2004/08/20 - III. ÚS 459/03: CHILD MEDICAL TREATMENT

HEADNOTE

If the parents of a minor child, whose life is in imminent danger, refuse treatment, it does not represent a violation of their rights enshrined in Art. 32 para. 4 or Art. 16 para. 1 of the Charter of Fundamental Rights and Basic Freedoms to issue provisional measures, pursuant to § 76a of the Civil Procedure Code, which entrust the child to the care of an appropriate medical facility. In view of the necessity for immediate intervention, it is generally not possible, in a proceeding on the issuance of such provisional measures, to resolve any possible dispute between the parents and the medical facility concerning the appropriateness of the treatment at issue. If the matter concerns a child of the age of six, it is not a violation of Art. 12 para. 1 of the Convention on the Rights of the Child, if in the given proceeding the child was not heard by the court. The court must hear the parents only in the case that such would be necessary for decision in the case and possible, in the light of the statutory deadline for the issuance of a decision.

CZECH REPUBLIC

CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

On 20 August 2004, the Constitutional Court, in a panel composed of its Chairman, Jiří Mucha, and Justices, JUDr. Pavel Holländer a JUDr. Jan Musil, in the matter of the constitutional complaint of the complainants, 1. Pavol Jánoš and 2 Leona Jánošová, against the 10 September 2003 ruling of the Regional Court in Ostrava, file no. 13 Co 1074/2003, and the 13 August 2003 ruling of the District Court in Karvina, file no. 39 Nc 1507/2003, with the Regional Court in Ostrava and the District Court in Karvina taking part as parties to the proceeding, and the minor, Dominik Jánoš . . . , represented by a guardian, the Public Defender of Rights, JUDr. Otakar Motejl . . . , and the Municipal Office of the City of Karvina . . . as secondary parties to the proceeding, decided, with the consent of the parties without an oral hearing, as follows:

The constitutional complaint is rejected on the merits.

REASONING

In their constitutional complaint, which was timely submitted and in other respects met the formal requirements laid down in Act No. 182/1993 Coll., on the Constitutional Court, as amended (hereinafter „Act on the Constitutional Court"), the complainants contested the 10 September 2003 ruling of the District Court in Ostrava, file no. 13 Co 1074/2003, as well as the ruling which proceeded it, the 13 August 2003 ruling of the District Court in Karvina, file no. 39 Nc 1507/2003. According to the complainants, these decisions violated their rights enshrined in Art. 6 para. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter „European Convention"), Art. 32 para. 4 and Art. 36 para.1 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter „Charter"), Art. 6 para. 2 of the Convention for the Protection of Human Rights and the Dignity of the Human Being in Connection with the Application of Biology and Medicine (hereinafter „Convention on Human Rights and Bio-Medicine"), Art. 9 paras. 1, 2 and Art. 12 of the Convention on the Rights of the Child.

In the cited ruling, the District Court in Karvina ordered, on the motion of the Municipal Office of the City of Karvina, provisional measures by which the complainants' minor son, Dominik Jánoš, born on the 14th of November 1996, was placed into the custody of Child Oncology Clinic of the University Hospital – Brno and, pursuant to § 76a para. 3 of the Civil Procedure Code, appointed Mgr. Olga Kypastová, a judicial trainee of the Regional Court in Ostrava, as his guardian for the purposes of the proceeding. It appears from the reasoning of that decision that on 7 August 2003 the Municipal Office of the City of Karvina received information from the University Hospital – Brno to the effect that since 18 July 2003 it had had in its care a minor child who had been diagnosed with a highly malignant tumor which would, were it not properly treated, inevitably result in the patient's death. The currently available methods of treatment offer hope of a cure; however, the use of a blood derivative is a necessary part of the treatment. Both parents were informed of these facts, but they informed the hospital that they are Jehovah's Witnesses and from the start of the treatment had expressed a negative attitude toward the use of a blood derivative. However, as they were aware of the seriousness of the illness, they gave their consent to the treatment. On 31 July 2003 the minor child was discharged for treatment at home, at which time the minor's parents were again informed of the character of the illness and that there would be the need for a further round of chemotherapy treatment on 15 October 2003. Several days later the minor's condition worsened, and then on 4 August 2003 he was admitted to the University Hospital, where it was also necessary to administer a blood transfusion. On 6 August 2003, the parents made a statement to the effect that they are aware of the seriousness of the illness. However, should the minor's treatment require any further transfusion of blood, due to their religious convictions and on health grounds, they could not consent to it. Accordingly, they insisted that the minor be treated solely by means that relieved the pain and also requested his transfer to the Children's Clinic of the University Hospital, Ostrava – Poruba, where he was at that time recovering from the previous treatment. In view of the fact that the parents continued to refuse further treatments of chemotherapy with the transfusion of blood, to which there was no alternative treatment, according to the moving party they were denying the minor child

