2005/04/26 - PL. ÚS 21/04: ADMINISTRATIVE PROCEEDING´S REGULATION

HEADNOTES

The Constitutional Court stated its legal opinion on constitutional aspects of the issue of ruling out general regulations on administrative proceedings in judgment file no. Pl. ÚS 14/96. It stated that meeting the constitutional postulate under which state power can be exercised only in cases, within the bounds, and in the manner provided by law (Art. 2 par. 3 of the Constitution, Art. 2 par. 2 of the Charter), is a guarantee against abuse of state power, and it results in a requirement for a statutory basis for its application (in the present matter, whether in the form of the Administrative Procedure Code or another independent norm). According to the Constitutional Court, ruling out the application of general regulations on administrative proceedings when no others exist also creates inconsistency with Art. 36 par. 1 of the Charter, which governs everyone's right to due process in the exercise of his rights.

The view that, given the absence of explicit regulation of administrative proceedings, an administrative body is required to observe the fundamental principles of administrative proceedings, and these are recognizable not only from doctrine, but also a posteriori from the case law of decisions in administrative court proceedings. However, that concept conflicts with the constitutional maxim that state power can be exercised only in the manner provided by law (Art. 2 par. 3 of the Constitution, Art. 2 par. 2 of the Charter). The maxim of a statutory basis for the exercise of state power, or written procedural law, does not rule out fine-tuning it through case law, or decisions by administrative bodies; however, it makes constitutionally unacceptable the absence of explicit statutory procedural regulation in its entirety.

If doctrine permits the use of analogy in administrative proceedings at all, then it does so only limited by certain conditions – only in a limited scope, for the purpose of bridging gaps in procedural regulations, and only to the benefit of the rights of parties to the administrative proceedings. However, one can not conclude from these opinions that it could be considered acceptable to use analogy to create procedural regulation for administrative proceedings in their entirety.

CZECH REPUBLIC
CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court, composed of JUDr. Stanislav Balík, JUDr. František

Duchoň, JUDr. Vojen Güttler, JUDr. Pavel Holländer, JUDr. Ivana Janů, JUDr. Dagmar Lastovecká, JUDr. Jiří Mucha, JUDr. Jiří Nykodým, JUDr. Pavel Rychetský, JUDr. Miloslav Výborný, JUDr. Eliška Wagnerová and JUDr. Michaela Židlická, decided on 26 April 2005 on a petition from the Supreme Administrative Court seeking the annulment of the phrase "3," in § 44 of Act no. 20/1987 Coll., on State Historical Preservation, as follows:

The phrase "3," in § 44 of Act no. 20/1987 Coll., on State Historical Preservation, is annulled as of the day this judgment is promulgated in the Collection of Laws.

REASONING

I.
Definition of the Matter and Recapitulation of the Petition

On 15 April 2004 the Constitutional Court received a petition from the Supreme Administrative Court seeking the annulment of the phrase "3," in § 44 of Act no. 20/1987 Coll., on State Historical Preservation.

The petitioner did so under § 64 par. 3 of Act no. 182/1993 Coll., as amended by later regulations, after, in connection with its decision making activity in accordance with Art. 95 par. 2 of the Constitution, it concluded that § 44 of Act no. 20/1987 Coll., on State Historical Preservation, is inconsistent with Art. 2 par. 3 of the Constitution, and Art. 2 par. 2 and Art. 36 par. 1 of the Charter of Fundamental Rights and Freedoms (the "Charter").

In the matter file no. 6 A 102/2001, the Supreme Administrative Court is deciding on a complaint from O.M., seeking the annulment of the decision of the Ministry of Culture of 17 September 2001 file no. 5381/1998 designating a set of drawings and graphics owned by the plaintiff as a cultural monument. The reasoning of that decision states that proceedings to designate the set of items of personal property as a cultural monument were opened at the proposal of the National Gallery in Prague, which identified the set of drawings and graphics from the "M" collection to be valuable works which can not be threatened with export. The city hall of Prague and the State Institute for the Preservation of Historic Monuments agreed with the designation as a cultural monument, and the petitioner did not respond to the petition by the deadline provided. On the basis of documents presented, the Ministry of Culture concluded that selected works form the set meet the criteria of a cultural monument, and are representative components of a historical collection and an important document of the development of Czech and European drawing and graphics in the period from the 16th to the 19th centuries, as a result of which they were designated as a cultural monument.

