

2005/03/31 - I. ÚS 554/04: PERSONAL FREEDOMS

HEADNOTES

In the case of the imposition of an unconditional sentence of imprisonment, it is manifestly also necessary to examine whether or not, in connection with the length of the proceeding, the interference with the complainant's personal liberty (Art. 8 para. 2 of the Charter), generally foreseen by the constitutional order, remains an interference that is proportional. In other words, it is necessary to examine the relation of the public good, represented by the objective of punishment, to the fundamental right to personal liberty, which may be restricted only by law, yet only under the condition that it is a measure necessary in a democratic society and the aim pursued cannot be accomplished by less restrictive means. That is, even statutorily foreseen restrictions on fundamental rights must be interpreted in a constitutionally conforming manner such that, among other things, their application passes the test of proportionality.

The protection of the right, under Art. 6 para. 1 of the Convention, to a proceeding of a commensurate length, alternatively to redress for its violation, can be attained even by means which are peculiar to criminal law. Thus the ordinary courts are obliged to make use of all such means afforded by criminal law in order to redress the violation of the right to have one's matter heard within a reasonable time, alongside a violation of the right to personal liberty. This should be accomplished in such a manner as to ensure, above all, the protection of the complainant's fundamental rights, and at the same time to exclude that the Czech Republic becomes responsible under international law for the violation of its obligations arising from the Convention.

The ordinary courts' deliberations on punishment or, in connection with the period of time that has passed since the commission of the offense and in view of the length of the criminal proceeding, directly on the further permissibility of prosecution itself, must be structured onto three planes. The first consists of considerations resting on criminal law enactments, followed by the test of proportionality flowing from the imperative of the law-based state and of personal liberty as construed within it (the constitutional plane), and lastly placing the length of the proceeding into the balance in the eventuality that a sentence is imposed (the plane of the Convention and responsibility under international law).

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

I N THE NAME OGF THE CZECH REPUBLIC

On 31 March 2005 the Constitutional Court, in a panel composed of its Chairman, JUDr. Miloslav Výborný, and Justices, JUDr. Jiří Mucha and JUDr. Eliška Wagnerová (Justice Rapporteur), in the matter of the constitutional complaint of Petr Holeček . . . currently serving a sentence in the Kuřim Penitentiary . . . against the 26 May 2004 ruling of the Supreme Court of the Czech Republic, file no. 8 Tdo 358/2004, with the Supreme Court of the Czech Republic taking part as a party to the proceeding, decided as follows:

I. Due to its failure to respect the principles contained in Art. 1 para. 1 and Art. 4 of the Constitution of the Czech Republic, the Supreme Court of the Czech Republic, in the 26 May 2004 ruling, file no. 8 Tdo 358/2004, violated the complainant's fundamental right under Art. 8 para. 2 of the Charter of Fundamental Rights and Basic Freedoms.

II. These rulings are therefore quashed.

REASONING

I.

In a timely filed constitutional complaint, that duly met the other requirements, the complainant contested the decision of the Supreme Court of the Czech Republic specified above.

As the complainant stated in his constitutional complaint, in the 28 February 2002 judgment of the Regional Court in Brno, file no. 46 T 17/2001, in conjunction with the 9 October 2003 judgment of the High Court in Olomouc, file no. 1 To 82/2003, the complainant was found guilty of committing the criminal offense of fraud under § 250 paras. 1, 4 and the criminal offense of embezzlement under § 248 paras. 1, 3 lit. c) of the Criminal Code and was given a total sentence of imprisonment of five and one half years, to be served in a high security penitentiary.

The complainant submitted an extraordinary appeal against the appellate court's judgment, and the Supreme Court of Czech Republic, in the ruling contested in this case,

rejected that appeal as manifestly unfounded.

The complainant is of the view that, in issuing its ruling, the appellate court violated his right to fair process under Art. 36 para. 1 of the Charter of Fundamental Rights and Basic Freedoms and Art. 6 para. 1 of the Convention for the Protection and Human Rights and Fundamental Freedoms, as the criminal prosecution should have been dismissed pursuant to § 11 para. 1 lit. j) of the Criminal Procedure Code.

In this connection, the complainant made reference to the rulings of the Supreme Court of the Czech Republic, file nos. 4 Tz 1/2002 and 7 Tz 316/2001, in which the Supreme Court reached the legal opinion that for a proceeding to last more than six years brings it into conflict with the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter „Convention“). According to Art. 6 para.1 of the Convention, parties to a judicial proceeding have the right to fair process and the resolution of their matter within a reasonable time. According to the complainant, the constant jurisprudence of the European Court of Human Rights is constructed on the position that it is not tolerable for a criminal proceeding (up through the final decision) to last more than six years. In addition to the judgments cited in the above-mentioned Supreme Court rulings, the complainant referred to the judgment in the matter of Santos v. Portugal, in which proceeding lasting six years and two months was determined to be disproportionately long, this despite the fact that the complainant had been missing during part of that period.

The complainant further drew attention to the fact that, in the above-mentioned rulings, the Supreme Court of the Czech Republic inferred that, if the infringement of the right to fair process gave rise to a claim of just satisfaction on the part of the injured party, a means must be found, according to the Czech legal order, how to deduce consequences from the violation of these rights. The complainant inferred that, according to the views of the Supreme Court of the Czech Republic as stated in the above-cited decisions, the analogical application of § 11 para. 1 lit. ch) of the Criminal Procedure Code (cited, according to relevant rulings, in the wording prior to amendment) is just such an acceptable manner.