his one hope of a cure, thus, were gravely threatening his health and life. Should the second round of chemotherapy not be initiated by 15 August 2003 at the latest, the child's life would be imminently threatened. In light of these factual findings, the District Court concluded that it must, pursuant to § 76a para. 1 of the Civil Procedure Code, grant the motion in full, as the minor was suffering from a very serious illness which seriously threaten his health and life, so that he requires proper treatment at the University Hospital – Brno, where it will most likely be necessary to administer to him a blood derivative, which his parents refuse to allow. In addition, pursuant to § 37 para. 1 of Act No. 94/1963 Coll., on the Family, as amended, the Court appointed a guardian to represent the child in that proceeding.

In the complainants' appeal, the Regional Court in Ostrava upheld the cited ruling of the District Court in Karvina, as it entirely concurred with the conclusions contained therein. It stated that issuance of provisional measures, pursuant to § 76a of the Civil Procedure Code, was justified by the urgent need for a speedy operation procedure, which could not be resolved even in the decision on the merits, nor by the issuance of provisional measures pursuant to § 76 para. 1 lit. b) of the Civil Procedure Code. At the same time the reason for provisional measures was unequivocally demonstrated by the showing that the minor child faced imminent danger to his life. The complainants' refer to the fact that, due to the issuance of the contested ruling, the petitioner, the guardian or the court assumed decision-making responsibility for the minor child's treatment, whereas that responsibility belongs exclusively to the parent (Art. 32 para. 4 of the Charter); however, in the court's view this argument is not correct, as the mentioned provision explicitly allows for such a decision, as it provides that minor children may be removed from their parents' custody against the latter's' will only by the decision of a court on the basis of the law, as occurred in the case before it. A further argument of the parents, relating to the manner in which the University Hospital – Brno proceeded, which supposedly conflicted with § 77 of Act No. 20/1966 Coll., on the Care and Health of People, as amended, is not in the court's view decisive for the assessment of the matter; alternatively, it cannot affect the correctness of the District Court's decision, also in view of § 75 para. 5 of the Civil Procedure Code, which provides that the parties may not in an appeal, or in the course of an appellate procedure, introduce any new facts or evidence. The contested ruling is correct also in appointing the guardian because, although the minor child has his own statutory representatives, they cannot represent him in the instant proceeding due to a possible conflict of interest in the sense of § 37 para. 1 of the Act on the Family.

The complainants state in their constitutional complaint that they are the minor child's statutory representatives, that they were caring for him properly, and that they requested for him treatment that conforms to scientific knowledge without the risks of a transfusion. However, in the complainants' view, it can be inferred from the court's action that whenever parents, in the case of treatment of their gravely ill child, express an opinion, conforming with scientific knowledge, that differs from that of the examining doctor, that constitutes grounds for restricting their parental rights by means of provisional measures, without any independent body scrutinizing whether, in conformity with the opinion of the child's parents, there exists in the field of medicine de lege artis alternative possibilities for treatment with comparable prospects for success. They deduce from this that the courts did not take into consideration the rights of the child's statutory representatives, as guaranteed by Art. 6 para. 2 of the Convention on Human

