-care providers:

i. a specific situation where an individual patient's life is knowingly put in danger by denial of access to life-saving emergency treatment. It does not extend to circumstances where a patient is considered to have received deficient, incorrect or delayed treatment;
ii. where a systemic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment and the authorities knew about or ought to have known about that risk and failed to undertake the necessary measures to prevent that risk from materialising, thus putting the patients' lives, including the life of the particular patient concerned, in danger.

For a case to fall into the latter category, the following factors, taken cumulatively, must be met. Firstly, the acts and omissions of the health-care providers must go beyond a mere error or medical negligence, in so far as those health-care providers, in breach of their professional obligations, deny a patient emergency medical treatment despite being fully aware that the person's life is at risk if that treatment is not given. Secondly, the dysfunction at issue must be objectively and genuinely identifiable as systemic or structural in order to be attributable to the State authorities, and must not merely comprise individual instances where something may have been dysfunctional in the sense of going wrong or functioning badly. Thirdly, there must be a link between the dysfunction complained of and the harm which the patient sustained. Finally, the dysfunction at issue must have resulted from the failure of the State to meet its obligation to provide a regulatory framework in the broader sense indicated above.

Failure to conduct adequate and timely inquiry into death resulting from suspected medical negligence

Summary:

I. In November 1997, following an operation for the extraction of nasal polyps, the applicant's husband developed bacterial meningitis, which was not detected until two days after he had been discharged from hospital. He was re-admitted to hospital several times, suffering from acute abdominal pain and diarrhoea. He died three months after the operation from the consequences of septicaemia caused by peritonitis and hollow viscera perforation.

In 1998, the applicant wrote a letter of complaint to the authorities stating that she had received no response from the hospitals to explain the sudden deterioration in her husband's health and his death. In response to her letter, the Inspector General for Health initiated an investigation and eventually, in 2006, ordered the opening of a disciplinary procedure against one of the doctors; however, those proceedings were stayed pending the outcome of criminal proceedings that had been started in 2002. The criminal proceedings ended in 2009 with the doctor's acquittal on a charge of homicide with gross negligence. In separate proceedings, the Medical Association regional disciplinary council decided to take no further action after concluding that there was no evidence of misconduct or medical negligence. Lastly, a civil action for damages commenced by the applicant in 2003 was dismissed in a judgment of 2012 that was ultimately upheld by the Supreme administrative Court in 2013.

In the Convention proceedings, the applicant complained under Article 2 ECHR about the death of her husband in hospital as a result of a hospital-acquired infection and of carelessness and medical negligence. She further complained that the disciplinary, criminal and civil authorities to which she had applied had failed to elucidate the precise cause

of the sudden deterioration in her husband's state of health and about the duration and outcome of the domestic proceedings.

II.a. Substantive limb: After reviewing its case-law in medical negligence cases, the Court considered it necessary to clarify its approach as follows.

In the context of alleged medical negligence, the States' substantive positive obligations relating to medical treatment are limited to a duty to regulate, that is to say, a duty to put in place an effective regulatory framework compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives.

Even in cases where medical negligence is established, the Court would normally find a substantive violation of Article 2 ECHR only if the relevant regulatory framework failed to ensure proper protection of the patient's life. Where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, matters such as an error of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a particular patient cannot be considered sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 ECHR to protect life.

The question whether there has been a failure by the State in its regulatory duties calls for a concrete rather than an abstract assessment of the alleged deficiencies. In this regard, the Court's task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention. Therefore, the mere fact that the regulatory framework may be deficient in some respect is not sufficient in itself to raise an issue under Article 2 ECHR. It must be shown to have operated to the patient's detriment.

It must, moreover, be emphasised that the States' obligation to regulate must be understood in a broader sense which includes the duty to ensure the effective functioning of that regulatory framework. The regulatory duties thus encompass necessary measures to ensure implementation, including supervision and enforcement.