The complainant further referred to the content of ruling no. 7 Tz 316/2001, in which the Supreme Court of the Czech Republic explicitly stated that, if the right and obligation of the state to prosecute and punish a perpetrator comes into extreme conflict with the right of the accused to have his case heard within a reasonable time, by its inactivity the state deprives itself of the right to prosecute and punish the perpetrator of criminal conduct. In the complainant's view, the Supreme Court of the Czech Republic established that such a manner of proceeding by bodies active in the criminal justice system markedly weakens the legal certainty of the accused and his confidence that state authorities will safeguard his fundamental rights and basic freedoms.

According to the complainant, it must be emphasized, in relation to the specific criminal prosecution against him, that it was initiated in 1993, in the period from 4 May 1995 until 22 October 1997 not a single procedural step was taken, the preliminary proceeding was completed on 15 December 1998, the indictment was issued on 15 February 1999, and the first main hearing was not scheduled until 20 February 2002.

The complainant believes that, with the exception of motion to admit further evidence concerning the graphological testing of the authenticity of his signature, he did not contribute in any way to the inordinate length of the proceeding. According to the complainant, however, that delayed the passing of judgment by several months and did not have substantial influence on the overall length of the criminal proceeding.

In the extraordinary appeal, the court did not, however, concur with this line of argument; on the contrary, it referred to the Constitutional Court ruling, no. II. ÚS 32/2003, according to which the violation of the right to fair process, in the form of incommensurate delay, does not establish grounds for the application by analogy of § 11 para. 1 lit. j) of the Criminal Procedure Code. At the same time, it cites a further two Constitutional Court judgments, nos. IV. ÚS 215/96 and II. ÚS 70/97. According to the complainant, however, these judgments cannot be considered as evidence of constant jurisprudence; moreover, they do not concern the field of criminal law, rather civil and administrative law. In the complainant's view, broad conclusions in the field of criminal law cannot be drawn from these Constitutional Court decisions. In this context, the complainant made repeated reference to the Supreme Court's view, contained in its ruling no. 7 Tz 316/2001, according to which international obligations, especially where they take precedence over domestic law, may not be mere proclamations, the violation of which should have no repercussions for the state in question. The opposite interpretation would in no way compel the signatories to rectify a problem and in essence would allow for the unlimited violation of the right in question. Such an interpretation would conflict with Art. 17 of the Convention, which provides that „[N]othing in this Convention may be interpreted as implying for any State, group, or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.“

According to the complainant, the court's arguments in the extraordinary appeal, which were based on the Constitutional Court decision, no. II. ÚS 32/2003, represented de facto a defense of the outdated theory of legal dualism, where the infringement of international obligations do not result in direct effects, on the domestic law plane. Thus, in the complainant's view, the cited Article 17 of the Convention does not represent a binding interpretational rule, according to which a signatory state may not consciously conduct a criminal trial in conflict with its own international obligations and leave it up to the convicted person to submit ex post a complaint against that state to the European Court of Human Rights. This is all the more the case as the Convention represents a directly applicable part of the legal order which is of a higher legal force than the Criminal Procedure Code itself.

The complainant further refers to the fact that, since the start of the criminal prosecution, he has faced a possible imprisonment in a range from five to twelve years and that after a criminal proceeding lasting ten years, which in essence corresponds to the length of the period of limitations according to the rules in effect when the criminal prosecution was initiated, he was convicted and given a sentence of five and a half years imprisonment. In other words, the complainant has been affected by an ongoing criminal proceeding for a period of more than fifteen years, has been deprived of the genuine possibility to make further plans for his personal life, to make practical arrangements for his personal relations. In addition, in the complainant's view, after decades of life as an upright citizen, a long-term sentence of imprisonment represents sheer repression without any educational effects.

In consideration thereof the complainant proposed that the Constitutional Court quash the contested ruling of the Supreme Court of the Czech Republic.

In reaction to the Constitutional Court's request, the Chairman of the relevant panel of the Supreme Court of the Czech Republic gave his view on the submitted constitutional complaint. The Supreme Court of the Czech Republic above all made reference to the reasoning in the contested ruling, in which it stated that all circumstances that are significant for the resolution of the issues in dispute, as well as to the consideration which it guided its decision. It also stated that the objections put forward by the complainant in his constitutional complaint are a verbatim repetition of the arguments made by him in the extraordinary appeal.

The Supreme Court of the Czech Republic further observes that it had agreed with the accused objections regarding delay in the criminal proceeding and noted that the infringement of the right to have ones matter heard within a commensurate time represents a significant encroachment upon the principles guaranteeing the right to fair process. At the same time, however, it stated that this fact did not, in and of itself, establish grounds for proceeding in accordance with § 11 para. 1 lit. j) of the Criminal Procedure Code, that is, for dismissing the criminal prosecution in consequence of the infringement of Art. 6 para. 1 of the Convention.