Rights and Bio-Medicine. The complainants further object that child was not left without medical care, as they had been properly caring for him the whole time, and he is not threatened by the parents‘ conduct, but by a very serious illness. In order that hope be maintained for a successful treatment, the psychological state of the child is very important, but he suffers due to the fact that he must remain in the hospital even during weeks when there is no reason for it in terms of treatment. Due to this, „favorable progress“ for the child is disturbed far more than by the parents' differing opinion regarding his treatment. Also, the differing opinion on the treatment and the parents‘ effort not to expose their child to the risks of a transfusion, also supported by evidence that treatment can proceed without a transfusion, are not, in the complainants‘ view, statutory grounds for provisional measures pursuant to § 76a of the Civil Procedure Code. It is alleged that the courts have applied this provision without differentiation, as if a case of abuse or neglect of a child were concerned, and not a case where the parents merely preferred another available form of treatment. The complainants are of the view that their child was removed from their custody without the statutory conditions being met therefor, and allegedly their right to raise their son pursuant to Art. 32 para. 4 of the Charter was thereby violated. The complainants also assert that the courts did not proceed in conformity with § 76a para. 3 of the Civil Procedure Code because they did not hear the parents and did not permit them to represent the minor child in the proceeding. This resulted in a child being removed from the custody of his parents against their will in the sense of Art. 9 para. 1 of the Convention on the Rights of the Child, whereby was also violated the complainants' right to fair process in the sense of Art. 6 para. 1 of the European Convention and Art. 36 para. 1 of the Charter. Finally, the complainants state that the court did not at all ascertain how the child's relationship with his parents is, alternatively whether the child is capable of formulating his own opinion on a treatment in which he was given a blood transfusion. Allegedly the court merely assumed that the child would not be capable of formulating one. The court thus brought to pass that the child's views could not be taken into account in any way, which was a violation of Art. 12 para. 1 and 2 of the Convention on the Rights of the Child. In view of the above, the complainants propose that, in its judgment, the Constitutional Court annul the contested decisions.

The Constitutional Court requested the opinions of the parties and secondary parties to the proceeding on the constitutional complaint. The Regional Court conveyed its view that it had not, by the manner it which it proceeded, encroached upon the rights either of the complainants or of their child guaranteed by the European Convention, the Charter, or the Convention on the Rights of the Child. The District Court stated that it issued its decision on the basis of the proposal of the Municipal Office of the City of Karvina and the enclosed doctors reports and that it did not have available any other documents and evidence. It further referred to the fact that, under § 75 para. 3 of the Civil Procedure Code, it is not required to hear the parties and the decision on provisional measures must be made within 24 hours of the submission of the motion, which occurred in this case, and that in such a brief time span it had not been possible to bring in and hear the parents or their legal representative, who was not known to it at that point in time. That court was persuaded that it had resolved the matter in conformity with the law and that in no case had the Convention on the Rights of the Child been infringed.

In its statement of views, the Municipal Office of the City of Karvina described the circumstances preceding the submission of the motion at issue, stated in its essentials just as it had been in the reasoning of the first instance court's ruling. Further, it made reference to the sense and purpose of the Convention on the Rights of the Child, just as to the rules contained in the Charter, the Act on the Family, and Act No. 359/1999 Coll., on the Social Legal Protection of Children, as amended, according to which it is the right and obligation of parents to do everything for the well-being of their children, including their health, and should they not do so, that the protection of children pursuant to relevant legal enactments must come into play. In view of the fact that the parents of the minor child refused further chemotherapy treatment, they took from him the sole hope of a cure and, thus, gravely threatened his health and life. According to the Chief Physician of the Clinic of Child Oncology of the University Hospital – Brno, there was and is no alternative treatment offering the child hope of a cure, and his parents are aware of this fact. In the opinion of the Municipal Office of the City of Karvina, in view of the parents' position on treatment, they threaten not only the child's health, but also his life; thus, they have violated their parental duty, in particular the obligation properly to care for the health of their children, so that it was necessary for the Office to proceed in the way that it has.

