

# 2005/08/01 - IV. ÚS 31/05: DISCIPLINARY FINE

## HEADNOTE

The amount of a disciplinary fine must always be set in view of the principle of proportionality, because when giving a fine there is a conflict between the constitutionally protected value of ensuring the proper conduct of criminal proceedings and the right to peaceful enjoyment of property. In order for the interference by the state authority in the right to property not to violate the requirement to preserve the essence and significance of constitutionally guaranteed human rights and freedoms, it is necessary to take into account, among other things, the importance of the smooth conduct and fulfillment of the aim of criminal proceedings, the intensity with which they will be endangered by non-compliance with the summons issued by the body active in criminal proceedings, as well as the gravity of the conduct concerning which the criminal proceedings are conducted. If we weigh the penalty for the harmful conduct concerning which the criminal or misdemeanour proceedings are conducted, and the penalty for violating procedural obligations in investigating the conduct, i.e. a transgression of much lower gravity, it is evident that imposing a fine several times higher for a less important transgression of a procedural nature can not meet the test of proportionality.

## CZECH REPUBLIC CONSTITUTIONAL COURT

### JUDGMENT

### IN THE NAME OF THE CZECH REPUBLIC

A Panel of the Constitutional Court, composed of its Chairwoman Michaela Židlická, judge Miloslav Výborný and Eliška Wagnerová decided on 1 August 2005 on the constitutional complaint of J. L., represented by Mgr. P. D., attorney, against a decision by the state prosecutor of the District State Prosecutor's Office in Žďár nad Sázavou of 22 November 2004, ref. no. Zt 468/2004-19, and against a decision by the police commissioner of the District Directorate of the Police of the CR, Criminal Police and Investigation Service, in Žďár nad Sázavou of 7 October 2004, ref. no. ORZR-592/KPV-00K-2004-9, with the participation of 1) the District State Prosecutor's Office in Žďár nad Sázavou, 2) District Directorate of the Police of the CR, Criminal Police and Investigation Service, in Žďár nad Sázavou, as parties to the proceedings, and with the consent of the parties, without a hearing, as follows:

The decision of the state prosecutor of the District State Prosecutor's Office in Žďár nad Sázavou of 22 November 2004, ref. no. Zt 468/2004-19, and the decision of the police commissioner of the District Directorate of the Police of the CR, Criminal Police and Investigation Service, in Žďár nad Sázavou of 7 October 2004, ref. no. ORZR-592/KPV-OOK-2004-9, are annulled.

## REASONING

In his timely filed constitutional complaint the petitioner seeks the annulment of the abovementioned decisions by criminal prosecution bodies, on the grounds that they violated his right to a fair trial, guaranteed by Article 36 par. 1 of the Charter of Fundamental Rights and Freedoms (the "Charter") and Article 6 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"). The petitioner also believes that there was an unconstitutional violation of his right to a defense, guaranteed by Article 40 par. 3 of the Charter and guaranteed by Article 6 par. 3 let. b) and c) of the Convention, as a so-called minimum right of a person accused of a criminal offence, in connection with Article 3 par. 3 of the Charter, under which nobody may be caused detriment to his rights merely for asserting his fundamental rights and basic freedoms.

From the requested investigation file of the District Directorate of the Police of the CR, Criminal Police and Investigation Service, in Žďár nad Sázavou, no. ČTS: ORZR-592/KPV-OOK-2004, and from the file of the Commission for Handling Misdemeanours in Nové Město na Moravě, no. MUNNMN/32866/2004, the Constitutional Court determined the following:

The decision by the police commissioner of the District Directorate of the Police of the CR, Criminal Police and Investigation Service, in Žďár nad Sázavou, of 23 September 2004, ref. no. ORZR-592/KPV-OOK-2004-1, opened criminal proceedings against the petitioner for the crime of unjustified violation of the right to a house, apartment, or non-residential space under § 249a par. 2 of the Criminal Code, which he was alleged to have committed when, as owner of the building at Palackého náměstí no. 32 in Nové Město na Moravě, during construction work in the period from 14 August 2004 to 30 August 2004 he had gravel brought into the passageway into the building, which made it difficult to impossible for employees of the company D., s.r.o., which resides in that building, to enter into the building and have access to their workplace, even though he knew that there was an easement on that property to the benefit of the company D., s.r.o., which consisted of permitting access on foot and by vehicle, and that permitting access to the premises of the company D., s.r.o., was one for the conditions in the building permit issued by the City Office in Nové Město na Moravě for repairs to the building. The mailing containing the decision to begin criminal prosecution included a summons to the petitioner to appear for questioning on 5 October 2004, and notice that he would have an opportunity to study the investigation file. The petitioner received the mailing on 4 October 2004, and filed a complaint against the decision to begin criminal prosecution the next day. As the