To the extent the complainant seeks the dismissal of the criminal prosecution and bases his assertion on the Supreme Court decisions, nos. 4 Tz 1/2002 a 7 Tz 316/2001, these are extraordinary decisions which cannot be considered as groundbreaking, as not only the Supreme Court, but also the Constitutional Court later departed from this decisional practice (the Supreme Court of the Czech Republic cited a number of its decisions, as well as Constitutional Court judgments nos. I. ÚS 296/04, and II. ÚS 7/03 and its rulings nos. II. ÚS 527/03 and IV. ÚS 487/03). It follows from all these decisions that the only appropriate way to proceed in a trial which has been unreasonably long, is to declare the infringement of the constitutionally guaranteed right to have ones matter heard within a reasonable time and award just satisfaction, in the sense of Art. 41 of the Convention, to the person who feels affected in his rights by the conduct of the criminal justice bodies. The European Court of Human Rights itself sanctioned an infringement of the rules laid down in

Art. 6 para. 1 of the Convention by concluding that the state was responsible in relation to the accused and then by awarding just satisfaction in the form of monetary compensation. In the Supreme Court's view, in none of its decisions did it elect a remedy in the form of dismissing a proceeding, which would, in essence, represent a breach of the principle of officiality and a weakening of the rights of the complaining party.

The Supreme Court of the Czech Republic is thus of the view that it proceeding in accordance with the appropriate provisions of the Criminal Procedure Code and that its decision did not result in a violation of Art. 6 para. 1 of the Convention, as the complainant asserts in his constitutional complaint. The Supreme Court of the Czech Republic thus proposes that the Constitutional Court deny the complaint by rejecting it on the merits in its judgment.

In order to assess these objections and the assertions of the complainant and the party to the proceeding, the Constitutional Court also requested from the Regional Court in Brno the case file, no. 46 T 17/2001.

II.

In accordance with the work schedule, the constitutional complaint was allotted to JUDr. Eliška Wagnerová, Ph.D, as Justice Rapporteur, who as Deputy Chief Justice of the Court was then assigned as a non-permanent member of the Constitutional Court's First Panel. Following the change of the work schedule, brought about by the addition to the Constitutional Court of a thirteenth Justice, with effect from 17 September 2004 the Justice Rapporteur was commissioned as a non-permanent member of the Fourth Panel. According to § 4 para. 1 of the current work schedule, (see www.usoud.cz) the constitutional complaint in this case must be heard by the panel to which is assigned the Justice Rapporteur to whom the matter was allotted; however, the matter retains the same file number. For this reason, the constitutional complaint was heard by the Constitutional Court's Fourth Panel, although it did retain the file no. I. ÚS 554/04.

In conformity with § 44 para. 2 of Act No. 182/1993 Coll., on the Constitutional Court, as amended (hereinafter „Act on the Constitutional Court“), the Constitutional Court sought the consent of the parties to the proceeding to dispense with an oral hearing as it came to the conclusion that further clarification of the matter cannot be expected from such a hearing.

After the Constitutional Court declared that the constitutional complaint is admissible (§ 75 para. 1 a contrario of the Act on the Constitutional Court), was timely submitted (§ 72 para. 3 of the Act on the Constitutional Court), and fulfills the other requirements called for by the Act [§ 30 para. 1, § 72 para. 1 lit. a) of the Act on the Constitutional Court], it proceeded to consider the merits of the matter. It then came to the conclusion that the

complaint is well-founded, as the contested decisions constituted a violation of the complainant's fundamental rights, however on grounds other than those adduced by the complainant in his constitutional complaint.

III.

The right to have one's matter heard without unnecessary delay, or the right to have one's matter resolved within a commensurate time, is an integral part of the right to fair process, that is the fundamental rights guaranteed in Art. 36 para. 1, in conjunction with Art. 38 para. 2, of the Charter of Fundamental Rights and Basic Freedoms (hereinafter „Charter“) and Art. 6 para. 1 of the Convention. The Constitutional Court has announced this proposition of law in many of its decisions in which it considered the incommensurate length of the proceeding (for example, cases nos. I. ÚS 5/96, IV. ÚS 358/98, and I. ÚS 600/03). The time-frame within which parties to a proceeding receive a final decision in a matter is an inseparable part of the benchmark of the overall fairness of the proceeding. The greater this time-frame is, the more indistinct are the contours of justice in the eyes of the direct parties to the proceeding, but also in the general perception of the public and in public opinion. On the whole, this weakens the credibility of the state, and specifically that of the judicial branch. A proceeding that is of an incommensurate length is thus directly reflected in citizen's trust in the state, its institutions, and in the law, which is a foundational condition for the functioning of a legitimate, democratic law-based state.

In the case under consideration is being adjudicated whether it constitutes an infringement of the complainant's fundamental rights for the Supreme Court of the Czech Republic, where it has acknowledged in its contested decision that the proceeding has been unreasonably long and was burdened in some phases by delays, not to weigh this conclusion when deciding on the merits of the case, and thus to tolerate the result of the proceeding before the lower ordinary courts. On the contrary, the Supreme Court of the Czech Republic inferred that such a conclusion does not constitute „such a circumstance as could justify the dismissal of a criminal prosecution in consequence of the violation of Art. 6 para. 1 of the Convention, as there was not in this case an extreme conflict between the rights of the accused and the state, assuring the due course of the criminal proceeding.“

