

2004/04/08 - II. ÚS 482/02: RESTRICTIONS UPON PROPERTY RIGHTS

HEADNOTES

Art. 11 para. 1 of the Charter guarantees to everyone the right to own property and accords each owner's property right the same content and the same protection. The Charter does not provide, however, that absolutely no restrictions may be placed upon the right of property. Art. 11 para. 3 manifestly permits restrictions upon property rights. The legislature may, by statute, place restrictions on property rights on the grounds of protecting the rights of others and of protecting the public interest, in particular of public health, nature, and the environment. In view of the obligation to preserve the essence and significance of property rights (Art. 4 para. 4 of the Charter), in so doing property rights may not be restricted beyond a proportional degree.

This interpretation is in conformity also with the protection of property under Art. 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. Stated briefly, the European Court of Human Rights adjudges, in accordance with this provision, whether restrictions on the enjoyment of possessions (property rights) pursues a legitimate aim, whether it is in conformity with domestic law, and whether it is proportional in relation to the legitimate aim that is pursued.

A decision, pursuant to § 88 para. 1 lit. b) of the Construction Act, ordering the removal of a structure put up without a construction permit on the another's plot of land without the owner's permission, pursues a legitimate aim consisting in the interest in maintaining construction discipline, in the protection of the environment, and in the protection of the rights of the owner of the plot of land. Laying down the duty to remove a "black" and "unauthorized" structure is an interference that was proportionate to the aims pursued, for it could not have been accomplish by other measures. It is not a sanction which could be possible as an alternative in addition to a fine for a delict against the Construction Code, rather it is a measure the aim of which is to return the land to its original condition.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Constitutional Court decided in a panel in the matter of the constitutional complaint of P.A., represented by JUDr. J. S., an attorney, against the 30 April 2002 judgment of the Regional Court in Hradec Králové, No. 30 Ca 11/2002-25, with the participation of this court as a party to the proceeding and the City Hall of the City of Hradec Králové and the Regional Office of the Hradec Králové Region as secondary parties to the proceeding, as follows:

The constitutional complaint is rejected on the merits.

REASONING

I.

In his timely submitted constitutional complaint, which also in other respects fulfills the requirements prescribed in Act No. 182/1993 Coll., on the Constitutional Court, as subsequently amended, the complainant requested that the judicial decision mentioned in the heading be quashed.

The complainant stated that the contested decision rejected on the merits his action against the 6 December 2001 decision of the District Office in Hradec Králové, Department of Regional Development, No. La/RR2/212/01, in which the District Office upheld the 30 March 2001 decision of the first instance body, the City Hall of Hradec Králové, the Section for Construction and Transportation, No. Sb1/735/2000/Mu (correctly No. SD1/735/2000/Mu), which ordered the complainant to remove the recreational cottage on the plot of land, parcel no. 355/10 and 355/1 in cadastral district S.

The complainant reasoned his complaint to the effect that the decision of the County Office in Hradec Králové, as well as the decision of the City Hall of Hradec Králové, were issued on the basis of improperly conducted administrative proceedings and in conflict with the constitutional act which guarantees human rights and freedoms. According to the complainant, the administrative bodies did not conduct themselves in accordance with the Construction Act and the Construction Code; they did not accord the complainant the opportunity, if necessary, to submit the documents required for the approval inspection of the reconstruction of the recreational structure. In the complainant's view the building was only reconstructed, therefore that process could not have resulted in its legal and

factual termination and the construction of a new building. In addition, the administrative bodies did not even sufficiently provide the complainant with the required advice as to which documents he should submit to the administrative body, and by which deadlines. Not even the Regional Court in Hradec Králové cured the illegal situation called forth by the improper decisions of the administrative bodies. Their factual conclusions find no support in the admitted evidence.