petitioner did not appear for questioning on 5 October 2004 (without providing an adequate excuse, according to the police commissioner), the police commissioner, applying § 66 par. 1 of the Criminal Procedure Code, by decision of 7 October 2004, ref. no. ORZR-592/KPV-00K-2004-9, imposed a disciplinary fine on him in the amount of CZK 7,000; The petitioner filed a complaint against this decision. On the same day, the police commissioner presented the file to the appropriate state prosecutor for a ruling on the complaint until a decision was made to begin criminal prosecution, and summoned the petitioner for questioning on 14 October 2004. The state prosecutor of the District State Prosecutor's Office in Žďár nad Sázavou, by decision of 22 November 2004, ref. no. Zt 468/2004-16, cancelled the decision to begin criminal proceedings, and directed the police body to review the matter and make a new decision. In her reasoning she stated that the petitioner's conduct did not reach the degree of social danger required by the Criminal Code, and therefore could not be classified as a crime, but should be classified as an misdemeanours. The state prosecutor of the District State Prosecutor's Office in Žďár nad Sázavou denied the complaint against the decision to impose a disciplinary fine, as unjustified, by resolution of 22 November 2004, ref. no. Zt 468/2004-19. The state prosecutor did not consider adequate the petitioner's defense, that on the day in question he was unable to reach the police commissioner by telephone to provide an excuse for his absence; in her opinion, the petitioner could have done this by a subsequent written apology, or in person, because he was present in Žďár nad Sázavou on that day. She rejected the petitioner's objection that he did not have enough time to prepare for questioning, on the grounds that § 90 et seq. of the Criminal Procedure Code, in view of the quite different procedural status of someone who is accused and someone who has been indicted, does not contain any deadline similar to the deadline provided in § 198 par. 1 of the Criminal Procedure Code.

On 3 December 2004 the petitioner's matter was transferred to the Commission for Handling Misdemeanours in Nové Město na Moravě. The decision of the Commission for Handling Misdemeanours of 9 March 2005 found the petitioner guilty of committing an misdemeanour against civil coexistence under § 49 par. 1 let. c) of the Act on Misdemeanours, and he was fined CZK 2,000. The misdemeanour proceedings have not yet been completed with legal effect, because the petitioner has filed an appeal.

The petitioner cites Constitutional Court judgment Pl. US 15/04 of 30 November 2004, in which the Plenum of the Constitutional Court took the position that a disciplinary fine is a criminal charge under Article 6 par. 1 of the Convention, but in terms of the existence of effective procedural guarantees or remedies § 146 par. 2 of the Criminal Code suffers from a constitutional defect, as it does not permit exercise of the right to judicial protection where the body filing charges is the state prosecutor supervising the preliminary proceedings. Moreover, persons affected by this provision are in a constitutionally unacceptably unequal procedural position compared to persons who were given a disciplinary fine by the chairman of a court panel. As regards his non-compliance with the summons to appear for questioning, the petitioner states that he did not receive the mailing until 4 October 2004 in the afternoon, after returning from work, and therefore could not choose his defense counsel until 5 October 2004, when he was also supposed to appear for questioning, which did not provide him adequate time to prepare a defense

(conferring with counsel, viewing the file before questioning). In conclusion the petitioner adds that all the conduct for which he was given a disciplinary fine was merely the exercise of his right to a defense.

The police commissioner of the Police of the CR, Criminal Police and Investigation Service, in Žďár nad Sázavou, in his statement on the constitutional complaint, described the course of the criminal proceedings in the matter in question.

The state prosecutor of the District State Prosecutor's Office in Žďár nad Sázavou states that she is familiar with Constitutional Court judgment Pl. US 15/04, but at the time that the decision in question was issued that judgment was not and could not have been known, and therefore she reviewed the contested decision, under § 147 par. 1 let. a), b) of the Criminal Procedure Code, in accordance with the legal order of the Czech Republic then in effect. The statement further provides that if telephone communication failed, the petitioner had other opportunities to excuse his absence from questioning, but did not take advantage use of any of them, and his efforts to excuse himself from the questioning could not, even with the benefit of the doubt, be considered adequate. The state prosecutor adds that the petitioner was not given a penalty for not appearing for questioning, but primarily for not providing an excuse, even subsequently.