As a preface, the Constitutional Court states that it is familiar with the conclusions contained in the Supreme Court's current jurisprudence relating to the consequences of an infringement of the right to a criminal proceeding of a commensurate length, which would be reflected in the possibility, or even the obligation, to dismiss a criminal proceeding [§ 11 para. 1 lit. j) of the Criminal Procedure Code]. In most of its decisions in the past, the Supreme Court did not concur with the interpretation given by certain lower court, which had inferred from the disproportionate length of a criminal proceeding, thus from the infringement of Art. 6 para. 1 of the Convention, the duty to dismiss the criminal prosecution, although there are decisions to which the complainant referred in the instant constitutional complaint and in which the Supreme Court of the Czech Republic accepted

and affirmed this conclusion (4 Tz 1/2002, 7 Tz 316/2001). The prevailing approach in the jurisprudence of the Supreme Court of the Czech Republic is for that Court to accept such lower court decisions solely in the circumstance that the proceeding was dismissed at some point before the matter was decided on the merits. If, for example, the proceeding was dismissed during the appellate phase, that is, after the reversal of the judgment on the merits, where the infringement of Art. 6 para. 1 of the Convention was considered as grounds for the reversal, the Supreme Court of the Czech Republic did not accept such decision and declared that, to the extent the proceeding has already reached the merits, it must be decided on the merits, and to the extent it was decided on the merits, in the Supreme Court's view, the decision cannot be quashed due to the infringement of the right to have the matter heard within a reasonable time (compare Hrachovec, P., Extraordinary Appeals in Criminal Matters, the Third Year, The Bulletin of Advocacy, 11-12/2004, p. 19). Similarly as in the case of its presently contested ruling, in its prevailing jurisprudence the Supreme Court of the Czech Republic proceeds on the basis of the view that the Convention prescribes for such cases neither that criminal prosecution is impermissible, nor that there are grounds for quashing the judgment, rather it allows only for just satisfaction pursuant to Art. 41, unless the judgment that the Convention has been infringed itself constitutes sufficient satisfaction.

In a number of its past decisions, the Constitutional Court has concurred with that interpretation (rulings nos. II. ÚS 32/03, II. ÚS 7/03, II. ÚS 527/03, III. ÚS 217/03, III. ÚS 95/04, and IV. ÚS 8/03), where it concluded that a criminal prosecution may not be dismissed merely due to delay in the proceeding.

IV.

In the matter under consideration, the Supreme Court of the Czech Republic addressed the infringement of Art. 6 para. 1 of the Convention and the consequences thereof for the criminal prosecution of the complainant in a manner which, for that matter, the Constitutional Court had also in the past in the above-mentioned decisions. In the matter currently under consideration, however, the Constitutional Court came to the conclusion that, along with the issue of fair process and the component thereof, that is the right to have one's matter heard within a commensurate time, it is also necessary to examine the issue of what consequences a violation of what are by their nature procedural fundamental rights has in the sphere of the complainant's fundamental rights which are by their nature substantive. In the case of the imposition of an unconditional sentence of imprisonment (as in the given case), it is manifestly also necessary to examine whether or not, in connection with the length of the proceeding, the interference with the complainant's personal liberty (Art. 8 para. 2 of the Charter), generally foreseen by the constitutional order, remains an interference that is proportional. In other words, it is necessary to examine the relation of the public good, represented by the objective of punishment, to the fundamental right to personal liberty, which may be restricted only by law, yet only under the condition that it is a measure necessary in a democratic society and the aim pursued cannot be accomplished by less restrictive means. That is, even statutorily foreseen restrictions on fundamental rights must be interpreted in a constitutionally

conforming manner such that, among other things, their application passes the test of proportionality.

In order to carry out this test, it is necessary, first of all, to examine:

a) factors which are significant for assessing the length of the proceeding from the perspective of delays caused by state bodies, that is, bodies in criminal justice, in relation to the overall length of the proceeding, the seriousness of the criminal accusation, the extent and difficulty of the subject-matter of the criminal proceeding, and last but not least the extent of the separate burden to which the accused is subjected in connection with the length of the criminal proceeding; in contrast, delays in the proceeding caused by the accused may not be taken into consideration;

b) factors important for the assessment of the objective of punishment, such as it is defined in § 23 para. 1 of the Criminal Code: 1. indispensability or necessity of the protection of society from the specific perpetrator of a criminal offense (special deterrence), assessed in light of the life which the perpetrator led after the commission of the act for which he is prosecuted until the decision in his case; 2. the ascertainment whether the accused (again in view of his life style during the above-defined period of time) actually requires education in leading an upright life by means of a punishment imposed in a specific amount, or whether through punishment at all; 3. the actual effectiveness of the punishment imposed in terms of its educative effect on the other members of society (general deterrence) in connection with the lapse of time since the criminal offense was committed.

Following the analysis of the individual factors contained in the two above-specified groups, it will be necessary to draw a conclusion on the issue of whether the restriction of the complainant's personal liberty in consequence of the imposition of punishment, alternatively the restriction of his fundamental rights resulting from the criminal prosecution itself, are still in a commensurate (proportional) relation to the protection of the public good, as specified under b), thereby attained.

A)

An assessment of the length of the proceeding and its proportionality is a relative issue, in which it is necessary to review the relation of the length of the proceeding to further attributes of the proceeding, such as the complexity of its subject matter, the need for the admission of evidence in the course of the proceeding, the conduct and procedural steps of the parties to the proceeding, etc. The conclusion on whether the length of a specific proceeding is commensurate or not, can always be formulated in view of these factors by which the proceeding was directly influenced.

In the given case, the Constitutional Court ascertained from the file of the Regional Court in Brno that the criminal prosecution of the complainant had been initiated by the 18 May 1993 resolution of the investigator, ČVS: MVV - 1955/20-93, which was delivered to the complainant on 21 May 1993. The criminal prosecution concerned only certain acts for the commission of which the complainant was subsequently found guilty in a judgment that became final and effective. The criminal proceeding was completed on 9 October 2003, when the judgment of the High Court in Olomouc, file no. 1 To 82/2003, became final and effective. Thus, altogether the proceeding lasted more than 10 years.