The complainant asserts that, in consequence of the contested judgment, his constitutionally-guaranteed rights, protected by Art. 11 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter the “Charter”), were seriously violated. In his view, there is no dispute concerning the ownership of the cottage, it has stood on the given spot for 66 years, and its reconstruction, with a larger floor-plan but not one detrimental to the environment, even if carried out without the prior consent of the competent bodies, does not give grounds for such a basic decision as the removal of the structure.

II.

The Constitutional Court requested be sent to it the court file, 30 Ca 11/2002, the file from the City Hall of Hradec Králové, the Section for Construction and Transportation (hereinafter “Construction Office”), and the file from the County of in Hradec Králové, from which it ascertained the following.

On 4 May 1999, it came to the attention of the Construction Office during an on-site inspection on a parcel of land, No. 355/10 and 355/1 in the cadastral territory, that a cottage was under construction on that parcel without a proper construction permit. A day later the Office called upon the owner of the structure (that is, the complainant) to cease the construction work, at the same time it initiated a proceeding on the removal of a structure, called upon the complainant to demonstrate by 30 June 1999 that the construction of the cottage was in harmony with the public interest, especially with territorial planning documentation, aims and designs of the territorial planning, and that he also submit a consent to the construction given by the owner of the plot, the consent of the state administrative body competent in the sector of forest husbandry, and the position of the Office for the City of Hradec Králové, unit of the main architect, for a supplemental construction permit (notification and request no. OV/1668/99/Mu, č.l. 30-31, the 31 May 1999 Construction Office communication on the application for a supplemental construction permit, OV/2146, 2184/99/Mu, č.l. 24). During an on-site investigation on 28 May 1999, the Construction Office discovered that the complainant had ignored its request to cease work and had continued in the construction to the point where it was nearly completed. Therefore, in its 9 June 1999 decision (no. OV/1668/99/Mu, č.l. 22), it ordered him to cease all construction work. In the meantime, the complainant formally requested a supplemental construction permit.

In its 8 February 2000 request, No. SD1/735/2000/Mu, č.l. 15, the Construction Office repeatedly called upon the complainant to submit to the Construction Office, by 31 March 2000, an application for a supplemental construction permit for the recreational cottage (including the detailed prescribed requirements as to content) and to attach the prescribed documents, among other things demonstrating the right in the plot of land, documentation, the layout of the situation, construction drawings, the position, consent, and assessment of the affected state administrative body. It also stated that should the complete application with required documents not be submitted by the prescribed deadline, the Construction Office shall decide to order the structure's removal.

In its 30 March 2001 decision, No. SD1/735/2000/Mu, č.l. 4, the Construction Office ordered the complainant to remove the recreational cottage, seeing as he did not succeed in demonstrating that he met the conditions laid down in § 88 para. 1 lit. b) of Act No. 50/1976 Coll., on Territorial Planning and the Construction Code (the Construction Act), as amended in the decisive period (hereinafter "Construction Act"). The complainant brought an appeal against this decision, however, in its 6 December 2001 decision, the County Office in Hradec Králové rejected the appeal on the merits.

By his action before the Regional Court in Hradec Králové, the complainant sought the review of legality of this decision. He stated in his action that the contested decision was issued on the basis of an improperly conducted administrative proceeding and in conflict with the law. He asserted that he is the uncontested owner of the recreational cottage at issue. Due to the age of the original wooden cottage, it was necessary to reconstruct it which, in his word, encompassed also its modernization. He acknowledged his error in not timely requesting a permit for the reconstruction of the building, however, he alleges that he acted in good faith and that the adapted building, in its appearance, did not disrupt the countryside, rather it represented an improvement in it. In his view, the administrative bodies did not accord him the opportunity, if necessary, to submit the documents required for the approval inspection of the cottage, and did not even sufficiently provide him with the required advice as to which documents he should submit, and by which deadline. He considers the fact that the cottage now takes up an additional 14 square meters not to be decisive from the perspective of the protection of the forest land. He asserted that the building has stood on that spot for 66 years and that the reconstruction of it according to a larger floor plan cannot constitute grounds for a decision so basic as the removal of the structure. Thus, the removal constitutes a marked interference with his right to property as protected by Art. 11 of the Charter. He considers that a sanction consisting in the removal of the structure to be disproportionately severe and that a proportionate fine would have sufficed as a lawful sanction.

