1995/09/18 - IV. ÚS 81/95: OBJECTION OF CONSCIENCE

HEADNOTES

1. A court which decides concerning guilt and innocence of a criminal act must respect the principle expressed in Art. 40(5) of the Charter,1) as well as in Art. 4(1) of Protocol No. 7 of the Convention on the Protection of Human Rights and Basic Freedoms, that nobody may be prosecuted or punished repeatedly for the same act, that is the principle „ne bis in idem".

2. If § 269(1) of the Penal Code2) provides a substantially more severe punishment for those who fail to report for military service with the intent of permanently avoiding it, it is unacceptable to interpret this provision such that „permanently" actually means temporarily or short-term.

CZECH REPUBLIC

CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Constitutional Court of the Czech Republic, sitting in a Panel . . . in the matter of J. Ř. . . . against the ruling of the Regional Court in Ostrava in connection with the decision of the County Court in Olomouc, decided thusly:

The decision of the County Court in Olomouc sp. zn. 7 T 14/95 of 24 February 1995 and the ruling of the Regional Court in Ostrava, the Olomouc branch, sp. zn. 2 To 130/95 of 22 March 1995 are hereby vacated.

REASONING

By decision of the County Court in Olomouc of 24 February 1995, the complainant was found guilty of the crime, under § 269(1) of the Penal Code,2) of refusing to report for service in the armed forces and was given an unconditional sentence of 12-months imprisonment. The complainant and his parents appealed this decision, with reference primarily to the fact that he had already been finally convicted for the permanent refusal of military service, by decision of the same court . . . and that the interpretation that he had commited a new offense by his refusal to obey the later conscription order would in fact mean that anyone who, for whatever reason, missed the deadline for submitting a

request to perform civilian service . . . may be punished practically without break until the age of 60, when the defense obligation ends. . . . By its ruling on 22 March 1995, the Regional Court rejected the appeal . . . . In its [the appellate court's] view, the court of first instance had, without any doubt, ascertained that, on 15 June 1994, the defendant had personally received the conscription order from the County Military Authority in Karvina, that the order placed upon him the duty to report for basic military service on 7 July 1994 . . . which he failed to do even 24 hours after the deadline set in the conscription order had expired. As far as concerns the appellant's argument that it is impermissible to criminally prosecute someone repeatedly for the same act, the court stated that while it was a matter of the same type of criminal offense, nonetheless it had been a very different act, defined by quite different factual circumstances.

In addition, the complainant urged that Art. 40(5) of the Charter1) had been infringed, because he had already once been finally convicted for the permanent refusal to perform military service . . . . In this context, he asserted that such repeated judicial prosecution is at the same time contrary to the Convention on the Protection of Human Rights and Fundamental Freedoms ...

The Constitutional Court requested the record from the County Court in Olomouc . . . from which it ascertained that the complainant was conscripted on 3 June 1992. . . . The Constitutional Court further ascertained that . . . on 4 May 1994 the complainant was found guilty, under § 269(1) of the Penal Code,2) of the criminal offense of failure to report for service in the armed forces because . . . he did not report for this service, not even within 24 hours following the deadline. For this criminal offense . . . the complainant was given a 12-month suspended sentence [delayed for a 15-month trial period]. . . . [O]n 15 June 1994 the complainant received a further conscription order, which directed him to report for basic military service on 7 July 1994. . . The complainant did not report at that time. . . . On 19 December 1994, the complainant was notified that he had been charged with the criminal offense, under § 269(1),2) of failure to report for service in the armed forces . . . . In the decisions which form the subject of this constitutional complaint, he was convicted and sentenced unconditionally to 12-month's imprisonment.