In the course of the proceeding, the Constitutional Court found that there were several phases during which the competent bodies in the criminal justice system remained entirely inactive, in other words, in which they took no procedural steps whatsoever. At the very beginning of the preliminary proceeding, it took more than one year from the initiation of the criminal proceeding before the complainant was questioned (30 May 1994). The Constitutional Court has ascertained that between 4 May 1994 and 15 October 1997, that is for a period of more than two years, not a single procedural step was taken; likewise the period of time that elapsed from the issuance of the indictment by the state attorney (15 February 1999) until the first step was taken by the Regional Court in Brno (a closed hearing on 4 September 2001) was again in excess of two years. It can thus be concluded both that bodies in the preliminary proceeding and the ordinary court itself significantly delayed the proceeding, which contributed to the proceeding's overall length.

In contrast, the complainant's conduct did not in any significant way contribute to the overall length of the proceeding. In the course of the proceeding, the complainant and his defense attorney cooperated with the bodies of the criminal justice system, and appeared for the various phases of the criminal proceeding. The sole exception was the complainant's action during February, 2002, when the complainant failed to take delivery of documents, thus thwarting the holding of the main hearing ordered for 21 February 2002, as well as his motion, made in the course of the of the main hearing on 8 October 2002, to obtain an expert opinion (from the field graphology) on his hand-written signature, even though he must have been aware of the fact that he had personally signed these documents. An expert opinion on handwriting was then delivered to the court on 13 January 2003. The complainant thereby contributed to prolonging the proceeding by a total of four months (February 2002, and November, 2002 until January, 2003).

There is not doubt that additional factors also had some impact on the overall length of the proceeding, above all the considerable extent of the complainant's activities which the bodies of the criminal justice system assessed, further the nature of this activity and changes in the legal rules, in which are reflected, among other things, the development of societal reflection upon conduct such as the complainant's. It must be mentioned that the complainant committed the given conduct in the period 1991-1992, when the entrepreneurial milieu and market economy principles were only gradually being established into the former Czechoslovakia. It was a period of entrepreneurial euphoria and optimism, which often manifested itself in the fact that various forms of commercial conduct preceded the legal regulation thereof, or the legal regulation was often merely an

ex post reaction to the forms of practical entrepreneurial activity. These facts were reflected, among other things, in amendments to the criminal law and were otherwise directed manifested in the course of the complainant's criminal prosecution, when with the growing length of the proceeding there were various kinds of requalifications of the acts for which the complainant had originally been charged (violation of the obligations when administering the property of another, the violation of binding rules of economic relations). In other words, along with the growing length of the proceeding, the fundamental societal and economic changes which occurred during the 1990's doubtless had impact on the assessment of the criminality of the given conduct and its qualification. According to the Constitutional Court, this circumstance did not, however, relieve the bodies in the criminal justice system of their obligation to perform their duties in such a way that delays in the proceeding did not occur. The Constitutional Court is of the opinion that the individual may not under any circumstances suffer the consequences of the fact that, during that time, these issues were new or difficult to evaluate. In the Constitutional Court's view, it is likewise necessary to take into consideration even the fact that the ongoing criminal prosecution negatively influences the personal life of the criminally accused, who must be deemed not guilty until a final decision on the merits; yet, the mere fact of criminal prosecution is a burden for each criminal defendant. The ordinary courts did not, however, ascertain what sort of specific burdens the complaint might have to bear.

B)

There is no doubt that, as a proceeding becomes more and more drawn out, the basic relation between the criminal act and the imposition of punishment becomes attenuated. The amount of time elapsing between the complainant's criminal conduct and the imposition of the final decision has an immediate impact on the objective of punishment, which should be achieved by the specific punishment that is imposed. Apart from the definition of the objective of punishment, contained in § 23 of the Criminal Code, its objective is to protect society from the perpetrator of criminal offenses, prevent the convicted person from further engaging in criminal activities, and educate him to lead an upright life, thereby also having an educative effect on other members of society.

With a growing time lapse from the commission of a criminal offense both the components of special and general deterrence fade. All the more so in a situation where it was shown in the criminal proceeding that the conduct for which the complainant was convicted was clearly an excess in his life and represents a deviation from a life otherwise lead in a blameless fashion, both before, and in particular after, the commission of the criminal behavior and during the criminal proceeding. The capability of punishment to have an educative influence on society is likewise very much reduced after such a long time. All the more so where the society has, in the meantime, gone through profound changes in the course of an economic, social, and legal transformation and has, in the interim, been confronted with far more complex and dangerous forms of economic criminality. The Constitutional Court is thus of the view that, in the given case, the objective of

punishment, such as it is defined in § 23 of the Criminal Code, cannot, after more than twelve years have passed since the commission of the criminal conduct, be entirely attained by the imposition of a punishment of imprisonment, which, in terms of its objective or function, in relation to the complainant represents sheer repression. However, the law (§ 23 of the Criminal Code) does not envisage this as the main objective of punishment, so that it can be applied solely as an accessory objective, that is, in addition to the main objective of punishment as laid down in § 23 of the Criminal Code. At the same time, it should not be overlooked that imprisonment is the most severe sanction envisaged in the Criminal Code.

