ALB-1999-3-008 10-12-1999 65 On the constitutionality of the death penalty

a) Albania / **b)** Constitutional Court / **c)** / **d)** 10-12-1999 / **e)** 65 / **f)** On the constitutionality of the death penalty / **g)** *Fletorja Zyrtare* (Official Gazette), 33, 1301 / **h)** CODICES (English, French).

Keywords of the Systematic Thesaurus:

1.6.9.2 **Constitutional Justice** - Effects - Consequences for other cases - Decided cases.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.2 **Sources of Constitutional Law** - Categories - Unwritten rules.
2.3.5 **Sources of Constitutional Law** - Techniques of review - Logical interpretation.
2.3.6 **Sources of Constitutional Law** - Techniques of review - Historical interpretation.
3.9 **General Principles** - Rule of law.
3.13 **General Principles** - Legality.
3.18 **General Principles** - General interest.
4.16.1 **Institutions** - International relations - Transfer of powers to international institutions.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.1.4 **Fundamental Rights** - General questions - Emergency situations.
5.3.1 **Fundamental Rights** - Civil and political rights - Right to dignity.
5.3.2 **Fundamental Rights** - Civil and political rights - Right to life.

Keywords of the alphabetical index:

Death penalty, abolition / Human dignity / Human life, intrinsic value / Treaty, ratification, reference for a preliminary ruling / Death penalty, enforcement, prohibition.

Headnotes:

The existence of the death penalty in peacetime, under the Criminal Code and Military Criminal Code, is unconstitutional. The legal effects of this decision concern all death sentences pronounced by the courts and not yet enforced.

Summary:

The Criminal Chamber of the Supreme Court, hearing an appeal against a decision by lower courts to sentence a defendant to death, referred the case to the Constitutional Court for a preliminary ruling on the grounds that, under the Constitution, the right to life is a fundamental personal right, the essence of which would be violated by the application and enforcement of the death penalty.

Under Article 21 of the Constitution, "The life of a person is protected by law". This provision expresses the principle of the protection of human life, affirming it as a constitutional right. The concepts of life and human dignity are of key importance in the Constitution and form the basis for all other fundamental and absolute rights. The inviolability of personal rights and freedoms underpins the entire section of the Constitution in which these rights and freedoms are enunciated. Article 15 of the Constitution stipulates that the fundamental human rights and freedoms are inalienable and inviolable and stand at the basis of the entire juridical order. The state therefore has a basic constitutional duty to see that they are respected and protected. The essence of these articles is concerned with ensuring respect for life and human dignity. All other rights are founded on the right to life, the denial of which implies the removal of all other human rights. Human life thus takes precedence over all the other rights protected by the Constitution.

The question raised in the application cannot be decided solely on the basis of Article 21 of the Constitution. For while stipulating that the life of every person is protected by the law, this article does not explicitly prohibit

the death penalty (although that does not imply that it permits it), and it leaves scope for the counter-argument that the protection of individuals' lives is a matter for statute law rather than the Constitution. The Constitutional Court interpreted this article on the one hand in conjunction with the rest of the Constitution and its spirit generally, and on the other in relation to the way the question was addressed under Albania's former Major Constitutional Provisions. It analysed and compared the two sets of provisions, noting a significant difference between them. The new Constitution extends and reinforces the substance of the fundamental personal rights and freedoms, and thus constitutes a clear step forward.

By comparison with Article 1 of Chapter VII of the Major Constitutional Provisions, as amended by Law no. 7692 of 31 March 1993, Article 21 of the current Constitution represents a significant shift towards abolition of the death penalty, the protection of life and recognition of its inviolability, inasmuch as the death penalty is no longer mentioned even in terms of a possible exception to the general principle contained in Article 1 of Chapter VII of the Major Constitutional Provisions. As a legal affirmation of the principle of the protection of life, it does not simultaneously negate that principle, nor does it leave other alternatives open. Thus it was not the law-makers' intention to retain the death penalty, even in exceptional circumstances. Otherwise (i.e. had they been in favour of the death penalty and its application in Albania), they would have been bound to make provision to that effect, for example by including in Article 21 of the Constitution the words used in Article 1 of Chapter VII of the Major Constitutional Provisions.

The new Constitution makes provision for personal rights and freedoms. But clearly, in accordance with the guiding principles of international law, these cannot be regarded as total and absolute. The Constitution itself explicitly permits restrictions to be placed on certain rights and freedoms, as exceptions to the general principle. There is provision for such restrictions, for example, in Articles 18.3, 26, 27, 29, 34, 35, 37, 41, 43, 45 and 47.2 of the Constitution. On the other hand, certain provisions in the part of the Constitution on fundamental rights and freedoms are framed simply as general rules without any reference to exceptions. The absence of exceptions is notable in a number of Articles, among them Article 21 of the Constitution, which, because it includes no provision for the death penalty, cannot be deemed to permit violation of the right to life through the existence of such a penalty.

The entire Constitution is coloured by the fundamental principles of the protection of human life. Life is a right and a fundamental attribute, and the taking of life arbitrarily or otherwise entails the destruction of the person as an individual with rights and duties. Human life is a basic constitutionally protected value. That is not to say that the level of protection of life is identical at all times and in all circumstances, for it depends on many different factors, and it is therefore up to the law-makers to frame appropriate provisions. Only they are empowered to establish by statute the exceptional circumstances in which a person may be deprived of life in order to protect a more important right. Hence the Constitutional Court found it necessary to study Article 21 in depth in order to grasp its intent.

Article 21 can only be interpreted in the light of Article 2.2 **ECHR**, which permits deprivation of life. But the taking of life as envisaged by the European **Convention** on Human Rights, even though it may be done by the organs of the state, bears no relation to the death penalty; and because it results from exceptional circumstances it cannot be compared with the death penalty, which is a sentence imposed by a court.

The legal provisions for the protection of human life, as required by Article 21 of the Constitution, thus need interpretation. Article 21 merely refers to the law, without any mention of death in particular circumstances where - in the light of Article 2.2 **ECHR** - the taking of life is permissible. The legal definition of such circumstances is to be found in the general provisions of the Criminal Code, which recognises the legal concept of self-defence, and in the Use of Firearms Act, under which the armed forces are permitted to use firearms in specific situations. Furthermore, under Article 17.1 of the Constitution, it may be lawful to take life in order to protect the rights of others or to defend a vital constitutional principle. The limitations [on the right to life] imposed under Article 17.1 of the Constitution must relate to cases where the law can permit the taking of an individual's life in order to protect the rights of others. The taking of any life in the enforcement of a court decision does not fall into this category, because the death penalty is not one of the exceptions or limitations permitted by the Constitution.

Moreover, several , particularly in the section on fundamental rights and freedoms, refer to the European **Convention** on Human Rights. That is why it is important to interpret Article 21 of the Constitution in

conjunction with Article 17.2, which stipulates: "These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European **Convention** on Human Rights".

Under Articles 5, 116 and 122 of the Constitution, the Republic of Albania is bound to carry out its obligations under international law by providing for the incorporation of ratified international agreements into its domestic legislation and by giving them precedence over statute law. One such international agreement is the European **Convention** on Human Rights, which Albania has ratified. Article 1 Protocol 6 **ECHR** stipulates: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed". Albania has not yet ratified the protocol, but given that Article 17.2 of the Constitution prohibits any limitations of rights and freedoms exceeding those permissible under the **Convention**, it follows that the death penalty as provided for in the Criminal Code lies outside the intention and spirit of Constitution and of the European **Convention** on Human Rights itself, which does not admit this type of limitation.

Considered in the light of the Constitution and the European **Convention** on Human Rights, the death penalty is essentially incompatible with fundamental rights and freedoms. It negates the right to life and is a cruel and inhuman penalty even when applied by the state in the exercise of its judicial authority. Capital punishment has nothing to do with limiting the right to life, its purpose being to eliminate individuals absolutely, removing them from society. It is a means of killing people with the state in the role of executioner.

Nor can the death penalty be seen as a measure for punishing crime that serves an important function by significantly influencing the sentenced person, which would put it in the same category as general or social rehabilitation or solitary confinement, for example. The other penalties provided for in the Penal Code, such as fines, imprisonment for up to 25 years, or life imprisonment as an alternative to the death penalty, are quite adequate for the purposes of punishing offenders.

The Criminal Code's provisions concerning the death penalty are incompatible with the spirit of the Constitution and infringe the essence of the right to life and human dignity. In particular, when a death sentence is enforced as a result of human error it cannot be undone, and the individual executed becomes the innocent victim of the mistake.

It is clear, on the one hand, from an analysis of Article 17.2 of the Constitution in the light of the application before the court, that the right to life cannot be limited by a measure such as the death penalty, because this penalty constitutes not merely a limitation but the abolition of the right. And on the other hand, the limitations permissible under the European **Convention** on Human Rights do not extend to the death penalty as a punishment for crime.

The Constitutional Court concluded that a complete understanding of the spirit and substance of Article 21 of the Constitution could be reached under the terms of Article 17.2, which provides, as a matter of principle, for legislation to limit fundamental rights and freedoms.

It found, in particular, that Articles 3, 5, 17.2, 21, 116 and 122 of the Constitution, taken together and in conjunction with the preamble to the Constitution, not only failed to justify the death penalty, but in fact prohibited its application in Albania. It concluded that the death penalty as provided for in the Criminal Code was unconstitutional.

Since the Supreme Court's application was concerned only with the constitutionality of certain Articles of the Criminal Code, the Constitutional Court, recognising a direct link between these articles and the Military Criminal Code's provisions concerning the death penalty in peacetime, decided to review the constitutionality of the latter at the same time. Under Article 15 **ECHR**, the High Contracting Parties may, in time of war or other public emergency, take measures derogating from their obligations under the **Convention**, and Article 2 Protocol 6 **ECHR** stipulates that "a state may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war [...]". The European **Convention** on Human Rights thus permits the application of the death penalty in time of war, so the Military Criminal Code's provisions to that effect, rather than being exceptions, are in fact compatible with the **Convention**. By contrast, its provisions concerning the death penalty in peacetime (referred to above) cannot be deemed compatible with the Constitution.

In conclusion, the Constitutional Court decided unanimously that the death penalty in peacetime, as provided for in the Criminal Code and Military Criminal Code, was to be abolished on the grounds that it was incompatible with the Albanian Constitution.

This decision is final and irrevocable and its legal effects concern all death sentences not yet enforced.
Languages:

Albanian, French (translation by the Court).

ARM-2002-1-001 22-02-2002 DCC-350 On the conformity of obligations stated in the Convention for the Protection of Human Rights and Fundamental Freedoms signed on 4th November 1950 at Rome, in the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms signed on 20th March 1952 at Paris, in Protocol no. 4 _"On certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, as amended Protocol no. 11_", signed on 16th September 1963 at Strasbourg, and Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 22nd November 1984 with the Constitution of the Republic of Armenia

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 22-02-2002 / **e)** DCC-350 / **f)** On the conformity of obligations stated in the Convention for the Protection of Human Rights and Fundamental Freedoms signed on 4th November 1950 at Rome, in the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms signed on 20th March 1952 at Paris, in Protocol no. 4 "On certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, as amended Protocol no. 11", signed on 16th September 1963 at Strasbourg, and Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 22nd November 1984 with the Constitution of the Republic of Armenia / **g)** *Tegekagir* (Official Gazette), 1/2003 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

1.3.5.1 **Constitutional Justice** - Jurisdiction - The subject of review - International treaties.
2.1.1.4 **Sources of Constitutional Law** - Categories - Written rules - International instruments.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European Convention on Human Rights of 1950.
2.1.1.4.6 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Civil and Political Rights of 1966.
2.1.1.4.7 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Economic, Social and Cultural Rights of 1966.
2.2.1.1 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - Treaties and constitutions.
5.1 **Fundamental Rights** - General questions.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.

Keywords of the alphabetical index:

Treaty, obligation / Obligation, international / State, duty to protect / *Pacta sunt servanda*.

Headnotes:

The Constitution, providing for human rights and freedoms itself, does not restrict the right of individuals to also enjoy other rights and freedoms enshrined in international treaties on human rights.

Summary:

The Constitutional Court considered the issue of conformity of obligations stated in the European Convention on Human Rights and its several protocols with the Constitution. The Court's examination ascertained that some of the rights and fundamental freedoms stated in the Convention and said protocols correspond to those guaranteed by the Constitution, while some of the rights and freedoms are stated in the Constitution but in a different manner and formulation. On the other hand, some rights established in the Convention and its Protocols are absent from the Constitution.

The essence of the difference between constitutionally guaranteed rights and freedoms and those enshrined in the European Convention on Human Rights, is that the Conventional and Protocol norms protect human rights and freedoms more extensively.

Although at the first sight it may seem that there is a contradiction of a normative nature between the different legal instruments, such an impression is false if one considers the whole legislative system and the obligations of international treaties: a unique intercommunicated legal system.

In this regard, Article 6 of the Constitution states that, "International treaties that contradict the Constitution may be ratified after making a corresponding amendment to the Constitution". Furthermore, it should also be adopted as an obligatory initial provision regulating the constitutional relations, as is required by Article 4 of the Constitution, which declares: "The State guarantees protection of human rights and freedoms based on the Constitution and the laws, in accordance with the principles and norms of international law". This constitutional provision means that the Republic of Armenia is obliged to conscientiously carry out its obligations arising from principles and norms of international law, including international treaty obligations *(Pacta sunt servanda)*.

The International Pact of 16 December 1966 on Civil and Political Rights and the facultative protocol thereto, as well as the International Pact of 16 December 1966 on Economic, Social and Cultural Rights as international, all-encompassing documents providing for human rights and fundamental freedoms, as well as their possible limitation or derogation, are legally binding in the Republic of Armenia.

Thus, in accordance with Articles 4 and 43 of the Constitution, the provisions of the above-mentioned international instruments do form part of the legal system of norms and principles regulating constitutional-legal relations.

This condition may create the illusion of apparent contradiction between Articles 4 and 6.6 of the Constitution.

However, there is no contradiction as Article 43 of the Constitution provides that "the rights and freedoms set forth in the Constitution are not exhaustive and shall not be construed to exclude other universally accepted human and civil rights and freedoms". In other words, a citizen of the Republic of Armenia - or a person being under its jurisdiction - not only has the rights and freedoms guaranteed by the Constitution, but also such rights and freedoms which are the logical continuation of the rights and freedoms stated by the Constitution or an additional guarantee of the implementation of the latter.

The ground for this interpretation is that a possible collision of the provisions of the Constitution and any international treaty supposes that the Constitution either directly excludes the right, which is clearly determined by an international treaty, or imposes such a behaviour, which is categorically prohibited by a treaty. There is no such collision in the view of above-mentioned rights.

The Constitutional Court also considered that regardless of the norms of Public International Law, states are bound by mutual obligations, yet the approach towards the protection of human rights, formed in the system

of Public International Law, gives grounds to conclude that the human rights and fundamental freedoms, based on the system of multilateral conventions, are rather the objective standards of the behaviour of states, than their mutual rights and obligations. The obligations of states, stemming from international instruments, are rather directed to individuals under the jurisdiction of these states than to other participating states. In this regard, the Convention of 4 November 1950 is used to protect persons and non-governmental organisations from the organs of state power, which is an important sign of the rule of law, stated by Article 1 of the Constitution. Moreover, the Convention and its Protocols are based on such rights and standards, which conform to the spirit and letter of human rights and fundamental freedoms guaranteed by the Constitution and the international treaties to which the Republic of Armenia is party.

The whole legal regime of the Convention, including the principles on the possible limitation of the guaranteed rights, are constructed on that initial provision that the obligations adopted by the State are directed to the protection of all individuals, in accordance with the norms and principles of international law. Consequently, taking into account Article 4 of the Constitution, obliging the State to guarantee all internationally recognised rights and freedoms; Article 43 of the Constitution, stating that the rights and freedoms enumerated by the Constitution are not exhaustive, meaning that a citizen or other person do have other universally recognised rights and freedoms, and accepting the fact that the constitutional norms on human rights and freedoms do not have a prohibiting, but an authorising nature; it can be said that the issued conventional and Protocol norms conform to the norms and principles on human rights and fundamental freedoms, set forth in the Constitution.

Languages:

Armenian, English, Russian (translations by the Court).

AUT-2002-3-005

12-12-2002 G 151, 152/02

a) Austria / **b)** Constitutional Court / **c)** / **d)** 12-12-2002 / **e)** G 151, 152/02 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

1.2.2.1 **Constitutional Justice** - Types of claim - Claim by a private body or individual - Natural person.
1.3.5.5 **Constitutional Justice** - Jurisdiction - The subject of review - Laws and other rules having the force of law.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
3.4 **General Principles** - Separation of powers.
3.9 **General Principles** - Rule of law.
3.17 **General Principles** - Weighing of interests.
4.6.6 **Institutions** - Executive bodies - Relations with judicial bodies.
4.7.1.1 **Institutions** - Judicial bodies - Jurisdiction - Exclusive jurisdiction.
5.3.13.4 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Double degree of jurisdiction.

Keywords of the alphabetical index:

Extradition, powers / Extradition, granting authority / Receiving state, guarantees / Remedy, effective.

Headnotes:

Under § 33 of the Extradition and Legal Assistance Act *(Auslieferungs- und Rechtshilfegesetz*; "the Act") it is

exclusively for the Court of Appeal to decide whether a request for extradition is permissible, taking into account all aspects of the rights granted by the Act as well as all rights guaranteed by the Constitution, including the rights guaranteed by the European **Convention** on Human Rights.

The final decision on a request for extradition lies with the Minister of Justice, but only if the Court of Appeal has first found that the extradition is permissible. The Minister has to weigh other interests such as, in particular, aspects of international law. As his or her decision might interfere with a person's individual rights the Minister has to issue a formal decree *(Bescheid)*, against which the person concerned is entitled to lodge a complaint with the Administrative and/or the Constitutional Court.

The exclusion of appeals against the decision of the Court of Appeal as laid down in § 33.5 of the Act is unconstitutional. It contradicts the principle of the rule of law as well as the right to an effective remedy under Article 13 **ECHR**.

Summary:

A citizen of the United States (as well as of Israel) was convicted of fraud and sentenced to 845 years' imprisonment in the USA. He fled to Austria before the judgment was pronounced. He was arrested in October 2000 and the US Embassy requested his extradition in December 2000.

The Vienna Court of Appeal *(Oberlandesgericht Wien)* refused to grant the request for extradition because the requesting state had not guaranteed that the person concerned could have his conviction reviewed by a higher court. For this reason, extradition would contravene Article 2 Protocol 7 **ECHR**.

Upon appeal by the Prosecutor General *(Generalprokurator)* on the basis of a plea of nullity for the preservation of law *(Nichtigkeitsbeschwerde zur Wahrung des Gesetzes)*, the Supreme Court quashed the decision on 9 April 2002. The Supreme Court found that the legal question of the guarantee of access to appeal proceedings in criminal cases (Article 2 Protocol 7 **ECHR**) was not to be answered by the Court of Appeal but by the Minister of Justice. Considering the principle of the separation of powers (Article 94 of the Constitution) and §§ 33 and 34 of the Act, the Court of Appeal and the Minister of Justice share jurisdiction on the granting of a request for extradition. The Supreme Court returned the case to the Vienna Court of Appeal.

On 26 April 2002 the Constitutional Court received an (individual) application of the person, whose extradition proceedings were again pending. The applicant alleged that his rights were directly violated by the unconstitutionality of certain provisions of the Act, including the provision stipulating that no appeal lies against the decisions of the Court of Appeal in the relevant matters (§ 33.5 of the Act). He further argued that the term for his custody *(Haftfrist)* was about to expire. The Court of Appeal would therefore have to decide quickly on his extradition and this time, owing to the above-mentioned Supreme Court decision, could not find in favour of him. The Court of Appeal, deciding this matter as court of first and last instance, was not entitled to request a constitutional review of the provisions applied (Article 140 of the Constitution), while the Minister of Justice was not at all entitled to do so. Moreover the Minister's final decision would not even be qualified as a decree against which one could lodge a complaint with the Administrative and/or the Constitutional Court. The Minister's decision would simply be qualified as an order.

With respect to the admissibility of this application, the Court found that § 33.5 of the Act, which excluded appeals in cases such as the present one, had already directly forestalled the applicant since the Supreme Court's quashing of the Vienna Court of Appeal's earlier decision. Furthermore, the Vienna Court of Appeal had in the meantime allowed the extradition of the applicant on 8 May 2002. The Court accepted the applicant's argument that there was no other possibility to have the relevant provision reviewed. The applicant could not be expected to appeal against his extradition, precisely because this avenue was barred by the law, nor could he be expected to lodge an appeal for the protection of fundamental rights *(Grundrechtsbeschwerde)* as this recourse was barred by the Supreme Court's relevant precedents. Therefore his (individual) application to the Constitutional Court was admissible.

Pursuant to Article 94 of the Constitution, the judicial and executive branches of power "shall be separate at all levels of proceedings". Considering all aspects of this (organisational) principle of the separation of powers the Court found - unlike the Supreme Court - that §§ 33 and 34 of the Act do not provide for shared

jurisdiction. Accordingly the jurisdiction to decide whether to grant extradition is exclusively assigned to the Court of Appeal (§ 33 of the Act), which must consider all aspects of rights granted by the Act and by the Constitution. Therefore, where the Court of Appeal gives reasons based on rights guaranteed by Article 2 Protocol 7 **ECHR**, it is not exceeding its jurisdiction but may only be wrong as to its decision on the merits. The Minister can only decide on the basis of a decision by the Court of Appeal granting a request for extradition. He or she considers above all questions of international law or the political aspects of the extradition (§ 34 of the Act). As the Minister must use his or her discretionary power lawfully, his or her decision is consequently subject to review by the Administrative and/or the Constitutional Court.

Finally the Court ruled that the exclusion of appeals (§ 33.5 of the Act) contradicted the principle of the rule of law. The Court recalled that it is the essence of the rule of law that all actions of state organs must have a statutory and at least indirectly a constitutional basis (Article 18 of the Constitution) and that a system of judicial review must guarantee that each action is consistent with the law and the Constitution. Furthermore the rule of law requires that such a system of review grants a certain degree of efficiency.

Taking into account the case-law of the European Court of Human Rights on Articles 3 and 6 **ECHR**, granting extradition may give rise to issues of interference with and encroachment on certain constitutionally guaranteed rights. With regard to the right to an effective remedy (Article 13 **ECHR**) the decision to extradite a person must be subject to appeal. It is, however, also required by the principle of the rule of law that such a decision must be subject to appeal. The Court annulled § 33.5 of the Act insofar as it denied this right.

Languages:

German.

AUT-2002-3-004 02-12-2002 B 942/02

a) Austria / **b)** Constitutional Court / **c)** / **d)** 02-12-2002 / **e)** B 942/02 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
4.7.2 **Institutions** - Judicial bodies - Procedure.
5.3.13.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Trial/decision within reasonable time.

Keywords of the alphabetical index:

Proceedings, re-opening, conditions / European Court of Human Rights, judgement, execution / Individual complaint, grounds.

Headnotes:

No constitutional requirement can be derived from the European **Convention** on Human Rights according to which domestic proceedings must be reopened in every case where a judgment of the European Court of Human Rights has found a breach of the **Convention**. The reopening of disciplinary proceedings could only be taken into account in proceedings that had (already) been found to be unreasonably long by the European Court of Human Rights. However, the European Court of Human Rights had itself observed in the judgment pertaining to the present case that there was "no causal link" between the penalty imposed on the applicant under domestic law and the breach of the **Convention**.

Summary:

The European Court of Human Rights had found that the duration of certain disciplinary proceedings - among a group of disciplinary proceedings - against a practising lawyer was unreasonably long (seven years and four months), thus violating Article 6.1 **ECHR** (*W.R. v. Austria*, judgment of 14 December 1999, Application no. 26602/95).

On the basis of this judgment, the lawyer in question filed an application "to renew the disciplinary proceedings under § 363.a of the Code of Criminal Procedure" *(Strafprozeßordnung)*, the provisions of which must be applied in disciplinary proceedings according to the Disciplinary Act *(Disziplinarstatut 1990)*. In his application of 28 May 2001 the lawyer argued that it could not be excluded that the unreasonable length of the proceedings had had a disadvantageous influence on the decision of the Appeals Board *(Oberste Berufungs- und Disziplinarkommission)*.

His application was rejected by the Appeals Board on 25 February 2002. The lawyer appealed to the Constitutional Court, complaining (again) of the length of the disciplinary proceedings (Article 6.1 **ECHR**).

As the complainant's disciplinary conviction had not yet been erased *(Tilgung)* in the disciplinary penal record the complaint was considered admissible.

As to the merits of the appeal, the Court found that § 363.a of the Code of Criminal Procedure was enacted in 1996 in order to fulfil Austria's obligations arising under the **Convention**, in particular "to abide by the final judgment of the Court" (Article 46 **ECHR**) in criminal matters. It provides for the reopening *(Erneuerung)* of criminal proceedings where a breach of the **Convention** is found by the European Court of Human Rights and where this breach may have had an unfavourable impact on the decision by the domestic courts.

According to the established Strasbourg case-law, it is for each member State to choose the means to be used in its domestic legal system for discharging its obligations under Article 46 **ECHR** (the former Article 53). Considering that case-law, the Constitutional Court concluded that although a general constitutional requirement that domestic proceedings be reopened where a violation of the **Convention** is found by the European Court of Human Rights could be derived from the **Convention**, this requirement does not cover every case of violation found by the European Court of Human Rights.

As there were no doubts as to the constitutionality of the provision applied, nor any violation of constitutionally guaranteed rights, the Court dismissed the complaint.

Languages:

German.

AUT-2002-1-001

26-02-2002 B 137/01

a) Austria / **b)** Constitutional Court / **c)** / **d)** 26-02-2002 / **e)** B 137/01 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
4.7.15.1.4 **Institutions** - Judicial bodies - Legal assistance and representation of parties - The Bar - Status of members of the Bar.
4.7.15.1.5 **Institutions** - Judicial bodies - Legal assistance and representation of parties - The Bar - Discipline.
5.3.13.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Trial/decision within reasonable time.

5.3.21 **Fundamental Rights** - Civil and political rights - Freedom of expression.

Keywords of the alphabetical index:

Ethics, professional / Lawyer, status / Lawyer, ethics / Justice, administration.

Headnotes:

The special status of lawyers gives them a central position in the administration of justice. They therefore are expected to contribute to the proper administration of justice. A statement of claim written by a lawyer has to be objective and moderate in tone whatever the tone of the current political discussions might be.

Summary:

A lawyer was fined for a breach of professional ethics by the Vienna Bar Council *(Disziplinarrat der Rechtsanwaltskammer Wien)* for having attacked the opposing party in a way that was neither objective nor showing proper respect. The lawyer had written in his statement of claim that the opponent had denied the justified claims of the lawyer's client "in the manner of a robber baron" *(Raubrittermanier)*. The Appeal Bar Council *(Oberste Berufungs- und Disziplinarkommission für Rechtsanwälte und Rechtsanwaltsanwärter - OBDK)* confirmed this decision and stated that the incriminating passage was neither justified by the claim's contents nor that it could be recognized as a "humorous overstatement or exaggerated metaphor".

The lawyer lodged a complaint with the Constitutional Court alleging that this decision encroached on his right to freedom of expression (Article 10 **ECHR**). Additionally he complained about the length of the proceedings (Article 6 **ECHR**). The complainant argued that the incriminating words "in the manner of a robber baron" were clearly used only to colour the claim of his client and therefore must be seen in the context of the whole statement. The passage must clearly be regarded as a humorous and ironic remark which was made before a Carinthian judge and to a Carinthian lawyer and a Carinthian opponent. As is proven by statements of the Governor of Carinthia, arguments and discussions in Carinthia have a different style, and so expressions like the one in question are typical for that region.

The Court did not follow these arguments but dismissed the complaint. A comparison to the style of a political discussion or to words used by a politician cannot be successful due to the peculiar status of lawyers. The Court referred to the case-law of the European Court of Human Rights (see *Schöpfer v. Switzerland,* judgment of 20 May 1998, Appl. no. 56/1997/840/1046). Taking into account the circumstances of the case the length of the proceedings (three years and one month) did not violate Article 6 **ECHR**.

Cross-references:

- Schöpfer v. Switzerland, 20.05.1998, *Reports of Judgments and Decisions*, 1998-III.

Languages:

German.

AUT-2001-1-002 06-03-2001 B 159/00

a) Austria / **b)** Constitutional Court / **c)** / **d)** 06-03-2001 / **e)** B 159/00 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

1.3.5.13 **Constitutional Justice** - Jurisdiction - The subject of review - Administrative acts.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.

2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
2.3.9 **Sources of Constitutional Law** - Techniques of review - Teleological interpretation.
5.1.1 **Fundamental Rights** - General questions - Entitlement to rights.
5.3.2 **Fundamental Rights** - Civil and political rights - Right to life.
5.3.3 **Fundamental Rights** - Civil and political rights - Prohibition of torture and inhuman and degrading treatment.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.

Keywords of the alphabetical index:

Appeal, capacity / Appeal, instance, special / Act, direct administrative power, compulsion / Deceased / Relative, close / Succession, by law / Bondage / Gag.

Headnotes:

The Independent Administrative Tribunals in the *Länder (Unabhängige Verwaltungssenate)* were installed by Article 129a.1.2 of the Constitution as special appeal proceedings to decide on complaints by persons alleging an infringement of their rights through the exercise of direct administrative power and compulsion (so-called complaints against coercive measures; *Maßnahmenbeschwerde)*.

If a person directly affected by such an act dies in the course of it the close relatives of the deceased are entitled (by succession) to file a complaint against the relevant measure and the Independent Administrative Tribunals have to exercise their jurisdiction.

Compulsory acts such as the use of bondage and a gag used during deportation - an act of direct administrative power and compulsion itself - are part of one event and must be seen as one act only.

Summary:

The Independent Administrative Tribunal of Vienna rejected a complaint filed pursuant to Article 129a.1.2 of the Constitution by which the complainant - a minor - contended that the (lethal) use of bondage and a gag, as well as the poor planning and handling of her father's deportation, infringed not only the deceased's but also her constitutionally guaranteed rights to life and freedom from torture and cruel and degrading treatment (Articles 2 and 3 **ECHR**). The Tribunal based its decision on two procedural grounds:

1. Due to the wording of Article 129a.1.2 of the Constitution, a complaint may be filed solely by the person who is directly affected by a measure. The right to file the complaint is not transferred to close relatives if the directly affected person has died.

2. As the (probably fatal) use of bondage and the gag started at the airport *Schwechat*, which is located in the *Land* Lower Austria, the Independent Administrative Tribunal of Vienna has no jurisdiction to decide on these separate acts regardless of the fact that the deportation started in Vienna.

The minor (represented by her mother) brought the case to the Constitutional Court. The Court rejected the authority's legal opinion. It found the literal interpretation relied on by the authority was inappropriate. The constitutional legislator, when enacting Article 129a.1.2 of the Constitution in 1988, had clearly intended for there to be an *(ex post)* ascertainment of whether an act of direct administrative power and compulsion was legal or illegal.

Article 129a.1.2 of the Constitution was inserted after both the European Commission and Court of Human Rights had already developed case law allowing applications (Article 34 **ECHR**) brought by applicants on behalf of their deceased close relatives (see the *Çaçan* Judgment of 28 March 2000, Appl. no. 33646/96). According to this case law the spouse, parents, children, and siblings of the deceased are acknowledged as

close relatives.

As to the right to life, the Court argued that the entitlement of the (surviving) relative results from the specific character of this right. Otherwise a violation of this right could never be claimed.

Taking into account all these considerations the Court concluded that the constitutional legislator having installed a special instance of appeal for complaints against (coercive) measures could not have intended to exclude the possibility of a claim that a violation of the right to life by relatives if the person directly affected by a measure has died as a result of the measures.

Finally the Court stated that the deportation of the complainant's father had started in Vienna. The subsequent use of bondage and a gag were not separate acts but part of the deportation. The impugned Tribunal had therefore unlawfully rejected the complaint and violated the complainant's constitutionally guaranteed right not to be deprived of a fair hearing.

Supplementary information:

The circumstances of the deportation and the tragic death of the complainant's father caused some positive changes. In July 1999 a Human Rights Committee *(Menschenrechtsbeirat)* was installed by a constitutional provision (§ 15a) in the Act of Security Police *(Sicherheitspolizeigesetz)*. This independent Committee, with the help of six (sub)commissions (established at the High Courts of Appeal), observes and reviews the activity of the police and other organs exercising coercive measures, reviews prison conditions (a recommendation of the Committee for the Prevention of Torture of the Council of Europe), publishes reports on its work and passes recommendations to the Federal Minister of the Interior, which are later evaluated by the Human Rights Committee.

Languages:

German.

AUT-2000-1-003 16-03-2000 G 151/99, G 166/99, G 168/99

a) Austria / **b)** Constitutional Court / **c)** / **d)** 16-03-2000 / **e)** G 151/99, G 166/99, G 168/99 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.3.13.4 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Double degree of jurisdiction.
5.3.13.26 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to have adequate time and facilities for the preparation of the case.

Keywords of the alphabetical index:

Criminal proceedings / Exceptional case / Time-limit, extension.

Headnotes:

A provision stipulating a time-limit of four weeks for a plaintiff to lodge an appeal for a plea of nullity *(Nichtigkeitsbeschwerde)* in general grants sufficient (reasonable) time. There is no general necessity for the legislator to provide for a possibility of extending of any period within which an appeal must be filed in criminal

proceedings.

Article 6.3.b **ECHR**, however, guarantees that everyone charged with a criminal offence has the right to have adequate time and facilities for the preparation of his or her defence. Pursuant to Article 2 Protocol 7 **ECHR**, everyone is entitled to have his or her conviction or sentence reviewed by a higher tribunal. These procedural guarantees safeguarded by Article 6.3 **ECHR** must be granted in every single case, even extreme cases.

As § 285.1 of the Code of Criminal Procedure *(Strafprozeßordnung)* does not allow for any possibility of extending the period of four weeks within which an appeal for a re-trial on procedural grounds must be lodged, even in extreme cases, it is inconsistent with the above-mentioned constitutional guarantees.

Summary:

Several persons sentenced to long-term imprisonment (for fraud) by a judgment pronounced in June 1999 had notified the sentencing courts that they would lodge appeals for re-trials on procedural grounds. The written judgment was expected within the course of the first half of the year 2000.

Some of those sentenced by a court of first instance filed applications with the Court alleging that their rights had been directly infringed by the unconstitutionality of § 285.1 of the Code of Criminal Procedure, according to which they would be given only four weeks' time to draw up the notified appeals from the day on which the written judgment would be served. The applicants argued that their lawyers would then have to cope with about 100 000 pages of files recorded in the proceedings, about two million pages of seized documents, a database installed especially for the proceedings, more than 16 000 pages of recorded minutes of the (main) hearing and in addition a judgment expected to exceed 1000 pages. The lawyers would not be able to go through this enormous amount of files in order to lodge the appeal within this time limit observing the required formality and listing all substantial reasons for the appeal.

The Court declared the applications admissible and duly substantiated on the grounds that the legislator must provide for an exception (in terms of a possible extension) of the four-week period in order to ensure the rights of the defence of plaintiffs involved in such extraordinary, voluminous cases. The Court annulled the relevant parts of the challenged law.

Languages:

German.

AUT-1999-1-001

11-03-1999 B 1159/98 et al.

a) Austria / **b)** Constitutional Court / **c)** / **d)** 11-03-1999 / **e)** B 1159/98 et al. / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
2.3.1 **Sources of Constitutional Law** - Techniques of review - Concept of manifest error in assessing evidence or exercising discretion.
3.22 **General Principles** - Prohibition of arbitrariness.
5.1.1.3 **Fundamental Rights** - General questions - Entitlement to rights - Foreigners.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.2 **Fundamental Rights** - Equality.
5.3.5 **Fundamental Rights** - Civil and political rights - Individual liberty.
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.

5.3.6 **Fundamental Rights** - Civil and political rights - Freedom of movement.

Keywords of the alphabetical index:

Detention, international zone / Movement, restriction / Immigration, unlawful.

Headnotes:

Departing from its earlier precedent the Court followed the legal arguments of the European Court of Human Rights, namely that in order to determine whether an individual has been "deprived of his liberty" within the meaning of Article 5 **ECHR**, it is necessary to examine the actual situation and to take into account a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation and restriction of liberty is merely one of degree or intensity, and not one of nature and substance.

Holding aliens in the international zone involves a restriction of liberty, but one which is not in every respect comparable to that experienced in centers for the detention of aliens who are to be deported. Such confinement, accompanied by suitable safeguards for persons concerned, is acceptable only in order to enable States to prevent unlawful immigration. Such detention should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty into a deprivation of liberty (see the *Amuur v. France* judgment of 25.06.1996, *Reports of Judgments and Decisions* 1996-III, *Bulletin* 1996/2 [ECH-1996-2-011]).

The failure to ascertain the facts in a decisive question of (administrative) proceedings concerning aliens violates the right of equal treatment of aliens among themselves.

Summary:

Three Indian citizens were refused leave to enter Austrian territory at Vienna airport as they could not present travel documents. According to Article 33.1 of the Alien Act *(Fremdengesetz)* they were requested to stay in the airport's transit area until the continuation of their journey. They had to stay 22 days in the airport's transit area and 6 days in a separate transit area *(Sondertransitraum)* which is actually a container-construction outside the airport building and - due to its exposed site close to hangar, runways and airplanes - under strict and constant surveillance.

Complaints were filed with the Court maintaining that amongst the violations of other constitutionally guaranteed rights, holding the complainants in the transit area had violated their right not to be deprived of their liberty (Article 5 **ECHR**).

Referring to earlier case law the Court adhered to its legal opinion that the complainants were neither restricted in their freedom of movement nor deprived of other constitutionally guaranteed rights when being held in the airport's transit area. Their stay there was not based on the intention to restrict the complainants' liberty but on the intention to hinder them from entering Austria. The complainants were at all times free to leave Austria and to organise the continuation of their journey.

As for the complainants' stay in the separate transit area the Court stated that the authority had failed to ascertain any of those facts essential to determine whether the complainants had been deprived of their liberty according to the European Court of Human Rights' case-law quoted above. This neglect constitutes such a defect of proceedings that it encroaches on the right of equal treatment of aliens among themselves. The Court therefore overruled the impugned administrative decision.

Cross-references:

Legal norms referred to: Article 5 **ECHR**.
Languages:

German.

AUT-1998-1-004 11-03-1998 G 363/97

a) Austria / **b)** Constitutional Court / **c)** / **d)** 11-03-1998 / **e)** G 363/97 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

1.3.4.1 **Constitutional Justice** - Jurisdiction - Types of litigation - Litigation in respect of fundamental rights and freedoms.
1.3.5.5 **Constitutional Justice** - Jurisdiction - The subject of review - Laws and other rules having the force of law.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.1.1.3 **Fundamental Rights** - General questions - Entitlement to rights - Foreigners.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.2.1.3 **Fundamental Rights** - Equality - Scope of application - Social security.
5.2.2.4 **Fundamental Rights** - Equality - Criteria of distinction - Citizenship or nationality.
5.3.39 **Fundamental Rights** - Civil and political rights - Right to property.
5.4.15 **Fundamental Rights** - Economic, social and cultural rights - Right to unemployment benefits.

Keywords of the alphabetical index:

Unemployment / Emergency, assistance / Pecuniary right.

Headnotes:

Entitlement to emergency assistance is linked to payment of contributions to the unemployment insurance fund. Emergency assistance is a pecuniary right for the purposes of Article 1 Protocol 1 **ECHR**.

The different treatment between Austrian citizens (including some foreigners) and the group of non-Austrians as regards entitlement to emergency assistance pursuant to the relevant provisions of the Unemployment Insurance Act is not based on any objective and reasonable justification. Therefore, those provisions are discriminatory and contrary to Article 14 **ECHR** taken in conjunction with Article 1 Protocol 1 **ECHR**.
Summary:

Section 33 of the Unemployment Insurance Act (*Arbeitslosenversicherungsgesetz*) granted emergency assistance to persons having exhausted their entitlement to unemployment benefits or parental leave allowance. Among other statutory conditions set forth in Section 33.2.a, persons applying for emergency assistance had to have Austrian citizenship. According to Section 34.3 explicitly named groups of foreigners were to be treated equally to Austrian nationals while Section 34.4 granted emergency assistance to another group of foreigners just once and just for a period of 52 weeks. Their emergency assistance was restricted although this group had paid contributions to the unemployment fund on the same basis as Austrian employees.

Such different treatment would be unconstitutional according to Article 14 **ECHR** requiring that the enjoyment of rights and freedoms safeguarded by the **Convention** shall be secured without discrimination. As Article 14 **ECHR** has no independent existence but complements the other substantive provisions of the **Convention**

and the Protocols the facts at issue have to fall within the ambit of one or more of those provisions.

Rejecting the Government's view that emergency assistance was not to be considered as an insurance benefit but as an emergency benefit granted by the State to people in need, the Court found as follows: Admittedly, the award of emergency assistance also contains components of welfare benefits. But its entitlement results from the payment of contributions to the unemployment insurance fund. Benefits granted by unemployment insurance are by and large covered by the payment of those contributions. Thus, emergency assistance comes within the scope of Article 1 Protocol 1 **ECHR**. It follows that Article 14 **ECHR** - taken together with Article 1 Protocol 1 **ECHR** - is applicable.

Departing from its earlier case-law, the Constitutional Court agreed with the European Court of Human Rights' view (see the *Gaygusuz v. Austria* judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV) that the right to emergency assistance is a pecuniary right within the meaning of Article 1 Protocol 1 **ECHR**.

According to the European Court of Human Rights' case-law, a difference in treatment is discriminatory for the purposes of Article 14 **ECHR** if it has «no objective and reasonable justification», that is if there is not a «reasonable relationship of proportionality between the means employed and the aim sought to be realised».

The Constitutional Court could not find any reasons justifying the different treatment of the two groups of unemployed persons concerning their right to emergency assistance. Consequently, it annulled the relevant provisions causing the discriminatory treatment.

Given that the unconstitutionality of the provisions lies in an infringement of the **Convention**, the Court refused to set a deadline for their nullification.

Supplementary information:

Regarding the *Gaygusuz v. Austria* judgment of the European Court of Human Rights, the Austrian legislator had already prepared a bill amending the Unemployment Insurance Act accordingly. The annulment of the above-mentioned provisions by the Constitutional Court forced the legislator to realise this project earlier than planned.

Languages:

German.

AUT-1997-3-007 02-10-1997 B 2434/95

a) Austria / **b)** Constitutional Court / **c)** / **d)** 02-10-1997 / **e)** B 2434/95 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)** *Ecolex*, 1997, 989.

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
4.7.9 **Institutions** - Judicial bodies - Administrative courts.
4.13 **Institutions** - Independent administrative authorities.
5.3.5 **Fundamental Rights** - Civil and political rights - Individual liberty.
5.3.13.14 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Independence.
5.3.13.15 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Impartiality.

Keywords of the alphabetical index:

Civil servant on leave / Tribunal, member / Tribunal, independent, requirement.

Headnotes:

Article 6 of the Federal Constitutional Law on the Protection of the Right to Freedom grants the constitutionally guaranteed right that the lawfulness of any case of detention (deprivation of liberty) must be reviewed by an «independent authority».

The term «independent authority» within the meaning of Article 6 of the Federal Constitutional Law on the Protection of the Right to Freedom is equivalent to the term «tribunal» within the meaning of Article 6 **ECHR**. Therefore, the «independent authority» must meet all requirements of a «tribunal».

The Constitutional Court must accordingly examine whether the single member of the Independent Administrative Tribunal of Vienna *(Unabhängiger Verwaltungssenat Wien)* who was competent to decide the relevant case according to the assignment of business fulfilled the requirements of an «independent and impartial tribunal» within the meaning of Article 6 **ECHR**.

The European Court of Human Rights stated in its judgment of 29 April 1988 in the case of *Belilos v. Switzerland* that «the ordinary citizen will tend to see [the member of the Police Board/Lausanne who is a senior civil servant liable to return to other departmental duties] as a member of the police force subordinate to his superiors and loyal to his colleagues». The same would appear to be true in the present case.

A civil servant of the police headquarters, on leave from this position during his time as a member of the Independent Administrative Tribunal and entitled to review the legality of actions taken by members of the same police headquarters, may be seen as loyal to his former and possibly future colleagues.

Summary:

A person caught when using public transport means illegally (without paying) and trying to resist arrest was detained for about four hours by policemen of the police headquarters in Vienna. This person subsequently filed a complaint against the action of the policemen with the Independent Administrative Tribunal of Vienna. The complaint was dismissed (on substantial grounds); the decree dismissing the complaint was issued by the single member of this authority competent to decide this case according to the assignment of business.

The complaint lodged with the Constitutional Court was based on the ground that both the right to a legally competent judge and the right to a fair trial by an independent and impartial tribunal established by law were infringed by the dismissing decision. The complainant argued that the decree was issued by a single member of the Independent Administrative Tribunal of Vienna who was a lawyer of the police headquarters until being appointed a member of this Independent Administrative Tribunal of Vienna, and who would probably return to his former office. Therefore the doubt arises whether a member of the Administrative Tribunal of Vienna is truly provided with the required independence and impartiality.

The Constitutional Court found that there had been no breach of the rights alleged but that the single member of the Independent Administrative Tribunal issuing the impugned decree did not satisfy the requirements embodied in the term «independent authority» (Article 6 of the Federal Constitutional Law on the Protection of the Right to Freedom) and overruled the impugned decision.

Supplementary information:

Legal norms referred to:

Article 144 of the Constitution, Article 6 Federal Constitutional Law on the Protection of the Right to Liberty, Article 6 **ECHR**.

Languages:

German.

AUT-1996-1-002 11-12-1995 B 2300/95

a) Austria / **b)** Constitutional Court / **c)** / **d)** 11-12-1995 / **e)** B 2300/95 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

2.1.1.3 **Sources of Constitutional Law** - Categories - Written rules - Community law.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.2.1.6.4 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - Community law and domestic law - Secondary Community legislation and domestic non-constitutional instruments.
3.26.3 **General Principles** - Principles of Community law - Genuine co-operation between the institutions and the member states.
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:

Contract, award / Preliminary ruling, referral.

Headnotes:

The Court of Justice of the European Communities is the «lawful judge» (*«gesetzlicher Richter»*) - with the extensive connotation of *due process* given to the term in the established case-law of the Constitutional Court.

An independent administrative tribunal which delivers a final ruling is a tribunal, and as such must submit any preliminary question to the Community court.

Lawful apportionment of responsibilities is infringed by a tribunal that fails in its duty to request the intervention of the Community judge through a preliminary ruling. It rests with the Constitutional Court to remedy such error by finding a violation of the right to a *due process*.

Summary:

The appeal involved a challenge to a decision by an administrative authority (the Federal Tenders Board - *Bundesvergabeamt*), submitting that a contract was not awarded to the lowest bidder (the dispute raised the issue of the extent to which an alternative bid should be taken into consideration). The appellant alleged a violation of the right to a *due process* in that the national authority did not refer to the Community court the preliminary question regarding the interpretation of a Council Directive on the co-ordination of procedures for the award of public works projects.

The Constitutional Court supported the position of the parties in its finding that the impugned decision was issued by an authority constituting not only a tribunal within the meaning of Article 6 **ECHR** but also a court within the meaning of Article 177 EC. It was established in accordance with federal constitutional law as a collegial authority which has power to deliver final rulings, whose decisions are not subject to annulment or amendment under administrative procedures and which includes at least one judge, while its other members

are not subject to instructions in the performance of their functions. The decision cannot be referred to the Administrative Court. The possibility of appeal to the Constitutional Court does not alter the fact that it is a decision at last instance within the meaning of Article 177.3 EC (as review by the Constitutional Court is limited to its specific area of jurisdiction under the terms of Article 144 B-VG).

In its established case-law, the Court gives a broad interpretation to the constitutional right to *due process* as it applies to the protection of the competent authority established by law. This interpretation is in line with the case-law of the former Imperial Court, in which the term «lawful judge» was to be understood as including not only a tribunal but also any State authority empowered by a law or regulation to take a decision. In this sense, the Court of Justice of the European Communities is a «lawful judge». The national authority is competent to enforce the law - including Community law - but is bound by the preliminary ruling which establishes the interpretation of Community law. Thus there is a collaboration among the tribunals.

In the case considered, the Court did not allow the claim: plainly, the interpretation of national law is not contrary to the requirements of the relevant Community law.

Languages:

German.

AUT-1996-1-001 25-09-1995 B 1030/94, V 126/94

a) Austria / **b)** Constitutional Court / **c)** / **d)** 25-09-1995 / **e)** B 1030/94, V 126/94 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

1.3.5.13 **Constitutional Justice** - Jurisdiction - The subject of review - Administrative acts.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.4.16 **Fundamental Rights** - Economic, social and cultural rights - Right to a pension.

Keywords of the alphabetical index:

Civil right.

Headnotes:

Decisions awarding a pension are not part of the «hard core of civil rights» (*«Kernbereich der civil rights»*), ie traditionally judicial matters. Review by public law tribunals suffices.

Summary:

The Bar Council of Tyrol had dismissed a lawyer's request to be granted an occupational invalidity pension. He appealed against this administrative decision, complaining that he was denied access to an independent and impartial tribunal and alleging a violation of his constitutional rights as secured by Article 6 **ECHR**.

The Constitutional Court almost invariably defers to the case-law of the European Court of Human Rights; here it conceded the applicability of Article 6 **ECHR** but held that in the instant case the rights at issue were not infringed, relying on a more restrictive interpretation of the aforesaid provision than that of the European Court of Human Rights. The Constitutional Court referred to its established precedents as from decision VfSlg. 11500/1987, to the effect that civil rights must be determined on the merits by an independent and

impartial tribunal where the litigation concerns the «hard core of civil rights» (*«Kernbereich der civil rights»*) - ie traditionally judicial matters. In that case - if an administrative authority without the status of an independent body is competent to rule in these matters - review by the Constitutional Court and the Administrative Court, which normally deliver only judgments setting aside decisions, does not meet the requirements of Article 6 **ECHR**. This applies to decisions in litigation relating to:

- damage caused by game animals (VfSlg 11591/1987);
- settlement of disputes over the interpretation of an agreement by an arbitration board instituted by the Social Security General Act and the Hospitals Act (VfSlg. 11729/1989 and 12083/1989);
- refund of hospital fees *(Pflege- und Sondergebühren nach dem oberösterreichischen Krankenalstaltengesetz*) (VfSlg. 12470/1990);
- a dispute concerning reasonable rent (in accordance with the Allotment Gardens Act *«Kleingartengesetz»* (VfSlg. 12003/1989);
- an award of compensation for expropriation (VfSlg. 11760/1988, 11762/1988).

Conversely, review by the Constitutional Court and the Administrative Court suffices in respect of decisions (by the competent authority where it is not an independent body, «a tribunal») taken in order to determine civil rights which relate solely to private law situations. This is valid for:

- planning permission to build a house, or refusal of planning permission (VfSlg. 11500/1987);
- an authorisation for road construction (VfSlg. 11645/1988);
- a permit under the Animal Husbandry Act *«Viehwirtschaftsgesetz»* (VfSlg. 12082/1989);
- withdrawal of a licence to operate a pharmacy (VfSlg. 11937/1988);
- fixing of the rate for parking space allocated in accordance with the Civil Service Act *«Beamtendienstrechtsgesetz»* (VfSlg. 12929/1991);
- refusal of a work permit for foreigners (VfSlg. 13505/1993).

On the basis of these precedents, the Court held that in the case before it the award of a pension was not in the nature of a typical civil right and - with reference to the judgment of the European Court of Human Rights of 21.09.1993 in the case of *Zumtobel v. Austria* - that review of (administrative) decisions by public law tribunals meets the requirements of Article 6 **ECHR**.

Languages:

German.

AUT-1995-2-006

19-06-1995 G 183/94, G 212/94

a) Austria / **b)** Constitutional Court / **c)** / **d)** 19-06-1995 / **e)** G 183/94, G 212/94 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.3.7 **Sources of Constitutional Law** - Techniques of review - Literal interpretation.
3.12 **General Principles** - Clarity and precision of legal provisions.

4.6.6 **Institutions** - Executive bodies - Relations with judicial bodies.
4.7.9 **Institutions** - Judicial bodies - Administrative courts.
4.8.6.2 **Institutions** - Federalism, regionalism and local self-government - Institutional aspects - Executive.
4.13 **Institutions** - Independent administrative authorities.

Keywords of the alphabetical index:

Procedure, administrative / Independent administrative section.

Headnotes:

The independent administrative tribunals in the *Länder*, fulfilling the tasks assigned to them by the Constitution, are not courts *(Gerichte)*; under the terms of the Federal Constitution they are administrative authorities whose members are not bound by instructions - *(weisungsfreie Verwaltungsbehörde)*.

Summary:

An independent administrative tribunal instituted proceedings before the Constitutional Court in which it claimed that - according to the principle of the separation of powers - a provision of the law on general administrative procedure authorising an appeal court to change an administrative decision in any way was unconstitutional. The Administrative Court had quashed the decision of the independent administrative section on grounds of illegality, on account of its failure to establish the facts in proceedings relating to an administrative fine.

In its reasoning, the independent administrative tribunal referred to its description in the Federal Constitutional Law: Part VI, «Constitutional and Administrative Safeguards», instructs «the independent administrative sections in the *Länder* and the Administrative Court to ensure that all public administration complies with the law». The independent administrative tribunal, which is bound by the decisions of the Administrative Court, is obliged, in preliminary rulings, to fix penalties, i.e. to use its discretion and not to rely on that of the administrative authorities at first instance.

The federal government, which was invited to give its opinion, emphasised the fact that the aim of the Constitution in setting up independent administrative tribunals was to create an independent administrative authority - in pursuance of Article 6 **ECHR** - in matters of administrative criminal law.

Having noted that the independent administrative tribunal clearly considered itself to be an administrative court *(Verwaltungsgericht)* the Constitutional Court acknowledged that the literal interpretation of the Federal Constitutional Law was perfectly clear, that the provisions on the Administrative Court - which in principle only hands down judgments on points of law - are not applicable to independent administrative sections (the aforementioned Part VI distinguishes between «A. the independent administrative tribunals in the *Länder*» and «B. the Administrative Court» and, moreover, the Administrative Court rules on appeals in which the illegality of «a decision taken by the administrative authorities, including the independent administrative tribunals» is alleged). The Court therefore declined to set aside the impugned provision.

Languages:

German.

AUT-1995-1-003 14-12-1994 B 711/94

a) Austria / **b)** Constitutional Court / **c)** / **d)** 14-12-1994 / **e)** B 711/94 / **f)** / **g)** *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest), 13981/1994 / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.1.1.3 **Fundamental Rights** - General questions - Entitlement to rights - Foreigners.
5.3.2 **Fundamental Rights** - Civil and political rights - Right to life.
5.3.3 **Fundamental Rights** - Civil and political rights - Prohibition of torture and inhuman and degrading treatment.

Keywords of the alphabetical index:

Death penalty / Expulsion.

Headnotes:

The Austrian Federal Constitution secures to everyone, without exception, the subjective right not to be sentenced to death or executed.

Summary:

The decision of a Contracting State to extradite a foreigner can raise a problem in relation to Article 3 **ECHR** and therefore render the State liable under the terms of the **Convention**, if there are serious, well-founded reasons for believing that if the foreigner were returned to a particular country, he might genuinely risk being subjected to torture or to inhuman or degrading treatment. This judicial doctrine applies by analogy to the right safeguarded under the Constitution by Article 1 Protocol 6 **ECHR**, in conjunction with Article 85 of the Constitution of the Federation relating to the abolition of the death penalty. Accordingly, an administrative decision may infringe the fundamental right in question.

In the present case, the Constitutional Court set aside an administrative decision which had been challenged and in which the administrative authority had stated that a person who had refused to do his national service in the former «Federal Republic of Yugoslavia« could be deported: the applicant - an Albanian from Kosovo, who is a citizen of Yugoslav nationality - alleged that he ran a genuine risk of being subjected to torture and the death penalty. The administrative authorities neglected to study the evidence provided by the applicant and dismissed his appeal on the basis of information supplied by the Embassy of the former Republic of Yugoslavia in Austria. By reason of the obvious procedural defects, the applicant's fundamental rights had been infringed. Similarly, the administrative authorities should have examined whether the applicant, once deported, genuinely risked dying as a result of torture or inhuman or degrading treatment - without necessarily having been sentenced to death.

Languages:

German.

AUT-1994-3-012

29-09-1994 G 24/94, G 85/94, G 86/94

a) Austria / **b)** Constitutional Court / **c)** / **d)** 29-09-1994 / **e)** G 24/94, G 85/94, G 86/94 / **f)** / **g)** *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest), 13879/1994 / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.

2.3.2 **Sources of Constitutional Law** - Techniques of review - Concept of constitutionality dependent on a specified interpretation.

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.

Keywords of the alphabetical index:

Criminal proceedings / Detention, provisional, compensation.

Headnotes:

The provision of the law on compensation in criminal cases (*Strafrechtliches Entschädigungsgezetz*) concerning the right to compensation of a person acquitted of an alleged offence is compatible with the presumption of innocence guaranteed by Article 6.2 **ECHR**. In the event of final acquittal - in this case the accused was given the benefit of the doubt - the presumption of innocence is to be observed by the authorities ruling on the claim for compensation in separate proceedings.

Summary:

On application by a court called upon to decide at second instance on compensation in a criminal case, the Constitutional Court found that the provision allowing compensation where «the injured party ... is subsequently acquitted of the alleged offence or otherwise freed from prosecution and the suspicion that he committed the offence has been dispelled...» is in conformity with the Constitution. The application cited the reasoning of the European Court of Human Rights in the Sekanina v. Austria judgment of 25 August 1993, Series A no. 266-A, to the effect that owing to the irrevocable nature of the judgment in the criminal proceedings, the question put to the jury concerning the guilt of the accused should not have been raised in a decision relating to compensation. The Court held that the provision in question allows of an interpretation which is in conformity with Article 6.2 **ECHR**: when re-examining the assessment of the evidence, the court which is competent to decide on compensation must comply with the requirements of Article 6.2 **ECHR**.

Languages:

German.

AUT-1987-C-001 14-10-1987 B 267/86; B 2434/95; G 363-365/97 G 463,464/97 *et al.*; 120s63/97, 4Ob266/00 6Ob69/01t, B 1625/98

a) Austria / **b)** Constitutional Court / **c)** / **d)** 14-10-1987 / **e)** B 267/86; B 2434/95; G 363-365/97, G 463,464/97 *et al.*; 120s63/97, 4Ob266/00x, 6Ob69/01t, B 1625/98 / **f)** / **g)** *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest), 11.500/1987 of 14.10.1987, 14.939/1997 of 02.10.1997, 15.129/1998 of 11.03.1998, 15.462/1999 / **h)** .

Keywords of the Systematic Thesaurus:

1.1.4.4 **Constitutional Justice** - Constitutional jurisdiction - Relations with other institutions - Courts.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
2.2.1.5 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - European Convention on Human Rights and non-constitutional domestic legal instruments.
3.19 **General Principles** - Margin of appreciation.

Keywords of the alphabetical index:

Fundamental rights / Interpretation.

Headnotes:

In Austria fundamental rights guaranteed by the European Convention on Human Rights (hereafter the Convention) are regarded as individual rights and rank as constitutional law. The courts are at liberty, within the limits of their jurisdiction, to base their decisions on provisions of the Convention. This is a frequent practice. For example, in the field of criminal law, the fundamental right to freedom of opinion takes on considerable importance when offences against a person's reputation are being dealt with (cf. the Supreme Court's decisions of 18.12.1998, 120s63/97; 24.10.2000, 4Ob266/00x; and 26.04.2001, 6Ob69/01t). The courts are also required to take account of the fundamental rights guaranteed by the Convention when interpreting the provisions of ordinary law. However, consideration of the Convention when interpreting ordinary written law is admissible only to the extent that this leaves some room for freedom of interpretation.

Where an ordinary law that a court must apply in a given case is at variance with fundamental rights under the Convention, and must consequently be deemed "unconstitutional", the court concerned is nonetheless under an obligation to apply it. The matter must then be referred to the Constitutional Court, which can cancel the provisions in question if it holds that they are unconstitutional by reason of their failure to comply with the Convention.

Anyone entitled to appeal to the Constitutional Court may do so on the ground that a legal decision (an administrative decision, a law or a regulation) has interfered with his or her rights under the Convention.

Nonetheless, the Constitutional Court does not consider itself strictly bound by the case-law of the European Court of Human Rights. It has, for instance, already expressly underlined that it is in principle autonomous in giving its own interpretations and pointed out that "domestic law governing organisation of the state, which is of constitutional rank" may gainsay the consequences of certain interpretations. The Constitutional Court has also stated that the European Court of Human Rights must be regarded as "the principal body required to interpret the Convention and must accordingly be accorded 'special importance'" (*VfSlg* 11.500/1987). In this respect, to avoid contravening international law, the Constitutional Court makes a regular effort to take account of developments in the Strasbourg court's case-law (*VfSlg* - Official Digest - 14.939/1997, *Bulletin* 1997/3 [AUT-1997-3-007]; *VfSlg* 15.129/1998, *Bulletin* 1998/1 [AUT-1998-1-004]; *VfSlg* 15.462/1999; decision of 24.02.1999, B 1625/98, *Bulletin* 1999/1 [AUT-1999-1-002]).

Languages:

German.

AUT-1985-R-001 27-09-1985 B 643/82

a) Austria / **b)** Constitutional Court / **c)** / **d)** 27-09-1985 / **e)** B 643/82 / **f)** / **g)** *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest), 10547/1985 of 27.09.1985 / **h)** .

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.1.1.4.3 **Fundamental Rights** - General questions - Entitlement to rights - Natural persons - Prisoners.
5.3.18 **Fundamental Rights** - Civil and political rights - Freedom of conscience.

Keywords of the alphabetical index:

Object of worship, use in prison, restriction / Prisoner, object of worship, use.

Headnotes:

Prisoners too have the right to practise a religion; this right is violated where the use of religious objects for their original purpose is prohibited. An arrested person must therefore be allowed to use a phylactery and a prayer shawl (as part of the Jewish religion).

Summary:

The applicant, a practising Jew, had been arrested by the police (because he was suspected of an offence). While he was in custody, the police authorities refused to give him a phylactery and a prayer shawl; thus, he could not use them in order to pray.

The Constitutional Court ruled that this constituted a violation of the prisoner's religious freedom. Article 14 of the Basic Law of the State (StGG) and Article 9 **ECHR** guaranteed each individual the right to choose his or her religion freely without interference from the state, and to engage in religious activities in accordance with his or her beliefs. Essentially, this fundamental right prohibited the state from imposing constraints in relation to religion. Every individual must enjoy absolute, unlimited freedom in denominational and religious matters.

These freedoms were supplemented by Article 63.2 of the State Treaty of St. Germain, StGBl 1920/303. According to this article, every inhabitant of Austria had the right, in public or in private, alone or in community with others, to manifest or practise freely any kind of belief, religion or denomination, provided that it was consistent with public order and morals. Article 9.2 **ECHR** provides for the statutory restrictions allowed; no such statute existed in this instance.

Languages:

German.

AUT-1972-R-001 20-06-1972 B 223/69

a) Austria / **b)** Constitutional Court / **c)** / **d)** 20-06-1972 / **e)** B 223/69 / **f)** / **g)** *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest), 6747/1972 of 20.06.1972 / **h)** .

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.1.1.4.3 **Fundamental Rights** - General questions - Entitlement to rights - Natural persons - Prisoners.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.18 **Fundamental Rights** - Civil and political rights - Freedom of conscience.

Keywords of the alphabetical index:

Religious service, attendance / Prisoner, religious service, attendance, prohibition / Religious service, congestion / Prison, disciplinary problem.

Headnotes:

It is legitimate to prevent a remand prisoner from attending a religious service held in prison. This does not violate religious freedom (Article 14 of the Basic Law of the State of 1867 and Article 9 **ECHR**). The republic is not obliged to take special measures to enable legally detained persons to exercise this individual right.

Summary:

The applicant, a remand prisoner, had asked several times to be allowed to attend a weekly Protestant religious service held at the prison. The prison authorities refused his requests owing to disciplinary problems caused by congestion at the services.

The Constitutional Court ruled that this refusal did not violate the right to religious freedom (Article 14 of the Basic Law of the State of 1867 and Article 9 **ECHR**, which ranks as constitutional law in Austria). This right did not require the legislature to enable prisoners to attend services in prison. Even though such services were held in the prison, the constitutional rights of the applicant (who was of foreign nationality) were not violated if attendance was restricted owing to congestion at the services and the ensuing disciplinary problems.

Languages:

German.

AUT-1950-R-001 27-09-1950 B 72/50; B 92/53; G 9,17/55; B 185,186/58 B 112/59; B 39/70 Freedom of religious worship (freedom to manifest one's beliefs and freedom from external constraints)

a) Austria / **b)** Constitutional Court / **c)** / **d)** 27-09-1950 / **e)** B 72/50; B 92/53; G 9,17/55; B 185,186/58; B 112/59; B 39/70 / **f)** Freedom of religious worship (freedom to manifest one's beliefs and freedom from external constraints) / **g)** *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest), 2002/1950 of 27.09.1950, 2610/1953 of 14.12.1953, 2944/1955 of 19.12.1955, 3505/1959 of 11.03.1959, 3711/1960 of 25.03.1960, 6919/1972 of 08.12.1972 / **h)** .

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.1.1.4.3 **Fundamental Rights** - General questions - Entitlement to rights - Natural persons - Prisoners.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.18 **Fundamental Rights** - Civil and political rights - Freedom of conscience.

Keywords of the alphabetical index:

Belief, manifestation / Bell, ringing / Clothing, religious / Sacrifice, animals / Jehovah's witness / Prisoner,

participation in a religious service, prohibition / Marriage, religious, prior to civil marriage.

Headnotes:

As well as providing for freedom of religion, conscience and personal belief, the Austrian Constitution - which applies a liberal definition of fundamental rights - protects the right to practise a religion and to manifest one's personal beliefs. This is known as "*Weltanschauungspflege*" (exercise of personal beliefs) or "freedom of worship" in the broad sense. It encompasses "freedom of worship" in the narrow sense as well as "freedom of religion". Whereas the former refers to belief-oriented activities bearing some relation to an event such as a religious ritual and implying the establishment of at least a primitive form of religion (*VfSlg.* 2002/1950, 2610/1953), the latter includes all other manifestations of belief, regardless of whether they concern private or public behaviour. Every inhabitant of Austria has the right, in public or in private and alone or in community with others, to manifest or practise freely any kind of belief, religion or denomination (Article 63.2 of the State Treaty of St. Germain, StGBl 1920/303, Article 9 **ECHR**). The right to practise a religion both in private and in public is not confined to followers of recognised religions or members of recognised religious communities (*VfSlg.* 6919/1972).

Religious practice takes a number of forms (conducting and participating in worship, conducting services, administering and receiving sacraments at religious ceremonies to mark specific occasions such as weddings and funerals, meditation, processions, verbal expressions of religious belief, distribution of tracts or presentation of works of religious art, speeches on religious themes, education and upbringing). The identification of behaviour as a religious practice does not depend on whether it complies with binding religious rules, especially since this issue is often subject to debate. Religious practices include religious customs such as the ringing of bells during a service, the wearing of religious clothing and animal sacrifices as part of the observance of certain religions. Prisoners also have the right to practise a religion: according to the case-law of the Constitutional Court, this right is violated where the use of religious objects for their original purpose is prohibited (*VfSlg.* 10.547/1985, [AUT-1985-R-001]). The right to manifest one's religious beliefs also includes the freedom not to do so and the freedom to manifest non-religious personal beliefs such as pacifist convictions.

The Constitution therefore does not guarantee unrestricted freedom of worship. The manifestation of various personal beliefs must be consistent with public order and morals (Article 63 of the State Treaty of St. Germain). In particular, freedom of worship is subject to the statutory restrictions provided for in Article 9.2 **ECHR**; such restrictions are allowed on grounds of public safety, public order, health, morals and protection of the rights and freedoms of others. On the basis of a regulation issued by the highway police, the Constitutional Court consequently ruled that a member of the "Jehovah's Witnesses" could be punished for advertising on a highway (*VfSlg.* 3505/1959). It ruled that police measures connected with the burial of bodies in urban areas (funeral chambers and display on a catafalque) were authorised (*VfSlg.* 3711/1960). It also ruled that it was permissible to prevent a remand prisoner from taking part in a religious service held in prison (*VfSlg.* 6747/1972, [AUT-1972-R-001]). This latter decision was fiercely criticised by legal writers. On the other hand, the Court ruled that sentences could not be imposed in cases where a religious ceremony was conducted by a priest prior to a civil marriage (*VfSlg*. 2944/1955).

Languages:

German.

AUT-1927-R-002	16-05-1927	B 442/26 et al.; B 399, 437/26; B 392, 438/26; B 41/31; B 229/56; B 146/58; B 122/67; B 13/68; B 205/74; B 213/74; B 55/76; B 248/75; B 438/84; B 714/83; B 460/86; B 1044/86	Freedom of conscience (freedom of self-determination in relation to acts reflecting personal beliefs, including religious beliefs)

a) Austria / **b)** Constitutional Court / **c)** / **d)** 16-05-1927 / **e)** B 442/26 et al.; B 399, 437/26; B 392, 438/26; B 41/31; B 229/56; B 146/58; B 122/67; B 13/68; B 205/74; B 213/74; B 55/76; B 248/75; B 438/84; B 714/83; B 460/86; B 1044/86 / **f)** Freedom of conscience (freedom of self-determination in relation to acts reflecting personal beliefs, including religious beliefs) / **g)** *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest), 799/ 1927, 800/1927, 802/1927 of 16.05.1927, 1408/1931 of 23.06.1931, 3220/1957 of 28.06.1957, 3480/1958 of 17.12.1958, 5583/1967 of 09.10.1967, 5809/1968 of 15.10.1968, 7494/1975 of 06.03.1975, 7679/1975 of 28.11.1975, 7907/1976 of 15.10.1976, 8033/1977 of 26.03.1977, 10.674/1985 of 23.11.1985, 10.915/ 1986 of 19.06.1986, 11.105/1986 of 28.11.1986, 11.253/1987 of 02.03.1987 / **h)** .

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.7 **General Principles** - Relations between the State and bodies of a religious or ideological nature.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.2.2.6 **Fundamental Rights** - Equality - Criteria of distinction - Religion.
5.3.18 **Fundamental Rights** - Civil and political rights - Freedom of conscience.
5.3.26 **Fundamental Rights** - Civil and political rights - National service.

Keywords of the alphabetical index:

Church, recognition / Religious activity, freedom / Freedom of religion, negative / Ceremony, religious, participation, freedom / Ideology, national-socialist / Atheist / Agnostic / Indifferent / Tolerance, state / Procession, religious.

Headnotes:

Article 14 of the Basic Law of the State of 1867 (StGG) guarantees each individual the right to choose his/her religion freely without interference from the state and to engage in religious activities (*VfSlg.* 1408/1931, 10.547/1985) in accordance with his/her beliefs. Essentially, this fundamental right prohibits the state from imposing constraints in relation to religion (*VfSlg.* 802/1927, 1207, 3220/1957, 1408/1931, 10.547/1985, 13.513/1993, [AUT-1993-R-001]). Every individual must enjoy absolute, unlimited freedom in denominational and religious matters (*VfSlg.* 799/1927, 800/1927, 10.547/1985, 13.513/1993, [AUT- 1993-R-001]). No one may be forced (*VfSlg.* 802/1927) to perform a religious ritual or to take part in a religious ceremony; this rule

encompasses the freedom of choice to believe or not to believe, to change religion or to renounce one's religion (*VfSlg.* 5583/1967, 5809/1968). Every individual is guaranteed this freedom, regardless of whether the community in which s/he manifests or practises his/her faith, religion or denomination is legally recognised as a church or religious community (*VfSlg.* 10.915/1986). This freedom is confined to the religious sphere, however, and does not apply to a sense of belonging to a linguistic or ethnic group; on no account can it apply to matters connected with National-socialist ideology (*VfSlg.* 3480/1958, 7494/1975, 7679/1975, 7907/1976, 8033/1977, 10.674/1985).

The foregoing partly coincides with Article 9 **ECHR**, but is not as far-reaching. This provision - which ranks as constitutional law in the Austrian domestic legal system - establishes a general freedom of thought, conscience and religion, including a general freedom of non-religious personal belief (without reference to a transcendental being). Atheists, agnostics and those who are indifferent are thus protected. This freedom also covers fundamental non-religious matters, but does not include the right to exemption from military service (*VfSlg*. 8033/1977, 11.105/1986, 11.253/1987). In addition to the ensuing requirement for state tolerance, it can be inferred that the state has to take measures in respect of third parties such as to allow the holding of religious services (obligation to protect religious values). As part of this obligation, the state may decide that it is bound to protect religious processions. The state might also legitimately consider it necessary to prohibit certain behaviour, including the broadcasting of information and ideas that are incompatible with respect for freedom of thought, conscience and religion (protection of religious beliefs). State interference with freedom of opinion may therefore be warranted. The fundamental right to freedom of religion and conscience is subject to statutory restrictions in Austria. According to Article 14 of the Basic Law of the State of 1867, adherence to a religion does not affect civil rights (*VfSlg.* 802/1927) (serving as a juror or lay assistant judge, making a statement as a witness before a court). A person may only be forced to participate in religious activities, particularly religious ceremonies, where s/he is subject to the statutory authority of another (parental authority). Article 9.2 **ECHR** allows the legislature to limit the fundamental right in question, where this is necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. In a democratic society characterised by the coexistence of various religions, it may therefore be both legitimate and necessary to limit this freedom in order to strike a balance between the interests of different groups and to ensure respect for individual beliefs. Restrictions on this freedom are now particularly important, since they make it possible to protect young people from the practices of sects and religions that might interfere with their freedom of self-determination.

The specific right to exemption from military service (conscientious objection - *Waffendienstverweigerung*) is governed by § 2 of the Alternative Civilian Service Act (*Zivildienstgesetz*). This Act applies to people subject to military obligations who refuse to do military service on conscientious grounds: with the exception of personal self-defence or assistance to people at risk, they might face a crisis of conscience if required to take up arms against another human being in the course of their military service. In this case, a person subject to national service simply has to make a statement in which he undertakes to complete twelve months of alternative civilian service.

Languages:

German.

BEL-2002-1-003 28-03-2002 56/2002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 28-03-2002 / **e)** 56/2002 / **f)** / **g)** *Moniteur belge* (Official Gazette), 13.04.2002 / **h)** CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

1.2.2.2 **Constitutional Justice** - Types of claim - Claim by a private body or individual - Non-profit-making corporate body.
1.4.9.1 **Constitutional Justice** - Procedure - Parties - *Locus standi*.
1.6.5.3 **Constitutional Justice** - Effects - Temporal effect - Limitation on retrospective effect.

2.1.1.4.3	**Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1	**Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
2.3.2	**Sources of Constitutional Law** - Techniques of review - Concept of constitutionality dependent on a specified interpretation.
3.10	**General Principles** - Certainty of the law.
3.12	**General Principles** - Clarity and precision of legal provisions.
3.14	**General Principles** - *Nullum crimen, nulla poena sine lege*.
3.16	**General Principles** - Proportionality.
3.19	**General Principles** - Margin of appreciation.
4.6.3.2	**Institutions** - Executive bodies - Application of laws - Delegated rule-making powers.
5.2	**Fundamental Rights** - Equality.
5.3.5.1.3	**Fundamental Rights** - Civil and political rights - Individual liberty - Deprivation of liberty - Detention pending trial.
5.3.13	**Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.
5.3.13.3	**Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.13.15	**Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Impartiality.
5.3.13.26	**Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to have adequate time and facilities for the preparation of the case.
5.3.14	**Fundamental Rights** - Civil and political rights - *Ne bis in idem*.

Keywords of the alphabetical index:

Crime, urban / Hooliganism / Police custody, legality / Criminal procedure, immediate trial / Criminal procedure, preparatory phase, guarantees.