In its judgment contested here, the Regional Court rejected on the merits the complainant's action. In reasoning its judgment, it stated that it was indisputably proven that the case did not involve the modification of the existing structure of a recreational cottage, rather the construction of an entirely new, original structure: the original building was demolished and in place of it a new structure appeared, one of a different size, employing a different construction method, and made of different materials, all of which requires a construction permit. According to the Regional Court the new construction was carried out without a construction permit, and that without regard to the 5 May 1999 request to cease construction work or the 9 June 1999 decision. In the

Regional Court's view, there is no doubt that the action was in bad faith. The Regional Court referred to the wording of § 88 para. 1 lit. b) of the Construction Act, according to which the Construction Office shall order the owner of a structure put up without a permit to remove the structure. It shall not order such removal if the owner of the structure can prove that the structure is in harmony with the public interest, especially with the territorial planning documentation, the aims and designs of the territorial planning, etc. In this regard, the court declared that the structure is in conflict with the territorial plan of the City of Hradec Králové, in conflict with the 16 April 1996 generally binding ordinance of the City of Hradec Králové, No. 4/1996, on Creating the Nature Park Orlice, that is, in conflict with the aims and designs of the territorial planning. Further, the structure was built upon another person's plot of land and the owner of the structure did not succeed in obtaining a positive standpoint on the construction from the side of the bodies protecting nature and the countryside and the state administrator of the forests. The court further made reference to the fact that the administrative complaint contained no objection to a concrete violation of the Construction Act.

In its statement of views on the constitutional complaint, the Regional Court in Hradec Králové referred to the reasoning in its judgment and emphasized that this case did not involve the reconstruction of an existing cottage, rather the construction of an entirely new one. It considered the complainant's assertions on this point to be clearly opportunistic.

In its statement of views on the constitutional complaint, the City Hall of Hradec Králové proposed that the Constitutional Court reject the constitutional complaint on the merits. The complainant had the opportunity to prove that the construction is in conformity with the public interest; he was requested to submit the necessary documents, however he did not submit any of them. Accordingly, in conformity with the Construction Act, the Construction Office, ordered the removal of the structure. The Construction Office also fulfilled its duty to advise by its requests of 5 May 1999 and 31 May 1999, as well as its 8 February 2000 request to submit an application for a supplemental construction permit, in which was stated in detail what should be in the application and which annexes should be submitted, as well as the relevant deadlines. The new cottage takes up 1/3 more space than the original cottage, and the owner of the plot of land did not give his consent. In the view of the City Hall, the construction was intentionally carried out without a construction permit, and the owner of the structure disregarded the Construction Office's requests to cease construction work. It cannot be the case that the property rights of the owner of the structure were violated, as the construction of the structure on a plot of land belonging to someone else, without that owner giving his consent at the start of construction, constitutes on the part of the owner of the structure the abuse of his rights to the detriment of the rights of the owner of the plot of land.

In its statement of views on the constitutional complaint, the Regional Office of the Hradec Králové Region stated that it is in total disagreement with it. It emphasized that the builder constructed an entirely new recreational cottage without a construction permit, on top of that on land which is protected and does not even permit the building of recreational cottages.

The Constitutional Court sent the above-cited statements of views of the parties and secondary parties to the complainant's attention. In his rejoinder, the complainant pointed to the administrative body's evident bias against him personally, as well as to the manner in which it conducted itself, and informed the Constitutional Court that he persists in his objections.

As all parties and secondary parties agreed to dispense with an oral hearing (§ 44 para. 2 of the Act on the Constitutional Court), no hearing was held.