The Public Defender of Rights, JUDr. Otakar Motejl, who by the Constitutional Court's 31 May 2004 ruling (document no. III. ÚS 459/03-20) was appointed the minor child's guardian for the purposes of the proceeding before the Constitutional Court, stated regarding the constitutional complaint that the above-mentioned international conventions and constitutional documents, invoked by the complaints, declare and ensure a complex of rights and obligations that pursue the protection first and foremost of the child and that they are based on two assumptions, first and foremost that they concern a child who is alive and that in conformity with the tradition in civilization, the protection of children is provided, in the first place, by its parents. In the guardian's view, the complainants overlook the fact that the right to life enjoys unquestioned priority in the system of the rights of human beings and concurrently is a condition of the enjoyment of all other constitutional rights of human beings. With their conscious position on the treatment of the minor child, which is attested to by their 6 August 2003 declaration, the complainants decided to discontinue active treatment of the child's imminently life-threatening disease and requested that the chemotherapy treatment be interrupted and the child be given only palliative treatments; thus, they consented only to the examining doctors applying soothing medicines that do not, however, influence the essential course of the disease itself. In view of the diagnosis, this would mean the irreversible end of his life, so that without doubt has arisen the situation foreseen in § 76a of the Civil Procedure Code in relation to the enjoyment of the right to life and the protection of health, and nothing can call into doubt, in connection with the presumed exceptions to the parents' authoritative decision-making, the approach which the ordinary courts chose. The guardian thus proposes that the Constitutional Court reject the constitutional complaint on the merits.

The University Hospital – Brno waived its status as a secondary party.

The Constitutional Court also asked for the standpoint of Mgr. Olga Kypastová, who had been appointed the minor child's guardian (due to a conflict of interest) for the purposes of the proceedings before the ordinary courts. She made reference to the original Explanatory Report to the Convention on Human Rights and Bio-Medicine, specifically to

Art. 48 thereof, according to which, „ [t]he first duty of doctors or other health care professionals is to their patient and it is also part of the professional standard (Article 4) to act in the interest of the patient. It is, in fact, a duty of the doctor to protect the patient against decisions taken by a person or body whose authorisation is required, which are not in the interest of the patient; in this respect, national law should provide adequate recourse procedures.“ To the extent that the statutory representatives of a minor child whose life is threatened, and who himself lacks capacity to give consent to the medical procedure, do not give their consent to such medical procedure as can save the child‘s life, in the guardian’s view the child’s right to life to precedence, otherwise the Convention on Human Rights and Bio-Medicine would come into conflict with Art. 3 and Art. 6 paras. 1, 2 of the Convention on the Rights of the Child. Further, the guardian is of the view that Art. 32 para. 4 of the Charter has not been infringed, as the rights of the parents have been restricted by means of a court decision issued on the basis of law and there were grounds, in the given case, for ordering provisional measures under § 76a of the Civil Procedure Code. Nor, according to the guardian, had Art. 9 para. 1 of the Convention on the Rights of the Child, Art. 36 of the Charter, or Art. 6 para. 1 of the European Convention been infringed, as the first-mentioned provision allows for the removal of children from parents’ custody, provided it had been effected by means of a court decision, in the interests of the child and in conformity with law currently in effect, while the list of such examples in this Convention is merely demonstrative. The child had been removed from his parents’ custody against their will by means of a court decision issued in conformity with Czech law currently in effect in the context of the proper procedure. Despite the complainants objected that Art. 12 paras. 1, 2 of the Convention on the Rights of the Child, in view of the child’s age and the nature of the proceeding, the court acted correctly in not hearing the child. In conclusion, the guardian proposed that the Constitutional Court reject the constitutional complaint on the merits.