Headnotes:

The law has discretionary power to waive the normal rules of criminal procedure, so that certain cases can be dealt with more rapidly under summary procedure before a criminal court judge. The Court must decide, however, whether the measures adopted for this purpose do not adversely affect the rights of the accused in a discriminatory manner.

Article 6 **ECHR** applies to the preparatory phase of criminal proceedings.

In leaving the law to decide when, and in what form, criminal proceedings may be brought, Article 12.2 of the Constitution guarantees that no one may be prosecuted, except under rules adopted by a democratically elected deliberative assembly. Delegation to another authority does not violate the principle of legality, provided that the powers of that authority are defined with sufficient clarity and concern the execution of measures, of which the essential features have been previously defined by law.

Summary:

In anticipation of the Euro 2000 European football championship, the Act of 28 March 2000 provided for summary proceedings before a criminal court judge, as a way of dealing immediately with certain forms of urban crime and hooliganism.

The "summary proceedings Act" may be used when offenders are caught in the act (or enough evidence is collected within a month to take the case to court), and when the offence is punishable by one to ten years' imprisonment. In such cases, the public prosecutor may apply for an arrest warrant for immediate trial. The

accused is entitled to a lawyer, and may inspect the case file (or a copy). Having heard the accused, the investigating judge may order his arrest, and he must then appear before the criminal court between four and seven days later. In principle, the court gives judgment at once or within five days.

The *"Ligue des droits de l'homme"* ("Human Rights League"), a non-profit association, applied to have the whole Act repealed. In view of its statutory aim ("to combat injustice and all arbitrary violations of individual or collective rights") and of the nature of the impugned provisions, the Court decided that it had an interest in repeal of the Act.

The Court examined each of its arguments, and found some of them well founded.

1. Firstly, the association argued that the Act violated the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken in conjunction with Articles 5 and 6 **ECHR**, since it failed to regulate the situation of accused persons who were not arrested or were conditionally released. The Court found that the difference in treatment between accused persons who were arrested by order of the investigating judge (procedure specified in the Act), and accused persons who were not arrested (no procedure specified) was unjustified.

2. Secondly, the association argued that summary proceedings violated the accused person's defence rights, by comparison with ordinary proceedings. The Court decided that the measures were justified in principle, but restricted the defendant's defence rights in two ways which were not commensurate with the aim pursued: first, the accused person was given very little time to prepare his defence; secondly, he was not allowed to have further investigations carried out.

3. Thirdly, the association argued that the Act made no provision for judicial review of the lawfulness of detention. The Court noted that cases were heard, in principle, within seven days. This might be two days more than the five allowed in ordinary proceedings, but the measure was not a disproportionate encroachment on the right of persons arrested or detained to challenge the lawfulness of their detention under Article 5.4 **ECHR**.

4. The association also argued that there was discrimination between persons prosecuted under the summary procedure and persons punished for the same offences with administrative sanctions under Section 23 of the Act of 21 December 1998 on security at football matches. The Court noted that this first act punished a specific kind of crime, and that it was up to the law to decide whether criminal or administrative sanctions should apply.

5. The association objected to the fact that the same investigating judge who had issued the summary trial warrant might, in some cases, issue an arrest warrant later. This would violate the impartiality guaranteed by the general principles of Belgian law and by Article 6 **ECHR**. Referring to the *Imbrioscia v. Switzerland* judgment of 24 November 1993 (*Special Bulletin **ECHR*** [ECH-1993-S-008]), the Court confirmed that this article applied to the preparatory phase of criminal proceedings.

It held that the fact that the same judge took part in a later stage of the proceedings was not at variance with Article 6 **ECHR**.

6. The association further argued that the scope of the summary procedure was not sufficiently clearly defined. The Court noted that the procedure was designed to combat certain "less serious or less organised" forms of crime, but that the offences covered carried prison sentences of one to ten years. It pointed out that, under Article 12 of the Constitution, criminal offences and punishments must be strictly defined in law, and found that the law in this case was not sufficiently specific about the cases in which exceptions to the guarantees offered by ordinary criminal law were permitted.

7. Finally, the association argued that the summary procedure discriminated between accused persons at first instance and in appeal proceedings. The Court took the view that, when the Act was interpreted in conformity with the Constitution, this allegation was unfounded.

It decided to repeal certain parts of the Act forthwith, but made use of the possibility (see Article 8 of the

special Act of 6 January 1989 on the Arbitration Court - CODICES) of maintaining the effects of the repealed provisions, in order to avoid overloading the prosecuting authorities and courts, and to safeguard the rights of victims. In other words, detentions and convictions already decided under these provisions could not be challenged.

Cross-references:

- Imbrioscia v. Switzerland, 24.11.1993, Vol. 275, Series A of the Publications of the Court; *Special Bulletin **ECHR*** [ECH-1993-S-008].

Languages:

French, Dutch, German.

BEL-2002-1-002 20-02-2002 41/2002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 20-02-2002 / **e)** 41/2002 / **f)** / **g)** *Moniteur belge* (Official Gazette), 22.05.2002 / **h)** CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

1.3.1 **Constitutional Justice** - Jurisdiction - Scope of review.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.1.4.7 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Economic, Social and Cultural Rights of 1966.
4.7.9 **Institutions** - Judicial bodies - Administrative courts.
5.2 **Fundamental Rights** - Equality.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.13.4 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Double degree of jurisdiction.
5.4.4 **Fundamental Rights** - Economic, social and cultural rights - Freedom to choose one's profession.
5.4.5 **Fundamental Rights** - Economic, social and cultural rights - Freedom to work for remuneration.

Keywords of the alphabetical index:

Profession, access, conditions / Trade, access, conditions / Professional aptitude / Civil right, determination / Professional competence / Profession, authorisation.

Headnotes:

Making access to certain regulated professional activities conditional on managerial and professional skills is not incompatible with the Constitution or with international law. Disputes concerning compliance with these conditions can be submitted to the administrative courts, even if the right to exercise a professional activity on a self-employed basis is considered, as the European Court of Human Rights has consistently ruled, a civil right within the meaning of Article 6 **ECHR**.

Summary:

An act of 15 December 1970 regulates the exercise of professional activities in small and medium-sized commercial and craft trade firms in Belgium. This law empowers the King to lay down certain requirements concerning the managerial and professional skills of persons wishing to engage in certain professional activities on a self-employed basis, the aim being to protect the self-employed sector and also those who avail

of its services. Such persons must apply to the relevant trade guilds for a certificate. If this is refused, they may appeal to the council of the guild concerned and possibly, on a point of law, to the State Council (*Conseil d'État*, highest Administrative Court).

A. Ceressia was refused a certificate to work as a self-employed glazier, and appealed unsuccessfully to the council of the guild concerned. He then appealed to the State Council, but complained at being unable to take his case to the ordinary courts, and claimed that he had suffered discrimination in respect of his right to exercise a professional activity freely. The State Council asked the Court of Arbitration for a preliminary ruling on the compatibility of the act of 15 December 1970 with the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken in conjunction with other provisions of the Constitution and international treaties (see supplementary information below).

The Court of Arbitration re-worded the preliminary question for two reasons: firstly, the question, as worded, seemed to postulate violation; secondly, there were actually two separate issues: was it not discriminatory to limit access to certain independent trades: verification with regard to the constitutional principle of equality - Articles 10 and 11 of the Constitution, taken in conjunction with the right to the free choice of a professional activity - Article 23 of the Constitution, the right to gain one's living by work freely chosen or accepted - Article 6 of the International Covenant on Economic, Social and Cultural Rights and the right to own property - Article 1 Protocol 1 **ECHR**; and was it not discriminatory to refer the appeals in question to administrative rather than civil courts (verification with regard to the constitutional principle of equality) - Articles 10 and 11 of the Constitution, taken in conjunction with Article 144 of the Constitution, which states that the (ordinary) courts have sole jurisdiction to rule on disputes concerning civil rights?

On the first question, the Court found that there had been no discriminatory limitation of the right to choose a professional activity freely: "Considering both the purpose of the law and the practical arrangements adopted (particularly the involvement of the trade federations, the limited character and the nature of the conditions of knowledge likely to be imposed, and the existence of remedies), the impugned restrictions on free choice of professional activity are not without the requisite justification". The Court also found that there had been no discrimination in respect of the rights guaranteed by Article 6 of the International Covenant on Economic, Social and Cultural Rights and Article 1 Protocol 1 **ECHR**.

On the second question, the Court again found that there had been no discrimination in respect of the right to bring complaints concerning civil rights before the (ordinary) courts: under the Constitution, the (ordinary) courts have sole jurisdiction in disputes concerning civil rights, but the legislator was entitled in this case to make disputes concerning political rights (Article 145 of the Constitution) a matter for the administrative courts, in view of the predominantly public-law character of the regulations applying to the self-employed professions. This was not affected by the fact that the European Court of Human Rights had consistently ruled that the right to work as a self-employed person was a civil right within the meaning of Article 6 **ECHR**. "Belgian law fulfils the requirements of this provision of the **Convention**, insofar as complaints concerning the conditions of access to such professions are heard by a judicial body having full jurisdiction, which is itself subject to supervision by the State Council."

Supplementary information:

The Court of Arbitration's powers of review are limited to issues raised by the rules which determine the respective powers of the federal government and the communities, and by Articles 10, 11 and 24 of the Constitution. However, in verifying compliance with the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), it may also refer indirectly to other provisions of the Constitution and even of international law, as it did in this case.

Languages:

French, Dutch, German.

BEL-2002-1-001 09-01-2002 9/2002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 09-01-2002 / **e)** 9/2002 / **f)** / **g)** *Moniteur belge* (Official Gazette), 19.03.2002 / **h)** CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
3.16 **General Principles** - Proportionality.
5.2 **Fundamental Rights** - Equality.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.13.4 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Double degree of jurisdiction.

Keywords of the alphabetical index:

Appeal, time-limit / Judgment *in absentia*, appeal, time-limit / Criminal procedure, guarantees.

Headnotes:

A difference in treatment resulting from the application of different procedures before different courts in different circumstances is not, in itself, discriminatory. The principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) is violated only if different treatment is accompanied by disproportionate restriction of the rights of the parties concerned.

The right of access to a court, which is one aspect of the right to a fair trial, may be subject to conditions of admissibility, particularly in respect of time-limits for lodging appeals. However, such conditions must not restrict the right in a manner which affects its very substance.

Summary:

The Mons Court of Appeal asked the Court of Arbitration for a preliminary ruling on questions raised by a provision in the Code of Criminal Procedure which gave persons sentenced *in absentia* - but not persons sentenced in the normal way - extra time to appeal.

The Court of Arbitration noted that the purpose of the appeal procedure applying to judgments given *in absentia* was to allow the person concerned to secure a second hearing, in his/her presence, before the same court which had given the first judgment.

The very essence and aim of this procedure was to allow a person judged *in absentia*, who might, for that reason, be unaware of certain aspects of the case, or at least have been unable to comment on them, to exercise his/her defence rights fully.

The purpose of an ordinary appeal, on the other hand, was to allow a person sentenced at first instance to challenge the decision, or certain aspects of the decision, before a higher court.

The Court had already ruled in several decisions that a difference in treatment resulting from the application of different procedures before different courts in different circumstances was not, in itself, discriminatory. The principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) was violated only if the rights of the parties were restricted to a disproportionate degree.

The Court further stated that the right of access to a court, which was one aspect of the right to a fair trial, might be subject to conditions of admissibility, particularly in respect of time-limits for lodging appeals. Such conditions must not, however, restrict the right in a manner which affected its very substance. Referring to the judgment given by the European Court of Human Rights on 19 December 1997 in the *Brualla Gómez de la Torre v. Spain* case, the Court further stated that the right to use a remedy provided for in law would be violated if the restrictions imposed did not pursue a legitimate aim, and if the means used were not in due proportion to that aim.

Referring to another judgment of the European Court of Human Rights on 28 October 1998, *Pérez de Rada Cavanilles v. Spain*, the Court added that the rules on time-limits for appeals against ordinary judgments or judgments given *in absentia* were designed to ensure the sound administration of justice and prevent legal uncertainty. However, these rules must not prevent individuals from using the remedies open to them.

The Court concluded in this case that the time-limit for lodging an appeal did not unduly limit the rights of sentenced persons. It took account of the special rules applying to judgments given *in absentia*. The fact that the law did not provide for the same time-limit in both cases could not be regarded as discrimination.

Cross-references:

European Court of Human Rights:

- *Brualla Gómez de la Torre v. Spain*, 19.12.1997; *Reports* 1997-VIII;

- *Pérez de Rada Cavanilles v. Spain*, 28.10.1998; *Reports* 1998-VIII.

Languages:

French, Dutch, German.

BEL-2001-3-008 06-11-2001 140/2001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 06-11-2001 / **e)** 140/2001 / **f)** / **g)** *Moniteur belge* (Official Gazette), 22.12.2001 / **h)** CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

1.3.5.15 **Constitutional Justice** - Jurisdiction - The subject of review - Failure to act or to pass legislation.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.16 **General Principles** - Proportionality.
3.20 **General Principles** - Reasonableness.
5.2.1.1 **Fundamental Rights** - Equality - Scope of application - Public burdens.
5.2.2.12 **Fundamental Rights** - Equality - Criteria of distinction - Civil status.

Keywords of the alphabetical index:

Tax, unequal treatment, married persons, cohabitees / Legislator, omission / Tax, deduction / Tax, spouse / Tax, cohabitees.

Headnotes:

Article 131 of the Income Tax Code, fixing the tax-exempted proportion of income at 165 000 BEF (4 090,24 €) for single taxpayers and 130 000 BEF (3 222,62 €) for married persons, is not contrary to the constitutional

rules of equality and non-discrimination (Articles 10 and 11 of the Constitution). Conversely, it is unjustified that married couples and unmarried persons living together should receive different treatment through the application to unmarried cohabitees (in the absence of any specific statutory provision) of the regulations for single taxpayers. However, this discrimination does not arise from the aforementioned Article 131 which was the subject of the preliminary question.

Summary:

When assessing tax on annual income, a tax-exempted proportion of income is allowed in Belgium, i.e. an amount that may be deducted from the taxable income on which tax is calculated. Married couples are required to make a joint declaration of income and both husband and wife are allowed a deduction of 130 000 BEF (3 222,62 €) each, in accordance with Article 131 of the 1992 Income Tax Code. The same provision specifies 165 000 BEF (4 090,24 €) as the tax-exempted proportion of income for a single person. Unmarried cohabitees are regarded as single persons for taxation purposes.

A married couple, both earning occupational income, laid a complaint against the personal income tax levy for the 1998 taxation year on the ground that discrimination between married and cohabiting persons existed in their estimation. After their complaint was dismissed by the tax authorities, they appealed to the taxation court. This court asked the Court of Arbitration to determine whether or not Article 131 of the Income Tax Code infringed the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution) "construed to the effect that an unmarried cohabiting couple, both earning a significant taxable occupational income, qualify for twice the tax-exempted income amount of 165 000 BEF (not indexed), whereas cohabiting spouses, both likewise earning a significant taxable occupational income, can claim twice the tax-exempted income amount of 130 000 BEF (not indexed)".

The Court firstly recalled its modus operandi for review in the light of the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), and quoted the following recital appearing in many of its judgments and strongly resembling the phraseology of the European Court of Human Rights with regard to Article 14 **ECHR**:

"The constitutional rules of equality and non-discrimination do not rule out the possibility of different treatment being applied to different categories of people, provided that it is based on objective criteria and reasonably justified.

The existence of such justification must be appreciated in the light of the aim and the effects of the impugned measure and the nature of the principles at issue; the principle of equality is violated where it is established that there is no reasonable proportionality between the means employed and the aim."

The Court held that the difference in treatment between spouses and unmarried cohabitees was based on an objective criterion, namely their dissimilar legal position regarding not only their mutual obligations but also their pecuniary situation. This differing legal position could in some cases, where linked with the object of the measure in question, justify a difference in treatment between married and unmarried cohabitees.

The Court found that the different treatment of single and married taxpayers was not unjustified with regard to the level of the tax-exempted income amount, as the legislator may have taken account of the fact that regular subsistence expenses per head are generally lower for married couples than for single persons.

In the Court's view, this justification would nevertheless be unacceptable when comparing the situation of spouses with that of unmarried cohabitees, also jointly bearing regular subsistence expenses. These expenses being essentially unaffected by the married or unmarried status of persons living together, the distinction as to marital status was not material in determining the amount of tax-exempted income allowed them. Consequently, there was an unjustified difference of treatment between married and unmarried cohabitees.

The Court nevertheless held that the discrimination in question did not arise from Article 131 of the 1992 Income Tax Code. It had its origin in the application to unmarried cohabitees of the provision relating to single taxpayers, the legislator having failed to make any specific provision for the former.

Supplementary information:

The law of 10 August 2001 (*Moniteur belge* of 20.09.2001 - www.moniteur.be) laid down new tax regulations.

Cross-references:

Compare the German Constitutional Court's decision of 10.11.1998 (2 BvR 1057/91, 2 BvR 1226/91, 2 BvR 980/91), *Bulletin* 2000/2 [GER-2000-2-002].

Languages:

French, Dutch, German.

BEL-2001-2-007 13-07-2001 105/2001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 13-07-2001 / **e)** 105/2001 / **f)** / **g)** *Moniteur belge* (Official Gazette), 03.10.2001 / **h)** CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
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.
5.3.14 **Fundamental Rights** - Civil and political rights - *Ne bis in idem*.
5.3.17 **Fundamental Rights** - Civil and political rights - Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Driving licence, withdrawal / Safety measure / Road traffic, automatic device / Sanction, criminal, concept / Sanction, nature / Responsibility, authorities / Precaution, principle / Prudence, principle.

Headnotes:

Immediate withdrawal of a driving licence has to be regarded as a temporary safety measure, and not as a criminal sanction. It does not imply any determination of a criminal charge within the meaning of Article 6 **ECHR**. In view of the legislature's concern to improve road safety, the need to take action without delay may justify the prosecuting authorities' ability to take such a measure without prior judicial verification.

However, withdrawal of a driving licence for a maximum of 15 days, and its possible extension for two further periods of 15 days may, in certain cases, have serious consequences for the persons against whom the measure is taken. The issue of whether such decisions may be taken without verification by the courts concerns Article 56 of the law, about which no question was put to the Court.

Summary:

A police court asked the Court about the conformity with the constitutional principles of equality and absence of discrimination (Articles 10 and 11 of the Constitution), possibly taken in conjunction with Article 6.1 **ECHR**, of road traffic policing provisions allowing a driving licence to be immediately withdrawn when a serious offence has been committed, such withdrawal being decided by the prosecuting authorities. The Court noted

that the prosecuting authorities had discretion and had to consider in each individual case, taking into account all the circumstances of the case, whether the seriousness of the offence was such that the temporary withdrawal of the driving licence was justified in order to maintain road safety.

The Court took the view that the immediate withdrawal of a driving licence was a temporary safety measure, and not a criminal sanction, so it did not imply any determination of a criminal charge within the meaning of Article 6 **ECHR**. In this context, the Court cited the Escoubet judgment of the European Court of Human Rights, of 28 October 1999. The legislature's concern to improve road safety - and the corresponding need to take action without delay - could justify the taking of this measure by the prosecuting authorities without prior judicial verification. The Court nevertheless noted that withdrawal of a driving licence for a maximum of 15 days and its possible extension for a maximum of two further periods of 15 days could, in certain cases, have serious consequences for the persons against whom the measure was taken. However, it did not take further its consideration of whether such decisions could be taken without judicial verification, because it had not been asked to rule on the provision which allowed such extensions.

Nor had the *ne bis in idem* rule been violated, as withdrawal of a driving licence was not a criminal sentence and was independent of prosecution.

The judge *a quo* also asked the Court about the conformity of the law with the constitutional rules of equality and absence of discrimination (Articles 10 and 11 of the Constitution), in that it made no provision for compensation for the unjustified withdrawal of a driving licence comparable to the compensation payable, for instance, when detention in custody was wrongful. The Court noted firstly that the situation of wrongful detention in custody for a period of more than eight days was not comparable with the withdrawal of a driving licence. It then noted that there was no difference in treatment between persons to whom damage was caused by the unjustified withdrawal of their driving licence and persons who suffered damage as a result of a fault committed by an authority, since the state could be held responsible in both cases under Articles 1382 and 1383 of the Civil Code if the damage was caused by a fault such as violation of the principle of precaution and prudence.

Also referred to the Court were two differences in treatment between the arrangements applicable to disqualification from driving and those applicable to immediate withdrawal of a driving licence: in the event of disqualification, it was possible to reach a compromise, and the measure might be limited to certain categories of vehicles. The Court took the view that the character of a criminal sanction of a disqualification from driving enabled the first difference to be justified. Where the second was concerned, the Court also emphasised the difference in scope between the two measures. An urgent and temporary safety measure might, in order to achieve its aim, consist of the withdrawal pure and simple of a driving licence, whereas the judge passing a criminal sentence was able to modulate the sanction imposed, taking individual factors into account.

Finally, the judge *a quo* asked the Court about the difference in treatment, in the event of a driving licence being immediately withdrawn, between cases in which the breaking of a speed limit was detected by an automatic device operating in the presence or in the absence of a qualified official. The Court accepted that the legislature could, in order to achieve its aim of immediately removing dangerous drivers from the roads, and without violating the principle of equality and absence of discrimination, allow the Crown Prosecutor to decide whether the driving licence of a driver who has committed a serious offence should be withdrawn, without the law itself having to make a distinction between the ways in which the offence was detected.

The Court concluded that there had been no violation of Articles 10 and 11 of the Constitution.
Languages:

French, Dutch, German.

BEL-2001-2-006 07-06-2001 77/2001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 07-06-2001 / **e)** 77/2001 / **f)** / **g)** *Moniteur belge* (Official Gazette),

25.09.2001 / **h)** CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
3.16 **General Principles** - Proportionality.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.

Keywords of the alphabetical index:

Sentence, classification / Sentence, suspension / Sentence, deferral / Sentence, cumulative / Sanction, criminal, concept / Sanction, nature / Fine, administrative / Social security, undeclared employment.

Headnotes:

The distinction between a penalty and additional financial sanctions is based, the case-law of the European Court of Human Rights being borne in mind, on whether or not the measure was applied for law enforcement purposes, on its objective, on the categories of persons likely to be subjected to it, on the preventive nature of the measure and on the classification of the sanction itself.

The fact that a sanction has to be classified as a penalty does not necessarily mean that all the applicable rules of ordinary criminal law are applied to it. The court in such cases verifies proportionality in the light of the intention of the legislature.

It may thus be justified for several sanctions to be imposed cumulatively, without application of the criminal law rule that, when more than one offence has been committed, only the severest penalty is imposed. It would be unjustified, on the other hand, for the judge not to be able to order remission of sentence or suspension of the judgment.

Summary:

Two preliminary questions were put to the Court of Arbitration at the request of employers who had been prosecuted for infringements of social security legislation (employment of persons not declared to the social security authorities and not included on the staff register, and without sufficient payment of social insurance contributions). The reported offences are subject not only to ordinary criminal sanctions, but also to large additional financial sanctions. The employers had already been ordered in civil proceedings to pay the social insurance contributions evaded. They asserted that ordinary criminal rules did not apply to such additional financial sanctions, a fact which, in their view, violated the constitutional principles of equality and absence of discrimination (Articles 10 and 11 of the Constitution).

The Court first considered whether the additional sanctions were criminal ones, taking into account the case-law of the European Court of Human Rights relating to what constitutes a criminal matter for the purposes of Article 6 **ECHR**. It noted that the sanctions concerned were predominantly applied for law enforcement purposes; that they were intended to prevent and punish infringements of social security legislation by employers, subordinates or representatives, without any distinction; that such persons were aware in advance of these sanctions and were therefore encouraged to comply with their obligations; that the provisions of the law under which these sanctions were imposed were to be found in the chapter on criminal sanctions; that, lastly, the sanctions were additional to a penalty imposed by a criminal court and were intended to make the sanction more severe. The Court concluded that the additional sanctions complained of were criminal ones, and it then examined the question of whether any exceptions that existed to these

ordinary rules of criminal law were justifiable.

The first exception to ordinary criminal law to which the interested parties objected was the failure to apply Article 65 of the Criminal Code, in pursuance of which only the severest penalty is to be imposed when a single act constitutes several offences, or when different offences are the expression of a single criminal intent. The Court concluded from various evidence that the legislature had deliberately wished to create an exception to this article, in a field where undeclared labour was frequently used, and that this exception was justified.

According to the persons concerned, a second exception lay in the fact that it would not have been possible to apply the ordinary provisions relating to criminal cases under which a suspended sentence might be imposed or sentencing be deferred (Law of 29 June 1964). In a previous judgment (no. 98/99 of 15 September 1999), the Court had taken the view that it was discriminatory to fail to apply the provisions of the aforementioned 1964 law to comparable additional sanctions under social security law which also should have been classified as criminal sanctions, but which had been regarded by the judge *a quo* as civil law sanctions. In the present case, the Court decided that there was no provision prohibiting application of the 1964 law by the judge. The Court concluded that, in this respect, there was no difference in treatment between the persons prosecuted, and that this part of the preliminary questions did not necessitate a reply.

Cross-references:

Like all judgments, Judgment no. 98/99, to which the summary refers, may be consulted (in French and in Dutch) on the Court of Arbitration's website (www.arbitrage.be). For a comparable case, see Judgment no. 80/2001 of 13 June 2001.

Languages:

French, Dutch, German.

BEL-2001-1-001

07-02-2001 10/2001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 07-02-2001 / **e)** 10/2001 / **f)** / **g)** *Moniteur belge* (Official Gazette), 01.03.2001 / **h)** CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.1.4.6 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Civil and Political Rights of 1966.
2.3.2 **Sources of Constitutional Law** - Techniques of review - Concept of constitutionality dependent on a specified interpretation.
3.3 **General Principles** - Democracy.
3.19 **General Principles** - Margin of appreciation.
4.5.10.2 **Institutions** - Legislative bodies - Political parties - Financing.
4.5.11 **Institutions** - Legislative bodies - Status of members of legislative bodies.
4.9.5 **Institutions** - Elections and instruments of direct democracy - Eligibility.
4.9.7.3 **Institutions** - Elections and instruments of direct democracy - Preliminary procedures - Registration of parties and candidates.
5.2 **Fundamental Rights** - Equality.

Keywords of the alphabetical index:

Political party / Extremism, right-wing / Racism / Xenophobia / Immunity, parliament.

Headnotes:

A legislative provision whereby a political party can lose part of its annual financial allocation if it itself or any of its components displays manifest hostility towards rights or freedoms guaranteed by the European **Convention** on Human Rights (**ECHR**) or its protocols is not unconstitutional.

Summary:

Belgium's law of 4 July 1989 introduced rules on the financing of political parties. The law of 12 February 1999 inserted into that first law an Article 15ter, laying down that, on a complaint from a given number of members of parliament, a bilingual chamber of the highest administrative court could withdraw the funding of a political party which was found to display manifest hostility towards fundamental rights or freedoms guaranteed by the European **Convention** on Human Rights (**ECHR**) or its protocols.

Leaders of the right-wing extremist party *Vlaams Blok*, together with the association which received the allocation on the party's behalf, had applied to have the law of 12 February 1999 annulled on the ground of contravention of the principles of equality and non-discrimination (Articles 10 and 11 of the Constitution) and freedom of expression (Article 19 of the Constitution).

The Court held that it was for the legislature to introduce whatever measures it considered necessary or desirable for guaranteeing fundamental rights and freedoms, as Belgium had undertaken to do in particular in ratifying the European **Convention** on Human Rights. In appropriate cases the legislature could lay down penalties for threatening the basic principles of democratic society. The Court did not have discretionary or decision-making powers comparable to those of democratically elected legislative assemblies. It would be exceeding its jurisdiction if it substituted its own assessment of the matter for the policy decision which the legislature had made. It was, however, required to consider whether the system introduced was in any way discriminatory.

In the Court's view this was not the case: only a political party which "gave a number of manifest and concordant indications of hostility" towards guaranteed rights or freedoms was liable to lose, for a time, a proportion of its grant from the public authorities.

The Court nonetheless considered it important that the challenged provisions be interpreted strictly and not allow a party to be deprived of funding that had merely called for some rule in the European **Convention** on Human Rights or its protocols to be reinterpreted or revised or which had criticised the underlying philosophy or ideology of those international instruments. In this context "hostility" must be understood to mean incitement to contravene a legal provision in force (in particular, incitement to commit violence or oppose the aforementioned rules); it was also for the relevant upper courts to check that what the hostility was being directed at was indeed a principle crucial to the democratic nature of the political system. Condemnation of racism or xenophobia was undoubtedly one such principle since if these tendencies were tolerated there was a danger *(inter alia)* of their leading to discrimination against certain sections of the community in the matter of rights, including political rights, on the ground of their origins.

A further point was that the challenged provisions did not interfere with the rights to stand as candidate, to be elected or to sit in a legislative assembly and could not be interpreted as interfering with the parliamentary immunity afforded by Article 58 of the Constitution. Article 15ter could therefore not be applied to an opinion expressed or a vote cast by a member of parliament. Subject to that, the measure was not disproportionate.

The Court concluded that there had not been any contravention of the principles of equality and non-discrimination (Articles 10 and 11 of the Constitution) as such, or even when taken together with the constitutional provision guaranteeing freedom of expression (Article 19 of the Constitution). With regard to freedom of expression the Court took into account Articles 10 and 17 **ECHR** and Article 19 of the International Covenant on Civil and Political Rights, together with the case law of the European Court of Human Rights (see, in particular, the judgments of 7 December 1976, *Handyside v. United Kingdom*, para. 49, *Special Bulletin **ECHR*** [ECH-1976-S-003]; 23 September 1998, *Lehideux and Isorni v. France*, para. 55; and 28 September 1999, *Öztürk v. Turkey*, para. 64).

Further, a political party could lose its funding whether by its own actions or those of its component groups, its lists, its candidates or persons representing it in elective public office. The Court had no objection to the legislature's concerning itself with a party's members or component groups: political parties themselves generally did not have legal personality and it could be either the political party itself or one of its component elements that was doing the incitement, although in the latter case there must be no doubt as to the connection between such elements and the political party. The measure would, however, be manifestly disproportionate if it caused the party to lose some of its funding on account of such elements' expressing hostility within the meaning of Article 15ter.1 when the party itself had clearly and publicly disavowed the elements in question.

The Court rejected the appeal with the proviso that the provisions under challenge must be interpreted strictly, could not affect parliamentary immunity and could not cause a party to lose funding which had clearly and publicly disavowed the group or member manifesting hostility within the meaning of Article 15ter.

Cross-references:

- Handyside v. United Kingdom, 07.12.1976, *Special Bulletin* ***ECHR*** [ECH-1976-S-003];
- *Lehideux et Isorni v. France*, 23.09.1998;
- *Öztürk v. Turkey*, 28.09.1999.

Languages:

French, Dutch, German.

BEL-2000-1-004

06-04-2000 42/2000

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 06-04-2000 / **e)** 42/2000 / **f)** / **g)** *Moniteur belge* (Official Gazette), 20.05.2000 / **h)** CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

1.3.5.5 **Constitutional Justice** - Jurisdiction - The subject of review - Laws and other rules having the force of law.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.1.4.7 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Economic, Social and Cultural Rights of 1966.
4.11.2 **Institutions** - Armed forces, police forces and secret services - Police forces.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.27 **Fundamental Rights** - Civil and political rights - Freedom of association.
5.4.10 **Fundamental Rights** - Economic, social and cultural rights - Right to strike.
5.4.11 **Fundamental Rights** - Economic, social and cultural rights - Freedom of trade unions.

Keywords of the alphabetical index:

Right to strike, conditions, exercise.

Headnotes:

A law under which the exercise by police officers of the right to strike is conditional on prior consultation and certain authorities are empowered to order police officers exercising or wishing to exercise their right to strike

to continue or resume working for a specific period in which they have essential duties to perform does not conflict with the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), considered separately or in conjunction with Articles 5, 6, 4, 31 and 32 of the European Social Charter (the right to strike) and Article 11 **ECHR** (freedom of association).

Summary:

Under Section 126 of the Act of 7 December 1998 on the organisation of an integrated police force, police officers may only exercise the right to strike if the strike has been announced in advance by an approved trade union and a discussion on the issue that has prompted the intended strike has been held with the relevant authorities. Furthermore, certain authorities (the Minister of the Interior, following consultation with, or jointly with, the Minister of Justice where the federal and local police are concerned, and with the mayor or police council where the local police are concerned) may nevertheless force police officers to continue or resume working.

The leader of an inter-occupational trade union and a municipal police officer who was a trade union delegate requested the Court to set aside the Act of 7 December 1998 in its entirety. However, since the objections they raised only applied to Section 126 of the act, their complaint was deemed admissible in respect of this section only. The Court acknowledged that the applicants were entitled to bring a case against a provision which restricted the conditions under which the right to strike and trade union rights could be exercised by municipal police officers.

With regard to the merits of the case, however, all the arguments were rejected, including those which relied on the European Social Charter and Article 11 **ECHR**. The Court noted firstly that the provision did not empower the relevant authorities to deprive police officers entirely of the right to strike. It held that there was no need to state whether freedom of association, including the right to form and join trade unions to defend one's interests, as enshrined in Article 11 **ECHR**, provided a guarantee of the right to strike. Lastly, it pointed out that under the second paragraph of this article, Article 31 of the European Social Charter and Article 8.2 of the International Covenant on Economic, Social and Cultural Rights, restrictions on freedom of association in general and the right to strike in particular were possible in certain cases and under certain conditions. In this particular case, given the specific need for police officers to be readily available for duty, the contested restriction of the right to strike was consistent with the need, in a democratic society, to ensure respect for the rights and freedoms of others and to uphold law and order.

Languages:

French, Dutch, German.

BEL-1999-1-002 10-02-1999 17/99

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 10-02-1999 / **e)** 17/99 / **f)** / **g)** *Moniteur belge* (Official Gazette), 06.05.1999 / **h)** CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4 **Sources of Constitutional Law** - Categories - Written rules - International instruments.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.17 **General Principles** - Weighing of interests.
4.7.9 **Institutions** - Judicial bodies - Administrative courts.
5.2 **Fundamental Rights** - Equality.
5.3.13.15 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Impartiality.

Keywords of the alphabetical index:

Administrative proceedings / Administrative application, urgent / Administrative decision, suspension.

Headnotes:

Sections 14 and 17 of the consolidated laws on the *Conseil d'État* which grant competence to the latter to annul, and in the meantime, suspend the decisions of administrative authorities do not contravene Articles 10 and 11 of the Constitution guaranteeing the principle of equality and discrimination, either read separately or in conjunction with Article 6 **ECHR**, insofar as these Articles do not rule out the possibility of the merits of a case being examined in the *Conseil d'État* by all or some of the members of a bench which has already ruled on the application for suspension.

Summary:

Under the terms of Section 17 of the consolidated laws on the *Conseil d'État*, the latter is competent to suspend the decisions of administrative authorities which have been brought before the *Conseil d'État* in applications to have them set aside.

In a case pending before the court, the bench ruling on the application to set aside a decision comprised one of the judges who had been a member of the bench which had suspended the decision at issue.

The *Conseil d'État* had asked the Court of Arbitration whether the principle of equality and non-discrimination enshrined in Articles 10 and 11 of the Constitution, in conjunction with Article 6 **ECHR**, precluded this partially similar composition of the bench in that such a situation could mean that a particular category of citizens would be denied the guarantee of impartiality.

The Court of Arbitration replied in the negative. Having noted that the suspension procedure, also referred to as an urgent administrative application *(référé administratif)*, formed part of the main appeal procedure on the merits, that it resulted in a provisional decision which could be overturned by the final decision, the Court considered, without prejudging the latter, that the legislation had struck a fair balance between the need (i) for effective legal protection so that a rapid decision could be reached on an application for suspension of an administrative decision and, in the event of suspension, the application to set aside the decision with due regard for the interests of both the defendant and the applicant and (ii) for the *Conseil d'État* to function smoothly and to avoid a situation where, in the various stages of the same procedure, the case file must, on each occasion, be examined by different members of the *Conseil d'État* and different legal officers attached to that body and responsible for preparing the appeal case file and providing an opinion.

The Court of Arbitration considered that there was consequently no undermining of the principle of objective impartiality, particularly as members of the *Conseil d'État* were not required to rule on the merits of individual rights but on the merits of allegations challenging the objective legality of an administrative decision.

The Court of Arbitration did not comment on the applicability of Article 6 **ECHR** to the case at issue, which concerned an environmental permit, but stated that even if this Article were applicable to the dispute in question as to the merits, the interpretation would be no different, particularly in view of the fact that Recommendation no. R (89) 8 of 13 September 1989 of the Committee of Ministers of the Council of Europe on provisional court protection in administrative matters did not rule out the possibility of provisional measures being ordered by the same court as ruled on the merits.

Supplementary information:

For a similar conclusion, see judgment no. 48/99 of 20 April 1999, which nevertheless takes into account not only Article 6 **ECHR** but also, with the same reservations, Article 14 of the International Covenant on Civil and Political Rights.

Languages:

French, Dutch, German.

BEL-1998-3-013 03-12-1998 122/98

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 03-12-1998 / **e)** 122/98 / **f)** / **g)** *Moniteur belge* (Official Gazette), 20.01.1999 / **h)** CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
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:

Parent, foster.

Headnotes:

The right to respect for private and family life guaranteed under Article 22 of the Constitution in conjunction with Article 8 **ECHR** includes the right for each of the interested persons to be able to be joined to court proceedings which may have repercussions on their family life. The provisions referred to above guarantee that both parents and children have this right. It also applies to the relationship between a child and its foster parents. The Court also found that the right to family life is a civil right in the sense of Article 6 **ECHR**.

Summary:

The court which referred this case to the Court of Arbitration had heard an appeal brought by a mother against a decision by the juvenile court forbidding her to contact her daughter, who was placed in a foster family. The foster parents wished to be heard in this case but the Appeal Court had found that the law did not allow it. This court had therefore referred the preliminary question to the Court of Arbitration of whether Articles 10 and 11 (concerning the principle of equality and non-discrimination) had been violated insofar as, in these proceedings, the law made a distinction between a child's biological parents and foster parents, between those children brought up by their biological parents and those brought up by foster parents and insofar as foster parents were not joined to the proceedings and their request to be allowed to intercede in the proceedings was not accepted.

The Court confirmed that there was discrimination in the present case. In reaching its decision, the Court took account of Article 22 of the Constitution and Article 8 **ECHR** which both guarantee the right to respect for private and family life, and of Article 6 **ECHR**.

Supplementary information:

For a similar decision, see judgment no. 47/96 of 12 July 1996 (B.4 and B.5), published in the *Moniteur belge* of 14 August 1996. All judgments are published in this gazette and can be consulted at the following Internet address: http://moniteur.be.

Languages:

French, Dutch, German.

BEL-1997-2-009 14-07-1997 50/97

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 14-07-1997 / **e)** 50/97 / **f)** / **g)** *Moniteur Belge* (Official Gazette), 15.08.1997 / **h)** CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

1.4.8.4 **Constitutional Justice** - Procedure - Preparation of the case for trial - Preliminary proceedings.
1.4.9.2 **Constitutional Justice** - Procedure - Parties - Interest.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.
5.3.13.1 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Scope.
5.3.13.15 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Impartiality.

Keywords of the alphabetical index:

Civil right, dispute / Merit of a prosecution, objection.

Headnotes:

According to the case-law of the European Court of Human Rights, Article 6.1 **ECHR** can apply to a constitutional court. That court has a duty to consider objectively whether the dispute referred to it, to which Article 6.1 **ECHR** would apply, concerns civil rights and obligations or a criminal charge against an applicant.

Without having to ascertain whether Article 6.1 **ECHR** was applicable to the preliminary screening procedure, the Court found that the dispute referred to it by the applicant, concerning the legal provision stipulating that the president of the court of first instance may be granted the power, where necessary, to call on all active judges at that court to sit alone, regardless of their length of service, in no way related to civil rights and obligations or a ruling on a criminal charge against the applicant.

Summary:

An individual filed an application for judicial review and a request that a law providing that all judges at the court of first instance sit alone, regardless of their length of service, be set aside: he feared that, as the defendant, he would be obliged «to appear before a single, inexperienced judge».

In their conclusions, the reporting judges had indicated to the applicant that they might be induced to propose that the Court terminate consideration of the case on the basis of a preliminary screening procedure for reasons of inadmissibility deriving from the absence of any legitimate interest on the part of the applicant.

In his written reply to the conclusions of the reporting judges, the applicant set out the grounds of his appeal against the preliminary screening procedure: in his view, the procedure violated Article 6.1 **ECHR** in that the right to be heard, in particular in a public hearing, was not respected, and in that judicial impartiality was breached by the fact that the two reporting judges sat on the bench, which had less than its full complement of judges.

The Court of Arbitration referred to the Ruiz-Mateos judgment of 23 June 1993, in which the European Court

of Human Rights considered that Article 6.1 **ECHR** could apply to a constitutional court (Series A, no. 262, §§ 57-60).

The Court did not consider whether or not Article 6.1 **ECHR** actually applied to the preliminary screening procedure. It found that the case did not specifically concern a civil right within the meaning of that article, so that in any event the article could not be applied to the dispute in question.

With regard to the violation cited by the applicant of the right to a fair hearing in general and the right to be heard in particular, the Court found that the sole purpose of the conclusions of the reporting judges was to notify applicants of an obvious problem of inadmissibility, lack of jurisdiction or lack of foundation. That notification was designed to safeguard applicants' right to proper administration of justice by giving them the option of defending themselves in respect of the problem raised.

Consideration of the case was terminated by the preliminary screening procedure on the basis of a ruling of inadmissibility resulting from the absence of any legitimate interest on the part of the applicant, who, according to the Court, did not show that he was directly adversely affected by the contested statutory provision.

Cross-references:

For two very similar cases, see judgments nos. 52/97 of 14 July 1997 and 55/97 of 17 September 1997. Those judgments concerned a dispute regarding the establishment of a bench of Principal Crown Prosecutors and the introduction of the office of national prosecutor as part of a uniform policy on inquiries and prosecutions; the Court considered that the dispute did not concern «a criminal charge against the applicant» within the meaning of Article 6.1 **ECHR**.

Languages:

Dutch, French, German.

BEL-1997-2-008 14-07-1997 49/97

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 14-07-1997 / **e)** 49/97 / **f)** / **g)** *Moniteur Belge* (Official Gazette), 30.09.1997 / **h)** CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

1.4.8.4 **Constitutional Justice** - Procedure - Preparation of the case for trial - Preliminary proceedings.
1.4.10.6 **Constitutional Justice** - Procedure - Interlocutory proceedings - Challenging of a judge.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.2.2 **Sources of Constitutional Law** - Categories - Unwritten rules - General principles of law.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.
5.3.13.15 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Impartiality.

Keywords of the alphabetical index:

Judge, reporting, impartiality / Judge, challenging.

Headnotes:

Like any other court, the Court of Arbitration is obliged to respect the general legal principle that judges must

be both subjectively and objectively impartial.

The fact that reporting judges continue to sit at the Court after proposing that consideration of a case be terminated by a preliminary screening procedure does not necessarily violate the right to be heard by an impartial tribunal, which is a general legal principle and is, moreover, enshrined in Article 6.1 **ECHR**.

Summary:

At an early stage in the proceedings, the two reporting judges had indicated in their conclusions that they might be induced to propose that the Court terminate consideration of the case, following an initial inspection of the file, on the basis of a preliminary screening procedure. The party concerned is notified of those conclusions and may lodge a written appeal against them. Once the grounds for the appeal had been considered, it was decided that the case should be settled by ordinary proceedings, but the person concerned had doubts as to the impartiality of the reporting judges.

The Court pointed out that the right to be heard by an impartial judge, being a general legal principle, was also applicable to the Belgian Court of Arbitration, and that Article 6.1 **ECHR** must be taken into account.

The Court referred to the Ruiz-Mateos judgment of 23 June 1993, in which the European Court of Human Rights considered that Article 6.1 **ECHR** could apply to a constitutional court (Series A, no. 262, §§ 57-60).

The Court also referred to the Padovani judgment of the European Court of Human Rights of 26 February 1993. According to that judgment, in respect of judicial impartiality the standpoint of the litigant «is important but not decisive. What is decisive is whether this fear can be regarded as objectively justified» (Series A, no. 257-B, §§ 24-27).

The Court concluded that the participation of reporting judges, which was introduced in a concern both to speed up proceedings and to ensure adversarial hearings, was unlikely to affect judicial impartiality.

Cross-references:

With regard to the issue of the impartiality of judges at the Court of Arbitration, see also judgment no. 32 of 29 January 1987 and nos. 35/94 and 36/94 of 10 May 1994 (see *Bulletin* 1994/2 [BEL-1994-2-009]).

Languages:

Dutch, French, German.

BEL-1996-2-005 12-07-1996 45/96

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 12-07-1996 / **e)** 45/96 / **f)** / **g)** *Moniteur belge* (Official Gazette), 27.07.1996 / **h)** *Information et documentation juridiques (IDJ)*, 1996, liv. 9, 21;*Revue de Jurisprudence de Liège, Mons et Bruxelles (J.L.M.B.)*, 1996, 1068.; CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.1.4.6 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Civil and Political Rights of 1966.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.2 **Fundamental Rights** - Equality.
5.3.21 **Fundamental Rights** - Civil and political rights - Freedom of expression.

Keywords of the alphabetical index:

Genocide / Negationism / Revisionism.

Headnotes:

Freedom of expression is one of the fundamental requisites of a democratic society. It holds good not only for «information» or «ideas» that are received favourably or considered inoffensive or innocuous, but also for opinions that shock, disturb or go against the State or some fraction of the population. Freedom of expression is not, however, absolute. Furthermore, freedom of expression as guaranteed by Article 10 **ECHR** cannot be used as an argument when it goes against Article 17 **ECHR**.

The activities established as offences by the Act of 23 March 1995, which was designed to make negation, minimisation, justification or approval of the genocide committed by the German national socialist regime during the second world war an offence, are similar in that it is hardly conceivable to engage in such activities without wanting, if only indirectly, to rehabilitate a criminal ideology hostile to democracy and to cause serious offence to one or more categories of human beings. The Act challenged can be considered as meeting an imperative need, because the expression of such opinions is dishonourable and offensive to the memory of the victims of genocide, its survivors and in particular the Jewish people themselves. The Act can also be regarded as necessary in a democratic society: it is punitive, does not provide for any preventive measure to hinder the circulation of opinions and only punishes opinions expressed in certain places and certain circumstances, not because of their content but because of their injurious consequences for others and for democratic society as such. The Act at issue certainly does not aim to hinder scientific and critical research into the historical reality of the genocide in question or to obstruct any form of factual information on the subject.

The Act of 23 March 1995 does not violate the constitutional principle of equality and non- discrimination established in Articles 10 and 11 of the Constitution, when read either in isolation or in combination with Articles 10 and 17 **ECHR** and Article 19.3 of the International Covenant on Civil and Political Rights.

Summary:

Two private individuals requested that the Act of 23 March 1995, designed to make negation, minimisation, justification or approval of the genocide committed by the German national socialist regime during the second world war an offence, be declared void. The petition of the first applicant, who was known to be revisionist and denounced the restriction of the right to freedom of expression, was held to be admissible. However, the petition of the second, who considered that the Act did not go far enough, was inadmissible. The applicant's disapproval of a law on the basis of a subjective, personal viewpoint or the feelings it evoked in him could not be accepted as evidence of the interest required by law.

With regard to the merits of the case, the Court concluded - after a thorough examination of the provisions of the Act at issue and the Court's *travaux préparatoires*, and in the light of Articles 10 and 17 **ECHR** and Article 19.3 of the International Covenant on Civil and Political Rights - that the applicant's claim that the Act comprised a discriminatory restriction of the right to freedom of expression in that its scope was too widely defined and that the consequences of the Act were disproportionate to the objectives pursued, could not be admitted. The grounds for the decision summarised here are particularly detailed.

Languages:

French, Dutch, German.

BEL-1996-1-001 09-01-1996 4/96

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 09-01-1996 / **e)** 4/96 / **f)** / **g)** *Moniteur belge* (Official Gazette), 27.02.1996; *Cour d'arbitrage - Arrêts* (Official Digest), 1996, 21 / **h)** *Journal des tribunaux*, 1996 (abbreviated), 188;

Information et documentation juridiques, 1996, liv. 4, 20.; CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.1.1.2 **Fundamental Rights** - General questions - Entitlement to rights - Citizens of the European Union and non-citizens with similar status.
5.1.1.3 **Fundamental Rights** - General questions - Entitlement to rights - Foreigners.
5.2.2.4 **Fundamental Rights** - Equality - Criteria of distinction - Citizenship or nationality.
5.2.2.12 **Fundamental Rights** - Equality - Criteria of distinction - Civil status.
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:

Family reunion, law / Immigration / Marriage.

Headnotes:

The principles of equality and non-discrimination contained in Articles 10 and 11 of the Constitution are not infringed by the distinction made by the legislator, regarding admission to Belgian for a period of more than three months with a view to family unification, between married foreigners who are not nationals of a member State of the European Union, to the effect that anyone married to a Belgian may automatically reside in Belgium, whereas anyone who is not married to a Belgian only receives authorisation to stay if their cohabitation is genuine and lasting. This difference in treatment reflects the legislator's aim to curb immigration whilst catering for the situation of foreigners who have ties with Belgians. It is not contrary to this objective to subject family unification of two foreign partners to more stringent conditions than family unification between two partners of whom one is Belgian. Interference in the private life of the persons concerned is not disproportionate, provided that the administrative authorities assess whether cohabitation is genuine and lasting within a reasonable time and that they do not consider a separation which is not genuine and lasting as a ground for refusing authority to reside in the country. Once granted, the right to reside cannot be withdrawn for reasons of divorce or separation.

Summary:

A Moroccan man who was married to a Moroccan woman who had settled in Belgium but with whom he had cohabited only from mid-1988 to the beginning of 1990, brought before the *Conseil d'Etat*, the highest administrative court, an action to set aside and a request to suspend a ministerial decision denying the right to residence and ordering him to leave the territory. In connection with this case, the *Conseil d'Etat* applied to the Court of Arbitration for a preliminary ruling as to whether the legislation which requires that cohabitation between foreign partners residing in Belgium for more than three months is genuine and lasting is discriminatory, considering that this condition is not imposed on foreigners (from outside the European Union) who are married to a Belgian. Having noted that foreigners in Belgium enjoy the same personal and property rights as Belgians, apart from the exceptions prescribed by law (Article 191 of the Constitution), the Court decided that the distinction made by the legislator was justified, given that the action taken was based on an objective criterion, namely the nationality of the spouse, that it was in reasonable proportion to the goal of the legislator, and did not, as far as the checks on cohabitation were concerned, constitute a disproportionate infringement of the right to respect for private and family life guaranteed by Article 22 of the Constitution and Article 8 **ECHR**, provided that the authorities took a decision within a reasonable time (at the time that this case was brought before the *Conseil d'Etat* the time limit was one year, and could be extended by three months).

Cross-references:

See decision no. 93-325 DC of 13.08.1993 of the Constitutional Council, *Bulletin* 1993/2, 22 [FRA-1993-2-007]; decision no. 28/1995 of 19.01.1995 of the Constitutional Court, *Bulletin* 1995/1, 48 [ITA-1995-1-003]; decision no. 8152 of 07.05.1993 of the Supreme Court, *Bulletin* 1994/2, 141 [NED-1994-2-005].

Languages:

French, Dutch.

BEL-1995-1-002 02-03-1995 19/95

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 02-03-1995 / **e)** 19/95 / **f)** / **g)** *Moniteur belge* (Official Gazette), 11.05.1995; *Cour d'arbitrage - Arrêts* (Official Digest), 1995, 305 / **h)** *Revue de jurisprudence de Liège, Mons et Bruxelles*, 1995, 376;

Journal des procès, 1995, 28;

Information et documentation juridiques, 1995, 468;

Journal des tribunaux, 1995, 424;

Revue de droit pénal, 1995 (abbreviated), 652;

Tijdschrift voor bestuurswetenschappen en publiekrecht, 1995 (abbreviated), 463;

Droit de la circulation-jurisprudence, 1995, 262;

Rechtskundig weekblad, 1995-96, 1022.; CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.2 **Fundamental Rights** - Equality.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.
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.
5.3.13.26 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to have adequate time and facilities for the preparation of the case.

Headnotes:

In providing that copies of case files shall be made available on payment of a fee, the law must not lead to what amounts to discriminatory treatment of certain defendants, regard being had to the nature of the principles involved. These principles are respect for the rights of the defence and the right to a fair trial, as secured in Article 6 **ECHR**. They entail a right for defendants to have adequate time and facilities for the preparation of their defence and submissions, a right covered by the constitutional principles of equality and absence of discrimination. By preventing defendants who receive legal aid and who by definition do not have sufficient resources from obtaining copies of case files free of charge under any circumstances, in that it does not even provide that the cost of copies should be advanced to them subject to its later reimbursement if they

are found guilty, the legislature disproportionately impedes the exercise of the rights of the defence.

Summary:

People who do not have sufficient resources to cover the cost of legal proceedings are, as a rule, entitled to legal aid, entailing *inter alia* the right to request copies of and extracts from documents contained in the case file free of charge. The relevant provision of Article 671 of the Judicial Code is, however, construed to mean that such legal aid is not applicable in criminal proceedings. The court with jurisdiction in committals for trial sought a ruling from the Arbitration Court as to whether Article 671 was at variance with the constitutional principles of equality and absence of discrimination laid down in Articles 10 and 11 of the Constitution.

The Arbitration Court first pointed out that this problem did not relate to unequal treatment but to identical treatment of two different categories of people, namely those with sufficient financial resources to pay the fee for copies of the case file (BEC 30 per page for the first 1,000 copies and BEC 10 per page thereafter) and those without sufficient resources.

In the case under consideration the Court held that the rights of the defence and the right to a fair trial, as secured in Article 6 **ECHR**, were interfered with disproportionately on account of the fact that defendants qualifying for legal aid were generally and unconditionally deprived of the right to obtain copies of documents in their case files free of charge. The Court accordingly found that Article 671 of the Judicial Code was at variance with Articles 10 and 11 of the Constitution.

Languages:

Dutch, French, German.

BEL-1994-3-021 22-12-1994 90/94

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 22-12-1994 / **e)** 90/94 / **f)** / **g)** *Moniteur belge* (Official Gazette), 12.01.1995, 8, 546; *Cour d'arbitrage - Arrêts* (Official Digest), 1994, 1021 / **h)** *Information et documentation juridiques*, 1994, 717;

Journal des tribunaux, 1995, 241.; CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

1.3.5.3 **Constitutional Justice** - Jurisdiction - The subject of review - Constitution.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.1.4.6 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Civil and Political Rights of 1966.
3.6.2 **General Principles** - Structure of the State - Regional State.
4.3 **Institutions** - Languages.
4.5.1 **Institutions** - Legislative bodies - Structure.
4.5.3.2 **Institutions** - Legislative bodies - Composition - Appointment of members.
4.8.6.1 **Institutions** - Federalism, regionalism and local self-government - Institutional aspects - Deliberative assembly.
4.9.3 **Institutions** - Elections and instruments of direct democracy - Electoral system.
4.9.4 **Institutions** - Elections and instruments of direct democracy - Constituencies.
4.9.6 **Institutions** - Elections and instruments of direct democracy - Representation of minorities.
5.2.2.10 **Fundamental Rights** - Equality - Criteria of distinction - Language.
5.3.41 **Fundamental Rights** - Civil and political rights - Electoral rights.

Keywords of the alphabetical index:

Constituency.

Headnotes:

The Court cannot rule on choices made by the authors of the Constitution (B. 2.3 and B.3.5).

Article 3 Protocol 1 **ECHR** safeguards the right to vote or to be elected, but only in elections to assemblies which exercise legislative powers over electors or candidates who invoke that article (B.4.6 to B.4.8, B.4.15 and B.4.16).

Article 27 of the International Covenant on Civil and Political Rights concerns the protection of persons belonging to ethnic, religious and linguistic minorities, and prohibits Contracting States, *inter alia*, from denying these persons the right to their own cultural life in community with other members of their group. The constitutional rules safeguarding the principles of equality and non-discrimination covered by the aforementioned Article 27 of the International Covenant on Civil and Political Rights are not violated by the legislative provision which no longer allows French- speaking inhabitants of a district in the Flemish region to sit on the Council of the French Community, which has no legislative power over the said inhabitants, but does not deprive them of the right to have their own cultural life in community with other members of their group or of the right to use the cultural amenities for which the French Community is responsible (B.4.12 to B.4.14).

In the light of the case-law of the European **Convention** on Human Rights (Mathieu-Morin and Clerfayt case, Series A no. 113, para. 57,*Special Bulletin **ECHR*** [ECH-1987-S-001]) and in view of the fact that the oath taken by elected representatives is of equal concern to those who administer and those who take it, the obligation of taking the oath in Dutch imposed on all members of the Flemish Council, including French-speaking members, by the special law under Article 115 of the Constitution, is not discriminatory. This obligation cannot be regarded as a clearly unreasonable restriction of the right secured to every person by Article 27 of the International Covenant on Civil and Political Rights to use their own language in community with other members of their group. The different systems applying in other legislative assemblies reflect their special character (B.4.18 to B.4.24).

The decision to keep the Brussels-Hal-Vilvorde constituency, comprising communes located in two separate regions (the Flemish region and the Brussels-Capital region), for elections to the federal chambers and the European Parliament was taken for the sake of arriving at a general compromise and securing the essential balance between the interests of the various communes and regions within the Belgian State. This aim may justify the distinction made by the challenged provisions between electors and candidates in the constituency of Brussels- Hal-Vilvorde and those in other constituencies, provided that the measures taken can reasonably be regarded as not disproportionate. They would be if they disregarded fundamental freedoms and rights (B.5.5 to B. 5.10).

Summary:

This judgment concerns an application for setting-aside of various provisions in the laws governing elections to the parliamentary assemblies of the federation (House of Representatives and Senate) and the federated entities (councils of the communities and regions). One of the complaints was that, in direct elections to the Senate, there is no constituency for the German-speaking region, as there is for the Dutch- and French-speaking regions. The Constitution itself stipulates that twenty-five senators are to be directly elected by the Dutch constituency and fifteen senators by the French constituency, and that a fixed number of senators are to be nominated by the councils of the three communities (Flemish, French-speaking and German-speaking) and by the directly elected senators. Concerning the complaint that the principles of equality and non-discrimination have been violated, the Court notes that the Constitution itself regulates the nomination of directly elected senators and that it cannot rule on a claim which would involve it in assessment of a choice made by the authors of the Constitution. A similar reply was given to the complaints concerning the composition of the House of Representatives.

Another complaint was lodged by natural persons, in their capacity as members of parliament or

French-speaking electors, against legislation which no longer permits French-speaking inhabitants of the administrative district of Hal-Vilvorde, which is part of the Flemish region, to sit on the Council of the French Community. The decrees of the Council of the French Community are not legally binding in the Dutch-speaking region. Having first defined the scope of Article 3 Protocol 1 **ECHR**, the Court noted that both Dutch-speaking and French- speaking inhabitants have the right to vote in elections to the legislative assembly which is responsible for community matters concerning them and that, conversely, neither group may vote in elections to a legislative assembly which is not responsible for them. There is, in this respect, no discrimination between the French-speaking electors in Hal-Vilvorde, on the one hand, and the Dutch-speaking electors in Hal-Vilvorde, the Dutch-speaking electors of Brussels-Capital and the French-speaking electors of Brussels-Capital, on the other. Nor does the Court consider that there has been a violation of the principles of equality and non- discrimination covered by Article 27 of the International Covenant on Civil and Political Rights, in view of the explanations relating to application of this provision given in the judgment.

In this same context, the Court considers that the obligation imposed on members of the Flemish Council, including French-speaking members, of taking the oath in Dutch, does not violate the principles of equality and non-discrimination covered by Article 3 Protocol 1 **ECHR** and Article 27 of the Covenant.

As for the complaint that maintenance of a single electoral district covering two regions (Brussels-Hal-Vilvorde, situated in both the bilingual Brussels-Capital region and in the monolingual Flemish region) violates the constitutional rules on equality and non- discrimination, since it makes a distinction between electors and candidates in the same language region, region and province, by including some, but not others, in a bilingual constituency, the Court considers the measure justified by the need to secure that general compromise which opened the way to institutional reform in Belgium, and by the fact that there has been no disproportionate interference with fundamental freedoms or rights. The challenged provisions do not disproportionately affect the freedom of each person to vote for the candidate of his choice and to stand for election, and do not impair the essence or nullify the substance of the individual's electoral rights. Nor do they mean that some electors have less influence on the nomination of representatives than others, that one political party is favoured to the detriment of other parties, or that one candidate has an electoral advantage over others. The fact that the districts of Nivelles and Louvain were not brought into a single constituency with Brussels-Hal-Vilvorde can be justified by the fact that the outlying communes which have special status concerning the use of languages for administrative purposes, are all situated in the Hal-Vilvorde district.

Languages:

Dutch, French, German.

BEL-1994-2-009

10-05-1994 35/94

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 10-05-1994 / **e)** 35/94 / **f)** / **g)** *Moniteur belge* (Official Gazette), 31.05.1994; *Cour d'arbitrage - Arrêts* (Official Digest), 1994, 461 / **h)** *Revue de jurisprudence de Liège, Mons et Bruxelles*, 1994, 874;

Information et documentation juridiques, 1994, 605;

Tijdschrift voor Milieurecht, 1994, 279; *Rechtskundig weekblad*, 1994-95, 23;

Journal des tribunaux, 1994, 532;

Tijdschrift voor bestuurswetenschappen en publiekrecht, 1994 (abbreviated), 697; CODICES (French).

Keywords of the Systematic Thesaurus:

1.1.2.3 **Constitutional Justice** - Constitutional jurisdiction - Composition, recruitment and structure - Appointment of members.

1.4.10.6.2 **Constitutional Justice** - Procedure - Interlocutory proceedings - Challenging of a judge - Challenge at the instance of a party.

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.

5.3.13.15 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Impartiality.

Summary:

The Arbitration Court is a judicial body and as such required to comply with the general legal principle relating to the subjective and objective impartiality of judges (B.2.1).

Participation by a member of Parliament in the drafting of a law does not suffice to cast doubt on the impartiality he will be required to observe in circumstances where, in his capacity as an independent judge appointed for life and subject to strict rules governing incompatibility of office with other functions, he is called upon to review the constitutionality of the law in question on the bench of a judicial body to which an action for annulment has been referred.

Article 101.2 of the special law of 6 January 1989 on the Arbitration Court, which provides that the participation of a judge in the elaboration of a legislative norm which is the subject of an action for annulment does not in itself constitute grounds for challenging the judge concerned, is to be interpreted having regard to the standards developed by the European Court of Human Rights in connection with the requirement of impartiality laid down in Article 6.1 **ECHR**.

The participation by a member of Parliament in the elaboration of the law complained of before the Court, which consisted in supporting the majority to which his political group belonged by voting in favour of the law and against amendments tabled by the opposition, is not sufficient objective justification for the applicants' misgivings regarding his subsequent ability, as a judge, to review impartially the constitutionality of the law at issue (B.4).

Supplementary information:

Idem, judgment no. 36/94 of the same date. Under the terms of the Institutional Act on the Arbitration Court, half the twelve judges on the Court are required to have served as members of a legislative assembly for a period of at least five years.

Languages:

Dutch, French, German.

BEL-1993-3-038 01-12-1993 83/93

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 01-12-1993 / **e)** 83/93 / **f)** / **g)** *Moniteur belge* (Official Gazette), 02.03.1994; *Cour d'arbitrage - Arrêts* (Official Digest), 1993, 977 / **h)** *Information et documentation juridiques*, 1994, 27;

Revue trimestrielle de droit familial, 1993, 416.; CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.

2.2.1.5 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - European **Convention** on Human Rights and non-constitutional domestic legal instruments.
5.2 **Fundamental Rights** - Equality.
5.3.33.1 **Fundamental Rights** - Civil and political rights - Right to family life - Descent.

Keywords of the alphabetical index:

Succession law / Child, born out of wedlock.

Summary:

The basic objective pursued by the legislator in adopting the law of March 31, 1987 was to put an end to inequality between children, notably in respect of determining their descent and its consequences, particularly for succession; by acknowledging that the children born to a woman other than their father's spouse have, in principle, an entitlement to their father's succession which is equal to that of the other children, the legislator sought to comply with Articles 8 and 14 **ECHR**, as interpreted by the European Court of Human Rights, notably in its Judgments in the *Marckx* (*Special Bulletin **ECHR** [ECH-1979-S-002]), Vermeire and Johnston* cases (*Special Bulletin **ECHR** [ECH-1986-S-006]). Consequently, former Article 756 of the Civil Law Code violates Articles 6 and 6bis of the Constitution which guarantee the principles of equality and non-discrimination, to the extent that it excludes the right of children born to a woman other than their father's spouse to succeed their father (B.4 to B.5.1).*

Languages:

Dutch, French, German.

BEL-1993-2-029 15-07-1993 62/93

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 15-07-1993 / **e)** 62/93 / **f)** / **g)** *Moniteur belge* (Official Gazette), 05.08.1993, 156, 17724; *Cour d'arbitrage - Arrêts* (Official Digest), 1993, 671 / **h)** *Proces en bewijs*,1993, 149;

Zonder winstoogmerk, 1993, 112.; CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.1.4.6 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Civil and Political Rights of 1966.
2.2.1.1 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - Treaties and constitutions.
2.2.1.4 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - European **Convention** on Human Rights and constitutions.
3.16 **General Principles** - Proportionality.
4.11.2 **Institutions** - Armed forces, police forces and secret services - Police forces.
5.1.1.4 **Fundamental Rights** - General questions - Entitlement to rights - Natural persons.
5.3.21 **Fundamental Rights** - Civil and political rights - Freedom of expression.
5.3.27 **Fundamental Rights** - Civil and political rights - Freedom of association.

Summary:

Articles 14 and 20 of the Constitution, guaranteeing freedom of expression and association, do not preclude the possible imposition of certain restrictions on civil servants in respect of those freedoms, but such restrictions must meet the requirements set out in Articles 10.2 and 11.2 **ECHR** and in Articles 19.3 and 22.2 of the International Covenant on Civil and Political Rights.

The statutory provision which provides that active staff members of the operational corps of the *gendarmerie* must «refrain in all circumstances from publicly manifesting their political opinions and engaging in political activities», a provision which concerns political stances and activities of a distinctly public nature, is not manifestly disproportionate to the objective pursued, which is to guarantee an efficient police service that is undeniably impartial, on behalf of the authorities and the citizens, in order to safeguard the proper functioning of democracy.

However, the statutory provision which prevents these persons from belonging to or assisting political parties, or movements, bodies, organisations or associations pursuing political objectives is, by reason of its general character, manifestly disproportionate to the objective pursued, since membership of a political party, a movement or an organisation pursuing political objectives, and other non-public forms of cooperation, are not such as to threaten the neutrality of the force or impair its preparedness (B.3.3-B.3.6).

Languages:

Dutch, French, German.

BEL-1991-C-001 04-07-1991 18/91

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 04-07-1991 / **e)** 18/91 / **f)** / **g)** *Moniteur belge* (Official Gazette), 22.08.1991 / **h)** CODICES (French, German, Dutch).

Keywords of the Systematic Thesaurus:

1.6.2 **Constitutional Justice** - Effects - Determination of effects by the court.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
3.10 **General Principles** - Certainty of the law.
5.2 **Fundamental Rights** - Equality.
5.3.33.2 **Fundamental Rights** - Civil and political rights - Right to family life - Succession.

Keywords of the alphabetical index:

Preliminary question / Inheritance rights on intestacy / Descent, lawful / Child, natural / *Res iudicata*.

Headnotes:

In continuing to enforce, on a transitional basis, a provision of the Civil Code which deprives natural children of their inheritance rights even after a judgment of the European Court of Human Rights declaring Belgium to be guilty of breaching Article 8 **ECHR** in conjunction with Article 14 **ECHR** (Judgment in the case of *Marckx v. Belgium* of 13 June 1979, *Special Bulletin Leading Cases **ECHR*** [ECH-1979-S-002]), the legislature violates the constitutional principles of equality and non-discrimination (Articles 6 and 6bis of the former Constitution, now (since 1994) Articles 10 and 11 of the Constitution).

Summary:

Under former Article 756 of the Civil Code, natural children were not recognised as heirs and had no rights in

respect of the property of their deceased father and mother unless they had been officially recognised. They also had no rights under the article in respect of their parents' relatives' property. The Article was amended by an Act of 31 March 1987 but maintained, on a transitional basis for estates passed to heirs prior to the Act's entry into force on 6 June 1987.

A natural child applied to the Belgian civil courts to have his inheritance rights recognised. The Court of Cassation asked the Court of Arbitration to rule on the question of whether the transitional provision that applied the old law to estates passed to heirs in 1956 and 1983 was compatible with the principles of equality and non-discrimination.

The Court of Arbitration noted that the explanatory memorandum accompanying the amending bill was based, *inter alia*, on the view that it was necessary to put an end to the discrimination against children born out of wedlock, which constituted a "glaring exception" to the principle that all people were equal before the law. It also noted that in its Judgment in the case of *Marckx v. Belgium* of 13 June 1979 (*Special Bulletin Leading Cases **ECHR*** [ECH-1979-S-002]), the European Court of Human Rights had considered that the limitations imposed on the rights of recognised natural children in respect of their right to inherit their mother's property and the fact that they had no inheritance rights at all in respect of their close relatives on their mother's side breached Articles 8 and 14 **ECHR** (43).

The Court found that the difference in the treatment of children born in and out of wedlock, in terms of their inheritance rights and as established under Article 756 of the Civil Code and kept in force on a transitional basis under Section 107 of the Act of 31 March 1987, breached the constitutional principles of equality and non-discrimination (Articles 6 and 6bis of the former Constitution, now (since 1994) Articles 10 and 11 of the Constitution).

The Court then examined the question of the extent to which its decision constituted *res iudicata* (37). It noted that according to Section 28 of the Special Law of 6 January 1989, a ruling handed down by the Court of Arbitration in respect of a preliminary question only constituted *res iudicata* for the lower court and other courts required to rule "on the same case". However, in accordance with Sections 4.2 and 26.2, sub-paragraph 3.1 of the Act, insofar as the scope of such a ruling exceeded the limits laid down in Section 28, the Court needed to bear in mind the possible consequences of its decision for cases other than the case giving rise to the preliminary question.

Accordingly, the Court observed that in its Judgment in the *Marckx* case, the European Court of Human Rights had stated that "the principle of legal certainty, which is necessarily inherent in the law of the **Convention** (...) dispenses the Belgian State from re-opening legal acts or situations that antedate the delivery of the present judgment". It found that the fact that estates passed to heirs prior to this judgment were not affected by the unconstitutionality ruling was justified by the principle of legal certainty. It followed that former Article 756 of the Civil Code could still be applied to estates passed to heirs prior to 13 June 1979 but not to any passed to heirs after that date.

Supplementary information:

See also Decision no. 83/93 of 1 December 1993, *Bulletin* 1993/3 [BEL-1993-3-038].

Languages:

French, Dutch, German.

BIH-2003-3-002 28-11-2003 U 28/00

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 28-11-2003 / **e)** U 28/00 / **f)** / **g)** *Sluzbeni Glasnik Bosne I Hercegovine* (Official Gazette of Bosnia and Herzegovina) 08/04 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

2.1.1.1.2 **Sources of Constitutional Law** - Categories - Written rules - National rules - Quasi-constitutional enactments.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.2.1.5 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - European **Convention** on Human Rights and non-constitutional domestic legal instruments.
4.7.1.1 **Institutions** - Judicial bodies - Jurisdiction - Exclusive jurisdiction.
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:

United Nations, peace-keeping force, immunity from jurisdiction / Treaty, international, direct applicability / Real estate, damage.

Headnotes:

The state cannot be exonerated from responsibility for damage caused to individuals by the implementation of international agreements to which it is a party.

According to the Constitution, the rights and freedoms set forth in the European **Convention** on Human Rights shall apply directly in Bosnia and Herzegovina and shall have priority over all other laws. Consequently, the rights and laws applied by the ordinary courts must be in accordance with the **Convention**, regardless of the literal meaning of certain provisions of the law of the domestic legal system.

The individual must be protected from the arbitrary actions of the state. Every failure to do so may have consequences for the direct application of Article 6.1 **ECHR**, whose sole purpose, like that of the **Convention** in general, is to protect the individual from the arbitrary actions of the state.

Summary:

The appellant filed an appeal with the Constitutional Court of Bosnia and Herzegovina against the ruling of the Municipal Court II Sarajevo, the ruling of the Cantonal Court of Sarajevo and the ruling of the Supreme Court of the Federation of Bosnia and Herzegovina.

The appellant is the owner of real property with an area of 2,255 m^2. During the armed conflict in Bosnia and Herzegovina, from July 1994 until the end of 1995 UNPROFOR occupied the appellant's real property, removed the topsoil, spread gravel and destroyed the existing fence.

In June 1996 the appellant submitted a claim to UNPROFOR for compensation for damage caused to her property but did not receive a response. Subsequently, in December 1998 the appellant filed a complaint with the Municipal Court against UNPROFOR and against Bosnia and Herzegovina. The appellant claimed either full restoration of her property to its state before UNPROFOR occupied it or monetary compensation for the damage caused to her property.

In a ruling, the Municipal Court dismissed the complaint due to lack of competence.

In February 1999 the appellant filed an appeal with the Cantonal Court against the ruling of the Municipal Court.

On appeal, the Cantonal Court upheld the Municipal Court ruling and dismissed the appeal stating that the

UN **Convention** on Privileges and Immunities of 13 February 1946 grants immunity to the UN from every form of judicial proceedings, unless it is an extraordinary case to which immunity does not apply. Moreover, the Cantonal Court concluded that the Agreement entered into by the Government of Bosnia and Herzegovina and the UN on the status of UNPROFOR (15 May 1993) was based upon the said UN **Convention**. The Cantonal Court held that that Agreement did not exempt the UN from all forms of judicial proceedings. It provides for ways and procedures for resolving disputes, which are to be adjudicated by a Standing Claims Commission or by a tribunal of three arbitrators under the prescribed conditions. The Cantonal Court consequently held that it was not competent to deal with the claim.

The appellant lodged an application for revision (an appeal on points of law) with the Supreme Court. The Supreme Court dismissed the revision on the ground that the lower courts had correctly applied Article 16.1 of the Law on Contentious Procedure, which provides for the rejection of a case due to lack of jurisdiction.

The appellant did not challenge the decisions of the Municipal, Cantonal and Supreme Court with regard to her claim against the UN; however, she did challenge the rejection of her claim against the Republic of Bosnia and Herzegovina. The appellant contended that the lower courts by refusing to decide on her claim for compensation, violated her right of access to a court as protected by Article II.3.e of the Constitution and Article 6.1 **ECHR**, which, according to the Constitution, is to have priority over all other law.

The appellant argued that since the Standing Claims Commission provided for under the Agreement of 15 May 1993 had never been set up, she was compelled to file a claim with the courts. Due to the immunity granted to the UN through the **Convention**, the appellant only pursued her claim against Bosnia and Herzegovina, the legal successor to the Republic of Bosnia and Herzegovina. She argued that the authorities of the Republic of Bosnia and Herzegovina by assigning the use of her real property to UNPROFOR without her consent were responsible for the damage caused to that property by UNPROFOR's occupation of it.

Considering that the right invoked by the appellant is of a civil nature, the Constitutional Court established that Article II.3.e of the Constitution and Article 6.1 **ECHR** were applicable in the case under consideration.

The right of access to a court is an inherent element of the Article 6.1 **ECHR**, which secures to everyone the right to have any claim relating to his civil rights and obligations brought before an independent and impartial tribunal established by law.

In the instant case, both the Municipal and the Cantonal Court had dismissed the complaint on grounds of immunity, referring to the UN **Convention** and the Agreement. However, neither the Municipal nor the Cantonal Court had stated any grounds for which the complaint against Bosnia and Herzegovina was inadmissible. The Cantonal Court had recognised that the court would have been competent had the Agreement not provided otherwise. However, the Constitutional Court found no provision in the said Agreement that would grant immunity to Bosnia and Herzegovina. None of the lower courts had given any other reason for which the complaint against Bosnia and Herzegovina was inadmissible. Therefore the Constitutional Court could not find any grounds barring a lawsuit against Bosnia and Herzegovina.

