

# 1996/06/05 - II. ÚS 98/95: RIGHT TO ASSISTANCE OF COUNSEL

## HEADNOTE:

The right to the assistance of counsel when making a statement under Art. 12 of Act No. 283/1991 Coll. relies on Art. 37 par. 2 of the Charter, and does not entail a duty on the part of the police to procure the presence of counsel in every case, but merely the duty to permit such legal representation.

## CZECH REPUBLIC

### CONSTITUTIONAL COURT JUDGMENT

#### IN THE NAME OF THE CZECH REPUBLIC

Panel II of the Constitutional Court in the matter of the constitutional complaint of R. R., against the action of the County Directorate of the Czech Police in Teplice, with the County Directorate of the Czech Police in Teplice present as a party to the proceeding, decided:

The constitutional complaint is granted in view of the fact that the means of proceeding employed by the County Directorate of the Czech Police in Teplice, by which the petitioner was prevented from exercising his right to the assistance of counsel when, in matter no. ORTP - 199/KS-HK-95, he made a statement under § 12 of Act No. 283/1991 Coll.,<sup>1)</sup> as amended, constituted a violation of the petitioner's constitutionally guaranteed right to assistance of counsel as declared in Article 37 para. 2 of the Charter of Fundamental Rights and Basic Freedoms.<sup>2)</sup> The County Directorate of the Czech Police in Teplice is prohibited from continuing in its violation of the right under Article 37 para. 2 of the Charter of Fundamental Rights and Basic Freedoms<sup>2)</sup> in connection with the making of statements under § 12 of Act No. 283/1991 Coll.<sup>1)</sup>

## REASONING

In his petition, the complainant sought a decision whereby the Constitutional Court would declare that the means of proceeding employed by the police body of the County Directorate of the Czech Police in Teplice constituted a violation of his constitutionally guaranteed right to assistance of counsel as declared in Article 37 para. 2 of the Charter of Fundamental Rights and Basic Freedoms<sup>2)</sup> (hereinafter „Charter“), in that the petitioner was prevented from exercising his right to the assistance of counsel when making a

statement as meant by § 12 of Act No. 283/1991 Coll.,<sup>1)</sup> as amended (hereinafter „Act No. 283/1991 Coll.“). In explanation of his petition, he stated that on 6 March 1995 he was called in to make a statement pursuant to § 12 of Act No. 283/1991 Coll.,<sup>1)</sup> and on 3 May 1995 he was brought in for that purpose, despite his request that his attorney, with whom he had entered into a contract for legal representation, be present as well. The attorney was not, however, permitted to be present when the statement was given with the explanation that Act No. 283/1991 Coll. contains no provisions which would place upon the police the duty to make it possible for a person to have legal representation when making a statement and further that no attorney is needed until the commencement of a criminal proceeding, as meant by the relevant provisions of the Criminal Procedure Code. The petitioner emphasized, in addition, that he had cited Article 2 para. 2<sup>3)</sup> and Article 37 para. 2 of the Charter<sup>2)</sup> and had pointed out the difference between assistance of counsel by a defense attorney in a criminal proceeding and by an attorney on the basis of a contract for legal representation. In addition to a violation of Article 37 para. 2<sup>2)</sup> and Article 2 para. 2 of the Charter<sup>3)</sup> he concluded that Article 4 para. 2<sup>4)</sup> and Article 2 para. 3 of the Charter<sup>3)</sup> had been violated as well.

The County Directorate of the Czech Police in Teplice did not submit a written statement responding to the petition, despite the fact that it had been duly delivered to the directorate on 23 June 1995; however, its director subsequently proposed at the hearing that the petition be denied on the merits. He explained its position with reference to the fact that § 12 of Act No. 283/1991 Coll.<sup>1)</sup> does not impose any duty to secure the presence of an attorney because it is not concerned with a criminal proceeding, which also corresponds to the extent of the police's duty to instruct persons on their rights when summoned to make a statement, and finally in reference also to the fact that the statement is binding precisely on the person who is to make it.