In their reply to the pleading of the Public Defender of Rights, the complainants stated that they are aware of the value of life, as it was they who initiated the treatment, however they wished for their child the best solution and they did not want to subject him to risks which could be avoided, thus they proposed a specific treatment that concords with scientific knowledge. As concerns the declaration, on 6 August 2003 the complainants did in fact propose, as an alternative, a palliative treatment, but they conceived of it as the ultimate solution, which is substantiated in their letter of 12 August 2003, in which they propose a number of alternative methods of treatment. In response to the District Court’s pleading, they stated that they do not share its view that, according to § 75 para. 3 of the Civil Procedure Code, parties need not be heard because that would conflict with Art. 9 paras. 1, 2 and Art. 12 paras. 1, 2 of the Convention on the Rights of the Child. In their view, the cited provision of the Civil Procedure Code must be interpreted such that a court may issue a decision even if it has not proved possible to hear the parties, however it cannot be taken as a general „excuse letter“, which would free the court from the duty to marshal all available evidence, including through examining the parents and child, if it is the least bit possible. In response to the pleading of the Municipal Office of the City of Karvina, the complainants declare that it is not true that they had violated they parental duties, as they had consented to treatment, even to chemotherapy; they merely required that the chemotherapy be performed in such a manner as to not subject the child to risks connected with a blood transfusion, as are substantiated in expert studies. The employees of the Municipal Office did not, however, respond to this point. The complainants also

gave their view on the position of Mgr. Olga Kypastová in the sense that they do not agree with the view that it should be grounds for removing a child from its parents' custody, if the parents give preference to one method of treatment over the other. They acknowledge that it may sometimes be imperative to separate a child from its parents, but that is not the case with them, as they are properly caring for their child.

The Constitutional Court reviewed the contested decisions with regard to the asserted violation of the constitutionally protected rights and freedoms and came to the conclusion that the constitutional complaint is not well-founded.

In their constitutional complaint, the complainants refer to, among others, their rights governed by Art. 32 para. 4 of the Charter. In the Constitutional Court's view, the mentioned provision is of key significance for the adjudication of the matter as, on the one hand, it enshrines the right of parents to care for and raise their children, on the other hand, however, also the right of children to parental upbringing and care. This right may be restricted, however, under the conditions that such occurs by decision of a court and on the basis of a statute. Although the cited provision does not contain any further conditions, there is no doubt that, in making such decision, the restrictions flowing from other provisions of the Charter must also be respected. In relation to the given case, then, Art. 4 of the Charter is relevant. This issue is also governed by Art. 8 of the European Convention, even though that provision is broader in scope than Art. 32 para. 4 of the Charter as it establishes the general right of everyone to respect for his private and family life. Thus, the matter must be adjudged also in light of this provision. This right to respect for one's private and family life under the European Convention is not unlimited, as public authorities may interfere with the exercise of this right, however, only in the case if such is in accordance with the law and it necessary in a democratic society in the interests (among others) of the protection of health or the rights and freedoms of others.

Insofar as the ordinary courts decided to commit the minor child, Dominik, to the custody of the mentioned medical facility, there is no doubt that, by restricting the parents' right to make decisions on the medical treatment of their child, they thereby interfered with the complainants' constitutionally guaranteed right under Art. 32 para. 4, first sentence, of the Charter, as well as with the right enshrined in Art. 8 para. 1 of the European Convention; only in part did this result in his „removal" from his parents' custody, however, that was not the sense of the relevant measure, rather its incidental consequence. In view of that fact, it was necessary to adjudge whether, in the given case, the conditions were met for the permissibility of this type of interference, pursuant to Art. 32 para. 4, second sentence, of the Charter, or Art. 8 para. 2 of the European Convention, that is, whether it concerned an interference that is necessary in a democratic society, and the basis of and in accordance with the law, where it is common ground that it occurred on the basis of a judicial decision.