While the basic constitutional right to have the option of civilian service is contained in Art. 15(3) of the Charter,4) the content of that right must be interpreted in conjunction with Art. 9 of the Charter,6) which clearly states that military service or some other service prescribed by law in place of compulsory military service cannot be considered to be forced work or service. In this context, reference must be made to the fact that in this area Czech law goes beyond what is requied in the European Convention for the Protection of Human Rights and Fundamental Freedoms, from Art. 4(3)(b) of which can clearly be deduced that it is not an infringement of the Convention if one of the Member States refuses to give sanction in its legal order to the refusal to perform military service on the grounds of conscious ... It can generally be said, then, that the Czech rules require everyone who is drafted under the Defense Act to fulfil the duty to serve, whether as a soldier or as someone subject to civilian service. Therefore, someone may not be exempted, on the grounds of conscious, from every form of service whatsever, which is sometimes requested. To accept such a position would be in sharp conflict with the principle of equality ...

If the Act on Civilian Service provides that, by performing it, a citizen may not obtain any unjustified advantage over him who performed basic or substitute military service or training, then it must follow logically that if we were to tolerate conduct leading to the avoidance of any sort of service whatsoever, then this would result in the violation of the principle of equality. Stated otherwise, in a law-based state the non-fulfillment of a duty set by law must be sanctioned. It is the state's affair to set a sanction and the type, taking the character of the offense into consideration. Czech law prescribes solely criminal law prosecution for cases of refusal to perform either military or civilian service. It is the legislature's business to consider whether in such cases it is really necessary to choose only this form of legal sanction. In a state which seeks to be a law-based state the legitimacy of criminal law sanctions can be justified solely with reference to the necessity of protecting elementary values from acts which are especially dangerous to society and only when no other resolution exists. Thus, state repression must always be based on the principle that it be subsidiary and minimalized.

The material elements of the criminal offenses of refusal to report for service in the armed forces are contained in §§ 269 and 270 of the Penal Code, and those of the criminal offense of refusal to report for civilian service in §§ 272a, or 272b of the Penal Code. The constitutional complaint is directed against a court decision in which the complainant was finally convicted of a criminal offense under § 269(1).2) The material elements of this offense are defined relatively precisely and concretely and provide that anyone who, with the intent permanently to avoid military service or special substitute service, fails to report for service in the armed forces within 24 hours of the expiry of the deadline stated in the conscription order, shall be punished with imprisonment of one to five years. Thus, the intention permanently not to report for this service is an essential element of the definition of this criminal offense. This element comes into even sharper focus when contrasted with the material elements of the criminal offense under § 270(1) which is formulated such that a person commits it if he fails to report, even if out of negligence, for service in the armed forces within 24 hours of the expiry of the deadline stated in the conscription order. In addition, as this conduct does not have as its aim the permanent avoidance of military service, the punishment it is substantially more lenient (imprisonment of up to two years). There is a parallel difference between the criminal offense under § 272a, which governs the intentional permanent avoidance of civilian service, and under § 272b, which defines the elements for the „mere" refusal to report for civilian service.

The constitutional complaint and the introduced evidence make clear that the complainant was twice convicted of a criminal offense under § 269(1),2) the first time for failure to report to the military unit in Hodonín in July, 1993, and then the second time for failure to obey a conscription order approximately a year later. Neither of the courts held doubts on the score that they were dealing with two identical and repeated criminal offenses, this despite the fact that from the beginning the complainant objected that he had already clearly asserted when first convicted that he had not reported for service and had the intent permanently not to report, even though he was aware of the criminal consequences. The court of first instance did not respond to this defense at all. The appellate court then rejected this defense, mainly for the reason that in the second case

the failure to report occurred at a different time and that the summons to service was made in a different place. In the Constitutional Court's opinion, the heart of the matter consists in resolving this issue.

For each constitutional complaint, the Constitutional Court must perform the task of judging whether a court's interpretation of the applicable legal rules exceeds constitutional bounds. Even interpretations that at first glance may appear to be legal, may, in view of the actual circumstances, be so extreme as to depart from the Constitution. Art. 4(4) of the Charter5) provides that in applying provisions which limit fundamental rights and basic freedoms their essence and purpose must be maintained. And, in addition, a court which decides concerning guilt and innocence of a criminal act must respect the principle expressed in Art. 40(5) of the Charter,1) as well as in Art. 4(1) of Protocol No. 7 of the Convention on the Protection of Human Rights and Basic Freedoms, that nobody may be prosecuted or punished repeatedly for the same act, that is the principle „ne bis in idem". In the case at hand, the ordinary courts had no doubt that this principle had not been violated; the complainant, however, is of a different opinion.