The Constitutional Court reviewed the complainant's petition, as well as the attached file from the County Directorate of the Czech Police in Teplice, together with the summons of 6 March 1995 submitted by the complainant, and supplementary evidence from the examination of witnesses, whose testimony agreed in the respect that the police had repeatedly denied the complainant's request to be represented by his attorney for the statement which he was called in to give. On the basis of the foregoing, the Court came to the conclusion that, by proceeding in this manner, which consisted in preventing the complainant from exercising his right to assistance of counsel in connection with making a statement, the County Directorate of the Czech Police in Teplice had violated Article 37 para. 2 of the Charter.<sup>2)</sup> That clause explicitly states that everyone shall have the right in proceedings before courts, other state bodies, or public administrative authorities, to the assistance of counsel from the very beginning of such proceedings. The finding that Article 37 para. 2<sup>2)</sup> was violated was due in particular to the fact that, in the matter of making a statement, the requirement of a proceeding is met by the characteristic of the county directorate of the police that, as a state body which took part in the process, it has a directing status. As a consequence of its proceeding in this manner, the County Directorate of the Czech Police in Teplice also violated Article 15<sup>5)</sup> as well as Article 2 paras. 2 & 3 of the Charter,<sup>3)</sup> just as Article 1,<sup>6)</sup> Article 2 paras. 1, 3, & 4 of the Constitution,<sup>7)</sup> in which is enshrined the principle of the primacy of the citizen before the state. This conclusion is in no way affected by the fact that Act No. 283/1991 Coll. is deficient in not providing express legal rules relating to the legal representation of a

person making a statement for the simple reason that quite clear rules are found in norms of the highest legal force, that is, the Charter and the Constitution. Moreover, to cite a deficiency of express legal provisions as the reason for denying a person his right to the assistance of counsel corresponds to a purely positivistic approach to the law does not match the requirements of a law-based state, which are characteristic of the natural law bent (compare, for example, the Preamble of the Charter or Article 85 para. 2 of the Constitution). For completeness, the Constitutional Court explicitly states as the final point that the right to the assistance of counsel when making a statement does not entail a duty on the part of the police to procure the presence of counsel in every case, but merely the duty to permit such legal representation.

So far as concerns the petitioner's assertion that Article 4 para. 2 of the Charter<sup>4</sup>) has been violated in that it declares that limitations may be placed upon the fundamental rights and basic freedoms only by a statute under the conditions prescribed in this Charter, then conceptually this clause cannot be invoked in a situation where no more detailed statutory provisions exist relating to the fundamental right to the assistance of counsel when making a statement (compare Act No. 283/ 1991 Coll.).

For the reasons given above and pursuant to § 82 para. 1, 2, & 3 lit. a) of Act No. 182/1993 Coll., on the Constitutional Court, the Constitutional Court decided in the manner set down in the statement of judgment and, additionally that it did not require a return to the status quo ante due to the fact that it became apparent in the course of the proceeding before the Constitutional Court that the petitioner has already made the statement and that the principle of investigation, searching, and officiality are applicable for state authorities active in criminal proceedings, including the County Directorate of the Czech Police in Teplice, which means that the Court reached the conclusion that it is no longer possible to return the status quo ante the violation in the instant case.

## II. US 81/95

### Overview of the most important legal regulations

1. § 12 of Czech National Council Act no. 283/1991 Coll., on the Police of the CR, as amended by later regulations, provides that a police officer is entitled to request necessary explanations from a person who may contribute to clarifying facts which are important for uncovering a crime or offence and their perpetrators, as well as for finding searched for or missing persona and things, and in case of need, call on the person to come to a specified place within a set time for purposes of preparing a protocol and providing an explanation. The person is required to comply immediately in the uncovering of serious criminal activity.
2. Art. 37 par. 2 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides that in proceedings before courts, other state bodies, or public administrative authorities, everyone shall have the right to assistance of counsel from the very beginning of such proceedings.
3. Art. 2 par. 2 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides that state authority may be asserted only in cases and within the bounds provided for by law and only in the manner prescribed by law. Par. 3 provides that everyone may do that which is not prohibited by law; and nobody may be compelled to do that which is not imposed upon him by law.
4. Art. 4 par. 2 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides that limitations may be placed upon the fundamental rights and basic freedoms only by law and under the conditions prescribed in the Charter.
5. Art. 1 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides that all people are free, have equal dignity, and enjoy equality of rights; fundamental rights and basic freedoms are inherent, inalienable, non-prescriptible, and not subject to repeal.
6. Art. 1 of Act no. 1/1993 Coll., the Constitution of the CR, provides that the Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens.
7. Art. 2 of Act no. 1/1993 Coll., the Constitution of the CR, provides in par. 1, that all state authority emanates from the people, in par. 2, that a constitutional act may designate the conditions under which the people may exercise state authority directly., par. 3, that state authority is to serve all citizens and may be asserted only in cases, within the bounds, and in the manner provided for by law.