The Constitutional Court noted that by refusing to decide on the merits of the appellant's complaints, the courts had denied the appellant access to the court, which was in violation of Article II.3.e of the Constitution and Article 6.1 **ECHR**. Those actions by the courts had led to the decision not to hear the matter on the appellant's "civil rights and obligations" within the meaning of Article 6.1 **ECHR**.

Consequently, the Constitutional Court annulled the ruling of the Supreme Court.

Languages:

Bosnian, Serbian, Croatian, English (translation by the Court).

BIH-2002-2-005

10-05-2002 U 18/00 K.H.

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 10-05-2002 / **e)** U 18/00 / **f)** K.H. / **g)** *Sluzbeni*

Glasnik Bosne I Hercegovine (Official Gazette of Bosnia and Herzegovina) 30/02 / **h)** .

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.6.3 **General Principles** - Structure of the State - Federal State.
3.8 **General Principles** - Territorial principles.
3.9 **General Principles** - Rule of law.
4.6.10.1 **Institutions** - Executive bodies - Liability - Legal liability.
4.6.10.1.2 **Institutions** - Executive bodies - Liability - Legal liability - Civil liability.
4.8.1 **Institutions** - Federalism, regionalism and local self-government - Federal entities.
4.8.8 **Institutions** - Federalism, regionalism and local self-government - Distribution of powers.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.6 **Fundamental Rights** - Civil and political rights - Freedom of movement.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.39.3 **Fundamental Rights** - Civil and political rights - Right to property - Other limitations.

Keywords of the alphabetical index:

Damage, compensation / Powers, implicit / Powers, negative, conflict / Remedy, effective / Transport, public, accident / State, successor, liability for obligations of former state.

Headnotes:

The State of Bosnia and Herzegovina must assume responsibility for those issues constitutionally assigned to it. It must provide for judicial bodies that adjudicate claims against State bodies. As long as the State does not provide for such judicial bodies, it is responsible for the payment of compensation that the individual is unable to achieve due to deficiencies in the legal order.

Summary:

The appellant requested compensation for damages.

In 1979, the appellant was injured in a traffic accident on a public road when a stone fell on and broke the window of the bus in which the appellant was sitting, and caused him serious injuries. He initiated legal proceedings for compensation for damage. In 1981, the Municipal Court of Visegrad ordered the Republic Fund for Main and Regional Roads of Bosnia and Herzegovina ("the Fund") to pay compensation for pecuniary and non-pecuniary damage, compensation for the treatment and care that the appellant was given and penalty interest. In later proceedings for compensation for loss of earnings against the same defendant, several judgments were rendered from 1983 to 1991, each of which ordered the payment of compensation for damage, however, in differing amounts and for differing periods of compensation.

In 1998, the appellant initiated proceedings before the Municipal Court of Sarajevo against the Federation of Bosnia and Herzegovina (Federal Ministry of Traffic and Communications). He requested compensation for loss of earnings with penalty interest for the period from 1 January 1998 as a result of the 1979 accident. In 1999, the Municipal Court rejected the appellant's claim due to the absence of a proper defendant for the claim. This judgment was confirmed by the Cantonal Court of Sarajevo.

The appellant complained that the challenged judgment of the Cantonal Court violated his right to property provided for in Article II.3.k of the Constitution of Bosnia and Herzegovina.

The Federal Ministry of Traffic and Communications declared itself incompetent and requested that the

appeal be dismissed as ill founded. The Ministry of Civil Affairs and Communications of Bosnia and Herzegovina declared itself incompetent with respect to the subject of the appeal. The Ministry of Traffic and Communications of the Republika Srpska refused to express an opinion on the appeal due to its non-involvement in the proceedings conducted before the Court of the Federation of Bosnia and Herzegovina.

The Court granted the appeal and quashed the challenged judgments. Moreover, it declared Bosnia and Herzegovina to be responsible for remedying the violation of the appellant's rights. The Council of Ministers of Bosnia and Herzegovina was ordered to implement the decision of the Court, and to pay the appellant a specified sum.

The Court found that the challenged court decisions violated the appellant's right of access to the courts (Article 6.1 **ECHR**), the right to an effective legal remedy (Article 13 **ECHR**) and the right to property (Article 1 Protocol 1 **ECHR**).

With regard to Article 6.1 **ECHR**, the Court recalled that the right of access to a court embodied not only extensive procedural guarantees and requirements of expeditious and public proceedings, but also required compatibility with the rule of law. If the right of access to the courts could be limited by the State, these limitations were not to restrict or reduce the access in such a way that the very essence of the right was impaired. Furthermore, a limitation would not be compatible with Article 6.1 **ECHR** if it did not pursue a legitimate aim and if there was not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

The Court found Article 6 **ECHR** to be applicable. It noted that all three public legal persons that had been addressed by the Court declined their competence regarding the present case. The event had occurred in 1979, on a location within the former territory of Bosnia and Herzegovina which was now within the territory of Republika Srpska. At the time, the responsible party was the Fund.

The Court held that the appellant's appeal fell within the exclusive responsibility of the State of Bosnia and Herzegovina. The Fund had in practical terms ceased to exist without providing for a successor. A new body taking over the Fund's duties and finances had never been established. On the one hand, the Republika Srpska had never taken over the responsibilities or financial means of the Fund and it could not be regarded as responsible for the compensation of damage caused on its territory at the time prior to the date of the entry into force of the Constitution of Bosnia and Herzegovina (14 December 1995). On the other hand, according to the Agreement on Realisation of the Federation of Bosnia and Herzegovina, the government of the Republic of Bosnia and Herzegovina retained the necessary competences to enable it to function as a government of the internationally recognised State of Bosnia and Herzegovina, while all other civil responsibilities were transferred to the government of the Federation of Bosnia and Herzegovina. This kind of transfer also included the transfer of responsibilities for functions that had been transferred by areas of competence and, therefore, included the transfer of obligations not specifically regulated but arising in the performance of duties. The Federation of Bosnia and Herzegovina therefore was intended to take over the responsibilities and financial funds previously belonging to the bodies of the Republic of Bosnia and Herzegovina. Consequently, the obligations of the Republic of Bosnia and Herzegovina, under Article 9 of the Law on Federal Ministries and other Bodies of the Federal Administration, according to which the Federal Ministry of Traffic and Communications would perform administrative, expert and other duties established by law, fell within the responsibility of the Federation in the field of traffic and communications.

However, the Court held that the State could not evade its obligation to establish bodies that were within its exclusive constitutional responsibilities. Nor could the Entities take over the State's responsibilities assigned to it in the Constitution of Bosnia and Herzegovina. According to Article I of the Constitution of Bosnia and Herzegovina, "the Republic of Bosnia and Herzegovina, the official name of which shall henceforth be 'Bosnia and Herzegovina', shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognised borders (...)". Moreover, Article III of the Constitution of Bosnia and Herzegovina regulated the responsibilities of and the relations between the institutions of Bosnia and Herzegovina and the Entities, and according to Article III.1.i of the Constitution, the regulation of inter-Entity transportation fell within the exclusive competence of the State.

The Court further argued that, regardless of whether the State had a *prima facie* legal interest in the present

case, it was the legal entity that had the final responsibility with regard to possible violations of human rights under Article II of the Constitution of Bosnia and Herzegovina. The Court found that an individual must not be overburdened in determining the most effective way of realising his rights. One of the main principles of the European **Convention** on Human Rights was that the legal means available to an individual had to be accessible and understandable. It was the duty of the State to organise its legal system so as to allow the courts to comply with the requirements of Article 6.1 **ECHR**.

The matter at issue therefore fell within the competence of the State of Bosnia and Herzegovina and it had to comply with its constitutional responsibility. However, since there was, at the time of the decision, no State Court before which the appellant would have been able to defend his civil rights, the appellant had been denied his right of access to court.

Accordingly, the Court found a violation of the appellant's right under Article 13 **ECHR**. Article 13 **ECHR** had to be interpreted so as to guarantee an "effective remedy before a national authority" to everyone who claims that his rights and freedoms under the **Convention** have been violated. Article 13 **ECHR** guaranteed the availability within the national legal order of an effective remedy to enforce **Convention** rights and freedoms in whatever form they might happen to be secured. The object of this article was thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant **Convention** complaint and to grant effective relief to the aggrieved party. The remedy required by Article 13 **ECHR** must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent party.

The Court found that the appellant had a valid claim in the sense of Article 13 **ECHR**. As a result of constitutional re-organisation, Bosnia and Herzegovina had not established all the bodies necessary to perform its obligations under the Constitution of Bosnia and Herzegovina. It had not established an operative body that would be competent for inter-Entity transport matters or a judicial body that would deal with cases brought by appellants against the decisions of those State bodies that ran counter to the principle of the rule of law.

Finally, the Court found a violation of the appellant's right to peaceful enjoyment of his possessions. The present case did not fall within the ambit of the application of laws controlling the use of property; but it concerned a failure by the authorities to effectively secure the appellant's right to property. Despite its positive obligation to do so, the State of Bosnia and Herzegovina had failed to provide a proper legal protection of the appellant's property right. The Court could not see in what way the State had struck a fair balance between the demands of the general interest of the community and the requirements of the protection of the appellant's right to property.

The Court concluded that the appellant had a well-founded claim for compensation and that Bosnia and Herzegovina was responsible for honouring that claim. In the absence of a court before which he could have his claim confirmed, the Court argued that the State of Bosnia and Herzegovina had to be directly ordered to pay him compensation based on the average income in the Federation of Bosnia and Herzegovina.

Languages:

Bosnian, Croat, Serb.

BIH-2001-3-008 22-06-2001 U 28/01 Appeal of Mr K.J. against the judgment of the Supreme Court of Republika Srpska no. KZ-196/00 of 18.12.2000

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 22-06-2001 / **e)** U 28/01 / **f)** Appeal of Mr K.J. against the judgment of the Supreme Court of Republika Srpska no. KZ-196/00 of 18.12.2000 / **g)** *Sluzbeni Glasnik Bosne I Hercegovine* (Official Gazette of Bosnia and Herzegovina) 16/01 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

1.5.4.7 **Constitutional Justice** - Decisions - Types - Interim measures.

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
3.9 **General Principles** - Rule of law.
3.13 **General Principles** - Legality.
5.3.13.19 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Equality of arms.

Keywords of the alphabetical index:

Hearing, court, obligation to inform the accused / European **Convention** on Human Rights, direct application.

Headnotes:

It violates the right to a fair trial, especially the principle of equality of arms, if in a public hearing dealing with factual and legal aspects of the appeal, neither the appellant nor his or her legal counsel are given the possibility to attend while the public prosecution office is represented, even if this is based on the law in force.

Summary:

The appellant challenged the judgments of the Supreme Court of Republika Srpska and of the District Court of Srpsko Sarajevo under Article VI.3.b of the Constitution of Bosnia and Herzegovina. He alleged that his constitutional right to a fair trial (especially equality of arms) under Article 6 **ECHR** (Article II.3.e of the Constitution of Bosnia and Herzegovina, respectively) and his right not to be discriminated against under Article II.4 of the Constitution of Bosnia and Herzegovina had been violated since he, unlike the public prosecutor, had not been able to attend the hearing before the Supreme Court dealing with the appellant's conviction of murder. Without previous notice to the appellant and his counsel, and despite their request to be so informed, the Supreme Court held a hearing on the appellant's appeal complaining that the proceedings before the District Court contained significant violations of procedural provisions and that the facts had been wrongly and incompletely established. The Supreme Court judgment dismissed the appeal as ill-founded and confirmed the judgment of the District Court. It had also stated that the accused had not been informed about the hearing according to Article 5 of the Law Amending the Law on Criminal Proceedings. This provision (which had been introduced during the war in Bosnia and Herzegovina and subsequently not abolished) suspended the court's obligation under Article 371 of the Law on Criminal Proceedings to inform, *inter alia*, the accused and his defendant of the hearing of the court council.

After a temporary suspension of the execution of the Supreme Court judgment (Article 75 of the Rules of Procedure of the Court), the Court eventually annulled the judgment of the Supreme Court of Republika Srpska on the basis of a violation of the principle of the equality of arms as an inherent and essential part of Article 6 **ECHR**. It referred the case back to the Supreme Court for a new examination and decision while observing the right of the appellant/accused and his attorney to attend the session of the court council. In view of the legal and factual circumstances of the case, the Court said, the appellant was entitled, according to Article 6 **ECHR**, to attend the hearing before the Supreme Court and to present, personally or through his attorney, arguments in his favour.

The Court recalled that the manner in which Article 6 **ECHR** should be applied to appeal proceedings would depend on the special features of the proceedings concerned. According to the jurisprudence of the European Court of Human Rights, the Court said the question as to whether an accused had had a fair trial would have to be assessed on the basis of the proceedings in their entirety. The Supreme Court may have acted in accordance with the amended Article 371 of the Law on Criminal Proceedings. However, it did not observe the requirements set out by Article 6 **ECHR** which had priority over all other law and had to be applied directly by all domestic authorities (Article II.2 of the Constitution of Bosnia and Herzegovina). The notion of "session of the council of the court" in Article 371 had to be interpreted in the sense of a public

"hearing" under Article 6 **ECHR**. The Court stressed that in his appeal the appellant had requested the Supreme Court to make a full review of the first instance judgment as regards facts and law, and that the Supreme Court was not bound by the findings of the lower court but was competent to make a new examination as well as assessment of the facts and of the significant violations of criminal proceedings procedural provisions, and, in case of accepting those claims, to refer the case back to the first instance court for new first instance proceedings and decision. In view of an imminent prison sentence of three years, the outcome of the proceedings before the Supreme Court was of great importance to the appellant.

As for first instance proceedings, the Court considered it unnecessary to examine any relating claims since the second instance proceedings before the Supreme Court would be renewed, and the appellant would therein be in a position to address the alleged violations by the first instance judgment.

Languages:

Bosnian, Croat, Serb (translations by the Court).

BIH-2001-3-005

04-05-2001 U 14/00 Appeal of Mr Z.M. against Fed BiH SC Judgment no. UZ-39/00 of 18.05.2001, Cantonal Court Bihac Judgment no. U 267/99 of 21.12.1999 and Cantonal Ministry ruling no. 11/1-23-1054-4 II/99 of 09.11.1999

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 04-05-2001 / **e)** U 14/00 / **f)** Appeal of Mr Z.M. against Fed BiH SC Judgment no. UZ-39/00 of 18.05.2001, Cantonal Court Bihac Judgment no. U 267/99 of 21.12.1999 and Cantonal Ministry ruling no. 11/1-23-1054-4 II/99 of 09.11.1999 / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina), 33/2001, 30.12.2001 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.3.2 **Sources of Constitutional Law** - Techniques of review - Concept of constitutionality dependent on a specified interpretation.
3.16 **General Principles** - Proportionality.
3.17 **General Principles** - Weighing of interests.
5.3.35 **Fundamental Rights** - Civil and political rights - Inviolability of the home.
5.3.39 **Fundamental Rights** - Civil and political rights - Right to property.

Keywords of the alphabetical index:

Occupancy, right, conditions / Property, restitution / Refugee, return, objective / Displaced person, return, objective.

Headnotes:

As far as the re-instatement of people into pre-war apartments is concerned, previous occupants without an occupancy right have to be treated like occupancy right holders if their factual position is comparable to that of an occupancy right holder.

Summary:

The appellant challenged various court decisions which denied him the restitution of the apartment he had been living in for several years until he left it due to the war in Bosnia and Herzegovina. The court decisions were based on a strict application of the Law on Housing Relations and post-war laws regulating the

restitution of apartments to their pre-war occupants. The courts had argued that the appellant could not be reinstated since he had not concluded a contract on use of the apartment and, therefore, had not acquired an occupancy right.

The Court annulled the ordinary court decisions and the administrative rulings and ordered the competent administrative organ to reinstate the appellant into the apartment in question. It considered that the non-restitution of the apartment amounted to a violation of the appellant's right to respect for his home (Article 8 **ECHR**) and to the peaceful enjoyment of his possessions (Article 1 Protocol 1 **ECHR**).

As regards Article 8 **ECHR**, the Court argued that the apartment at issue had to be regarded as the appellant's "home" within the meaning of this provision. It based its view on Article 1.1 Annex 7 General Framework Agreement for Peace in Bosnia and Herzegovina ("Agreement on Refugees and Displaced Persons" - GFAP) and Article II.5 of the Constitution of Bosnia and Herzegovina which both provide that all refugees and displaced persons have the right freely to return to their homes of origin and that they shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991. The latter article, said the Court, raised this right of refugees and displaced persons to the level of constitutional rights. The appellant had been in possession of the apartment and had had legal grounds for initially entering into and subsequently living in the apartment. The fact that no contract on the use of the apartment was concluded with the Housing Association (being a formal requirement for obtaining an occupancy right) was not due to any negligence on the part of the appellant. However, the Court noted, the appellant had paid the rent to the factory which had allocated the apartment to him from the moment he moved into it, and he therefore fulfilled the same obligation as he would have had to fulfil had he concluded a contract on the use of the apartment. The behaviour of the parties involved indicated that they had silently agreed to the factual state of affairs. The appellant had spent four years in the apartment from the moment of entry to 30 April 1991 (the qualifying date according to property law) as well as three further years until 1994 before leaving it due to the war. During this period nobody had contested his right to use the apartment.

The Court held that the failure to return the apartment during a period of approximately five years resulted in an interference with the appellant's right to respect for his home, which was not justified. In the Court's opinion, the interference had initially served a legitimate aim in accordance with the meaning of Article 8.2 **ECHR**. The relevant aim had been the protection of the rights of others, i.e. the rights of persons who were forced to leave their homes because of the war and needed accommodation in other parts of the country. However, five years after the end of the war, the denial to give back the apartment could no longer be seen as a necessary interference in a democratic society and, therefore, was disproportionate in relation to the legal aim pursued.

As for Article 1 Protocol 1 **ECHR**, the Court found the appellant's legal position with regard to the apartment to constitute a "possession" within the meaning of this article, recalling the arguments put forward in the context of Article 8 **ECHR** which showed that the apartment represented an acquired economic value for the appellant. Moreover, the Court based its view on relevant provisions of the Law on Housing Relations which regulate the possibility of an eviction. Since the appellant had been living in the apartment for several years, those provisions, in the Court's eyes, excluded his eviction, thereby creating a legal status of possession equally strong as that of an occupancy right holder.

The Court observed that the ordinary courts' decisions denied the appellant his right to make use of the economic value which the apartment represented for him, and that this denial was not justified under the European **Convention** on Human Rights or the Constitution.

It considered that the courts failed to strike a fair balance between the appellant's interests and other conflicting interests. Similar to its line of argument under Article 8 **ECHR**, the Court accepted that there may have been strong reasons in the war period justifying the use of the apartment to give shelter to refugees. However, the conditions which then prevailed had fundamentally changed and could no longer justify an interference with the appellant's rights. Weighing the various interests involved, the Court paid particular attention to the fact that the return of refugees and displaced persons to their previous homes is a primary objective of the GFAP and the Constitution of Bosnia and Herzegovina and that the restoration of previously existing rights to houses and apartments should in this perspective be seen as a predominating objective. Article II.5 of the Constitution of Bosnia and Herzegovina constituted a constitutional right to the restoration of

the *status quo ante*.

The Court saw its view further supported with regard to the lawfulness of the omission. At the time, the competent authorities assigning the apartment to a third party may have acted on the basis of the Law on Abandoned Apartments. However, in the meantime "all administrative, judicial and any other decisions enacted on the basis of the regulations referred to Article 1.1 of this law terminating occupancy rights" had been annulled (Article 2 Law on Cessation of the Law on Abandoned Apartments) and the authorities had been ordered to cease to apply those regulations. Thereby, the legal basis for the temporary re-allocation of those apartments had been removed. The present situation could therefore no longer be regarded as lawful.

The Court further pointed out that it was irrelevant that the competent administrative authorities and the courts may have applied the Law on Cessation of the Law on Abandoned Apartments according to its exact wording, i.e. not returning the apartment to the appellant because they did not consider him an occupancy right holder. In view of their obligation to apply the European **Convention** on Human Rights and the Constitution of Bosnia and Herzegovina as prevailing law, the Court stressed they were to interpret the Law on Cessation of the Law on Abandoned Apartments in a manner that would be compatible with the European **Convention** on Human Rights and the Constitution of Bosnia and Herzegovina, namely by equating the status of the appellant with that of an occupancy right holder.

Languages:

Bosnian, Croat, Serb (translations by the Court).

BIH-2001-2-001

02-02-2001 U 16/00 Request of eleven members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina for institution of proceedings for the evaluation of constitutionality of Article 8.a.1 of the Law on Sale of Apartments with Occupancy Rights

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 02-02-2001 / **e)** U 16/00 / **f)** Request of eleven members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina for institution of proceedings for the evaluation of constitutionality of Article 8.a.1 of the Law on Sale of Apartments with Occupancy Rights / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina), 13/200, 12.06.2001 / **h)** *Bulletin of the Constitutional Court of Bosnia and Herzegovina* (upcoming); CODICES (English).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.16 **General Principles** - Proportionality.
3.17 **General Principles** - Weighing of interests.
3.20 **General Principles** - Reasonableness.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.2 **Fundamental Rights** - Equality.
5.2.1.1 **Fundamental Rights** - Equality - Scope of application - Public burdens.
5.2.2.3 **Fundamental Rights** - Equality - Criteria of distinction - National or ethnic origin.
5.3.39.3 **Fundamental Rights** - Civil and political rights - Right to property - Other limitations.

Keywords of the alphabetical index:

Housing, right to return / Ethnic proportionality / Occupancy right / Property, disposal, limitation / Ethnic cleansing, reversal / Refugee / Displaced person.

Headnotes:

In the pursuit of enabling the return of refugees and displaced persons (Article II.5 of the Constitution of Bosnia and Herzegovina) and ensuring adequate pricing, it does not violate the right to non-discrimination (Article II.4 of the Constitution of Bosnia and Herzegovina and Article 14 **ECHR**) or the right to property (Article II.3.k of the Constitution of Bosnia and Herzegovina and Article 1 Protocol 1 **ECHR**) if the state requires a person to stay in an apartment for two years before allowing him or her to acquire full property rights over it where that person previously only had occupancy rights in relation to it.

Summary:

The applicants, eleven members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, requested the review of Article 8.a.1 of the Law on the Sale of Apartments with Occupancy Rights (the "Apartment Law").

The Apartment Law regulates the sale of apartments with occupancy rights, a legal institution formulated in the days of the former Socialist Federal Republic of Yugoslavia that contains certain, but not all elements of full property rights over an apartment. According to other property legislation adopted in the aftermath of the war in Bosnia and Herzegovina, refugees and displaced persons were given the right to return to their pre-war homes even if this would require the eviction of other occupants of the properties in question. In practice, the return process showed little success, and often the former holders of occupancy rights preferred to buy and then sell their apartments immediately thereafter, often at very low prices, instead of returning to uncertain surroundings.

In order to promote the return of refugees and displaced persons and to ensure the sale of the properties at adequate prices, in July 1999, the High Representative in Bosnia and Herzegovina inserted the contested provision into the Apartment Law. According to this provision, "the holder of occupancy rights, over a property which was proclaimed as being abandoned by special regulations applied on the territory of the Federation of Bosnia and Herzegovina during the period of 30 April 1991 to 4 April 1998, shall acquire the right to purchase the property in compliance with the provisions of this law upon the expiry of a two year deadline after his or her reinstatement in the property."

The Court found that the contested provision was not in violation of the Constitution or the European **Convention** on Human Rights, the rights and freedoms set forth in which are directly applicable in Bosnia and Herzegovina and have priority over all other laws (Article II.2 of the Constitution of Bosnia and Herzegovina), in particular Articles II.3.k and II.4 of the Constitution of Bosnia and Herzegovina (Article 1 Protocol 1 **ECHR** and Article 14 **ECHR**). The Court interpreted these fundamental rights in the light of Article II.5 of the Constitution of Bosnia and Herzegovina which grants to all refugees and displaced persons the right freely to return to their homes of origin, and to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. It further declares any commitments or statements relating to such property made under duress null and void.

The right to property was considered to be applicable to the question of occupancy rights. The Court argued that the right to return to and continue living in property over which refugees and displaced persons had had an occupancy right reflects an economic value protected under Article 1 Protocol 1 **ECHR**. However, due to the limited possibility of acquiring full ownership over the property, the protection afforded by this fundamental right was limited accordingly. Looked at separately from the aspect of possible discrimination, it could not be considered to give the holder of the occupancy rights a right to purchase the property and become the legal owner.

When interpreting the right to freedom from discrimination, the Court referred to the case-law developed under Article 14 **ECHR**, which allows differential treatment when there is an objective and reasonable justification in relation to the aim and effects of the measure under consideration. The Court observed that as a result of Article 8.a of the Apartment Law, holders of occupancy rights who abandoned their properties during the war are treated differently from those who did not escape, because the former, unlike the latter, are

only allowed to buy their properties (and then sell them to other persons) after having lived in the property for two years after their return. It was considered to be a reasonable and legitimate objective with a view to Article II.5 of the Constitution of Bosnia and Herzegovina to encourage refugees and displaced persons to return to their previous homes and to discourage any sales of their properties at very low prices to members of the majority ethnic population in a certain area. Respecting the legislator's margin of appreciation in determining how this objective could best be served, the Court found the two-year rule to be a proportionate means to achieve this goal. Other possible regulations would give rise to legal difficulties with unpredictable consequences. Moreover, the Court noted that Article 8.a of the Apartment Law is of general application and cannot be considered to apply specifically to persons of a particular ethnic origin. The purpose was to make refugees and displaced persons, irrespective of their ethnic origin, return to their previous homes and to prevent the perpetuation of ethnic cleansing.

There are separate opinions by the Judges Prof. Dr. Vitomir Popovic, Prof. Dr. Snezana Savic and Mirko Zovko.

Supplementary information:

Since, on the one hand, the two-year rule proved ineffective and sometimes counter-productive in motivating the return of refugees or displaced people, or at least in providing for material compensation, and, on the other hand, there was no such restriction on the territory of the Republika Srpska, by a decision of 17 July 2001, the Office of the High Representative struck out the two-year rule in Article 8.a of the Apartment Law.

Languages:

Bosniac, Croat, Serb. English, French, German (translations by the Court).

BIH-2000-1-002 30-01-2000 U 5/98

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 30-01-2000 / **e)** U 5/98 / **f)** / **g)** *Sluzbeni Glasnik Bosne I Hercegovine* (Official Gazette of Bosnia and Herzegovina) 25/99, 15.12.2000 / **h)** .

Keywords of the Systematic Thesaurus:

1.2.1.1 **Constitutional Justice** - Types of claim - Claim by a public body - Head of State.
1.3.4.3 **Constitutional Justice** - Jurisdiction - Types of litigation - Distribution of powers between central government and federal or regional entities.
1.3.5.3 **Constitutional Justice** - Jurisdiction - The subject of review - Constitution.
1.4.9.1 **Constitutional Justice** - Procedure - Parties - *Locus standi*.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.1.4.8 **Sources of Constitutional Law** - Categories - Written rules - International instruments - Vienna **Convention** on the Law of Treaties of 1969.
2.3.8 **Sources of Constitutional Law** - Techniques of review - Systematic interpretation.
3.8 **General Principles** - Territorial principles.
4.8.4 **Institutions** - Federalism, regionalism and local self-government - Basic principles.
4.8.4.1 **Institutions** - Federalism, regionalism and local self-government - Basic principles - Autonomy.
4.8.7 **Institutions** - Federalism, regionalism and local self-government - Budgetary and financial aspects.
4.8.8.2.1 **Institutions** - Federalism, regionalism and local self-government - Distribution of powers - Implementation - Distribution *ratione materiae*.
4.8.8.5 **Institutions** - Federalism, regionalism and local self-government - Distribution of powers - International relations.
4.10.5 **Institutions** - Public finances - Central bank.

Keywords of the alphabetical index:

Extradition, powers / Asylum, powers / Border, definition / Border, definition / Autonomy, constitutional, relative / Representation, international / Ambassador, nomination / Monetary policy, powers.

Headnotes:

The constitutionally established jurisdiction of the Constitutional Court of Bosnia and Herzegovina covers the Entity's constitutions, since according to Article VI.3.a of the Constitution the Constitutional Court has exclusive jurisdiction to review whether any provision of an Entity's constitution or law is consistent with the Constitution of Bosnia and Herzegovina. On 29 and 30 January 2000, the Court declared with a partial decision some provisions or parts of provisions of the Constitutions of the Republika Srpska and of the Federation of Bosnia and Herzegovina null and void on the ground that they were not in conformity with the Constitution of Bosnia and Herzegovina.

Summary:

On 12 February 1998 Mr Alija Izetbegovic, Chair of the Presidency of Bosnia and Herzegovina, requested the Constitutional Court of Bosnia and Herzegovina to evaluate the constitutionality of some provisions of the Constitutions of the Federation of Bosnia and Herzegovina ("the Federation Constitution") and of the Republika Srpska ("the RS Constitution").

The Court found that the request was admissible, since it was submitted by the Chair of the Presidency, who is among the institutions entitled to refer disputes to the Constitutional Court under Article VI.3.a of the Constitution of Bosnia and Herzegovina.

According to Article 31 of the Vienna **Convention** on the Law of Treaties it is necessary to clarify the terms used in the Constitution of Bosnia and Herzegovina by interpreting them in the context of the entire General Framework Agreement for Peace (signed in Paris on 14 December 1995). It followed from an analysis of these texts that there was a consistent terminology, according to which "border" and "boundary" are given different meanings: Article III of the General Framework Agreement refers to "the boundary demarcation between the two Entities", but the term "border" is used in Article X when referring to frontiers between states. In such circumstances, the use of a different terminology in the RS Constitution cannot be considered consistent with the Constitution of Bosnia and Herzegovina and Article 2.2 of the RS Constitution was declared unconstitutional in so far as the term "border" is used in the wrong context.

According to Article III.1.g of the Constitution of Bosnia and Herzegovina, the institutions of Bosnia and Herzegovina are responsible for international and inter-Entity criminal law enforcement.

Article 6.2 of the RS Constitution, as supplemented by Amendment XXX, refers to citizenship, exile and extradition. The Court found that there is no doubt that extradition of persons against whom the authorities of another state are proceeding for an offence or who are wanted by the said authorities to carry out a sentence or detention order is covered by the term international law enforcement. Article 6 of the RS Constitution thus regulates a matter which lies within the responsibility of the institutions of Bosnia and Herzegovina. The Court must, therefore, conclude that the words "or extradited" Article 6.2 of the RS Constitution are inconsistent with the Constitution of Bosnia and Herzegovina.

With regard to the challenged provision of Article 44.2 of the RS Constitution, the Entities cannot regulate the "asylum policy", since according to Article III.1.f of the Constitution of Bosnia and Herzegovina asylum policy and regulation are responsibilities of the institutions of Bosnia and Herzegovina.

With regard to the protection of fundamental rights in the RS Constitution, the question arises whether the Constitution of Bosnia and Herzegovina can be interpreted as prohibiting provisions in the Entity constitutions that are more favourable to the individual.

It is generally recognised in federal states that component entities enjoy "relative constitutional autonomy" granting their constitutions the right to regulate matters in such a way that they do not contradict the wording

of the constitution of the respective state. The same principle can be seen as an inherent principle underlying the entire structure of the Constitution of Bosnia and Herzegovina.

Moreover, Article 53 **ECHR** (the former Article 60) provides that the protection granted by the European **Convention** on Human Rights is only a minimum protection and that States are not prevented by the **Convention** from granting the individual more extensive or favourable rights and freedoms. The same principle must apply to the interpretation of the Constitution of Bosnia and Herzegovina, which indeed makes the European **Convention** on Human Rights directly applicable in Bosnia and Herzegovina and grants it priority over all other law.

It follows from what has been stated that the Entities are free to provide for a more extensive protection of human rights and fundamental freedoms than required under the European **Convention** on Human Rights and the Constitution of Bosnia and Herzegovina. Amendment LVII, item 1, to the RS Constitution is therefore not in conflict with the Constitution of Bosnia and Herzegovina.

The Court found that the Entities have a right to establish representations abroad as long as this does not interfere with the power of Bosnia and Herzegovina to be represented as a State. Moreover, the Entities may propose their own candidates to be elected as ambassadors and other international representatives of Bosnia and Herzegovina; however such proposals must be regarded as nothing more than proposals and cannot restrict the right of the Presidency of Bosnia and Herzegovina to appoint either the persons proposed by the Entities' institutions or persons who have not been proposed by them.

Hence the contested provisions of Articles 80 and 90 of the RS Constitution concerning the power to appoint and recall heads of missions of Republika Srpska in foreign countries and the establishment of missions abroad are in conformity with the Constitution of Bosnia and Herzegovina.

With regard to the contested provisions of Article 98 of the RS Constitution the Court found that since the power for issuing currency and for monetary policy through Bosnia and Herzegovina is given by Article VII of the Constitution of Bosnia and Herzegovina to the Central Bank of Bosnia and Herzegovina, there is no power left in this respect for the Entities under Article III.3 of the Constitution of Bosnia and Herzegovina.

Hence, the challenged provisions of Article 98 of the RS Constitution must be declared unconstitutional.

Moreover, the Court found that Article 76.2 of the RS Constitution is also not in conformity with the Constitution of Bosnia and Herzegovina, because the Central Bank is vested with the exclusive responsibility to make legislative proposals in the field of "monetary policy" as referred to above.

According to Article VI.3.a of the Constitution of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina has "exclusive jurisdiction", when serving as a protective mechanism in "any dispute". Moreover, Article 75 of its Rules of Procedure allows for preliminary measures to be granted by the Court, and therefore there is no room left for unilateral measures to be taken by institutions of the Republika Srpska. The Court thus found that Article 138 of the RS Constitution, as modified by Amendments LI and LXV, is unconstitutional.

With regard to the contested provisions of Amendment VII to Article II.A.5 of the Federation Constitution, the Constitutional Court found that the wording of this amendment simply refers to the citizenship requirements prescribed by Articles I.7.a and I.7.d of the Constitution of Bosnia and Herzegovina. This contested provision must, therefore be considered to be in conformity with the Constitution of Bosnia and Herzegovina.

With regard to the power to appoint heads of diplomatic missions in the Federation of Bosnia and Herzegovina, as it has already been stated above, Article V.3.b of the Constitution of Bosnia and Herzegovina vests the power to appoint them in the hands of the Presidency of Bosnia and Herzegovina without limits to its decision-making Therefore, the Court found that the provisions of Article IV.B.7.a.i and IV.B.8. of the Federation Constitution clearly contradict the Constitution of Bosnia and Herzegovina since the contested provisions, unlike those of the RS Constitution, vest the power to make such an appointment in the President of the Federation.

Languages:

Bosnian, Croatian, Serb, English.

BIH-1999-3-004 24-09-1999 U 2/99

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 24-09-1999 / **e)** U 2/99 / **f)** / **g)** *Sluzbeni List BiH* (Official Gazette of Bosnia and Herzegovina), 20/99; *Sluzbene Novine Fed. BiH* (Official Gazette of the Federation of Bosnia and Herzegovina), 47/99 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
4.7.7 **Institutions** - Judicial bodies - Supreme court.
4.7.8 **Institutions** - Judicial bodies - Ordinary courts.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.35 **Fundamental Rights** - Civil and political rights - Inviolability of the home.
5.3.39 **Fundamental Rights** - Civil and political rights - Right to property.

Keywords of the alphabetical index:

Occupancy right, conditions.

Headnotes:

A judicial decision which prevented access to both judicial and administrative authorities thereby depriving an applicant of the possibility of obtaining a decision on a dispute violated the applicant's right to access to a court under Article 6.1 **ECHR**.

An interference by a court with an individual's apartment without legal basis violated the right to respect for the home under Article 8 **ECHR**.

Occupancy rights may be considered as "possessions" in the sense of Article 1 Protocol 1 **ECHR**. Since an individual may only be deprived of his possessions subject to the conditions provided by law and since no legal basis existed in the present case, the right to peaceful enjoyment of one's possessions under Article 1 Protocol 1 **ECHR** had been violated.

Summary:

The appellants requested the Constitutional Court to review the constitutionality of a judgment of the Supreme Court of the Republika Srpska.

The following facts were presented by the first appellant and were not contested by the defendant.

The first appellant was the occupancy right holder of an apartment in Banja Luka until she died on 27 July 1998. From 1986 the second appellant was a member of the common household and from April 1991 she fulfilled the legal conditions to obtain the occupancy right in the case of the first appellant's death.

On 24 August 1995 the defendant forced the appellants to leave the apartment. The defendant is now living there and prevents the second appellant and her family from re-entering the apartment.

The appellants initiated proceedings before the Municipal Court in Banja Luka which held that the defendant

should vacate and hand over a one-roomed apartment in Banja Luka to the first appellant free of persons and personal belongings within 15 days, failing which the judgment would be implemented forceably.

The District Court in Banja Luka established that the matter in question had to be decided by administrative authorities, and not by ordinary courts. The Supreme Court of the Republika Srpska confirmed the District Court's decision.

As far as the admissibility of the request is concerned, the Constitutional Court accepted that the second appellant had the right to bring the case, since she was a member of the common household and as the first appellant's heir had a legal interest in continuing the legal proceedings after the latter died.

The Constitutional Court found that all other domestic remedies had been exhausted and that the request had been filed in due time. Consequently the Constitutional Court declared the appeal admissible.

Moreover, the Court found that the judgment of the Supreme Court of the Republika Srpska did in fact prevent the second appellant from returning to the apartment and from carrying out judicial proceedings in this respect. The present case might therefore raise issues under Article 6.1 **ECHR**, under Article 8 **ECHR** and Article 1 Protocol 1 **ECHR**.

By confirming the judgment of the District Court of Banja Luka, the Supreme Court of Republika Srpska excluded any possibility for the second appellant to obtain a decision by the ordinary courts on the dispute about the apartment.

This finding is supported by a judgment of the Supreme Court of Bosnia and Herzegovina of 19 May 1988. The Supreme Court found that, according to Article 10 of the Law on Housing Relations of the Republika Srpska, disputes over housing relations are handled in general by the competent court and administrative authorities are competent only when specified by this law. In the present case no such competence was specified. The access to administrative authorities was therefore legally excluded for the appellant too.

It follows that the judgment of the District Court in Banja Luka as confirmed by the judgment of the Supreme Court prevented the appellant from having access both to judicial and administrative authorities and therefore, from any possibility of obtaining a decision on the dispute about the apartment. Consequently, this judgment violated the appellant's right to access to a court under Article 6.1 **ECHR**.

Moreover, the Court found that the judgment of the Supreme Court in Banja Luka interfered with the appellant's right to respect for her home in the sense of Article 8.1 **ECHR**. Since this interference was not justified, as it was not "in accordance with the law", the Constitutional Court found that this judgment violated the appellant's right to respect for her home under Article 8 **ECHR**.

With regards to Article 1 Protocol 1 **ECHR**, the Court found that the occupancy right entails, *inter alia*, the right to use an apartment undisturbed and permanently and the possibility for cohabiting members of the holder's household to obtain the occupancy right after the holder's death. The Constitutional Court found that the second appellant's right to keep the first appellant's occupancy right after her death constitued a "possession" in the sense of Article 1 Protocol 1 **ECHR**.

The Court established that the judgment of the Supreme Court in Banja Luka of 19 August 1998 deprived the second appellant of her possession in the sense of the second rule of Article 1 Protocol 1 **ECHR**. According to this provision this deprivation may only be justified in the public interest and subject to the conditions provided for by the law. The Constitutional Court has, however, already found that the judgment of the Supreme Court of Banja Luka was in fact not in accordance with the Law on Housing Relations of Repubika Srpska. The interference was therefore not justified. Consequently, the judgment violated the appellant's right to peaceful enjoyment of her possession under Article 1 Protocol 1 **ECHR** as well.

Languages:

Bosnian, Croatian, Serb, English, French.

CYP-2002-1-001 08-05-2001 9931 Yiallouros v. Nicolaou

a) Cyprus / **b)** Supreme Court / **c)** Plenary / **d)** 08-05-2001 / **e)** 9931 / **f)** Yiallouros v. Nicolaou / **g)** / **h)** .

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.32 **Fundamental Rights** - Civil and political rights - Right to private life.
5.3.36.2 **Fundamental Rights** - Civil and political rights - Inviolability of communications - Telephonic communications.

Keywords of the alphabetical index:

Compensation, damages, non-economic loss / Compensation, determination / Fundamental right, protection, effectiveness / Telephone tapping / Remedy, effective / Civil right, notion / Right, notion.

Headnotes:

Violation of the right to a private life and the right to respect for, and to secrecy of, correspondence and other communications, guaranteed by Articles 15 and 17 of the Constitution, entitles the victim of the violation to claim compensation from the wrongdoer although the violation does not rank as a civil wrong under domestic law.

Summary:

Article 15 of the Constitution guarantees the right to a private and family life. Article 17 of the Constitution safeguards the right to respect for, and to secrecy of, correspondence and other communications if such communications are made through means not prohibited by Law. Under Article 35 of the Constitution the legislative, executive and judicial authorities of the Republic "shall be bound to secure, within the limits of their respective competence, the efficient application of the provisions of the Constitution" which safeguard the fundamental rights and liberties of the subject.

The appellant was the Director and the respondent a sewage engineer of the Sewage Board of Nicosia. During a period of one year, the appellant tapped the telephone conversations of the respondent. The latter sued the appellant for damages emanating from the violation of the aforesaid two rights. The trial Court held that the violation of the above rights establishes an actionable right and awarded £ 5,000 damages as "equitable compensation".

The appellant appealed contending that the violations of the fundamental rights of the respondent, which do not constitute civil wrongs under the Torts Law Chapter 148, do not give a right to damages or to protection through the civil jurisdiction of the court.

The Supreme Court dismissed the Appeal. It held that the Constitution safeguards in a special Part - Part II - the Fundamental Rights and Liberties and imposes their respect. These human rights and liberties are of a universal character. Everyone is bound to respect them and to abstain from any act violating them. Restrictions to the guaranteed human rights and freedoms, other than those provided by Article 33.1 of the Constitution, are not allowed. The fundamental rights of the person are not defined by reference to his or her civil rights under domestic law. They are of a universal character and coincide with the nature and autonomy of a person in the social and state area. Article 35 of the Constitution renders the protection of fundamental rights and their efficient application the primary obligation of the State in all its functions. It imposes an

obligation on each one of the three powers of the state, within the limits of their respective competence, to secure the efficient application of human rights. The ascertainment of violations of human rights and the granting of a remedy, fall, in view of their nature, within the sphere of judicial competence. The remedies that can be awarded are those provided by national legislation, the organic laws which govern the administration of justice (see *inter alia* the Courts of Justice Law 1960 (14/60) and the Civil Procedure Law, Chapter 6). Access to Courts is regulated by the Rules governing the Administration of Justice (see also Article 30.1 of the Constitution). The remedies that can be granted in the sphere of Civil Jurisdiction include damages for restoration of the affected rights, restitution of the injury that was caused, prohibitive and mandatory orders and remedies incidental to them. No safeguard of human rights is effective if it does not provide the means for judicial protection by the remedies established by law. Without this protection, the rights would have lost not only their foundations but also their very character as rights, by being altered to declarations of good behaviour. The other dimension of the obligation imposed by Article 35 is the prohibition of every act involving violation or intrusion into the fundamental rights of the person.

The right to a private life is safeguarded by Article 8.1 **ECHR**, which also constitutes part of domestic law as a result of Ratification Law 39/62.

In Cyprus the provisions of Article 13 **ECHR** constitute part of the domestic law; they safeguard the right of granting effective remedy for the violation of the rights set forth in the European **Convention** on Human Rights (which to a great extent coincide with the rights safeguarded by Part II of the Constitution) by a competent court.

The Constitutional Court therefore concluded that the violation of the above two rights gives a right to legal protection through recourse to the judicial process for the granting of remedies provided by Law. This conclusion is consonant with the principle of law that where there is a wrong there is a remedy. Deviation from this principle constitutes an anomaly.

As regards the assessment of damages, the guiding principle is that of equitable compensation. Distress, grief, pain, loss of opportunity of employment, feelings of injustice, pain and suffering constitute acceptable heads of damage. The efficient application of human rights, dictated by Article 35 of the Constitution, imposes the award of compensation to the victim of the violation for any damage caused to his person, as a natural and social being. The amount of £ 5,000 which was awarded to the respondent is considered as just and in all respects equitable compensation for the consequences of the violation of his aforementioned rights.

Languages:

Greek.

CYP-1995-C-001 22-05-1995 8656 / Larkos v. Attorney-General of the Republic

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 22-05-1995 / **e)** 8656 / **f)** / Larkos v. Attorney-General of the Republic / **g)** (1995) 1 *C.L.R.* 510 / **h)** *Yearbook of the European **Convention** on Human Rights*, 1999, p. 88.

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.16 **General Principles** - Proportionality.
5.2.2 **Fundamental Rights** - Equality - Criteria of distinction.
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.
5.3.39 **Fundamental Rights** - Civil and political rights - Right to property.

Keywords of the alphabetical index:

House, lease / Discrimination, justification / Legitimate aim, action / Tenant, capacity, rights.

Headnotes:

Difference in treatment is discriminatory if it has no objective and reasonable justification.

Summary:

Article 28.1 of the Constitution safeguards the right of equality and Article 28.2 safeguards the enjoyment of all the rights and liberties provided for in the Constitution without any direct or indirect discrimination. Furthermore Article 8 **ECHR** safeguards the right to respect for private and family life and Article 14 **ECHR** prohibits discrimination.

The appellant was a retired civil servant. In May 1967 he rented a house from the Government under the terms of a tenancy agreement which had many of the features of a typical landlord-tenant agreement for the lease of property. On 3 December 1986 the Ministry of Finance, his employer, gave him notice to quit the property by 30 April 1987. The appellant refused to do so. He claimed that he was a protected tenant within the meaning of the Rent Control Law 1983. Following his refusal the Government sued the appellant before the District Court of Nicosia and claimed his eviction from the premises. The appellant contended that he was protected by the Rent Control Law 1983 and thus the District Court lacked jurisdiction. The District Court ruled against the appellant. It held that the Government was not bound by the above law. It further held that the appellant was in unlawful possession of the premises after the termination of the tenancy and ordered him to vacate the premises.

The appellant lodged an appeal against the above decision before the Supreme Court. He invoked Article 28 of the Constitution and Article 14 **ECHR** in conjunction with Article 1 Protocol 1 **ECHR** which safeguards the right to respect of property. He contended that his undisputed capacity as tenant of the premises constituted a species of property. He invited the Supreme Court to hold that he was protected by the above law because to hold otherwise would have amounted to unequal treatment in relation to his rights, as a protected tenant, which constitute property. Regarding Article 28 of the Constitution the appellant contended that since the Government enjoyed the benefits of the above Law as a tenant it would have constituted a violation of the principle of equality had the Law relieved them from the obligations of the landlord as prescribed by the Law in question.

The Supreme Court rejected the contentions of the appellant. By means of its decision, dated 22 May 1995, it held that Article 14 **ECHR** in conjunction with Article 1 Protocol 1 **ECHR** had not been violated because the appellant did not satisfy the prerequisite of being a protected tenant. It further held that the principle of equality which is safeguarded by Article 28 of the Constitution was not violated because under the Rent Control Law it was possible for the Government to be "a tenant" without, at the same time, being considered as a "landlord".

Supplementary information:

The appellant lodged an application against the above decision of the Supreme Court with the European Commission on Human Rights on 21 November 1995. The Commission declared the application admissible. It adopted a report in which it expressed the unanimous opinion that there had been a violation of Article 14 **ECHR** in conjunction with Article 8 **ECHR** and that it was not necessary to examine whether there had been a violation of Article 14 **ECHR** in conjunction with Article 1 Protocol 1 **ECHR**.

The Cypriot Government referred the case to the European Court on Human Rights on 1 November 1998.

The appellant complained that as a Government tenant living in an area regulated by the Rent Control Law 1983 he had been unlawfully discriminated against in the enjoyment of his right to respect for his home. He maintained that, unlike a private tenant living in accommodation in such an area rented from a private landlord, he was not protected from eviction at the end of his lease. He alleged a breach of Article 14 **ECHR**

in conjunction with both Article 8 **ECHR** and Article 1 Protocol 1 **ECHR**.

The Court concluded that there had been a violation of Article 14 **ECHR** taken together with Article 8 **ECHR**. It recalled that in accordance with its established case-law a difference in treatment is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

While it accepted that public interest considerations may justify treating differently persons in a relatively similar situation, the Court noted that the Government had not adduced any preponderant interest which would warrant the withdrawal from the appellant of the protection accorded to other tenants under the 1983 Law. As to the Government's contention that they could not be equated to a private landlord when disposing of State property, the Court recalled that the authorities had leased the house to the appellant acting as a party to a private-law transaction. It also observed that a decision not to extend the protection of the 1983 Law to Government tenants living side-by-side with tenants in privately-owned dwellings in a regulated area requires specific justification, more so since the Government are themselves protected by that Law when renting property from private individuals. For these reasons the Court concluded that the Government had not adduced any reasonable and objective justification for treating the applicant differently.

Cross-references:

European Court of Human Rights, *Larkos v. Cyprus*, Reports 1999-I.

Languages:

Greek, English.

CYP-1995-2-002 29-11-1994 1912

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 29-11-1994 / **e)** 1912 / **f)** / **g)** / **h)** .

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
4.7.1 **Institutions** - Judicial bodies - Jurisdiction.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.

Headnotes:

A previous judgment and the expression of views by a judge does not necessarily prejudge his opinion on constitutional and legal matters in a later judgment, especially in the case of judges of the Supreme Court, and it is not an impediment for the same judge to try a case between the same or other litigants in which the same legal point is raised.

Summary:

The case concerned an application for the exemption of a judge from the composition of the Court of Appeal when he had previously issued a judgment as a judge of first instance in another case on the same legal point which was raised on appeal.

The right to a fair trial is safeguarded by Article 30.2 of the Constitution and by Article 6.1 **ECHR**. Cyprus case-law coincides with the case-law of the European **Convention** on Human Rights on the matter.

Languages:

Greek.

CZE-2000-2-013 29-05-2000 IV. US 615/99 Criminal proceeding

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 29-05-2000 / **e)** IV. US 615/99 / **f)** Criminal proceeding / **g)** / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.1.1.3 **Fundamental Rights** - General questions - Entitlement to rights - Foreigners.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.
5.3.13.15 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Impartiality.
5.3.13.22 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Presumption of innocence.
5.3.13.27 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to counsel.

Keywords of the alphabetical index:

Pre-trial, investigator, conduct / Lawyer, appointment, consent.

Headnotes:

Even though criminal proceedings are subdivided into several phases, none of these phases may be considered in isolation. If the pre-trial proceedings, for example, suffer from serious irregularities, then proceedings before the trial court, if they fail to remedy these irregularities defect either at all or in a suitable manner, cannot fulfil the requirements of an impartial and fair trial in the sense of Article 36.1 of the Charter of Fundamental Rights and Basic Freedoms and Article 6.1 **ECHR**.

Summary:

The complainant was a Russian national alleged to have committed fraud by taking advantage of a bank clerical error in his favour and withdrawing a large sum to which he was not entitled. He was found guilty and his appeal was turned down. He objected that the conduct of the investigator in the pre-trial phase and subsequent court proceedings based thereupon violated, among others, his constitutional right to counsel and the presumption of innocence.

The investigator's improper conduct was demonstrated by an assertion he wrote in the official report to the effect that he would not consider reliable the testimony of any Russian (the nationality of the complainant). Further, the investigator did not allow the complainant his choice of counsel, as required by the Criminal Procedure Code, but appointed one for him without his consent. The quality of defence by counsel appointed in such a manner was apparent from the fact that the counsel came late for the questioning of the complainant and did not pose a single question. Also, the complainant was not informed, as required by the Act on Pre-Trial Custody, that he had the right to contact his national diplomatic representative.

In his report the investigator also pre-empted a conclusion (guilt) which resided solely within the competence of the courts, which means the complainant was considered guilty prior to being found guilty by a final court judgment.

The trial court ignored the objections of the complainant's counsel (chosen subsequently by the complainant) to these pre-trial irregularities and the request that the investigator in question be excluded on the ground that he was biased.

Languages:

Czech.

CZE-2000-2-010 02-05-2000 I. US 326/99 Residence on the territory of the Czech Republic

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 02-05-2000 / **e)** I. US 326/99 / **f)** Residence on the territory of the Czech Republic / **g)** / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.1.4.6 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Civil and Political Rights of 1966.
3.17 **General Principles** - Weighing of interests.
5.1.2.2 **Fundamental Rights** - General questions - Effects - Horizontal effects.
5.3.6 **Fundamental Rights** - Civil and political rights - Freedom of movement.

Keywords of the alphabetical index:

Residence, place of treatment / Housing, non-occupancy, eviction.

Headnotes:

Citizens have the right to reside anywhere within the territory of the Czech Republic, as well as abroad, without the exercise of this right being used to their detriment. The provisions of the Civil Code must therefore be interpreted so as to ensure that provisions of international human rights treaties, such as Article 2 Protocol 4 **ECHR** and Article 12.1 of the International Covenant of Civil and Political Rights, as well as constitutional texts, are respected.

Summary:

The complainant was an elderly woman suffering from illness. During the period from January 1996 until October 1997, she received treatment at a hospital in another city (the place where her son lived). The owners of the building in which she had a flat considered that her absence constituted grounds for terminating her lease and evicting her pursuant to § 711.1.d and 711.1.h of the Civil Code (residence lease can be terminated for failure to reside there). The trial and appellate courts, as they did not find serious grounds for her to be away (she could have had treatment in her city of residence), agreed and ordered her to vacate.

The Constitutional Court found a violation of the constitutional right to free movement anywhere within the country or abroad without the exercise of that right being used against a person. The Court disagreed with the finding of the ordinary courts that the complainant had no serious grounds for being away from her residence. As she had the right to choose her place of treatment, her decision to seek treatment in the city where her son lived was valid, especially in view of her advanced age and the need for family support.

The Court held that the ordinary court decisions violated the right to travel as guaranteed by Article 2 Protocol 4 **ECHR**, as well as Article 14 of the Covenant of Civil and Political Rights. It referred predominantly to the European **Convention** on Human Rights and the Covenant, as Article 10 of the Constitution makes human

rights treaties directly binding and requires courts to accord them precedence over statutes (such as the Civil Code).

Languages:

Czech.

CZE-2000-1-003 23-11-1999 Pl. US 28/98 Judicial review of disciplinary fines

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 23-11-1999 / **e)** Pl. US 28/98 / **f)** Judicial review of disciplinary fines / **g)** / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
4.10.6 **Institutions** - Public finances - Auditing bodies.
5.2 **Fundamental Rights** - Equality.
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, disciplinary, review by court / Criminal charge.

Headnotes:

The denial of judicial protection in matters concerning the judicial review of administrative acts is permissible in the cases laid down by law, but is not allowed when decisions affecting fundamental rights are concerned. To deny judicial protection in such cases constitutes a violation of Article 36.2 of the Charter of Fundamental Rights and Basic Freedoms, which provides that "Unless a law provides otherwise, a person who claims that her rights were curtailed by a decision of a public administrative authority may turn to a court for review of the legality of that decision. However, judicial review of decisions affecting the fundamental rights and basic freedoms listed in this Charter may not be removed from the jurisdiction of courts."

In the case of decisions imposing disciplinary fines, § 248.2.e of the Civil Procedure Code does not respect this guarantee because it denies the parties' right to have the decision of a public administrative organ reviewed by an independent and impartial court.

Summary:

The case was initiated by a complainant who had been fined 50 000 Kc by the Supreme Auditing Office ("the Office") for his failure to fulfil a duty placed upon him by that office, but which the complainant believed was not a duty imposed by law. After appealing the fine to the President of the Office, he brought a court action against it.

Citing § 248.2.e of the Civil Procedure Code ("the Code"), the court determined it had no jurisdiction and dismissed the action. § 248 of the Code enumerates the exceptions to the general jurisdiction of ordinary courts to review administrative actions, and § 248.2.e includes among the exceptions from this jurisdiction "administrative decisions of a preliminary or procedural nature and decisions imposing disciplinary fines".

The complainant submitted a constitutional complaint against this decision and at the same time requested that the Court annul that portion of § 248.2.e reading "decisions imposing disciplinary fines", arguing that it was in conflict with the right to judicial protection (Article 36.2 of the Charter of Fundamental Rights and Basic

Freedoms) and to a fair trial (Article 6.1 **ECHR**).

Disciplinary fines are used in criminal, civil and administrative procedures to assist in ensuring the smooth course of the proceedings and the co-operation of the parties. This is equally true in auditing matters, where such co-operation is crucial to the successful carrying out of an audit.

As a sign of judicial restraint, so as to minimise its intrusion into the jurisdiction of ordinary courts, the Constitutional Court refused to consider whether either the audit itself or the duties that the Office imposed in pursuance thereof were proper. It limited itself to the issue of denial of justice - in other words, whether the lack of judicial review in such matters violates the Constitution.

The Court held that the imposition of disciplinary fines is capable of infringing basic rights, with the implication that a provision excluding the review of the imposition of such fines constitutes a violation of the above-mentioned Article 36.2 of the Charter of Fundamental Rights and Basic Freedoms. The Court did not consider other basic rights that might also be affected by this provision, but limited itself to a finding that § 248.2.e violated the right to equality of rights before public authorities, as guaranteed by Article 1 of the Charter of Fundamental Rights and Basic Freedoms, and the right to judicial protection as guaranteed by Article 6.1 **ECHR**. Although Article 6.1 **ECHR** does not generally apply to administrative matters, it applies to those that can be categorised under the concept of "civil rights and duties" or "criminal charge". Disciplinary fines do not fall within the former category, as they concern public law "civic" duties, but they do come under the latter. It should be noted in this context that under the European **Convention** of Human Rights the concept of a "criminal charge" is not limited merely to procedures which the domestic law designates as criminal but also to accusations of unlawful activities. In this context, the question whether the measure is meant not merely to compensate, but also to serve as a preventive or repressive measure, must be considered, as must the severity of the measure. The Court concluded that disciplinary fines constitute sanctions for criminal conduct falling within the terms of Article 6.1 **ECHR**, so that § 248.2.e runs foul of Article 6.1 **ECHR** and is therefore unconstitutional.

Languages:

Czech.

CZE-1999-2-008

01-01-1998 | Pl. 29/98 (date incorr.) | US | The Right of Aliens to Judicial Review of Detention pending Deportation

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 01-01-1998 / **e)** Pl. US 29/98 (date incorr.) / **f)** The Right of Aliens to Judicial Review of Detention pending Deportation / **g)** / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

1.3.2.3 **Constitutional Justice** - Jurisdiction - Type of review - Abstract review.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
5.1.1.3 **Fundamental Rights** - General questions - Entitlement to rights - Foreigners.
5.3.5.1.2 **Fundamental Rights** - Civil and political rights - Individual liberty - Deprivation of liberty - Non-penal measures.
5.3.9 **Fundamental Rights** - Civil and political rights - Right of residence.
5.3.13.3.1 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts - *Habeas corpus*.

Keywords of the alphabetical index:

Alien, detention / Judicial review, meaning.

Headnotes:

Article 5.4 **ECHR** and Article 36.2 of the Charter of Fundamental Rights and Basic Freedoms (right to judicial review of administrative decisions) in conjunction with Article 8.2 of the Charter (guarantee that personal liberty may be restricted only in cases provided for by law) place upon the legislature, in all cases where an individual is deprived of personal liberty by state authorities, the duty to ensure that the case is subject to independent, effective judicial review. Hence, the inclusion of judicial review is an indispensable part of each and every statutory scheme regulating the deprivation of liberty and without which, due to conflict with the above-mentioned provisions of the European **Convention** of Human Rights and the Charter, the statutory scheme in question may not be sufficient.

Summary:

In a 1997 decision of the Alien and Border Police made pursuant to § 14.1.f of the Residence of Foreigners Act (which provision the Court declared unconstitutional in an unrelated 1998 judgment, see cross-references below), the complainant, a foreigner, was prohibited from residing in the Czech Republic for a total of ten years. Subsequently, pursuant to §§ 15.2.c and 15.3 of the Czech Police Act (which allows a foreigner to be taken into custody for up to 30 days "where there is reason to suppose that they are remaining in the Czech Republic without authorisation"), the complainant was taken into custody for 30 days for the purposes of establishing his identity so that a deportation proceeding could be initiated against him. He challenged this internment, first unsuccessfully before ordinary courts and then before the Constitutional Court, and in conjunction therewith he contested the constitutionality of §§ 15.2.c and 15.3.

This judgment was concerned exclusively with the abstract issue of the constitutionality of those provisions. The complainant's individual case was considered separately and subsequently.

The Court noted that the European Court of Human Rights has interpreted Article 5.4 **ECHR** as applying to all deprivations of liberty because the general aim of that provision is to provide effective control of the legality of that deprivation (*De Wilde Case*, see cross-references below).

In addition to Article 5.4 **ECHR**, Articles 8.2 and 36.2 of the Charter also apply to all deprivations of liberty.

In this regard, it is irrelevant how the statute in question designates a particular act; what is decisive is that the act of a state authority deprives a person of his liberty. The Court framed the issue as whether the provisions of the Civil Procedure Code concerning judicial review of administrative decisions can be considered to be judicial review in the sense meant by Article 5.4 **ECHR** and Article 36.2 of the Charter. It determined that they could not, as they do not meet the requirements contained in those articles concerning the speediness of such decisions. This is all the more obvious when the provisions of the Civil Procedure Code are compared with analogous statutory provisions concerning the taking of an accused into custody or the placement of a person into a medical institution without his consent.

In order to give the Parliament sufficient time to revise the relevant statutory provisions, the Court thus annulled § 15.2.c as of 31 May 2000. The Court decided not to annul § 15.3 as it related also to other provisions the constitutionality of which was not before the Court.

Cross-references:

The Constitutional Court annulled § 14.1.f of the Residence of Foreigners Act by its decision of 13.05.1998, Pl. ÚS 25/97 (*Bulletin* 1998/2 [CZE-1998-2-007]).

De Wilde, Ooms and Versyp v. Belgium, 18.06.1971, series A, no. 12; *Special Bulletin* ***ECHR*** [ECH-1971-S-001].

Languages:

Czech.

CZE-1999-1-002 26-01-1999 I. US 508/98 The right to be heard in the context of electoral disputes

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 26-01-1999 / **e)** I. US 508/98 / **f)** The right to be heard in the context of electoral disputes / **g)** / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.2.1.5 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - European **Convention** on Human Rights and non-constitutional domestic legal instruments.
3.17 **General Principles** - Weighing of interests.
4.9.9 **Institutions** - Elections and instruments of direct democracy - Voting procedures.
4.9.9.11 **Institutions** - Elections and instruments of direct democracy - Voting procedures - Announcement of results.
5.3.13.6 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to a hearing.
5.3.13.19 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Equality of arms.
5.3.29.1 **Fundamental Rights** - Civil and political rights - Right to participate in public affairs - Right to participate in political activity.
5.3.41.1 **Fundamental Rights** - Civil and political rights - Electoral rights - Right to vote.

Keywords of the alphabetical index:

Treaty on human rights, direct applicability / Election, unfair.

Headnotes:

In view of the fact that the Civil Procedure Code deprives courts, in proceedings on electoral complaints in local elections, of the power to hold an oral hearing, the court is obliged to decide itself on the conduct of the proceedings and can decide without the participation of the parties. Naturally, it could even go beyond the bounds set by statute and decide on the basis of Article 6.1 **ECHR** (requiring a fair, public hearing) which, under Article 10 of the Constitution, is directly binding and takes precedence over statutes. However, as the objective conditions which should guarantee the proper conduct of an election should be given more weight than particular individual rights, it was not necessary for the court to do so, especially in view of the fact that the oral hearing before the Constitutional Court fulfils the requirements of Article 6 **ECHR**.

Summary:

The outcome of the elections in a district of Prague was challenged by means of a complaint submitted to the municipal court against the issuance of a certificate of election to several candidates declared to have won seats. It was claimed that the election had been conducted in a manner that violated the law, namely that some voters received ballots that had already been filled out, and that it was manipulated in that the number of votes tabulated for each candidate did not correspond to the number actually cast for them. Further, when the municipal court requested documentation on the election in the possession of the relevant electoral committee, it was discovered that the relevant documents had been stolen by two persons impersonating police officers. Accordingly, the municipal court granted the complaint and declared the election invalid.

A constitutional complaint was filed by some of the winning candidates claiming a violation of the constitutional right to due process in that the municipal court did not include them as parties. Article 2001 of the Civil Procedure Code governs proceedings on this type of complaints and paragraph 1 thereof provides that the court shall make a decision without an oral hearing. In addition, the original paragraph 2 provided that only the petitioning person would be a party to the proceeding. This provision was annulled in 1996 by the Constitutional Court as it violated the right, under Article 38.2 of the Charter, of parties to the proceedings to be heard. Nonetheless, the Parliament had not as yet adopted a new provision granting rights to other interested persons to be a party.

The Constitutional Court determined that the trial court had decided correctly and had not violated the complainants' constitutional rights by refusing to grant them status as a party to the proceeding. First, the procedural code does not instruct it as to who is to be a party to the proceedings. In such a situation, it is true that the court could have granted the complainants status as parties by relying upon Article 6 **ECHR**, which, as is the case with all treaties on human rights binding on the Czech Republic, is directly binding and takes precedence over statutes. Nevertheless, the fact that the court did not make use of this possibility does not constitute a violation of the complainant's constitutional rights due to the fact that the court is allotted a very short time to decide the case and that objective conditions, which are meant to protect the due course of elections, are accorded more importance that individual electoral rights.

Languages:

Czech.

CZE-1997-3-009

14-10-1997 I. US 322/96 Repeated Conviction for the Criminal Offence of the Evasion of Military Service

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 14-10-1997 / **e)** I. US 322/96 / **f)** Repeated Conviction for the Criminal Offence of the Evasion of Military Service / **g)** / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.2.1.2 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - Treaties and legislative acts.
2.3.2 **Sources of Constitutional Law** - Techniques of review - Concept of constitutionality dependent on a specified interpretation.
5.3.14 **Fundamental Rights** - Civil and political rights - *Ne bis in idem*.
5.3.26 **Fundamental Rights** - Civil and political rights - National service.

Keywords of the alphabetical index:

Offence, criminal, definition / Military service, evasion / Norm, unconstitutional application / Jehovah's witness, military service.

Headnotes:

If a person has already once been convicted, under § 269 of the Criminal Code, of the criminal offence of failure to report for military service with the intention of permanently evading it, to convict him a second time under the same section of the Criminal Code constitutes a violation of the principle *ne bis in idem*, as laid down both in Article 40.5 of the Charter of Fundamental Rights and Basic Freedoms and Article 4.1 Protocol 7 **ECHR**.

As the violation of the complainant’s fundamental rights occurred in principle due to incorrect application of

the relevant legal norms, in particular the Criminal Procedure Code, and not to any constitutional defect in the norm itself, there is no reason to initiate a procedure for abstract review of the constitutionality of § 269 of the Criminal Code.

Summary:

Seeing it as contrary to his religious obligations, the complainant, a Jehovah's Witness, refused to perform either the prescribed military service or an alternative community service. Consequently, he was convicted under § 269 of the Criminal Code for the failure to perform military service with the intention of permanently evading it and given a twelve month suspended sentence. The following year he received a second call-up order, which he ignored as well. For failing to respond he was convicted a second time of a criminal act under § 269 of the Criminal Code, sentenced to an eleven month unconditional prison term, and ordered to serve the first conditional sentence as well.

Citing the first ruling by the Constitutional Court on this issue (see below under cross-references), the Minister of Justice suspended the complainant's service of his time in prison and lodged an application with the Supreme Court for revision of the law, asking it to hold that a second such conviction, being contrary to the constitutional principle *ne bis in idem*, also violates the statutory equivalent of this principle, found in the Criminal Code. The Supreme Court refused to make such a finding and reaffirmed its view that the complainant had committed two separate, punishable criminal acts. In expressing this view Supreme Court stressed its continued adherence to its long-held criminal law principles to the effect that:

1. for a defendant to have the same intention does not mean his act is the same; and

2. the dividing line between one criminal act and another is at the issuance of an indictment - if the person persists in his behaviour after that date his conduct counts as a further criminal act.

The Supreme Court did, nonetheless, overturn the second conviction and return the case to the trial court, suggesting that it consider whether the Act on Civilian Service gave sufficient opportunity for one who objects to military service on grounds of conscience to assert his right under Article 15.3 of the Charter of Fundamental Rights and Basic Freedoms not to be compelled to perform military service. In addition, it instructed the trial court to give consideration to the circumstances of and grounds for the complainant's second refusal, so as to determine whether, due to the level of danger the act presents for society and to the prescribed duration of military service, the previous conviction was sufficient to make a second prosecution inappropriate. In its re-examination of the case, the trial court did not deal with these matters; rather, it convicted the complainant again but decided not to impose any punishment.

The complainant then filed a constitutional complaint against this last decision. In addition to reaffirming its position expressed on three previous occasions, the Constitutional Court pointed out that, since the *ne bis in idem* principle is also laid down in Article 4.1 Protocol 7 **ECHR**, it is directly binding and overrides statutes, so that the ordinary courts should have applied it directly. In addition, the Constitutional Court refused the proposal to initiate an abstract review proceeding in relation to § 269 of the Criminal Code, as it saw no grounds for declaring it unconstitutional. The problem in this case was rather that the ordinary courts had interpreted this provision in an unconstitutional manner.

Cross-references:

The Constitutional Court has on three previous occasions dealt with essentially the same issue and come to the same conclusion, that a second prosecution in such circumstances violates the constitutional principle *ne bis in idem*. See judgment IV. ÚS 81/95 of 18 September 1995 (reported in the C*onstitutional Court's Collection of Judgments and Rulings* («Collection») at Vol. 4, no. 50), which was reported in the *Bulletin* 1995/3 [CZE-1995-3-010]. See also judgment I. ÚS 184/96 of 20 March 1997 (reported in the *Collection* at Vol. 7, no. 32), and judgment no. IV. ÚS 82/97 of 28 August 1997.

Languages:

Czech.

CZE-1997-2-003	30-06-1997	IV. 98/97	US	Societal interest justifying a criminal conviction must be real, not fictional

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 30-06-1997 / **e)** IV. US 98/97 / **f)** Societal interest justifying a criminal conviction must be real, not fictional / **g)** / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.2.2 **Sources of Constitutional Law** - Categories - Unwritten rules - General principles of law.
2.3.6 **Sources of Constitutional Law** - Techniques of review - Historical interpretation.
3.1 **General Principles** - Sovereignty.
3.13 **General Principles** - Legality.

Keywords of the alphabetical index:

International law, generally recognised norm / Evidence, historical event, judicial notice / Offence, criminal, element.

Headnotes:

In relation to the criminal offences against the Republic under Chapter One of the Special Part (Offences) of the Criminal Code no. 140/1961 Sb., the dissimulated interest of the governing party oligarchy, which employed all instruments of totalitarian power in relation to the «remainder of the population», was enshrined in the law as the object of these criminal offences. The complainant's acts, which were qualified as the criminal offence of high treason pursuant to § 91 of the Criminal Code and as the criminal offence of espionage pursuant to § 105 of the Criminal Code, were thus at the very most only capable of calling in question the interests of that ruling oligarchy. Moreover, the existence of the sovereign State during the period in question was merely a fiction, since the Czechoslovak State, presenting itself as a totalitarian system in its internal relations, was actually nothing but a mere servant of a foreign power occupying its territory.

If, on the one hand, it is permissible, under Article 7.2 **ECHR**, to convict and punish a person even for offences, the material elements of which are not specifically defined in the Criminal Code, either imprecisely or not at all, then, on the other hand, it is hardly possible to convict and punish persons whose conduct during the period of Soviet control exhibited some formal aspects of criminal offences against the foundations and the security of the Republic, albeit under conditions where the actual object of the criminal offence was lacking.

Summary:

In a judgement of the Higher Military Tribunal at Príbram on 30 November 1978, confirmed by resolution of the Supreme Court of the cSSR of 15 March 1979, the complainant, a Czechoslovak citizen and member of the Czechoslovak Army, was found guilty of having abused his position in the years 1969-1976 during his mission at home and abroad with the intention of impairing the defensive capacity of the Republic by disclosing to a foreign intelligence service facts bearing the character of State secrets of special importance and, in co-operation with a foreign power, of having hindered and even disabled the fulfilment of some tasks in areas of especially important interest to the Czechoslovak Republic. Thus he was found to have committed the criminal offences of espionage and high treason according to § 105 paragraphs 1 and 3, lit. b. and d. and § 91 of the Criminal Code then in force, and he was sentenced to 25 years in prison.

The complainant's petition for a re-examination proceeding pursuant to Act no. 119/1990 Sb. on Judicial Rehabilitation, was rejected on the merits by resolution of the Regional Court in ceské Budejovice (Tábor branch), of 16 April 1994, which was confirmed by resolution of the Superior Court in Prague of 28 July 1994.

The Minister of Justice submitted a complaint claiming a violation of the law by the conviction. In its ruling of 23 January 1997, the Supreme Court rejected the complaint on the merits, reasoning in particular that the task of courts does not consist in its particular assessment of the political and other circumstances and consequences of the invasion of Czechoslovakia by the armies of the five Warsaw Pact States on 21 August 1968 and its occupation by the Soviet soldiers during the following 23 years. According to the Supreme Court, courts have no way of supporting their decisions on the basis of mere political and historical views on those events, especially in the light of the fact that Czechoslovakia remained an independent State, recognised as one by other governments. Furthermore, even after the changes brought about after 1989, the legal order presumes a factual and legal continuity with the previous regime, unless specified otherwise in a relevant statute, as is declared in § 2 of Act no. 480/1991 Sb. on the Era of Soviet control. The complainant's conduct does not qualify as an expression of resistance against the previous regime, as it did not exhibit any features other than those of the criminal offences. Such resistance should have been unambiguously manifested by some form of struggle against the regime as meant by Act no. 198/1993 Sb. on the Unlawfulness of the Communist Regime and on Resistance to it. Moreover, one cannot speak of resistance with regard to the present situation because, whereas the complainant did some harm to the bodies of the government of that period, at the same time he enjoyed its considerable trust and profited both from that regime and from his co-operation with a foreign power.

In the opinion of the Constitutional Court, the primary duty of the Supreme Court was to consider the issue whether the basic features of a criminal offence had been present in this case, in particular, the object of the criminal offence. The object, namely, is one of the features of every criminal offence, so that an act directed against an interest the protection of which is incapable of being the object of a criminal offence cannot be punishable. This case concerns the issue that Article 7 **ECHR** («**Convention**») seems not to have been given any thought by authorities active in the criminal process, for it was never even applied in adjudging the criminality of conduct engaged in during the period of Soviet control. In particular, Article 7.1 **ECHR** provides that no one may be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed; Article 7.2 **ECHR**, however, states that this Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations. The embodiment of the binding nature of these principles in the **Convention** indicates the **Convention**'s quite evident bent towards tying the interpretation of what is or can be law and, on the contrary, what is not and can not be law, to the existence of a certain value order founded on the principle of consensus. Norms cannot regulate, prescribe, or order «out of thin air», rather they build upon an already existing hinterland of values. Norms share a common base with values to the extent that, together with them, they form the normative and value order of a given society, serving as its constitutive, establishing, and organising principle. Therefore, all this means that if, on the one hand, it is permissible under Article 7 **ECHR** to convict and punish a person for an offence, when the material elements of that offence are not at all or insufficiently defined in the criminal code, it is hardly possible, on the other hand, to convict and punish persons whose conduct during the era of Soviet control exhibited some formal features of criminal offences against the foundations and the safety of the Republic, albeit under conditions in which, beyond any doubt, the actual object of the criminal offence was lacking.