Criminal law relations are relations between the state and the individual. It is a state authority which initiates the criminal prosecution of an individual and another which makes the determinations of guilt and of the punishment to be imposed. Therefore, as a matter of constitutional law it involves a weighty assessment of the appropriateness of the relation between the public interest defined in the Criminal Code by the objective of punishment and the fundamental rights of specific accused persons, in particular the right that his guilt or innocence and his punishment be decided upon within a reasonable time, as well as the right to personal liberty. Naturally the mentioned public interest cannot apply absolutely, just as the complainant's fundamental right cannot be absolutized. It is therefore necessary to find a proportional relation and a just balance between the restriction on the fundamental rights of the individual and the public interest.

V.

On the basis of the above-stated considerations, the Constitutional Court reached the conclusion that, in imposing the specific punishment, the ordinary courts failed to respect the constitutional requirement of proportionality. In other words, the restrictions on the complainant's personal liberty in the form of the imposition of unconditional punishment of imprisonment for a term of five and one half years appears, in view of all circumstances of the given case ascertained by the Constitutional Court, disproportionate to the public interest in the punishment of perpetrators of criminal offenses, or the aim of punishment as defined in the Criminal Code.

In the instant case, however, it is not the Constitutional Court's task to anticipate what specific punishment should be imposed, and in what amount, in order for the constitutional principle of proportionality to be respected. Nevertheless, the Constitutional Court points out that criminal enactments present a whole host of means to effect that purpose, for example, from refraining from punishment or the exceptional commutation of a sentence of imprisonment below the minimum prescribed sentencing range (which can be employed in instances where it is justified by, among other things, the circumstances of the case or if the statutory range of sentences are employed in a disproportionate fashion), through the conditional suspension of such sentence of imprisonment as is imposed, or finally the dismissal of the criminal prosecution.

At the same time, however, it is necessary to balance various factors so that the employment of such means does not result in the encroachment upon rights of other parties to the criminal prosecution, for example, the complaining parties who also are expecting the protection of their rights from the proceeding. In the Constitutional Court's view, therefore, the dismissal of a criminal prosecution is rather an option for exceptional cases, appropriate in the circumstances where, after assessing all of the above-mentioned facts, the ordinary court finds that the conditions are met for proceeding in accordance with § 223 para. 2 of the Criminal Procedure Code in conjunction with § 172 para. 2 lit. c) of the Criminal Procedure Code [alternatively § 257 para. 1 lit. c) of the Criminal Procedure Code].

The Constitutional Court observes on this point that the Regional Court in Brno evidently took the above-indicated considerations into account in its 28 February 2003 judgment, file no. 46 T 17/2001. It is stated in the reasoning that the court „in consideration of all pertinent circumstances of the case as well as of the character of the defendant, when in particular it placed stress on the fact of his clean record, following the minimal period of 8 years since his most recent offense . . . the sentence imposed upon him was at the very lower edge of the prescribed range of punishments. As regards the defendant, in view of his life up till now, where he must be viewed as a person who has not as yet been criminally punished, while allowing for his partial admission of guilt, the court came to the conclusion that it can still, one last time, impose a reformatory punishment and, in the court's view, the sentence imposed of two years imprisonment conditionally suspended for an extended probational period is a punishment that is sufficient to ensure the aim of punishment is attained, that is both general and special deterrence.“ The Constitutional Court considers it necessary to observe on this point that a further two years have passed since the first instance court issued that judgment and that, in addition to the considerations directly arising from criminal law norms, the constitutional law imperative of proportionality must always be considered as well.

VI.

The Constitutional Court has, already in the past in relation to the Czech Supreme Court's decision-making on extraordinary appeals, ruled that judicial decision-making, whether in a proceeding on an ordinary or an extraordinary appeal, may not operate outside the framework for the protection of the fundamental rights of the individual, all the more so as Art. 4 of the Constitution of the Czech Republic places the fundamental rights under the protection of the judicial power (judgments file no. I. ÚS 55/04, file no. I. ÚS 4/04). In a democratic law-based state all public authorities are obliged to respect the fundamental rights and basic freedoms; the role of courts is to provide protection of them or, in the case of the Constitutional Court, a special and specific form of protection. If the protection of fundamental rights and basic freedoms is the pivot of the functioning of the democratic law-based state, in the application of them, the principle of the direct and immediate nature of their application must be insisted upon. If an ordinary court itself finds that a fundamental right or basic freedom has been infringed, it is obliged to take all

measures to ensure that no further infringement occurs and to redress the existing infringement by means which it has competence to employ. This point is otherwise reflected in the complementary principle of subsidiarity, which applies in proceedings before bodies endowed with the power to afford individuals specific protection of their fundamental rights and basic freedoms (the Constitutional Court, the European Court for Human Rights), but only in the eventuality that the mechanisms for protection before other public bodies (or the domestic bodies) have failed. In view of the maxims of the law-based state, it is thus impermissible for an ordinary court to acknowledge the infringement of a fundamental right while not, however, drawing therefrom the appropriate conclusions leading to an effective protection of the individual's fundamental rights.