The first instance decision contested in the constitutional compliant was issued on the basis of § 76a para. 1 of the Civil Procedure Code after the deciding court came to the conclusion that the condition of the minor child's health, even his life, were seriously threatened. In the Constitutional Court's view, it did not need to concern itself, on a general level, with constitutionality of the cited provisions, as the object that those provisions regulate is the protection of the rights of minor children resulting, in particular, from Art. 6 para. 1 and Art. 31 of the Charter, while the assurance of such protection

results for the Czech Republic also from its international obligations, namely from the already-mentioned Convention on the Rights of the Child and the Convention on Human Rights and Bio-Medicine. As far as concerns the subsequent assessment of the question which necessarily emerges from the above one, that is, whether the interference at issue was effected in conformity with the law, the Constitutional Court proceeded from its constant jurisprudence, according to which, as the judicial body for the protection of constitutionalism (Art. 83 of the Constitution of the Czech Republic), it is not an ordinary further instance in the general system of courts, it is not a court that is superior to the ordinary courts and does not review the overall legality of the decisions they issue. It is not, therefore, its task to concern itself even with any potential violation of the ordinary rights of natural or legal persons protection by ordinary legislation, unless such violation represents at the same time a violation of the fundamental rights or basic freedoms guaranteed by a constitutional act. In view of its status in relation to ordinary courts, the Constitutional Court adopts the position that the interpretation and application of ordinary law is a matter for the ordinary courts and a differing view on the interpretation of an ordinary statute, regardless of whether the issue was raised or even authoritatively determined, cannot in and of itself bring about a violation of constitutionally protected rights (for example, its 29 May 1997 judgment, file no. III. ÚS 31/97, published in the Collection of Judgments and Rulings of the Constitutional Court, vol. 8, judgment no. 66). As a general matter, action by courts may result in the violation of the constitutionally protected rights of parties to a proceeding only in cases where courts proceed from an incorrect assessment of the influence on the case under consideration of the constitutionally protected rights which the complainant invokes, or alternatively in the case that an element of arbitrariness is included in the process of interpretation and application of ordinary law (compare the 9 July 1999 judgment, file no. III. ÚS 224/98; published in the Collection of Judgments and Rulings of the Constitutional Court, vol. 15, judgment no. 98). The issue of the assessment of evidence is analogous, where it can be considered a violation of constitutionally guaranteed rights in a situation in which an elementary error occurs in the proceeding, in particular, if an extreme conflict arises between the introduced evidence and the findings of fact, on the basis of which the ordinary courts then decide. It should be added that the possibility for the Constitutional Court to intervene into the decision-making of ordinary courts in the above-mentioned sense increases with the intensity of the encroachment upon the fundamental rights and basic freedoms.

As regards the manner in which the ordinary courts proceeded, the Constitutional Court did not ascertain any error in the above-stated sense. As regards the state of facts upon which the ordinary courts based their decisions, in essence it has not been called into question by the complainants (see below). As the Constitutional Court has ascertained, the first instance court based its decision on the reports made on the 6th and 12th of August 2003 by the University Hospital – Brno, in which the Municipal Office of the City of Karvina is alerted to the fact that the complainants have refused treatment for their minor son. It was made unambiguously clear in those reports that, unless the chemotherapy treatment which his parents had refused were initiated immediately, the minor Dominik's health and life would be gravely threatened. This facts are evident also from the written documents entitled „Informed Consent", dated 22 July 2003, and „The Treatment of Dominik Jánoš, no. 961114/5522", dated 6 August 2003. As can be ascertained from these documents, the minor's parents refused the treatment for religious and health reasons. It