III.

The complainant asserts that the contested judgment, which upheld the decision of the administrative body ordering him to remove the recreational cottage, constitutes an unconstitutional encroachment upon his right to property in conflict with Art. 11 of the Charter.

By way of preface, the Constitutional Court would state that there is no dispute concerning the fact that the complainant constructed the recreational cottage without a construction permit, that it was an entirely new structure, and that the only thing it had in common with the original cottage is that they were built on the same general location. The Constitutional Court considers that, in the best case, the complainant's assertions concerning the alleged "adaptation" of the original wooden cottage are entirely opportunistic. The documents from the file and the complainant's fragmentary assertions show without any doubt that the original wooden cottage was completely demolished and that, without a construction permit, an entirely new cottage was put up on approximately the same spot. Moreover, it was made of different material, a different approach to construction was employed, a cellar and a second floor were added, and it even took up one third more surface area than the original structure. In addition to this, the Constitutional Court learned that the complainant continued in the construction work despite repeatedly being called upon to desist, so that he essentially completed it. Further, the structure was constructed on the grounds of a nature park proclaimed for the purpose of the protection of the character of a region having a significant concentration of things of aesthetic and natural value. On top of that, the structure was constructed on someone else's plot of land without the owner's consent.

Immediately after the illegal situation was ascertained the Construction Office initiated a proceeding on the removal of the structure, of which the complainant was informed. At the same time, in conformity with the Construction Act, the complainant was repeatedly advised of the possibility to request a supplemental construction permit, of the what should be submitted with the request, and by when it should be submitted, and the deadline was extended for him several times. However, the complainant did not fulfill the conditions required by law for a supplemental construction permit; therefore, the Construction Office ordered its removal.

Under these circumstances the constitutional complaint can be viewed in two different ways.

First, based on the context of the proceeding in which the removal was ordered. Pursuant to § 88 para. 1 lit. b) of the Construction Act, the Construction Authority “shall order the owner of a structure, erected without a permit or in conflict therewith, to remove the structure, and shall not order the removal of the structure should the constructor prove ...” etc. In other words, by inveighing against the decision ordering him to remove the structure, he is in essence seeking to have granted his supplementary request for a construction permit, despite the fact that he has not demonstrated that he meets the statutory requirements for such supplementary permit. Such a request is not, however, the object of protection of Art. 11 of the Charter. The fundamental right to own property should not be confused with the “right” to be successful in administrative proceedings and in court proceedings connected therewith.

The second perspective takes note of the impact the administrative decision (affirmed by the contested decision) has had on the complainant’s property sphere. From this perspective, there is no doubt that, by ordering the removal of the structure, the complainant’s property right in the structure has been interfered with, albeit from the perspective of the construction laws this involves a “black” structure, and from the perspective of the rights of the owner of a piece of land an “unauthorized” construction. All that remains is to adjudge whether such an interference is permitted under the constitutional law of the Czech Republic.

Art. 11 para. 1 of the Charter guarantees to everyone the right to own property and accords each owner’s property right the same content and the same protection. The Charter does not provide, however, that absolutely no restrictions may be placed upon the right of property. Although Art. 11 para. 3 does not specify grounds for placing restrictions on property rights in a similar as is the case with other fundamental rights and basic freedoms (compare, for example, Art. 12 para. 3, Art. 14 para. 3, Art. 16 para. 4, Art. 17 para. 4, Art. 19 para. 2, and Art. 20 para. 3 of the Charter), it manifestly permits restrictions upon property rights.

According to Art. 11 para. 3 ownership entails obligations and may not be misused to the detriment of the rights of others or in conflict with legally protected public interests. Property rights may not be exercised so as to harm human health, nature, or the environment beyond the limits laid down by law. It follows from this provision that the legislature may, by statute, place restrictions on property rights on the grounds of protecting the rights of others and of protecting the public interest, in particular of public health, nature, and the environment. In view of the obligation to preserve the essence and significance of property rights (Art. 4 para. 4 of the Charter), in so doing property rights may not be restricted beyond a proportional degree.