The Constitutional Court weighed the facts determined above, and concluded that the constitutional complaint is justified, although also for a reason other than those stated by the petitioner.

With the consent of the parties, the Constitutional Court, under § 44 of the Act on the Constitutional Court, waived a hearing because it could not be expected to provide further clarification of the matter.

The Constitutional Court has already emphasized many times that it is not authorized to intervene in the decision making of the general courts; it is not the apex of that court system (Art. 81, Art. 90 of Constitutional Act no. 1/1993 Coll.), and therefore can not assume the right to supervisory review of their activities; of course, this is only insofar as these courts conduct their activities in accordance with Chapter Five of the Charter of Fundamental Rights and Freedoms (cf. judgment Pl. US 23/93, Collection of Decisions, vol. 1, p. 41). This conclusion applies - if the abovementioned prerequisite is met - not only to the autonomous status of the general courts, but is also regularly applied to other state authorities, including the Police of the CR and the State Prosecutor's Office.

The European Court of Human Rights has consistently ruled that the obligation of the parties under Article 1 of the Convention to secure the rights and freedoms specified in the Convention for everyone subject to their jurisdiction requires that states ensure that individuals subject to their jurisdiction will not be exposed to bad treatment, including bad treatment by other individuals. States have a positive obligation to conduct proper

investigations (cf. the decision *M.C. v. Bulgaria*, no. 39272/98, published in the Reports of Judgments of the European Court of Human Rights 1/2004, p. 38). Criminal proceedings fulfill the constitutionally protected value of securing public safety and protection of the rights of others, especially persons injured by a crime, but they also have, not least, preventive and educational importance in relation to perpetrators of crimes. In order to ensure the smooth conduct of criminal proceedings, punishment of the perpetrator, and compensation of the detriment suffered by the victim, it is essential for the bodies active in criminal proceedings to have at their disposal effective means which will make it possible for criminal proceedings to fulfill their mission if the accused does not cooperate or even resists. Of course, if such means of compulsion are used, it is necessary for that to occur only in situations and within bounds specified by law, and in a manner specified by law. The legal regulation (here, the Criminal Procedure Code) must be construed so as to preserve as much as possible the essence and significance of human rights and freedoms; this aspect must also be taken into account by bodies active in criminal proceedings when implementing a specific statutory provision in practice.

One of these means of compulsion is the institution of a disciplinary fine, regulated by § 66 of the Criminal Procedure Code. The Constitutional Court, without revisiting the reasons for the unconstitutionality of the legal framework for review of disciplinary fines stated in judgment Pl. US 15/04 (published in the Collection of Laws as no. 45/2005 Coll.), repeats that disciplinary fines are penalties for misconduct behaviour, they are provided by law and intended to be preventive and at the same time repressive measures taken by the state authority. They can be issued on a discretionary basis, so it is not ruled out that their imposition on various subjects may have a discriminatory effect (cf. judgment Pl. US 28/98, Collection of Decisions, vol. 16, no. 161). Under § 66 par. 1 of the Criminal Procedure Code, a disciplinary fine may be given to anyone who, despite a previous warning, cancels proceedings or behaves insultingly to a court, state prosecutor, or police body, or who, without a sufficient excuse, fails to obey an order or fails to comply with a notice which was given to him under the Criminal Procedure Code. In order for the consideration of a disciplinary fine by a body active in criminal proceedings not to conflict with the principle of constitutional protection of human rights and freedoms, it must always be indisputably and clearly proved that such circumstances have arisen (cf. judgment III. US 766/2000, Collection of Decisions, vol. 22, no. 94).