After consideration of all circumstances, the Panel of the Constitutional Court has come to the conclusion that, in the complainant's case, the contested court decision violated the principle „ne bis in idem", thus, the above-mentioned basic rights guaranteed by the Constitution. If § 269(1) of the Penal Code2) provides a substantially more severe punishment for those who fail to report for military service with the intent of permanently avoiding it, it is unacceptable to interpret this provision such that „permanently" actually means temporarily or short-term. Interpreted in this way, the number of criminal offenses committed by a person would in actual fact be determined by the number of summons to service which the military administrative bodies send him. There is no doubt that even after a person is convicted for the first such act, it is possible to deliver a new conscription order to him; his failure to obey it, however, may not be assessed as a new criminal offense if the court in the earlier proceeding found the intent permanently not to report for military service. It is the Constitutional Court's view that when the complainant received further summons, he merely persisted in his earlier expressed intention not to report for military service. It was the same conduct with the same result, thus, the identical, and by no means a different, act. This identity cannot be disrupted by a change in particular circumstances which individualize the act, in this instance a summons at another time and to another place.

Due to the fact that the contested court decision violated the principle that a person may not be repeatedly criminally prosecuted for the same act, which is laid down in Art. 40(5) of the Charter,1) as well as in Art. 4(1) of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitutional Court has no option but to annul the decision.

The Constitutional Court expects that its principled decision will serve for the ordinary courts' future decision-making as a guideline concerning the length of punishment for those who permanently refuse to perform military service, or civilian service. In its view, the Penal Code as it now stands provides ample opportunity so that in similar cases the legal affliction may be of such an intensity as to avoid the doubtless undesirable result of giving those who violate the law an advantage over those who fulfill their duties. At the

same time, the Constitutional Court is convinced that the legislature is considering the possibility as well of enacting sanctions other than imprisonment.

IV. US 81/95

Overview of the most important legal regulations

1. Art. 40 par. 5 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides that no one may be criminally prosecuted for an act for which she has already been finally convicted or acquitted of the charges. This rule shall not preclude the application, in conformity with law, of extraordinary procedures for legal redress.

2. § 269 par. 1 of Act no. 140/1961 Coll., the Criminal Code, as amended by later regulations, provides that anyone who, with the intent of permanently avoiding active military service or special service does not begin service in the armed forces within 24 hours after the deadline set in the draft order, shall receive a prison sentence of one to five years.

3. § 2 par. 1 of Act no. 18/1992 Coll., on the Civil Service, as amended by later regulations, entitled Procedure for Refusing Performance of Military Service, provides that a declaration of refusal to perform military (substitute) service or military exercise can be submitted by a) a draftee no later than 30 days after the end of the draft proceedings, b) a draftee who was permitted a deferral of basic military service, no later than 5 days after the ending of the grounds for which he was allowed a deferral, c) a soldier whose basic (substitute) service was interrupted, no later than 5 days after the end of the grounds for the interruption, d) a soldier in the reserves in the period up to 31 January of the calendar year.

4. Art. 15 par. 3 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides that no one may be compelled to perform military service if such is contrary to his conscience or religious conviction. Detailed provisions shall be laid down in a law.

5. Art. 4 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides in par. 3 that any statutory limitation upon the fundamental rights and basic freedoms must apply in the same way to all cases which meet the specified conditions., par. 4, In employing the provisions concerning limitations upon the fundamental rights and basic freedoms, the essence and significance of these rights and freedoms must be preserved and such limitations are not to be misused for purposes other than those for which they were laid down.

6. Art. 9 par. 1 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides that no one may be subjected to forced labor or service. par. 2 provides that military service or some other service provided for by law in place of compulsory military service is not considered forced labor or service.