It follows from all of the above-described facts that the Supreme Court of the Czech Republic has failed to meet its constitutional obligation to afford protection to the complainant's fundamental rights (Art. 4 of the Constitution of the Czech Republic), in consequence of which it also violated the basic principles upon which the substantive law-based state are constructed (Art. 1 para. 1 of the Constitution of the Czech Republic). If, in such a situation, the Supreme Court of the Czech Republic left undisturbed the lower-court decision which had imposed upon the complainant an unconditional sentence of imprisonment, without having respected the requirements of a fair balance between the restriction of the right to personal liberty, on the one hand, and the public interest in the prosecution and punishment of the complainant, then it violated Art. 8 para. 2 of the Charter. The grounds for finding that it was disproportionate were, on the one hand, the failure to take into account the length of the court proceeding, just as the period of time that had elapsed since the commission of the act for which the complainant had been found guilty and, on the other hand, the failure to consider the complainant's previous and subsequent life, the burden resulting from the length of the criminal proceeding, etc.

VII.

It follows from the above that, due to the disproportionate restriction upon the complainant's personal liberty, the Constitutional Court has found a violation of his fundamental right guaranteed in Art. 8 para. 2 of the Charter. The incommensurate length of the criminal proceeding then represents a significant factor (naturally not the sole one) which led the Constitutional Court to the conclusion, as formulated above, regarding the disproportionate relation between the restriction on the complainant's personal freedom and the public interest represented by the aim of criminal prosecution.

In view thereof, it is necessary to deal with the issue of to what extent such conclusion is capable of redressing the violation of the complainant's right that his proceeding be of a commensurate length. In other words, under what circumstances can such a conclusion, and the consequence flowing from it to the benefit of the complainant's personal liberty, be considered as sufficient redress for the violation of the right that one's proceeding be

of a commensurate length, such that Art. 6 para. 1 of the Convention also be respected.

In the contested ruling, the Supreme Court of the Czech Republic proceeded from a reading of the Convention from which it deduced that no obligation has arisen requiring the ordinary courts to take a prospective violation of Art. 6 para. 1 of the Convention into account either when deciding on the merits (that is, on the complainant's guilt and the imposition of sentence), or when deciding on the permissibility of the criminal prosecution itself. It formulated the conclusion that the sole means of redress results from the Convention, namely by the declaration of a violation of the Convention and the award of just satisfaction.

First of all, the Constitutional Court considers it necessary to emphasize that it is not permissible to deduce, from the mechanism created by the Convention for the protection of fundamental rights, the manner and limits of the protection of fundamental rights on the domestic plane, in the way that the Supreme Court of the Czech Republic did in the contested ruling. The mechanism for the protection of fundamental human rights by means of a proceeding before the European Court of Human Rights is, first and foremost, a subsidiary mechanism, further it is established on the basis of public international law principles, such as the sovereign equality of states, general consensus in concluding a multilateral international agreement, the responsibility under international law of states as subjects of international law, non-interference into the internal affairs of other states, the precedence of international law over domestic law, etc. The protection of human rights by means of an international law mechanism thus attains only such level as is generally acceptable in the international milieu and is equipped with the limited devices of public international law. It thus represents merely the minimum standard to which the international community of states is capable of giving it unanimous assent.

The international law mechanism for protection of fundamental rights comes into play only in the case that such protection on the domestic law plane has miscarried (in this respect, it constitutes a subsidiary protection). The conduct of organs of the States Parties, which fail in domestic law proceedings to ensure the protection of the fundamental rights guaranteed by the Convention, is attributable, in terms of responsibility under international law, to the respective State Party. The European Court of Human Rights is, therefore, called upon to decide solely concerning a state's responsibility for its infringements of the Convention, it is not endowed with cassational authority in relation to a domestic court decision and in relation to the individual is authorized to award him just satisfaction. In no sense, however, can it be deduced from the competence of the European Court of Human Rights the manner in which the protection of the fundamental rights guaranteed in the Convention is ensured on the domestic law plane.

The relevant case-law of the European Court of Human Rights has established that, in the case of a violation of the right to a proceeding of a commensurate length, the Court either declares a violation of the Convention, or alternatively awards just satisfaction. Although neither the European Court of Human Rights nor the European Commission for Human Rights has deduced from the violation of Art. 6 para. 1 of the Convention a State Party's

obligation to redress a violation by dismissing the criminal prosecution or by a commutation of the sentence, neither did they rule out such form of redress. In view of their mentioned authority, while remaining consistent they could not even deduce such an obligation. On the contrary, the European Court of Human Rights considers that such form of redress constitutes a sufficient remedy, assuming that the court explicitly employs it due to the infringement of the right to have one's matter heard within a reasonable time and, as far as concerns the reduction in punishment, states the degree to which the punishment was, on these grounds, reduced (the judgment in *Eckle v. SRN* of 15 July 1982; compare also *Repík, B., On the Issue of the Legal Remedies for Exceeding a Commensurate Period of Time for a Proceeding*, *Bulletin of Advocacy*, 6-7/2001, p. 13). Under these circumstances the European Court for Human Rights is of the view that the State Party provided sufficient protection of the rights arising from the Convention, with the consequence that the complainant lost the status as an injured party under Art. 34 (previously Art. 25) of the Convention and thereby also the standing to submit a complaint. In its 26 June 2001 judgment in the matter of *Beck v. Norway*, the European Court of Human Rights formulated more precisely the relation between a violation of the right to have one's matter resolved within a reasonable time and the redress thereof in the form of moderating the punishment to be imposed, by stating that the reduction of punishment does not deprive the individual of his status as an injured party under Art. 34 of the Convention. However, there is an exception to this general rule, where the national body in a sufficiently transparent manner has declared the violation of the rule that a proceeding must be of a commensurate length and has already redressed this error by a reduction in the punishment, in an explicit and quantifiable way. If such a condition is met, then the European Court of Human Rights will reach the conclusion that Art. 6 para. 1 of the Convention has been violated.