In relation to criminal offences against the Republic under Chapter One of the Special Part (Offences) of the Criminal Code, no. 140/1961 Sb., the dissimulated interest of the ruling party oligarchy, employing all instruments of totalitarian power against the «remainder of the population», was enshrined in the law as the object of such criminal offences. The behaviour of the complainant, irrespective of the reasons motivating it, was capable at the very most of calling in question the interests of that ruling oligarchy. The Czech Supreme Court reasoned that the complainant's conduct did not exhibit the characteristics of resistance as meant by Act no. 198/1993 Sb., on the Unlawfulness of the Communist Regime and Resistance to It. In the opinion of the Constitutional Court, however, this argument misses the point of the matter, since the Court must decide not whether the complainant, by his conduct, offered resistance to the totalitarian regime, but whether his conduct can be qualified as a criminal offence. It is the opinion of the Constitutional Court that, in the light of the above reasons, the complainant's conduct cannot be qualified as such, and therefore it is also irrelevant which group of inhabitants the complainant belonged to and whether he may have profited from his membership in such a group. If there are general legal principles which are legally binding and which reflect in essence the value order of the nations in question, then the legal orders of individual States, as well as the application of law within them, must correspond with these principles. In this case, therefore, it is not merely a

matter of basing decisions on political and historical opinions, but also on assessments and interpretations that no court can avoid if it wishes to fulfil its duty laid down in Articles 90 and 95.1 of the Constitution.

The fact that the Supreme Court of the Czech Republic rejected on the merits the complaint of an infringement of the law submitted by the Minister of Justice, while failing in its obligation to examine the infringement of law in the light of the above-stated criteria, resulted in the violation of Articles 90 and 95.1 of the Constitution, as well as of Article 36.1 of the Charter of Fundamental Rights and Basic Freedoms. Therefore, the Constitutional Court granted the constitutional complaint by annulling the contested judgement.

Languages:

Czech.

CZE-1996-3-009 24-09-1996 Pl. 18/96 US The Parties' Right to a Hearing in Judicial Review of Administrative Decisions

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 24-09-1996 / **e)** Pl. US 18/96 / **f)** The Parties' Right to a Hearing in Judicial Review of Administrative Decisions / **g)** / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

1.6.5.5 **Constitutional Justice** - Effects - Temporal effect - Postponement of temporal effect.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.13.6 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to a hearing.
5.3.13.7 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to participate in the administration of justice.
5.3.13.9 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Public hearings.

Keywords of the alphabetical index:

Civil procedure.

Headnotes:

If senates of local courts at all levels are the first and only independent tribunal at which the right for court protection can be sought, then § 250.f of the Code of Civil Procedures which, given this organisation of administrative justice, permits that the proceedings may be excluded at the sole discretion of the court irrespective of the opinion of the participants on the necessity or requirement for a hearing, and where such an opinion is not legally significant, is in contravention of the provisions contained in Article 38.2 of the Charter of Fundamental Rights and Basic Freedoms and Article 6.1 **ECHR**.

Summary:

Pursuant to § 250 of the Code of Civil Procedure (CCP), the court may, without holding proceedings, pass a verdict with respect to a simple case, in particular, if it is beyond doubt that the administrative body acted on the basis of correctly ascertained facts of the case and if only the legal side of the case is examined. The court takes the same course of action if the contested decision cannot be examined due to incomprehensible

or insufficient reasons.

The unconstitutionality of § 250 CCP not only ensues from the analysis of this provision as such, but also, in particular, from the essence of the existing regulations of administrative justice in the Czech Republic. Administrative justice in the Czech Republic is formed as a one-instance procedure without the possibility of regular or exceptional remedies. Administrative senates of the local courts at all levels are, therefore, the first and only court tribunals at which the right for court protection can be sought. If the valid regulations of law, namely § 250.f CCP, permit, given such an organisation of administrative justice, that the proceedings may be excluded at the sole discretion of the court irrespective of the opinion of the participants on the necessity or requirement for hearing, and where such an opinion is legally insignificant, then this is not in compliance with the provisions of Article 38.2 of the Charter of Fundamental Rights and Freedoms and Article 6.1 **ECHR**.

Nothing could alter the Constitutional Court's opinion, not even the fact that in administrative justice, the courts only examine the legality of the decision and are bound by the facts of a case as ascertained by administrative bodies. In administrative justice, it is impossible to divert from the facts of a case. In other words, the court cannot consider the legality of the decision without considering the facts. This, *inter alia*, ensues from § 250.j.2 CCP, which charges the court to examine whether the finding of the facts on which the administrative decision was based contradicts the contents of the files. If it does, the court is obliged to cancel the contested administrative decision and return the case to the administrative body for further proceedings. During such evaluation and examination, direct participation of the disputing parties can only be beneficial. In this respect, a reference can be made to the decision of the European Court for Human Rights of 1994 in the matter Fredin (Series A-283). In this case, and in spite of the State's objection that the Supreme Administrative Court could annul the decision but not replace it with another decision and thus decide in the matter only on the basis of documents and without hearing the plaintiff, the Court clearly stated that if the Supreme Administrative Court is the first and the only court tribunal which made decisions in the matter, then non-public proceedings are in contravention of Article 6.1 **ECHR**. The Court also concluded that the evaluation of a legal issue is impossible without referring to relevant facts.

The publicity of the proceedings protects the parties against secret justice which is out of the public's control and is one of the means for the creation and preservation of trust in courts (Decision of the European Court in Pretto case, 1983, Series A-71). From the constitutional point of view, the proceedings do not have to be ordered if the parties expressly or silently waiver this right (see similarly the decision of the European Court for Human rights in Hakansson and Sturesson case, 1990, Series A-171), for instance, in a manner regulated by Act no. 182/1993, on Constitutional Court, § 44.2.

The Plenum of the Constitutional Court holds the same view as that expressed by the Senate at the end of its resolution on suspension of the proceedings, viz., that non-public proceedings regarding the matter and the absence of any remedy against the decision passed in such proceedings deprives the participant of the possibility to demand the observance of the principles of fair procedure, such as, for instance, raising objections against a biased judge, requesting interpretation into his or her mother tongue, etc. In this connection, the Plenum of the Constitutional Court only notes that this constitutional-law problem arises in non-public proceedings of other fields of justice too.

On the other hand, the Constitutional Court is aware of the fact that, regarding the observance of fundamental human rights, the most problematic is the existing system of administrative justice in the Czech Republic, where the non-existence of an independent body to decide on the «right itself», in combination with the limited jurisdiction of courts, is in contravention of the obligations arising for the Czech Republic from the provisions of Article 6.1 **ECHR**. The Constitutional Court is fully aware of the fact that senates of local courts, as they are today, can hardly become such bodies. The Constitutional Court does not believe either that the current situation could be rectified by cancelling § 250.f or any other single provision of the CCP. The Court also knows that the regulation will probably have to be positive: the annulment of the administrative decision without proceedings would be upheld in cases which cannot be examined or lack reasoning, as well as of the proceedings held in this manner with express, or otherwise communicated, agreement of the participants. Last but not least, it is understood that the annulment of the contested provision will put a heavier load on the court even if accompanied by the aforementioned positive regulation.

However, in the opinion of the Constitutional Court, all the above mentioned problems and circumstances are

just reasons for the suspension of the applicability of the verdict on the cancellation of § 250.f CCP. Nonetheless, the basic requirement is that, for the above given reasons, this provision be repealed as non-constitutional. Therefore, the Constitutional Court cancelled § 250.f CCP as of 1 May 1997.

Languages:

Czech.

DEN-2002-3-001 21-05-2002 II 222/2001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 21-05-2002 / **e)** II 222/2001 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen* 2002, 1789; CODICES (Danish).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.19 **General Principles** - Margin of appreciation.
5.2.2.3 **Fundamental Rights** - Equality - Criteria of distinction - National or ethnic origin.
5.2.2.4 **Fundamental Rights** - Equality - Criteria of distinction - Citizenship or nationality.
5.3.39.3 **Fundamental Rights** - Civil and political rights - Right to property - Other limitations.

Keywords of the alphabetical index:

Licence, granting, requirements / Transport, commercial.

Headnotes:

A requirement of citizenship as a condition for receiving a licence for the commercial transportation of persons (taxi driving) was not contrary to the European **Convention** on Human Rights, the International **Convention** on the Elimination of All Forms of Racial Discrimination or the International Covenant on Civil and Political Rights.

Summary:

In 1997 an amendment of the act regulating taxi driving was passed, which included a citizenship requirement as a condition for receiving a licence for the commercial transporting of passengers. This requirement was revoked in 1999. In June 1998 the Copenhagen Taxi Board advertised some vacant taxi licences. The plaintiff, who was a Pakistani citizen, and who at that time already held six taxi licences, was among the persons who were not granted a new licence. The plaintiff did not receive his seventh licence until June 1999. The plaintiff instituted legal proceedings against the Ministry of Transportation claiming that the application of the citizenship requirement in the act regulating taxi driving in relation to him was contrary to Article 14 **ECHR** read in conjunction with Article 1 Protocol 1 **ECHR**, as well as the International **Convention** on the Elimination of All Forms of Racial Discrimination, Article 26 of the International Covenant on Civil and Political Rights and Article 2.2 of the International Covenant on Economic, Social and Cultural Rights read in conjunction with Article 6 of that Covenant. Furthermore the plaintiff claimed before the High Court for Western Denmark that the provision on citizenship was contrary to Section 74 of the Constitution governing the free choice of occupation.

The High Court found that the requirement of citizenship as a condition for undertaking the commercial transportation of passengers gave rise to different treatment of persons legally residing in Denmark without having Danish citizenship. The grounds given by the legislator were not sufficient to justify such different treatment. Furthermore, the High Court found that the applicant's six taxi licences were covered by the

concept of property in Article 1 Protocol 1 **ECHR**. It was apparent from the act regulating taxi driving that the plaintiff would no longer be able to exercise his commercial activity after 1 January 2005 if he was not able to obtain Danish citizenship. The High Court found that the application of the citizenship requirement in relation to the plaintiff was contrary to Article 1 Protocol 1 **ECHR** as well as Article 14 **ECHR** read in conjunction with Article 1 Protocol 1 **ECHR**. Furthermore the High Court concluded that the plaintiff would have obtained one more taxi licence in 1998 and that it was only due to the requirement of citizenship that he had not obtained this licence until 22 June 1999. In this respect the High Court found that the plaintiff had suffered an economic loss for which the defendant was liable for damages.

Before the Supreme Court the applicant only claimed that the application of the provision on citizenship was contrary to Article 14 **ECHR** read in conjunction with Article 1 Protocol 1 **ECHR**.

The Supreme Court stated that the application of Article 14 **ECHR** is contingent on the disputed discrimination concerning the enjoyment of the rights and freedoms recognised in the European **Convention** on Human Rights. The Supreme Court found that the plaintiff had no legal claim for being awarded another licence. According to the case law of the European Court of Human Rights the possibility of being granted a public licence to carry out commercial activities is not a right protected under Article 1 Protocol 1 **ECHR**. Therefore the Supreme Court found that the plaintiff's possibility of being awarded an additional licence in 1998 was not protected by Article 1 Protocol 1 **ECHR**. Accordingly the Supreme Court found that the application of the citizenship requirement in relation to the plaintiff was not contrary to Article 14 **ECHR** read in conjunction with Article 1 Protocol 1 **ECHR**.

Furthermore the Supreme Court found that differential treatment on the grounds of citizenship was not in itself a violation of Article 5 of the International **Convention** on the Elimination of All Forms of Racial Discrimination and that Article 26 of the International Covenant on Civil and Political Rights had to be interpreted in the same manner. The Supreme Court held that the insertion of the requirement for citizenship was motivated by a wish to consider stated legitimate aims and that differential treatment on the ground of national origin was unintentional. Furthermore the Supreme Court found that the Parliament *(Folketinget)* enjoyed a certain margin of appreciation in deciding whether a requirement for citizenship was appropriate and was reasonable in relation to the aims pursued. Thus the application of the citizenship requirement was not contrary to Article 5 or Article 26.

Languages:

Danish.

DEN-1999-3-006

06-05-1999 66/1998

a) Denmark / **b)** Supreme Court / **c)** / **d)** 06-05-1999 / **e)** 66/1998 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1999, 1316; CODICES (Danish).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
5.3.27 **Fundamental Rights** - Civil and political rights - Freedom of association.
5.4.11 **Fundamental Rights** - Economic, social and cultural rights - Freedom of trade unions.

Keywords of the alphabetical index:

Closed shop agreement / Trade union, membership, compulsory / Labour market.

Headnotes:

A company cannot dismiss an employee for not belonging to a particular trade union if a closed shop agreement is concluded after the appointment of the employee, and if the employee is not a member of the concerned trade union at the time of the agreement.

Summary:

The appellant had in September 1989 been hired by a company which in August 1990 concluded a closed shop agreement with a Danish trade union. The appellant joined the trade union in October 1990 but was expelled in January 1996. As a consequence, the appellant was dismissed from his job. The appellant, relying on the Freedom of Association Act taken together with the case law of the European Court of Human Rights concerning the interpretation of Article 11 **ECHR**, claimed that the dismissal was unlawful.

The Supreme Court first addressed the general question of the compatibility of closed shop agreements with Article 11 **ECHR**. The Court noted that the European Court of Human Rights had not taken a position on closed shop agreements as such in the *Young, James and Webster v. United Kingdom* [ECH-1981-S-002] and the *Sigudur A. Sigurjønsson v. Iceland* [ECH-1993-S-005] judgments (see below under Cross-references), nor in its subsequent case law.

The Supreme Court then noted that the Freedom of Association Act was enacted in 1982 in order to protect the freedom from compelled membership of certain associations following the interpretation of the European Court of Human Rights of Article 11 **ECHR** in the *Young, James and Webster v. United Kingdom* judgment [ECH-1981-S-002]. Pursuant to § 2.1 of the Act, an employee cannot be dismissed for not being a member of a particular trade union nor for not being a member of any trade union. The Act contains, however, certain exemptions from this rule; that is:

1. if an employee at the time of his appointment knew that membership of a particular trade union or membership of some trade union is a condition for employment (§ 2.2) or

2. if an employee who is a member of a trade union is informed after his appointment that the membership is a condition for his continuous employment (§ 2.3).

After making a contextual interpretation of the provision, the majority of the Supreme Court (5 judges) concluded that § 2.3 of the Freedom of Association Act does not allow the dismissal of an employee for not belonging to a particular trade union if a closed shop agreement is concluded after the appointment of the employee, and if the employee is not a member of the concerned trade union at the time of the agreement. The Court thereby set aside a mutual procedural declaration on a contrary interpretation of the provision made before the Court by both parties. The majority further noted that its understanding of § 2.3 of the Act was the understanding most in line with the *Young, James and Webster v. United Kingdom* judgment [ECH-1981-S-002].

The dismissal of the appellant therefore contravened § 2.1 of the Freedom of Association Act. The company was thus ordered to pay compensation to the appellant.

In a dissenting opinion, the minority of the Supreme Court (4 judges) stated that as a result of the mutual procedural declaration, the parties had not further dealt with the question of the interpretation of § 2.3 before the Court. The minority further noted that the majority's interpretation of § 2.3 did not correspond well with the wording of the provision and the *travaux préparatoires*. The minority, therefore, did not find sufficient grounds for ruling that the dismissal contravened § 2.3 of the Freedom of Association Act. Thus, the minority voted in favour of the High Court decision to dismiss the appellant's claim.

Cross-references:

In this judgment the Supreme Court referred to the judgments of the European Court of Human Rights in *Young, James and Webster v. United Kingdom* (Series A no. 44), presented in précis form in *Special Bulletin - **ECHR*** [ECH-1981-S-002], and in *Sigudur A. Sigurjønsson v. Iceland* (Series A no. 264), presented in précis

form in *Special Bulletin* - ***ECHR*** [ECH-1993-S-005].

Languages:

Danish.

DEN-1999-2-004 06-01-1999 I 134/1997

a) Denmark / **b)** Supreme Court / **c)** / **d)** 06-01-1999 / **e)** I 134/1997 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1999, 560; CODICES (Danish).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.17 **General Principles** - Weighing of interests.
3.18 **General Principles** - General interest.
5.3.22 **Fundamental Rights** - Civil and political rights - Freedom of the written press.
5.3.31 **Fundamental Rights** - Civil and political rights - Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Defamation / Identity revealed / Public watchdog / Rumour, unverified.

Headnotes:

A newspaper's dissemination of a charge against a person, who could easily be identified, was held to be based on unverified rumours and therefore not justified in the public interest.

Summary:

In February 1996 a Danish newspaper, Jyllands-Posten, published a series of articles on various business transactions made by a Danish bank. The articles were based upon summaries of board meetings and other confidential material. On 20 February 1996 another Danish newspaper, *Det Fri Aktuelt*, published an article with the headline "Bank considers notifying the police" stating that the management of the bank had a presumption as to who had given the confidential material to Jyllands-Posten but that the management did not wish to reveal the identity of the person in question.

In the article certain information was given that would identify A, the person who was supposed to have given the confidential information, to anyone with slightest knowledge of the state of affairs of the bank. The article, in which it was also hinted that revenge against the bank was the reason for A's behaviour, thereby contained a defamation against A under Section 261.1 of the Criminal Code. The Supreme Court took into account that the rumour passed on was unverified, a fact which reduced the importance of the public interest in being informed about the matter. On this basis the Supreme Court unanimously concluded that the comprehensive freedom of speech, which is generally afforded the press in order to enable them to fulfil their role as "public watchdog", when weighed against A's interests, would not render the defamation unpunishable in accordance with Section 269.1 of the Criminal Code and Article 10 **ECHR**. The chief editor of *Det Fri Aktuelt*, having known that one of the journalists of the newspaper had sought to reveal the source of the information published in Jyllands-Posten, was found to share the responsibility for the content of the article under Section 13 of the Media Liability Act and therefore was required to pay a fine as well as compensation for damages.

Cross-references:

In decisions I 488/1995 (*Bulletin* 1997/1 [DEN-1997-1-001] and I 508/1997 (*Bulletin* 1999/1 [DEN-1999-1-001]

the Supreme Court also considered to what extent the freedom of expression of the press is guaranteed under Article 10 **ECHR**.

Languages:

Danish.

DEN-1996-1-001 16-11-1995 I 36/1995

a) Denmark / **b)** Supreme Court / **c)** / **d)** 16-11-1995 / **e)** I 36/1995 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1996, 234; CODICES (Danish).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.2.1.5 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - European **Convention** on Human Rights and non-constitutional domestic legal instruments.
5.3.5.1.3 **Fundamental Rights** - Civil and political rights - Individual liberty - Deprivation of liberty - Detention pending trial.
5.3.13.15 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Impartiality.
5.3.13.22 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Presumption of innocence.

Keywords of the alphabetical index:

Judge, acting / Criminal proceedings / Justice, appearance.

Headnotes:

The judgments of the district court (*byret*) and of the High Court (*Landsret*) in a criminal case were quashed and the case remitted for retrial before the district court because in the circumstances of the case an order for detention in custody based on an especially confirmed suspicion - made during the trial before the district court - disqualified the court from trying the case.

Summary:

A person charged with rape had been detained pending trial of the case before the court, as in the circumstances of the case there were specific reasons to believe that the accused would render difficult the prosecution of the case. The judge found that the detention could not be based on an especially confirmed suspicion.

During the trial before the district court, an order was made to maintain the detention, but now based on the establishment of an especially confirmed suspicion. At the time of this order, the court had examined the accused and six witnesses in the trial. The witness examination was not concluded, and counsel for the defence had not yet made his closing speech.

The accused claimed that the court had disqualified itself through the order for detention, and that the continued trial was an infringement of Article 6.1 **ECHR**.

The presuppositions for the rules on disqualification as declared by the legislator in the Danish Administration of Justice Act (*retsplejeloven*), and the relationship of these rules to detention pending trial, were expressed in

the preparatory works of an amendment to the Act in 1990. This amendment was caused by the decision of the European Court of Human rights in the *Hauschildt* case (*Special Bulletin **ECHR** [ECH-1989-S-001]). The preparatory works presupposed that no disqualification would arise pursuant to Article 6.1 **ECHR** caused by detentions based on an especially confirmed suspicion (not prior to, but) during the trial.*

*The Supreme Court stated that the present practice from the **Convention** bodies does not provide a basis for establishing that in all cases it will be compatible with the **Convention** provision that a judge participates in the adjudication of a case if he has ordered detention of the accused based on an especially confirmed suspicion during the trial.*

*The majority (three judges) of the Supreme Court found that, in the circumstances, the use of the provision on detention was suited to give the accused the impression that the question of guilt now had in fact been decided without his having had an opportunity to exercise his right of defence, cf. Articles 6.3.c and 6.3.d **ECHR**. Accordingly, these judges found that the case had presented circumstances which were suited to call in question the absolute impartiality of the court during the continued trial.*

The minority (two judges) found that, although the production of evidence was not completely concluded and counsel for the defence had not yet had an opportunity to make his closing speech, disqualification did not arise because by far the most important part of the production of evidence had been completed when the order was made.

The judgments of the district court and of the High Court were then quashed and the case was remitted for retrial.

Cross-references:

The judgments of the district court and of the High Court are reported in Ugeskrift for Retsvæsen (Danish Law Reports) 1994, 225 .

The decision refers to the Supreme Court order of 1 November 1989, reported in *Ugeskrift for Retsvæsen* 1990, 13, and to the judgment of the European Court of Human Rights of 24 May 1989 in the *Hauschildt* case (Series A no. 154), *Special Bulletin **ECHR** [ECH-1989-S-001].*

Languages:

Danish.

DEN-1986-S-001 24-10-1986 II 193/1985, 194/1985, 195/1985

a) Denmark / **b)** Supreme Court / **c)** / **d)** 24-10-1986 / **e)** II 193/1985, 194/1985, 195/1985 / **f)** / **g)** / **h)** *Ugeskrift for Retsvaesen*, 1986, 898.

Keywords of the Systematic Thesaurus:

1.3.4.1 **Constitutional Justice** - Jurisdiction - Types of litigation - Litigation in respect of fundamental rights and freedoms.
1.6.1 **Constitutional Justice** - Effects - Scope.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.2.1.5 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - European **Convention** on Human Rights and non-constitutional domestic legal instruments.
5.1.2.2 **Fundamental Rights** - General questions - Effects - Horizontal effects.
5.3.18 **Fundamental Rights** - Civil and political rights - Freedom of conscience.

5.3.27 **Fundamental Rights** - Civil and political rights - Freedom of association.
5.4.3 **Fundamental Rights** - Economic, social and cultural rights - Right to work.
5.4.11 **Fundamental Rights** - Economic, social and cultural rights - Freedom of trade unions.

Keywords of the alphabetical index:

Trade union, membership, change / Necessity, legal, justification.

Headnotes:

Eight bus drivers, who had terminated their membership of certain trade unions, were subsequently dismissed. Their constitutional rights did not render the dismissal invalid nor could Article 11 **ECHR** be applied directly. Under the Act granting Protection against Dismissal due to Trade Union Relations, however, the bus drivers were awarded compensation. However, the bus drivers were not entitled to be reinstated in their service.

Summary:

Eight bus drivers employed at the Greater Copenhagen Bus Service had terminated their membership of certain trade unions, which until then had represented all bus drivers employed at the bus company. The bus drivers had instead joined either Denmarks Free Trade Union or the Christian Unemployment Fund. This resulted in extensive strikes and blockades of the bus service by their colleagues and finally led to the dismissal of the eight bus drivers.

The plaintiffs - the eight bus drivers - were of the opinion that the dismissals conflicted with their constitutionally-protected rights of worship (Article 68 of the Constitution), choice of trade (Article 74 of the Constitution), and association (Article 75 of the Constitution) as well as the principle of access to employment in a suitable job, cf. Article 78 of the Constitution. They further referred to the principle of equal rights, the Act granting Protection against Dismissal due to Trade Union Relations, the Salaried Employee Act, and Article 11 **ECHR**.

The employer, the Greater Copenhagen Council, argued that the dismissal of the bus drivers was not due to the change in their trade union conditions but was solely a consequence of restrictions on the operation of the bus service in the metropolitan area. According to the Council, every other possible a verve had been explored to solve the conflict. The dismissal was in any case justified by legal necessity.

The Supreme Court stated that the Greater Copenhagen Council's decision could not be declared invalid pursuant to the paragraphs of the Constitution, referred to by the plaintiffs, or any other constitutional principles. The Supreme Court further stated that Article 11 **ECHR** could not be applied directly in this case. Instead, the dismissals had to be judged under the Act granting Protection against Dismissal due to Trade Union Relations, which had been adopted with the aim of fulfilling Denmark's obligations pursuant to Article 11 **ECHR**. The Supreme Court then went on to conclude that the dismissals were in contravention of the said Act as well as of the principle of equal rights. The bus drivers should therefore be granted compensation. The Act did not, however, contain any provisions pursuant to which the bus drivers could be reinstated in their jobs.

Supplementary information:

At the time of the judgment, Denmark was bound by the European **Convention** of Human Rights on the basis of international law. In 1992 the **Convention** was incorporated in Danish law.

Languages:

Danish.

EST-2004-1-004

06-01-2004 3-1-3-13-0: Criminal case on charges brought against Tiit Veeber under Articles 148.1.7, 166.1 and 143.1 of the Criminal Code

a) Estonia / **b)** Supreme Court / **c)** *En banc* / **d)** 06-01-2004 / **e)** 3-1-3-13-03 / **f)** Criminal case on charges brought against Tiit Veeber under Articles 148.1.7, 166.1 and 143.1 of the Criminal Code / **g)** *Riigi Teataja III* (Official Gazette), 2004, 4, 36 / **h)** http://www.nc.ee; CODICES (English, Estonian).

Keywords of the Systematic Thesaurus:

1.4.6 **Constitutional Justice** - Procedure - Grounds.
1.4.13 **Constitutional Justice** - Procedure - Re-opening of hearing.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
3.17 **General Principles** - Weighing of interests.
5.3.38.1 **Fundamental Rights** - Civil and political rights - Non-retrospective effect of law - Criminal law.

Keywords of the alphabetical index:

Proceedings, reopening, condition / European **Convention** on Human Rights, violation, ground for reopening proceedings.

Headnotes:

It has to be ascertained whether reopening proceedings is a necessary and appropriate remedy for a violation of a **Convention** right or a violation with a causal link to the former, found by the European Court of Human Rights. The reopening of proceedings would be justified only in a case of a continuing and serious violation and only where it is a remedy affecting the legal status of the person. The need to reopen judicial proceedings must be weighed against legal certainty and the possible infringement of other persons' rights in a new hearing of the matter.

The European **Convention** on Human Rights constitutes an inseparable part of the Estonian legal order, and under Article 14 of the Constitution, the guarantee of the rights and freedoms of the **Convention** is also the responsibility of the judicial power.

The Supreme Court may refuse to hear a person's petition only where there are other effective ways available for the person to exercise his or her right to judicial protection, which is guaranteed by Article 15 of the Constitution.

Summary:

In the *Veeber v. Estonia* (no. 2) Judgment of 21 January 2003, the European Court of Human Rights found that the Republic of Estonia had violated Article 7.1 **ECHR**.

The Court observed that according to the text of Article 148.1 of the Criminal Code (hereinafter: "CC") before its amendment in 1995, a person could be held criminally liable for tax evasion only where he or she had already received an administrative penalty for a similar offence. The Court consequently concluded that that prerequisite was an element of the offence of tax evasion, without which there could be no criminal conviction. The Court further observed that a considerable number of the acts of which the applicant had been convicted took place prior to January 1995. The sentence imposed on the applicant - a suspended term of three years and six months' imprisonment - took into account acts committed both before and after January 1995. The

Court pointed out that it could not be stated with any certainty that the domestic courts' approach had no effect on the severity of the punishment or had no tangible negative consequences for the applicant. That being so, the European Court of Human Rights found that the domestic courts had retrospectively applied the 1995 amendment to the law to behaviour which did not previously constitute a criminal offence and, in doing so, had violated Article 7.1 **ECHR**.

After the European Court of Human Rights had delivered that decision, T. Veeber filed a petition for the correction of court errors with the Supreme Court, requesting that the judgment of the Criminal Chamber of the Supreme Court of 8 April 1998, the judgment of Tartu Circuit Court of 12 January 1998 and the Judgment of Tartu City Court of 13 October 1997 be quashed and that he be acquitted under Articles 143.1, 148.1.7 and 166 CC. Counsel applied for dismissal of the civil actions.

The first question that had to be decided by the general assembly of the Supreme Court was whether and on the basis of which procedure the Supreme Court was competent to hear the petition. The second question was whether it was necessary to reopen criminal proceedings after a finding by the European Court of Human Rights of a violation of a **Convention** right.

As regards the first question, the general assembly found that even a broad interpretation of the grounds for review and correction of court errors set out in the Code of Criminal Court Appeal and Cassation Procedure (hereinafter "CCCACP") did not allow a new hearing of a criminal matter after the delivery of a judgment by the European Court of Human Rights. Examining whether the court was competent to hear the petition even though the CCCACP did not provide grounds for it to do so, the Court pointed out that according to Article 123.2 of the Constitution, the European **Convention** on Human Rights constitutes an inseparable part of the Estonian legal order, and that the guarantee of the rights and freedoms of the **Convention** is, under Article 14 of the Constitution, also the responsibility of the judicial power. The general assembly found that in order for the judicial power to best fulfil that duty, an amendment to the procedural laws was required with a view to eliminating any ambiguity as to whether, in which cases and in which manner a new hearing of a criminal matter was to take place after the delivery of a judgment by the European Court of Human Rights.

That, however, did not mean that the Supreme Court had no jurisdiction to consider and determine T. Veeber's petition. In its Judgment of 17 March 2003 in case no. 3-1-3-10-02 (RT III 2003, 10, 95), the general assembly of the Supreme Court held that criminal proceedings might be considered in the Supreme Court even if the code of procedure did not provide for a direct ground to do so. The Supreme Court may refuse to hear a person's petition only where there are other effective ways available to the person for exercising his or her right to judicial protection, guaranteed by Article 15 of the Constitution.

The general assembly stated that in deciding whether to reopen proceedings, it had to be ascertained whether the reopening of proceedings would be a necessary and appropriate remedy of a violation of a **Convention** right or of a violation with a causal link to the former found by the European Court of Human Rights. In doing so, it was necessary to consider whether the finding of a violation or an award of just satisfaction by the Human Rights Court was sufficient for the person. The general assembly was of the opinion that reopening of proceedings would be justified only in cases of continuing and serious violation and only where it is a remedy affecting the legal status of the person. The need to reopen judicial proceedings must be weighed against legal certainty and the possible infringement of other persons' rights in a new hearing of the matter. Moreover, a prerequisite for the revision of a judgment that has entered into force is that there are no other effective means to remedy the violation.

Next, the general assembly assessed whether the reopening of criminal proceedings against T. Veeber concerning his conviction under Article 148.1.7 CC for acts committed before 1995 was justified on the basis of the *Veeber v. Estonia* (no. 2) Judgment of the European Court of Human Rights.

The general assembly was of the opinion that the fact that T. Veeber had been convicted for acts that were not punishable at the time they had been committed did not in itself constitute a ground to argue that that his rights were still being seriously violated. Furthermore, the general assembly pointed out that the European Court of Human Rights had ordered the Estonian Republic to pay T. Veeber 2,000 euros compensation for non-pecuniary damage.

The European Court of Human Rights held that it followed from Article 7.1 of the **Convention** that T. Veeber should not have been convicted under Article 148.1.7 CC for the acts committed before 1995. Thus, if the criminal proceedings were to be reopened, T. Veeber would be acquitted under Article 148.1.7 CC for the acts committed before 1995 on the ground of the absence of the necessary elements of the criminal offence. Pursuant to Article 269.3 CCP, such an acquittal would be accompanied by a partial refusal to hear the civil action. As the amount of the civil action would decrease considerably, the Court found it necessary to reopen proceedings under Article 148.1.7 CC for the acts committed before 1995. The judgments of conviction of the Criminal Chamber of the Supreme Court of 8 April 1998, of Tartu Circuit Court of 12 January 1998 and of Tartu City Court of 13 October 1997 were quashed.

- 1 dissenting opinion.

Cross-references:

Supreme Court of Estonia:

- 3-1-3-10-02 of 17.03.2003, *Bulletin* 2003/2 [EST-2003-2-003].

European Court of Human Rights:

- *Veeber v. Estonia* (no. 2) Judgment of 21.01.2003, which entered into force on 21.04.2003, *Reports of Judgments and Decisions* 2003-I.

Languages:

Estonian, English.

EST-1996-3-002 08-11-1996 3-4-1-2-96 Disputed amendments to laws

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 08-11-1996 / **e)** 3-4-1-2-96 / **f)** Disputed amendments to laws / **g)** *Riigi Teataja I* (Official Gazette), 1996, Article 1558 / **h)** CODICES (Estonian).

Keywords of the Systematic Thesaurus:

1.3.2.3 **Constitutional Justice** - Jurisdiction - Type of review - Abstract review.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.18 **General Principles** - General interest.
3.25 **General Principles** - Market economy.
5.3.39.2 **Fundamental Rights** - Civil and political rights - Right to property - Nationalisation.
5.3.39.4 **Fundamental Rights** - Civil and political rights - Right to property - Privatisation.

Keywords of the alphabetical index:

Re-nationalisation / Compensation / Forced alienation.

Headnotes:

Pursuant to Article 32 of the Constitution, the property rights of all persons shall be inviolable and shall enjoy equal protection. No property may be expropriated without the consent of the owner, except in cases of public interest, in accordance with procedures established by law, and in exchange for equitable and appropriate compensation. Any person whose property has been expropriated without his or her consent shall have the right to bring a case before the courts and to contest the expropriation and the nature and the amount of

compensation.

Summary:

One year before the Constitution was enacted, the Law on the Principles of Property Reform was adopted, with the aim of re- organising ownership relations in order to guarantee the inviolability of property and free entrepreneurship, to make up for the wrong done by violations of ownership and to create the necessary preconditions for the transformation into a market economy. The law provides that 1) the land that is owned by the state shall be given into municipal ownership free of charge (municipalisation of property); 2) state property or municipal property shall be given, either for a charge or free of charge, into private ownership (privatisation of property); 3) the property which previously had been given, free of charge, into the ownership of co-operative, State co-operative and social organisations, shall be returned into state ownership (re-nationalisation of property).

The Law on Privatisation of Dwellings, enacted on 6 May 1993, provided that all co-operative organisations shall re-nationalise and privatise their property regardless of whose resources had been used to build the dwellings. With its decision of 12 April 1995, reviewing the proposal by the Tallinn City Court to declare Articles 3.1, 6.5 and 6.6 null and void (*Bulletin* 1995/1 [EST-1995-1-002]), the Constitutional Review Chamber of the Supreme Court found that the Law on Privatisation of Dwellings prescribes that a co-operative organisation also has the obligation to privatise property which had not been obtained from the state free of charge. This constitutes expropriation of the property of co- operative organisations and is only allowed in cases and according to procedures prescribed in Article 32 of the Constitution. The Constitutional Review Chamber satisfied the petition, but this does not prevent privatisation of dwellings or other property on the basis of mutual agreement for special securities meant for privatisation or for some other mutually agreed form of compensation.

Pursuant to the decision of the Chamber, on 20 December 1995, the *Riigikogu* adopted the Amendments to the Law on Privatisation of Dwellings and to the Law on «Re-nationalisation and privatisation of the property of co-operative, State co- operative and social organisations». The *Riigikogu* amended the laws on privatisation of dwellings and on re- nationalisation to bring Article 3.1 of the Law on Privatisation into conformity with the Constitution, but at the same time clause 1 was added to the effect that, pursuant to Article 40 of the Law on Property Reform Foundations and to the Law on Privatisation of Dwellings, the dwellings owned by persons who have the obligation to re-nationalise their property may be privatised. The words «to whom state property had been transferred free of charge» were omitted from Article 1.2 of the Law on Re-nationalisation. Thus, the *Riigikogu*, bypassing the decision of the Constitutional Review Chamber and ignoring the Constitution, put the obligation on private-law persons to privatise the property that they had not obtained from the state free of charge. The Law on Privatisation of Dwellings was adopted on 6 May 1993, that is after the Constitution had come into force. The Implementation Act of the Constitution of the Republic of Estonia does not provide any exceptional grounds for enacting laws which are inconsistent with the principles and norms of the Constitution.

As the *Riigikogu* did not agree, on proposal by the Legal Chancellor, to bring Articles 1.2, 6.1 and 7 into accordance with Article 32 of the Constitution, the Legal Chancellor petitioned the Supreme Court to declare the said provisions null and void. The Constitutional Review Chamber is, on proposal by the Legal Chancellor, entitled to exercise abstract norm control. Unlike the case which was solved by constitutional review procedure on 12 April 1995, this particular case was not initiated on the grounds of a concrete case.

Pursuant to the Constitution, expropriation without the consent of the owner is allowed only in cases and according to procedures stipulated by laws, in the public interest, and for just and immediate compensation. On these grounds the Chamber viewed the Legal Chancellor s motivation, the Amendments adopted by the *Riigikogu* after 12 April 1995 and current developments.

Public interest is a criterion which should be evaluated according to changes brought about by different times. Generally, the obligation of a private-law person to give away his property can not be conceived as promoting public interests. In the case of expropriation of dwellings the general and individual interest are interwoven. Public interest is expressed in the need for a property reform. The necessity of property reform was also upheld by the fact that the *Riigikogu* has, by adopting two laws, expressed its unambiguous legislative will to

expropriate dwellings. That is why the Constitutional Review Chamber found that within the framework of abstract norm control it has no right to dispute the observance of public interest.

Pursuant to Article 8 of the Law on the Privatisation of Dwellings, the dwellings may be privatised for special types of obligations, and special types of securities meant for privatisation, issued while compensating for unlawfully expropriated land, and for money or following some other procedure. The Legal Chancellor only disputed payment for expropriated dwellings for special types of obligations. As far as the compensation for the privatisation of dwellings is concerned, the *Riigikogu* has, after the Constitutional Review Chamber decision of 12 April 1995, acted in accordance with the said decision and has looked for and found additional resources to compensate for expropriated dwellings. The Supreme Court considers that the fact that persons who have the obligation to privatise dwellings also have the possibility to use the special type of securities to privatise land, is the rise of the value of special type of securities. Within the framework of property reform this can also be viewed as just compensation, if the parties thus agree. In the process of general norm control it is not possible to assess whether such compensation is just and satisfactory to the parties in each concrete case.

Pursuant to the requirement of immediate compensation, stipulated in Article 32 of the Constitution, the persons who have the obligation to re-nationalise are entitled to just compensation at least by the time the expropriation is completed. In case of disputes the property may be expropriated only after a pertinent court decision has taken effect and the person has received the sum awarded by the decision. If the property is expropriated before the dispute has been settled or before the sum awarded by the court decision has been received, Article 32 of the Constitution provides that everyone whose property has been expropriated without his consent has the right of recourse to the courts and to contest the expropriation, the compensation, or the amount thereof.

For the aforesaid reasons, the Constitutional Review Chamber did not satisfy the petition of the Legal Chancellor.

Supplementary information:

On 13 March 1996, when ratifying the European **Convention** on Human Rights, Estonia made a reservation to Protocol 1 **ECHR**. The reservation admits that Estonia, having become newly independent, is unable to carry out «wide economic and social reforms» in full conformity with the **Convention**. Pursuant to Article 64 **ECHR**, the reservation indicates that Article 1 Protocol 1 **ECHR** is not extended to reform laws enumerated in the reservation. Pursuant to the spirit of the reservation, Estonia admitted the need to complete the undertaken property reform and the possibility that the reform is not in full conformity with the universally recognised principles of property protection embodied in the **Convention**. The Law on the Ratification of the **Convention** is effective and the reservation has been recognised as acceptable by State Parties. According to the spirit and interpretation practice of the **Convention**, the reservations may be temporary and, when making a reservation, the states undertake to eliminate the inconsistencies. Estonia has admitted the possibility of inconsistency of the property reform with the internationally recognised principles of property protection and has undertaken to eliminate these drawbacks. To admit an inconsistency does not mean it is possible to ignore the requirement that laws must be in accordance with the Constitution.

Languages:

Estonian.

GER-2001-1-001

20-12-2000 2 BvR 591/00

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 20-12-2000 / **e)** 2 BvR 591/00 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

2.1.1.4.3	**Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.9	**General Principles** - Rule of law.
3.22	**General Principles** - Prohibition of arbitrariness.
5.1.3	**Fundamental Rights** - General questions - Limits and restrictions.
5.3.13.17	**Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Rules of evidence.
5.3.13.28	**Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to examine witnesses.

Keywords of the alphabetical index:

Evidence, value / Evidence, evaluation / Informant / Evidence, indirect / Undercover agent / Witness, hearsay.

Headnotes:

The right to a fair trial can be affected if proceedings are conducted in a way that is contrary to a process that aims at ascertaining the truth, and thus, contrary to a fair judgment.

A constitutionally relevant violation only occurs, however, if an overall survey of all circumstances unequivocally shows that requirements that are indispensable from the point of view of the rule of law were not met.

Summary:

I. In 1998 the complainant was convicted by the Higher Regional Court in Frankfurt am Main onaccount of her participation in the hijacking of the Lufthansa aircraft "Landshut" to Mogadishu in October 1977. The Higher Regional Court found that evidence proved the complainant had transported the weapons that had been used in the hijacking from Algiers to Palma de Mallorca, where they were handed over to the hijackers. The court essentially based its findings regarding the complainant's participation in the hijacking on the statement of S., another participant in the crime. S., who was in custody in Beirut, could not be examined at the trial because the Lebanese authorities refused to transfer him to Germany for examination. On account of a request for assistance, S. had, however, made detailed statements as an accused to the Lebanese police in Beirut. In these interrogations, two officers of the Federal Office of Criminal Investigation *(Bundeskriminalamt)* had been present, who during the trial gave evidence as witnesses to the Higher Regional Court about the circumstances in which S.'s statement was made and about the contents of the statement.

The Higher Regional Court regarded S.'s statement, presented in this manner, as credible because it was confirmed by other important pieces of evidence. One corroborating piece of evidence was the statement given by the witness P., a senior official in the Federal Office for the Protection of the Constitution *(Bundesamt für Verfassungsschutz)*. P. stated that several documents existed that confirmed the complainant's plane journey from Algiers to Palma de Mallorca. P. claimed that, in the interest of protecting his informants, he could neither name the persons from whom the BfV had received the documents nor disclose the documents themselves, as this would involve the risk of revealing the identity of the person who had procured the documents.

The witness G., a former head of criminal investigation at the Federal Office of Criminal Investigation, stated in the trial that he had received, from a reliable source, documents that confirmed that the complainant was identical to the person who had taken arms to Mallorca. G. also stated that he could neither submit the documents nor name his sources.

The Higher Regional Court was unsuccessful in its efforts to obtain from the Federal Ministry of the Interior permission for both hearsay witnesses to make more expansive statements.

Along with other circumstances and evidence presented at the trial, the Higher Regional Court also based its findings regarding the complainant's participation in the crime on the statement of the witness B., a former member of the terrorist group Red Army Faction *(Rote Armee Fraktion - RAF)*, who had been examined at the trial. B. stated that he had seen the complainant in Baghdad during the preparatory stages of the hijacking. The Court held that B.'s statement was an additional refutation of the complainant's claim that she had not left Aden. At the same time, B.'s statement was consistent with the statement of S. who had participated in the crime.

When her appeal was unsuccessful, the complainant, by way of a constitutional complaint, alleged that the conviction constituted a violation of the principle of a fair trial and of the prohibition of arbitrariness. The complainant also alleged that her conviction was inconsistent with Articles 6.1 and 6.3 **ECHR**, as the conviction had fundamentally been based on hearsay evidence and on the testimony of informants which cannot be confirmed because it was obtained in the framework of criminal investigation and of intelligence service activities. The complainant is of the opinion that, for these reasons, the conviction had, to a considerable degree, been based on sources that had remained anonymous. The Higher Regional Court concluded that this anonymous evidence compensated for the deficiencies of S.'s statements. The evidentiary value of S.'s statements was deficient because the statements were obtained in this specific interrogation situation, namely that S. was also a suspect to the crime and being held by the authorities with whom he might seek to curry favour by providing evidence against the complainant. In the complainant's opinion, this conclusion failed to meet the requirements that the Constitution places on the production of evidence in criminal proceedings. The complainant argued that the cumulative effect of the court's reliance on several pieces of hearsay evidence - the genesis of which cannot be autonomously assessed by the parties to the legal action - is in no way compatible with the case-law of the Federal Constitutional Court.

II. The Third Chamber of the Second Panel did not admit the case for decision, giving, in essence, the following reasons:

The right of access to the sources which serve as the basis for the findings of fact follows from the right to a fair trial. A constitutionally serious violation of this principle occurs only if an overall survey of all circumstances unequivocally shows that requirements that are indispensable from the point of view of the rule of law were not observed. The challenged judgments, however, meet the requirements of the right to a fair trial, although only just to a sufficient extent. They also fulfil the standards arising under Articles 6.1 and 6.3 **ECHR**, which are taken along with the case law of the European Court of Human Rights and of the Federal Court of Justice *(Bundesgerichtshof)* as a guide to the interpretation of this provision of the Basic Law. The relevant standards have been met even though the administration of procedural law by the court that presided over the case can be regarded as being situated at the borderline of what the Constitution permits as regards the organisation of proceedings.

As regards their evidentiary value, statements that originate from informants who are not examined during the trial are, as a general rule, not sufficient for the formation of judicial findings unless other important aspects and indicia confirm them. Therefore, increased care is required of the court presiding over the case if - as in this case - police or intelligence service informants cannot be heard as witnesses for the sole reason that the competent authority refuses to disclose their identities or to give them permission to testify. In such a case, it is the executive that prevents an exhaustive inquiry into the facts and makes it impossible for the parties to the legal action to verify the personal credibility of the informant whose identity remains in the dark.

The evidence on which the challenged judgment is based, is, however, not limited to the evaluation of (1) the testimony given by the police hearsay witnesses; (2) the statements of S., who is also an accused in the proceedings, which are contained in the testimony of the police hearsay witnesses; and (3) the statements of several police and secret service informants, agents and an "informants' leader", all of whom operate undercover in foreign countries. Rather, the Higher Regional Court relied in its evaluation of evidence, apart from the statements by the complainant herself, above all on the testimony of the (direct) witness B. The witness refuted, to the court's satisfaction, the complainant's statement that at the material time, she did not stay at the place of the criminal offence but exclusively in Aden. The Higher Regional Court also regarded this as a further confirmation of S.'s statement, which had been conveyed by the Federal Office of Criminal Investigation officials. The Higher Regional Court supported its conclusion that S.'s statements and the statements given by other sources were correct with the results of further investigations of the participating

agencies. These further investigations were performed by the participating agencies on the basis of and in order to review the information provided by their sources. Under these circumstances, and in the framework of the required consideration of all the factors, the process employed by the Higher Regional Court cannot be criticised.

If, for these reasons, the proceedings regarded as a whole were fair according to the standards set by the Basic Law, the opinion of the Federal Court of Justice that the standards of fairness stipulated by Article 6.1 **ECHR** were not violated, is not objectionable from the constitutional point of view.

Languages:

German.

GER-1985-C-001 11-10-1985 2 BvR 336/85

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 11-10-1985 / **e)** 2 BvR 336/85 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), Vol. 73, 339 / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

1.1.4.4 **Constitutional Justice** - Constitutional jurisdiction - Relations with other institutions - Courts.
1.3.4.1 **Constitutional Justice** - Jurisdiction - Types of litigation - Litigation in respect of fundamental rights and freedoms.
1.6.9.2 **Constitutional Justice** - Effects - Consequences for other cases - Decided cases.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
4.7.2 **Institutions** - Judicial bodies - Procedure.
4.7.8.2 **Institutions** - Judicial bodies - Ordinary courts - Criminal courts.
5.3.13.7 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to participate in the administration of justice.
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:

Res iudicata / Drug, dealing / Defence counsel, criminal proceedings / Defence counsel, officially appointed / European Court of Human Rights, decision, effects in national law.

Headnotes:

Even if a judgment of the European Court of Human Rights holds that the European **Convention** for the Protection of Human Rights was violated in the proceedings that preceded a decision of a German court, this finding does not nullify the *res iudicata* effect of the challenged decision of the competent court.

Summary:

I. The complainant, a Turkish citizen who was born in 1937, lived and worked in the Federal Republic of Germany from 1964 to 1976. On 7 May 1974, he was arrested on account of a violation of the *Betäubungs-mittelgesetz* (German Narcotics Act). In the attending criminal proceedings, the complainant was assigned a lawyer from Heilbronn as his court-appointed defence counsel, who represented the complainant in the criminal proceedings that took place in April 1976, before the Heilbronn Regional Court. This role was sometimes performed by the appointed lawyer's associate.

On 30 April, the Heilbronn Regional Court sentenced the defendant to 27 months in prison for violation of the German Narcotics Act and for tax evasion. The Court regarded it as established that the defendant, in the spring of 1972, illegally brought 16 kg of hashish, which he had hidden in his car, into the Federal Republic of Germany.

On 3 May 1976, the court-appointed defence counsel lodged an appeal from the judgment passed by the Regional Court, relying in particular on § 146 of the *Strafprozessordnung* (StPO, the Criminal Procedure Code), pursuant to which the same lawyer may not simultaneously represent several defendants in one case or whose cases arise out of the same set of events. The court-appointed defence counsel additionally argued that he had represented an accomplice of the defendant's. The appeal was dismissed as inadmissible on 22 October 1976, by the Federal Public Prosecutor.

On 19 November, the associate of the court-appointed defence counsel applied for reinstatement of the case, which was granted by the *Bundesgerichtshof* (BGH, Federal Court of Justice); at the same time, he lodged a new appeal. On 13 January 1977, the Regional Court appointed the associate as defence counsel for the submission of the pleadings in the appeal proceedings, as per his application. When substantiating the appeal, the newly appointed defence counsel raised challenges concerning only procedural errors, *inter alia*, the violation of § 146 of the Code of Penal Procedure (joint defence). The alleged error regarding § 146 StPO resulted, so it was argued in the appeal, from the fact that the former defence counsel had, on 21 June 1974, defended someone who had been convicted as an accomplice of the defendant, which, it was argued, constituted a prejudicial conflict with the defendant's interests.

The Federal Court of Justice fixed 29 November 1977 as the date for the *Hauptverhandlung* (oral argument on appeal); the defence counsel and the complainant, who had since returned to Turkey, were informed of the date on 17 October. On 24 October, the complainant's defence counsel applied for appointment by the Court to serve as defence counsel for the oral argument. The application was refused by the presiding judge of the Grand Criminal Senate of the Federal Court of Justice, who justified the refusal by stating that a defendant who is at large has no right to a court-appointed defence counsel for the oral argument in the appeal proceedings. The presiding judge stated that §§ 350.2 and 350.3 neither prescribed that the defendant appear in person nor that he be represented by defence counsel. The judge further stated that the court of appeal would examine the procedural objections on the basis of the pleadings; in the case of material objections, comprehensive investigation would be carried out *ex officio.*

On 29 November the oral argument took place; the complainant and his lawyer were not present.

After the appeal had been dismissed as inadmissible in its entirety, the court-appointed defence counsel lodged a constitutional complaint with the Federal Constitutional Court. The competent three-judge chamber, however, decided on 10 May 1980, that the constitutional complaint had no prospect of success because the presiding judge of the Grand Criminal Senate of the Federal Court of Justice had not acted arbitrarily. The chamber stated additionally that the complainant could have stayed in the Federal Republic of Germany and could have participated in the oral argument before the Federal Court of Justice, with the help of an interpreter if necessary.

Thereafter, the court-appointed defence counsel invoked the jurisdiction of the European Court of Human Rights, asking that Court to review the decision of the Federal Constitutional Court. The European Court of Human Rights decided on 25 April 1983, that the decision of the Federal Court of Justice refusing to appoint defence counsel constituted an infringement of Article 6.3.c **ECHR**.

Relying on the judgment of the European Court of Human Rights, the court-appointed defence counsel filed an application to have the case re-opened before the German courts. This application, however, was refused in the last instance by the competent *Oberlandesgericht* (OLG, Higher Regional Court), which stated that the decision of the European Court of Human Rights had no immediate modifying influence on the domestic legal situation.

The complainant lodged a constitutional complaint against the denial of the request to re-open the proceedings, alleging, in essence, a violation of Article 2.1 of the Basic Law.

II. The Second Panel did not admit the constitutional complaint for decision as there was no reasonable prospect of success:

In principle, a court decision that burdens an individual and that is based on:

1. a provision of domestic law that is contrary to general international law, or

2. an interpretation and application of a provision of domestic law that is incompatible with general international law

infringes the right to free development of one's personality which is protected by Article 2.1 of the Basic Law. This applies independently of whether the general rule of international law, in its content, establishes rights or obligations for the individual or whether it exclusively addresses states or other subjects of international law.

In the case at hand, however, these prerequisites had not been met. The Higher Regional Court ruled that the conclusion, by a *res iudicata* decision, of the criminal proceedings against the complainant before the Federal Court of Justice had not been affected by the decision of the European Court of Human Rights. This ruling in particular, the Panel concluded, is not constitutionally objectionable.

The European **Convention** for the Protection of Human Rights proceeds on the assumption that - apart from decisions that grant an indemnification (Article 50 **ECHR**) - the decisions of the European Court of Human Rights are, in essence, of a declaratory nature, and that it is left to the state concerned to draw the necessary conclusions from such a decision.

Due to the nature of the **Convention** under European law, a state that is party to the **convention**, which the European Court of Human Rights has found to be in violation of the **Convention**, is to make compensation for the infringement, as far as possible, by restoration of the pre-violation situation. In the present case, such restoration would have to consist, first and foremost, in a re-opening of the proceedings against the complainant before the court of appeal and in a decision that is in conformity with the **Convention** about his application for the free-of-charge assignment of a defence counsel. In Article 50 **ECHR**, however, the **Convention** takes into consideration the possibility that the domestic laws of the states that are party to the **Convention** do not permit a "complete compensation" for the violation of international law which has occurred. In this case, this domestic prohibition on "complete compensation" has been assumed by the European Court of Human Rights and confirmed by the Higher Regional Court through the challenged decision. In such a case, the European Court of Human Rights has the option of granting the persons affected by the violation of the **Convention** a fair indemnification. This regulation has been modelled after classical provisions in arbitration agreements under international law, like, for instance, Article 10.2 of the Swiss-German Arbitration and Settlement Agreement of 3 December 1921.

Like this provision, Article 50 **ECHR** permits the states which are party to the **Convention**, specifically with regard to the institution of legal force and the high rank that is generally attributed to this institution in the domestic legal systems, to leave undisturbed *res iudicata* decisions which have been found to be the products of proceedings in which international law has been infringed.

Article 13 **ECHR** also does not create an obligation on the part of state parties, in those cases where the European Court of Human Rights has found a violation of the **Convention** in the proceedings at issue, to facilitate a re-opening of criminal proceedings that would nullify the *res iudicata* effect of the conclusion of the original proceedings. Certainly no such obligation exists that takes precedence over Article 50 **ECHR**.

Moreover, the complainant had the possibility to assert before the Federal Court of Justice and the Federal Constitutional Court that the refusal of his application for the assignment of a court-appointed defence counsel violated his rights. At any rate, this fulfils the complainant's claim to an "effective complaint". Article 13 **ECHR** does not contain a more far-reaching claim that the grounds, provided by domestic law, for re-opening criminal proceedings that have been concluded and are *res iudicata*, must be expanded.

All aspects considered, no violation of Article 2.1 of the Basic Law can be ascertained.

Languages:

German.

HUN-2001-1-002 14-03-2001 6/2001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 14-03-2001 / **e)** 6/2001 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2001/30 / **h)** .

Keywords of the Systematic Thesaurus:

1.2.4 **Constitutional Justice** - Types of claim - Initiation *ex officio* by the body of constitutional jurisdiction.
1.3.5.15 **Constitutional Justice** - Jurisdiction - The subject of review - Failure to act or to pass legislation.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.27 **Fundamental Rights** - Civil and political rights - Freedom of association.

Keywords of the alphabetical index:

Association, registration / Court proceedings, length.

Headnotes:

The possibility for citizens to form a legal entity to act collectively is one of the most important aspects of the right of freedom of association. The disputed registration system did not violate the basic right of free association, since when deciding on whether to enter an association into the register the judge may only establish whether an association has met the formal conditions prescribed by law. At the same time, it is indispensable to have legal guarantees to avoid lengthy court proceedings.

Summary:

The petitioner requested the constitutional review of Article 4.1 of Act no. II of 1989 on Freedom of Association. In the petitioner's view, the provision under which associations acquire legal personality on registration infringes Article 63.1 of the Constitution (freedom of association). This constitutional provision guarantees that everyone has the right to establish organisations for any purpose not prohibited by law and the right to join such organisations.

The Court rejected the petition and held that the judicial registration of associations in itself is not unconstitutional. The Act on Freedom of Association prescribes mandatory registration of associations. In this way, an association becomes a legal entity. From the day of its registration the organisation may begin to operate as an association. The judge issues a decision on the entry of an association into the register. In such a decision, however, the judge may only establish whether an association has met the formal conditions prescribed by law. The main purpose of such a system is to avoid having associations operating contrary to law. Since the judge cannot refuse to register an association that has already met the formal conditions prescribed by law, the registration is not a restriction of the right of freedom of association. The Court referred to the decision of the European Commission of Human Rights in the case of *Lavisse v. France*, in which the Commission held that Article 11 **ECHR** does not ensure legal personality of associations. Therefore in those countries where the registration is a prerequisite for having legal personality, a refusal of the authorities to register an association does not necessarily involve an interference with the rights of the association under Article 11 **ECHR**.

After refusing the petition, the Court *ex officio* examined whether parliament has fulfilled its legislative tasks concerning the fundamental right of freedom of association. Neither the preliminary proceedings ensured by the Act on Freedom of Association, nor that provision of the Code on Civil procedure under which civil proceedings must be finished within a reasonable time meant there were sufficient legal guarantees of freedom of association. Therefore, because of the unsatisfactory regulation, the Court held that parliament failed to comply with its legislative tasks concerning freedom of association.

Supplementary information:

Five Justices attached separate opinions to the decision. According to these opinions, the Court should not have declared that the parliament had failed to fulfil its legislative tasks, leading to unconstitutionality. The regulations of the Act on Freedom of Association and the Code on Civil Procedure currently in force provided sufficient guarantees to avoid lengthy court proceedings when registering associations.

Languages:

Hungarian.

HUN-1998-1-002 24-02-1998 793/B/1997

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 24-02-1998 / **e)** 793/B/1997 / **f)** / **g)** *Alkotmánybíróság Határozatai* (Official Digest), 2/1998 / **h)** .

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
2.3.2 **Sources of Constitutional Law** - Techniques of review - Concept of constitutionality dependent on a specified interpretation.
3.16 **General Principles** - Proportionality.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.
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.

Keywords of the alphabetical index:

Criminal proceedings / Testimony, pre-trial, use in trial / Testimony, refusal.

Headnotes:

To read aloud the testimony of an accused person at a court hearing despite the fact that the accused has refused to testify during the trial does not mean a disproportionate restriction of the rights of the defence if this limitation complies with the following constitutional requirements:

- reading aloud and using the testimony made during the investigation can be constitutional if it is done in the interest of making clear the facts of the case or in the interest of another accused or the victim;

- the judge should examine whether during the investigation the accused was familiarised with the possibility of refusing to testify and its consequences, and whether the testimony was given under duress;

- the judge should obtain evidence from other sources even if the accused made a full confession.

Summary:

Upon the petition of a judge, the Constitutional Court examined the constitutionality of Article 83 of Act I of 1973 on the Code of Criminal Procedure (hereinafter: the Code) according to which the document containing the testimony could be used if the person who testified cannot be heard, the person refuses to testify or the document is contrary to the testimony. In the petitioner's opinion, that part of the challenged provision under which the testimony can be used in spite of the fact that the accused person later refuses to testify violates the rights of the defence ensured by Article 57.3 of the Constitution.

According to Article 57.3 of the Constitution, a person charged with a criminal offence is entitled to the rights of the defence in every phase of the criminal procedure. The Constitutional Court in this decision examined whether the contested provision of the Code infringes the fundamental rights of the defence.

Under Article 83 of the Code, the document containing the testimony is a piece of evidence, which, as a general rule, can be used only according to the provisions of this Code as direct evidence. According to Article 83.3, however, three cases are exceptions to the above-mentioned rule, one of which is the case where the accused refuses to testify.

The right not to incriminate oneself emerging from the fundamental right to human dignity guaranteed by Article 54 of the Constitution ensures for the accused the right to remain silent. In order for this right to be realised, under the Code the investigator is obliged to draw the accused's attention to the possibility of refusing to make a statement. But if the accused decides to make a statement despite the notice of the investigator, later on he/she does not have the right to decide whether this statement can be used at trial. Under the Code, however, both the defence counsel and the accused have the possibility of making a remark if the court decides on using the statement made during the investigation as evidence.

According to Article 50 of the Constitution, the courts punish the perpetrators of criminal offences. The restriction of the rights of the defence therefore can be justified by this obligation of the State if this restriction is necessary and proportionate to the purpose of the limitation. In answering the question whether in the instant case the restriction is necessary and proportionate, the Constitutional Court took into consideration the case-law of the European Court of Human Rights, especially the *John Murray v. the United Kingdom* Judgment of 8 February 1996, *Reports of Judgments and Decisions* 1996, p. 30, *Bulletin* 1996/1 [ECH-1996-1-001]. In this case the European Court of Human Rights stated that the right to remain silent is a generally recognised international standard which lies at the heart of a fair trial. However, the European Court of Human Rights also held that the right to silence is not an absolute right, but rather a safeguard which might, in certain circumstances, be removed provided other appropriate safeguards for accused persons are introduced to compensate for the potential risk of unjust convictions. The court has a discretionary power to draw inferences from the silence of an accused, but this does not, in itself, violate the right to silence. Accordingly, the Court held that there had been no violation of Articles 6.1 and 6.2 **ECHR**.

On the basis of the aforesaid considerations, the Constitutional Court held the contested provision restricting the rights of the defence to be constitutional, since according to the reasoning of the Court, this limitation is justified by the interest of another accused or the victim and the rights of the defence can be also restricted in the interest of making clear the facts of the case.

Languages:

Hungarian.

HUN-1997-2-008 01-07-1997 39/1997.

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 01-07-1997 / **e)** 39/1997. / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 58/1997 / **h)** .

Keywords of the Systematic Thesaurus:

1.6.2 **Constitutional Justice** - Effects - Determination of effects by the court.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.2.1.2 **Fundamental Rights** - Equality - Scope of application - Employment.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.13.22 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Presumption of innocence.
5.3.27 **Fundamental Rights** - Civil and political rights - Freedom of association.
5.4.4 **Fundamental Rights** - Economic, social and cultural rights - Freedom to choose one's profession.

Keywords of the alphabetical index:

Membership, compulsory / Chamber, professional / Membership, termination and suspension / Freedom of association, negative.

Headnotes:

The right of Professional Chambers to regulate and decide a question affecting basic rights, such as the determination of the right to belong to a professional association, must be regulated by statute.

In a case concerning the supervision of the legality of a public administrative body's decisions, it is a constitutional requirement that the Court shall decide the case according to the rights and obligations set forth in Article 57 of the Constitution, under which all persons are equal before the law and have the right to defend themselves against any charge brought against them, or, in a civil suit, to have their rights and duties judged by an independent and impartial court of law at a fair public trial or hearing. The rule regulating a public administrative body's right to decide cases must contain provisions under which the court has supervisional jurisdiction over the legality of this kind of decision.

Summary:

In its current decision, the Constitutional Court distinguished between Economic Chambers and Professional Chambers. Professional Chambers were found to be the governing bodies of the traditional professions, composed of their members, so as to exercise a form of self-government. As such, the Court found that the regulation of the Professional Chambers could go further than in the case of other types of public bodies, since their conduct could affect even fundamental rights. Nevertheless, this kind of regulation is also limited by Article 8.2 of the Constitution, under which regulation of fundamental rights and obligations must be effected by statute. Determination of the content and essential guarantees of fundamental rights, and also of direct and essential restrictions on basic rights must be regulated exclusively by statute. In the instant case, the Court had to examine whether objective restrictions on free choice of employment and occupation are inevitable and proportional, although, in general, a restriction on the exercise of one’s profession, according to the Court, is constitutional for professional and practical purposes.

The petitioners asserted that the right of the Hungarian Medical Association (henceforth: HMA) to suspend and to terminate a medical practitioner’s membership in the HMA was unconstitutional. In the petitioners’ view, these rights of the HMA are equivalent to a prohibition on the exercise of one's profession, which would therefore violate the presumption of innocence as defined by Article 57.2 of the Constitution. The HMA is authorised to terminate membership if a medical practitioner has been sentenced to imprisonment for a term of more than a year or if she/he has been prohibited from exercising her/his profession. In case of complete

prohibition, the medical practitioner's membership is terminated until the court finds her/him suitable to exercise the profession again. Since both of these punishments can be imposed only in the context of a criminal procedure, and since termination of HMA membership is only a consequence of such a sentence, the Court found that the petitions were unfounded as regards this question.

Suspension of HMA membership entails that the medical practitioner is deprived temporarily of her/his right to practise. The issue in the present case was whether a medical practitioner is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law according to the Constitution and Article 6 **ECHR**. In answering this question, the Constitutional Court took into account the case-law of the European Court of Human Rights, especially the Le Compte, Van Leuven and De Meyere judgement of 23 June 1981, Series A no. 43 and the Albert and Le Compte judgement of 10 February 1983, Series A no. 58, wherein it was held that Article 6.1 **ECHR** is applicable to the above-mentioned cases. Since a medical practitioner in private practice exercises the right to continue to practise, his/her relationships with patients are usually contractual or quasi- contractual and are established directly between individuals on a personal basis. The suspension of a medical practitioner's right to practise thus concerns a private relationship.

To establish the independence and impartiality of the HMA would be difficult, but, if the procedure before the Association violates Article 57.1 of the Constitution, the medical practitioner has recourse to a hearing by a tribunal established by law. Therefore, the Court found constitutional the provision challenged by the petitioners. Under Article 50.2 of the Constitution, the courts supervise the legality of the decisions of public administration and thus, the decisions of HMA. During this procedure all procedural safeguards ensured by Article 57.1 must be realised. The regulations which limit the supervision of the legality of the public administrative bodies' decisions by the courts, are unconstitutional.

In the submission of the petitioners, the obligation to join the HMA limited freedom of association, and thus, by implication, freedom not to associate. The Court referred to the European Court of Human Rights Le Compte, Van Leuven and De Meyere judgement in which the European Court of Human Rights declared that Professional Chambers and thus the Medical Association, are public law institutions, which are founded not by individuals but by the legislature. The Constitutional Court, however went further and declared that the constitutionality of compulsory membership of Professional Chambers, like the HMA, does not derive from the fact that they are public bodies. It held that the obligation to join such a chamber restricts the right to self-determination. Therefore, in order to decide on its constitutionality, the Court has to examine whether to carry out public tasks, compulsory membership of the HMA is required, and, whether this limitation is proportionate to the aim to be achieved. The Court in its current decision stated that the HMA is a public body which is entitled to adopt and to sanction decisions affecting the medical profession. This public task and other rights of the HMA require that every medical practitioner has the right to vote and to be elected. The obligation to join the HMA does not prevent practitioners from forming together or joining professional associations. Therefore, the Court did not find the provision on compulsory membership unconstitutional. However, according to the Act on the Medical Association, the medical professional, acting in a public capacity, is not obliged to join the HMA. In the Court's opinion, there is no constitutional reason to differentiate between a medical practitioner acting in a public capacity and a medical practitioner in private practice in this sense, hence this provision of the Act violates Article 70/A of Constitution, which prohibits discrimination.

The petitioners also asserted that the provision under which the HMA is accorded the right to veto the permission of the Minister of Public Health concerning a foreigner's ability to practise medicine and to have their name entered on the Medical Practitioners' National Register without a certificate of naturalisation was unconstitutional. The entry of the medical practitioner's name on the register is a requirement of HMA membership, and HMA has a further possibility to decide whether to permit the foreign medical practitioner to practise, when it decides on the membership of a non-Hungarian national. The decision in this case can be supervised by the Court. However, there is no legal remedy in a case where the HMA stops a foreign medical practitioner either from exercising his profession without a naturalised diploma, or from having his/her name entered into the Medical Practitioners' National Register. The Court further found that the HMA's right to veto registration and the regulation of membership decisions restrict the right of non- Hungarian medical practitioners to free choice of occupation. The problem is that there is no legal provision regulating the circumstances under which the HMA should accept or refuse the request of the foreign medical practitioner. The right to appeal to the courts in case of a refusal does not make any sense, since the Court cannot

examine the legality of such a decision. Therefore, the Court held the challenged provision unconstitutional, but upheld the validity of the unconstitutional regulation and called upon Parliament to meet its legislative obligation. In case of failure to pass the necessary legislation, the court held that from 1 January 1998 the legal situation of foreign and the Hungarian medical practitioners will be merged concerning entry on the register and HMA membership.

Supplementary information:

The Constitutional Court also examined the constitutionality of some provisions of the Act on the Chambers of Architects and Engineers based upon the principles laid down in its current decision.

Languages:

Hungarian.

HUN-1997-1-002 19-03-1996 20/1997

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 19-03-1996 / **e)** 20/1997 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 24/1997 / **h)** .

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.1.4.6 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Civil and Political Rights of 1966.
3.16 **General Principles** - Proportionality.
4.7.4.3.1 **Institutions** - Judicial bodies - Organisation - Prosecutors / State counsel - Powers.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.22 **Fundamental Rights** - Civil and political rights - Freedom of the written press.

Keywords of the alphabetical index:

Prior restraint / Media, censorship.

Headnotes:

It is unconstitutional that on the prosecutor's proposal the court is entitled to prohibit publication of any printed matter which contravenes the provisions of Articles 3.1 and 12.2 of the Law on the Press, and that the prosecutor has the right to suspend publication of such printed matter immediately.

Summary:

According to Article 3.1 of the Law on the Press, information published by the press may not be aimed at committing crimes or subordinated to the commission of crimes, and may not damage others' personal rights and public morals. The provision of Article 12.2 provides that before starting a periodical it is necessary to register the intention of establishing and publishing it. Prior to registration, the periodical should not be distributed.

In the petitioner's view, all forms of censorship, including the prior restraints under Article 15.3 of the Law on the Press, are against the constitutional requirement of a free press (Article 61.2 of the Constitution). Instead of suspending or prohibiting publication of press products in the abovementioned cases, the acceptable and proportional remedy could be the press correction in the frame of due process. Since personal rights may be typically enforced personally, the prosecutor's right to propose the prohibition of publication of printed matter

which contravenes Articles 3.1 and 12.2 of the Law on the Press, infringes the right to self-determination.

According to the petitioner, the Law, by authorising the court to exercise the right to prohibit publication of the printed matter, damages public morals and is also against the freedom of the press.

The provision according to which the prosecutor has the right to suspend publication of printed matter immediately is clearly unconstitutional according to the petitioner, since the court can not reverse the act of the prosecutor even with its interim decision.

The Court found only one part of the petition justified.

In Decision 1 of 1994 (I.17), *Bulletin* 1994/1 [HUN-1994- 1-001] the Constitutional Court declared that the right to personal dignity includes the right to self-determination, specifically the person's right to enforce or not to enforce his or her rights either before the court or the state bodies. In the present case the Court held that the provision authorises the prosecutor to propose the prohibition of publication of printed matter if it injures others' personal rights, and the Article according to which the prosecutor has the right to suspend this kind of printed matter, infringes the abovementioned provisions of the Civil Code which limit the right to self-determination without it being in fact necessary for the validation of any other constitutional right without, that is, the limitation meeting the obligation for proportionality under Article 8.2 of the Constitution.

The Constitutional Court held that Article 3.1 of the Law on the Press is in accordance with the restrictions worded by Article 19 of the International Covenant on Civil and Political Rights, and Article 10 **ECHR**. Under these provisions the exercise of freedom of expression can be restricted by law if it is necessary in a democratic society for the prevention of disorder or crime. Despite that, the Court declared that it is unnecessary and against the injured party's right to self-determination that the prosecutor could propose and on the prosecutor's proposal the court could prohibit publication of a newspaper or a periodical if it aimed at committing a crime or the aim was an incitement to commit a crime and the crime punishable upon private motion.

According to the Covenant and the European **Convention** of the Human Rights public morals may also be subject to certain restriction, hence the Article 3.1 of the Law on the Press is not unconstitutional. Neither did the Constitutional Court hold unconstitutional Article 12.2 of the Law on the Press. According to the Court's opinion the registration of press products is traditional and crucial with regards to press policing, therefore it is not contrary to the freedom of press.

Three judges wrote dissenting opinions, and one of these opinions was concurred by another judge.

In two judges' opinions - including the opinion of the President of the Court - the prosecutor's right to suspend the printed matter at once if according to the prosecutor it damages public morals, is unconstitutional. Public morality is an abstract value, therefore in the interests of this the exercise of free expression could not be restricted. The Constitutional Court, in an earlier decision, had held that the laws restricting the freedom of expression are to be assigned greater weight if they directly serve the realisation or protection of another basic right, a lesser weight if they protect such rights only indirectly through the mediation of some institution, and the least weight if they merely serve some abstract value as an end in itself (public order) (decision 30/1992 of 26.05.1992).

According to the two judges the fact that there is no guarantee that the procedure on the prohibition of publication of press products will be finished soon or at least in a reasonable time and that the prosecutor acts as a party in this type of procedure, violates the right to self-determination.

In his dissenting opinion which was concurred in by another judge, one of the judges of the Constitutional Court stated that the prosecutor's right to propose that the court prohibit publication of press products is not unconstitutional. The decision of the court at the end of this procedure does not mean *res iudicata* concerning the persons' entitlement to enforce their rights before the court. Regardless of the prosecutor's right, persons can decide themselves whether they will bring the case before the court or not. According to the judge Article 15.3 of the Law on the Press does not create a «clear and present danger», therefore the Court should not have had to annul this provision.

Languages:

Hungarian.

LAT-2002-1-001 17-01-2002 2001-08-01 On Conformity of Article 348 (the seventh part) of the Civil Proceedings Law with Article 92 of the Republic of Latvia *Satversme* (Constitution)

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 17-01-2002 / **e)** 2001-08-01 / **f)** On Conformity of Article 348 (the seventh part) of the Civil Proceedings Law with Article 92 of the Republic of Latvia *Satversme* (Constitution) / **g)** *Latvijas Vestnesis* (Official Gazette), 18.01.2002 / **h)** CODICES (English, Latvian).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
5.1.1.5.1 **Fundamental Rights** - General questions - Entitlement to rights - Legal persons - Private law.
5.3.13.4 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Double degree of jurisdiction.

Keywords of the alphabetical index:

Bankruptcy, court decision, right to appeal / Debtor, insolvent, right of appeal.

Headnotes:

The constitutional guarantee to a fair trial must be interpreted in the context of Article 6 **ECHR** and its jurisprudence as a human right with regard to criminal charges, which cannot be extended to civil proceedings involving legal persons.

In this sense, Article 348 of the Law on Civil Proceedings, which provides that in cases of insolvency and bankruptcy a court decision in the first instance stating that the declaration of the insolvent debtor is final, with no further appeal procedure, is consistent with the right to a fair trial guaranteed by Article 92 of the Constitution.

Summary:

An applicant, the owner of an insolvent farm, challenged the conformity of Article 348 of the Law on Civil Proceedings with Article 92 of the Constitution. The applicant considered that her human right to protect her rights in a fair trial, as established by the Constitution, had been violated by Article 348 providing that a court decision in the first instance is final and allowing no appeal against it.

In order to evaluate the conformity of the challenged norm with the Constitution, the Court deemed it necessary to establish whether the notion of "fair trial" was intended to include the right of appeal against the court decision in a civil case.