In the complaint for the administrative decision, O. M. claimed that § 44 of the Act on State Historical Preservation, under which general regulations on administrative

proceedings do not apply proceedings to designate a thing as a cultural monument, was unconstitutional. He finds it unconstitutional in the lack of an opportunity for a party to the administrative proceedings to file an appeal, as well as in the lack of review by an independent and impartial body with full jurisdiction, as at the time when the complaint was filed (before the Administrative Procedure Code went into effect) courts could review only the legality of administrative decisions. In addition, the plaintiff claimed that the Act on State Historical Preservation was inconsistent with Art. 11 of the Charter, i.e. inconsistent with the constitutionally guaranteed protection of property. He proposed that a general court review the submission of the matter to the Constitutional Court, because he believed that in his case the decision was made on the basis of a law which is inconsistent with the constitutional order.

In its response to the complaint, the Ministry of Culture pointed to Constitutional Court judgment file no. I. ÚS 35/94, from which it concludes confirmation that the Act on State Historical Preservation is constitutional. It also pointed to a decision by the High Court in Prague, file no. 7 A 13/99, under which the Act on State Historical Preservation can not be deemed to be inconsistent with the constitutional order only on the grounds that the Act does not permit two-level proceedings. It also points to the opportunity to have a matter reviewed by an independent body under Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention").

The matter of O.M., conducted at the High Court in Prague under § 246 par. 2 of the Civil Procedure Code, as in effect before 1 January 2003, was transferred to the Supreme Administrative Court under § 132 of the Administrative Procedure Code. While reviewing it, the Supreme Administrative Court took the opinion that § 44 of Act no. 20/1987 Coll., on State Historical Preservation, which must be applied in the matter, is inconsistent with the constitutional order insofar as it provides that general regulations on administrative proceedings do not apply to proceedings to designate a thing as a cultural monument.

The Supreme Administrative Court believes that the mere ruling out of generally regulations on administrative proceedings [meaning Act no. 71/1967 Coll., on Administrative Proceedings (the Administrative Procedure Code)] can not, without anything further, be considered unconstitutional, if this ruling out is compensated by the creation of a set of special rules, more suitable for the given type of proceedings (as, for example, in the case of Act no. 337/1992 Coll., on Administration of Taxes and Fees, as amended by later regulations). It sees the justification for the existence of special regulations for administrative proceedings in the complexity and diversity of public administration. However, in the petitioner's opinion, if the law rules out the general rules for administrative proceedings without replacing them with others, that establishes the unconstitutionality of such a framework. In its opinion, the result of the absence of another procedural regulation which would apply to the matter is the fact that an administrative body is not bound to protect the rights and interests of the citizens, is not even obligated to consider the matter conscientiously and responsibly, is not obligated to dispose of the matter in time and without unnecessary delays, and does not have to take care that the decision be based on the reliably determined facts of the matter; on the

contrary, the person whose rights are concerned in the matter does not have the opportunity to defend such rights himself or to respond to the bases for the decision. Likewise, according to the Supreme Administrative Court, in such a case a number of other obligations and rules do not apply: for example, in such proceedings there is no party to the proceedings, the matter can be decided by an employee of the administrative body who has a personal or material interest in the outcome of the proceedings, no one need be permitted to review the file, no one need be notified of the decision or have the decision delivered to him, in fact the decision does not even need to be prepared in writing, the decision is not bound by any preliminary question, deadlines for issuing a decision do not exist, the decision can not be appealed, an unlawful decision can not be annulled by re-opening proceedings or by the procedure under § 65 of the Administrative Procedure Code, and the decision does not even formally go into legal effect.

In this situation the petitioner considers the setting of rules for the decision making procedure to be fully in the jurisdiction of the appropriate administrative body. In this regard it points to an expert opinion according to which in such cases there is no choice but to analogously apply certain institutions from the administrative code and perhaps also generally principles of administrative law (D. Hendrych a kol., Správní právo. Obecná část., [D. Hendrych and collective of authors, Administrative Law. General Part.], 4th edition, Prague 2001, p. 247). However, it considers insufficient the arguments of an administrative body which would claim that its procedure was constitutional because it was based on analogous application of the administrative code and the principles of administrative law. Some of these principles can be found in the introductory provisions of the Administrative Procedure Code, others can arise from provisions of other laws, and yet others may be a generalization of administrative or judicial decision making. However, there is no binding list of them, and it is thus left to the discretion of the administrative body which of the aggregate of generally recognized principles it will observe in its decision making.