This interpretation is in conformity also with the protection of property under Art. 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (promulgated together with the Convention as No. 209/1992 Coll., hereinafter “Additional Protocol”), according to which States may enforce such laws as they deem necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. Stated briefly, the European Court of Human Rights adjudges, in accordance with this provision, whether

restrictions on the enjoyment of possessions (property rights) pursues a legitimate aim, whether it is in conformity with domestic law, and whether it is proportional in relation to the legitimate aim that is pursued.

The Constitutional Court affirms that the interference with the complainant's property rights were manifestly undertaken in the interest of construction discipline and of the protection of the environment, which are without doubt public interests protected by statute, and finally also in the interest of the protection of the rights of others, specifically the property rights of the owner of the plot of land, which rights the complainant arbitrarily violated by building his "black" and "unauthorized" construction thereupon. Thus, the decision ordering him to remove the structure did pursue a legitimate aim. The Constitutional Court further declares that this decision was supported by substantive law [§ 88 para. 1 lit. b) of the Construction Act], and the Construction Office reached it in a proceeding that was conducted in conformity with the procedural rules, otherwise, neither in the administrative suit nor in the constitutional complaint did the complainant raise the infringement of a specific provision on proceedings (he limited himself to the mere assertion, in no way specified, that "the administrative proceeding was conducted improperly", and to the incorrect assertion that the Construction Office did not sufficiently carry out its duty to instruct; see the requests and notices of the Construction Office of 5 May 1999, 31 May 1999, and 8 February 2000). Thus, the interference was manifestly carried out in conformity with law.

The duty to remove a "black" structure, which was not permitted even before it was constructed, is the logical and inevitable consequence of a lack of construction discipline, as well as the failure to respect the statutory protection of nature, of the environment, and finally of the property rights of others. In this sense, this was an interference that was proportionate to the aims pursued, for it could not have been accomplished by other measures. Laying down the duty to remove a "black" and "unauthorized" structure is not a sanction which could be possible as an alternative in addition to a fine for a delict against the Construction Code; rather it is a measure the aim of which is to return the land to its original condition. The decision to removal of the structure is a consequence which, without more, is faced by the owner of a structure if he fails to demonstrate in the proceeding that the conditions for the granting of a supplemental license are fulfilled. This consequence follows entirely unequivocally from the Construction Act, as well as from the logic of the matter, so that the complainant might, and should, have been well aware of it. Moreover, he was alerted to the fact already during the course of the construction work, and the failure to respect the calls to desist in building it only added to his own loss.

Thus, the complaint could not legitimately expect that he would not be ordered to remove the structure nor that his "black structure" might even possibly enjoy the protection which is accorded the peaceful enjoyment of property by Art. 1 of the Additional Protocol to the Convention [see the decision of the European Court for Human Rights in the matter of *Malhous v. the Czech Republic* (2001), *Poláček v. the Czech Republic* (2002), or *Gratzinger v. the Czech Republic* (2002)]. After all such an expectation was founded neither on the wording of the law, nor the case-law, nor even the approach taken by the deciding bodies, rather was evidently founded solely on the complainant's hope, in no way legally tenable,

that these bodies would not act consistently in relation to him and that they would tolerate the existence of a “black structure”, without regard to the law in force.

On the basis of the above-stated facts, the Constitutional Court declares that there has been no infringement of the complainant’s fundamental right to the protection of his property under Art. 11 of the Charter and Art. 1 of the Additional Protocol to the Convention and therefore, pursuant to § 82 para. 1 of the Act on the Constitutional Court, has rejected the constitutional complaint as not well-founded.

Notice: A Constitutional Court decision can not be appealed.

Brno, 8. April 2004