When interpreting Article 92 of the Constitution in the context of binding international laws, agreements and practices, the Court established that Article 6 **ECHR** and ensuing judgments of the European Court of Human Rights do not extend the right to a fair trial to the right of appeal against court decisions. The right of appeal is established in Article 2 Protocol 7 **ECHR** with regard to criminal charges, and that only applies to physical persons. The European Court of Human Rights has also stated that Article 6 **ECHR** does not imply the

institution of appeal courts; the states are free to decide on the institution of an appeal jurisdiction, and on determination of categories of cases to which such right of appeal will be extended.

In the present case, the Court held that in the procedure of insolvency, which by its nature is a civil procedure, the applicant participated in the capacity of a representative (owner) of the legal person (the farm). Therefore, no fundamental rights of the physical person could have been violated.

It was also established that existing procedural norms provide sufficient guarantees to verify the legality and validity of court decisions even without employing the appeal procedure.

Furthermore, in the particular category of cases involving insolvency and bankruptcy, the principle of immediate protection of the interests of creditors, debtors and third parties have been applied.

Based on the above, the Court declared the challenged legal norm to be in conformity with Article 92 of the Constitution.

Languages:

Latvian, English (translation by the Court).

LAT-2001-2-003 26-06-2001 2001-02-01 On Compliance of the Transitional provisions of the Law on State Pensions (on length of insurance period for foreign citizens and stateless persons whose permanent place of residence on 1 January 1991 has been the Republic of Latvia) with the Constitution and with Article 14 of the European **Convention** for the Protection of Human Rights and Fundamental Freedoms and Article 1 of the First Protocol to the **Convention**

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 26-06-2001 / **e)** 2001-02-0106 / **f)** On Compliance of the Transitional provisions of the Law on State Pensions (on length of insurance period for foreign citizens and stateless persons whose permanent place of residence on 1 January 1991 has been the Republic of Latvia) with the Constitution and with Article 14 of the European **Convention** for the Protection of Human Rights and Fundamental Freedoms and Article 1 of the First Protocol to the **Convention** / **g)** *Latvijas Vestnesis* (Official Gazette), 99, 27.06.2001 / **h)** CODICES (English, Latvian).

Keywords of the Systematic Thesaurus:

1.3.5.5 **Constitutional Justice** - Jurisdiction - The subject of review - Laws and other rules having the force of law.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.2.1.3 **Fundamental Rights** - Equality - Scope of application - Social security.
5.2.2.4 **Fundamental Rights** - Equality - Criteria of distinction - Citizenship or nationality.
5.4.16 **Fundamental Rights** - Economic, social and cultural rights - Right to a pension.

Keywords of the alphabetical index:

Non-citizen, social insurance / Normative act / Pension, principle of solidarity / Pension, principle of insurance.

Headnotes:

A legal norm establish that foreign citizens and stateless persons, whose permanent place of residence until

January 1991 was Latvia, were only allowed to include their periods of employment in Latvia but not those when they worked abroad, when assessing the length of the insurance period for calculating their state pension was held not violate these individuals' social rights, as protected by the Constitution.

The pension system, which existed in Latvia up until January 1991, and which was based on the principle of solidarity, did not create "possessions" within the meaning of Article 1 Protocol 1 **ECHR**.

Summary:

The case was initiated by 20 members of the parliament *(Saeima)* who questioned the conformity of Paragraph 1 of the Transitional Provisions of the Law on State Pensions with the Constitution *(Satversme)*, and with Article 14 **ECHR** and Article 1 Protocol 1 **ECHR**.

The disputed legal norm established that the length of the insurance period for calculating the state pensions of foreign citizens and stateless persons, whose permanent place of residence until January 1991 had been Latvia, included only periods of employment in Latvia. Periods of employment abroad, up until January 1991, were not to be included in the as part of the period of insurance.

The applicants pointed out that the disputed legal norm limited the right of permanent residents of Latvia - non-citizens, foreign citizens and stateless persons - to the state pension, even though up to 1 January 1991 all the residents of Latvia - citizens, non-citizens, foreign citizens and stateless persons - made the same pension contributions, and the length of service required in order to receive the pension was calculated on the basis of the same unified social insurance system and on the same principles. The applicant noted that Article 109 of the Constitution established that "everyone has the right to social security in old age, to disability benefits, to unemployment benefit, and in other cases as provided by law", and that Article 91 established that human rights should be implemented without any discrimination. Therefore, the applicant considered that the Constitution prohibited discrimination on the grounds of citizenship and that the expression "everyone" meant every inhabitant of Latvia, including non-citizens, foreign citizens and stateless persons. The applicant also pointed out that Article 14 **ECHR**, taken with Article 1 Protocol 1 **ECHR**, had been violated. The applicant considered that pensions constituted "possessions" within the meaning of Article 1 Protocol 1 **ECHR** and referred to the European Court of Human Rights case of *Gaygusuz v. Austria*.

The Constitutional Court held that in the Soviet times the pension system was based on the principle of re-division, which did not encourage employees to make provision for their old age. Therefore, after the renewal of independence, it became necessary to formulate a new pension system, and the Law on State Pensions was adopted in 1995. The law radically changed the classical principle of solidarity. It introduced a mandatory system based on insurance principles. According to the law, the amount of the state pension shall depend on the length of insurance, which is constituted from periods of employment and periods regarded as equal to employment. None of this depends on the citizenship of a person. The new pension scheme is the "property"-creating system. A person makes payments into defined funds, creating an individual share, the amount of which may be calculated at any moment. The pension system which existed in Latvia up to January 1991 was based on the principle of solidarity, which established the responsibility of the community as a whole and did not create a link between the payment of contributions and the amount of the pension. According to the principle of solidarity, it was not possible to establish which part of the fund belonged to an individual participant. Therefore, the right to possessions protected by Article 1 Protocol 1 **ECHR** was not created. The disputed legal norm is not covered by Article 1 Protocol 1 **ECHR** and does not violate Article 14 **ECHR**.

According to Article 109 of the Constitution, everybody has the right to social guarantees and benefits in old age, but the article sets out neither a particular age nor the amount of the pension and the specific conditions of the pension scheme. The nature and the principles of the Latvian pension system objectively justify the differentiated approach, established by the disputed legal norm. Thus it may not be regarded as discrimination, and Articles 91 and 109 of the Constitution are not violated.

Latvia has concluded bilateral agreements on social security with several states. These agreements specify the rights and obligations of the contracting parties regarding social security.

As the disputed norm does not violate Articles 91 and 109 of the Constitution and the European **Convention** for the Protection of Human Rights and Fundamental Freedoms, it does not contradict Article 89 of the Constitution, which establishes that "the state shall recognise and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia".

The applicants also questioned the norm in connection with the rights of non-citizens. Non-citizens are a group of people with a specific legal status, provided by the special "Law on Non-Citizens". In Latvian law, groups such as non-citizens, foreign citizens and stateless persons are strictly determined. The term "non-citizens" was not mentioned in the disputed legal norm. Nothing suggests that the notion of "stateless person" includes also non-citizens. Therefore, the legislator did not regulate the issue on whether to include the periods of employment of non-citizens up to 1991 in calculating the length of insurance. The Constitutional Court may evaluate only legal norms, which are formulated in normative acts, and cannot evaluate the compliance of a non-existent norm with a legal norm of higher legal force. However it should be taken into consideration that non-citizens are a part of the inhabitants of Latvia and the legislator should regulate the issue on including periods of employment abroad by non-citizens up to January 1991 in calculating the length of insurance.

The Constitutional Court decided the disputed norm was in compliance with Articles 89, 91 and 109 of the Constitution and Article 14 **ECHR** and Article 1 Protocol 1 **ECHR**.

Cross-references:

Cases of the European Court of Human Rights:

- *Gaygusuz v. Austria*, *Bulletin* 1996/3 [ECH-1996-3-012];

- *Marckx v. Belgium*, *Special Bulletin* ***ECHR*** [ECH-1979-S-002];

- *Sporrong and Lönnroth v. Sweden, Special Bulletin* ***ECHR*** [ECH-1982-S-002].

Languages:

Latvian, English (translation by the Court).

LAT-2000-3-004 30-08-2000 2000-03-01 On Compliance of the *Saeima* Election Law and the City Dome, Region Dome and Rural Council Election Law with the Constitution, the **Convention** for the Protection of Human Rights and Fundamental Freedoms, and the International Covenant on Civil and Political Rights

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 30-08-2000 / **e)** 2000-03-01 / **f)** On Compliance of the *Saeima* Election Law and the City Dome, Region Dome and Rural Council Election Law with the Constitution, the **Convention** for the Protection of Human Rights and Fundamental Freedoms, and the International Covenant on Civil and Political Rights / **g)** *Latvijas Vestnesis* (Official Gazette), 307/309, 01.09.2000 / **h)** CODICES (English, Latvian).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.

2.1.1.4.6 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Civil and Political Rights of 1966.

2.1.3.2.2 **Sources of Constitutional Law** - Categories - Case-law - International case-law - Court of Justice of the European Communities.

2.1.3.3 **Sources of Constitutional Law** - Categories - Case-law - Foreign case-law.

2.3.3	**Sources of Constitutional Law** - Techniques of review - Intention of the author of the enactment under review.
3.3	**General Principles** - Democracy.
3.13	**General Principles** - Legality.
3.16	**General Principles** - Proportionality.
3.19	**General Principles** - Margin of appreciation.
4.6.9.2.1	**Institutions** - Executive bodies - The civil service - Reasons for exclusion - Lustration.
5.1.3	**Fundamental Rights** - General questions - Limits and restrictions.
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:

Election, candidacy, restriction / Organisation, anti-constitutional, participation / Social need, pressing / Morality, democracy protection.

Headnotes:

The right to be elected may be restricted for persons who have been active in organisations that tried to destroy the new democratic state and were recognised as anti-constitutional. Such restrictions are lawful where their aim is to protect the democratic state system, national security and the territorial unity of the state.

However, the legislator should determine the term of the restrictions; such restrictions may last only for a certain period of time.

Summary:

The case was initiated by twenty-three members of Parliament who claimed that provisions of the Parliament *(Saeima)* Election Law and of the City Dome, Regional Dome and Rural Council Election Law establishing various restrictions on the right to be elected contradicted Articles 89 and 101 of the Constitution, Article 14 **ECHR**, Article 3 Protocol 1 **ECHR**, and Article 25 of the International Covenant on Civil and Political Rights.

The laws established restrictions on the right of the following to be elected as deputies in Parliament and in the municipalities: those who after 13 January 1991 have been active in the Communist Party of the Soviet Union, the Working People's International Front of the Latvian S.S.R., the United Board of Working Bodies, the Organisation of War and Labour Veterans, the All-Latvia Salvation Committee or its regional committees; those who belong or have belonged to the regular staff of the U.S.S.R., the Latvian S.S.R. or foreign state security, intelligence or counterintelligence services.

Article 101 of the Constitution establishes the right of every citizen of Latvia, prescribed by law, to participate in the activity of the state and local authorities. This right guarantees the democracy and legitimacy of the democratic state system.

However the right is not absolute; Article 101 includes the condition "in the manner prescribed by law". The constitution leaves it for the legislature to make decisions limiting the right. By including the words "in the manner prescribed by the law" the legislature determined that in every case one should interpret the words "every citizen of Latvia" as including the limitations established by law. Article 101 of the Constitution shall be interpreted together with Article 9 of the Constitution: "Any citizen of Latvia, who enjoys full rights of citizenship and, who is more than twenty-one years of age on the first day of elections may be elected to the Parliament." Article 9 of the Constitution authorises Parliament to specify the content of the notion of "a citizen of Latvia, who enjoys full rights of citizenship"; and this is done in the *Saeima* Election Law. The limitations of this right are permissible only if they do not contradict the notion of democracy, mentioned in Article 1 of the Constitution, other and general principles relating to fair elections. Thus the legislature, in passing the disputed norms creating a necessary legal norm to be realised for the right to be elected, implemented the

task of Article 101 of the Constitution.

Reasonable restrictions on the right to vote and to be elected at genuine periodic elections, established in Article 25 of the International Covenant on Civil and Political Rights, are permitted. Not all types of different treatment constitute prohibited discrimination. Reasonable and objective prohibitions with an aim that is considered as legitimate by the Covenant cannot be regarded as discrimination.

The restrictions to the election rights established in Article 3 Protocol 1 **ECHR** shall be established according to the universal procedure: although the states have "a wide margin of appreciation in this sphere", any restrictions must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Rights may be restricted only to the extent the restrictions do not deprive the right of its essence and/or diminish its efficiency. The principle of equality of treatment shall be respected and arbitrary restrictions must not be applied. Article 14 **ECHR** does not establish a prohibition of all difference in treatment with regard to the realisation of the rights and freedoms provided by the **Convention**. The principle of equal treatment is considered violated only if the difference of treatment does not have a reasonable and objective justification.

The Court found that the statement of the applicants that the disputed norms discriminated against the citizens just because of their political membership was groundless. The disputed norms do not establish difference in treatment just because of the political opinion of the person, they establish a restriction for activities against the renewed democratic system. The words "to be active", used in the disputed norms mean to continuously perform something, to take an active part, to act, to be engaged in. Thus the legislature has connected the restrictions with the degree of individual responsibility of every person in the realisation of the aims and programme of the organisations mentioned in the disputed norms. Formal membership of any of the mentioned organisations cannot alone serve as the reason for forbidding a person from being included in the candidate list and being elected. Thus the disputed norms are directed only against those persons who, with their activities after 13 January 1991 and in the presence of the occupation army, tried to renew the former regime, and are not applied just to those with different political opinions.

The norms of human rights included in the Constitution should be interpreted in compliance with the practice of application of international norms of human rights. To establish whether the disputed restrictions comply with Articles 89 and 101 of the Constitution, one has to evaluate whether the restrictions included in the disputed norms are determined by law, adopted under due procedure; justified by a legitimate aim, and necessary in a democratic society. As this case does not contain any dispute on whether the restrictions were determined by law or adopted under the due procedure, the two last issues have to be evaluated.

In 1990, although the democratic state and the first of 1922 were renewed, the Latvian Communist Party was not going to give up the role of the "leading and ruling force". It started anti-state activities. With the efforts of the Latvian Communist Party and its satellite organisations the All-Latvia Salvation Committee was established. The aims of the activities of these organisations were connected with the destruction of the existing state power, and were therefore anti-constitutional. In August 1991 the legislature prohibited these organisations, evaluating them as anti-constitutional. Thus the aim of the restrictions of the election rights is to protect the democratic state system, national security and the territorial unity of Latvia. The disputable norms are not directed against a pluralism of ideas in Latvia or the political opinions of a person, but against persons, who with their activities have tried to destroy the democratic state system. Enjoyment of human rights must not be turned against democracy as such.

The essence and efficiency of rights lies also in morality. To demand loyalty to democracy from its political representatives is within the legitimate interests of a democratic society. The democratic state system has to be protected from persons who are not ethically qualified to become the representatives of a democratic state on the political or administrative level. The state should be protected from persons who have worked in the former apparatus, implementing occupation and repression, and from persons who after the renewal of independence to the Republic of Latvia tried to renew the anti-democratic totalitarian regime and resisted the legitimate state power. The restrictions to the election right do not refer to all members of the mentioned organisations, but only to those who had been active in the organisations after 13 January 1991. Excluding a person from the candidates list if he has been active in the mentioned organisations is not administrative arbitrariness; it is based on an individual court decision. Thus the principle, requiring an equal attitude to

every citizen has not been violated, the protection by a court is guaranteed, and the restrictions are not arbitrary. Consequently the aim of the restrictions is legitimate.

To establish whether the restrictions of the election right is proportional to the aims of protecting the democratic state system, national security and the territorial unity of Latvia, the legislature has repeatedly evaluated the political and historical conditions of the development of democracy in connection with the issues of the election right, adopting or amending the election law just before elections. The Court held that at the present moment there did not exist the necessity to doubt the proportionality of the applied restrictions. However, the legislature, in periodically evaluating the political situation in the state as well as the necessity of the restrictions, should decide on determining the term of the restrictions. Such restrictions to the election rights may last only for a certain period of time.

The Constitutional Court decided by a majority of four votes to three. The dissenting judges disagreed with the majority on several grounds. According to the dissenting opinion, restrictions to human rights in a democratic society were necessary not only if they had a legitimate aim, but also if there was a pressing social need to establish the restrictions and the restrictions were proportionate. Today, ten years after the re-establishment of independence, the election of the persons mentioned in the disputed norms would not threaten democracy in Latvia, and therefore the pressing social need to establish the restrictions does not exist. Restrictions of fundamental rights are proportionate only if there are no other means that are as effective but are less restrictive of the fundamental rights. The election rights are restricted so far that in fact the persons do not enjoy the right at all; the legislature has the possibility of using other "softer" forms, therefore the measure is not proportionate.

Cross-references:

In the Decision the Constitutional Court referred to the following Judgments of the European Court of Human Rights: *Mathieu-Mohin and Clerfayt*, 02.03.1987; *Belgian Linguistic* Case, 23.07.1968; *Karlheinz Schmidt v. Germany*, 18.07.1994; as well as to the Decision of the Federal Constitutional Court of Germany in Case 2 BvE 1/95, 21.05.1996, *Bulletin* 1996/2 [GER-1996-2-017].

In the dissenting opinion, the judges referred to the following Judgments of the European Court of Human Rights: *Dudgeon* Case, 22.10.1981; *Handyside* Case, 07.12.1976; *Barthold* Case, 25.03.1985; *Vogt v. Germany*, 26.09.1995; *Rekvenyi v. Hungary*, 20.05.1999; as well as to the Decision of the Constitutional Tribunal of Poland in Case no. K 39/97, 10.11.1998; *Bulletin* 1998/3 [POL-1998-3-018].

Languages:

Latvian, English (translation by the Court).

LAT-1998-2-003 30-04-1998 09-02(98) On Conformity of Paragraph 2 of the Resolution of the Supreme Council of 15 September 1992 on the Procedure by which the Law on Eminent Domain Takes Effect with Article 1 First Protocol of the Law of the **Convention** for the Protection of Human Rights and Fundamental Freedoms

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 30-04-1998 / **e)** 09-02(98) / **f)** On Conformity of Paragraph 2 of the Resolution of the Supreme Council of 15 September 1992 on the Procedure by which the Law on Eminent Domain Takes Effect with Article 1 First Protocol of the Law of the **Convention** for the Protection of Human Rights and Fundamental Freedoms / **g)** *Latvijas Vestnesis* (Official Gazette), 122, 05.05.1998 / **h)** CODICES (English, Latvian).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.

2.2.1.5	**Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - European **Convention** on Human Rights and non-constitutional domestic legal instruments.
3.16	**General Principles** - Proportionality.
3.17	**General Principles** - Weighing of interests.
3.18	**General Principles** - General interest.
5.2	**Fundamental Rights** - Equality.
5.3.13.3	**Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.39.1	**Fundamental Rights** - Civil and political rights - Right to property - Expropriation.
5.3.39.2	**Fundamental Rights** - Civil and political rights - Right to property - Nationalisation.
5.3.39.4	**Fundamental Rights** - Civil and political rights - Right to property - Privatisation.

Keywords of the alphabetical index:

Real estate / Compensation, determination / State Land Service.

Headnotes:

The general principle of peaceful enjoyment of possessions is always to be considered in connection with the right of the State to limit the use of property in accordance with conditions envisaged by Article 1 Protocol 1 **ECHR**.

Summary:

On 19 December 1996, the Parliament *(Saeima)* passed the law "Amendment to the Supreme Council Resolution of 15 September 1992 on the procedure by which the Law of the Republic of Latvia on eminent domain takes effect", supplementing paragraph 2 with the second, third and fourth parts in the following wording:

"When expropriating real estate necessary for the State or public - needs for maintaining and operating specially protected natural objects, educational, cultural and scientific objects of State significance, State training farms, national sport centres, as well as objects of engineering and technical, energy and transportation infrastructure - according to which the ownership rights are renewed or shall be renewed in accordance with the law to former owners (or their heirs), the extent of compensation shall be determined in money by a procedure established by law, but shall be not more than the evaluation of the real estate in the Land Books or cadastral documents drawn up before 22 July 1940 in which the value of real estate is indicated. Coefficients for the recalculation of value of property according to prices in 1938-1940 (in pre-war lats) and present prices (in lats) shall be determined by the State Land Service.

The fourth part stresses that the procedure for expropriation of real estate established by this paragraph shall also be applied to owners who have acquired the real estate from the former land owner (or his/her heir) on the basis of an endowment contract."

Taking into consideration that Article 64 **ECHR** (henceforth "the **Convention**") envisages the possibility of making reservations to any particular provision of the **Convention** where any law then in force in its territory is not in conformity with the provision, the *Saeima* included the following reservation in Article 2 of the Law on the **Convention**:

"Claims under Article 1 Protocol 1 **ECHR** shall not relate to the property reform that regulates restitution of property or paying compensation to former owners (or their heirs) whose property has been nationalised, confiscated, collectivised or otherwise unlawfully expropriated during the period of the annexation by the USSR or to the process of privatisation of agricultural enterprises, fishermen's collective bodies and State or municipal property."

The case was initiated by twenty deputies of the *Saeima* who asked that parts 2 and 4 of paragraph 2 of the Resolution be declared null and void from the day the **Convention** took effect in Latvia, i.e. from 27 June 1997.

The applicants pointed out that the procedure established by the second and fourth parts of paragraph 2 of the Resolution, when applied to persons mentioned there, makes them less equal before court than those whose property is expropriated in the public or State interest under general procedure, since the persons mentioned in paragraph 2 of the Resolution have no right or reason to protect their interests at the court as regards the amount of compensation for the expropriated property. Courts - in cases like this and according to the law - can only quite formally approve of the price, determined by the State Land Service.

They also pointed out that the second and fourth parts of paragraph 2 of the Resolution express the notion that evaluation of the property depends only on what basis or how the property has been obtained and on whether the property status of its owner has improved or become worse. The applicants are of the opinion that compensation for expropriated property should be reasonable and should not be determined merely on the basis of the manner of obtaining it. If for one and the same property two people are paid different sums of money just because the properties have been obtained differently, then that constitutes discrimination on the ground of property status.

The Constitutional Court concluded that the procedure for the evaluation and determination of compensation for immovable property, which is envisaged by the second part of paragraph 2 of the Resolution, has been determined taking into consideration State or public interests. The terms of the second part of paragraph 2 of the Resolution refer only to immovable properties that are necessary for State or public needs for the maintenance and operation of specially protected natural objects, educational, cultural and scientific objects of state significance, State training farms, national sport centres as well as objects of engineering and technical, energy and transportation infrastructure. Such a procedure is in conformity with the fundamental principle of denationalisation of property in the Republic of Latvia - "to denationalise the property or to compensate its value to the extent that has been indicated during nationalisation" and it has the objective - in the context of consequences of the policy of annexation by the USSR to re-establish social justice and to fairly balance interests of the individual and the society after completion of the property reform (conversion).

Although the amount of compensation is to be reasonably related to the value of the property to be expropriated, Article 1 Protocol 1 **ECHR** - as has repeatedly been shown in the practice of the European Court of Human Rights - does not envisage full compensation for the expropriated property, especially in cases when expropriation of property takes place for important public interests. The European Court of Human Rights has come to the conclusion that legitimate objectives of public interest, such as those pursued by measures of economic reform or measures designed to achieve greater social justice, may call for reimbursement of less than the full market value. Thus, the principle of fair balance not only establishes a certain boundary between an admissible and inadmissible expropriation of property but also invests the government with extensive rights when evaluating the property to be expropriated and determining the amount of compensation.

The second and fourth parts of paragraph 2 of the Resolution do not prevent the owner whose property is being expropriated in the public or State interest from appealing to a court to review the extent of compensation. The second part of paragraph 2 of the Resolution only establishes the maximum extent of compensation. Therefore the viewpoint of the applicants, that the above persons have been denied the right to protection by a court and equality before the court, is unfounded.

The Constitutional Court decided to declare the second and fourth part of Paragraph 2 of the Supreme Council Resolution of 15 September 1992 on the procedure by which the Law of the Republic of Latvia on eminent domain takes effect as being in compliance with Article 1 Protocol 1 **ECHR**.

Cross-references:

On the question of reimbursement for less than full market value, see:

- Judgment J*ames and Others v. the United Kingdom*, 21.02.1986, paragraph 54;

- Judgment *Lithgow and Others v. the United Kingdom*, 08.07.1986, paragraph 121; *Special Bulletin* ***ECHR*** [ECH-1986-S-002];

- D.J.Harris, M.O'Boyle, C.Warbrick: Law of the European **Convention** on Human Rights; London, Dublin, Edinburgh, 1995, pages 532-534.

Languages:

Latvian, English (translation by the Court).

LIE-1998-2-001

18-06-1998 StGH 1998/6

a) Liechtenstein / **b)** State Council / **c)** / **d)** 18-06-1998 / **e)** StGH 1998/6 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.16 **General Principles** - Proportionality.
3.17 **General Principles** - Weighing of interests.
3.18 **General Principles** - General interest.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
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.

Keywords of the alphabetical index:

Co-defendant, consultation of the case-file, restriction / Co-defendant, collusion / Extortion, serious.

Headnotes:

The right to consult case-files may be restricted within the limits of the law and in keeping with the principles of proportionality and the public interest *(Übermaßverbot)*. When there is more than one accused, consultation of the case-file during investigation proceedings may be refused until all the accused have been questioned.

Summary:

During an investigation opened against the applicant and two other defendants for serious extortion, the investigating judge rejected a request from the applicant to consult the case-file on the grounds that he was still due to be questioned. The investigating judge accepted a second request to consult the file once this questioning had taken place.

In response to an appeal by the Public Prosecutor's Department, the Appeal Court set aside the investigating judge's decision to allow the applicant's second request on the grounds, *inter alia*, that his co-defendants were still due to be questioned. The applicant appealed to the Supreme Court to overrule this decision. The Supreme Court rejected this application, also relying primarily on the grounds that there was a need to prevent collusion between the defendants. If the public interest inherent in the quest for truth during a criminal hearing is weighed against the interest of the applicant in consulting the case-file, a brief restriction on the right to consult the case-file until all the defendants have been questioned is fully justified.

The applicant lodged a constitutional appeal against this decision, which was rejected by the State Council. In

its judgment the State Council found that the fundamental right to consult the case-file can be restricted within the limits of the law and in keeping with the principles of proportionality and the public interest *(Übermaßverbot)*. Article 6.3.d **ECHR** does not offer broader legal protection than the basic domestic law, as the fundamental law of the European **Convention** on Human Rights is only applicable after indictment, and then only subject to certain restrictions. In the instant case, the refusal to allow the applicant to consult the entire criminal case-file until all the defendants had been questioned seems proportionate. For in the event that there is more than one accused, there is often an obvious risk of collusion between them to prevent the investigation from continuing. However, even in this event, any automatic refusal to allow consultation of the criminal case-file is contrary to the application of the fundamental right to consult the case- file required by the Constitution. Both the decision to restrict the right to consult the case-file in itself and the extent and duration of this restriction must be furnished with detailed reasons.

Languages:

German.

LIE-1996-3-002

30-08-1996 StGH 1996/6, 7

a) Liechtenstein / **b)** State Council / **c)** / **d)** 30-08-1996 / **e)** StGH 1996/6, 7 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

2.1.1.1.1 **Sources of Constitutional Law** - Categories - Written rules - National rules - Constitution.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.3.9 **Sources of Constitutional Law** - Techniques of review - Teleological interpretation.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.13.6 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to a hearing.
5.3.13.9 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Public hearings.
5.3.13.28 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to examine witnesses.

Keywords of the alphabetical index:

Disciplinary procedure / Right of reply / Right to defend oneself.

Headnotes:

In the event of disciplinary dismissal for offences under criminal law, the person concerned has the right to be heard and to have witnesses heard. This right derives from the right to a hearing and to a fair trial enshrined in the Constitution. According to Strasbourg case law, however, the right to a fair trial enshrined in the European **Convention** on Human Rights is not generally applicable to disciplinary procedures.

The person concerned also has the right to a public hearing, but not under Article 6.1 **ECHR**, because Liechtenstein entered a reservation in that respect. Nevertheless, this provision of the **Convention** has a definite influence on the law of Liechtenstein. As part of a modern institutional approach to fundamental rights, the principle is also based on the fundamental right, embodied in the law of Liechtenstein, to a fair trial and to a hearing.

Summary:

The two applicants were dismissed from state service by the Government for disciplinary reasons. They were accused of regularly absenting themselves from their work over a period of several months, without authorisation, and of clocking in for one another to cover up these absences.

The applicants lodged an appeal against this immediate dismissal with the Administrative Court *(Verwaltungsbeschwerdeinstanz)*. Following a non-public hearing which the two applicants were not invited to attend, the court basically dismissed the appeal and upheld the disciplinary decision (immediate dismissal).

The applicants then appealed to the State Council, pleading the right to a free and public hearing under Article 6.1 **ECHR**, and alleging a violation of their constitutional right to a judicial hearing. The Council noted that when Liechtenstein ratified the European **Convention** on Human Rights, it entered a reservation concerning the requirement under Article 6.1 **ECHR** for a public hearing. This reservation is generally considered to be in conformity with Article 64 **ECHR**. The right to a fair trial also enshrined in Article 6.1 **ECHR** was not included in Liechtenstein's reservation, but according to Strasbourg case law this provision is not generally applicable to disciplinary procedures. However, the right to a fair trial and to a judicial hearing is also an acknowledged fundamental right in Liechtenstein. In particularly serious cases, procedural guarantees call for a public hearing with the possibility of calling witnesses. Since immediate dismissal is the most serious form of disciplinary measure, and the applicants were accused inter alia of criminal offences, the Council considered this to be a particularly serious case.

Furthermore, in cases which receive extensive media coverage, the Council considers that it is in the interest of the law to hold a public hearing before the Administrative Court. While this interest does not derive directly from Article 6.1 **ECHR**, the State Council acknowledged, even before the **Convention** entered into force with respect to Liechtenstein, the clear influence on Liechtenstein law of certain provisions of the **Convention** and, subsequently, of some of its protocols which have not been ratified. In the context of a modern institutional approach to fundamental rights, and independently of the list of fundamental rights set forth in the **Convention**, the basis for this legal right to a public hearing may be considered to reside in the constitutional right to a fair trial and to a judicial hearing.

As a result, the Council ruled in favour of the applicants.

Languages:

German.

LTU-2000-2-005	08-05-2000	12/99, 27/99, 29/99, 1/2000, 2/2000	On undercover operations involving the simulation of a criminal act

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 08-05-2000 / **e)** 12/99, 27/99, 29/99, 1/2000, 2/2000 / **f)** On undercover operations involving the simulation of a criminal act / **g)** *Valstybes zinios* (Official Gazette), 39-1105, 12.05.2000 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.2 **Sources of Constitutional Law** - Categories - Case-law - International case-law - Court of Justice of the European Communities.
3.9 **General Principles** - Rule of law.
4.4.4.1.1.1 **Institutions** - Head of State - Status - Liability - Legal liability - Immunity.

4.5.11	**Institutions** - Legislative bodies - Status of members of legislative bodies.
4.11.2	**Institutions** - Armed forces, police forces and secret services - Police forces.
5.3.13.17	**Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Rules of evidence.
5.3.13.22	**Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Presumption of innocence.
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.

Keywords of the alphabetical index:

Police, undercover operation / Agent provocateur.

Headnotes:

The Preamble to the Constitution, which states that the Lithuanian nation strives for an open, just and harmonious civil society and a state governed by the rule of law, pre-supposes that every individual and society as a whole must be safe from unlawful infringements. One of the duties of the state and one of its priority tasks is to ensure such safety. Therefore the state is compelled to implement various specific lawful means permitting the curbing of crime.

One of such lawful means is to undertake undercover police operations involving the simulation of a criminal act. This means undertaking authorised acts exhibiting criminal characteristics aimed at protecting the key interests of the state, the public or an individual. This method is a special form of operational activities. The undercover participants in such activities perform actions which formally correspond to the definitions of particular crimes. Using this method allows for more favourable conditions to be created for the detection or investigation of serious or complex crimes. Certain crimes, e.g. cases of corruption, would be extremely difficult to detect without using such methods.

Summary:

The petitioners - the Vilnius Regional Court and the Vilnius City Court of the First District - questioned whether undercover police operations involving the simulation of a criminal act could be carried out at all. The petitioners maintain that the Law on Operational Activities does not define the contents, intensity, mechanism of accomplishing such actions, as well as other issues: all this is left for the person and officers conducting the activities. Therefore, the disputed provisions of the law do not protect the person who is the object of such activities from provocation and active inducement. Furthermore, the petitioners were of the opinion that such methods might only be used with prior authorisation by a court or a judge, but not by the Prosecutor General or the Deputy Prosecutor General designated by him.

The group of Parliament *(Seimas)* members that also petitioned the Court argued that under the meaning of Article 11 of the law undercover police operations involving the simulation of a criminal act may be used against any person. The law therefore restricts the guarantees of personal immunity conferred on certain categories of persons. Under the law, such operations may be used against the President of the Republic as well as parliament members, whereas the provisions of the Constitution regarding immunity of these persons guarantee their protection against possible (unlawful) provocation. In the opinion of the petitioner, Article 11 of the law unreasonably narrows the immunity of the President of the Republic and of parliament members.

The Constitutional Court emphasised that such activities may only be carried out with the aim of "connecting oneself" to permanent or continuing crimes. Such criminal deeds continue without the efforts of participants in undercover police operations. The undercover participants only imitate the actions of preparation of a crime or those of a crime which is being committed. It is not permitted for undercover police operations to incite or provoke the commission of a new crime nor to incite the commission of a criminal deed which was merely prepared and only later terminated by an individual. Thus, under the law the actions performed by police in undercover operations are held to be lawful where the established limits of such actions are not overstepped.

Disregard of these limits established in the law, provocation of the commission of a crime or any other abuse by means of such operations makes them unlawful. Thus the Court ruled that this type of action may be used.

The Constitutional Court also noted that according to the case-law practice of the European Court of Human Rights, in themselves secret methods of detection of crimes and offenders do not violate Article 8 **ECHR** (43). It emphasised that in its Judgment in the case of Klass and others vs. Germany of 6 September 1978, the European Court of Human Rights considered that the use of secret means is not incompatible with Article 8 **ECHR**, since it is the fact of not informing the individual that ensures the efficacy of this measure.

The Constitutional Court also noted that immunity of the President of the Republic is very broad while he or she is in office. Thus, the Constitutional Court concluded that no forms of police operations, including undercover operations involving the simulation of a criminal act, may be used against the President of the Republic. The provisions of the Constitution do not, however, prohibit the enactment of legal regulations providing for undercover and similar police operations to be used against other persons including members of the parliament.

Languages:

Lithuanian, English (translation by the Court).

MLT-2001-3-004 18-11-2001 18/01 Ronald Agius v. Advocate General

a) Malta / **b)** Constitutional Court / **c)** / **d)** 18-11-2001 / **e)** 18/01 / **f)** Ronald Agius v. Advocate General / **g)** / **h)** .

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.
5.3.13.4 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Double degree of jurisdiction.
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.

Keywords of the alphabetical index:

Appeal, effect / Appeal Court, procedure / Extradition, safeguard.

Headnotes:

Where domestic law provides for judicial proceedings in determining a request for extradition, the conduct of such proceedings is to be in conformity with the rules that guarantee a fair trial in terms of Article 6 **ECHR** and Article 39 of the Constitution.

Summary:

Extradition proceedings were filed against the applicant. In the appeal stage the prosecution produced fresh evidence, and the applicant contended that Article 22.3 of the Extradition Act (Chapter 276 of the Laws of Malta) was in breach of his fundamental rights as safeguarded by Article 6 **ECHR** and Article 39 of the Constitution. In terms of Article 22.3 of the Act, "it shall be lawful for the Commissioner of Police or for the

Attorney General as the case may be, as well as for the person whose return is requested, to produce evidence before the Court of Criminal Appeal even though such evidence shall not have been produced before the court of committal".

The Extradition Act is a special law that regulates the extradition to and from other countries of persons accused or convicted of offences. Under Maltese law, the ultimate decision whether or not to extradite an individual is an executive decision. However, the law provides for a judicial process to establish the circumstances which motivated the request for extradition and the issue of a warrant of arrest. The Magistrates Court is competent to decide the matter, and either party has a right to appeal. As an ultimate resort the person committed to custody has also the right to file a constitutional application if he believes that any provision of the Constitution is, has been, or is likely to be, contravened (Article 16 of the Extradition Act).

The Court observed that case-law has established the principle that in extraditions the arguments an individual might successfully raise under the European **Convention** on Human Rights are correspondingly narrower. In fact, with respect to the substantive rights, which an individual can invoke as protection of his fundamental rights under the European **Convention** on Human Rights, these arguments are limited only to allegations of a high probability that the individual being extradited could be subjected to serious maltreatment prohibited under Article 3 **ECHR**. However, in the current proceedings the Court was dealing with the procedural aspect. The Court also considered the constant jurisprudence of the Strasbourg organs that the decision to deport a person does not involve a determination of a civil right and obligation or a criminal charge against him within the meaning of Article 6 **ECHR**.

Notwithstanding, where domestic law (Malta is a case in point) provides for a judicial process in determining a request for extradition, the conduct of such proceedings is to be in conformity with the rules that guarantee a fair trial in terms of Article 6 **ECHR** and Article 39 of the Constitution. The provisions of the Extradition Act reflect such principles, thereby ensuring the right of the accused to make submissions against a request for extradition, the right to have the case reviewed by a Court of second instance and equality of arms between the parties to the proceedings.

Article 22.3 of the Extradition Act provides an additional guarantee in favour and against extradition, in that the person whose extradition is being requested has the opportunity to produce further evidence whilst the proceedings are pending in front of the Court of Criminal Appeal. Such a guarantee places both parties on an equal footing. Furthermore, the law does not impose any limitation or restriction on either party to verify and control the evidence that is produced in the appeal stage or to rebut and contradict such evidence.

The Court also dismissed the complaint that Article 22.3 deprived the applicant of his right to appeal from the decision of a Court of Criminal Appeal based on fresh evidence. The Court held that Article 6.1 **ECHR** does not guarantee a right of appeal from a decision of a court. However, where a state in its discretion provides such a right, then proceedings before the appellate court are governed by Article 6.1 **ECHR**.

The Constitutional Court reiterated that extradition proceedings were a substantive right of the person whose return is requested. Judicial proceedings are to be conducted in terms of the guarantees established by the European **Convention** and the Constitution.

Languages:

Maltese.

MLT-2001-2-001 17-01-2001 579/97AJM Giovanni Psaila v. the Advocate General

a) Malta / **b)** Constitutional Court / **c)** / **d)** 17-01-2001 / **e)** 579/97AJM / **f)** Giovanni Psaila v. the Advocate General / **g)** / **h)** .

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.18 **General Principles** - General interest.
5.3.5.1.1 **Fundamental Rights** - Civil and political rights - Individual liberty - Deprivation of liberty - Arrest.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.13.17 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Rules of evidence.
5.3.17 **Fundamental Rights** - Civil and political rights - Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Witness, detention / Informant, identity, disclosure / Witness, obligation, fulfilment.

Headnotes:

The applicant contended that Article 522.2 of the Criminal Code (Chapter 9 of the Laws of Malta) was in violation of Articles 5.1 and 5.4 **ECHR** and Article 34.1 of the Maltese Constitution. The article stipulated that "it shall be in the power of the court to order any witness, who shall refuse to be sworn in or to make a deposition, to be arrested and detained as long as may be necessary, or as the court may think proper, having regard to the insubordination of the witness and the importance of the matter".

The law provided guarantees which secured the fulfilment of the obligation of the witness to reply to questions. Judges had to use their discretion in deciding if this obligation had been fulfilled, taking into account the supreme interest of the proper administration of justice.

The fact that Article 522.2 of the Criminal Code did not impose any limitation on the period of detention was in violation of Article 5.1.b **ECHR** and Article 34 of the Constitution. The Court held that in terms of the article it was possible for a hostile witness to be detained in custody even after the conclusion of the trial.

Article 522.2 was also held to be in breach of Article 5.4 **ECHR** in that it did not afford the witness an opportunity to contest the court's order and request a review thereof.

Summary:

The applicant was summoned as a witness in the course of criminal proceedings instituted against a third party accused of homicide. During his deposition, the applicant refused to answer a question made by the prosecuting officer whereby he was requested to reveal the identity of a person. The Court of Magistrates ordered the arrest of the applicant under Article 522.2 of the Criminal Code. The applicant alleged that he was detained for a period of seven days.

The Constitutional Court emphasised that the Court had every right to adopt legitimate measures provided by legislation to ensure that a witness, declared to be hostile, understands that he has an obligation towards society to state the truth, and nothing but the truth. The witness had no right to refuse to disclose the identity of an individual. This was not a case where the witness could invoke the privilege of professional secrecy. His claim was based on the promise he made to his informant not to disclose his identity.

Under the disputed provision, detention was intended to secure the fulfilment of the obligation imposed on the witness to reply to questions. Detention in order to ensure the fulfilment of an obligation, rather than to act as a punishment for breaching such an obligation, cannot be justified under Article 5.1.b **ECHR**.

The law outlined the criteria for retaining a witness in detention in terms of Article 522.2 of the Criminal Code, and declared that they were not based on time but on the attitude of the witness and the circumstances under

which he refused to co-operate. However, the Court took exception to that part of the provision which did not establish a maximum period during which the witness could be detained. The obligation of the witness to tender evidence should subsist during the course of the proceedings and no further. On conclusion of the court proceedings, the obligation of the witness ceased and his evidence would no longer be essential. The words "detained as long as may be necessary, or as the court may think proper", without any limitation or qualification, could theoretically lead to a situation where the witness is remanded in custody notwithstanding the closure of the trial.

Furthermore, the law itself did not provide a right to appeal or to contest the detention once the court ordered the arrest of the witness or during the course of arrest. Article 5.4 **ECHR** was held to apply in all those cases where it was possible for an individual to be deprived of his liberty. The **Convention** intends ensuring the right of an individual to contest his detention in all circumstances, even where his arrest ensues for non-compliance with the lawful order of a court or to secure the fulfilment of an obligation imposed by law. A state must provide recourse to the courts in all cases whether the detention is justified by Article 5.1 **ECHR** or not. Therefore, although a detention has been found to be lawful under the European **Convention** on Human Rights, Article 5.4 **ECHR** must nonetheless be considered.

The respondent argued that in terms of Article 137 of the Criminal Code, a magistrate was empowered to attend to a lawful complaint dealing with an unlawful detention. Therefore, the decision to remand in custody a hostile witness was subject to revision by a court of law. However, the Constitutional Court referred to a judgment delivered by the European Court of Human Rights, *T.W. v. Malta* (App. Number 25644/94) on 29 April 1999, and upheld the view that:

"The review must be automatic. Furthermore, even in the context of an application by an individual under Section 137, and having regard to Section 353, the scope of the review has not been established to be such as to allow a review of the merits of the detention. Apart from the cases where the time limit of 48 hours was exceeded, the government has not referred to any instances in which Section 237 of the Criminal Code has been successfully invoked to challenge either the lawfulness of, or the justification for, an arrest on suspicion of a criminal offence...".

The Constitutional Court concluded that the arrest of a witness to ensure that he submits his evidence and replies to questions was a legitimate measure to ensure the proper administration of justice.

Article 522.2 of the Criminal Code was in breach of an individual's fundamental rights, in that it did not stipulate that the period of detention could not exceed the duration of the trial in which the witness was summoned to give evidence. Furthermore this provision of law failed to provide for a system whereby the court's order could be challenged.

In this particular case, the period of detention was not disproportionate to the scope of the Criminal Code, namely establishing an adequate mechanism in the search for the truth.

No compensation was due. The mere fact of violation of one or more of the first four paragraphs of Article 5 **ECHR** does not in itself constitute a sufficient ground for an award of compensation.

Cross-references:

- Decision no. 7341/76, *Egg v. Switzerland*;
- Decision no. 10600/83, *Johansen v. Norway*;
- *De Wilde, Ooms and Versyp v. Belgium*, 18.06.1971, *Special Bulletin **ECHR*** [ECH-1971-S-001];
- *T.W. v. Malta,* 29.04.1999.

Languages:

Maltese.

MLT-1998-2-002 18-08-1998 466/94 Dr Lawrence Pullicino v. The Hon. Prime Minister et al

a) Malta / **b)** Constitutional Court / **c)** / **d)** 18-08-1998 / **e)** 466/94 / **f)** Dr Lawrence Pullicino v. The Hon. Prime Minister et al / **g)** / **h)** .

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.10 **General Principles** - Certainty of the law.
3.17 **General Principles** - Weighing of interests.
5.3.13.10 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Trial by jury.
5.3.13.15 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Impartiality.
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.
5.3.13.26 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to have adequate time and facilities for the preparation of the case.
5.3.22 **Fundamental Rights** - Civil and political rights - Freedom of the written press.

Keywords of the alphabetical index:

Judge, pre-trial decisions / Publicity of proceedings / Note, confiscation / Media, newspaper articles, prejudicial / Media, press campaign, virulent / Judge, challenging / Text-book, legal, confiscation.

Headnotes:

Although publicity is a means of guaranteeing the fairness of a trial, a balance must be struck between the right to a fair trial and the freedom of expression enjoyed by the media in terms of Article 10 **ECHR**.

The taking of certain pre-trial decisions by a judge presiding over a trial by jury does not in itself justify fears as to his impartiality.

The confiscation of notes written by an accused during a trial by jury constitutes a breach of his fundamental right to a fair hearing. However, account could be taken of the proceedings in their entirety when deciding whether to grant a remedy.

Summary:

The applicant had been condemned to a term of fifteen years imprisonment, having been found guilty of complicity in the crime of grievous bodily harm followed by death of a person while in police custody. The crime was committed at the time when the applicant occupied the office of Police Commissioner. The judgement delivered by the Criminal Court was confirmed by the Court of Criminal Appeal on 15 April 1994.

The applicant filed a constitutional application alleging that during the criminal proceedings his right to a fair trial had been breached.

Although in his application the applicant raised various grievances, those of major interest were that during the criminal proceedings the presiding judge:

1. Had been negatively influenced against the accused as a result of the various press reports which were published in the local newspapers.

2. Was prejudiced against the applicant since prior to the commencement of the trial by jury he had already expressed himself in the sense that the applicant was not a credible person.

3. Had ordered that prior to the applicant giving evidence in the trial by jury, all his personal papers and law text-books which were in his possession be removed from his cell.

1. Virulent press campaign

In respect of the publicity campaign which the applicant complained of, the Constitutional Court expressed the view that publicity is to be considered as a guarantee of the fairness of a trial. Furthermore, the right to a fair trial was to be counter — balanced with the right of the freedom of the press as laid down in Article 10 **ECHR**. There is general recognition of the fact that the Courts cannot operate in a vacuum. Whilst they are the forum for settlement of disputes, this does not mean that there can be no proper discussion of disputes elsewhere, be it in specialised journals, in the general press, or amongst the public at large. The media also has an obligation to impart information on matters which come before the Courts.

It is true that certain articles published in the local newspapers were not written in an objective manner and were prejudicial to the applicant. However these were the exception and not the rule. Furthermore, some press comments on a similar trial involving a matter of public interest must be expected. One had also to consider that the objectionable articles were published after the jury had reached its final verdict, although the appeal was still pending. Thus, one could not conclude that a virulent press campaign was directed against the applicant, and which if present would have prejudiced the applicant's fundamental right to a fair hearing.

Although in trials by jury the risk that the jury is influenced by public opinion is more pronounced, this is difficult to prove as no written statement of reasons is provided by the members of the jury. No proof was produced that the articles in question produced a negative effect on the members of the jury or the presiding judges. According to the Constitutional Court, the articles which contained a prejudicial comment were also countered by the judge himself during the proceedings, by his direction towards the jury intended to discount such comments. Furthermore, the long period of time during which the jury deliberated, the vote expressed by the jury and the objective conclusion it reached, are a confirmation that the jury was in no way influenced by the press. Although the jury was not composed of professional judges, nonetheless it provided every guarantee of integrity and impartiality. In this respect the Constitutional Court concluded that it did not find any appearance of a violation of the rights and freedoms of the applicant as set in the Maltese Constitution and the European **Convention** on Human Rights.

2. Impartiality of the presiding Judge

The applicant alleged that the presiding judge in the trial by jury was not objectively impartial. The applicant contended that in the early stages of the jury, the judge delivered certain decisions which instilled the appearance that he was prejudiced against the applicant. The applicant claimed prejudice in the sense that prior to the commencement of the jury, the presiding judge had already formed an opinion of the character of the person to be judged. This could be seen, argued the applicant, when the judge revoked the applicant's bail and ordered his immediate arrest. The applicant argued that in a case which revolved around the credibility of witnesses and under such circumstances the presiding judge could not be said to be objectively impartial. The applicant further contended that during the proceedings he had not requested the presiding judge to withdraw from taking cognisance of the case, in order not to prolong proceedings. Furthermore, had he made such a request, then if refused the bias against him would have been of a larger scale.

The Constitutional Court held that in applying the objective test, what is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. Justice must not only be done; it must also be seen to be done. It further held that according to jurisprudence of the E.C.H.R, the mere fact that a judge has made pre — trial decisions cannot

be taken as in itself justifying fears as to his impartiality. What matters is the extent and the nature of those decisions.

Respondents contended that prior to the commencement of the trial, the applicant could have raised a plea requesting the presiding judge to abstain from sitting in the proceedings. In this respect, the Constitutional Court held that Article 734 of the Code of Organisation and Civil Procedure (Chapter 12) stipulated that a judge was to abstain from sitting in a case if he had previously taken cognisance of the case as a judge. However, this was only applicable where the previous decision delivered by the judge definitely disposed of the merits. Thus, the Constitutional Court held that a judge who had not expressed himself on the merits of the case could not be challenged. Furthermore, the judge had taken no part in the preparation of the case for trial or the decision to prosecute. The preliminary decision delivered by the judge concerning the issue whether the applicant should be remanded in detention had no connection with the merits of the case.

Another remedy was to request the Criminal Court to refer the issue to the First Hall of the Civil Court sitting in its constitutional jurisdiction, in terms of Article 46 of the Maltese Constitution.

Furthermore, the Constitutional Court held that notwithstanding this preliminary decision, at no point in time did the judge express an opinion on the character of the applicant. This is apart from the consideration that under the Maltese legal system the final decision concerning the guilt or otherwise of the accused is the responsibility of the members of the jury and not the judge. No proof was produced that the presiding judge had influenced the members of the jury in an adverse manner. The manner in which the judge addressed the jury is added proof that no such bias was present. In particular, throughout his address the judge warned the members of the jury that they had to deliver the verdict on the facts as produced to them.

3. Sequestration of personal notes and legal text-books during the trial by jury

The Constitutional Court opined that the criminal proceedings were lengthy and it was evident that the final decision depended much on the credibility of the evidence heard throughout the trial. It was thus essential for the applicant to be placed in the best possible position to rebut evidence given by witnesses produced by the Prosecution. The Constitutional Court contended that for this to be achieved the applicant had a right to refer to the various notes he had compiled throughout the trial. Although the Criminal Court of Appeal had made specific reference to this incident, it concluded that notwithstanding such an irregularity, no miscarriage of justice had occurred during the trial.

On this issue the First Hall of the Civil Court concluded that the fact that the notes were in the possession of the accused during the whole criminal proceedings, except while he was giving evidence, and the fact that they were at the disposal of his defence counsel, were determinate in permitting the applicant to prepare his defence.

The Constitutional Court referred to Article 583 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) which stipulates:

> "A witness may refresh his memory by referring to any writing made by himself or by another person under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing; but in such case, the writing must be produced and may be seen by the opposite party".

The Court argued that according to Article 463 of the Criminal Code (Chapter 9 of the Laws of Malta), in criminal proceedings the accused has a right to be furnished with a copy of the transcript of the evidence submitted, and of all the documents which form part of the acts of proceedings (Article 519 of the Criminal Code — Chapter 9 of the Laws of Malta).

Thus, as the accused enjoys the right to such documents he must also have the right to take notes of the evidence produced during the trial. In terms of Article 583 (Chapter 12 of the Laws of Malta) he has the right to refresh his memory by referring to these notes.

The scope of this Article is to ensure that evidence produced in court is genuine and not contaminated. This

provides a further guarantee that during the proceedings the truth is established. The applicant's evidence during the trial was one of the means whereby he could defend himself from the accusations. Therefore, the courts were bound to ensure that the defendant was afforded all the guarantees of a fair trial. Furthermore, reference to legal text — books would have assisted the applicant in the preparation of his defence.

The order for the immediate removal of all applicants' notes and legal textbooks from his cell had a negative effect on the evidence given by the applicant both from the factual and psychological point of view. Furthermore, according to the principle of equality of arms, one of the features of the concept of fair trial, each party was to be afforded a reasonable opportunity to present its case in conditions which do not place him at a disadvantage in respect to his adversary. In this respect the Constitutional Court declared that the applicant's right to a fair hearing was breached, notwithstanding the fact that the Court of Criminal Appeal had declared that no miscarriage of justice had occurred.

However, the Constitutional Court expressed the view that while proceedings were still pending before the Court of Criminal Appeal, the applicant should have requested that he give evidence with the assistance of the notes seized from his possession. Although the applicant had this remedy, for some reason he failed to make use of it. Consequently, the Constitutional Court was entitled to refuse the granting of a remedy to applicant.

The Constitutional Court further stated that in similar proceedings, account had to be taken of the entirety of proceedings in the domestic legal order. Where it ensued that as a whole, the proceedings were fair, then the applicant's grievances could not be entertained. The Court concluded that when the criminal proceedings instituted against the applicant are examined as a whole, one could safely declare that they were fair.

Cross-references:

In its reasoning the Constitutional Court referred to judgments delivered by the European Commission and European Court of Human Rights amongst which were:

De Cubber v. Belgium (1984); *Hauschildt v. Denmark* (24.05.1989), *Special Bulletin* ***ECHR*** [ECH-1989-S-001]; *Stanford v. the United Kingdom* (23.02.1994); *Fey v. Austria* (24.02.1993); *Padovani v. Italy* (26.02.1993).

The Sunday Times v. the United Kingdom (26.04.1979), *Special Bulletin* ***ECHR*** [ECH- 1979-S-001]; *The Sutter Case, X v. the United Kingdom*, a decision of the Commission (16.05.1969), *X v. Austria*, a decision of the Commission (23.07.1963).

Jespers v. Belgium, a decision of the Commission (14.12.1981); *Can v. Austria,* a decision of the Commission (14.12.1983); *F. v. the United Kingdom*, a decision of the Commission (13.05.1986); *Windisch Case* (27.09.1990); *Delta Case* (19.12.1990); *Vidal v. Belgium* (22.04.1992).

Languages:

Maltese.

NED-1999-3-002 26-02-1999 R97/140

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 26-02-1999 / **e)** R97/140 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1999/716.

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.

2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.21 **Fundamental Rights** - Civil and political rights - Freedom of expression.
5.3.36.2 **Fundamental Rights** - Civil and political rights - Inviolability of communications - Telephonic communications.

Keywords of the alphabetical index:

Telephone communication, freedom of expression, applicability / *Lex specialis*.

Headnotes:

In respect of telephone calls, Article 8 **ECHR** is not a *lex specialis* in relation to Article 10 **ECHR**, in the sense that Article 10 **ECHR** is wholly inapplicable to telephone communications.

Summary:

Neither the wording of Articles 8 and 10 nor the case law of the European Court of Human Rights (European Court of Human Rights, *Klass et al.*, 6 September 1978, Series A no. 28; European Court of Human Rights, *Special Bulletin **ECHR*** [ECH-1978-S-004], *Silver et al.*, 25 March 1983, Series A no. 61, *Special Bulletin **ECHR*** [ECH-1983-S-002]) provide any grounds on which to argue that in respect of telephone communications Article 8 is a *lex specialis* in relation to Article 10, in the sense that Article 10 is wholly inapplicable to telephone communications. It would be at odds with the technological advances of the past few decades to withhold the protection afforded by Article 10 from users of the telephone network. In the case at hand, the Court of Appeal's ruling that the measures (deliberately tampering with call-back lines) constituted an interference within the meaning of Article 10.1 **ECHR** did not display an incorrect conception of law.

The argument that without restrictions loss of income would have occurred to such an extent as to render the maintenance and renewal of the infrastructure impossible indicates grounds that would justify the view that this interference was a restriction necessary in a democratic society in the interests of the prevention of disorder or the protection of the rights of others.

Languages:

Dutch.

NED-1998-1-010 19-12-1997 8974

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 19-12-1997 / **e)** 8974 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1998, 3.

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
5.3.13.19 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Equality of arms.
5.3.13.21 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Languages.

Keywords of the alphabetical index:

Interpreter, right, civil proceedings / Language of civil proceedings, interpreter.

Headnotes:

Under certain circumstances, the failure in civil cases to provide the assistance of an interpreter free of charge could conflict with the requirements of a fair hearing, including the principle of equality of arms.

Summary:

The Supreme Court held that it was right that in the cassation proceedings of this civil case it was not being contested that the right to the free assistance of an interpreter in the verbal hearing of these divorce proceedings could be derived from Article 6.3.e **ECHR**. Where civil proceedings were concerned, Dutch law did not provide for any such right, so that the question arose of whether it could be directly derived from the provisions of Article 6.1 **ECHR**.

In the opinion of the Supreme Court, this question should be answered as follows. The mere fact that the **ECHR** provided for such a right in the treatment of criminal cases but not in that of civil cases did not justify the conclusion that such a right could never be held to exist in relation to civil cases (cf. European Commission of Human Rights 9 December 1981, application no. 9099/80, D&R 27, p. 210). Under certain circumstances, the failure in civil cases to provide the assistance of an interpreter free of charge could conflict with the requirements of a fair hearing, including the principle of equality of arms. Hence in principle, the same applied to the right to the free assistance of an interpreter as to the right to free legal assistance. The member States had an obligation to provide free legal assistance under Article 6.3.c **ECHR**, but the **ECHR** included no such express provision in regard to civil cases. Even so, the obligation to provide free legal assistance sometimes existed in civil cases, namely if such legal assistance was necessary to ensure that the fair trial requirement of Article 6.1 **ECHR** was met (cf. European Court, 23 November 1983 in the case of Van der Mussele vs. Belgium, series A, no. 70, § 29, p. 14); whether this applied depended entirely on the circumstances of the case at hand, in particular the question of whether free legal assistance was indispensable to a fair hearing of the case (cf. European Court, 9 October 1979, case of Airey vs. Ireland, series A, no. 32, §26, p. 16; *Nederlandse Jurisprudentie*, 1980, 376).

In the present case, the Supreme Court held that it could not be said in the present case that the failure to provide the woman with the free assistance of an interpreter at hearings by the two courts that dealt with the facts of her case was in breach of the requirements embraced by the concept of a fair hearing.

Languages:

Dutch.

NED-1998-1-002 14-10-1997 105.128

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 14-10-1997 / **e)** 105.128 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1998, 187.

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.1.4.6 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Civil and Political Rights of 1966.
5.3.13.14 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Independence.

Keywords of the alphabetical index:

Judge, participation in previous process / Statement of accused, previous evaluation as statement of a witness.

Headnotes:

When an accused is faced in his criminal case with a number of judges who have already assessed his reliability as a witness in a different criminal case against a fellow suspect, the fear of the accused that the Court is biased against him is objectively justified.

Summary:

In a different criminal case against a fellow suspect, the Court of Appeal had used statements made by a witness in that case (now the accused), having first expressed its opinion, furnished with reasons, as to the reliability of the testimony of the witness. In the case at hand, two of the three justices were also on the bench in the case against the fellow suspect. The accused contended that his case was therefore not being heard by independent judges.

The Supreme Court considered that the mere circumstance that the accused's case was dealt with on appeal by a division of the Court of Appeal, two members of which also belonged to the division that had previously found that a fellow suspect, together with *inter alia* the accused, had contravened Article 140 of the Criminal Code in another case, did not in itself constitute a serious indication that the Court was biased against the accused, or that the accused's fear in that regard was objectively justified.

However, the Supreme Court went on to consider that the following special circumstances applied in the case at hand. In the case against the fellow suspect, the accused, acting as a witness, had testified that the statement he had previously made to the police was incorrect, as it had been obtained through intimidation and the promise of a reduced sentence. In his own case he reiterated this position. However, he found himself facing a division of the Court of Appeal two members of which had formed an opinion on this position before, giving their reasons and having first investigated it, and who had therefore already given their opinion on the reliability of the accused in the case at hand. In the view of the Supreme Court, under these special circumstances it must be concluded that the fear of the accused as to the Court's partiality was objectively justified, and that on these grounds there had been a violation of Article 6.1 **ECHR** and Article 14.1 of the International Covenant on Civil and Political Rights.

Languages:

Dutch.

NED-1997-2-011 02-05-1997 16246

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 02-05-1997 / **e)** 16246 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1997, 117; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.3.21 **Fundamental Rights** - Civil and political rights - Freedom of expression.
5.3.32 **Fundamental Rights** - Civil and political rights - Right to private life.
5.4.12 **Fundamental Rights** - Economic, social and cultural rights - Right to intellectual property.

Keywords of the alphabetical index:

Portrait law / Right of picture / Photograph, use without consent.

Headnotes:

Since a person whose portrait has been taken has legal protection against infringement of the right to respect for his or her private life, this person will in principle always have a reasonable interest in opposing the use of the portrait in a commercial advertising message.

Summary:

The respondent operated the *IT* discotheque in Amsterdam. In the evenings when the discotheque was open, a group of around eight people performed as dancers. In August 1991 the appellant was one of those performing. A photograph was made of his performance and used by the respondent in an advertising brochure bearing the heading «Nice bare flesh wanted for topless party». The respondent also had the photograph printed in its entirety on the back cover of the *GAY* magazine.

The appellant sued the respondent, claiming compensation of NLG 10,000 for the damage which he alleged he had suffered as a result of the unlawful acts of the respondent, namely the publication of the photograph of his performance at the *IT* discotheque in the brochure and the *GAY* magazine, which thereby constituted an infringement of his right to respect for his private life contrary to Section 21 of the Copyright Act 1912. The appellant's specific objection was that as a result of the disputed publication of the photograph in the advertising brochure and the *GAY* magazine, he was associated by his acquaintances with the gay movement - an association which he - as a non-gay - did not desire.

Section 21 of the Copyright Act provides that publication by the copyright owner of a portrait made without instructions is not permissible if this would be contrary to the reasonable interests of the person portrayed. On appeal the Court of Appeal ruled that, having regard to all the circumstances of the case, no ground could be found in the appellant's objection to publication of the photograph for holding that the publication of the portrait constituted an infringement of the appellant's right to respect for his private life which could support his argument based on a reasonable interest as defined above. In the opinion of the Court of Appeal, a factor of particular significance in this connection was «that by performing (for money) in the *IT* discotheque, with which he was acquainted (and which was also known nationwide), the appellant had placed himself in a public atmosphere of eroticism and freedom of expression and had thus to a certain extent intentionally invited an association of the kind to which he had referred». The Court of Appeal also held that although the publication in print was indeed aimed at a wider public than the visitors to the discotheque «the nature of the photograph and of the media in which it was published were not so far removed from the appellant's earlier performance there - given that the announcement of the topless party in the *IT* discotheque was not such as to give offence - that a different view should be taken of this publication and the possible associations to which it might give rise».

On appeal in cassation, the Supreme Court held on this point that it should be stated at the outset that the protection afforded by Section 21 of the Copyright Act, in conjunction with Sections 30 and 35 of the Copyright Act, to a person whose portrait has been taken, in particular against infringement of his right to respect for his private life, meant that in principle the person portrayed always had a reasonable interest in opposing the use of the portrait in a commercial advertising message. The Supreme Court explained this by stating that the inclusion of a portrait in an advertisement for a product or service means that the subject of the portrait would be associated by the public with that product or service. The public would also generally - and usually rightly - assume that the portrait would not have been used without the consent of the person portrayed and would regard the inclusion of the portrait in the advertising message as a sign of support for the product or service by the person concerned.

The Supreme Court then ruled that the mere fact that a portrayed person is already associated in a particular circle with a product or service as a result of his cooperation in the making of the product or the provision of

the service to which the advertisement relates did not mean that publication of his portrait in an advertising message intended for a wider audience and the resulting association of the portrayed person with the product or service by the wider public reached by this message could not be regarded as an infringement of his right to respect for his private life or that the portrayed person no longer had a reasonable interest in opposing the infringement. Whether the nature of the publication corresponds with the nature of the product or service was therefore not relevant in determining whether there has been a breach of Section 21 of the Copyright Act. In the view of the Supreme Court, an infringement of the right to respect for private life would exist in particular in the case of advertising messages which, as the Court of Appeal noted in the present case, placed the portrayed person in «a public atmosphere of eroticism and freedom of expression». Finally, the Supreme Court also held that no matter how much the commercial interests of the respondent in advertising the services provided by it also enjoyed the protection of Article 10 **ECHR**, they were not sufficiently important to justify an infringement of the appellant's right to respect for his private life.

Languages:

Dutch.

NED-1997-2-003 17-01-1997 16.122

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 17-01-1997 / **e)** 16.122 / **f)** / **g)** / **h)** *Rechtspraak van de Week,* 1997, 23; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.4 **General Principles** - Separation of powers.
3.10 **General Principles** - Certainty of the law.
3.19 **General Principles** - Margin of appreciation.
4.7.1 **Institutions** - Judicial bodies - Jurisdiction.
5.2.2.12 **Fundamental Rights** - Equality - Criteria of distinction - Civil status.
5.3.33.2 **Fundamental Rights** - Civil and political rights - Right to family life - Succession.

Keywords of the alphabetical index:

Child, born out of wedlock, right to inheritance / Father, biological / Family life, definition / Interpretation, limit.

Headnotes:

It is not in contradiction with Article 8 **ECHR** if the law on succession does not consider an illegitimate child whose biological father has not acknowledged her or him as the latter's legal heir.

Summary:

In this case, H. laid claim to the estate of his biological father, submitting that while the testator had not acknowledged him and that the law did not therefore designate him the heir, he should nevertheless be regarded as the testator's heir because he and the testator had had a legal relationship that could be defined as family life within the meaning of Article 8 **ECHR**. On these grounds, in conjunction with Article 14 **ECHR**, H. pleaded that he could enforce claims against the estate under the law of succession.

In cassation proceedings the Supreme Court held as follows. In the first place, the significance of Articles 8 and 14 **ECHR** for the inheritance rights of illegitimate children must be viewed in the light of the European Court of Human Rights' rulings in the Marckx case of 13 June 1979, Series A no. 31 (*Nederlandse Jurisprudentie* 1980, 462) paragraphs 53-56 and 59, and in the Vermeire case, 29 November 1991, Series A

no. 214-C, paragraphs 25- 28. Article 8 in itself leaves States Parties a certain amount of discretion in the regulation of claims under the law of inheritance, and therefore allows in principle limitation of the degree to which children born outside marriage may inherit from their parents, whether *ab intestato* or under the terms of a will. Excluding intestate inheritance on the sole grounds of illegitimate descent is discriminatory, however, and hence constitutes a violation of Article 8 **ECHR** in conjunction with Article 14 **ECHR**. This does not exclude the possibility that other kinds of limitations to the *ab intestato* inheritance rights of illegitimate children may exist that are justified on objective and reasonable grounds. In this respect too, national legislative authorities may exercise a degree of discretion.

Viewed against this background, it is important that the present case involves an illegitimate child who has not been acknowledged, and who is invoking the above-mentioned Articles in support of his submission that he has the right to inherit from the man he claims fathered him. It should be noted that this case differs from those involved in the aforementioned judgments; in particular it differs from the case of a) an illegitimate child, whether or not acknowledged by the father, that is its mother's heir under Dutch law, and b) that of an acknowledged illegitimate child that is also the heir under Dutch law of the man who has acknowledged it. One of the aims of the Act of 27 October 1982, Bulletin of Acts and Decrees 608, in which the rules given above under points a) and b) were incorporated in their present form into Dutch legislation, was to bring Dutch legislation on natural children into line with the principles applying in this connection that followed from Articles 8 and 14 **ECHR** according to the then recent judgment of the European Court of Human Rights in the Marckx case. A Bill to amend both the law of parentage and the adoption regulations, introduced on 20 March 1996, is now before the Lower House. Article 1207 of the Civil Code, in amendments proposed by the Government, provides in certain cases for the court to establish paternity at the request of the mother or the child, one consequence of which would be to establish the child's heirship. It is as yet unclear whether this legislation will in fact enter the statute-books in the form now being proposed. One point to have emerged from this is that the legislature has adopted the point of view that a review of the law of parentage which would regulate *inter alia* the position under the law of succession of an illegitimate child who has not been acknowledged by the biological father is impossible without making important decisions in the sphere of legal policy, and that the legislative process needed for this has not yet been concluded. In the first place it must be inferred from this that the absence of a rule under Dutch law stating that an illegitimate child whose father has not acknowledged paternity is his biological father's heir cannot be said to be based exclusively on his illegitimate descent but rather on the difficulty, in the legislation that has been drafted, of striking a proper balance between all the interests involved in the law of parentage. In the second place, it follows from this that the choices to be made here go beyond the courts' task of making new law through interpretation. This also means in the case at hand that it is impossible to anticipate - whether wholly or in part - the legislation referred to above.

The Supreme Court identified three problems in relation to this point, including the following. If judgment were to be given at this stage on the basis of Article 14 **ECHR** in conjunction with Article 8 **ECHR**, it would raise the question of exactly what ties are required between the biological father and the child for sufficient grounds to be present for heirship. Invoking these Articles automatically implies the existence of family life within the meaning of Article 8 **ECHR**. According to the case law of the European Court of Human Rights, the essential factor here is the nature of the relationship between the father and the mother within which the child was born. If they were legally married, the birth of a child within that relationship in itself establishes the existence of family life with the father. The same applies in the case of a relationship between the father and the mother that can be equated with marriage to a sufficient extent to allow it to be defined as family life (European Court of Human Rights 26 May 1994, Series A no. 290, *Nederlandse Jurisprudentie (NJ)*, 1995, 247). Aside from this, a situation may arise in which, despite the lack of a relationship between the parents as referred to above, family life may be assumed to exist between the biological father and the child on the basis of attendant circumstances, as indeed arose in one specific case. The proof for the existence of such circumstances, however, may depend on coincidental events, and their assessment can easily lead to divergent opinions. It is therefore difficult to attach consequences under inheritance law to such circumstances without jeopardizing, to an almost unacceptable degree, the legal certainty that is of the essence precisely in inheritance law. Furthermore, only the legislature has the competence to introduce a stricter rule, one that would both be compatible with the aforementioned provisions of international law and serve the interests of legal certainty.

Languages:

Dutch.

NED-1996-3-019 15-11-1996 8857

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 15-11-1996 / **e)** 8857 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 224; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.3.13.9 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Public hearings.

Keywords of the alphabetical index:

Medical malpractice / Public hearing, right, waiver.

Headnotes:

A waiver of the right to a public hearing must be made either expressly or tacitly, in an unambiguous manner, and may not conflict with any significant public interest.

In determining whether a medical practitioner has waived his right to a public hearing, it is significant that the Medical Malpractice (Disciplinary Sanctions) Act is based on the assumption of a hearing in camera, but that it does give the disciplinary court the power to hear the case in open court. It is also significant that the medical practitioner had legal counsel to assist him.

Summary:

In this medical malpractice case, the appeals hearing, as it is clear from its official report, did not take place in public. It was therefore contended in the appeal in cassation that there had been a violation of Article 6.1 **ECHR**.

There is no evidence in the disputed appeal court judgment or in the official report of the proceedings either that the medical practitioner requested the appeals court for his appeal to be dealt with in a public hearing or that he expressly waived his right to such a public hearing.

The Supreme Court considered that someone who is entitled to a public hearing pursuant to Article 6.1 **ECHR** may waive his right to this either expressly or tacitly, provided that this occurs in an unambiguous fashion and does not conflict with any significant public interest.

In deciding whether the medical practitioner waived his right it is significant on the one hand that he was represented at the hearing by legal counsel, and on the other hand that the Medical Malpractice (Disciplinary Sanctions) Act, in contrast to Article 6.1 **ECHR**, proceeds on the assumption of a hearing in camera, but does give the disciplinary tribunal the competence to hear the appeal in public, so that the medical practitioner, if he had wanted a public hearing, could have made a request to this effect to the appeal court. All things considered, the Supreme Court believes that it should be considered that the failure on the part of the medical practitioner and his counsel to make such a request constituted a tacit but nevertheless unambiguous waiver of the medical practitioner's right to a public hearing (cf. European Court of Human Rights, 21 February 1990, Series A no. 171 and 24 June 1993, Series A no. 263). Furthermore, since it cannot be said that a public hearing of the appeal at issue was required by any significant public interest, the appeal court did not violate the provision of international law invoked by the medical practitioner.

Languages:

Dutch.

NED-1996-3-018 15-11-1996 8770

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 15-11-1996 / **e)** 8770 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 221; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.17 **General Principles** - Weighing of interests.
3.19 **General Principles** - Margin of appreciation.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.2 **Fundamental Rights** - Equality.
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:

Media, subscriber television / Licence, exclusive / Monopoly.

Headnotes:

The rejection of an application for a licence to run a subscriber television company does not constitute a violation of Article 10 **ECHR**.

A restriction to the freedom of expression consisting of the granting of a monopoly position to a single enterprise in the establishment and running of a pay-TV service is permissible where there are compelling reasons for it. It is important to establish whether the refusal of a licence is justifiable in principle and proportionate.

Summary:

By Country Decree of 26 February 1991, TDS was granted a licence, excluding other potential applicants, to establish and run a pay-TV service on Curaçao. For this reason, Multivision's request for a similar licence was turned down. In the interlocutory injunction proceedings at issue here, Multivision asked the court to order the Netherlands Antilles to grant it a licence to establish and run a pay-TV service. This application was denied.

The Joint Court of Justice dismissed Multivision's complaint that the refusal of its application for a licence constituted a violation of Article 10 **ECHR**. The Court considered *inter alia* with reference to the Lentia judgment (European Court of Human Rights, 24 November 1993, Series A no. 276) that restricting freedom of expression by granting a monopoly position to a single enterprise (TDS) is permissible only where there are compelling reasons for it, but that in deciding when this is the case, the authorities should be allowed a certain margin of appreciation within the context of local conditions. Briefly summarised, the Joint Court's view was as follows:

a. that against the backdrop of the above-mentioned margin of appreciation of national governments and the requisite circumspect examination of this by the court ruling in interlocutory injunction proceedings, it may be deemed financially and economically impossible at present for any company to establish and run a

paid television system covering the entire island if a second provider were to be admitted;

b. that it is furthermore of importance that TDS's monopoly position is attached to a set period of time which cannot be extended - the ten-year period that now applies not necessarily being unreasonable in this respect - and that the point of granting TDS a monopoly is to enable it to earn back its start-up expenses, and finally that it is significant that TDS is under an obligation to provide the entire island of Curaçao with high quality television signals to which everyone is free to subscribe;

c. that under these conditions, it must be held, for the present, that there is sufficient proportionality between the violation of the fundamental right enshrined in Article 10 **ECHR** and protecting the interest of - in this case - preventing «harmful competition between providers of subscriber television that would be detrimental to viewers» and protecting the rights of others (TDS).

Ruling in cassation proceedings, the Supreme Court considered that the Joint Court had been right to ascertain whether the refusal of the licence had been justifiable in principle and proportionate. In answering this question in the affirmative, the court's reasoning, according to the Supreme Court, was evidently that allowing competition at present between a number of paid television providers would mean that none of those authorised to broadcast would be capable of running a paid television system at a profit, so that ultimately the viewers would suffer, and for this reason TDS's rights merit protection. Only if these rights are protected can the information supply of the viewers as a whole be safeguarded. This line of reasoning, in the view of the Supreme Court, does not display an incorrect interpretation of the law, and is interwoven with assessments of the facts to such an extent that its soundness is not susceptible to further examination.

Languages:

Dutch.

NED-1996-2-013 10-05-1996 8722

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 10-05-1996 / **e)** 8722 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 112; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.18 **General Principles** - General interest.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.21 **Fundamental Rights** - Civil and political rights - Freedom of expression.
5.3.22 **Fundamental Rights** - Civil and political rights - Freedom of the written press.