On the basis of this broader understanding of the States' obligation to provide a regulatory framework, the Court has accepted that, in the very exceptional circumstances described at a. and b. below, the responsibility of the State under the substantive limb of Article 2 ECHR may be engaged in respect of the acts and omissions of health-care providers, namely where:

a. an individual patient's life is knowingly put in danger by denial of access to life-saving emergency treatment; this exception does not extend to circumstances where a patient is considered to have received deficient, incorrect or delayed treatment; or
b. where a systemic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment and the authorities knew about or ought to have known about that risk and failed to take the necessary measures to prevent that risk from materialising, thus putting the patients' lives, including that of the particular patient concerned, in danger.

The Court was aware that on the facts it may sometimes not be easy to distinguish between cases involving mere medical negligence and those where there is a denial of access to life-saving emergency treatment, particularly since there may be a combination of factors which contribute to a patient's death. For a case to fall in the latter category, the following factors, taken cumulatively, must be met:

i. the acts and omissions of the health-care providers must go beyond a mere error or medical negligence, in so far as those health-care providers, in breach of their professional obligations, deny a patient emergency medical treatment despite being fully aware that the person's life is at risk if that treatment is not given;
ii. the dysfunction at issue must be objectively and genuinely identifiable as systemic or structural in order to be attributable to the State authorities, and must not merely comprise individual instances where something may have been dysfunctional in the sense of going wrong or functioning badly;
iii. there must be a link between the dysfunction complained of and the harm which the patient sustained; and
iv. the dysfunction at issue must have resulted from the failure of the State to meet its obligation to provide a regulatory framework in the broader sense indicated above.

The Court found on the facts that there was not sufficient evidence of:

i. a denial of healthcare;
ii. a systemic or structural dysfunction affecting the hospitals where the applicant's husband was treated; or

iii. a fault attributable to the health-care professionals going beyond a mere error or medical negligence or failure by the health-care professionals to discharge their professional obligations to provide emergency medical treatment.

The case thus concerned allegations of medical negligence which meant that Portugal's substantive positive obligations were limited to the setting-up of an adequate regulatory framework compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. Having regard to the detailed rules and standards laid down in the domestic law and practice of the respondent State in the area under consideration, the Court considered that the relevant regulatory framework did not disclose any shortcomings as regards the State's obligation to protect the applicant's husband's right to life.

The Court therefore found no violation of Article 2 ECHR.

b. Procedural limb: The Grand Chamber reiterated that the procedural obligation under Article 2 ECHR in the context of health care required, *inter alia*, that the proceedings be completed within a reasonable time. Apart from the concern for the respect of the rights inherent in Article 2 ECHR in each individual case, the prompt examination of cases concerning medical negligence in a hospital setting was also important for the safety of all users of health-care services. The length of all three sets of domestic proceedings in the applicant's case (disciplinary, criminal and civil) had been unreasonable.

In addition, for the purposes of the procedural obligation of Article 2 ECHR, the scope of an investigation faced with complex issues arising in a medical context could not be interpreted as being limited to the time and direct cause of the individual's death. Where there was a *prima facie* arguable claim of a chain of events possibly triggered by an allegedly negligent act that may have contributed to the death of a patient, in particular if an allegation of a hospital-acquired infection is concerned, the authorities may be expected to conduct a thorough examination into the matter. No such examination had been conducted in the instant case in which the domestic courts, instead of carrying out an overall assessment, approached the chain of events as a succession of medical incidents, without paying particular attention to how they may have related to each other.

In sum, the domestic system as a whole, when faced with an arguable case of medical negligence resulting in the death of the applicant's husband, had failed to provide an adequate and timely response consonant with the State's obligation under Article 2 ECHR.

The Court therefore found a violation of Article 2 ECHR.