is also objected in the constitutional complaint that the requirements for applying the cited provision were not met because the child was not threatened by his parents' conduct, rather by a serious illness, and his parent merely preferred a different form of treatment. To begin with it should be stated that the Constitutional Court entertains no doubt on the point that the scope of the norm encompasses also cases in which essential medical care is denied a minor child, especially where his or her life is thereby directly threatened. One cannot concur with the complainants' view that Art. 9 para. 1 of the Convention on the Rights of the Child was infringed because, as concerns the minor Dominik, it was not a case of an abused or neglected child. In this respect, state parties retain a certain degree of discretion, as the list of defined situations, in which interference in the rights of parents (and children) is permissible, are merely demonstrative and, otherwise, any other approach would be in direct conflict with Art. 6 para. 1 and Art. 31 of the Charter, just as with the Convention on the Rights of the Child and the Convention on Human Rights and Bio-Medicine. It must further be stated that the ordinary courts proceeded in the correct manner even as regards the reasons for which treatment was refused. As far as concerns the first, that is, the religious reason, the exercise of the right enshrined in Art. 16 para. 1 of the Charter can be restricted under certain conditions, as will be discussed below, these conditions were met, and in details reference can be made to the Constitutional Court's conclusions stated below. As far as concerns the alleged health reasons, however, no more specific details were given about them, that is, with the exception of the assertion that certain risks are associated with a blood transfusion. However, insofar as the parents requested for their child a „treatment" which does not eliminate the causes of the illness, but merely temporarily alleviates its symptoms and as they were aware of the fact that the life of their child is in grave threat if proper chemotherapy treatment is not initiated, then this reason could hardly pass muster. If the complainants have constructed their arguments in their appeal from the first instance court's ruling, as well as in their constitutional complaint, such that this is a matter of a dispute between the parents of a minor child and a medical facility concerning the manner of treatment, where the complainants sought a different means of treatment of their minor child (chemotherapy without administering a blood transfusion), then this assertion finds no support in the material in the file, and the Constitutional Court rejects it as purpose-built. It should be added that as a rule, in proceedings pursuant to § 76a of the Civil Procedure Code, ordinary courts may not resolve issues of the suitability of the treatment in question, for this provision applies to exceptional (and serious) case, where a decision must be had without delay, so that the view of a clearly competent medical facility, as was the medical facility in this case, constitutes a sufficient basis for the court's decision in this regard.

As regards the other criteria for the permissibility of interference with the rights and freedoms of the complainants, in the Constitutional Court's view no doubt arises in this case that the purpose and aim of the issued provisional measures was the protection of the rights of the minor, namely his right to the protection of his health under Art. 30 para. 1 of the Charter and his right to life enshrined in Art. 6 of the Charter. It remains to determine whether this interference is one that is necessary in a democratic society, that is, whether there were relevant and sufficient grounds for it [compare the 27 November 1992 decision of the European Court of Human Rights, (hereinafter „ECtHR") in the matter of Olsson v. Sweden, published in A250]. In this regard, the Constitutional Court came to the conclusion that the protection of the health and life of the child, and in view of the

specific circumstances it was really a matter of these (see above), an entirely relevant and a more than sufficient reason for such interference with the parents' rights exists, where a value is concerned which, in the scheme of fundamental rights and basic freedoms, is accorded unconditional priority. In other words, the ordinary courts are obliged to secure a just balance between the interests of a child and the interests of his or her parents; especial attention must, however, be given to the interests of the child which may - depending on their nature and seriousness – outweigh the parents' interests (see the cited decision). Above all, it cannot be permitted for parents to adopt measures that are harmful to their child's health or development (see the 7 August 1996 decision of the ECtHR in the matter of Johansen v. Norway, published in Reports 1996-III). That the measures in this case were of this sort appears from the above-mentioned decisions. Since they made it possible to immediately begin the necessary treatment of the minor child, the Constitutional Court did not ascertain that the relevant measures of public authorities were excessive and did not fulfill their aim; nor were they manifestly disproportionate measures, because in the given case they restricted the rights of the parents only to the extent necessary.