Keywords of the alphabetical index:

Media, journalist, source, disclosure, refusal, right.

Headnotes:

Article 10.1 **ECHR** gives a journalist the right to refuse to answer questions, except in special circumstances, if he would risk exposing his source by doing so.

Summary:

This case concerns the refusal of two journalists to answer questions put to them when they were being questioned as witnesses. The purpose of this questioning was to ascertain the journalists' sources and hence

to discover what information the latter had supplied to them.

The Supreme Court held that it follows from the judgment of the European Court of Human Rights of 27 March 1996 (*Goodwin vs. United Kingdom*, [ECH-1996-1-006]) that it must be accepted that Article 10.1 **ECHR** entitles a journalist in principle to refuse to answer a question put to him if he would risk exposing his source by doing so. The court is not obliged to accept an invocation of this right, however, if it is of the opinion that in the particular circumstances of the case, revealing the source is necessary in a democratic society with a view to protecting one or more of the interests referred to in Article 10.2 **ECHR**, provided that the person hearing the journalist as a witness cites such an interest and, where necessary, provides a plausible case for its existence.

In the case at hand, the Supreme Court took the view that the only interest the plaintiffs had in exposing the journalists' sources was their desire to locate the «leak» so that they could go on to bring legal proceedings against the State and the parties involved, personally, both to obtain compensation and to forbid those involved, personally, to «leak» any more information to the press. On the basis of the aforementioned judgment of the European Court of Human Rights, it must however be assumed, according to the Supreme Court, that this interest is in itself insufficient to offset the compelling public interest at stake here in the protection of the journalists' sources.

Languages:

Dutch.

NED-1996-2-010 23-04-1996 101.655

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 23-04-1996 / **e)** 101.655 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1996, 548.

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
4.11.2 **Institutions** - Armed forces, police forces and secret services - Police forces.
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:

Residence, limits / Premise, inviolability.

Headnotes:

Opening a movable roof to look inside a garage which neither the occupant or the accused is using as residential accommodation does not constitute a violation of the right to respect for private life.

Summary:

The police suspected on the basis of surveillance activities that criminal offences within the meaning of the Opium Act were being committed in a garage. As part of their investigation, the police opened up the movable portion of the garage roof and looked into the garage through the opening thus created. On the day of the investigation the garage was not being used as residential accommodation either by the occupants of the house to which the garage belonged or by the accused, who had been given the use of the garage.

In response to complaints about an invasion of privacy, the Supreme Court held as follows: The concept of

«home» or «domicile», as these terms appear in the English and French texts, respectively, of Article 8.1 **ECHR**, is not confined to dwellings but may in certain circumstances include premises used for business or other work. In the Supreme Court's opinion, where a garage belonging to a home is being used by the occupant, it will in general come under the protection of Article 8 **ECHR** because the garage is part of the home. Where a garage that belongs to a home is not being used by the occupant, or is otherwise not in residential use, a court, in coming to a decision on whether action taken in the course of an investigation such as that referred to in the case at hand breaches the right of the user of the garage to respect for private life, having regard to the customary purpose of a garage, is entitled to proceed on the assumption - unless exceptional circumstances have either been established or brought forward with respect to the use of that garage - that there is no question of any such violation. In the case at hand, the Supreme Court found no exceptional circumstances that would have called for an investigation to determine whether the garage was in fact covered by the protection to which the accused was entitled under Article 8 **ECHR**. The Supreme Court then went on to dismiss the allegation that the disputed investigative activities had constituted an invasion of the accused person's privacy.

Languages:

Dutch.

NED-1996-1-005 19-03-1996 101.094

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 19-03-1996 / **e)** 101.094 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 96.251.

Keywords of the Systematic Thesaurus:

2.1.1.1.1 **Sources of Constitutional Law** - Categories - Written rules - National rules - Constitution.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
4.11.2 **Institutions** - Armed forces, police forces and secret services - Police forces.
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 **Fundamental Rights** - Civil and political rights - Right to private life.

Keywords of the alphabetical index:

Police, power / Video surveillance.

Headnotes:

The covert and continuous surveillance, using a video camera and monitor, of a suspect who has been confined in a police cell for questioning, without his being able to take account of the possibility that he is under surveillance, constitutes such a drastic measure, in the light of Article 10 of the Constitution and Article 8.1 **ECHR**, as to require a separate provision by or pursuant to an Act of Parliament. As no such provision exists, this *modus operandi* on the part of the police constitutes a violation of the suspect's privacy. Observations procured by these means may not be used as evidence.

Summary:

After a suspect in a shooting incident had been locked up prior to questioning, the reporting officers following the suspect's movements in his cell on a monitor, and observed the suspect urinating over his hands and scratching his nails and hands against the wall. This was recorded in an official report drawn up under oath of office. The lorensic laboratory stated that the suspect's actions were capable of obliterating traces left after a shooting.

The suspect contended that the observations could not be used as evidence, because placing the suspect in a special cell fitted with video cameras with a view to observing his behaviour constituted a violation of Article 8 **ECHR**. The appeal court rejected this defence, and held that there had been no violation of Article 8 **ECHR**.

The Supreme Court, however, reached a different conclusion. The Supreme Court considered that during the stage at which a suspect is being held awaiting questioning, unlike the stages of police custody and pre-trial detention, the law does not provide for the possibility of ordering measures in the interests of the investigation. It may however be necessary, in the interests of the investigation, to ensure that a suspect is prevented, in the period between his arrest and his subsequent questioning, from getting rid of any evidence that may be present or rendering it unusable. As a preventive measure, it may be necessary for the suspect to be placed in a secure room under continuous police guard. The power to impose a security measure of this kind is a derivative of the power to hold the suspect for questioning.

However, continuous covert surveillance as a means of investigation, using a camera or other device, of a suspect who has been confined in a police cell or an equivalent room in which it is in principle reasonable for him to assume that he is unobserved, without the suspect being able to take account of the fact that he is to be subjected to this form of surveillance as he has been told nothing about it and has no way of knowing it, constitutes, in the light of the right to privacy enshrined in Article 10 of the Constitution and Article 8.1 **ECHR**, such a drastic measure as to require a separate provision by or pursuant to an act of parliament. As no such provision exists, the police was not justified in subjecting the suspect to continuous surveillance in the manner described.

Languages:

Dutch.

NED-1996-1-001 19-12-1995 101.269

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 19-12-1995 / **e)** 101.269 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 96.152; *Nederlandse Jurisprudentie*, 1996, 249.

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
4.11.2 **Institutions** - Armed forces, police forces and secret services - Police forces.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.32 **Fundamental Rights** - Civil and political rights - Right to private life.
5.3.36.2 **Fundamental Rights** - Civil and political rights - Inviolability of communications - Telephonic communications.

Keywords of the alphabetical index:

Fundamental right, violation, pro-active stage / Police, power / Garbage bags, search.

Headnotes:

Violations of fundamental rights, in particular the right to privacy, at a stage at which it is unclear, or insufficiently clear, that a criminal offence has been or is being committed (the pro-active stage) and no suspect can be identified, are permissible only if they are allowed under the Constitution or a treaty provision.

Police searches of garbage bags placed outside do not constitute a violation of Article 8 **ECHR**.

The scanning, monitoring and recording of conversations conducted on mobile telephones in principle constitutes a violation of Article 8 **ECHR**. However, as telephone conversations of this kind can easily be monitored, interference of this kind in the right to respect for private life must be accepted up to a point.

Summary:

The central question to be answered in this case is what kinds of interference are permissible when fundamental rights are concerned, such as the right to respect for private life, in the stage preceding that of the investigation within the meaning of the Code of Criminal Procedure, in other words before suspicions have been formulated, when it is unclear, or insufficiently clear, that a criminal offence has been or is in the process of being committed. It is sometimes described as the pro-active phase.

In the case at hand, during the pro-active phase the police used powers which are vested in them by law for the purposes of investigating criminal offenses which have been, or which are suspected of having been committed. The question is whether the police were justified in doing so, and if so, the limits of acceptability that should have been taken into account. The action taken by the police included searching garbage bags that had been placed outside, and using scanners to monitor calls made by mobile telephone.

The Supreme Court considered that in the phase prior to that of investigation within the meaning of the Code of Criminal Procedure, any infringement by police officers of individuals' fundamental rights as enshrined either in the Constitution or in provisions of treaties whose content can be universally binding is unlawful, unless such an infringement is permitted in the conditions and restrictions contained in, or laid down pursuant to, the Constitution or treaty provision concerned. Where the Constitution regards the imposition of restrictions on any fundamental right to be permissible, such restrictions can acquire legitimacy only by or pursuant to an Act of Parliament. The power to commit such an infringement must be defined in the legislation in a sufficiently accessible and foreseeable manner. A provision in general terms such as Section 2 of the 1993 Police Act does not fulfil this requirement. The continuing development of the fundamental right to the protection of privacy combined with the increasing technological sophistication and intensification of investigative methods and techniques make it essential for such infringements to be based on a more precise justification than Section 2 of the 1993 Police Act.

The Supreme Court observed however that the above does not detract from the police's authority, pursuant to Section 2 of the 1993 Police Act, to perform actions in the pro-active phase which properly belong to its duties as defined in the Section 2, such as, in the interests of public policy, ordering someone to leave a particular location, impounding property, the surveillance and following of individuals and photographing them in public, and that even where actions of this kind amount to a limited infringement of privacy, the general definition of the duties of the police as defined in Section 2 of the 1993 Police Act provides a sufficient basis for this.

The Supreme Court then proceeded to discuss the disputed investigating methods. It endorsed the appeal court's ruling that someone who has put garbage bags out to be collected must be deemed to have relinquished possession of these bags and their contents. Police searches of these bags do not therefore constitute a violation of Article 8 **ECHR**. For objectively speaking, according to the Supreme Court, it is not reasonable for someone who puts garbage bags out in the street to expect their contents to be subject to rules governing the protection of privacy.

As far as a three-week period of monitoring (by means of a scanner) and recording conversations conducted by mobile telephone is concerned, the Supreme Court held that the confidentiality of telephone conversations is protected by Article 8 **ECHR**. The Court observed however that it is widely known that conversations conducted by mobile telephone can be monitored by anyone who wishes to do so with the aid of simple and readily available electronic devices. This in itself not only means that persons conducting conversations by mobile telephone should take into account the possibility that a third party may be able to receive and overhear the call, but also that he is up to a point obliged - given that everyone is in principle free to receive radio signals - to resign himself to it. This does not however mean that he forfeits every right to respect for privacy in this regard.

If investigating officers, as in the case at hand, for a long period of time and using specially placed apparatus, deliberately and systematically monitor and record telephone calls that are made from inside or from the

immediate vicinity of an individual's home by mobile telephone, the limit of acceptability is exceeded, thus constituting a violation of the right to telephone confidentiality pursuant to Article 8.1 **ECHR**. In such a case, the interference with the person's right to respect for his private life is of such a nature that it must be provided with a statutory basis, having regard to the provisions of Article 8 **ECHR** and Article 10 of the Constitution, by or pursuant to an Act of Parliament. This did not occur in the present case. The interference with the right to privacy was not however, in the view of the Supreme Court, so serious as to constitute grounds for ruling the prosecution's case against the accused inadmissible.

Supplementary information:

Section 2 of the 1993 Police Act states: «The police has the task, acting in a subordinate capacity in relation to the competent authorities and in accordance with the applicable rules of law, to ensure the active enforcement of the law and the provision of assistance to those who require it».

Article 10 of the Constitution concerns respect for, and protection of, privacy.

Cross-references:

In relation to the removal of garbage bags that have been put out for collection, see also Supreme Court judgment of 13 February 1996, no. 101.665, *Delikt en Delinkwent*, 96.211, [NED-96- 1-003].

Supreme Court judgment of 23 January 1996, no. 101.302, *Delikt en Delinkwent*, 96.178, likewise concerns police scanning of mobile telephone calls. In it, the Supreme Court reiterated its considerations in relation to the judgment given on 19 December 1995.

Languages:

Dutch.

NED-1995-3-016 22-12-1995 8643

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 22-12-1995 / **e)** 8643 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 10; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.1.4.12 **Sources of Constitutional Law** - Categories - Written rules - International instruments - **Convention** on the Rights of the Child of 1989.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.32 **Fundamental Rights** - Civil and political rights - Right to private life.
5.3.33 **Fundamental Rights** - Civil and political rights - Right to family life.
5.3.44 **Fundamental Rights** - Civil and political rights - Rights of the child.

Keywords of the alphabetical index:

Paternity.

Headnotes:

The mere fact of a child's birth does not create a relationship between the father and the child which may be described as family life. The right of a child to know his or her parents does not extend to the right to enforced contact with the child's biological father against the latter's wishes.

Summary:

In June 1985 a child was born out of the relationship between a man and a woman who had never lived together. The man broke off the relationship when he learned that the woman was pregnant. The child expressed a wish to meet his father. The man was married and had no contact with the child since his birth, nor did he wish to; there was never any agreement between the man and the woman concerning contact with the child. In the proceedings the woman applied for an arrangement for meetings between father and child.

In response to the woman's application, the Supreme Court held that the requirements which should determine the existence of family life depend on the context in which Article 8 **ECHR** is invoked and on who invokes it. If a child invokes the protection of Article 8 **ECHR** in order to establish some form of contact with his biological father the conditions to be met are not the same as those which would apply if the biological father were seeking some form of contact with a child he had fathered but not acknowledged. The Supreme Court was of the opinion that, in view of the case-law of the European Court of Human Rights, it must be assumed that a relationship which could be described as family life within the meaning of Article 8 **ECHR** could not be said to exist simply because the child was fathered by its biological father, even in the context of a request by the child for access arrangements involving him and his biological father. The nature and the permanency of the relationship between the mother and the biological father prior to the child's birth could not be overlooked.

Article 7.1 of the **Convention** on the Rights of the Child states that a child has, as far as possible, the right to know and be cared for by his or her parents. The Supreme Court believed that the right of a child to know his or her parents, as referred to here, embraces more than the simple right to know the parents' names. However, the Supreme Court did not deem it likely that the States Parties to the **Convention** intended to confer a right that extends to the point where, if a biological father has not acknowledged his child and has refused to have any personal contact with the child, the child has the right to enforce personal contact against the father's wishes. In the opinion of the Supreme Court, the District Court was correct to declare the woman's application inadmissible, as the arguments on which her application was based are insufficient to render it admissible.

Supplementary information:

The Supreme Court would refer in particular to the following judgments handed down by the European Court of Human Rights: 21 June 1988, Series A no. 138, NJ 1988, p. 746 (Berrehab), *Special Bulletin **ECHR*** [ECH-1988-S-005]. 26 May 1994, Series A no. 290, NJ 1995, 247 (Keegan), *Bulletin* 1994/2, 178 [ECH-1994-2-008] and 27 October 1994, Series A no. 297, NJ 1995, 248 (Kroon), *Bulletin* 1994/3, 301 [ECH-1994-3-016]. The **Convention** on the rights of the Child was concluded in New York on 20 November 1989 and approved by the Netherlands by Kingdom Act of 24 November 1994 (Bulletin of Acts and Decrees, no. 862). It entered into force for the Netherlands on 8 March 1995 (Netherlands Treaty Series 1995, no. 92).

Languages:

Dutch.

NED-1995-3-015 08-12-1995 8659

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 08-12-1995 / **e)** 8659 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1995, 261; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.17 **General Principles** - Weighing of interests.
5.3.32 **Fundamental Rights** - Civil and political rights - Right to private life.

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

Keywords of the alphabetical index:

Paternity, acknowledgement.

Headnotes:

The mere fact of birth does not create a relationship between father and child that may be characterised as family life. Acknowledgement affects a child's interests as protected under Article 8 **ECHR**. The child's interests must therefore be weighed against those of the man acknowledging paternity.

Summary:

On 16 January 1987 a child was born out of the relationship between a man and a woman, who were both unmarried. They had not lived together before the child's birth. After the child was born, the man and the woman lived together for a year with the woman's grandmother, in the latter's home. The relationship then came to an end, after which the man lived abroad for two and a half years, during which time he had no contact with the woman or the child. He returned to the Netherlands in 1991. The woman consistently refused to give permission to the man to acknowledge the child. She died on 15 February 1994. In accordance with the woman's wishes expressed in her will, the child was being cared for and brought up in her brother's family. The man applied to the registrar of births, deaths and marriages to add to the register of births a certificate containing the man's acknowledgement of the child.

The Supreme Court based its ruling on the principle that the child was not born of a relationship which, in the opinion of the Appeal Court, could be equated with a marriage. The Supreme Court also held that it had been established that the man had not lived with the woman before the child's birth, while there was nothing in the documents in the case to demonstrate the existence of any other circumstances which could justify the conclusion that the relationship between the man and the woman was nonetheless sufficiently lasting to be equated with marriage (cf. European Court of Human Rights judgment of 27 October 1994 in the case of Kroon vs. the Netherlands, series A, no. 297-C, no. 30, p. 56, *Bulletin* 1994/3, 301 [ECH-1994-3-016]). A relationship which could be described as family life did not therefore exist between the man and the child by virtue of the mere fact of the child's birth.

The Supreme Court then held that legally valid acknowledgement by the man would create a family-law relationship between the child and the man acknowledging her. As a result of this far-reaching consequence, acknowledgement affects interests of the child which are protected by Article 8 **ECHR**. Although acknowledgement may serve these interests, it is equally possible for these interests to be opposed to acknowledgement. The latter case involves both the law's defence of respect for the ties of family life which exist between the child and others and the freedom of choice regarding one's own life which forms part of everyone's right to respect for personal privacy. Since it was argued on the child's behalf, with reasons, that this latter situation was the case in the proceedings in question, the Appeal Court could not ignore such an argument. Indeed, the Appeal Court was bound, in accordance with the **ECHR** provision referred to above, to weigh the man's interest, assuming that a relationship which could be described as family life existed between him and the child, in having this relationship recognised under family law against the child's interests which enjoyed the protection of Article 8 **ECHR** in equal measure.

The factors which could be taken into account were the importance to the child of a stable place of residence, the nature and depth of the assumed relationship between the father and the child, the fact that the father had never previously indicated a desire actually to assume responsibility for caring for the child, and the fact that he had not been able to argue convincingly that he would be able to assume this responsibility in a proper manner. It also had to be borne in mind that recognition would give the child the father's name, so that she would have a different name from the other members of the family in which she was growing up, a situation which would not be in her interest. The Supreme Court took the view that the Appeal Court had been right in concluding that the interests of the child must prevail in this case.

Languages:

Dutch.

NOR-2003-2-006 01-07-2003 2002/922

a) Norway / **b)** Supreme Court / **c)** / **d)** 01-07-2003 / **e)** 2002/922 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2003, 928 / **h)** CODICES (Norvegian).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
3.17 **General Principles** - Weighing of interests.
3.18 **General Principles** - General interest.
5.3.22 **Fundamental Rights** - Civil and political rights - Freedom of the written press.
5.3.32.1 **Fundamental Rights** - Civil and political rights - Right to private life - Protection of personal data.

Keywords of the alphabetical index:

Defamation, through press / Information, false, nullification.

Headnotes:

It is the European **Convention** on Human Rights and the practice of the European Court of Human Rights that are the primary sources of law when Norwegian courts must draw the line for defamatory statements that can be made the object of punishment or a declaration that the defamatory statements are null and void. When weighing the relevant interests under Article 10 **ECHR**, an assessment must be made on the basis of several criteria.

Summary:

B. is A.'s spouse and owns a property in the municipality of X. On 8 June, *"Tønsbergs Blad"* published a report about non-compliance with the obligation to reside on that property. Front-page headlines read: "Can be forced to sell" with the subheading, "C. and A. must explain themselves regarding the obligation to reside on their property". The text contained the following statement:

"Obligation to reside on a property: C. may, at worst, be forced to sell his property at... The same applies to A. According to Tønsbergs Blad's information, their properties are on a list that the municipal authorities of X. will in the near future send to the County Governor. The list contains properties where it is believed that the obligation to reside on the property is not complied with."

The item on the front page was followed up with an article on page 3. It was illustrated with photographs of the properties and bore the heading: "The municipal authorities of X. are flushing out offenders of the residence obligation". The preamble read:

"Both singer C. and director A. may be forced to sell their properties at X. The reason is that, according to the municipal authorities of X., they have not complied with their obligation to reside on their properties."

A. later received from the Chief Municipal Officer written confirmation that the property was not subject to the residence obligation for the reason that the property had been acquired as an open (unbuilt) plot of land, and

that it was not until later that a house was built on it. On 30 June, "*Tønsbergs Blad*" featured a major article where that was made clear, and elaborated on it in another article on 8 August 2000. In the article of 30 June, it was stated that also C's property was not subject to the residence obligation.

A. initiated private prosecution proceedings against "*Tønsbergs Blad*" and the editor in charge seeking punishment, a declaration that the defamatory statements were null and void, and damages for non-economic loss. The City Court found that the article of 8 June contained a defamatory accusation against A. but that accusation was not unlawful and, therefore, acquitted the newspaper. The Court of Appeal, with dissenting opinions, handed down a judgment declaring the defamatory statements null and void, and awarded damages for non-economic loss. A unanimous Court of Appeal agreed with the City Court that the statements contained a defamatory accusation under Section 247 of the Penal Code, and that no clear and convincing proof of the allegation had been presented. The majority of the Court - two professional judges and two lay judges - found that the statements were also unlawful and could therefore be the object of an declaration of being null and void, and amounted to grounds for damages for non-economic loss. The minority - a professional judge and two lay judges - agreed with the City Court that the newspaper had to be acquitted on the grounds of the absence of unlawfulness. The newspaper was acquitted as to punishment, as there was no qualified majority in favour of punishment.

The appeal to the Supreme Court concerned the application of the law. The appeal was dismissed with one dissenting opinion.

A unanimous Supreme Court found that the newspaper had made a defamatory accusation about facts. The core of the accusation was that A. was on a list that was drawn up by the municipal authorities and contained the names of individuals that the local authorities believed had breached their duty to reside on their properties. The Supreme Court stated that the decision in *Rt.* 2002, page 764 (not summarised in the *Bulletin*) underlined the fact that it is the **Convention** and the practice of the European Court of Human Rights as to that **Convention** that are the primary source of law when Norwegian courts are to define the defamatory statements that may be the object of punishment or a declaration of being null and void. When weighing the relevant interests involved under Article 10 **ECHR**, an assessment must be made on the basis of several criteria.

That the statement containing the accusation was of interest to the general public was - in the majority's opinion - a fundamental condition for the media's own presentation of false defamatory allegations about actual facts aimed at private individuals to be regarded as protected by the freedom of speech. The majority found that the question of enforcement of the obligation to reside on a property in a coastal municipality was clearly of public interest, but whether properties/owners were on a list to be forwarded by the municipal authorities to the County Governor was of limited public interest. A. could not automatically be regarded as a public person in relation to the issue of the obligation to reside on the property. It could not be assumed that the newspaper had passed on a defamatory accusation made by others. No source of the accusation had been stated, and the Supreme Court could not depart from the Court of Appeal's assessment of evidence as regards the fact that the newspaper relied on an anonymous source for the information that A. was on the list that was to be forwarded to the County Governor and that his property "had thus been considered more carefully in respect of a breach of the obligation to reside on the property". That was the basis of the accusation that the local authorities believed that A. had breached the said obligation. In the case of the use of anonymous sources, the requirement of due care is made more stringent, and it must, to a considerable extent, be at the risk of the newspaper whether or not the information presented as fact is actually true. There were no written documents from any municipal examination of the case, and at the time the accusation was published, the reporter had no other factual indications that the allegation was true.

The minority agreed that the newspaper had made a false defamatory accusation and that as a general rule, such an accusation, according to the European Court of Humans Rights' interpretation of Article 10 **ECHR**, is not protected by the freedom of speech. However, the conditions for an exemption were satisfied in the case in question. The publication of a possible breach of the obligation to reside on the property on the part of A. was of general public interest, and the newspaper could not be reproached to any great extent for confusing the tip-off list with the list that the municipal authorities were to forward to the County Governor for a decision on compliance with the obligation to reside on the property.

Languages:

Norwegian.

NOR-2001-1-003

28-03-2001 2001/83

a) Norway / **b)** Supreme Court / **c)** / **d)** 28-03-2001 / **e)** 2001/83 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2001, 468 / **h)** CODICES (Norvegian).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
2.2.1.5 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - European **Convention** on Human Rights and non-constitutional domestic legal instruments.
2.3.2 **Sources of Constitutional Law** - Techniques of review - Concept of constitutionality dependent on a specified interpretation.
5.3.13.9 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Public hearings.

Keywords of the alphabetical index:

Prosecution, unjustified / Criminal procedure, hearing.

Headnotes:

A person who claims damages for unjustified prosecution is entitled to an oral hearing pursuant to Article 6 **ECHR**.

Summary:

A. was arrested on 5 September 1997, suspected of being in possession of alcoholic drinks in breach of Section 10.1.2 of the Alcohol Act. The Court of Examination and Summary Jurisdiction ordered his release from custody. The prosecution appealed to the Court of Appeal, and a stay of execution was ordered. On 10 September 1997, he was again remanded in custody by the Court of Appeal, initially subject to a prohibition against receiving mail and visitors. The prosecution agreed to his release on 2 October 1997. In May 1999, the prosecution dropped the case due to lack of evidence.

A. then brought a claim for damages for economic and non-economic loss on the grounds of unjustified prosecution. After having considered the written proceedings, the Court of Examination and Summary Jurisdiction found in favour of the State. A. appealed, and the Court of Appeal quashed the decision of the lower court on the grounds that A's counsel had not had sufficient opportunity to prepare the case before the court had reached its decision. At the rehearing in the Court of Examination and Summary Jurisdiction, A. requested oral proceedings. Section 449.3 of the Criminal Procedure Act provides that the court may decide to conduct oral proceedings concerning such claims, and A's request was initially granted but later turned down by a court order. Thereafter, A. limited his claim to a claim for compensation pursuant to Section 444 of the Criminal Procedure Act. The Court of Examination and Summary Jurisdiction again found in favour of the State. A. appealed to the Court of Appeal and claimed that the order of the Court of Examination and Summary Jurisdiction should be quashed on the grounds of a procedural error, and that the case referred back to the lower court. Alternatively, A. claimed that the Court of Appeal should pronounce a declaratory judgment for damages. The Court of Appeal dismissed the appeal. In dealing with the alternative claim, the

Court of Appeal stated that, like the Court of Examination and Summary Jurisdiction, it considered it unnecessary to conduct oral proceedings. A. appealed against the finding of the Court of Appeal to the Appeals Selection Committee of the Supreme Court.

The jurisdiction of the Appeals Selection Committee was limited to trying the Court of Appeal's interpretation of the law and procedure. A's appeal concerned the Court of Appeal's interpretation of the law. A. asserted that the Court of Appeal had erred in its interpretation of Section 449.3 of the Criminal Procedure Act, Section 3 of the Human Rights Act, and Article 6.1 **ECHR**. Section 449 was subordinate to the minimum requirements contained in Article 6.1 **ECHR**. The primary rule in Norwegian law whereby written proceedings shall be the norm, is contrary to Article 6.1 **ECHR**, which entitles a person who brings a claim for damages of the kind in question here, to oral proceedings.

The Appeals Selection Committee found that the Court of Appeal had correctly assumed that the right to a fair trial was fundamental in cases concerning damages for unjustified prosecution. In considering whether oral proceedings should be held in connection with a claim pursuant to Section 449.3 of the Criminal Procedure Act, the objective was to ensure that the case was dealt with fairly and properly. This had been expressed in various ways in the preparatory stages of the Act and in connection with other law reforms. The Appeals Selection Committee stressed that, in recent years, greater emphasis had been placed on the importance of oral proceedings in connection with such claims. Nevertheless, the Committee conceded that the Criminal Procedure Act had not as yet been interpreted such that it entitles a person who makes such a claim to oral proceedings in connection with the claim.

In the view of the Appeals Selection Committee, however, Article 6 **ECHR** and the practice of the European Court of Human Rights entitled the claimant to oral proceedings. The Committee pointed out that, in Norwegian law, a claim for damages for unjustified prosecution is by nature a civil claim, notwithstanding that it is dealt with in accordance with the rules of criminal procedure. The Committee found that such a claim must be deemed to be a "civil right" within the meaning of the **Convention**. The European Court of Human Rights had arrived at the same conclusion for similar claims in its judgment of 21 March 2000 in *Asan Rushiti v. Austria* (paragraphs 22 and 23) with references to earlier decisions.

Pursuant to the first sentence of Article 6.1 **ECHR**, a person who makes such a claim is entitled to a "public hearing". The Appeals Selection Committee found that the **Convention**'s requirement of a public hearing entails that the hearing must be held in open court with oral proceedings, except in cases covered by the rule of exception in Article 6.1 **ECHR**, second sentence.

The Appeals Selection Committee referred to several decisions of the European Court of Human Rights where the Court had found that there had been a breach of the right to a public hearing, including *Rushiti*, which also referred to the judgment of 24 November 1997 in *Werner v. Austria*.

The Committee underlined that the right to oral proceedings was particularly important in cases such as this where charges were dropped in the course of the investigation, so that there were not even oral proceedings in the criminal case, and additionally where oral proceedings had been requested.

The Committee remarked that the European **Convention** of Human Rights is directly applicable as a matter of Norwegian law pursuant to Section 2 Human Rights Act no. 30 of 21 May 1999. In the event of conflict, the **Convention** shall be given precedence over other legislation, (Section 3 of the Act). The right to oral proceedings can therefore be founded directly upon the **Convention**. However, the Committee pointed out that the rule whereby the provisions of the Criminal Procedure Act shall apply subject to such limitations as are recognised in international law or which derive from any agreement made with a foreign State, was introduced by statutory amendment to the former Criminal Procedure Act as early as 13 April 1962 and is now embodied in Section 4 of the current Act. Thus, even though Section 449.3 of the Criminal Procedure Act is phrased as a dispensable rule (the court "may" decide to conduct oral proceedings), it must be interpreted such that the court is obliged to conduct oral proceedings, since the applicant is entitled to oral proceedings pursuant to Article 6.1 **ECHR**.

The interlocutory orders of both the Court of Appeal and the Court of Examination and Summary Jurisdiction were quashed on the grounds that the respective courts had erred in their application of the law.

Languages:

Norwegian.

NOR-2001-1-002 23-03-2001 2000/793

a) Norway / **b)** Supreme Court / **c)** / **d)** 23-03-2001 / **e)** 2000/793 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2001, 428 / **h)** CODICES (Norvegian).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
4.6.9.1 **Institutions** - Executive bodies - The civil service - Conditions of access.
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.
5.3.32.1 **Fundamental Rights** - Civil and political rights - Right to private life - Protection of personal data.

Keywords of the alphabetical index:

Criminal record, access / Remedy, effective / Compensation, requirement.

Headnotes:

The unauthorised gathering of information from the Register of Criminal Records constituted a breach of Article 8 **ECHR**. The establishment of the fact of breach was sufficient to satisfy the right to an effective remedy in Article 13 **ECHR**. There was no requirement in Article 13 **ECHR** for the court had to make an award of compensation.

Summary:

In 1997, A. applied for the post of head of the execution and enforcement department of a District Court. After an interview with A., the chief judge suspected that A. had a criminal record. He asked A. whether this was the case, but A. refused to answer. The chief judge then contacted the Court Department of the Ministry of Justice. He spoke with a civil servant who was under the impression that the Ministry had the necessary authority to obtain information from the Register of Criminal Records. The civil servant then contacted KRIPOS, the National Criminal Investigation Service, and was given information over the telephone of the details registered against A's name. She passed the information on to the chief judge over the telephone, who in turn passed the information on to the appointments committee. A. was not given the job.

In the summer of 1997, A. took the matter up with the Ministry of Justice. In its reply, the Ministry acknowledged that it did not have the requisite authority to obtain information from the Register of Criminal Records, and apologised for what had happened. In the autumn of 1998, A. filed a civil suit against the chief judge and the Ministry of Justice on behalf of the State, claiming damages for economic and non-economic loss. In a decision of 15 March 2000, the Court of Appeal found in favour of the chief judge and the State. The chief judge died just seven days later. A. appealed against the decision of the Court of Appeal, directing the appeal against both the State and the chief judge's estate. The Appeals Selection Committee granted leave to appeal only in so far as the appeal was directed against the State, and only in respect of the claim for damages for non-economic loss. In the Supreme Court, the claim for damages for non-economic loss was based on Sections 3.5 and 3.6 of the Damages Act and Articles 8 and 13 **ECHR**. In the Supreme Court, the State argued that the authority that the civil servant at the Ministry of Justice believed she had to obtain

information from the Register of Criminal Records was not tenable, but that the Ministry had an alternative tenable authority.

The Supreme Court found that the Register of Criminal Records contains sensitive information and that the gathering and transmission of information from the Register must be deemed to be an interference in the right to respect for private life protected by Article 8 **ECHR**. Reference was made to the decision of the European Court of Human Rights 26 March 1987 in *Leander v. Sweden* (Series A, no. 116, *Special Bulletin* ***ECHR*** [ECH-1987-S-002]) paragraph 48. The pertinent issue was therefore whether the interference was justified in accordance with Article 8.2 **ECHR**.

The Supreme Court found that the Ministry did not have the necessary authority to obtain information from the Register of Criminal Records, and that the Ministry's action therefore constituted a breach of Article 8 **ECHR**. However, the Court was of the opinion that the transmission of the information did not constitute an unlawful defamation, since the purpose of the action was to provide the appointments committee with the best possible basis upon which to determine whether A. was a suitable candidate for the post, and the Ministry had proceeded as cautiously and carefully as possible. On these grounds, the Court found that the State was not liable to pay damages for non-economic loss pursuant to Section 3.6 of the Damages Act. Nor was it proven on a balance of probabilities that there was causation between the Ministry's unauthorised action and damage to A's person, and the Court therefore also found in favour of the State in the claim for non-economic loss pursuant to Section 3.5 of the Damages Act. In view of the Court's finding, it was unnecessary to consider the scope of the State's enterprise liability pursuant to these provisions.

With regard to the claim for compensation pursuant to Article 13 **ECHR**, the Supreme Court found that in order to satisfy A's right to an effective remedy, it was sufficient that the Supreme Court had made a finding that there had been a breach of the **Convention**. There was therefore no cause to award damages pursuant to this article.

Although the appeal was unsuccessful, the Supreme Court awarded A. costs for that part of the case concerning the Ministry's authority to obtain information from the Register of Criminal Records, and whether as a consequence of this had been a breach of the European **Convention** on Human Rights. The Court found that this was necessary in order to give A. an effective remedy in respect of the question of whether there had been a breach of the **Convention**.

Cross-references:

- Leander v. Sweden, 26.03.1987, *Special Bulletin* ***ECHR*** [ECH-1987-S-002].

Languages:

Norwegian.

NOR-1999-3-005

16-12-1999 lnr 87/1999

a) Norway / **b)** Supreme Court / **c)** / **d)** 16-12-1999 / **e)** lnr 87/1999 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1999, 1939 / **h)** CODICES (Norvegian).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.13 **General Principles** - Legality.
5.3.5.2 **Fundamental Rights** - Civil and political rights - Individual liberty - Prohibition of forced or compulsory labour.
5.3.18 **Fundamental Rights** - Civil and political rights - Freedom of conscience.
5.3.26 **Fundamental Rights** - Civil and political rights - National service.

Keywords of the alphabetical index:

Civil service, forced or compulsory labour / Error, procedural.

Headnotes:

An order to perform civil service instead of military service is exempted from the prohibition against forced or compulsory labour according to Article 4.3.b **ECHR**. Such an order is not contrary to the right to freedom of conscience in Article 9 **ECHR**.

Summary:

The applicant was charged with a violation of Section 19 and Section 20 of the Act on exemption from military service due to reasons of conscience for not performing civil service. The City Court had found that Section 19 had been violated, but the majority (2-1) referred to Article 9 **ECHR** which guarantees freedom of conscience and found that his Article excluded the possibility of conviction. He was thus acquitted.

The Prosecution Authority appealed the decision to the Court of Appeal and the decision was set aside.

The applicant appealed to the Supreme Court. The Supreme Court found that the Court of Appeal had made a procedural error, but that this error had not affected the court's application of the law. Like the Court of Appeal, the Supreme Court held that an order to perform civil service instead of compulsory military service was exempted from the general prohibition against forced or compulsory labour according to Article 4.3.b **ECHR**, and that Article 9 **ECHR** could not be interpreted in such a way as to oppose the right to freedom of conscience against an order to perform civil service.

Languages:

Norwegian.

NOR-1999-2-002

29-06-1999 lnr 50/1999

a) Norway / **b)** Supreme Court / **c)** / **d)** 29-06-1999 / **e)** lnr 50/1999 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1999, 961 / **h)** CODICES (Norvegian).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.2.2.1.1 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national sources - Hierarchy emerging from the Constitution - Hierarchy attributed to rights and freedoms.
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:

Litigation cost, security / Clarity, principle.

Headnotes:

The government's demand for security for the litigation costs of appeal proceedings in a case where the appellant had claimed compensation and redress for unlawful deprivation of liberty would be in conflict with Article 6.1 **ECHR**.

Summary:

A Yugoslav national resident (A.) in Kosovo in the Federal Republic of Yugoslavia brought a suit against the Norwegian Government represented by the Ministry of Justice, claiming compensation and redress for unlawful deprivation of liberty in Norway. The claim was denied in the City Court, and A. appealed to the Court of Appeal. The issue was whether the government might require him to deposit security for the litigation costs of the appeal proceedings.

In May 1994 A. had been sentenced to five years of preventive detention for several cases of violence and vandalism. As he was found to be of unsound mind, criminal proceedings were not instituted. From the time of the detention sentence in May 1994 until November 1996 he was kept in preventive detention at the Ila National Prison and Detention Institution. At the request of A., the detention was terminated in 1996 on condition that he returned to Kosovo.

The Supreme Court unanimously found that a demand for security for costs in this case would be in conflict with the right of access to the courts under Article 6.1 **ECHR**. In addition, a majority of four justices held that the Federal Republic of Yugoslavia should be considered as having acceded to the Hague **Convention** of 1954 relating to civil procedure, and that the Norwegian Government also for that reason was barred from demanding security for costs, in accordance with Article 17 of the **Convention** and Section 182.5 of the Norwegian Civil Procedure Act. The minority did not express any view as to whether Federal Republic of Yugoslavia could be regarded as party to the **Convention** on civil procedure.

The government contended that it had an unconditional right to demand security for costs under Section 182 of the Civil Procedure Act, and that the rule of access to the courts is not a sufficiently clear and unequivocal one to justify revoking the interpretation which follows from Section 182.

A majority of four justices found it neither necessary nor desirable to distance themselves from the principle of clarity enunciated in Rt 1994 p. 601 (the *Corrugated Board* decision). The majority held that admittedly there may be doubt about the range and detailed significance of this principle, but that the principle must under any circumstance be viewed in the light of other Supreme Court practice regarding the application of Norwegian procedural rules in the light of the European **Convention** on Human Rights.

The present case differed clearly from that of the *Corrugated Board* issue, and in the majority's opinion the principle of clarity did not prevent the result at which the Supreme Court had arrived here.

One of the justices held that it would be in conflict both with the wording of the Human Rights Act and with a statement by the Parliamentary Justice Committee when dealing with the Human Rights Act for the courts, in relation to human rights rules covered by the Human Rights Act, to apply the view that the rule must be sufficiently clear and unequivocal in order to set aside another Norwegian law. In his view, the courts should undertake an independent interpretation of the European **Convention** on Human Rights.

Languages:

Norwegian.

NOR-1998-3-002 20-11-1998 lnr 77B/1998

a) Norway / **b)** Supreme Court / **c)** / **d)** 20-11-1998 / **e)** lnr 77B/1998 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1998, 1795 / **h)** CODICES (Norvegian).

Keywords of the Systematic Thesaurus:

2.1.1.4.3	**Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.19	**General Principles** - Margin of appreciation.
3.20	**General Principles** - Reasonableness.
4.6.2	**Institutions** - Executive bodies - Powers.
5.1.1.3	**Fundamental Rights** - General questions - Entitlement to rights - Foreigners.
5.3.3	**Fundamental Rights** - Civil and political rights - Prohibition of torture and inhuman and degrading treatment.
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:

Expulsion of offender.

Headnotes:

An expulsion order imposed on a foreign national convicted of serious crimes (drug offences) is not contrary to Article 8 **ECHR**.

Summary:

A, a foreign national, was convicted in 1993 of serious drug offences, and sentenced to imprisonment for 1 year and 2 months. Previously, A had been convicted four times between 1981 and 1986 of several crimes against property. A had come to Norway in 1976 at the age of 13, and had mainly lived in Norway since. In 1983 he married a Pakistani woman in Pakistan. They had 3 children. His spouse and children live in Pakistan, as well as A's parents and six siblings.

The immigration authorities decided to expel A from Norway when the sentence was served on him. This decision was based on Sections 29 and 30 of the Immigration Act of 24 June 1988. A complaint to the Ministry of Justice confirmed the expulsion order. A then filed a civil case against the State/the Ministry of Justice claiming that the expulsion order was invalid.

The City Court found, with one dissenting vote, that the expulsion order was invalid. In the Court of Appeal, this decision was unanimously reversed.

A then appealed to the Supreme Court. He claimed that the expulsion order was contrary to Articles 3, 14 and 8 **ECHR**, and furthermore that the order was invalid due to national rules on unfair discrimination or highly unreasonable administrative decisions. The Supreme Court found that none of these arguments was sufficient to support the claim of invalidity.

The Supreme Court held that the Norwegian authorities had a certain margin of appreciation in relation to the **Convention**. This margin must also be applied by Norwegian courts. The expulsion order - whose purpose was the »prevention of disorder or crime» in Norway - was within the framework established in Article 8.2 **ECHR**. It could not be considered unreasonable to expel the appellant.

The Supreme Court stated that a similar evaluation of reasonableness had to be undertaken by the immigration authorities according to the Immigration Act Sections 29 and 30. In the present case, an evaluation of reasonableness according to Sections 29 and 30 of the Immigration Act would lead to the same result as Article 8.2 **ECHR**.

A had claimed that the expulsion would be contrary to Article 3 **ECHR** because he had received threats, and that the Pakistani government would not be able to guarantee his security if he was expelled. The Supreme Court noted that it was somewhat unclear whether Article 3 **ECHR** was applicable to threats from persons or

groups that did not represent public authorities. It was unnecessary for the Supreme Court to take a stand on this question because the alleged threats could not be considered to be sincere.

There were no grounds for the allegations that the expulsion order was highly unreasonable or based on any unfair discrimination.

Cross-references:

See also decision lnr 38/1996 of 29.04.1996, *Bulletin* 1996/1 [NOR-1996-1-002], decision lnr 39/1996 of 29.04.1996, *Bulletin* 1996/1 [NOR-1996-1-003], decision lnr 40/1996 of 29.04 1996, *Bulletin* 1996/1[NOR-1996-1-004] and decision lnr 72/1996 of 26.11.1996, *Bulletin* 1996/3 [NOR-1996-3-009].

Languages:

Norwegian.

NOR-1997-2-002

04-06-1997 lnr 42B/1997

a) Norway / **b)** Supreme Court / **c)** Division / **d)** 04-06-1997 / **e)** lnr 42B/1997 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1997, 1019 / **h)** CODICES (Norvegian).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.2.2 **Sources of Constitutional Law** - Categories - Unwritten rules - General principles of law.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.

Keywords of the alphabetical index:

Nuisance case, fine / Notification in advance, right.

Headnotes:

A person shall be notified and given the opportunity to express her or his opinion before a fine for filing a nuisance case is imposed by the court.

Summary:

A plaintiff as well as his counsel were fined by the District Court for filing a nuisance case according to Section 202 of the Court of Justice Act. They were not notified or given the opportunity to express their opinion before the fine was imposed. This procedure was, however, explicitly accepted in Section 215 of the Court of Justice Act for fines imposed according to Section 202.1 and 202.2.

The plaintiff and his counsel appealed to the High Court, claiming that the procedure in the District Court was contrary to important guarantees of law and order. Furthermore they claimed that the District Court had interpreted Section 202 incorrectly with regard to the criterion «clear nuisance» and that the assessment was based on the time of passing the sentence instead of the time of issuing the writ.

The High Court agreed with the District Court regarding the interpretation of Section 220, and found that the assessment had been correctly based on the time of issuing the writ. Furthermore the High Court found that the procedure was satisfactory. The plaintiff and his counsel appealed to the Supreme Court. The Supreme Court's competence was limited to retrying the interpretation of law and the proceedings in the High Court.

The Supreme Court agreed with the High Court as to the interpretation of Section 202. However, the Supreme Court stated that it is a fundamental principle of law and order to be notified and given the opportunity to express one's opinion before receiving a fine. Section 215 had to be interpreted according to the development regarding demands to proper procedure, as stated in Section 16 of the Public Administration Act. The Supreme Court also referred to Articles 6.1 and 6.3 **ECHR**.

Both the decision of the District Court and the decision of the High Court were quashed.

Languages:

Norwegian.

NOR-1996-3-009 26-11-1996 lnr 72/1996

a) Norway / **b)** Supreme Court / **c)** Division / **d)** 26-11-1996 / **e)** lnr 72/1996 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1996, 1510 / **h)** CODICES (Norvegian).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.16 **General Principles** - Proportionality.
3.19 **General Principles** - Margin of appreciation.
5.1.1.3 **Fundamental Rights** - General questions - Entitlement to rights - Foreigners.
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:

Expulsion of offender / Drug, trafficking.

Headnotes:

Courts can examine whether an expulsion order is contrary to the **Convention** for the Protection of Human Rights and Fundamental Freedoms.

The national authorities have a «margin of appreciation». Courts have to make a balanced evaluation between the reasons for expulsion and the right to respect for the applicant's private life and family life.

Summary:

A foreign national was expelled from Norway after a judgment of 10 years' imprisonment for keeping and attempting to sell one kilo of heroin. He filed a case against the State/Ministry of Justice and claimed that the expulsion order was invalid, especially as regards Article 8 **ECHR** which protects the right to private and family life.

The applicant had lived in Norway since he was 16 years old and had established a family life with a Norwegian woman before the imprisonment in 1987. They married while he was in prison and had two daughters, born in 1990 and 1996. The eldest daughter suffered from considerable health problems.

The City Court, the Court of Appeal and the Supreme Court maintained the expulsion order. The issue was whether the expulsion order was «necessary in a democratic society» to achieve the purpose stated in Article 8.2 **ECHR**.

The Supreme Court held that the expulsion order would lead to a separation of the family since the applicant's wife and children would not settle in his native country because of the eldest daughter's health problems. This was not decisive considering the serious crimes the applicant was convicted of. The expulsion order was therefore not disproportional and not contrary to Article 8 **ECHR**.

Cross-references:

See also decision lnr 38/1996 of 29.04.1996, *Bulletin* 1996/1 [NOR-1996-1-002], decision lnr 39/1996 of 29.04.1996, *Bulletin* 1996/1 [NOR-1996-1-003], decision lnr 40/1996 of 29.04.1996, *Bulletin* 1996/1 [NOR-1996-1-004].

Languages:

Norwegian.

NOR-1984-S-001

23-10-1984 lnr 141/1984

a) Norway / **b)** Supreme Court / **c)** / **d)** 23-10-1984 / **e)** lnr 141/1984 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1984, 1175 / **h)** .

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
5.1.1.4.2 **Fundamental Rights** - General questions - Entitlement to rights - Natural persons - Incapacitated.
5.3.5.1.2 **Fundamental Rights** - Civil and political rights - Individual liberty - Deprivation of liberty - Non-penal measures.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.

Keywords of the alphabetical index:

Privacy, invasion / Hospital, detention, compulsory / Detention, preventative.

Headnotes:

A person sentenced to detention in a mental hospital pursuant to Section 39.1 of the Penal Code may invoke the rule of Section 9.a of the Mental Health Act, and on that ground demand judicial review of the enforcement decision, under Chapter 33 of the Civil Procedure Act.

Summary:

A woman appeared persistently outside the home of a childhood friend and refused to leave, leading to her removal by the police. She was charged with invasion of privacy under Section 390.a of the Penal Code, and proceedings were instituted for preventative detention. In connection with these proceedings, she was placed under psychiatric observation. The two appointed experts found her insane, and agreed that there was a risk of repetition of the acts with which she had been charged.

She was sentenced to detention and placed in a mental hospital. While temporarily released in April and May 1983, she paid a further series of visits to her childhood friend. Renewed proceedings were instituted for

preventative detention. When the first detention period expired without any decision having been made in the new detention case, the police requested her compulsorily detention in hospital under the Mental Health Act, and she was subsequently hospitalised. On 24 September 1983, she initiated a suit in the City Court under Section 9 of the Act. The detention case was decided on 12 September 1983, the prosecuting authority being authorised to apply detention under Section 39.1.a, b, d and e of the Penal Code for a period of three years.

She appealed the detention judgment, but the appeal was denied. Thereupon it was decided that she was to be placed in a mental hospital pursuant to the judgment.

The government moved for termination of the civil suit before the City Court pursuant to Section 9 of the Mental Health Act. The government maintained that the enforcement decision that had been adopted pursuant to Section 5 of the Act was no longer relevant after the decision that had been made pursuant to the detention sentence.

Both the City Court and the Court of Appeal upheld the government's views. The woman appealed the decision to the Appeal Selection Committee of the Supreme Court. The Committee allowed the appeal to pass to the Supreme Court. The Supreme Court held that neither the wording nor the history of the Act furnished any direct guidance as to whether the right to have a judicial review pertained also to those who were forcibly placed in a mental hospital pursuant to a detention sentence. The decision would have to be made in accordance with the applicable considerations, including the consideration that Norwegian law should wherever possible be presumed to accord with treaties by which Norway was bound - in this case the European **Convention** on Human Rights of 4 December 1950 (**ECHR**).

As for the material conditions for compulsory detention in hospital under the Mental Health Act, these would also have to apply to anybody placed in a mental hospital pursuant to a detention sentence.

The Supreme Court held that important guarantees of individual legal safeguards called for the right to obtain a judicial review of detention orders, pursuant to the rules of Chapter 33 of the Civil Procedure Act - in line with the right of review provided for other persons forcibly detained. This solution accords with the views applied in the interpretation of Article 5 **ECHR**. The Supreme Court referred to several decisions by the Court and the Commission, including the judgment of 24 October 1979 *(Winterwerp)*, the judgment of 5 November 1981 *(X v. United Kingdom)*, and the decision of the Commission of 22 April 1983 *(B v. United Kingdom)*.

Cross-references:

- Winterwerp v. the Netherlands, 24.10.1979, Vol. 33, Series A of the Publications of the Court, *Special Bulletin **ECHR*** [ECH-1979-S-004].

Languages:

Norwegian.

ROM-2002-2-004 16-04-2002 129/2002 Decision on an objection alleging the unconstitutionality of the provisions of Article 206 of the Penal Code

a) Romania / **b)** Constitutional Court / **c)** / **d)** 16-04-2002 / **e)** 129/2002 / **f)** Decision on an objection alleging the unconstitutionality of the provisions of Article 206 of the Penal Code / **g)** *Monitorul Oficial al României* (Official Gazette), 399/2002 / **h)** CODICES (French).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.1.4.6 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Civil and Political Rights of 1966.

2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
3.12 **General Principles** - Clarity and precision of legal provisions.
3.17 **General Principles** - Weighing of interests.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.1 **Fundamental Rights** - Civil and political rights - Right to dignity.
5.3.21 **Fundamental Rights** - Civil and political rights - Freedom of expression.

Keywords of the alphabetical index:

Libel, through the press / Criminal law / Facts, material, concerning others.

Headnotes:

The provisions of Article 206 of the Penal Code which define defamatory acts as offences against the dignity of the individual are meant to safeguard other people's rights and freedoms and are not a violation of freedom of expression. This text concerns the punishment not of value judgments but of specific material facts about or ascribed to a person.

The inviolability of freedom of expression stipulated in Article 30.1 of the Constitution does not justify injury to the individual's dignity and right to a personal image. Freedom of expression is not an absolute freedom; it may have restrictions placed on it, provided that they are necessary for safeguarding the rights and freedoms of others.

The limits to freedom of expression must be established by law and must be necessary to ensure respect for the rights of others or protection of national security, law and order, public health or public morality.

Summary:

The Constitutional Court had before it an objection alleging that the provisions of Article 206 of the Penal Code were unconstitutional.

In the statement of grounds for the objection, Article 206 of the Penal Code was alleged to infringe Articles 11.2 and 20 of the Constitution, in conjunction with the provisions of Article 10.1 **ECHR** and of Article 19.1.2 of the International Covenant on Civil and Political Rights. The objecting party asked the Court, also having regard to the provisions of Article 30 of the Constitution, to find the provisions of Article 206 of the Penal Code unconstitutional, at least in part from the angle of criminalising journalists' value judgments.

In its examination of the objection alleging unconstitutionality, the Court found that under the provisions of Article 206 of the Penal Code the legislator defined acts of defamation as punishable offences against human dignity, an essential value set forth in Article 1.3 of the Constitution. The impugned statute prescribes criminal sanctions for words, deeds and any other means whereby a person's honour or reputation is damaged, or for any statement or allegation in public of specific facts which, if true, would expose the person concerned to a criminal, administrative or disciplinary penalty or to public opprobrium, but not for value judgments.

The Court held that Article 206 of the Penal Code concerned punishment not for value judgments but for specific material facts about or ascribed to a person.

The Constitutional Court also found that not even the allegation of a violation of Article 10.1 **ECHR** was founded, because Article 10.2 **ECHR** requires that a measure restricting freedom be prescribed by law and necessary in a democratic society. In the cases relied on by the objecting party, *Dalban v. Romania*, and *Constantinescu v. Romania*, the European Court of Human Rights, having regard to the above criteria, held that the provisions of Article 206 of the Romanian Penal Code were not such as to infringe the provisions of Article 10 of the **Convention**.

The Court thus concluded that the provisions of Article 206 of the Penal Code concerning libel were not contrary to Article 30 of the Constitution (freedom of expression) or to the provisions of international human rights instruments.

Nor did the Court accept the argument that Articles 19.1 and 19.2 of the International Covenant on Civil and Political Rights had not been observed, considering that Article 19.3 thereof expressly prescribes the limits to freedom of expression.

Cross-references:

European Court of Human Rights:

- Case *Dalban v. Romania*, 28.09.1999, *Reports of judgments and decisions* 1999-VI;

- Case *Constantinescu v. Romania*, 27.06.2000, *Reports of judgments and decisions* 2000-VIII.

Languages:

French.

ROM-2002-1-003 21-02-2002 57/2002 Decision on the objection challenging the constitutionality of the provisions of Article 915.2 of the Code of Criminal of Criminal Procedure

a) Romania / **b)** Constitutional Court / **c)** / **d)** 21-02-2002 / **e)** 57/2002 / **f)** Decision on the objection challenging the constitutionality of the provisions of Article 915.2 of the Code of Criminal of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 182/18.03.2002 / **h)** CODICES (English, French).

Keywords of the Systematic Thesaurus:

2.1.1.4.2 **Sources of Constitutional Law** - Categories - Written rules - International instruments - Universal Declaration of Human Rights of 1948.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.1 **Sources of Constitutional Law** - Categories - Case-law - Domestic case-law.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.13.17 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Rules of evidence.
5.3.32 **Fundamental Rights** - Civil and political rights - Right to private life.
5.3.36 **Fundamental Rights** - Civil and political rights - Inviolability of communications.

Keywords of the alphabetical index:

Recording, audio, video / Criminal procedure, principles / Evidence, assessment.

Headnotes:

Articles 911-915 of the Code of Criminal Procedure concerning the use of audio and video recordings as evidence in criminal proceedings not only fulfil the need to make available to criminal courts new and effective means of proof recognised by systems of modern law, but also complies with the principle of safeguarding fundamental rights and freedoms.

In fact the provisions of the Universal Declaration of Human Rights and the European **Convention** on Human Rights acknowledge the legitimacy of restrictions to the exercise of certain rights and freedoms on condition that they are prescribed by law in order to protect important social values such as the conduct of the criminal investigation or the prevention of criminal acts.

Summary:

By preliminary request dated 27 September 2001, Criminal Division I of the Bucharest Court referred to the Constitutional Court an objection challenging the constitutionality of the provisions of Article 915.2 of the Code of Criminal Procedure stipulating that "the audio and video recordings referred to in this section [Section V (Articles 911-915) - Audio and video recordings] which are submitted by the parties may serve as evidence insofar as they are not prohibited by law".

It was alleged in the statement of grounds for the objection that the impugned statutory provisions did not comply with:

1. the principle of inviolability of personal, family and private life laid down in Article 26 of the Constitution, in that the provisions enabled the public authorities to interfere in the individual's personal life under other conditions than those governed by law in accordance with the Constitution;

2. the secrecy of correspondence provided for in Article 28 of the Constitution, in that the challenged provisions made it possible for any person, even a party to criminal proceedings, to record telephone or other conversations which could subsequently be used as evidence, and

3. Articles 6 and 8 **ECHR**.

On examining the objection, the Constitutional Court found the impugned provisions consistent with the principles of the law of criminal procedure, particularly disclosing the truth (Article 3 of the Code of Criminal Procedure), weighing evidence, and assuming that the value of evidence is not established in advance (Article 63.2 of the Code of Criminal Procedure). Thus, the impugned provisions are held to limit and determine the use of audio and video recordings as evidence that there are certain facts or tangible clues as to the planning and perpetration of an offence. They regulate the possibility of the audio and video recordings being subjected to technical appraisals at the request of the prosecutor, the parties or the Court of its own motion. The assessment of each piece of evidence is made by the judge following an attentive analysis of all evidence adduced. The trial court is thus required to verify whether it was legal and justifiable to make recordings whenever it is presented with evidence in the form of recordings of conversations or of scenes which parties to the proceedings have made.

The Court also considered the challenged provisions to be in accordance with the international principles invoked by the originator of the objection. In this connection reference was made to the judgment delivered by the European Court of Human Rights in the case of *Klass and others v. Germany* of 1978 (*Special Bulletin **ECHR*** [ECH-1978-S-004]).

Lastly, the Court recalled that it had already ruled on the constitutionality of the provisions of Articles 911-915 of the Code of Criminal Procedure in its Decision no. 21/2000. In that decision, it held that the interception and recording of conversations or the recording of certain scenes without the consent of the person concerned constituted a restriction on the exercise of the right to respect for personal, family and private life and to its protection by the public authorities, as well as restricting the exercise of the right to inviolability of the secrecy of conversations and other legal means of communication, rights secured by Articles 26.1 and 28 of the Constitution.

The Constitution itself, in Article 49, allows the exercise of certain rights and certain fundamental freedoms to be restricted in cases and under conditions which are exhaustively and precisely defined. In its earlier analysis of the formulation of the impugned statutory provisions, the Court had found that the conditions laid down by the Constitution for restricting the exercise of the rights secured by Articles 26.1 and 28 were complied with.

In the present case, the Court confirmed the terms of its previous decision.

Cross-references:

- Constitutional Court Decision no. 21 of 03.02.2000, published in *Monitorul Oficial al României*, Part I, no. 159 of 17.04.2000;

- *Klass and others v. Germany*, 06.09.1978, Vol. 28, Series A of the Publications of the Court; *Special Bulletin **ECHR*** [ECH-1978-S-004].

Languages:

Romanian, French (translation by the Court).

ROM-2002-1-001 20-11-2001 322/2001 Decision on objections challenging the constitutionality of the provisions of Section 17.11 of Judicature Act no. 92/1992 revised, with subsequent amendments

a) Romania / **b)** Constitutional Court / **c)** / **d)** 20-11-2001 / **e)** 322/2001 / **f)** Decision on objections challenging the constitutionality of the provisions of Section 17.11 of Judicature Act no. 92/1992 revised, with subsequent amendments / **g)** *Monitorul Oficial al României* (Official Gazette), 66/30.01.2002 / **h)** CODICES (English, French).

Keywords of the Systematic Thesaurus:

2.1.1.4.2 **Sources of Constitutional Law** - Categories - Written rules - International instruments - Universal Declaration of Human Rights of 1948.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
4.7.1.1 **Institutions** - Judicial bodies - Jurisdiction - Exclusive jurisdiction.
4.7.4.1.1 **Institutions** - Judicial bodies - Organisation - Members - Qualifications.
4.7.4.1.2 **Institutions** - Judicial bodies - Organisation - Members - Appointment.
4.7.4.1.6.1 **Institutions** - Judicial bodies - Organisation - Members - Status - Incompatibilities.
4.7.4.1.6.3 **Institutions** - Judicial bodies - Organisation - Members - Status - Irremovability.
4.7.4.2 **Institutions** - Judicial bodies - Organisation - Officers of the court.
4.7.5 **Institutions** - Judicial bodies - Supreme Judicial Council or equivalent body.

Keywords of the alphabetical index:

Judge, aptitude / Judge, authority / Judge, impartiality / Magistrate assistant, definition, duties / Labour dispute / Panel, composition.

Headnotes:

Justice is a state function performed by the Supreme Court of Justice and the other judicial authorities established by law, in the name of the law, and solely by judges. It is therefore not possible to assign the power of trial or the function of determining cases to anyone but judges.

Assistant magistrates, appointed by the Minister of Justice, have the status of public servants and thus can only perform a supporting function when cases relating to labour disputes and litigation are determined by a judge. In fact they are only entitled to a consultative vote in the reaching of decisions and are not entitled to engage in any activity connected with delivery of judgment, which is set aside by the Constitution for judges

alone.

Participation by assistant magistrates in the trying of certain cases, with a deliberative vote and the ability to outvote the judge, owing to the composition of the Court, is contrary to the principle of impartial justice in that these officials do not serve the law or have the guarantees of independence laid down by the Constitution (in the case of judges, immunity from dismissal and disqualification from other public office or private employment and from political party membership).

Summary:

The Constitutional Court had before it an objection on grounds of unconstitutionality to provisions of Section 17.11-13 of the Judicature Act no. 92/1992 revised, with subsequent amendments.

The submissions in support of the objections alleged that the impugned provisions instituting the office of assistant magistrates competent to try in the first instance cases relating to labour disputes and litigation in conjunction with a judge were contrary to the provisions of Articles 1.3, 51, 123, 124 and 125 of the Constitution. According to these provisions, the judge has sole competence to make rulings and have them enforced. The appointment of assistant magistrates as members of the Court with a deliberative vote is thus contrary to the principle of independence of judges, since these officials, representing the trade unions and employers' associations, are neither independent nor impartial.

Section 17.11 of the Judicature Act no. 92/1992 provides as follows:

"Cases relating to labour disputes and labour litigation shall be expeditiously tried at first instance by a court consisting of a judge and two assistant magistrates of whom one represents the employers' associations and the other the trade unions. Rulings in these cases shall be made by majority vote of the members of the Court".

In considering the allegations of unconstitutionality, the Court made the observation that according to Article 1.3 of the Constitution Romania is a law-based state, implying *inter alia* that the state's judicial function is exercised through the agency of impartial and independent judges deferring only to the law.

As the Court further pointed out, these principles are also enshrined in Article 10 of the Universal Declaration of Human Rights and Article 6.1 **ECHR**.

Thus, in full consonance with the aforementioned instruments, the Constitution lays down these three principles: in Romania, justice is administered by the Supreme Court of Justice and the other judicial authorities established by law; the independence of justice above all presupposes the complete independence of judges, to secure which the judges appointed by the President of Romania are irremovable, in accordance with the law, as well as the incompatibility of judicial office with any other public or private appointment except teaching functions in higher education, and exclusion from the activity of political parties.

One component of judicial authority is the Judicial Service Commission wholly consisting of magistrates elected by parliament whose characteristic function is to secure the irremovability, independence and impartiality of the judges whose appointment is proposed by the President of Romania.

The Court accordingly held that justice was purely a state function performed by the Supreme Court of Justice and the other judicial authorities established according to law, so as to exclude the discharge of judicial activity by other official bodies or by other private individuals or institutions. The Court also held that the activity of hearing and determining cases was performed in the name of the law solely by the members of these authorities, i.e. by independent judges deferring solely to the law.

The Court found that Section 17.11 of Act no. 92/1992 revised, with the subsequent amendments, requiring decisions in cases relating to labour disputes and labour litigation to be reached by majority vote of the members of the Court consisting of a judge and two assistant magistrates was contrary to Articles 1.3, 51, 123, 124 and 125 of the Constitution.

According to the terms of the impugned statute, one of the two assistant magistrates appointed by the Minister of Justice at the proposal of the Economic and Social Council represents the employers' associations, and the other the trade unions. In the Court's finding, their participation in the trying of cases with a deliberative vote and the ability to outvote the judge, owing to the composition of the Court, is contrary to the principle of impartiality of justice because they do not serve the law and lack the guarantees of independence laid down by the Constitution, these guarantees being, for judges, irremovability and disqualification from public or private appointments or political party membership. In other words, assistant magistrates are not independent and their lack of independence affects the very independence of justice.

Therefore they cannot perform any activity in connection with hearing and determining cases, which is set aside by the Constitution for judges alone. Consequently, the Court declared unconstitutional Section 17.11 of the Judicature Act no. 92/1992 revised, stipulating that "rulings in cases relating to labour disputes and litigation which are tried at first instance shall be taken by the majority vote of the trial court".

Supplementary information:

Subsequently, Section 171-3 of the Judicature Act no. 92/1992 revised, with subsequent amendments, was amended and supplemented by Government Emergency Order no. 20 of 20 February 2002 published in the *Monitorul Oficial al României*, Part I, no. 151 of 28 February 2002.

Languages:

Romanian, French (translation by the Court).

ROM-2000-2-012 20-12-1999 234/1999 Decision on the constitutionality of the provisions of government emergency Order no. 13/1998 concerning restitution of certain immovable property formerly owned by communities of citizens of Romania's national minorities

a) Romania / **b)** Constitutional Court / **c)** / **d)** 20-12-1999 / **e)** 234/1999 / **f)** Decision on the constitutionality of the provisions of government emergency Order no. 13/1998 concerning restitution of certain immovable property formerly owned by communities of citizens of Romania's national minorities / **g)** *Monitorul Oficial al României*(Official Gazette), 149/11.04.2000 / **h)** CODICES (English, French).

Keywords of the Systematic Thesaurus:

1.6.3 **Constitutional Justice** - Effects - Effect *erga omnes*.
2.1.1.4.2 **Sources of Constitutional Law** - Categories - Written rules - International instruments - Universal Declaration of Human Rights of 1948.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.9 **General Principles** - Rule of law.
4.6.3.2 **Institutions** - Executive bodies - Application of laws - Delegated rule-making powers.
4.6.6 **Institutions** - Executive bodies - Relations with judicial bodies.
5.3.17 **Fundamental Rights** - Civil and political rights - Right to compensation for damage caused by the State.
5.3.39.1 **Fundamental Rights** - Civil and political rights - Right to property - Expropriation.
5.3.45 **Fundamental Rights** - Civil and political rights - Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Government, emergency order, 'exceptional cases', entry into force / Redress, measure, delay.

Headnotes:

1. It is not permissible for the government to issue an emergency order disposing of property no longer owned by the state but under private ownership. Compulsory transfer of the ownership of certain classes of private property to the state may be effected by means of expropriation or confiscation under the conditions prescribed by Articles 41.3, 41.5 and 41.8 of the Constitution securing the right of private property.

2. Within the conditions prescribed by the first sentence of Article 114.4 of the Constitution, the "exceptional case" warranting the issue of a government emergency order is established in the instant case by the contents of the explanatory memorandum to the order and corroborated by the known fact that there had been a delay in enacting measures of redress concerning buildings wrongfully taken over by the communist dictatorship.

Summary:

By interlocutory decision of 18 December 1998, the Constitutional Court had been requested to give a preliminary decision on the constitutionality of the provisions of Government Emergency Order no. 13/1998 on restitution of immovable property formerly owned by the communities of citizens of Romania's national minorities.

In pleading its objection, the objecting party invoked three grounds of unconstitutionality: the government had issued the Emergency Order despite a lack of facts substantiating the exceptional situation warranting its intervention in the legislature's sphere of competence, and had thereby infringed the provisions of Article 114.4 of the Constitution, which provide that in exceptional cases the government may adopt emergency orders. These come into force only after their submission to parliament for approval. If parliament is not in session, it must be convened by law.

Second, it was claimed that the violation of a semi-public, public and private commercial company's right of private ownership in respect of the building whose restitution had been ordered was contrary to the provisions of Articles 41.1, 41.2 and 135.6 of the Constitution.

Articles 41.1 and 41.2 of the Constitution provides that:

1. The right of property, as well as claims on the state, are guaranteed. The content and limitations of these rights shall be established by law.

2. Private property shall be equally protected by law, irrespective of its owner. Foreigners and stateless persons may not acquire the right of land property.

Article 135.6 of the Constitution provides that private property shall, in accordance with the law, be inviolable.

The third ground concerns the violation of the provisions contained in Title III Chapter VI of the Constitution on judicial authority resulting from the Alba Iulia appeal court's ruling, not subject to review, that there was no succession in title of the commercial company "Magyar House SA" and of the former public limited company "Magyar House".

1. The Court did not accept the allegation of unconstitutionality founded on non-compliance with the provisions of Article 114.4 of the Constitution, under which the possibility of the government's employing this form of legislative delegation is contingent on the existence of an exceptional case.

The contents of the explanatory memorandum to the order, corroborated by the known fact that their had been a delay in enacting measures of redress concerning buildings wrongfully taken over by the communist dictatorship, were apt to warrant the issuing of this emergency order under the conditions prescribed in the first sentence of Article 114.4 of the Constitution.

According to the explanatory memorandum to the order, the exceptional case was justified by the numerous steps which certain persons had taken after the fall of the communist regime to recover immovable property confiscated or nationalised from 1940 onwards by totalitarian governments, and by the obligations which Romania had incurred, among them the restitution of property to communities of citizens belonging to the national minorities, also contemplated in the reports of international bodies.

The Court nevertheless held that the provisions of Government Emergency Order no. 13/1998 were unconstitutional as concerned the restitution to Romania's Magyar community of a building covered by the protection of private property instituted by Articles 41.1, 41.2 and 135.6 of the Constitution. Regarding private property, Constitutional Court plenum Decisions no. 1 of 7 September 1993, no. 37 of 3 April 1996, no. 9 of 22 January 1997 and no. 18 of 14 March 1994 may be cited.

This solution was based on the following arguments:

According to the items in column 6 of the appendix to the order, Decrees nos. 218/1960 and 712/1966, together with Act no. 15/1990, are designated as the official acts pursuant to which the building became state property.

It was intended, by effect of Decree no. 218/1960 amending Decree no. 167/1958 on the extinguishment of rights and obligations and Decree no. 712/1966 on property coming under the provisions of Section III of Decree no. 218/1960, to create a semblance of legality for abuses committed to the detriment of private ownership, it being established that the state was the owner of property which had come into its possession prior to the publication of Decree no. 218/1960, either without any title or under the procedure laid down by Decree no. 111/1951 regulating the status of all classes of property subject to confiscation in the absence of heirs or of the owner, together with certain assets no longer used by the budgetary institutions.

The Court stressed that Act no. 15/1990 on reorganisation of the state economic entities as independent public corporations and commercial companies, also specified as a basis for state ownership, did not constitute the legal instrument transferring the building to state ownership, but rather the prescriptive instrument under which the commercial companies set up following conversion of the former state economic entities had become the owners of the assets found in their holdings, as provided by Section 20.2 of the Act. According to these provisions, assets forming part of the holdings of commercial companies are their property, except for those acquired under a different title. This statutory instrument has come under constitutional review, the Court having ruled that the assets of independent public corporations and of commercial companies are not state property but private property. The state is an ordinary shareholder in these assets, owning a proportion of the registered capital. This being so, it is not permissible for the government to issue an emergency order disposing of such property which is no longer state-owned. At the same time, the Court held that in accordance with the constitutional provisions governing the right of property, compulsory transfer to state ownership of certain privately owned property could be effected by expropriation, under the conditions prescribed by Articles 41.3 and 41.5 of the Constitution, or by confiscation in the case of assets intended for, used in or accruing from criminal or petty offences, subject to the conditions prescribed by Article 41.8 of the Constitution. These constitutional provisions are guarantees for the right of private property, and cannot be evaded by the expedient of an emergency order, even though it is plainly not possible to call into question the right of Romania's Magyar community to reparation of the injustice done to it by the wrongful transfer to state ownership, during the period of communist government, of the building in dispute.

The Court also held that in a state based on the rule of law, in accordance with Article 1.3 of the Constitution, redress of an unjust act could be achieved only through legal procedures that were not incompatible with constitutional provisions or with obligations deriving from the treaties and international instruments accepted by the state of Romania, compliance with which is mandatory according to the terms of Articles 11 and 20 of the Constitution.

In consequence, the Court acknowledged that the provisions of Article 17 of the Universal Declaration of Human Rights, and of Article 1.1 Protocol 1 **ECHR**, which Romania had ratified by Act no. 30/1994, were applicable.

The unconstitutionality of the restitution of the building in question must be admitted, notwithstanding that the terms of Section 3 of the Order might suggest possible compensation, for in the present case the requirements of Article 41.3 of the Constitution, namely that no one may be expropriated, except on grounds of public utility, established according to the law and against just compensation paid in advance, were not met.

The Court could not accept the contention of the objecting party that there was interference by the executive in the affairs of the judiciary in so far as the government had nullified the effects of a court decision. Indeed, a reading of the order, appendix included, did not disclose that the building in question need be restored to the commercial company "Magyar House SA".

Supplementary information:

1. This decision was delivered by a majority of votes and dissenting opinions were entered, both with regard to the materiality of the exceptional case and with regard to the non-compliance of the provisions of Government Emergency Order no. 13/1998 with the provisions of Articles 41.1, 41.2 and 135.6 of the Constitution protecting private property.

2. In accordance with Section 25.1 and 25.4 of Act no. 47/1992 on the organisation and functioning of the Constitutional Court,

(1) Decisions establishing the unconstitutionality of a law or an order or a provision of a law or order in force shall be final and binding [...]

(4) Decisions delivered under the terms of paragraph 1 shall be notified to both houses of parliament and to the government.

The present decision was notified by the Constitutional Court to these public authorities.

Regarding the binding character and *erga omnes* effects of Constitutional Court decisions, see Decision no. 186 of 18 November 1999, *Bulletin* 2000/2 [ROM-2000-2-010].

Languages:

Romanian.

ROM-2000-1-008

23-11-1999 199/1999 Decision concerning the constitutionality of Sections 6 and 10 of the Organisation and Conduct of Public Meetings Act (no. 60/1991)

a) Romania / **b)** Constitutional Court / **c)** / **d)** 23-11-1999 / **e)** 199/1999 / **f)** Decision concerning the constitutionality of Sections 6 and 10 of the Organisation and Conduct of Public Meetings Act (no. 60/1991) / **g)** *Monitorul Oficial al României*(Official Gazette), 76/21.02.2000 / **h)** CODICES (English, French, Romanian).

Keywords of the Systematic Thesaurus:

1.3.5.5.1 **Constitutional Justice** - Jurisdiction - The subject of review - Laws and other rules having the force of law - Laws and other rules in force before the entry into force of the Constitution.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
2.2.1.4 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - European **Convention** on Human Rights and constitutions.
3.19 **General Principles** - Margin of appreciation.
3.20 **General Principles** - Reasonableness.

5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.28 **Fundamental Rights** - Civil and political rights - Freedom of assembly.

Keywords of the alphabetical index:

Law, temporal conflict of laws / Demonstration, prior authorisation, peaceful conduct / Public order.

Headnotes:

The legal requirement to seek approval to organise and conduct a public meeting is not unconstitutional. Freedom of assembly may lawfully be subject to limits and restrictions, to protect citizens' constitutional rights and freedoms.

Summary:

The Constitutional Court was asked to rule on the constitutionality of Sections 6 and 10 of the Organisation and Conduct of Public Meetings Act (no. 60/1991), on the grounds that they were in breach of Article 36 of the Constitution, on freedom of assembly, and Article 150 of the Constitution, on temporal conflict of laws.

The contested sections are as follows:

Section 6: The organisation of public meetings shall be declared to the municipality or other local authority where the meeting is to be held.