Although, where there are grounds for imposing a disciplinary fine, the Constitutional Court does not restrict itself in reviewing whether one of the abovementioned circumstances existed, it ordinarily does not intervene in the specific amount of a disciplinary fine, if it does not exceed the statutory limit of CZK 50,000; of course, only provided that the amount of the fine is not clearly disproportionate to the gravity of the situation for which it was given. The amount of a disciplinary fine must always be set in view of the principle of proportionality, because when giving a fine there is a conflict between the constitutionally protected value of ensuring the proper conduct of criminal proceedings and the right to peaceful enjoyment of property. In order for the interference by the state authority in the right to property not to violate the requirement to preserve the essence and significance of constitutionally guaranteed human rights and freedoms, it is necessary to take into account, among other things, the importance of the smooth

conduct and fulfillment of the aim of criminal proceedings, the intensity with which they will be endangered by non-compliance with the summons issued by the body active in criminal proceedings, as well as the gravity of the conduct concerning which the criminal proceedings are conducted. The Constitutional Court found that in the petitioner's case the amount of the disciplinary fine does not meet the criterion of proportionality. Although the state prosecutor expressed the binding legal opinion that the petitioner's conduct was to be classified as an misdemeanour, she did not take this fact into account in any way when reviewing the amount of the disciplinary fine. In proceedings on the misdemeanour proceedings, the petitioner was given a fine of CZK 2,000, and the statutory maximum amount is CZK 3,000. If we weigh the penalty for the harmful conduct concerning which the criminal or misdemeanour proceedings are conducted, and the penalty for violating procedural obligations in investigating the conduct, i.e. a transgression of much lower gravity, it is evident that imposing a fine several times higher for a less important transgression of a procedural nature can not meet the test of proportionality. Secondly, one can also argue on the basis of § 60 par. 2 of Act no. 200/1990 Coll., on Misdemeanours, which permits, in a similar case (failure to appear to provide an explanation), imposing a fine with a maximum amount of CZK 1,000; here too, in view of the amount of the fine, a transgression of a procedural nature is seen as less serious, and is therefore penalized less strictly. The local police commissioner's approach to the criminal prosecution and the state prosecutor's approach to the question of the disciplinary fine give the impression that they sought to punish the petitioner using quite inappropriate means. Nonetheless, the exercise of state power must be subject to the principle of equality before the law, and a body of state power may not give in to emotions in its decision making.

The Constitutional Court comments on the state prosecutor's statement that the petitioner was not penalized for failure to appear for questioning, but for not presenting a proper excuse. However, the purpose of a disciplinary fine is for the petitioner to appear for questioning, and therefore it is the failure to obey that summons that is penalized, not the failure to submit an excuse. An excuse, if it provides justifiable grounds, merely serves as a circumstance which rules out imposition of a disciplinary fine; however, it can not be compelled through the threat or actual imposition of a disciplinary fine. The accused does not have a statutory obligation to provide an excuse, though of course there is the risk that he will be penalized for the failure to act which he could have justified through providing an excuse.

The Constitutional Court must also state its reservations about the police commissioner's actions. The proceedings took place in reverse order; only after all available evidence was gathered was the petitioner sent the decision to begin criminal prosecution. The Constitutional Court also criticizes the police commissioner for simultaneously sending the petitioner the decision to begin criminal prosecution, the summons to appear for questioning, and the notice that he would have an opportunity to study the file. By summoning the petitioner for questioning on the day following delivery of the documents, the police commissioner gave the petitioner very little time to contact defense counsel and organize his work and personal matters so that he would be able to appear for questioning. In view of the circumstances of the case, such a short time period is

disproportionate, as this was not an urgent matter which could not be postponed. It is also not acceptable for the petitioner's to be informed about the existence of preliminary proceedings through delivery of the decision to begin criminal prosecution and about events connected with termination of the preliminary proceedings (the summons to study the file) at essentially the same moment. This procedure can be seen as an effort by the Police of the CR to make its work easier, and a step which, at a minimum, makes the accused's opportunity to effectively defend himself more difficult (if not impossible). The police commissioner's actions in the petitioner's matter were in direct conflict with Article 40 par. 3 of the Charter and Article 6 par. 3 let. b) of the Convention, and thus applied state power inconsistently with Article 2 par. 3 of the Constitution. Because the actions of bodies active in criminal proceedings and the decisions contested by the constitutional complaint violated the petitioner's right to a fair trial, guaranteed by Article 36 par. 1 of the Charter and Article 6 par. 1 of the Convention, as well as the right to peaceful enjoyment of his property, guaranteed by Article 1 of the Protocol to the Convention and Article 11 par. 1 of the Charter, the Constitutional Court, pursuant to § 82 par. 3 let. a) of Act no. 182/1993 Coll., on the Constitutional Court, as amended, annulled the contested decisions.

**Notice: Decisions of the Constitutional Court can not be appealed.**

Brno, 1 August 2005