Cross-references:

European Court of Human Rights:

- *Arskaya v. Ukraine*, no. 45076/05, 05.12.2013;
- *Asiye Genç v. Turkey*, no. 24109/07, 27.01.2015;
- *Aydoğdu v. Turkey*, no. 40448/06, 30.08.2016;
- *Bouyid v. Belgium* [GC], no. 23380/09, 28.09.2015, *Reports of Judgments and Decisions* 2015;
- *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, 17.01.2002, *Reports of Judgments and Decisions* 2002-I;
- *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, 17.07.2014, *Reports of Judgments and Decisions* 2014;
- *Elena Cojocaru v. Romania*, no. 74114/12, 22.03.2016;
- *Lambert and Others v. France* [GC], no. 46043/14, 05.06.2015, *Reports of Judgments and Decisions* 2015 (extracts);
- *Mehmet Şentürk and Bekir Şentürk v. Turkey*, no. 13423/09, 09.04.2013, *Reports of Judgments and Decisions* 2013;
- *Roman Zakharov v. Russia* [GC], no. 47143/06, 04.12.2015, *Reports of Judgments and Decisions* 2015;
- *Šilih v. Slovenia* [GC], no. 71463/01, 09.04.2009;
- *Slimani v. France*, no. 57671/00, 27.07.2004, *Reports of Judgments and Decisions* 2004-IX (extracts).

Languages:

English, French.

Systematic thesaurus (V22) *

* 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 general 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 sincere co-operation and subsidiarity, see 4.17.2.1 and 4.17.2.2, respectively.
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 Including the convening, duration, publicity and agenda of sessions.
64 Including their creation, composition and terms of reference.
65 State budgetary contribution, other sources, etc.
66 For the publication of laws, see 3.15.

67 For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.
68 For local authorities, see 4.8.
69 Derived directly from the Constitution.
70 See also 4.8.
71 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.
72 Civil servants, administrators, etc.
73 Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.
74 Other than the body delivering the decision summarised here.
75 Positive and negative conflicts.

[76] Notwithstanding the question to which to branch of state power the prosecutor belongs.
[77] For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.
[78] Comprises the Court of Auditors in so far as it exercises judicial power.
[79] See also 3.6.
[80] And other units of local self-government.

81 See also keywords 5.3.41 and 5.2.1.4.
82 Organs of control and supervision.
83 Including other consultations.
84 For questions of jurisdiction, see keyword 1.3.4.6.
85 Proportional, majority, preferential, single-member constituencies, etc.
86 For example, *Panachage*, voting for whole list or part of list, blank votes.
87 For aspects related to fundamental rights, see 5.3.41.2.
88 For the creation of political parties, see 4.5.10.1.
89 For example, names of parties, order of presentation, logo, emblem or question in a referendum.
90 Tracts, letters, press, radio and television, posters, nominations, etc.
91 For the access of media to information, see 5.3.23, 5.3.24, in combination with 5.3.41.
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 This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.
96 For example, Auditor-General.
97 Includes ownership in undertakings by the state, regions or municipalities.
98 Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.
99 For example, Court of Auditors.
100 The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.
101 *Staatszielbestimmungen*.
102 Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

103 Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.
104 Positive and negative aspects.
105 For rights of the child, see 5.3.44.
106 The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.
107 Includes questions of the suspension of rights. See also 4.18.
108 Including all questions of non-discrimination.
109 Taxes and other duties towards the state.
110 "One person, one vote".
111 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).

112 For example, discrimination between married and single persons.
113 This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.
114 Detention by police.
115 Including questions related to the granting of passports or other travel documents.
116 May include questions of expulsion and extradition.
117 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.
118 In the meaning of Article 6.1 of the European Convention on Human Rights.
119 This keyword covers the right of appeal to a court.
120 Including the right to be present at hearing.

121 Including challenging of a judge.

122 Covers freedom of religion as an individual right. Its collective aspects are included under the keyword “Freedom of worship” below.

123 This keyword also includes the right to freely communicate information.

124 Militia, conscientious objection, etc.

125 Aspects of the use of names are included either here or under “Right to private life”.

126 Including compensation issues.
127 This keyword also covers “Freedom of work”.
128 This should also cover the term freedom of enterprise.
129 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.

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