Section 10: After consultation with the local police, the local authority may prohibit the holding of the public meeting, if it has information that the conduct of the meeting would lead to a breach of Section 2 or if there are major construction or other public works at the location or on the route where the meeting is scheduled to take place.

The Constitutional Court found that Article 36 of the Constitution had to be taken in conjunction with Article 49 of the Constitution, since the exercise of freedom of assembly could be subject to certain legal restrictions and conditions, to ensure that citizens' constitutional rights and freedoms and their interests, and implicitly public order and national security, were not threatened.

In the context of Articles 11 and 20 of the Constitution, the Court noted that under Article 11 **ECHR** the right of assembly could be subject to certain restrictions which were prescribed by law and were necessary in a democratic society for the prevention of disorder, for the protection of morals or for the protection of the rights and freedoms of others. In this context, the European Court of Human Rights had ruled, in the cases of *Plattform Ärzte für das Leben v. Austria*, 1985, and *Rassemblement jurassien v. Switzerland*, 1979, that Article 11 **ECHR** allowed each state to adopt reasonable and appropriate measures to ensure the peaceful conduct of lawful demonstrations of its citizens, and that for gatherings taking place on the public highway, the requirement to seek prior authorisation was not unreasonable, since this would enable the authorities to ensure respect for public order and take the necessary measures to ensure that freedom to demonstrate was fully respected.

The Court found that since the contested provisions did not breach Article 36 of the Constitution, neither were they affected by Article 150.1, according to which laws and all other forms of legislation remained in force so long as they were compatible with the provisions of the Constitution.

Languages:

Romanian.

RUS-1998-2-006 17-07-1998

a) Russia / **b)** Constitutional Court / **c)** / **d)** 17-07-1998 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 30.07.1998 / **h)** .

Keywords of the Systematic Thesaurus:

1.1.4.4 **Constitutional Justice** - Constitutional jurisdiction - Relations with other institutions - Courts.
1.2.3 **Constitutional Justice** - Types of claim - Referral by a court.
1.3.5.5 **Constitutional Justice** - Jurisdiction - The subject of review - Laws and other rules having the force of law.
1.3.5.5.1 **Constitutional Justice** - Jurisdiction - The subject of review - Laws and other rules having the force of law - Laws and other rules in force before the entry into force of the Constitution.
1.6.3 **Constitutional Justice** - Effects - Effect *erga omnes*.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
4.7.2 **Institutions** - Judicial bodies - Procedure.
4.7.4 **Institutions** - Judicial bodies - Organisation.

Keywords of the alphabetical index:

Court, verification of the constitutionality of laws / Court, delimitation of powers / Constitutional court, exclusive jurisdiction.

Headnotes:

Ordinary courts do not have a right, but rather an obligation, to request the Constitutional Court to verify the constitutionality of a law applied or to be applied in a specific case if they find that law to be unconstitutional. Only in such cases will an unconstitutional provision be denied the force of law in accordance with the constitutionally established procedure, thereby ruling out its future application. This also ensures compliance with the constitutional principle that laws must be applied in a uniform manner throughout the territory of the Russian Federation, as well as the primacy of the Constitution, which cannot be guaranteed if different courts are allowed to interpret constitutional provisions in divergent ways.

Summary:

In this case, the Constitutional Court interpreted several at the request of the legislative assembly of the Republic of Karelia and the State Council of the Republic of Komi.

The subject of the interpretation in this case are the provisions of Article 125 of the Russian Constitution, pursuant to which the Constitutional Court is required to verify the constitutionality of the normative legal acts enumerated in this article and which, if they are found unconstitutional, cease to have force of law in respect of the provisions of Articles 126 and 127 of the Constitution; the latter provisions set out the powers of the Supreme Court as the supreme judicial authority in civil, criminal, administrative and other matters, and the Supreme Court of Arbitration as the supreme judicial authority ruling on economic disputes and other matters, and thus determine in general the relevant powers of the ordinary courts and the arbitration courts. The Constitutional Court was required to consider whether the powers of the ordinary courts and arbitration courts to verify the constitutionality of normative legal acts and to declare them null and void, i.e. as being no longer in force, flow from the above-mentioned provisions.

Of fundamental importance for this interpretation are the provisions of the Constitution laying down the superior legal force of constitutional provisions and the direct force of the Constitution (Article 15 of the Constitution), *inter alia* in the area of the rights and freedoms guaranteed by law (Article 18 of the Constitution), in which their legal protection is guaranteed (Article 46 of the Constitution). It follows that the requirement of the direct application of the Constitution applies to all courts.

At the same time, Article 125 of the Constitution contains special provisions giving a special judicial body, the Constitutional Court, power to verify the constitutionality of normative legal acts with the result that such acts may lose the force of law. The Constitution does not attribute such powers to the other courts.

In defining the powers of the Constitutional Court, the Constitution takes as a basis the obligation to exercise this power in a particular way, namely via constitutional judicial procedure. For this reason, it determines the main aspects of this procedure, i.e. what decisions may be challenged and who may appeal, as well as the types of procedures applicable and the legal effects of decisions rendered. For the other courts, there are no such regulations at constitutional level. Consequently, the Constitution does not contemplate verification by these courts of the constitutionality of normative acts.

This is also in conformity with the general legal principle that a court which was established and functions on a lawful basis (Article 6 **ECHR**) is considered to be competent to hear the case, which presupposes that the powers of the various courts are set forth in the Constitution and in the law adopted in keeping with the Constitution. This principle is expressed in Articles 47, 118, 120 and 128 of the Constitution of the Russian Federation and is at the basis of the definition of absolute territorial power and of the jurisdiction of the court hearing the case as well as the categorising of types of court jurisdiction. With regard to the exercise of the power to verify the constitutionality of acts, provision is made for the relevant court only in the Constitution; such provision may not be made by another law.

Articles 125, 126 and 127 of the Constitution develop the logic of Article 118, according to which judicial authority is exercised through constitutional, civil, administrative and criminal proceedings. It is precisely because the constitutional proceedings are the responsibility of the Constitutional Court, in accordance with Article 125, that Articles 126 and 127 give other courts jurisdiction in civil, criminal, administrative matters and economic disputes.

The decisions of the Constitutional Court pursuant to which unconstitutional normative legal acts lose the force of law produce the same general effects in respect of time, of territory and of the number of persons concerned as do normative legal acts that are decisions of the body creating the rules. Consequently, they also have the same general effects as these acts. Those effects are not unique to the decisions of ordinary courts and arbitration courts, which by nature are acts in application of the law designed to apply legal rules. The Constitutional Court alone takes official decisions of general application. Hence, its decisions are final and cannot be reviewed by other bodies or overruled by the adoption for a second time of an act which has been found unconstitutional, and require all those who apply the law, including other courts, to act in conformity with the legal positions of the Constitutional Court.

The decisions of the ordinary courts and the arbitration courts do not have such force of law. They are not binding on other courts in other cases, because the courts interpret independently the normative provisions which must be applied. The decisions of the ordinary courts and the arbitration courts may be challenged in accordance with established procedures. Moreover, no provision is made for the mandatory official publication of these decisions, which, by virtue of Article 15.3 of the Constitution stipulating that only officially published laws are applicable, also excludes other bodies applying the law from the obligation to follow suit when settling other cases. In view of the above, the decisions of courts of ordinary law and arbitration courts are not recognised as an appropriate way of depriving of the force of law normative legal acts which have been found unconstitutional.

The fact that courts of ordinary law and arbitration courts do not have the power to find the above-mentioned normative legal acts unconstitutional and thus without direct effect also flows from Article 125.2 of the Constitution, pursuant to which the Supreme Court and the Supreme Court of Arbitration are both bodies which may request the Constitutional Court to verify the constitutionality of normative legal acts (unrelated to the consideration of a specific case, i.e. verification of rules *in abstracto*). Upon the request of courts, the Constitutional Court also verifies the constitutionality of the law applied or applicable in a specific case.

Hence, it has been established at constitutional level that rulings of other courts on the unconstitutionality of a law cannot in themselves serve as a basis for officially finding that law unconstitutional and depriving it of legal effect. From the point of view of the interaction of courts with different types of jurisdiction and the

definition of their power to find laws unconstitutional, the exclusion of such laws from a number of acts in force is the joint result of the obligation on the ordinary courts to question the constitutionality of the law before the Constitutional Court and the obligation of the latter to render a final ruling on the question.

Appeals by other courts, provided for in Article 125 of the Constitution relating to verification of the constitutionality of the law applied or applicable in a specific case if the court finds the law to be unconstitutional, cannot be regarded as a right only: the court must lodge an appeal requesting that the unconstitutional act lose its force of law according to the constitutionally established procedure, which may rule out its future application.

Refusal to apply in a specific case a law found unconstitutional by the court, without an appeal having been lodged on this occasion before the Constitutional Court, would be at variance with the constitutional provisions according to which laws apply uniformly throughout the entire territory of the Russian Federation (Articles 4, 15 and 76), and would probably also cast doubt on the primacy of the Constitution, because it cannot be applied if conflicting interpretations of constitutional rules by different courts are allowed. This is precisely why an appeal to the Constitutional Court is also obligatory in cases in which the court, when examining a specific case, finds unconstitutional a law which was adopted prior to the entry into force of the Constitution and whose application must be ruled out in conformity with paragraph 2 of its Concluding and Interim Provisions.

In cases in which they find a law to be unconstitutional, the obligation on the courts to apply to the Constitutional Court for official confirmation of unconstitutionality does not restrict their direct application of the Constitution, whose purpose is to ensure the application of constitutional rules above all when they have not been given specific legislative form. If, in the view of the court, the law which should be applied in a specific case is unconstitutional and its provisions therefore cannot be applied, that law may cease to have statutory force in accordance with constitutional procedure, so that the Constitution has direct effect in all cases in which the court rules on the basis of a specific constitutional rule.

Article 125 of the Constitution does not limit the powers of other courts to decide which law is applicable in a given case, where laws contradict each other or gaps are revealed in the legal regulations, or rules which have actually lost their effect have not been abrogated in accordance with the established procedure. However, the court may refrain from applying the federal law or the law of a constituent entity of the Russian Federation; but it does not have the power to find them null and void.

Nor does the power of the federal courts to declare the normative legal acts of the constituent entities of the Russian Federation to be inconsistent with their constitutions (statutes) follow from Article 76 of the Constitution, which lays down the principles for settling conflicts between normative legal acts at various levels. Only the bodies of the constitutional court system, if such is provided for by the constitutions (statutes) of the constituent entities of the Russian Federation, may perform the above-mentioned function, which leads to the loss of force of law of those entities' normative legal acts.

The Constitutional Court has decided that it alone shall rule on the constitutionality of the laws of the Federation and its constituent entities. The ordinary courts of law are bound to appeal to the Constitutional Court if they believe such a rule to be unconstitutional. A federal constitutional law may require the ordinary courts to rule on the legality of normative legal acts below the level of statute law.

Languages:

Russian.

RUS-1998-2-005 16-06-1998

a) Russia / **b)** Constitutional Court / **c)** / **d)** 16-06-1998 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 30.06.1998 / **h)** .

Keywords of the Systematic Thesaurus:

2.1.1.4 **Sources of Constitutional Law** - Categories - Written rules - International instruments.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European Convention on Human Rights of 1950.
2.1.2.2 **Sources of Constitutional Law** - Categories - Unwritten rules - General principles of law.
4.5.8 **Institutions** - Legislative bodies - Relations with judicial bodies.
4.6.6 **Institutions** - Executive bodies - Relations with judicial bodies.
4.7 **Institutions** - Judicial bodies.
4.7.4.6 **Institutions** - Judicial bodies - Organisation - Budget.
4.10.2 **Institutions** - Public finances - Budget.
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:

Judicial system, financing / Court, independence / Budget, courts, reduction.

Headnotes:

The government cannot have the right to reduce budget allocations for the operation of the federal judicial system in accordance with actual receipts from the federal budget.

Summary:

At the request of the Supreme Court, the Constitutional Court considered a case relating to verification of the constitutionality of Article 102.1 of the federal Law "on the 1998 federal budget".

The Constitutional Court found that, according to the contested rule, in the event of rejection of the accumulated receipts of the federal budget on the basis of the amounts provided for in the present law, the expenditure of the federal budget is financed by the government in a manner strictly proportional to the annual appropriation, taking into account the actual budget receipts. This means accepting a discrepancy with regard to proportional financing by items of a maximum of five per cent for each quarter (with the exception of seasonal or lump-sum payments), provided that federal law does not contain a provision to the contrary. In the opinion of the applicant, this rule permits the government to reduce on its own initiative the size of federal budget allocations earmarked for the judicial system as a function of the situation of budget receipts, and is therefore in conflict with Articles 10, 76.3 and 124 of the Constitution.

The Constitutional Court noted that, pursuant to Article 124 of the Constitution, the courts are financed solely from the federal budget, and their financing must ensure the possibility of administering justice fully and independently in conformity with federal law. Such financing must be in keeping with the provisions and resources required to ensure that the economic conditions for the exercise of judicial authority exist.

Specifying the constitutional guarantees, the federal constitutional law "on the judicial system of the Russian Federation" provides that financing for the federal courts is based on the rules approved by federal law and is broken down by separate headings in the federal budget. The amount of budgetary resources earmarked for the courts in the current budget year or planned for the coming budget year cannot be reduced without the approval of the Congress of Judges of All Russia or the Council of Judges of the Russian Federation. The absence of rules approved by federal law on the financing of the courts cannot in itself justify allowing such financing to be left to the discretion of the legislature or the executive, because the federal budget allocations needed for the courts are directly protected by the Constitution itself and cannot be cut below the level required to ensure that the requirements of Article 124 of the Constitution are met.

Thus, the provisions of the Constitution, together with the implementing rules in Article 33 of the federal constitutional Law "on the judicial system of the Russian Federation", create the means of protecting the

financing of the judicial system that is mandatory for both the Federal Assembly, which approves the budget for the corresponding year, and the government, which is responsible for implementing it.

So in adopting Article 102 of the contested Law, the Federal Assembly gave the government the right to reduce allocations for operating the federal judicial system and regarded this as coming under an expenditure heading not protected in the same way as the other headings. The proposals of the Russian Federation's Supreme Court, the Supreme Court of Arbitration and the Council of Judges on maintaining allocations for the judiciary for 1998 as a protected heading were not approved by the State Duma.

It emerges from the case-file that in applying the contested rule, in April 1998 the government and the Ministry of Finance reduced by 26.2% the allocations in the federal budget earmarked for operating the federal judicial system. The reduction was carried out under the provisions of the contested rule.

By reducing federal budget expenditure for the judicial system, the Government and the Ministry of Finance fail to guarantee the complete and independent administration of justice and the smooth functioning of the judiciary, thereby diminishing the confidence of the Russian people in the state and ultimately jeopardising the human and civil right to judicial protection guaranteed by the Constitution, because the realisation of the constitutional provisions on ensuring the judicial protection of human and civil rights and freedoms is inseparably linked to the creation by the state of the necessary conditions for the functioning of the courts.

The contested rule, which permits the reduction in allocations for the judicial system in violation of Article 124 of the Constitution, is also at variance with the federal constitutional Law "on the judicial system of the Russian Federation" and thus infringes Article 76.3 of the Constitution, which states that federal laws may not be contrary to federal constitutional laws.

Moreover, given the principle universally recognised in international law of the independence of the courts, it should be borne in mind that the Vienna Declaration and Action Programme adopted at the Second World Conference on Human Rights (June 1993) consolidates this principle of the need for proper financing of institutions responsible for the administration of justice. Article 2 of the federal Law of 30 March 1998 "on the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the protocols thereto" stipulates that as from 1998, the federal budget must provide for the necessary increase in allocations for the operation of the federal judicial system for the purpose of applying legal rules fully in keeping with the Russian Federation's commitments arising from its accession to the Convention and its Protocols.

The Constitutional Court annulled the contested provision, finding it unconstitutional. It required the Government to ensure the financing of the courts and ruled that it was the Federal Assembly's responsibility to adopt appropriate rules to that effect.

Languages:

Russian, French (translation by the Court).

SVK-2001-3-005 19-12-2001 I. US 49/01

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 19-12-2001 / **e)** I. US 49/01 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), 56/01 / **h)** CODICES (Slovak).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.

2.2.1.5 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - European **Convention** on Human Rights and non-constitutional domestic legal instruments.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.13.17 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Rules of evidence.
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:

Appeal Court, procedure / Evidence, witness, written statement.

Headnotes:

Depriving a litigant of the possibility to comment on evidence which the court has dealt with and which contained findings relevant for its decision, results in subjecting the affected litigant to conditions for presenting his/her claim that are substantially less favourable than are the conditions for the other litigant, and thus violates not only the right to comment on all evidence presented to the court as guaranteed by Article 48.2 of the Constitution but also the principles of adversarial proceedings and equality of arms, which are the fundamental features of the right to a fair trial.

The European **Convention** on Human Rights and the associated case-law are binding interpretive guidelines for the domestic law-implementing bodies in their interpretation and application of the statutory regulation of the different components of the right of access to courts and thereby postulate the framework within which it is possible to apply for the protection by these agencies of the different aspects of the right to a fair trial.

Summary:

Following the concluding presentations by both parties to a dispute, a district court adjourned the hearing for the purpose of declaring its verdict. Subsequently, it inserted into the case file a statement by a witness on which statement the adversely affected litigant had no possibility to comment and to which the court referred in the *dictum* of its decision. The affected litigant appealed to a higher court, alleging violation of the applicable statutory rules on evidentiary procedure. The appellate court upheld the ruling.

The petitioner challenged the courts' action, arguing that it amounted to a violation of the right to comment on all evidence as guaranteed by Article 48.2 of the Constitution and the right to a fair trial as guaranteed by Article 6.1 **ECHR**.

In interpreting the constitutional right to comment on all evidence, the Constitutional Court relied on the applicable case-law of the European Court of Human Rights, arguing that such right is both, an integral part of the right to a fair trial and a specific articulation of the adversarial principle. On the other hand, it observed that if the domestic constitutional regulation faithfully transposes the country's international human rights commitments into the national legal order, it is indeed the constitutional regulation that should serve as the primary basis for the implementation in the legal practice of the Slovak Republic of these commitments. Therefore, if the petitioner alleges a violation of both a constitutional right and a corresponding right guaranteed by the respective international agreement, and if there is no relevant difference between the two rights, then the finding of a violation of the constitutional right exhausts the purpose of concrete constitutional review and there is no need to assess the allegations relating to the right guaranteed by the respective international agreement.

In the case at hand, however, the Constitutional Court found the courts' action to have broader implications for the quality of the contested proceedings than could be subsumed under the right to comment on all evidence. It stated that by depriving the petitioner of the possibility to obtain knowledge of, and comment on, evidence executed and relied upon within the adjudication of his claim, the district court created for the petitioner conditions for presenting his claim that were substantially less favourable than were those available for the other litigant in whose favour the contested evidence was presented.

It therefore considered that there has been violation of the adversarial nature of the civil procedure, and of the principle of equality of arms, two of the fundamental features of the right to a fair trial as interpreted by the European Court of Human Rights.

The Constitutional Court also held that the appellate court did not remedy the district court's deficient action by means of relying in its reasoning on anything other than the contested evidence, as such a measure could not have remedied the lack of protection that the petitioner suffered and that was in conflict with the purpose of the right to a fair trial as guaranteed by the **Convention**. The failure of the appellate court to concern itself with the alleged defects in the district court's action therefore interfered both with the petitioner's constitutional right to comment on all evidence and those aspects of his right to a fair trial under the European **Convention** on Human Rights that relate to the principles of adversarial proceedings and equality of arms.

Languages:

Slovak.

SVK-1999-2-003

16-06-1999 | II. US 10/99 | Case of violation of fundamental right

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 16-06-1999 / **e)** II. US 10/99 / **f)** Case of violation of fundamental right / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), 26/99, 73/99 / **h)** CODICES (Slovak).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
3.18 **General Principles** - General interest.
4.9.1 **Institutions** - Elections and instruments of direct democracy - Electoral Commission.
4.9.9.8 **Institutions** - Elections and instruments of direct democracy - Voting procedures - Counting of votes.
5.3.24 **Fundamental Rights** - Civil and political rights - Right to information.
5.3.41.2 **Fundamental Rights** - Civil and political rights - Electoral rights - Right to stand for election.

Keywords of the alphabetical index:

Administration, information, reasonable access / Election, observation / Election, summing up, presence.

Headnotes:

The right to information includes the right to be present at the summing up of the results of an election by the District Electoral Commissions.

Summary:

The petitioner, an individual from a group called "The Eye of the Citizens", submitted a petition claiming violation of Article 26.1 and 26.2 of the Constitution, and of Article 10 **ECHR**.

The alleged violation occurred during the parliamentary election in September 1998 when the Central Electoral Commission refused the petitioner the right to participate in the summing up of the results of the election. An identical petition submitted to the Court by "Obcianske oko" (The Eye of the Citizens) was joined to the petition. Both petitioners claimed unconstitutionality on the ground that members of the Organisation for Security and Co-operation in Europe were allowed to attend the summing up, while the same request from the petitioners was turned down.

According to Article 26.1 of the Constitution: "Freedom of expression and the right to information shall be guaranteed." Under Article 26.2 of the Constitution: "Every person has the right to express his or her opinion in words, writing, print, images and any other means, and also to seek, receive and disseminate ideas and information both nationally and internationally..." Article 26.5 of the Constitution reads: "Governmental authorities and public administration shall be obligated to provide reasonable access to the information in the official language of their work and activities. The terms and procedures of the execution thereof shall be specified by law."

The Constitutional Court ruled that there are three sorts of information which are guaranteed through Article 26 of the Constitution. The first is information which must be made available by the governmental authorities and the authorities of local self-government. The second is information which does not have to be made available but which is accessible upon request. The third is information which is restricted from the public according to Article 26.4 of the Constitution. There is no positive enumeration of information that may be given to individuals nor any negative enumeration of information which individuals may not seek, receive or disseminate. The Court ruled that the presence in the room where the results of an election are summed up is a form of access to information in the public interest.

The Court then decided on the issue of whether Article 10 **ECHR** had been violated. The Court first of all noted the difference in wording between the Slovak Constitution and the European **Convention** of Human Rights. The right to seek, receive and disseminate information is guaranteed through the Constitution while the right to receive and impart information is guaranteed under the European **Convention** of Human Rights. Following the reasoning of the European Commission in the case of *Nederlandse Omroepprogramna Stichting v. The Netherlands* (no. 13920/88) the Court decided that the right to seek information is implied within the protection rendered through Article 10 **ECHR**. On this basis, Article 26.1 and 26.2 of the Constitution, and Article 10.1 **ECHR** were violated by the Central Electoral Commission in the case.

Languages:

Slovak.

SVK-1999-1-001

11-03-1999 | Pl. ÚS 15/98 | Constitutional conflict between the Constitution and the law

a) Slovakia / **b)** Constitutional Court / **c)** Plenary / **d)** 11-03-1999 / **e)** Pl. ÚS 15/98 / **f)** Constitutional conflict between the Constitution and the law / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), 1/99 / **h)** CODICES (Slovak).

Keywords of the Systematic Thesaurus:

2.1.1.4 **Sources of Constitutional Law** - Categories - Written rules - International instruments.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.2.1.1 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - Treaties and constitutions.
2.3.2 **Sources of Constitutional Law** - Techniques of review - Concept of constitutionality dependent on a specified interpretation.
3.3.1 **General Principles** - Democracy - Representative democracy.

3.9 **General Principles** - Rule of law.
4.5.3.1 **Institutions** - Legislative bodies - Composition - Election of members.
4.9.8 **Institutions** - Elections and instruments of direct democracy - Electoral campaign and campaign material.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
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.
5.3.41.1 **Fundamental Rights** - Civil and political rights - Electoral rights - Right to vote.

Keywords of the alphabetical index:

Election, Parliament, Central Committee, decisions / Election, campaign, access to media / Election, electoral coalition, definition / International law, status.

Headnotes:

The rights and freedoms guaranteed by international treaties on human rights and fundamental freedoms have a supportive relevance, especially with respect to the interpretation of the Constitution.

The Constitution cannot be interpreted in a manner that would result in the violation of an international treaty on human rights as long as the Slovak Republic is a party to such treaty.

Summary:

Through a motion for abstract review, a faction of members of Parliament challenged several provisions of the amendment to the Act on Elections to the National Council of the Slovak Republic, alleging a violation of various constitutional provisions, including freedom of expression, the right of equal access to elected offices, the principle of free political competition and the right of access to a court, as well as Articles 6.1 and 10 **ECHR**.

The Constitutional Court upheld several of the contested decisions, but held that the limitations imposed upon the access of a political party to judicial proceedings in electoral matters and upon the right of private TV stations to broadcast political campaign advertisements were unconstitutional. Most importantly from the vantage point of the topic of this Special Bulletin, the Constitutional Court reaffirmed one of its early decisions when it stated that international treaties on human rights and fundamental freedoms were to be approached as a source of interpretive support in the judicial application of the Constitution. Moreover, according to the Constitutional Court the Constitution cannot be interpreted in a manner that would result in the violation of an international treaty on human rights if the Slovak Republic was a party to such treaty.

Languages:

Slovak.

SVK-1997-2-003

12-05-1997 II. 28/96 ÚS Petition from a natural person

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 12-05-1997 / **e)** II. ÚS 28/96 / **f)** Petition from a natural person / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), 7/97 / **h)** CODICES (Slovak).

Keywords of the Systematic Thesaurus:

1.1.4.4 **Constitutional Justice** - Constitutional jurisdiction - Relations with other institutions - Courts.
2.1.1.4.2 **Sources of Constitutional Law** - Categories - Written rules - International instruments - Universal Declaration of Human Rights of 1948.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.1.4.6 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Civil and Political Rights of 1966.
2.2.1.1 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - Treaties and constitutions.
3.3 **General Principles** - Democracy.
3.19 **General Principles** - Margin of appreciation.
4.7.2 **Institutions** - Judicial bodies - Procedure.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.21 **Fundamental Rights** - Civil and political rights - Freedom of expression.
5.3.24 **Fundamental Rights** - Civil and political rights - Right to information.

Keywords of the alphabetical index:

International law, status / Right to information, condition / Right to information, exception / Procedural ruling / Court session, public, tape recording, right.

Headnotes:

An allegation of a violation of the Universal Declaration of Human Rights cannot be the subject matter of proceedings at the Constitutional Court.

The criteria for the restriction of the right to information acknowledged by the European **Convention** on Human Rights but not by the Constitution are not to be deemed a source of law in the Slovak Republic, as the **Convention** is superior to the laws of the Slovak Republic only if it provides for a more extensive protection of rights and freedoms than the relevant national legislation.

Summary:

The petitioner filed a petition with the Constitutional Court alleging that his freedom of speech as well as his right to information under Article 26.1 and 26.2 of the Constitution, Article 19 of the Universal Declaration of Human Rights, Article 19.2 of the International Covenant on Civil and Political Rights and Article 10 **ECHR** had been violated by a procedural decision of the Supreme Court not to allow audio recordings of the proceedings.

The Constitutional Court found a violation of the relevant provisions of the Constitution, the International Covenant on Civil and Political Rights and the **Convention**. Before dealing with the merits of the case, the Constitutional Court had to address the objection voiced by the defendant (the Supreme Court) that it lacked the authority to review the contested decision, as it was a procedural decision of an ordinary court adopted in the course of its proceedings. The Constitutional Court held that although it lacked the authority to either remedy deficiencies in the decision-making activities of government authorities or to substitute their omissions with instructions to act in a particular way, it was competent to review whether the constitutionally guaranteed rights were violated or not in the proceedings carried out by the relevant government authorities, including ordinary courts.

Assessing the facts of the case in light of the criteria that the Constitution explicitly lists as admissible for the restriction of the right to information, the Constitutional Court held that even though implemented for a legitimate aim, the ban on audio recordings did not fulfil the "necessary in a democratic society" requirement. It therefore held the contested ban to be in violation of Article 26.4 of the Constitution. With respect to Article 10 **ECHR**, the Constitutional Court noted that it allowed for more extensive restriction of the right to

information than did the parallel provision of the Constitution. Referring to Article 11 of the Constitution, the Constitutional Court pointed out that any international treaty, including the **Convention**, was to be deemed superior to national legislation only if offering a more extensive protection of rights and freedoms.

Further, the Constitutional Court noted that the available international standard concerning Article 10 **ECHR** concerned only the receipt and dissemination of information with respect to judicial proceedings preceding the actual trial, and that there lacked any firmly established opinion as to the extent of the right to receive and impart information with respect to publicly held trials. In this vein, the Constitutional Court stated that national authorities were entitled to freely comment upon the implementation of the **Convention** on their territory. Therefore, where there was no international standard stemming from the implementation of the **Convention** that would specify the affected right or freedom, it was the role of the national authorities of the Slovak Republic to specify the conditions under which rights and freedoms contained in the **Convention** are guaranteed in the Slovak Republic.

Languages:

Slovak.

SVK-1996-3-005 04-09-1996 II.US 8/96 Petition from a natural person

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 04-09-1996 / **e)** II.US 8/96 / **f)** Petition from a natural person / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), 6/96 / **h)** CODICES (Slovak).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.3.6 **Fundamental Rights** - Civil and political rights - Freedom of movement.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.
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:

Obligation, positive / Right to free entry to a country / Homeland / Consular assistance / Failure to act / Obligation, extraterritorial.

Headnotes:

Fundamental rights and freedoms are protected by the Slovak Republic within the jurisdiction of its bodies.

The positive obligation provided for within the European **Convention** on Human Rights is incorporated also in the Constitution of the Slovak Republic. What is more, the rights and freedoms entrenched in the Constitution are also covered by the positive obligation of the Slovak Republic.

The right to defence can not only be asserted in person by the bearer of the right, but also by a lawyer acting in the name of the bearer.

Summary:

The petitioner, a Slovak citizen, brought a petition to the Court claiming that his constitutional right to free entry to the Slovak Republic had been violated. He also claimed that his right to privacy and family life had

been violated along with the right to have matrimony, parentage and family protected and the right for him or his counsel to have the opportunity to prepare his defence and to defend his case. The constitutional rights claimed by the petitioner to have been violated were supported by identical rights and freedoms guaranteed by international treaties on human rights which were also claimed to have been violated.

The petition was grounded on the following facts. The petitioner was found in a small town in Austria in the vicinity of the Slovak border. He was taken into custody by Austrian authorities for being suspected of having committed a crime in the Federal Republic of Germany. From September 1995 until February 1996 he was detained in Austria. On 20 February 1996, an Austrian court refused to extradite him to Germany. Following this judgment he returned to Slovakia. During the petitioner's stay in Austria he addressed the bodies of the Slovak Republic - the Ministry of Foreign Affairs, the Ministry of Justice, and the Attorney General - with requests for help. As no help was rendered to him, he brought a petition to the Constitutional Court in January 1996 claiming to have had two constitutional rights violated. The petition was supplemented in March 1996 by the claim that two further constitutional rights had been violated: the right to be free from unjustified interference into private and family life, which is guaranteed under Article 19.2 of the Slovak Constitution, and the protection of matrimony, parentage and family guaranteed under Article 41.1 of the Constitution.

The petitioner never made a claim as to the latter rights during the petitioner's stay in Austria. They were claimed before the Constitutional Court in March 1996. As a result, these two rights could not have been violated by reason of the government's failure to intervene. Thus, the petition was dismissed in the part claiming that the constitutional rights under Article 19.2 and 41.1 had been violated. The issue of the violation of Article 23.4 and Article 50.3 was decided by the Court on the merits of the case.

According to Article 23.4 of the Slovak Constitution every citizen has the right to free entry to the territory of the Slovak Republic. No citizen may be forced to emigrate or be expelled from his or her native country or be extradited to a foreign country. The petitioner claimed that the governmental bodies were obliged to act towards Austria in a manner to enable his return home. As the governmental bodies made no attempt to do so, his constitutional right was violated due to their failure to act.

The very first issue relevant to the case was the relationship between Articles 12.2 and 23.4 of the Slovak Constitution. According to Article 12.2 fundamental rights shall be guaranteed in the territory of the Slovak Republic. Non-activity of the governmental bodies occurred with respect to events within the territory of another country, namely Austria. The Court ruled on this issue that fundamental rights and freedoms afforded by the Constitution are guaranteed within the jurisdiction of the Slovak Republic, not only within its territory. This is so because any citizen of the Slovak Republic during his or her stay in the territory of a foreign country does not lose his or her rights and freedoms as guaranteed by the Slovak Constitution. The right to free entry into Slovakia in its very essence acquires its true meaning especially for a citizen who is abroad. Solely while abroad, a citizen is in a position to apply for entry into the Slovak Republic. This right is claimed by a citizen staying outside the territory of the Slovak Republic, and within the jurisdiction of competent bodies of the Slovak Republic.

The next step in settling the petition with respect to the claim that the petitioner's right under Article 23.4 had been violated was to examine the obligation of the Slovak Republic to adopt positive measures aimed at enabling the enforcement of the right to free entry.

The petitioner claimed the existence of a positive obligation under Article 8 **ECHR**. Upon this basis, he derived a positive obligation also for his case.

The Constitutional Court ruled that the Slovak Republic is obliged to guarantee not only those rights and freedoms which are protected via positive obligation under judgments of the bodies of the Council of Europe. Rights and freedoms guaranteed by the Slovak Constitution are protected with the help of positive obligation directly under the Constitution even if no such obligation exists under case-law of the European Court of Human Rights. The constitutional right to free entry to the territory of Slovakia is one of such rights. It is protected by way of positive obligation because only governmental bodies, and no citizen on his or her own, can act with equal legal status in relationship to the bodies of another country. In such a relationship the governmental bodies, of course, have no competence to enforce the right to free entry for a citizen demanding to have this right satisfied, but the governmental bodies have authority enough to make attempts

to help a citizen to reach the purpose of the right. No such attempt was made, however, in the case at hand by the Ministry of Foreign Affairs. Therefore, the Court found this body guilty of infringing the petitioner's right to free entry to the territory of the Slovak Republic.

On the other hand, no infringement of the constitutional right guaranteed by Article 50.3 of the Constitution was found. According to this provision, «Any person charged with an offence shall have the possibility to prepare his or her defence during such time as may be deemed necessary and shall have the right to defend the case by himself or herself and be represented by counsel.» The petitioner claimed that his right had been violated when criminal proceedings against him were opened on 27 December 1995. Owing to his stay abroad at that time, he had no opportunity to defend himself. The Court did not accept this statement. During his stay in Austria, the petitioner was represented by a barrister acting in his name in the affair. The barrister acting in this case was hired by the petitioner. All his demands were satisfied by the bodies involved in the criminal case. Thus no infringement of the constitutional right was found.

Cross-references:

The judgment of the European Court of Human Rights - *Pakelli* (Series A, no. 64) has also served as a legal basis for this part of the judgment passed by the Constitutional Court.

Languages:

Slovak.

SVK-1995-3-006

25-10-1995 | II. ÚS 26/95 | Case of right to trial within reasonable time

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 25-10-1995 / **e)** II. ÚS 26/95 / **f)** Case of right to trial within reasonable time / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), 7/95 / **h)** CODICES (Slovak).

Keywords of the Systematic Thesaurus:

1.1.4.4 **Constitutional Justice** - Constitutional jurisdiction - Relations with other institutions - Courts.
1.3.2.4 **Constitutional Justice** - Jurisdiction - Type of review - Concrete review.
1.3.5.12 **Constitutional Justice** - Jurisdiction - The subject of review - Court decisions.
1.4.4 **Constitutional Justice** - Procedure - Exhaustion of remedies.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
5.3.13.1 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Scope.
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.

Keywords of the alphabetical index:

Constitutional Court, pending case, effects / Constitutional Court, trial within reasonable time / Judge, independence.

Headnotes:

Only an instruction or an order given to a judge constitutes an interference with judicial independence. The review of objections regarding unreasonable delays in judicial proceedings cannot be deemed an interference with these proceedings.

The independence of a judge in his/her decision-making cannot be made superior to the constitutionally guaranteed rights of natural and legal persons. The exercise of judicial independence has to be in balance with constitutionally guaranteed rights.

In those matters in which, by virtue of the commitments made by the Slovak Republic, proceedings can be instituted by the respective authorities of the Council of Europe and the United Nations in addition to the proceedings before the Constitutional Court pursuant to the European **Convention** of Human Rights or other international treaties, the Constitutional Court is to proceed so as to provide a timely remedy through national instruments.

Summary:

The petitioner filed a complaint with the Constitutional Court, alleging that his right to trial within a reasonable time (Article 48.2 of the Constitution) had been violated by the respective courts of general jurisdiction, which commenced the proceedings in 1977 but failed to complete them before the petition was filed in 1995. The petitioner filed a parallel complaint with the European Court of Human Rights, which rejected it as inadmissible due to the petitioner's failure to exhaust all domestic remedies. The matter concerned a paternity dispute instituted against a foreign national.

The respective domestic court rejected the petitioner's arguments and, in addition, argued that the Constitutional Court lacked the authority to proceed in the matter, as it would thus interfere with the principle of judicial independence in Article 141.1 of the Constitution. The Constitutional Court held that to review a constitutional challenge against unreasonable delays in ordinary court proceedings could not be deemed an interference with judicial proceedings. According to the Constitutional Court, a person entitled by the Constitution to contest unreasonable delays in judicial proceedings has the right to do so at any moment and, consequently, may demand that the authorities competent to protect his/her rights review his/her allegations. Further, the Constitutional Court does not protect constitutionality only by making factual assertions about past events, but is to guarantee the protection of the Constitution at any moment so that the Constitution is effectively implemented both by the relevant government agencies and the citizens.

On the other hand, the Constitutional Court only protects rights if other government authorities do not fulfil their obligations with respect to the given right. The Constitutional Court neither protects rights that the petitioner does not assert against the government, nor adjudicates upon claims of rights infringements resulting from private transactions. The Constitutional Court is also only competent to act when it is obvious that the petitioner was unable to effectively apply for the protection of his/her right, or that by such application he/she could not achieve an effective protection of his/her right.

Relying on various decisions of the European Court of Human Rights, the Constitutional Court pointed out that the respective bodies of the Council of Europe may, and often do, commence proceedings to protect the right contained in Article 6.1 **ECHR** even before the challenged domestic proceedings are completed. Accordingly, in those matters in which, by virtue of the commitments made by the Slovak Republic, proceedings can be instituted by the respective authorities of the Council of Europe and the United Nations in addition to the proceedings before the Constitutional Court pursuant to the European **Convention** of Human Rights or other international treaties, the Constitutional Court is to proceed so as to provide a timely remedy through national instruments. Therefore, the scrutiny by the Constitutional Court of whether the respective ordinary courts have sufficiently observed rights related to judicial proceedings cannot be deemed an interference with judicial independence even if such scrutiny takes place during the course of these proceedings.

Languages:

Slovak.

ESP-2000-1-012

27-03-2000 87/2000 Iván Aitor Sánchez Ceresani contra República de Italia

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 27-03-2000 / **e)** 87/2000 / **f)** Iván Aitor Sánchez Ceresani contra República de Italia / **g)** *Boletín oficial del Estado* (Official Gazette), 107, 04.05.2000, 77-84 / **h)** CODICES (Spanish).

Keywords of the Systematic Thesaurus:

2.1.1.4 **Sources of Constitutional Law** - Categories - Written rules - International instruments.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
3.8 **General Principles** - Territorial principles.
3.13 **General Principles** - Legality.
4.17 **Institutions** - European Union.
5.1.2 **Fundamental Rights** - General questions - Effects.

Keywords of the alphabetical index:

Fundamental right, core / European Union, fundamental right, guarantee throughout member states / Reciprocity / Extradition, national, possibility / Foreign court, jurisdiction / Offence, international / Treaty, fundamental right / European **Convention** on Extradition / Dublin **Convention** of 1996.

Headnotes:

When dealing with an extradition request, the Spanish courts must uphold the fundamental rights secured by the Constitution, even where a possible violation of those fundamental rights is attributable to a foreign public authority. This is because fundamental rights are actual components of the legal system that concern all Spanish public authorities. Furthermore, the Spanish courts alone are competent to take decisions in respect of the person whose extradition has been requested.

A Spanish court which allows the extradition of a Spanish national for offences perpetrated in Spain in no way breaches the fundamental right of access to a court (Article 24.2.1 of the Constitution) where the offences are subject to universal jurisdiction under the international treaties to which Spain is a party, as is the case with international offences relating to drug trafficking.

Article 13.3 of the Constitution prohibits the extradition of Spanish nationals only in respect of political offences. This means that, except in such cases, extradition of a Spanish national is entirely in accordance with the Constitution where it is provided for under an international **convention** or, failing such a **convention**, under the Law on extradition requests.

Under no circumstances can the extradition of nationals to countries that have signed the European **Convention** on Human Rights give rise to general suspicions of failure to fulfil a state's obligations to guarantee and safeguard its nationals' constitutional rights. The countries concerned have specifically undertaken to uphold human rights and made themselves subject to the jurisdiction of the European Court of Human Rights, the ultimate guarantor of the fundamental rights of all individuals, irrespective of the different judicial cultures of the states parties to the **convention**.

Reciprocity in matters of extradition is not a fundamental right susceptible of protection; in this sphere it is enough that the courts respect the right to effective judicial protection (Articles 13.3, 24.1 and 53.2 of the Constitution). For extradition to be lawful, a court need merely certify in a reasoned decision that the foreign authorities from which the extradition request originated have complied with the principle of reciprocity.

Summary:

Italy had requested the extradition of a Spanish national accused of taking part in meetings and making payments in Spain in connection with a number of drug trafficking operations targeted at Italy. The Spanish national concerned was therefore accused of a drug trafficking offence under the international treaties on combating, preventing and punishing such offences ratified by Italy and Spain. The National Court *(Audiencia Nacional)* requested the Italian authorities to make further inquiries, so as to ascertain whether an Italian national might be extradited to Spain in accordance with the reciprocity principle, but the Italians failed to give a conclusive reply. The Spanish court none the less decided to grant extradition, holding that the Italian authorities' response was sufficient.

The applicant argued that this decision infringed a number of his fundamental rights, an argument which was rejected by the Constitutional Court.

The Constitutional Court held that the court's decision allowing the Spanish national's extradition was reasonable. Recognising the Italian courts' jurisdiction to bring charges against a Spanish national, although the person concerned did not have Italian nationality and the offences had been committed in Spain, in no way breached the right of access to the ordinary court prescribed by law (Article 24.2.1 of the Constitution), as it was not arbitrary to base the relevant decision on the European **Convention** on Extradition and international treaties against drug trafficking, which permitted the extradition of nationals. The finding that Spanish extradition law, which banned the extradition of Spanish nationals, was not applicable in the case under consideration, since the treaties took precedence, was also entirely reasonable.

It was also to be noted that Italy had ratified the European **Convention** on Human Rights and was subject to the jurisdiction of the European Court of Human Rights, which meant that any general suspicion that its authorities failed to uphold the relevant judicial guarantees was quite unacceptable.

In addition the Constitutional Court held that the Spanish court's finding that the Italian authorities complied with the principle of reciprocity did not constitute a breach of the right to the protection of the courts. In the material circumstances the judicial decision was not arbitrary. In dealing with appeals for constitutional protection *(amparo)*, the Constitutional Court indeed took into consideration solely the arbitrariness of the judicial decisions. It also pointed out that, on completion of the judicial phase of the extradition procedure, it was for the government to verify that reciprocal treatment was guaranteed. There was therefore nothing to prevent the government from requiring further guarantees, refusing the extradition request if it deemed that the guarantee given was insufficient or, possibly, granting that request if it took the view that the fact that Spain and Italy were both members of the European Union afforded sufficient guarantee of reciprocity in the light of the general trend in such matters, reflecting Article 7 of the Dublin **Convention** of 27 September 1996, which, within the European Union, prohibited refusal of extradition on the ground that the person concerned was a national.

Lastly, the Constitutional Court did not find that there had been any undue delay in the proceedings (Article 24.2.6 of the Constitution), in so far as the applicant had not complained of such a delay at the relevant time. In any case, the delay was essentially attributable to the Italian authorities, who had been slow in sending the Spanish court the result of the additional inquiries requested.

Supplementary information:

Article 13.3 of the Constitution; Sections 3, 1.2 and 6 of the 1985 Act on extradition requests received; Section 278.2 of the 1985 Organic Law on the Judiciary.

Article 6 of the European **Convention** on Extradition, signed in Paris on 13 December 1957; Article 7 of the Dublin **Convention** of 27 September 1996.

Decision of the European Court of Human Rights in the case of *Soering v. United Kingdom*, 07.07.1989, Series A, no. 161, *Special Bulletin **ECHR*** [ECH-1989-S-003].

Cross-references:

Regarding extradition and Article 13.3 of the Constitution, see Constitutional Court Judgments nos. 11/1983, 11/1985, 102/1997, 141/1998 (*Bulletin* 1998/2 [ESP-1998-2-013]) and 147/1999.

Languages:

Spanish.

SUI-2001-2-005 18-06-2001 1P.145/200 Mr and Mrs W. v. Administrative Court of Geneva Canton

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 18-06-2001 / **e)** 1P.145/2001 / **f)** Mr and Mrs W. v. Administrative Court of Geneva Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 127 I 115 / **h)** CODICES (French).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
5.3.1 **Fundamental Rights** - Civil and political rights - Right to dignity.
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.
5.3.32 **Fundamental Rights** - Civil and political rights - Right to private life.

Keywords of the alphabetical index:

Right, civil nature / Autopsy, order, review.

Headnotes:

Article 10 of the Federal Constitution and Article 6.1 **ECHR**; judicial review of an order to perform an autopsy.

Where the deceased's relatives subsequently challenge an autopsy order, the matter must in principle be submitted to the courts.

Summary:

On 2 April 1999 A., an eleven-year-old girl, was the victim of a road accident. She was rushed to the Geneva Cantonal University Hospital, where she died the next day of severe brain damage. She was declared dead on 3 April 1999 firstly at 10.23am and secondly at 6.30pm.

In accordance with their daughter's wishes, Mr and Mrs W. offered her organs for donation, and their removal was scheduled to take place on 4 April 1999. The parents went to the hospital on that date to keep vigil beside her body and were told that an autopsy had been ordered by the police chief pursuant to instructions issued by police headquarters. The autopsy was performed on 6 April 1999.

Mr and Mrs W. lodged a customary-law appeal with the Geneva Conseil d'Etat, with a view to having the autopsy order declared unfounded. The Conseil d'Etat transferred the case to the Administrative Court of Geneva Canton, which held that both the appeal against the autopsy order and any request for a declaration were inadmissible.

Mr and Mrs W. then lodged a public-law appeal, seeking to have the Administrative Court's decision set aside.

They alleged a violation of personal freedom and of the right of access to a court (Article 10 of the Federal Constitution, Articles 6 and 8 **ECHR**). The Federal Court allowed the appeal.

The Administrative Court had decided not to proceed with Mr and Mrs W.'s appeal on the strength of the Judicial Organisation Act, the Administrative Procedure Act and the Code of Criminal Procedure of Geneva Canton. The Federal Court noted that this decision was not based on arbitrary application of cantonal law.

Personal freedom, guaranteed by Article 10 of the Federal Constitution, was not confined to an individual's lifetime but continued after death, allowing everyone to decide in advance what was to become of their body and to guard against unlawful interference of any kind. The body of a deceased person was also protected under Article 8 **ECHR**. These guarantees did not, however, entail unconditional access to a court, since Article 13 **ECHR** required that individuals should have an effective remedy before a national authority, but not obligatorily a judicial authority. Nor did the Constitution provide for a right to review by a court.

The question then arose whether Article 6 **ECHR** was applicable and entitled Mr and Mrs W. to have their case decided by a court. Since there was no criminal charge, it was necessary to assess whether the dispute concerned determination of civil rights and obligations.

Legal personality was in principle no longer protected after death, but the courts allowed of an extension of protection. This followed firstly from public law, which contained rules on the declaration of deaths and on interments. It was also recognised under private law, in particular by reason of a desire to safeguard surviving relatives' religious and emotional feelings. Relatives thus had a genuine individual right to protection against state interference with a deceased family member's body. The case therefore concerned a civil right within the meaning of Article 6 **ECHR**.

Under the established case-law the right to compensation for damage caused through wrongful action by a public authority qualified as a civil claim. The same held true where the persons concerned were not seeking financial compensation, but merely reparation of a declaratory nature. It followed that Mr and Mrs W.'s application came within the ambit of Article 6.1 **ECHR** and must in principle be brought before a court.

Access to a court could be limited by procedural rules. Since the case under consideration concerned the very essence of this right, cantonal law concerning applications to the Administrative Court, which had been applied in a non-arbitrary manner, was not a determining factor. The argument that Mr and Mrs W. had no real interest was also not decisive, as they were seeking a mere declaration.

The public-law appeal was therefore founded. Mr and Mrs W. were entitled to have their case decided by a court. Given the lack of explicit provisions in cantonal law, a cantonal remedy must be opened up in their specific case on the sole basis of the European **Convention** on Human Rights. It was for the cantonal authorities to designate an authority and determine the appropriate legal channel for dealing with Mr and Mrs W.'s application.

Languages:

French.

SUI-2001-2-004 23-04-2001 2P.173/200 P. v. municipality of Luzern, Cantonal Buildings Department and Administrative Court of Luzern Canton

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 23-04-2001 / **e)** 2P.173/2000 / **f)** P. v. municipality of Luzern, Cantonal Buildings Department and Administrative Court of Luzern Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 127 I 84 / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

1.3.5.13 **Constitutional Justice** - Jurisdiction - The subject of review - Administrative acts.

2.1.1.4.3	**Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.18	**General Principles** - General interest.
3.19	**General Principles** - Margin of appreciation.
3.22	**General Principles** - Prohibition of arbitrariness.
4.6.8	**Institutions** - Executive bodies - Sectoral decentralisation.
4.10.8	**Institutions** - Public finances - State assets.
5.1.1.5.1	**Fundamental Rights** - General questions - Entitlement to rights - Legal persons - Private law.
5.1.3	**Fundamental Rights** - General questions - Limits and restrictions.
5.2	**Fundamental Rights** - Equality.
5.3.19	**Fundamental Rights** - Civil and political rights - Freedom of opinion.
5.3.21	**Fundamental Rights** - Civil and political rights - Freedom of expression.

Keywords of the alphabetical index:

Censorship, prohibition / Public property, use for advertising / Advertising, restriction / Transport, public, advertising.

Headnotes:

Articles 10, 14 and 18 **ECHR**; Articles 16 and 35.2 of the Federal Constitution; Section 84.1 of the Federal Judicial Organisation Act; private parties' use of public transport vehicles for advertising purposes; freedom of opinion; ban on censorship.

Does state interference preventing the conclusion of a private-law contract desired by a private individual constitute an act of public authority within the meaning of Section 84.1 of the Federal Judicial Organisation Act (recital 4a)?

There is no fundamental right of access to an urban public transport vehicle for use as an advertising medium, in order to disseminate an opinion. Difference between use of public property and use of administrative assets (recital 4b).

The state must also respect citizens' fundamental rights in performing those of its tasks where it acts under private law. Scope of the equal treatment obligation when public property is used for commercial purposes (recital 4c).

An advertising slogan that is to appear on the outside of a bus may be refused on the ground that part of the population might perceive it as offensive (recital 4d).

Summary:

The municipality of Luzern had granted *Société générale d'affichage* an exclusive licence to place adverts on the city's public transport vehicles. This included the possibility of painting the outside of a number of buses for advertising purposes.

With the aim of advertising in aid of animal protection, P. asked *Société générale d'affichage* to cover the whole of the outside of a bus with the following slogan "In the canton of Luzern, there are more pigs than people - why do we never see them?"

The urban public transport company turned down this request on the ground that the proposed slogan would shock the public and the contingent of buses available for this form of advertising was in any case used up. It was nonetheless willing to display posters bearing the slogan inside buses.

P. appealed to the municipality of Luzern, as the higher administrative authority, asking it to give permission

for the disputed advert to be shown on the outside of a bus. The municipal authority decided not to proceed further with P.'s appeal on the ground that the public transport company's refusal was a private-law matter and did not amount to an act of public authority. It nonetheless treated the appeal as a complaint and upheld the public transport company's decision.

Subsequent appeals to the Cantonal Buildings Department and the Administrative Court of Luzern Canton were dismissed. P. then lodged a public-law appeal with the Federal Court, asking it to set aside the cantonal decisions. *Inter alia*, he alleged unacceptable censorship and discrimination and a violation of freedom of opinion, as guaranteed by Article 16 of the Federal Constitution and Article 10 **ECHR**. The Federal Court held that the appeal was inadmissible.

The Federal Court left open the question whether the public transport company's refusal constituted an act of public authority against which a public-law appeal could be brought. It pointed out that relations between *Société générale d'affichage* and private individuals came under private law. However, in the case under consideration it was the public transport company which had rejected the advert in question. It could not be ruled out that the refusal might be regarded as a decision by a public authority (since the municipality had supervisory authority over *Société générale d'affichage*) and therefore open to a public-law appeal.

Freedom of opinion, as guaranteed in Article 16 of the Federal Constitution and Article 10 **ECHR**, protect individuals against all forms of censorship, but do not grant them an unconditional right to make use of the media. This principle applied to both private media and means of communication in the hands of public authorities. With regard to public property, such as streets and public areas, used to disseminate opinions or carry on commercial activities, the established precedents recognised some right of increased use. The authorities were obliged to take into consideration the specific substance of the fundamental rights at stake. However, property forming part of the community's administrative assets, such as public transport vehicles, must be used in accordance with its primary purpose, which left little scope for private use. It followed that P. could not rely on the protection of fundamental rights.

Public authorities are in general obliged to respect fundamental rights. This also applies where they act under private law or delegate administrative tasks to private parties. Compliance with the principle of equality and the ban on arbitrary treatment could, however, prove incompatible with the necessary margin of discretion and room for initiative. In such cases a balance must be struck, regard being had to the actual circumstances.

An assessment of the interests at stake in the case under consideration showed that the public transport company was willing to display posters bearing P.'s slogan inside buses. From this point of view, the allegation of unacceptable censorship was ill-founded. The public transport company was also entitled to take into consideration the fact that buses served above all as a means of public transport and were not intended for the distribution of posters that might shock members of the public. In addition, there was no evidence that the public transport company would have accepted other adverts similar to P.'s. The Administrative Court's judgment therefore did not violate P.'s freedom of opinion.

Languages:

German.

SUI-2000-3-010 09-11-2000 4P.87/200(Real-estate company X. v. S. and Appeals Chamber of the Vaud Cantonal Court

a) Switzerland / **b)** Federal Court / **c)** First Civil Law Chamber / **d)** 09-11-2000 / **e)** 4P.87/2000 / **f)** Real-estate company X. v. S. and Appeals Chamber of the Vaud Cantonal Court / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 126 I 235 / **h)** CODICES (French).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
4.7.8.1 **Institutions** - Judicial bodies - Ordinary courts - Civil courts.

5.3.13.14 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Independence.

5.3.13.15 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Impartiality.

Keywords of the alphabetical index:

Judge, associate / Rent Tribunal, jointly constituted.

Headnotes:

Right to an independent and impartial tribunal; jointly constituted Rent Tribunal; Article 6.1 **ECHR**.

The composition of the Rent Tribunal in Vaud Canton does not present any objective and organisational incompatibilities with Article 6.1 **ECHR**. The member of this court representing an association of tenants with which he is connected need not withdraw simply because another employee of the association is assisting one of the litigants, saving the possibility of the association itself having a direct interest in the outcome of the action or of this judge's failing to provide adequate assurances of independence and impartiality in the specific case.

Summary:

X., a real estate company, had rented a flat in a building situated in Lausanne to tenant S. who challenged the initial rental before the Lausanne district rent conciliation board. The conciliation session did not achieve a settlement. S. thereupon applied to the Rent Tribunal for a reduction of the agreed rental. The respondent company objected that the action was out of time and that the claim was barred by limitation. In a preliminary ruling, the Rent Tribunal dismissed both objections.

Before the Appeals Chamber of the Vaud Cantonal Court, X. submitted in particular that, following the aforementioned ruling, it had learned that a member of the Rent Tribunal was legal advisor to the Swiss Association of Tenants (ASLOCA), a tenants' protection association which was assisting S. in the proceedings. The Appeals Chamber upheld the challenged ruling.

In a public law appeal, X. requested the Federal Court to set aside the Appeals Chamber's decision. Relying on Article 30.1 of the Federal Constitution and Article 6.1 **ECHR**, X. contended that the Rent Tribunal was not an independent and impartial tribunal. The Federal Court dismissed the public law appeal.

The provisions invoked secure to everyone the right to be heard, in both civil and criminal cases, before an independent and impartial tribunal. The Rent Tribunal of Vaud Canton is a joint body constituted for each case by a career judge who presides the hearing and the deliberations, and two associate judges, one of whom represents the landlords and the other the tenants' organisations. This composition has the advantage of enabling specialists in the relevant legal field, who have direct knowledge of the practical problems raised, to take part in the deliberations.

The European Court of Human Rights and the Federal Court acknowledge that specialised tribunals comprising representatives of the groups concerned are compatible with the guarantee of an independent and impartial tribunal. The associate judge does not act as representative of an interest group but in a personal capacity, being appointed to this judicial office by the state authorities. It must be assumed that members of a joint tribunal are capable of placing themselves above the contingencies linked with their designation as associate judges.

It was therefore inappropriate to accept that membership of ASLOCA necessitated the withdrawal of the associate judge designated to represent it. Nor was it conclusive that another employee of ASLOCA was assisting one of the litigants, considering the associations' function of service to tenants. It did not even have any direct interest, capable of influencing the associate judge, in the outcome of the case. Nor was it proven

that the judge personally gave advice to tenant S. or could have been biased for personal reasons. The complaint of violation of Article 6.1 **ECHR** and Article 30.1 of the Federal Constitution was therefore unfounded.

Languages:

French.

SUI-1999-3-008 30-06-1999 1P.571/19 Association "Church of Scientology Basel City" and M. v. Council of State and Grand Council of Basel City Canton

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 30-06-1999 / **e)** 1P.571/1998 / **f)** Association "Church of Scientology Basel City" and M. v. Council of State and Grand Council of Basel City Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 125 I 369 / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

1.3.2.3 **Constitutional Justice** - Jurisdiction - Type of review - Abstract review.
1.4.9.1 **Constitutional Justice** - Procedure - Parties - *Locus standi*.
1.4.9.2 **Constitutional Justice** - Procedure - Parties - Interest.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.3.2 **Sources of Constitutional Law** - Techniques of review - Concept of constitutionality dependent on a specified interpretation.
3.13 **General Principles** - Legality.
3.16 **General Principles** - Proportionality.
3.18 **General Principles** - General interest.
4.8.8 **Institutions** - Federalism, regionalism and local self-government - Distribution of powers.
5.2.2.6 **Fundamental Rights** - Equality - Criteria of distinction - Religion.
5.3.20 **Fundamental Rights** - Civil and political rights - Freedom of worship.

Keywords of the alphabetical index:

Petty offence / Public property, use / Church of Scientology / Proselytism, misleading or dishonest / Public place, expulsion.

Headnotes:

Article 2 of the transitional provisions of the Federal Constitution, Sections 2-8 of the Law against Unfair Competition, Articles 4 and 49 of the Federal Constitution, Article 9 **ECHR**. Cantonal petty offences legislation; prohibition of dishonest or misleading advertising in public places; authority of the police to expel offenders. Abstract review of provisions.

Capacity of an association styled "Church of Scientology" to bring proceedings (recital 1).

The cantonal regulations do not constitute a distinct law contravening Article 4 of the Federal Constitution (recital 3).

Relationship of the cantonal regulations with the Federal Law against Unfair Competition (recital 4).

The impugned provision may entail interference with religious freedom. Its compatibility with other fundamental rights does not need to be determined in the present case (recital 5). The provision is not excessively imprecise (recital 6); it serves a public interest and may be interpreted and applied in accordance

with the Constitution and the principle of proportionality (recital 7).

Summary:

The Grand Council (parliament) of Basel City Canton transmitted a motion to the Council of State (Government) asking to receive a government bill for a law to protect the public against the aggressive propaganda of the Scientologists. On the basis of the government bill, the Grand Council amplified the cantonal law on petty offences. The new provision prescribes penalties for anyone who uses misleading or dishonest recruitment methods in public places. It further authorises the police to expel offenders from public places when they use unlawful methods, particularly of a misleading or dishonest kind, or where passers-by are unreasonably importuned.

In a public law appeal, Ms M. and the association "Church of Scientology Basel City" asked the Federal Court to set aside the new provision in question. The Federal Court dismissed the appeal on the following grounds.

The appellants have the capacity to lodge a public law appeal requesting an abstract review of a cantonal provision, complaining of violation of freedom of conscience and belief, and invoking the primacy of Federal law.

Irrespective of how the impugned provision originated, it is not directed strictly at Church of Scientology followers but generally at any group that seeks to recruit passers-by in public places, and is therefore not contrary to Article 4 of the Federal Constitution.

The complaint of disregard for the derogative effect of Federal legislation is unfounded; the Federal Law against Unfair Competition regulates economic competition and guards against unfair methods. In contrast to the Federal law, the cantonal law at issue is intended to protect passers-by in public places.

The question of the contested provision's compatibility with Article 49 of the Federal Constitution and Article 9 **ECHR** was also considered. Freedom of conscience and belief includes the possibility of recruiting individuals as members of a religious community.

Since the impugned provision constitutes a limitation of that freedom, a clear legal basis is required. The terms "misleading" and "dishonest" are sufficiently precise to define and restrict interference with religious freedom. The court may refer to identical concepts employed by federal and cantonal legislation in other areas.

The provision at issue serves an overriding public interest. Firstly, passers-by are to be guaranteed their own freedom of conscience and belief and protected against dishonest, unlawful methods. The criminal law provision is therefore justified. Secondly, expulsion from public places of persons who recruit others in an unlawful and dishonest fashion is consistent with the general duty of the police to maintain order. On that score too, the challenged provision proves to be justified. Generally speaking, the new provision of the law on petty offences can be interpreted in a manner consistent with the Constitution and the European **Convention** on Human Rights.

Languages:

German.

SUI-1999-2-006 26-07-1999 1A.178/199 A. v. Federal Prosecutor, Federal Department of Justice and Police, and Federal Council
1A.208/199

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 26-07-1999 / **e)** 1A.178/1998, 1A.208/1998 / **f)** A. v. Federal Prosecutor, Federal Department of Justice and Police, and Federal Council / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 125 II / **h)** *Pratique juridique actuelle* 1999 1491; *La Semaine judiciaire* 2000 I 202; *Europäische Grundrechte-Zeitschrift* 1999 475; *Revue de droit administratif et de droit*

fiscal 2000 1 589; CODICES (German).

Keywords of the Systematic Thesaurus:

1.3.4.1 **Constitutional Justice** - Jurisdiction - Types of litigation - Litigation in respect of fundamental rights and freedoms.
1.4.1 **Constitutional Justice** - Procedure - General characteristics.
1.4.9.2 **Constitutional Justice** - Procedure - Parties - Interest.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.1.4.8 **Sources of Constitutional Law** - Categories - Written rules - International instruments - Vienna **Convention** on the Law of Treaties of 1969.
2.2.1.2 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - Treaties and legislative acts.
2.2.1.5 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - European **Convention** on Human Rights and non-constitutional domestic legal instruments.
3.13 **General Principles** - Legality.
3.16 **General Principles** - Proportionality.
3.18 **General Principles** - General interest.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.13.4 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Double degree of jurisdiction.
5.3.21 **Fundamental Rights** - Civil and political rights - Freedom of expression.
5.3.22 **Fundamental Rights** - Civil and political rights - Freedom of the written press.

Keywords of the alphabetical index:

International law, primacy / Propaganda, material, confiscation / Security, external and internal / Security, national.

Headnotes:

Article 98a and Article 100.1a of the Federal Judicature Act (OJ); Article 6.1 **ECHR**; admissibility of an administrative-law appeal against confiscation of propaganda material belonging to the Kurdistan Workers Party.

Once a confiscation order has been made, there ceases to be any interest in contesting a seizure which preceded the order (recital 2).

Confiscation of propaganda material for reasons of external or internal security affects civil rights and obligations within the meaning of Article 6.1 **ECHR** (recital 4b).

In conflicts of law, international law in principle takes precedence over national law, in particular where the international rules seek to protect human rights. Thus, despite the letter of Article 98a and 100.1.a OJ and by virtue of Article 6.1 **ECHR**, an administrative-law appeal to the Federal Court against a confiscation order of the Federal Council is admissible (recital 4c-e).

Article 55 of the Federal Constitution (freedom of the press) and Article 10 **ECHR**; Article 102.8, 102.9 and 102.10 of the Federal Constitution; Article 1.2 of the Federal Council decree on subversive propaganda; confiscation of propaganda material for reasons of internal or external security.

The Federal Council decree on subversive propaganda constitutes, when taken together with Article 102.8, 102.9 and 102.10 of the Federal Constitution, a sufficient legal basis for a serious interference with freedom of expression and freedom of the press (recital 6).

In the circumstances of the case, the confiscation of written material belonging to the Kurdistan Workers Party (PKK) was consistent with the proportionality principle in that, in furtherance of the PKK's cause, the material incited violence and exerted pressure on emigrants living in Switzerland (recital 7).

Summary:

In 1997, the customs authorities intercepted 88 kg of propaganda material which the PKK had sent to A., who was resident in Switzerland. The federal prosecutor seized the material on grounds of internal and external security. A. appealed to the Federal Department of Justice and Police, which treated the appeal as a report to the surveillance authority and dismissed it. Under the 1948 decree on subversive propaganda the Federal Council then ordered the confiscation and destruction of the material.

A. lodged administrative-law appeals with the Federal Court to have the seizure decision and confiscation order set aside. He also requested that the material be returned to him. He relied, in particular, on Article 6.1 **ECHR**.

As the seizure decision had become devoid of purpose, the Federal Court decided not to go into the first appeal. It did, however, consider the appeal against the confiscation order, dismissing it on substantive grounds.

Under the Federal Judicature Act, decisions of the Federal Council cannot, in principle, be referred to the Federal Court, with one exception which did not apply in the present case.

The issue was whether the confiscation order fell under Article 6.1 **ECHR**. Confiscation is a serious interference with the appellant's property rights. According to legal theory, government measures taken on grounds of internal or external security do not fall within the ambit of the **Convention**. The European Court of Human Rights has never taken a clear position on the subject. In view of the seriousness of the interference, there could be no denial that Article 6.1 **ECHR** was applicable. The appellant's further reliance on Articles 10 and 13 **ECHR** did not have a decisive bearing.

In the present case, the provisions of the Federal Judicature Act could not be interpreted in a manner consistent with the European **Convention** on Human Rights. Swiss law here clashed with the **Convention**'s requirements, and Articles 114bis.3 and 113.3 of the Federal Constitution did not resolve the matter. General principles of international law and the Vienna **Convention** on the Law of Treaties require that states honour their international undertakings. The federal authorities thus had a duty to set up judicial authorities that met the requirements of Article 6 **ECHR**, and the Federal Court was required to deal with A.'s appeal against the Federal Council decision.

The 1948 decree on subversive propaganda was an independent decree of the Federal Council directly based on Article 102.8, 102.9 and 102.10 of the Federal Constitution. It was thus a sufficient legal basis to justify interfering with freedom of expression and freedom of the press, notwithstanding that the international situation had altered appreciably in recent years, and that, with the entry into force of a new federal law introducing internal security measures, the decree had been repealed.

The confiscated material contained PKK propaganda openly calling for armed resistance to the Turkish state; it went well beyond mere propaganda for the Kurdish movement. The material inciting violence was capable of endangering the peaceful co-existence of different groups living in Switzerland and seriously interfering with Switzerland's neutrality and external relations. These dangers justified confiscating the propaganda material.

Languages:

German.

SUI-1998-S-003 18-06-1998 6P.49/1998 B. v. Public Prosecutor of the Canton of Vaud

a) Switzerland / **b)** Federal Court / **c)** Criminal Cassation Division / **d)** 18-06-1998 / **e)** 6P.49/1998 / **f)** B. v. Public Prosecutor of the Canton of Vaud / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 124 I 170 / **h)** *Die Praxis des Bundesgerichts,* 1998 148 796; *La Semaine Judiciaire,* 1998 736; *Revue de droit administratif et de droit fiscal,* 1999 1 454; CODICES (French).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.20 **General Principles** - Reasonableness.
3.22 **General Principles** - Prohibition of arbitrariness.
5.2 **Fundamental Rights** - Equality.
5.3.5.1.3 **Fundamental Rights** - Civil and political rights - Individual liberty - Deprivation of liberty - Detention pending trial.

Keywords of the alphabetical index:

Detention, pending trial, costs.

Headnotes:

Article 5 **ECHR**, Article 4 of the Federal Constitution, costs of detention on remand payable by convicted person, personal freedom, equality of treatment, arbitrariness.

A decision to charge a convicted person for the costs of his detention on remand is not an infringement of his personal freedom (recital 2b).

Article 5 **ECHR** is silent as to how the costs of detention on remand are to be met (recital 2c).

It is not contrary to the principle of equality of treatment for the costs of detention on remand to be charged to the convicted person, while those arising from detention following sentence to a term of imprisonment are not (recital 2e). The cantonal legislation allowing the costs of detention on remand to be charged to the convicted person is not in itself arbitrary (recital 2g).

Summary:

On 21 July 1997, the Lausanne District Criminal Court sentenced B. to 6 years' imprisonment for a series of offences. This sentence was in the main upheld by the Cantonal Court of Cassation. Both courts ordered the convicted person to pay the costs of his period of detention on remand. In appealing against the judgment of the Cantonal Court of Cassation, the convicted person challenged the decision of the cantonal authority requiring him to pay the costs of his detention on remand. The Federal Court dismissed the appeal insofar as it was admissible.

The appellant argued that he had suffered an infringement of his personal freedom. In challenging the decision requiring him to meet the costs of his detention on remand, but not the detention itself, he was not complaining of unlawful imprisonment as it is understood by jurisprudence and legal theory, that is, the freedom to come and go, physical integrity, or any other basic freedom of expression; he was, on the contrary, objecting to a pecuniary charge by the state. His personal freedom was, therefore, not affected by the decision that was the subject of the appeal.

It was also unjustified for the appellant to claim a breach of Article 5 **ECHR**. While it establishes the

circumstances in which a person may be deprived of his liberty and confers certain procedural rights on any person arrested or detained, it is silent as to how the costs of detention on remand are to be met.

The appellant further complained of inequality of treatment between the detention on remand, the costs of which the convicted person is required to pay, and the sentence of imprisonment, which is free of charge to him.

Equality of treatment as granted under Article 4 of the Federal Constitution requires like to be given equal treatment with like, to the extent of the similarity, and that where there is a difference, treatment should differ to the extent of the dissimilarity. There is a fundamental difference between detention on remand and the serving of a sentence of imprisonment. Penal servitude and imprisonment are served in such a way as to rehabilitate the offender and prepare him to return to society; the serving prisoner is obliged to work and in exchange should receive a small remuneration, which should also help in setting him up upon his release from prison. A person who is remanded in custody is presumed to be innocent and should not be obliged to work. Detention on remand has no aim of rehabilitation and should simply enable the period of remand to be spent in good conditions, while preventing the accused person from absconding, interfering with witnesses or committing further offences.

The nature of detention on remand, which differs markedly from the serving of a sentence, does not necessary imply free board and lodging. The distinction complained about can thus be justified by the difference between the legal positions. The crediting of time spent on remand towards the sentence only affects the remainder of the sentence to be served and changes nothing. As for the system of advance enforcement of sentence, this stems logically from the distinction between detention on remand and serving a sentence. The appellant did not in any case claim to have applied for advance enforcement of sentence, which was then unreasonably refused. Inasmuch as he did not claim under any admissible head that the length of his detention had breached the principle of prompt criminal proceedings, there was no need to examine the question from that point of view.

The appellant was unjustified in his view of the cantonal legislation as being of its nature arbitrary. Detention on remand engenders costs for the community, whereas the person detained receives state subsidies, particularly in the form of food and medical supplies, that he would have to meet himself if he were at liberty. In the same way as a patient who has to pay the costs of staying in a public hospital, it is not illogical to impose costs for board and lodging on a person who is remanded in custody. It is indeed a forced stay, but if the prisoner is convicted, it should be observed that he has put the community to expense by committing an offence: it is therefore not unreasonable to make him pay those costs.

It is true that meeting the cost of detention on remand can make it more difficult for the prisoner to return to the community. The same observation could be made of the other costs of proceedings, particularly the fees of expert witnesses. However, detention on remand does not aim at facilitating return to the community. Whether or not the community should have to bear such charges is a moot point. To conclude that something is arbitrary, it is not enough that another interpretation might be considered or even that it might be preferable; inasmuch as it is not untenable for such costs to be to charged to the prisoner, the complaint is without substance.

Languages:

French.

SUI-1998-S-001 18-03-1998 1P.626/199 X. v. Court of Cassation and of Review of Criminal Cases of the Court of Appeal of the Canton of Ticino

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 18-03-1998 / **e)** 1P.626/1997 / **f)** X. v. Court of Cassation and of Review of Criminal Cases of the Court of Appeal of the Canton of Ticino / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 124 I 92 / **h)** *Die Praxis des Bundesgerichts,* 1998 132 730; *La Semaine judiciaire,* 1998 633; CODICES (Italian).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.1.4.6 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Civil and Political Rights of 1966.
3.19 **General Principles** - Margin of appreciation.
5.3.13.4 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Double degree of jurisdiction.

Keywords of the alphabetical index:

Right of appeal, power to examine / Fact, review / Point of law, review.

Headnotes:

Article 2.1 Protocol 7 **ECHR** and Article 14.5 of the International Covenant on Civil and Political Rights of 16 December 1966 (ICCPR): right to appeal to a higher court against a criminal conviction.

The conditions for exercising the right of appeal to a higher tribunal are laid down by national laws. Article 2.1 Protocol 7 **ECHR** and Article 14.5 ICCPR do not require such a court to have full powers to hear the case as to fact and as to law.

The Court of Cassation and of Review of Criminal Cases of the Court of Appeal of the Canton of Ticino constitutes a higher tribunal within the meaning of the said provisions, despite the fact that the appeal on points of law only guarantees a thorough examination of points of law, the examination of facts and evidence being confined to the issue of arbitrariness (recital 2).

Summary:

On 9 April 1997, the Criminal Assize Court of the Canton of Ticino found X. guilty of a series of serious offences and sentenced him to 8 years of imprisonment. When the convicted person appealed to the Cantonal Court of Cassation, the court dismissed his appeal, specifically rejecting the appellant's claim that the Court had failed to apply its discretion correctly in examining the facts of the case.

X. brought a public-law appeal against the finding of the Court of Cassation before the Federal Court, which dismissed the appeal insofar as it was admissible.

The appellant argued that the Ticino judicial system had no court of criminal appeal, but only an appellate court with limited powers of examination. The impossibility for a convicted person to have his case re-opened by a judicial authority with full examining powers was incompatible with Article 2.1 Protocol 7 **ECHR** and Article 14.5 ICCPR. Under the first of these provisions, "everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law". Under the second provision, "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." The European Commission of Human Rights has specified that the review guaranteed by Protocol 7 **ECHR** may be carried out in various ways depending on the legal system within each country: a review of legal issues only (for example in France and in Germany), issues both of law and of fact, or the requirement to seek leave to appeal. According to the case law of the European Commission and legal opinion, Protocol 7 **ECHR** does not require that the higher tribunal should be able to review freely questions of fact and law. The contracting states enjoy great freedom in the choice of legal procedure and particularly in drawing up the conditions for their implementation. A review limited to issues of law, as provided by the Ticino system (which also allows for examination as to arbitrariness), thus satisfies the requirements of Protocol 7 **ECHR**.

The same is true of Article 14.5ofthe ICCPR, the provisions of which reflect those of Article 2.1 Protocol 7 **ECHR** and also establish that the review must be carried out "according to law" in the state in question. The ICCPR provides no exception of the kind allowed under Article 2.2 Protocol 7 **ECHR** for offences of a minor character, as prescribed by law, for which it is possible to exclude review by a higher court. This distinction was not of relevance here in considering serious offences. Accordingly the review merely on issues of law and arbitrariness as chosen by the Canton of Ticino, does not contravene any provision of international law.