At the same time, such manner of redress (in the weighing of the punishment) is not unique among the States Parties to the Convention. Taking a comparative perspective, among the States Parties to the Convention is found a number which, within their domestic law, directly apply the redress for violations of the right to have one's criminal prosecution completed within a commensurate time (Belgium, the Netherlands, FRG, Norway, and Switzerland). In the event that the length of a proceeding has exceeded a commensurate period of time, the courts in these states have inferred, through their case-law, consequences affecting the imposition of criminal sanctions and, in exceptional cases, affecting the possibility to criminally prosecute (compare *Repík, B., On the Issue of the Legal Remedies for Exceeding a Commensurate Period of Time for a Proceeding*, *Bulletin of Advocacy*, 6-7/2001, p. 12 or *Repík, B., The European Convention on Human Rights and Criminal Law*, *Orac Publishers, Prague 2002*, p. 143). For example, in the FRG the Federal Constitutional Court has inferred the necessity for such redress directly from the principle of the law-based state, more particularly from the principle of proportionality (compare, for example, the decision of 5 February 2003, file no. 2 BvR 327/02 or the decision of 21 January 2004, file no. 2 BvR 1471/03).

From this it follows that the protection of the right, under Art. 6 para. 1 of the Convention, to a proceeding of a commensurate length, alternatively to redress for its violation, can be attained even by means which are peculiar to criminal law. Thus the

ordinary courts are obliged to make use of all such means afforded by criminal law in order to redress the violation of the right to have one's matter heard within a reasonable time, alongside a violation of the right to personal liberty. This should be accomplished in such a manner as to ensure, above all, the protection of the complainant's fundamental rights, and at the same time to exclude that the Czech Republic becomes responsible under international law for the violation of its obligations arising from the Convention.

In other words, in subsequent proceedings the ordinary courts must proceed, in conformity with the existing case-law of the European Court of Human Rights, so as to respect and protect both the complainant's personal liberty and to sufficiently redress the violation of the right to have his case heard within a reasonable time. The ordinary courts' deliberations on punishment or, in connection with the period of time that has passed since the commission of the offense and in view of the length of the criminal proceeding, directly on the further permissibility of prosecution itself, must be structured onto three planes. The first consists of considerations resting on criminal law enactments, followed by the test of proportionality flowing from the imperative of the law-based state and of personal liberty as construed within it (the constitutional plane), and lastly placing the length of the proceeding into the balance in the eventuality that a sentence is imposed (the plane of the Convention and responsibility under international law).

In view of the conclusions stated above concerning the violation of the complainant's fundamental rights, the Constitutional Court has, pursuant to § 82 para. 2 lit. a) Act No. 182/1993 Coll., on the Constitutional Court, as amended, granted the constitutional complaint and, pursuant to § 82 para. 3 lit. a) Act No. 182/1993 Coll., on the Constitutional Court, as amended, quashed the contested decision of the Supreme Court of the Czech Republic.

Notice : Decisions of the Constitutional Court may not be appealed.

Brno, 31 March 2005

Dissenting opinion

of Justice Miloslav Výborný to the reasoning in the Constitutional Court's Judgment No. I. US 554/04

Although I agree with the statement of judgment and the predominant part of the reasoning, I cannot but append the following reservations.

First of all, I consider it appropriate to supplement the judgment's reasoning by calling to mind the fact that, so far as concerns the state of facts, the complainant's case significantly differs from those matters in which, up until the present, the Constitutional Court has adjudicated to the effect that delay in criminal proceedings is no grounds for

declaring criminal prosecution inadmissible. However, even despite these factual dissimilarities causing even me to reach the conclusion that there has been an infringement of the constitutional requirement that the punishment imposed on the complainant be proportional, I find no reason for modifying the Constitutional Court's repeatedly declared position to the effect that „the infringement of the right, under Art. 6 para. 1 of the Convention on the Protection of Human Rights and Fundamental Freedoms, to have one's matter heard within a reasonable time does not, in and of itself give grounds for declaring a criminal prosecution inadmissible, not even in view of the requirement of effective remedy under Art. 13 of the Convention on the Protection of Human Rights and Fundamental Freedoms“ (see, for example, the unpublished rulings Nos. II. ÚS 32/03, IV. ÚS 8/03; further the ruling No. IV. ÚS 487/03 published in the Collection of Judgments and Rulings of the Constitutional Court, Vol. 31, ruling No. 26, and also Judgment No. II. ÚS 7/03 published at www.usoud, even though in this last judgment it is stated as obiter dictum), moreover on the grounds which are explained in the past in the cited Constitutional Court decisions.

I consider it correct that, in case the State is incapable of ensuring the course of a criminal proceeding such that it would be conducted justly, that is, among other things, without undue delay (i.e., within a reasonable time), the accused be adequately redressed for the infringement of this constitutionally guaranteed basic right. This redress can be manifested not only in terms of the criminal sentence handed down, but also in the form of compensation for damage (by which it is, in my view, not always necessary to consider solely material harm) or in the form of financial satisfaction. However, to afford such redress (even if entirely exceptionally) by the dismissal of the criminal prosecution can markedly affect not only the rights of the injured party, but might also undermine the general trust in the democratic law-based State, the task of which, among other things, is through the judiciary duly and justly to decide on matters of guilt and punishment for criminal offenses and not, on the grounds of unconstitutional time lag in the criminal proceeding, to evade such a decision.