Further the Constitutional Court dealt with the issue of whether the proceeding in which provisional measures were decided upon were conducted in conformity with the law or whether it resulted in a violation of Art. 36 of the Charter, Art. 6 of the European Convention and Art. 9 para. 2 of the Convention on the Rights of the Child. First of all, the complainants object that the ordinary courts did not hear them and did not permit them to represent their minor child in the proceeding, by which they violated § 76a para. 3 of the Civil Procedure Code. As appears from the file in the case, the motion to order provisional measures was delivered to the court on 13 August 2003 and contained the assertion that treatment must be initiated by 15 August 2003. From this, it is clear that the courts were justified in proceeding in accordance with § 76a para. 3 of the Civil Procedure Code, which applies to cases in which it is necessary to intervene without delay, which accords with the court's duty to decide within 24 hours (§ 75 para. 4 of the Civil Procedure Code). Generally, it would only with great difficulty be possible to hear the parties to the proceeding by that deadline, not even taking into account that the issue, as to whether such decision is imperative, has been entrusted to the court's discretion (§ 75 para. 3 of the Civil Procedure Code). In the appeal against the decision of the second instance court, the complaints then, as represented by an attorney, gave their views on the matter, although it was not evident from their submission that they were reproaching the court for this alleged „error"; nor did the need for such an approach follow from further facts. Nor did the Constitutional Court agree with the objection that § 76 para. 3 of the Civil Procedure Code had been violated. In the proceeding at issue, the courts resolved a possible conflict between the rights and interests of the child and the rights and interests of his parents, thus it was quite obvious that there existed doubts as to whether the complainants could act on their child's behalf in the proceeding. To this must be added that, in comparison to the court's decision pursuant to § 76 para. 1 of the Civil Procedure Code to place the minor child under the medical care of a specific person, as concerns the complainants' rights, the mere fact that the minor child was, pursuant to the cited provisions, assigned a guardian for the purposes of the proceeding at issue is strictly speaking insignificant.

Nor did the Constitutional Court find well-founded that objection relating to Art. 12 para. 1 of the Convention on the Rights of the Child, as the right, pursuant to this provision, to give his or her views on a matter is accorded to a child who is capable of formulating his or her own opinions. It is the Constitutional Court's view that, in interpreting this provision, not only must the child's age (and his intellectual maturity) be taken into account, but also the nature of the matter at issue, as well as further circumstances, such as the family background and social milieu in which the child is growing up. At the time the court was deciding, the minor Dominik was 6 years old, and thus it could scarcely be assumed that he would fully comprehend this complex matter relating to his treatment and be capable of exhibiting sufficient autonomy, that is, from his parents (at least to some extent), to formulate an independent opinion. In such a situation, to hear the minor would be a mere formality, which anyway could nowise influence the court's decision. As far as concerns the objected violation of Art. 6 para. 2 of the Convention on Human Rights and Bio-Medicine, in this regard as well the Constitutional Court does not agree with the complainants' views because the sense and purpose of the mentioned provision is above all to secure to minors upon whom medical procedures are being performed protection against the abuse of biology or medicine (see the Preamble to the Convention). Therefore, the carrying out of such procedure is conditioned upon the consent of the minor's statutory representative, official person, or some other person or body empowered by law for this purpose. However, it cannot be interpreted such that the consent of the statutory representative is always an essential condition, as such an approach to the problem would be in conflict not only with the Charter, the European Convention, and the Convention on the Rights of the Child (because it would essential protection of the rights and interests of the child), but also with the Convention on Human Rights and Bio-Medicine itself, which prescribes for the state parties the obligation to afford care without discrimination (Arts. 1, 3) and in conformity with the appropriate professional obligations and standards (Art. 4). One should be aware that this Convention represents complimentary protection of fundamental rights and basic freedoms and that it is not permitted, by means thereof, to restrict the rights and freedoms arising from other international conventions (see the Preamble).

In view of what has been stated above, the Constitutional Court had no choice but to reject the constitutional complaint on the merits, § 82 para. 1 of the Act on the Constitutional Court. The Constitutional Court reached this decision without holding a hearing (§ 44 para. 2 of the Act on the Constitutional Court), to which step the parties and secondary parties had expressed their assent in advance.

Notice: Decisions of the Constitutional Court cannot be appealed.

Brno, 20 August 2004