Languages:

Italian.

SUI-1998-3-008 23-09-1998 1P.684/19 André Plumey v. Public Prosecution Service and the Appeal Court of the canton of Basle-Urban

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 23-09-1998 / **e)** 1P.684/1997 / **f)** André Plumey v. Public Prosecution Service and the Appeal Court of the canton of Basle-Urban / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 124 I 274 / **h)** CODICES (German).

Keywords of the Systematic Thesaurus:

1.6.1 **Constitutional Justice** - Effects - Scope.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
5.3.5.1.3 **Fundamental Rights** - Civil and political rights - Individual liberty - Deprivation of liberty - Detention pending trial.
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.
5.3.13.28 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to examine witnesses.

Keywords of the alphabetical index:

Committee of Ministers, decision, binding force / Detention, provisional, compensation / Criminal procedure.

Headnotes:

Consequences of the finding of a violation of the European **Convention** on Human Rights for criminal proceedings under way; the authority ordering remand and the public prosecutor being one and the same person; cross-examination of prosecution witnesses (Articles 5.3, 5.5, 6.3.d and 32.4 **ECHR**).

Binding force of a decision of the Committee of Ministers based on Article 32.4 **ECHR** (recital 3b).

Instances in which the authority ordering remand and the public prosecutor are one and the same person are in breach of the guarantee contained in Article 5.3ofthe **ECHR**. A finding of a violation opens the way for an action for damages in accordance with Article 5.5 **ECHR**, but does not require a new indictment to be drawn up by another representative of the Public Prosecution Service (recital 3; change in case-law).

Principles relating to the right to cross-examination of prosecution witnesses; a decision not to allow the

accused to examine a large number of witnesses does not violate Article 4 of the Constitution nor Article 6.3.d **ECHR** (recital 5).

Summary:

In early 1986 the Public Prosecutor's Office of the canton of Basle-Urban initiated investigations against André Plumey for various financial offences committed against a large number of clients. Extradited, André Plumey was remanded in custody in 1989 by Prosecutor Helber, who charged him on 14 July 1992 with professional fraud.

Following the European Court of Human Rights' judgment of 23 October 1990 in the case of Jutta Huber v. Switzerland (Series A, vol. 188), André Plumey challenged the decision of the public prosecutor, maintaining that the fact that the authority ordering the remand and the public prosecutor were one and the same person was contrary to the European **Convention** on Human Rights; he therefore asked for a new indictment to be drawn up by an impartial prosecutor. In response to a public-law appeal, the Federal Court accepted an indirect violation of the European **Convention** on Human Rights; nevertheless, it dismissed the appeal by judgment of 4 October 1993 on the grounds that it was out of time. André Plumey then referred his case to the European Commission of Human Rights which found a violation of Article 5.3 **ECHR** (the officer ordering remand and the representative of the Public Prosecution being one and the same person). In an interim resolution, the Committee of Ministers confirmed this finding on 29 October 1997.

On 22 December 1993, the Criminal Court of the Canton of Basle-Urban sentenced André Plumey to seven years' imprisonment. The Appeal Court upheld only professional fraud and reduced the sentence to 5 years' imprisonment.

By means of a public-law appeal, André Plumey asked the Federal Court to set aside this ruling. He challenged the indictment drawn up by a biased prosecutor in violation of Article 5.3 **ECHR**. He asked the authorities to take account of the decision of the Committee of Ministers and consequently that a new indictment be drawn up. He also relied on Article 6.3.d **ECHR** on the grounds that he was unable to examine prosecution witnesses. The Federal Court dismissed this appeal.

Under Articles 52 and 32.4 **ECHR** (the version prior to the adoption of Protocol 11) States undertake to abide by the decisions of the European Court of Human Rights and the Committee of Ministers. These decisions require States simply to produce a specific result and leave them to decide on what measures they take in order to comply with the findings of the European **Convention** on Human Rights organs. It is a question therefore of examining the practical consequences to be drawn from the Committee of Ministers' interim resolution.

Article 5 **ECHR** guarantees in a general way a right to freedom and security. Any person arrested or detained must be brought promptly before a judge or other officer authorised by law to exercise judicial power. Such a person must be impartial and independent. There may however be some doubt as to impartiality and independence if the person who ordered the detention subsequently acts as public prosecutor. This is what happened in the case in question; it therefore follows that the detention of André Plumey was contrary to the guarantee contained in Article 5.3 **ECHR**.

The appellant can rely directly on the acknowledged violation of Article 5.3 **ECHR** to request compensation within the meaning of Article 5.5 **ECHR**; the assessment made by the Committee of Ministers can no longer be called into question in these new proceedings.

Contrary to the view held by André Plumey, there are no other consequences to be drawn in the case in question. Detention as such cannot be annulled subsequently. Even a new indictment would not compensate for the period of detention already spent. Neither the Constitution nor Article 5 **ECHR** give the accused any particular protection with regard to the prosecutor, whose primary role is to support the prosecution. Although the Federal Court adopted different and varied solutions in other cases, the only means of compensating for the period spent in detention is the one provided for by Article 5.5 **ECHR**.

André Plumey also claims a violation of Article 6.3.d **ECHR**. This provision guarantees any person accused the right to examine or have examined witnesses against him or her. According to the case-law of the Strasbourg organs, the accused may demand exercise of this right only once. Even taken in this sense, the right to examine or have examined witnesses is not an absolute one.

In the case in question, the appellant did not request the appearance of witnesses during the criminal investigation; he submitted his request to examine or have examined hundreds of witnesses only during the proceedings before the cantonal judicial authorities, which dismissed this request without violating the guarantees enshrined in the **Convention**. The witnesses' statements would have carried significantly reduced weight given the time which had elapsed since the facts in dispute took place (8-12 years). They could scarcely have elucidated the facts; in fraud matters it is primarily written documents which are decisive, and the appellant was able to present his case before the judicial authorities. Moreover he did not challenge the statements gathered during the investigation which were meticulously examined by the cantonal courts. The right to a fair trial was therefore complied with.

Languages:

German.

SUI-1991-S-003

15-11-1991 2A.120/19 Federal Tax Office v. Estate X. and Administrative Court of the Canton of Lucerne

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 15-11-1991 / **e)** 2A.120/1991 / **f)** Federal Tax Office v. Estate X. and Administrative Court of the Canton of Lucerne / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 117 Ib 367 / **h)** *Journal des Tribunaux,* 1993 I 273; *Archives de droit fiscal suisse,* 61 779; *Der Steuerentscheid,* 1992 B 101.6 4; *Revue fiscale,* 47 1992 390; *La Semaine judiciaire,* 1992 448; *Revue de droit administratif et de droit fiscal,* 1992 324; *Europäische Grundrechte-Zeitschrift,* 1992 416; CODICES (German).

Keywords of the Systematic Thesaurus:

1.3.5.5 **Constitutional Justice** - Jurisdiction - The subject of review - Laws and other rules having the force of law.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.1.4.8 **Sources of Constitutional Law** - Categories - Written rules - International instruments - Vienna **Convention** on the Law of Treaties of 1969.
2.2.1.5 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - European **Convention** on Human Rights and non-constitutional domestic legal instruments.
5.3.13.22 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Presumption of innocence.
5.3.33.2 **Fundamental Rights** - Civil and political rights - Right to family life - Succession.
5.3.42 **Fundamental Rights** - Civil and political rights - Rights in respect of taxation.

Keywords of the alphabetical index:

Succession, tax, penalty, liability of heirs / Tax, criminal legislation / International law, domestic law, relationship.

Headnotes:

Article 114bis.3 of the Federal Constitution (under which the Federal Court applies the Federal legislation and the agreements passed by the Federal Assembly), Article 130.1 of the Order of the Federal Council on the

collection of a direct federal tax (AIFD), Article 6.2 **ECHR**; criminal tax legislation; liability of heirs; presumption of innocence; examination of Federal legislation.

It is not open to the court to examine the constitutionality of the provisions of the AIFD, by virtue of Article 114bis.3 of the Federal Constitution (recital 1).

Is it possible to examine to what extent the provisions of the AIFD are compatible with the **ECHR** (recital 2)?

The liability of the heirs for the taxes avoided and penalties incurred by the deceased - provided for under Article 130.1 AIFD - is not contrary to the presumption of innocence arising from Article 6.2 **ECHR** (recitals 3-5).

Summary:

X. died on 18 October 1988. His legal heirs discovered that he had not declared his entire assets and income to the tax authorities. They accordingly advised the tax authorities, who proceeded to initiate proceedings to recover the tax and to hold the heirs liable for the tax evaded together with a penalty. The heirs appealed to the Cantonal Administrative Court, which set aside the tax penalty. The Federal Court heard the appeal brought by the Federal Tax Office and affirmed the obligation of the heirs to pay the tax due together with the penalty.

The heirs do not oppose their obligation to pay the tax due from the deceased; the proceedings are confined to the question of whether the provision in the order of the Federal Council on direct federal tax, under which the heirs are jointly liable for the penalty incurred by the deceased in proportion to their share of the estate and irrespective of any fault on their part, is contrary to the principle of presumption of innocence as laid down by Article 6.2 **ECHR**.

According to the Federal Constitution, the Federal Court is required to apply the laws and agreements passed by the Federal Parliament. The European **Convention** on Human Rights is part and parcel of Swiss law, the Federal Parliament having approved the accession of Switzerland to the **Convention**. The Federal Court, like any other authority, is thus bound by the **Convention**. It ranks higher than a mere federal law. International public law (Vienna **Convention** on the Law of Treaties, 23 May 1969, to which Switzerland is a party) expressly provides that international treaty law is to prevail over domestic law. The Federal Constitution does not preclude the Federal Court from inquiring as to whether a federal law is compatible with the **Convention**; it merely precludes repealing or amending it; on the other hand, it may refrain from applying it in a specific case where to do so would be contrary to international law and would thus render Switzerland liable to a conviction for contravening that law. In examining whether a provision of federal law is in accordance with the European **Convention** on Human Rights, the Federal Court must first of all ascertain whether it is possible to interpret such a provision as being in accordance with the **Convention**.

In this case, the provision in the federal decree whereby heirs are responsible for a penalty imposed on account of tax evasion on the part of the deceased during his lifetime is not contrary to the European **Convention** on Human Rights. While it is true that heirs are not liable for fines imposed for ordinary criminal law offences by the deceased, the case is otherwise with tax law because of its peculiarities (the heirs not being entitled to benefit in any way from a more favourable situation than that of the deceased to whose estate they succeed; moreover, the heirs have the right to repudiate the succession). The presumption of innocence on the part of the heirs is not at issue. The penalty is imposed not on account of any fault on their part, but purely as the result of that of the deceased. Moreover, the penalty in this particular case has been reduced to one quarter because the heirs of their own accord informed the tax authorities of the tax evasion by the deceased; such a reduction is aimed to ensure that heirs are not treated worse than a deceased person who, while he was alive, could at any time have advised the tax authorities of the tax evasion and thereby himself obtained a reduction in the fine.

Languages:

German.

SUI-1991-C-002

15-11-1991 2A.120/19 Federal tax authorities v. heirs of X and Administrative Court of the Canton of Lucerne

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 15-11-1991 / **e)** 2A.120/1991 / **f)** Federal tax authorities v. heirs of X and Administrative Court of the Canton of Lucerne / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 117 Ib 367 / **h)** *Journal des Tribunaux* 1993 I 273; *Archives de droit fiscal suisse* 61 779; *Der Steuerentscheid* 1992 B 101.6 4; *Revue fiscale* 47 1992 390; *La Semaine judiciaire* 1992 448; *Revue de droit administratif et de droit fiscal* 1992 324; *Europäische Grundrechte-Zeitschrift* 1992 416.

Keywords of the Systematic Thesaurus:

1.3.2.4 **Constitutional Justice** - Jurisdiction - Type of review - Concrete review.
1.3.5.5 **Constitutional Justice** - Jurisdiction - The subject of review - Laws and other rules having the force of law.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.1.4.8 **Sources of Constitutional Law** - Categories - Written rules - International instruments - Vienna **Convention** on the Law of Treaties of 1969.
2.2.1.5 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - European **Convention** on Human Rights and non-constitutional domestic legal instruments.
5.2.1.1 **Fundamental Rights** - Equality - Scope of application - Public burdens.
5.3.13.22 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Presumption of innocence.
5.3.42 **Fundamental Rights** - Civil and political rights - Rights in respect of taxation.

Keywords of the alphabetical index:

Tax, fine, heir, liability / Criminal law, fiscal / International law, domestic law, relationship.

Headnotes:

Article 114bis.3 of the Federal Constitution (under which the Federal Court applies federal legislation and treaties approved by the Federal Assembly), Article 130.1 of the decree of the Federal Council on the levying of a direct federal tax (AIFD), Article 6.2 **ECHR**; fiscal criminal law; liability of heirs; presumption of innocence; examination of federal legislation. Examination of the constitutionality of provisions of the AIFD is excluded by Article 114bis.3 of the Federal Constitution (recital 1).

Is it possible to examine the provisions of the AIFD in terms of their compatibility with the European **Convention** on Human Rights (recital 2)?

The heirs' liability for taxes withheld and fines incurred by the deceased - as stipulated in Article 130.1 of the AIFD - is not incompatible with the presumption of innocence in Article 6.2 **ECHR** (recitals 3-5).

Summary:

X died on 18 October 1988. His legal heirs discovered that he had not declared the whole of his fortune and income to the tax authorities. They informed the tax authorities of this and the latter commenced proceedings for tax evasion and to secure an order for the heirs to pay the taxes withheld and a fine.

The heirs applied to the Cantonal Administrative Court, which set aside the tax fine. The Federal Court admitted the federal tax authorities' appeal and confirmed the heirs' obligation to pay the missing taxes and the fine.

The heirs did not dispute their obligation to pay the taxes withheld by the deceased. Their action was solely concerned with whether the provision of the AIFD that required the heirs jointly to pay the fine incurred by the deceased, in proportion to their share of the estate and irrespective of any fault on their part, infringed the principle of the presumption of innocence enshrined in Article 6.2 **ECHR**.

According to the Federal Constitution, the Federal Court shall apply federal legislation and treaties approved by the Federal Assembly. The European **Convention** on Human Rights is also part of Swiss law, since the Federal Assembly has approved Swiss accession to this treaty. Like all other authorities, the Federal Court is thus bound by this **Convention**.

The **Convention** has a higher status than a simple federal law. Under public international law (Vienna **Convention** on the Law of Treaties of 23 May 1969, to which Switzerland is a party), international law in conventions takes precedence over domestic law. The Federal Constitution does not prohibit the Federal Court from examining the compatibility of federal legislation with the **Convention**, it only prohibits it from annulling or modifying such legislation. On the other hand, it may refrain from applying it in a particular case, if this infringes international law and thus exposes Switzerland to a finding that it has violated the **Convention**. In deciding whether a provision of Swiss federal law is compatible with the European **Convention** on Human Rights the Federal Court must first establish whether such a provision can be interpreted in a way that is compatible with the **Convention**.

In this case, the provision of the AIFD making the heirs liable to pay the fine incurred because of infringements of ordinary tax law previously committed by the deceased was not incompatible with the European **Convention** on Human Rights. Although the heirs were not liable for fines incurred by the deceased under ordinary criminal law, this did not apply in the tax field, because of the particular features of the latter (the heirs must not benefit in any way from a more favourable situation than that of the deceased from whom they inherited, and the heirs could in any case repudiate their inheritance). The heirs' presumption of innocence was in no way infringed.

The fine was not based on any fault of theirs, only on that of the deceased. Besides, in this particular case, the fine had been reduced to a quarter because the heirs had spontaneously informed the tax authorities of the withholding of tax committed by the deceased. The purpose of such a reduction was to prevent the heirs from being treated less well than the deceased who, in his lifetime, could have informed the tax authorities of the withholding of tax and thus secured for himself a reduction in the fine.

Languages:

German.

MKD-2000-2-005 12-07-2000 U.br.220/9

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 12-07-2000 / **e)** U.br.220/99 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 57/2000 / **h)** CODICES (Macedonian).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
3.9 **General Principles** - Rule of law.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.2.1.2.1 **Fundamental Rights** - Equality - Scope of application - Employment - In private law.
5.2.2.6 **Fundamental Rights** - Equality - Criteria of distinction - Religion.
5.3.18 **Fundamental Rights** - Civil and political rights - Freedom of conscience.

Keywords of the alphabetical index:

Employer, employee, relations / Holiday, religious / Religion, affiliation, evidence.

Headnotes:

The enjoyment of a statutory based right (the right to leave during a religious holiday) which derives from exercising a certain freedom (freedom of religion) has to be based on objective facts supported by evidence. The rule of law, understood as the supremacy of objective legal norms over subjective will and the existence of relatively objective criteria for ascertaining a citizen's affiliation to a certain religious belief, requires the determination of objective facts related to such a right being enjoyed.

Summary:

The Court refused an individual's request for protection from discrimination based on religious affiliation resulting from a judgment of the Court of Appeal. Due to a lack of procedural presumption for decision-making, stated by the Rules of procedure of the Court (expiration of two months after delivery of the act), it rejected the request in part dealing with singular acts, which in the petitioner's opinion violated his right.

The petitioner's request was based both on procedural and substantive grounds. The procedural ground referred to the constitutional protection of human rights and freedoms before regular courts and the Constitutional Court, through a procedure based upon the principles of priority and urgency (Article 50 of the Constitution). The substantive ground took into consideration several principles:

- the principle of equality of citizens in enjoying their rights and freedoms (Article 9 of the Constitution);
- the constitutional right of citizens freely to express their confession (Article 19 of the Constitution);
- the impossibility of individual rights and freedoms being withheld because of affiliation to or practice of a certain religion, including the impossibility of a ban on becoming a member of a religious community (Article 4 of the Law on religious communities and religious groups);
- Articles 9 and 14 **ECHR**, which guarantee everyone the freedom to manifest his/her religion, provided that the enjoyment of rights and freedoms is without discrimination based on any religion.

The facts of the case were as follows. The petitioner, a Macedonian who celebrated Christian holidays, left his office two working days on the first days of *Ramazan Bajram* and *Kurban Bajram* - holidays in the Muslim religion. Since he did not obtain leave, in first instance he was dismissed, which was later replaced with a fine. The petitioner justified the leave on the ground that he accepted the Muslim religion. Therefore, those days were not working days for him (according to the Law on holidays in the Republic of Macedonia) and he could not be made to bear any damaging consequences on that account. However, neither the employer nor the courts in two instances accepted his claim that he accepted the Muslim religion, and considered that his leave was unjustified.

The fact that the petitioner's claim that he is affiliated to the Muslim religion was not accepted and that he was asked to prove such religious belief meant that the petitioner felt discriminated against. In his opinion, the Constitution guarantees the freedom of religion as a personal conviction, the expression of which is part of one's privacy and therefore no one is obliged to prove it. The petitioner based the protection of his rights and freedoms only on his claim that he was affiliated to the Muslim religion indicating that neither he nor anyone else should be required to prove such an assertion.

In making its decision, the Court found it crucial to settle the following preliminary question: is the expression of the citizen's will sufficient to enjoy a certain right deriving from a freedom or must the citizen rely on objective facts which should be supported by evidence?

Taking into account that the rule of law is one of the fundamental principles of the constitutional order and that

there are objective criteria for ascertaining a citizen's affiliation to a particular religion, the Court judged that objective facts related to the enjoyment of a right have necessarily to be verified. Taking the rule of law as the supremacy of objective legal norms over subjective will, and after a public hearing and several consultations had been held, and especially bearing in mind the petitioner's statement, the Court found that the contents and form of his religious belief did not objectively correspond to that of the Muslim religion on several grounds. For example, he did not know the basic premises of that religious system, through which the essence of such belief is expressed; nor did he know how to enter this belief. Therefore, the Court found that the petitioner had not been discriminated against by the Court of Appeal's judgment, i.e. the fact that the court entered into fact-finding and determined objective facts had not put the petitioner in a disadvantageous position in comparison to other citizens based on his religious belief.

Languages:

Macedonian.

GBR-2001-1-006 17-05-2001 R. v. A.

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 17-05-2001 / **e)** / **f)** R. v. A. / **g)** [2001] *United Kingdom House of Lords,* 25 / **h)** [2001] *2 Weekly Law Reports*, 1546; [2001] *3 All England Law Reports*, 1 [2001]; CODICES (English).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.3.2 **Sources of Constitutional Law** - Techniques of review - Concept of constitutionality dependent on a specified interpretation.
2.3.7 **Sources of Constitutional Law** - Techniques of review - Literal interpretation.
3.16 **General Principles** - Proportionality.
3.17 **General Principles** - Weighing of interests.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.
5.3.13.17 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Rules of evidence.
5.3.13.28 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to examine witnesses.
5.3.15 **Fundamental Rights** - Civil and political rights - Rights of victims of crime.

Keywords of the alphabetical index:

Interpretation, compatibility with the European **Convention** on Human Rights / Interpretation, implications / Rape / Sexual offence.

Headnotes:

Section 41 of the Youth Justice and Criminal Evidence Act 1999 (Section 41) prevented a defendant charged with committing a sexual offence from giving evidence or questioning a complainant about her/his previous sexual history, except in restrictively defined circumstances where a criminal court could give permission to do so. A literal interpretation of Section 41 could, in certain circumstances, deny a defendant the right to a fair trial protected by Article 6 **ECHR**.

Section 3 of the Human Rights Act 1998 (the Human Rights Act) imposed an obligation on the courts to interpret all laws so as to be compatible with the European **Convention** on Human Rights where possible. Thus, Section 41 should be read to import the safeguards of a fair trial even if this required a strained, yet

nevertheless possible, interpretation.

Summary:

Mr A was charged with rape. His defence was that the complainant consented to sexual intercourse or (alternatively) that he had believed she had. Mr A's lawyer asked for permission to question the complainant about an alleged sexual relationship between her and Mr A over the course of a three week period before the alleged rape. The trial judge ruled that the complainant could not be cross-examined, nor could Mr A give any evidence, about the alleged relationship because Section 41 prevented the court from giving permission to a defendant to give evidence, or cross examine, a complainant on his/her previous sexual behaviour, unless the court was satisfied that the limited exceptions to the prohibition which are set out in the section applied, and that these did not apply to this case.

On appeal to the Court of Appeal it was held that Mr A could have been given leave under the limited exception in Section 41.3.a in relation to his belief in consent (i.e. where there is no actual consent), but that the exceptions where actual consent is alleged did not cover him. The Court of Appeal was concerned that a direction to a jury on that basis could lead to an unfair trial. The prosecution appealed to the House of Lords.

Under Section 41 permission can only be given where consent is an issue if the sexual behaviour of the complainant is alleged to have taken place at or about the same time as the offence (Section 41.3.b) or it is alleged to have been so similar to the sexual behaviour alleged to have taken place as part of the offence that it could not be a coincidence (Section 41.3.c).

The House of Lords said that a prior sexual relationship between the complainant and the accused may be relevant to the issue of consent. If the impact of Section 41 were to deny the right of an accused from putting forward a full and complete defence it might amount to a breach of the defendant's right to a fair trial under Article 6 **ECHR**.

The right to a fair trial under Article 6 **ECHR** is absolute. A conviction obtained in breach of it cannot stand (see: *R v. Forbes*). The only balancing permitted is in respect of what the concept of a fair trial entails. Account may be taken of the interests of the accused, the victim and society. In this context proportionality has a role to play. The criteria for determining the test of proportionality have been analysed in similar terms in the case law of the European Court of Justice and the European Court of Human Rights. In the U.K. case, *de Freitas*, it was held that the question was whether the legislative objective is sufficiently important to justify limiting a fundamental right; whether the measures designed to meet the objective are rationally connected to it; and whether the means used to impair the right are no more than is necessary to accomplish the objective.

The words "at or about the same time as the event" in Section 41.3.b can be given a wide meaning, a few hours or even a few days when a couple were continuously together. But that meaning could not reasonably be extended to cover a few weeks which are relied on in the present case even if read with Article 6 **ECHR**.

Section 41.3.c permits evidence where consent is alleged and the sexual behaviour of the complainant is alleged to have been so similar to her/his sexual behaviour which took place as part of the alleged offence that the similarity cannot reasonably be explained as a coincidence. Read literally or even purposively this provision is disproportionately restrictive.

However, Section 3 of the Human Rights Act imposes an interpretative obligation on the courts to construe legislation as compatible with the European **Convention** on Human Rights where possible. It applies even if there is no ambiguity in the language of the legislation. Parliament rejected the legislative model of requiring a reasonable interpretation. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it (see: Articles 31, 32 and 33 of the Vienna **Convention** on the Law of Treaties). However, Section 3 of the Human Rights Act qualifies this principle as it requires a court to find an interpretation compatible with **Convention** rights if it is possible to do so. It will sometimes be necessary to adopt an interpretation which may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility (for which provision is made in Section 4 of the Human Rights Act) is a measure of last resort. It must be avoided unless it is plainly impossible to do so.

It is not impossible to read Section 41.3.c together with Article 6 **ECHR** in a way which will result in a fair hearing. It is possible to read Section 41.3.c as permitting the admission of evidence or questioning which relates to a relevant issue in the case and which the trial judge considers necessary to make the trial a fair one. The result of such a reading would be that sometimes logically relevant sexual experiences between a complainant and an accused may be admitted under Section 41.3.c.

Under Section 41.3.c, construed where necessary by applying the interpretative obligation under Section 3 of the Human Rights Act, and due regard always being paid to the importance of seeking to protect the complainant from indignity and humiliating questions, the test of admissibility is whether the evidence is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6 **ECHR**. If this test is satisfied the evidence should not be excluded.

The appeal was dismissed.

Cross-references:

- R. v. Forbes [2001] 1 *Appeals Cases*, 473; [2001] 2 *Weekly Law Reports*, 1; [2001] 1 *All England Law Reports*, 686;
- *De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 *Appeals Cases*, 69; [1998] 3 *Weekly Law Reports*, 675.

Languages:

English.

GBR-2001-1-003

05-12-2000 Brown v. Stott

a) United Kingdom / **b)** Privy Council / **c)** / **d)** 05-12-2000 / **e)** / **f)** Brown v. Stott / **g)** / **h)** [2001] 2 *Weekly Law Reports*, 817; [2001] 2 *All England Law Reports*, 97; CODICES (English).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** - Categories - Case-law - International case-law - European Court of Human Rights.
3.16 **General Principles** - Proportionality.
3.17 **General Principles** - Weighing of interests.
3.19 **General Principles** - Margin of appreciation.
4.8.8.3 **Institutions** - Federalism, regionalism and local self-government - Distribution of powers - Supervision.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.
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.

Keywords of the alphabetical index:

Devolution / *Ex facto oritur ius* / Right, implied / Road safety, offence / Road traffic, offence.

Headnotes:

A provision requiring a person keeping a motor vehicle to give the police the identity of the person driving it when a suspected road traffic offence was committed is not incompatible with Article 6 **ECHR**, the right to a fair trial. Whilst it may, *prima facie*, infringe a person's privilege against self-incrimination, such privilege is not absolute and the infringement was both necessary and proportionate in the circumstances.

Summary:

A woman was suspected of shoplifting at a store. The police believed she had been drinking alcohol and asked her how she came to the store. She said she travelled by her car. She was taken to a police station, charged with theft, and obliged, under provisions in the Road Traffic Act 1988 ("the Act") to tell the police who was driving her car when she travelled to the store. She admitted she was the driver. She was then found to be over the alcohol limit for driving and was charged with an offence under the Act. She raised a "devolution issue", under Section 6 of the Scotland Act 1998, as to whether the prosecution's reliance on her compulsory admission of driving the car was compatible with Article 6.1 **ECHR**. The High Court of Justiciary in Scotland allowed her appeal and declared the prosecution could not rely on such evidence. The Scottish law officers appealed to the Privy Council.

Section 172 of the Act requires the person keeping a vehicle to provide police with the identity of the driver of that vehicle where the driver is alleged to be guilty of a specified driving offence. The defendant claimed this provision infringed her privilege against self-incrimination.

The Judicial Committee of the Privy Council recalled that Articles 10 and 11.1 of the Universal Declaration of Human Rights (1948) and Article 6 **ECHR** grant a right to a fair trial but contain no express guarantee of a privilege against self incrimination. The right is implied.

The European Court and Commission of Human Rights have interpreted Article 6 **ECHR** broadly by reading into it a variety of other rights to which the accused person is entitled in the criminal context. Their purpose is to give effect, in a practical way, to the fundamental and absolute right to a fair trial. They include the right to silence and the right against self incrimination with which this case is concerned. As these other rights are not set out in absolute terms in the article they are open, in principle, to modification or restriction so long as this is not incompatible with the absolute right to a fair trial. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for. The general language of the European **Convention** on Human Rights could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently avoided by the Court throughout its history. The case law shows that the Court has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree. *Ex facto oritur ius*. The Court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the **Convention**: see *Sporrong and Lönnroth v. Sweden* at paragraph 69 of the judgment (*Special Bulletin **ECHR*** [ECH-1982-S-002]); *Sheffield and Horsham v. United Kingdom* at paragraph 52 of the judgment.

The high incidence of death and injury on the roads caused by the misuse of motor vehicles is a very serious problem common to almost all developed societies. The need to address it effectively, for the public benefit, cannot be doubted. One way democratic governments have sought to address it is by subjecting the use of motor vehicles to a regime of regulation and making provision for enforcement by identifying, prosecuting and punishing offending drivers. Under some legal systems (e.g. Spain, Belgium and France) the registered owner of a vehicle is assumed to be the driver guilty of minor traffic offences unless he shows that some other person was driving at the relevant time. The jurisprudence of the European Court tells us that the questions that should be addressed when issues are raised about an alleged incompatibility with a right under Article 6 **ECHR** are the following: (1) Is the right which is in question an absolute right, or is it a right which is open to modification or restriction because it is not absolute? (2) If it is not absolute, does the modification or restriction which is contended for have a legitimate aim in the public interest? (3) If so, is there a reasonable relationship of proportionality between the means employed and the aim sought to be realised? The principle of proportionality directs attention to the question whether a fair balance has been struck between the general interest of the community in the realisation of that aim and the protection of the fundamental rights of the

individual. There being a clear public interest in enforcement of road traffic legislation the crucial question in the present case is whether the challenged provisions represents a disproportionate response, or one that undermines a defendant's right to a fair trial, if an admission of being the driver is relied on at trial.

In determining this question it is recalled that the European **Convention** on Human Rights places the primary duty on domestic courts to secure and protect rights. The function of the European Court of Human Rights is essential but supervisory. In that capacity it accords to domestic courts a margin of appreciation, which recognises that national institutions are in principle better placed than an international court to evaluate local needs and conditions. That principle is logically not applicable to domestic courts. On the other hand, national courts may accord to the decisions of national legislatures some deference where the context justifies it.

In the Privy Council's view, the challenged provision was not a disproportionate response to the serious problem of misuse of motor vehicles, nor would the defendant's admission undermine her right to a fair trial. The provision puts only a single, simple question, the answer to which cannot, by itself, incriminate a defendant since driving a car in itself is not an offence. The defendant was also required to submit to a breath test to discover her alcohol limit. It was not argued that such a procedure violated her right to a fair trial, and it is difficult to distinguish it from the challenged provision. The possession and use of a motor vehicle carries with it responsibilities including the submission to the regulatory regime in place. For all these reasons, the challenged provision was found to be compatible with Article 6 **ECHR** and the lower courts declaration was quashed.

Cross-references:

European Court of Human Rights:

- *Sporrong and Lönnroth v. Sweden*, 23.09.1982; (1982) 5 *European Human Rights Reports* 35, *Special Bulletin **ECHR*** [ECH-1982-S-002];

- *Sheffield and Horsham v. United Kingdom*, 30.07.1998; (1998) 27 *European Human Rights Reports* 163.

Languages:

English.

ECJ-2004-1-001

20-04-1999 | T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 et T-335/94 | Limburgse Vinyl Maatschappij E.A. v. Commission

a) European Union / **b)** Court of First Instance / **c)** Third Chamber, Extended Composition / **d)** 20-04-1999 / **e)** T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 et T-335/94 / **f)** Limburgse Vinyl Maatschappij E.A. v. Commission / **g)** / **h)** CODICES (English, French).

Keywords of the Systematic Thesaurus:

1.1.4.4 **Constitutional Justice** - Constitutional jurisdiction - Relations with other institutions - Courts.
1.3.1 **Constitutional Justice** - Jurisdiction - Scope of review.

1.3.5.2	**Constitutional Justice** - Jurisdiction - The subject of review - Community law.
1.3.5.2.2	**Constitutional Justice** - Jurisdiction - The subject of review - Community law - Secondary legislation.
1.4.5.3	**Constitutional Justice** - Procedure - Originating document - Formal requirements.
1.5	**Constitutional Justice** - Decisions.
1.6.4	**Constitutional Justice** - Effects - Effect *inter partes*.
1.6.9.2	**Constitutional Justice** - Effects - Consequences for other cases - Decided cases.
2.1.1.4.3	**Sources of Constitutional Law** - Categories - Written rules - International instruments - European Convention on Human Rights of 1950.
3.10	**General Principles** - Certainty of the law.
3.13	**General Principles** - Legality.
4.17.1.3	**Institutions** - European Union - Institutional structure - Commission.
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.
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.
5.3.13.13	**Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Trial/decision within reasonable time.
5.3.13.17	**Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Rules of evidence.
5.3.13.18	**Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Reasoning.
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.
5.3.13.22	**Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Presumption of innocence.
5.3.13.23	**Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Right to remain silent.
5.3.14	**Fundamental Rights** - Civil and political rights - *Ne bis in idem*.

Keywords of the alphabetical index:

Res iudicata / Competition, proceedings, formal error, remedy / Decision, multiple addressees, annullment, effects / Decision, adoption, authentication, lack / Fine, calculation.

Headnotes:

1. Under Article 44.1.c of the Rules of Procedure of the Court of First Instance, all applications must indicate the subject-matter of the proceedings and include a brief statement of the grounds relied on. The information given must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to give a ruling, if appropriate, without recourse to other information (see paras 39-40, 46).

2. Under Article 113 of its Rules of Procedure, the Court of First Instance may of its own motion consider whether there is any absolute bar to proceeding with an action. Accordingly, pleas in law which are set out for the first time at the reply stage and which are not based on matters of law or of fact coming to light in the course of the procedure, must be declared inadmissible under Article 48.2 of those Rules of Procedure (see paras 60, 64).

3. The principle of *res iudicata* extends only to the matters of fact and law actually or necessarily settled by a judicial decision.

The second sentence of the first paragraph of Article 54 of the Statute of the Court of Justice does not mean

that, where the Court, in the exercise of its appellate jurisdiction, itself gives final judgment in a dispute by accepting one or more pleas raised by the appellants, it automatically settles all points of fact and law raised by the latter in the context of the case (see paras 77, 84).

4. Where the Court of Justice has annulled a Commission decision - finding that the competition rules have been infringed and imposing fines - because it has not been duly authenticated, without disposing of the substantive pleas in law raised by the applicant undertakings, and the Commission then adopts a fresh decision finding against those undertakings, thus merely remedying the formal defect found by the Court, the Commission cannot be said to be taking action against the applicants twice in relation to the same set of facts or to be penalising them twice in respect of the same infringement, contrary to the principle of *non bis in idem* (see paras 96-98).

5. Fundamental rights form an integral part of the general principles of Community law whose observance the Community judicature ensures. For that purpose, the Court of Justice and the Court of First Instance rely on the constitutional traditions common to the Member States and the guidelines supplied by international treaties and conventions on the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights, to which express reference is made in Article F.2 EC, has special significance in that respect (see para 120).

6. Infringement of the general principle of Community law that decisions following administrative proceedings relating to competition policy must be adopted within a reasonable time justifies annulment of a Commission decision only in so far as it also constituted an infringement of the rights of defence of the undertakings concerned. Where it has not been established that the undue delay has adversely affected the ability of the undertakings concerned to defend themselves effectively, failure to comply with the principle that the Commission must act within a reasonable time cannot affect the validity of the administrative procedure and can therefore be regarded only as a cause of damage capable of being relied on before the Community judicature in the context of an action based on Article 178 EC and Article 215.2 EC.

Whether the time taken for a procedural stage is reasonable must be assessed in relation to the individual circumstances of each case, and in particular its context, the conduct of the parties during the procedure, what is at stake for the various undertakings concerned and its complexity (see paras 121-122, 126).

7. A Commission decision finding that several undertakings have infringed Article 85 EC and imposing a fine on each of them must be treated as a series of individual decisions even though it is drafted and published in the form of a single decision.

Accordingly, if an addressee decides to bring an action for annulment, the Community judicature has before it only the elements of the decision which relate to that addressee. The unchallenged elements of the decision relating to other addressees, on the other hand, do not form part of the subject-matter of the dispute which the Court is called on to resolve. Consequently, the decision can be annulled only as regards the addressees who have been successful in such actions.

Where, on grounds of procedural irregularity, the Court has annulled a decision concerning competition matters, and the Commission subsequently addresses a fresh decision solely to the addressees of the annulled decision who were successful in their actions, the Commission does not thereby infringe the principle of non-discrimination (see paras 167, 169-170, 173-174).

8. Given that, where a Commission decision finding that the competition rules have been infringed is annulled by the Court of Justice on account of a procedural defect relating to lack of due authentication, the annulment does not affect the validity of the measures preparatory to that decision, taken before the stage at which the defect occurred (see paras 188-189), a new hearing of the undertakings concerned is required, prior to the adoption by the Commission of a new decision, only to the extent that the latter contains objections which are new in relation to those set out in the decision annulled. In that regard, the fact that the new decision is adopted in factual and legal circumstances different from those which existed at the time when the original decision was adopted does not in any sense mean that the new decision contains new objections (see paras 250-252).

9. Article 184 EC expresses a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision under challenge, if that party was not entitled under Article 173 EC to bring a direct action challenging those acts, by which it was thus affected without having been in a position to seek to have them declared void.

Article 184 EC must therefore be given a wide interpretation in order to ensure effective review of the legality of the acts of the institutions. Its scope must extend to acts of the institutions which, although not in the form of a regulation, produce similar effects. In particular, it must extend to internal rules of an institution which, although they do not constitute the legal basis of the contested decision, determine the essential procedural requirements for adopting that decision and thus ensure legal certainty for those to whom it is addressed.

Consequently, in the context of an action for annulment of a Commission decision on a competition matter, those of the Commission's Rules of Procedure which are designed to ensure the protection of individuals may be the subject-matter of a plea of illegality. However, there must be a direct legal connection between the contested individual decision and the rules of procedure alleged to be unlawful (see paras 284-291).

10. There is no general principle of Community law requiring continuity in the composition of an administrative body handling a procedure which may lead to a fine (see paras 322-323).

11. The annexes to the statement of objections not emanating from the Commission should be regarded not as `documents' within the meaning of Article 3 of Council Regulation no. 1 but as supporting evidence on which the Commission relies. They are therefore to be brought to the attention of the addressee as they are. The Commission thus commits no infringement of Article 3 of Council Regulation no. 1 by communicating those annexes in their original language versions (see para 337).

12. The rights of the defence do not require that undertakings involved in a proceeding under Article 85.1 EC be able to comment on the report of the hearing officer. Observance of the rights of the defence is sufficiently assured where the various authorities which contribute to the final decision are correctly informed of the arguments of the undertakings in reply to the objections communicated to them by the Commission and the evidence submitted by the Commission in support thereof. The report of the hearing officer is a purely internal Commission document, which contains only advice, and whose purpose is not to supplement or correct the arguments of the undertakings, or to formulate new objections or to supply new evidence against them (see paras 375-377).

13. Decisions to investigate under Article 14.3 of Regulation no. 17 are in themselves measures which may be the subject-matter of an action for annulment on the basis of Article 173 EC.

Accordingly, in an action for annulment of a final decision adopted by the Commission pursuant to Article 85.1 EC, an undertaking cannot plead the illegality of an investigation decision addressed to it, and which it has not challenged within the time-limits. It may, on the other hand, in the context of such an action and in so far as documents obtained by the Commission are used against it, challenge the legality of investigation decisions addressed to other undertakings, whose actions to challenge the legality of those decisions directly, if brought, may or may not have been admissible. Likewise, in an action contesting the Commission's final decision, the undertaking may challenge the manner in which the investigation procedures were conducted (see paras 408, 410-411, 413-414).

14. It is apparent from Article 14.2 of Regulation no. 17 that investigations carried out on a simple authorisation are based on the voluntary cooperation of the undertakings. Where an undertaking has in fact cooperated in an investigation carried out on authorisation, a plea alleging undue interference by the public authority is unfounded, in the absence of any evidence that the Commission went beyond the cooperation offered by the undertaking (see paras 421-422).

15. Observance of the rights of the defence is a fundamental principle which must be respected, not only in administrative proceedings which may lead to the imposition of penalties, but also in preliminary inquiry procedures, such as requests for information pursuant to Article 11 of Regulation no. 17, which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings.

In order to ensure the effectiveness of Article 11.2 and 11.5 of Regulation no. 17, the Commission is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to the Commission, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct. Nevertheless, the Commission may not, by a decision to request information, undermine the undertaking's defence rights. Thus it may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (see paras 445-447, 449).

16. Having regard to Articles 14 and 20.1 of Regulation no. 17, information obtained during investigations must not be used for purposes other than those indicated in the authorisation or decision under which the investigation is carried out. That requirement is intended to protect both professional secrecy and the defence rights of undertakings.

On the other hand, it cannot be concluded that the Commission is barred from initiating an inquiry in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of conduct contrary to the competition rules in the Treaty. Moreover, the Commission, having obtained documents in one matter and used them as evidence to open another proceeding, is entitled, on the basis of authorisations or decisions concerning that second proceeding, to request fresh copies of those documents and to use them as evidence in the second matter.

The contrary approach would go beyond what is required to safeguard professional secrecy and the rights of the defence, and would thus constitute an unjustified hindrance to the Commission in the accomplishment of its task of ensuring compliance with the competition rules in the common market (see paras 472-477).

17. In competition cases, the purpose of providing access to the file is to enable the addressees of statements of objections to examine evidence in the Commission's file so that they are in a position effectively to express their views on the conclusions reached by the Commission in its statement of objections on the basis of that evidence.

Access to the file is one of the procedural safeguards intended to protect the rights of the defence, observance of which is a fundamental principle which requires that the undertaking concerned be afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts, charges and circumstances relied on by the Commission.

In the adversarial proceedings for which Regulation no. 17 provides, it cannot be for the Commission alone to decide which documents are of use for the defence. Having regard to the general principle of equality of arms, the Commission cannot be permitted to decide on its own whether or not to use documents against the undertakings concerned, where the latter had no access to them and were therefore unable to take the relevant decision whether or not to use them in their defence.

However, access to the file cannot extend to internal documents of the institution, the business secrets of other undertakings and other confidential information (see paras 1011-1012, 1015).

18. In the context of an administrative proceeding in a competition case, breach of an undertaking's rights of defence as regards access to the Commission's administrative file does not warrant annulment of a decision finding that there has been an infringement unless the ability of that undertaking to defend itself has been affected by the conditions in which it had access to the Commission's administrative file. In that respect, it is sufficient for a finding of infringement of defence rights for it to be established that non-disclosure of the documents in question might have influenced the course of the procedure and the content of the decision to the applicant's detriment.

Any infringement of the rights of the defence occurring during the administrative procedure cannot be remedied in the proceedings before the Court of First Instance, whose review is restricted to the pleas raised and cannot therefore be a substitute for a thorough investigation of the case in the form of an administrative proceeding (see paras 1019-1022).

19. The statement of reasons required by Article 190 EC must be appropriate to the measure at issue and disclose clearly and unequivocally the reasoning followed by the institution which adopted it in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review.

In the case of a decision imposing fines on several undertakings for an infringement of Community competition rules, the scope of the duty to state reasons must be assessed inter alia in the light of the fact that the gravity of the infringement depends on a large number of factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, and no binding or exhaustive list of the criteria to be applied has been drawn up. The Commission has a discretion when fixing the amount of each fine, and cannot be required to apply a precise mathematical formula for that purpose.

It is certainly desirable, in order to enable undertakings to define their position with full knowledge of the facts, for them to be able to determine in detail, in accordance with such system as the Commission might consider appropriate, the method whereby the fine imposed upon them has been calculated, without their being obliged, in order to do so, to bring court proceedings against the decision.

However, such calculations do not constitute an additional and subsequent ground for the decision, but merely translate into figures the criteria set out in the decision which are capable of being quantified (see paras 1172-1173, 1180-1181).

Summary:

By decision of 21 December 1988, adopted following an investigation lasting almost five years, the Commission of the European Communities ordered fourteen producers of PVC to pay heavy fines for participating in a prohibited cartel. The undertakings concerned - apart from one of them - sought annulment of the decision before the Court of First Instance. By judgment of 27 February 1992 in Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others v. Commission* [1992] ECR II-315, the Court of First Instance allowed the applicants' application and, owing to the major defects affecting the decision, held that it was non-existent. Upon appeal by the Commission, the Court of Justice set aside the judgment of the Court of First Instance on the ground that the irregularities found by that Court did not appear to be of such obvious gravity that the decision must be treated as legally non-existent. Taking the view that the state of the proceedings permitted it to give final judgment, the Court of Justice none the less decided to annul the Commission's decision for infringement of essential procedural requirements (Case C-137/92 P *Commission v. BASF and Others* [1994] ECR I-2555). Therefore, by a fresh decision of 27 July 1994, the Commission reiterated the objections against the majority of the undertakings concerned by the initial decision. Fresh actions for annulment followed and were determined in the present judgment of the Court of First Instance.

After considering the pleas of inadmissibility raised mainly by the Commission and setting out, in that regard, the requirements which must be satisfied both by the application initiating the proceedings and by the defendant's reply, the Court of First Instance referred to the rules governing the putting forward of new pleas in law in the course of proceedings. It then proceeded to answer the numerous pleas in law put forward by the parties alleging defects of form and procedure. It thus confirmed the Commission's power to adopt a fresh decision following the judgment annulling the original decision. In doing so, it defined the scope of the principle of *res iudicata* and of the principle *non bis in idem* and held that there had been no infringement of the "reasonable time" principle in the administrative procedure preceding the adoption of the contested decision. It likewise rejected the arguments alleging breach of the principle of non-discrimination in that the Commission had addressed its new decision only to the undertakings which had validly brought an action against the previous decision and been successful. Although published in the form of a single decision, the 1988 decision in reality constituted a series of individual decisions and those decisions whose addressees were not concerned by the judgment of annulment remained fully valid. As they were not placed in a situation comparable with the latter undertakings, the producers who had been successful in their actions and were therefore referred to by the new decision could not plead breach of the principle of equality. Continuing with its examination of the scope of the judgment of 15 June 1994, the Court of First Instance also rejected the objections alleging the invalidity of the procedural acts preceding the adoption of the decision. The annulment

of the 1988 decision could not affect the validity of the preparatory measures or of the oral stage of the administrative procedure prior to the stage at which the defect itself occurred. Only the existence of fresh complaints could justify a new hearing of the undertakings concerned.

Turning next to the alleged irregularities in the adoption and authentication of the decision, the Court of First Instance began by defining the scope of the plea of illegality provided for in Article 184 EC [now]. It thus accepted that the internal rules of an institution might, on certain conditions, be the subject-matter of a plea of illegality. However, it refused in the present case to uphold the plea of illegality alleging failure to satisfy the requirement of legal certainty of the provision of the internal rules of the Commission laying down the procedure for the authentication of the contested decision. It likewise refused to annul the decision for infringement of, first, the principle that decisions must be made and deliberated by the same body and, second, the principle of immediacy. There is no general principle of Community law requiring continuity in the composition of an administrative body handling a procedure which may lead to a fine.

As regards, last, the alleged defects in the administrative procedure, the Court of First Instance rejected all of the claims put forward by the applicants. Thus, the annexes to the statement of objections not emanating from the Commission did not have to be communicated to the undertakings in the language of their own Member States pursuant to Article 3 of Regulation no. 1, nor did the rights of the defence require that the report of the hearing officer be brought to their attention.

Turning to the substantive pleas, the Court of First Instance began by answering a series of pleas relating to the evidence but did not accept the applicants' claims. Thus, although they were entitled to challenge the lawfulness of the decisions to investigate which were addressed to other undertakings but which adversely affected the applicants or to criticise, in the context of the action against the final decision of the Commission, the investigations carried out by the Commission, the applicants had not provided evidence of the arbitrary or disproportionate nature of the investigations carried out on the basis of authorisations. Likewise, although the Commission unlawfully compelled the applicants to provide it with answers which might involve an admission on their part of the existence of an infringement which it was incumbent on the Commission to prove, that illegality did not affect the legality of the decision, since the applicants had been unable to prove that they had actually answered the questions put to them. The Court defined, last, the rules governing the use by the Commission of the information received in an investigation and held that in the present case it had been entitled to require the applicants to produce documents already produced during a previous investigation procedure.

Continuing with its examination of the substance and concerning, this time, the claim that the prohibited cartel did not exist, the Court of First Instance upheld the Commission's appraisal of the facts and their legal characterisation. It adopted a less rigid approach when determining the applicant's participation in the infringement. Although the Court of First Instance confirmed the involvement of all the applicants in the impugned facts, it none the less found that the Commission had not correctly assessed the duration of the participation in the infringement of one of the applicants. It thus annulled the decision in part and reduced the fine payable by the undertaking concerned.

As regards the pleas relating to access to the file, the Court of First Instance proved equally flexible. After thus recalling that access to the file in competition cases is an aspect of respect for the rights of the defence, which is a fundamental principle of Community law which prohibits the Commission from deciding on its own what documents are of use to the defence, the Court of First Instance observed that irregularities in access to the file can lead to annulment of a decision finding an infringement only if the ability of the undertakings concerned to defend themselves were actually affected by the restrictions established. The Court of First Instance held that in this case the applicants had not demonstrated any breach of the rights of the defence.

As regards, last, the pleas relating to the annulment or reduction of the fines, although the Court of First Instance considered it desirable that the undertakings concerned be informed of the method used in calculating the fines imposed, it did not uphold any of the objections alleging failure to provide sufficient reasons for the decision. However, it upheld the submissions presented by two of the applicants and reduced their fines on the ground that the Commission had not correctly assessed their market share.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.

ECJ-2002-3-002 11-03-1999 T-156/94 Siderúrgica Aristrain Madrid SL v. Commission of the European Communities

a) European Union / **b)** Court of First Instance / **c)** Second Chamber, Extended Composition / **d)** 11-03-1999 / **e)** T-156/94 / **f)** Siderúrgica Aristrain Madrid SL v. Commission of the European Communities / **g)** *European Court Reports*, II-0645 / **h)** CODICES (English, French).

Keywords of the Systematic Thesaurus:

1.3.5.2.1 **Constitutional Justice** - Jurisdiction - The subject of review - Community law - Primary legislation.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European Convention on Human Rights of 1950.
3.13 **General Principles** - Legality.
5.3.13.1.4 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Scope - Litigious administrative proceedings.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.13.14 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Independence.
5.3.13.15 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Impartiality.

Keywords of the alphabetical index:

European Coal and Steel Community, treaty / Competition, rules, violation / Commission, administrative procedure, guarantees.

Headnotes:

1. Claims are inadmissible where they seek to challenge the lawfulness of the system introduced by Articles 65 and 66 of the ECSC Treaty for preventing and penalising agreements, decisions and concerted practices or of the system introduced by Articles 33 and 36 thereof for the judicial review of administrative acts. The Treaty itself is not an act of the Commission and it is not amenable, therefore, to review by the Community judicature under Articles 33 or 36 (see paras 95-96).

2. Fundamental rights form an integral part of the general principles of law, the observance of which the Community judicature ensures. The Court of Justice and the Court of First Instance draw inspiration from the constitutional principles common to the Member States and also from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that context, the European Convention on Human Rights - to which reference is made in Article F.2 of the Treaty on European Union - has special significance (see paras 99-100).

3. During administrative proceedings which culminate in the adoption of a decision finding that the competition rules have been infringed and imposing a fine under the ECSC Treaty, the Commission is obliged to observe the procedural guarantees laid down by Community law. The fact that the Commission combines the functions of prosecutor and judge is not contrary to those safeguards and they do not require the Commission to adopt an internal arrangement under which an official is not permitted to act as both investigator and rapporteur in the same case.

The requirement of effective judicial review of any Commission decision establishing and penalising an infringement of the Community competition rules is a general principle of Community law which follows from the constitutional traditions common to the Member States. The unlimited jurisdiction of the Court of First

Instance, an independent and impartial tribunal, to review the penalty, pursuant to Article 36 of the Treaty - in conjunction, where necessary, with a review of the legality of the other elements of the decision, pursuant to Article 33 of the Treaty - is consistent with that requirement (see paras 101-102, 105-107, 115).

Summary:

An appeal was lodged before the Court of First Instance for the annulment of Commission Decision 94/215/ECSC relating to proceedings under Article 65 ECSC concerning agreements and concerted practices engaged in by European producers of beams (OJ L 116, p. 1) in which the Commission had found that 17 steel undertakings and one of their trade associations had engaged in a series of agreements, decisions and concerted practices designed to fix prices, share markets and exchange confidential information on the market for beams in the Community, in breach of Article 65.1 ECSC, and imposed fines on 14 undertakings in this sector for the infringements committed.

The applicant, a steel-manufacturing company incorporated under Spanish law, to which the above decision was addressed, argued that this decision had been taken in violation of the fundamental right to an independent and impartial tribunal as guaranteed by Article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The violation of this right was caused primarily by the fact that the proceedings conducted by the Commission failed to confer the investigation and decision-making functions on different organs or persons, despite the fact that the Treaty made no provision for an automatic appeal against decisions of the Commission to a tribunal with unlimited jurisdiction of the type required by the Convention. The Court first of all stated that it was the ECSC Treaty which set out the arrangements for penalising agreements and that the Treaty was not liable to a review of legality.

Having clarified this point, it then looked at whether the fact that within the Commission, the failure to assign the functions of investigation and decision-making to separate organs or bodies constituted a violation of the fundamental rights which Community law must uphold, which included procedural guarantees. It found that such was not the case because Commission decisions were subject to effective judicial control, carried out by the Court which, in pursuance of Article 33 ECSC, had unlimited jurisdiction to review decisions. In view of the power invested in the Court both to assess the legality of the sanction and to modify it, this offered interested parties the guarantees required by Article 6 of the Convention.

The Court then considered the applicant's complaints concerning the administrative proceedings before the Commission, and found that the *inter partes* principle had not been violated nor had the duration of the proceedings been excessive.

Rejecting the appeal for the remainder, the Court simply reduced the fine imposed on the applicant in view of the failure of the Commission to take account of the fact that the applicant had not been involved in part of the practices for which they had been penalised.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

ECJ-2000-3-014 14-05-1998 T-348/94 Enso Española SA v. Commission of the European Communities

a) European Union / **b)** Court of First Instance / **c)** / **d)** 14-05-1998 / **e)** T-348/94 / **f)** Enso Española SA v. Commission of the European Communities / **g)** *European Court Reports* 1998, II-1875 / **h)** CODICES (English, French).

Keywords of the Systematic Thesaurus:

1.4.5.3 **Constitutional Justice** - Procedure - Originating document - Formal requirements.
2.1.1.3 **Sources of Constitutional Law** - Categories - Written rules - Community law.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.

3.19	**General Principles** - Margin of appreciation.
4.17.1.3	**Institutions** - European Union - Institutional structure - Commission.
5.2	**Fundamental Rights** - Equality.
5.3.13.18	**Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Reasoning.
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:

Competition, infringement, gravity / Competition, infringement, fine.

Headnotes:

1. Fundamental rights form an integral part of the general principles of law whose observance the Community judicature ensures. For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the member states and from the guidelines supplied by international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories. The European **Convention** on Human Rights has special significance in that respect.

2. The Commission cannot, when applying provisions of Community competition law, be described as a "tribunal" within the meaning of Article 6 **ECHR**. A decision applying the Community competition rules cannot therefore be unlawful merely because it was adopted under a system in which the Commission carries out both investigatory and decision-making functions. However, during the administrative procedure before it, the Commission must observe the procedural guarantees provided for by Community law.

Community law confers upon the Commission a supervisory role which includes the task of conducting proceedings in respect of infringements of Articles 85.1 and 86 EC. Furthermore, Regulation no. 17 gives it the power to impose, by decision, fines on undertakings and associations of undertakings which have infringed those provisions either intentionally or negligently.

The requirement for effective judicial review of any Commission decision finding and punishing an infringement of the Community competition rules is a general principle of Community law which follows from the common constitutional traditions of the member states. That principle is not infringed where such a review is carried out, pursuant to Council Decision 88/591, by an independent and impartial court, such as the Court of First Instance, which may, in accordance with the pleas on which the natural or legal person concerned may rely in support of his application for annulment, assess the correctness in law and in fact of any accusation made by the Commission in competition proceedings and which, pursuant to Article 17 of Regulation no. 7, has jurisdiction to assess whether the fine imposed is proportionate to the seriousness of the infringement found.

3. Observance of the right to be heard is, in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed, a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings.

4. The purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted.

Although pursuant to Article 190 EC the Commission is bound to state the reasons on which its decisions are based, mentioning the facts, law and considerations which have led it to adopt them, it is not required to

discuss all the issues of fact and law which have been raised during the administrative procedure.

5. Under Article 44.1.c of the Rules of Procedure of the Court of First Instance all applications must indicate the subject-matter of the proceedings and include a brief statement of the grounds relied on. The information given must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to decide the case, if appropriate without other information in support. In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential facts and law on which it is based must be apparent from the text of the application itself, even if only stated briefly, provided the statement is coherent and comprehensible

6. The purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted.

In the case of a decision imposing fines on several undertakings for an infringement of the Community competition rules, the scope of the obligation to state reasons must be assessed in the light of the fact that the gravity of infringements falls to be determined by reference to numerous factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of criteria to be applied has been drawn up.

Furthermore, when fixing the amount of each fine, the Commission has a margin of discretion and cannot be considered obliged to apply a precise mathematical formula for that purpose.

Lastly, the reasons for a decision must appear in the actual body of the decision and, save in exceptional circumstances, explanations given *ex post facto* cannot be taken into account.

When the Commission finds in a decision that there has been an infringement of the competition rules and imposes fines on the undertakings participating in it, it must, if it has systematically taken into account certain basic factors in order to fix the amount of fines, set out those factors in the body of the decision in order to enable the addressees thereof to verify that the level of the fine is correct and to assess whether there has been any discrimination.

Summary:

The Enso Española company was penalised by the Commission for participating in an agreement involving Europe's major cardboard manufacturers.

It applied to the Court of First Instance to set aside the Commission's decision to subject it to a substantial fine for violation of Article 85 EC.

Its very numerous arguments concern the legality of the proceedings against it, the fundamental rights recognised in Community law and the European **Convention** on Human Rights, failure to comply with the obligation to state reasons laid down in Article 190 EC, the reality of its participation in a prohibited agreement and the size of the fine.

The Court's ruling gave partial satisfaction to the applicant, for example by reducing the size of the fine by about one third, but was above all an opportunity for the Court to explain to what degree Article 6 **ECHR** was applicable in the repression of violations of Community rules governing competition.

Languages:

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.

ECJ-1996-1-004 28-03-1996 2/94 Accession by the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 28-03-1996 / **e)** 2/94 / **f)** Accession by the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms / **g)** *E.C.R.* I-1759 / **h)** .

Keywords of the Systematic Thesaurus:

1.2.1.10 **Constitutional Justice** - Types of claim - Claim by a public body - Institutions of the European Union.
1.3.2.1 **Constitutional Justice** - Jurisdiction - Type of review - Preliminary review.
1.3.5.1 **Constitutional Justice** - Jurisdiction - The subject of review - International treaties.
1.5.4.2 **Constitutional Justice** - Decisions - Types - Opinion.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European Convention on Human Rights of 1950.
2.1.2.2 **Sources of Constitutional Law** - Categories - Unwritten rules - General principles of law.
4.17.2 **Institutions** - European Union - Distribution of powers between Community and member states.

Keywords of the alphabetical index:

Community, implicit and explicit powers / Community, internal and external powers / Powers, conferred, principle.

Headnotes:

The exceptional procedure laid down in Article 228.6 EC, under which the Opinion of the Court of Justice on the compatibility of an envisaged agreement with the provisions of the Treaty may be obtained, is a special procedure of collaboration between the Court of Justice on the one hand and the other Community institutions and the member States on the other whereby, at a stage prior to conclusion of an agreement which is capable of giving rise to a dispute concerning the legality of a Community act which concludes, implements or applies it, the Court is called upon to ensure, in accordance with Article 164 EC, that in the interpretation and application of the Treaty the law is observed. Its purpose is to avoid complications which may arise, not only in a Community context but also in that of international relations, from a possible decision of the Court to the effect that an international agreement binding the Community is, by reason either of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaty (cf. points 3-6).

In order to assess the extent to which a lack of firm information about the terms of an envisaged agreement affects the admissibility of a request for an Opinion addressed to the Court of Justice pursuant to Article 228.6 EC, the purposes of the request must be distinguished.

Where a question of Community competence to conclude an agreement has to be decided, it is in the interests of the Community institutions and of the States concerned, including non-member countries, to have that question clarified from the outset of negotiations and even before the main points of the agreement are negotiated, the only condition being that the purpose of envisaged agreements should be known before negotiations are commenced.

However, where it is a matter of ruling on the compatibility of provisions of an envisaged agreement with the rules of the Treaty, it is necessary for the Court to have sufficient information about the actual terms of the agreement.

Therefore, faced with the question whether accession by the Community for the Convention on the Protection of Human Rights and Fundamental Freedoms would be compatible with the Treaty, the Court may, even

though it has still not been decided to open negotiations, give an Opinion on the Community's competence to accede to that Convention because the general purpose and subject-matter of the Convention and the institutional significance of such accession for the Community are perfectly well known, but, where it has insufficient information regarding the arrangements for accession and in particular as to the solutions envisaged to give effect in practice to submission by the Community to the present and future judicial control machinery established by the Convention, it cannot give an Opinion on the compatibility of accession to that Convention with the rules of the Treaty (cf. points 7-22).

It follows from Article 3b EC, which States that the Community is to act within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein, that it has only those powers which have been conferred upon it. That principle of conferred powers must be respected in both the internal action and the international action of the Community. The Community acts ordinarily on the basis of specific powers which are not necessarily the express consequence of specific provisions of the Treaty but may also be implied from them. Thus, the competence of the Community to enter into international commitments may not only flow from express provisions of the Treaty but also be implied from those provisions. Whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community is empowered to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect (cf. points 23-26).

Article 235 EC is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.

That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 EC cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose (cf. points 29-30).

Fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the member States and from the guidelines supplied by international treaties for the protection of human rights on which the member States have collaborated or of which they are signatories. In that regard, the European Convention on Human Rights, to which reference is made in particular in Article F.2 EU, has special significance (cf. points 32-33).

As Community law now stands, the Community has no competence to accede to the Convention for the Protection of Human Rights and Fundamental Freedoms because no provision of the Treaty confers on the Community institutions in a general way the power to enact rules concerning human rights or to conclude international agreements in this field and such accession cannot be brought about by recourse to Article 235 EC.

Respect for human rights is a condition of the lawfulness of Community acts. Accession by the Community to the European Convention on Human Rights would, however, entail a substantial change in the present Community system for protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235 EC. It could be brought about only by way of Treaty amendment (cf. points 34-36 and disp.).

Summary:

A request was made to the Court for an Opinion under Article 228.6 EC by the Council, in order to determine whether the potential accession of the European Community to the Convention for the Protection of Human

Rights and Fundamental Freedoms would be compatible with the Treaty. Having recalled the purpose of the procedure provided for in Article 228.6 EC, the Court ruled on the admissibility of the request for an Opinion in so far as it concerns the competence of the Community to proceed with this accession, however, noting the absence of precisions on the content of the agreement envisaged, and particularly regarding the arrangements by which the Community envisages submitting to the judicial control machinery established by the Convention, it ruled that the Court is not in a position to give its opinion on the compatibility of accession with the Rules of the Treaty.

Upon consideration of the substantive issue, the Court ruled that, taking into account the present state of Community law and particularly the institutional constitutional implications of accession, accession to the Convention for the Protection of Human Rights and Fundamental Freedoms would not be compatible with the Treaty, recalling nonetheless that fundamental rights form an integral part of the general principles of law whose observance the Court ensures, and that the Convention has special significance for this purpose.

Supplementary information:

On fundamental rights, see also:

ECJ, 1 February 1996, *Perfili*, Case C-177/94; not yet published, paragraph 20

ECJ, 15 February 1996, *Fintan Dufl*, Case C-63/93; not yet published, paragraphs 29-31, 34

ECJ, 29 February 1996, *France and Ireland v. Commission*, Joint cases C-296/93 and C-307/93; not yet published, paragraphs 64-65

Languages:

French (language of the case); German, English, Danish, Spanish, Finnish, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

ECJ-1995-2-010 13-07-1995 T-176/94 K v Commission of the European Communities

a) European Union / **b)** Court of First Instance / **c)** Third Chamber / **d)** 13-07-1995 / **e)** T-176/94 / **f)** K v Commission of the European Communities / **g)** *E.C.R.* FP-II-621 / **h)** .

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.2.2 **Sources of Constitutional Law** - Categories - Unwritten rules - General principles of law.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
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:

Duty of care / Duty to grant assistance / Confidentiality, medical / Tradition, national constitutional / Confidentiality, professional.

Headnotes:

Fundamental rights form an integral part of the general principles of law, the observance of which the Community judicature ensures. For that purpose, the Community judicature draws inspiration from the

constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The European **Convention** on Human Rights, to which Article F.2 EU expressly refers, has special significance in that respect. (cf. points 29-30)

The right to respect for private life enshrined in Article 8 **ECHR** is one of the fundamental rights protected by the legal order of the Community. It includes in particular the right for every person to keep his state of health secret. (cf. point 31)

Fundamental rights, however, do not constitute unfettered prerogatives but may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute, with regard to the objective pursued, a disproportionate and intolerable interference which encroaches upon the very substance of the rights guaranteed. For that reason it is impossible to consider that an official's right to respect for his private life has been infringed where facts concerning his health have been made known to the persons responsible for examining a complaint against the refusal to reimburse medical expenses submitted by him and in support of which those facts were relied on, without any request that it should be dealt with anonymously. That communication is provided for by the relevant rules, it is necessary in order to verify whether claims for reimbursement are substantiated, a verification on which the survival of the common sickness insurance scheme for Community officials depends, and it is not disproportionate in so far as it is confined to a restricted category of persons, all bound by the obligation of professional secrecy under Article 214 EC Treaty. (cf. points 33-45)

Disclosure of a complaint exclusively to the persons competent to deal with it cannot constitute a breach of the principles of assistance and regard for welfare, even if the complaint does contain information which might give rise to a suspicion that the applicant's professional abilities are waning. (cf. point 48)

Summary:

The applicant, an insulin-dependant diabetic, made a claim against a decision of the payments office of the health insurance scheme common to the Community institutions, who had, despite the seriousness of the applicant's illness entitling him to reimbursement at 100% of his medical expenses, only authorised partial reimbursement of his expenses for certain dental care. This claim having been unreservedly distributed to various services within the Commission, he requested the Commission to publicly acknowledge that it erred in divulging his health problems, and that token damages of 1 ECU be paid in respect of same. This request having been implicitly refused, he lodged a claim for annulment of the decisions rejecting his claim and damages, and sought damages against the Commission to the value of 25 000 ECU to compensate the material and moral damage incurred, on the basis of an alleged infringement of Articles 8 and 10 **ECHR** and also the duty of care and the duty to grant assistance. The Court of First Instance, having dismissed the ground for relief based on infringement of the right of freedom of expression due to the applicant's failure to elaborate on this notion, rejected the ground based on infringement of the right to respect for family and private life, holding that, supposing there were interference in the applicant's private life, this was not without legal justification, being in the interest of «economic stability» and «protection of health», and was not disproportionate to the required objective, in compliance with Article 8.2 **ECHR**. The appeal was therefore rejected.

Supplementary information:

See also supra, CFI, 23 February 1995, *F. v Council* (Case T-535/93); *ECR*, FP-II-163, and the references cited under [Cross-references].

Cross-references:

On the restrictions to the exercise of fundamental rights, see:

ECJ, 13 December 1979, *Liselotte Hauer* (Case 44/79) [1979] *ECR* 3727, 3744

ECJ, 8 October 1986, *Keller* (Case 234/85) [1986] *ECR* 2897, 2912

ECJ, 11 July 1989, *Schräder* (Case 265/87) [1989] *ECR* 2237, 2267

ECJ, 13 July 1989, *Wachauf* (Case 5/88) [1989] *ECR* 2609, 2639

ECJ, 8 April 1992, *Commission v Germany* (Case C-62/90) [1992] *ECR* 2575

ECJ, 5 October 1994, *X v Commission* (Case C-404/92 P) [1994] *ECR* 4737

Languages:

French (language of the case).

ECJ-1995-2-001 23-02-1995 T-535/93 *F. v Council*

a) European Union / **b)** Court of First Instance / **c)** Fourth Chamber / **d)** 23-02-1995 / **e)** T-535/93 / **f)** *F. v Council* / **g)** *E.C.R.* FP-II-163 / **h)** CODICES (French).

Keywords of the Systematic Thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European **Convention** on Human Rights of 1950.
2.1.2.2 **Sources of Constitutional Law** - Categories - Unwritten rules - General principles of law.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.
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.
5.3.13.18 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Reasoning.

Keywords of the alphabetical index:

Court and tribunal, definition / Committee, medical, composition / Confidentiality, medical / Tradition, national constitutional / Measure, reasoning / Civil servant, recruitment / Physical unfitness, refusal to appoint.

Headnotes:

Fundamental rights form an integral part of the general principles of law which the Community judicature will enforce, as provided for by Article F.2 EU. In safeguarding such rights, the Court draws inspiration from constitutional traditions common to the Member States and from guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, the European **Convention** on Human Rights being particularly significant in that respect. (cf. point 32)

Article 6 **ECHR** does not apply to the medical committee provided for in the second paragraph of Article 33 of the Staff Regulations, since that committee does not exercise a judicial function but is an appeal body entrusted, in the context of the administrative procedure for appointments, with the task of giving a purely medical opinion after the medical officer of the institution has given his opinion. In any event, so far as the observance of the rights of the defence of a candidate for a post is concerned, the composition of the medical committee which excludes the doctor who issued the initial finding of unfitness and which is not exclusively composed of doctors of the institution in question and its detailed rules of procedure which include keeping the person concerned informed through his own doctor, the submission of an opinion by a doctor of his choice, and the possibility of carrying out further examinations and obtaining the opinion of specialists are such as to ensure a full and impartial examination of that candidate's position. (cf. points 35-36)

The duty to state reasons for the refusal to appoint a candidate to a post on grounds of physical unfitness must be balanced with the requirements of medical confidentiality. That balance is achieved by allowing the person concerned to require the grounds of unfitness to be communicated to the attending practitioner of his choice, to enable the latter to advise him on the possibility of challenging the reasons for refusing to recruit him. (cf. point 37)

In exercising its power to review the legality of a refusal to appoint on grounds of physical unfitness, the Community judicature cannot substitute its own assessment for that of the doctors, nor, in particular, for the assessment of the medical committee, which must therefore be considered definitive provided it was made under conditions which were not irregular. However, the Court does have jurisdiction to verify whether the recruitment procedure was lawfully conducted and, more particularly, to examine whether the decision of the appointing authority refusing to recruit a candidate on account of physical unfitness is based on a medical opinion for which reasons are given, and which establishes a comprehensible link between the medical findings it contains and the conclusion which it reaches. (cf. points 50-51)

Summary:

Winner of a competition organised by the Council and due to take up a typing post, the applicant, who had had surgery on a chondrosarcoma, was declared unfit for work by the medical consultant for the Council and the Medical Commission, to whom the matter was referred under Article 33.2 of the Community Officials' Regulation. This was due to the risk of metastasis, of disabling after-effects of surgery and a survival rate over the next ten years estimated between 30% and 40%. His administrative claim was rejected, and he thus requested the Court of First Instance to annul the Council's decision not to recruit him, the opinions of the medical consultant and the Medical Commission, and also the Council's decision rejecting his claim, invoking an alleged violation of his rights of defence under Article 6 **ECHR**, and grave error in the appraisal of future developments in his state of health. The Court of First Instance rejected the claim, however ordered the Council to pay full costs given the circumstances of the case.

Supplementary information:

Re the respect by the Community judge of fundamental rights as general principles of Community law, see:

CFI, 13 July 1995, *K v Commission* (Case T-176/94); *ECR*, FP-II-621

CFI, 19 June 1995, *Kik v Conseil* (Case T-107/94); not yet published

Re the protection of medical secrecy, see infra:

CFI, 13 July 1995, *K v Commission* (Case T-176/94); *ECR*, FP-II-621

Cross-references:

Re the respect by the Community judge of fundamental rights as general principles of Community law, see:

ECJ, 12 November 1969, *Erich Stauder* (Case 29-69) [1969] *ECR* 419

ECJ, 17 December 1970, *International Handelsgesellschaft* (Case 11-70) [1970] *ECR* 1125

ECJ, 17 December 1970, *Köster and Berodt* (Case 25-70) [1970] *ECR* 1161

ECJ, 14 May 1974, *Nold* (Case 4-73) [1974] *ECR* 491

ECJ, 15 June 1978, *Gabrielle Defrenne* (Case 149/77) [1978] *ECR* 1365

ECJ, 12 October 1978, *Belbouab* (Case 10/78) [1978] *ECR* 1915

ECJ, 13 December 1979, *Liselotte Hauer* (Case 44/79) [1979] *ECR* 3727

ECJ, 18 March 1980, *SpA Ferriera Valsabbia* (joint Cases 154, 205, 206, 226 to 228, 263 and 264/78; 39, 31, 83 and 85/79) [1980] *ECR* 907

ECJ, 19 June 1980, *Testa* (joint Cases 41/79, 121/79 and 796/79) [1980] *ECR* 1979

ECJ, 26 June 1980, *National Panasonic* (Case 136/79) [1980] *ECR* 2033

ECJ, 7 February 1985, *ADBHU* (Case 240/83) [1985] *ECR* 531

ECJ, 11 July 1985, *Cinéthèque* (joint Cases 60 and 61/84) [1985] *ECR* 2605

ECJ, 18 September 1986, *Commission v Germany* (Case 116/82) [1986] *ECR* 2519

ECJ, 8 October 1986, *Keller* (Case 234/85) [1986] *ECR* 2897

ECJ, 30 September 1987, *Demirel* (Case 12/86) [1987] *ECR* 3719

ECJ, 18 May 1989, *Commission v Germany* (Case 249/86) [1989] *ECR* 1263

ECJ, 11 July 1989, *Schräder* (Case 265/87) [1989] *ECR* 2237

ECJ, 13 July 1989, *Wachauf* (Case 5/88) [1989] *ECR* 2609

ECJ, 21 September 1989, *Hoechst AG* (joint Cases 46/87 and 227/88) [1989] *ECR* 2859

ECJ, 17 October 1989, *Dow Benelux NV* (Case 85/87) [1989] *ECR* 3137

ECJ, 17 October 1989, *Dow Chemical Ibérica* (joint Cases 97/87, 98/87 and 99/87) [1989] *ECR* 3165

ECJ, 18 October 1989, *Orkem* (Case 374/87) [1989] *ECR* 3283

ECJ, 13 December 1989, *Augustin Oyowe and Amadou Traore* (Case C-100/88) [1989] *ECR* 4285

ECJ, 8 April 1992, *Commission v Germany* (Case C-62/90) [1992] *ECR* 2575

ECJ, 28 October 1992, *Ter Voort* (Case C-219/91) [1992] *ECR* 5485

ECJ, 24 March 1994, *Dennis Clifford Bostock* (Case C-2/92) [1994] *ECR* 955

ECJ, 5 October 1994, *X v Commission* (Case C-404/92 P) [1994] *ECR* 4737

Languages:

French (language of the case).