In this regard the Supreme Administrative Court points to Constitutional Court judgment file no. Pl. ÚS 14/96, which, it believes, applies fully to the present matter and which states, among other things, that ruling out the use of general regulations on administrative proceedings when no others exist violates the guarantee of a statutory basis for the exercise of state power under Art. 2 par. 3 of the Constitution and Art. 2 par. 2 of the Charter and also creates inconsistency with Art. 36 par. 1 of the Charter, which provides the right of every person to a specified procedure when exercising his rights.

Based on the foregoing, the Supreme Administrative Court believes that completely excluding the Administrative Procedure Code from decision making on the rights and obligations of natural persons and legal entities in a situation where there is no other applicable framework which the administrative body would be required to observe is inconsistent with the constitutional order, specifically with Art. 2 par. 3 of the Constitution and the corresponding provision of Art. 2 par. 2 of the Charter, as well as with Art. 36 par. 1 of the Charter, for which reason it proposed that the phrase “3,” in § 44 of

Act no. 20/1987 Coll., on State Historical Preservation, be annulled.

II.

Recapitulation of Substantive Parts of the Statement from the Party to the Proceedings

The Constitutional Court, under § 42 par. 4 a § 69 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, sent the petition in question to the Chamber of Deputies. In his statement of 24 February 2005, the Chairman of the Chamber of Deputies of the Parliament of the Czech Republic, PhDr. Lubomír Zaorálek, points in the introduction to the procedure followed by the Ministry of Culture in the matter of the plaintiff O. M., during which he was informed in writing about the filing of a petition to designate a set of personal property as a cultural monument, and he was given an opportunity to respond to the petition under § 3 par. 2 of the Act on State Historical Preservation, from which the party to the proceedings before the Constitutional Court concludes that the fundamental principles of administrative proceedings were observed. The statement further provides that although the Act on State Historical Preservation does not permit an appeal against designation of things as cultural monuments, this does not yet mean that it is inconsistent with the Constitution or with international treaties by which the Czech Republic is bound. According to the party to the proceedings, the Act on State Historical Preservation does not rule out the possibility that a matter will be reviewed by handled by an independent body.

The Chairman of the Chamber of Deputies also refers to the arguments of the Supreme Administrative Court, pointing to the legal opinion contained in the decision of the High Court in Prague of 30 August 2001, file no. 7 A 13/99-28, concerning § 44 of the Act on State Historical Preservation and ruling out application of the Administrative Procedure Code for proceedings to designate things as cultural monuments, where by the Supreme Administrative Court itself confirms that it agrees with the view that in such proceedings an administrative body must observe the fundamental principles of administrative proceedings.

The Chairman of the Chamber of Deputies also confirmed that Act no. 20/1987 Coll. was passed by the necessary majority of deputies of the Czech National Council on 30 March 1987, was signed by the appropriate constitutionally required persons, and promulgated in the Collection of Laws.

In the closing of the statement, he then states that it is up to the Constitutional Court, in connection with the petition to annul the phrase “3,” in § 44 of Act no. 20/1987 Coll., on State Historical Preservation, to evaluate the constitutionality of that statutory provision and issue the appropriate decision.

The Constitutional Court, under § 42 par. 4 a § 69 of Act no. 182/1993 Coll., as amended by later regulations, also sent the petition to the Senate of the Parliament of the Czech Republic. In the introduction to his statement of 22 February 2005, the Senate Chairman, MUDr. Přemysl Sobotka, states that Act no. 20/1987 Coll., on State Historical Preservation, was passed by the Czech National Council on 30 March 1987, before the Senate was established, and none of the amendments to it concerned the contested § 44, so the Senate can not provide a statement which would be based on its discussion of the relevant provision of the Act in the Senate.

As regards the claimed unconstitutionality of § 44 of Act no. 20/1987 Coll., as regards the petitioners arguments, the party to the proceedings points to certain aspects related to the issue:

A matter concerning designating a thing as a cultural monument (under § 3 of the Act on State Historical Preservation) is not a clear case of ruling out general principles on administrative proceedings without any statutory procedural framework at all. Certain procedural rules on designating things as cultural monuments are provided precisely by § 3 of Act no. 20/1987 Coll., as well as by § 1 of Decree no. 66/1988 Coll., as amended by Decree no. 538/2002 Coll. Therefore, in the opinion of the Chairman of the Senate, from that point of view, rather than arguments about the non-existence of another legal framework it would be appropriate to deal with the contents of § 3 of the Act as to whether and on what grounds this statutory framework can be considered so inadequate that in relation to it the part of § 44 expressed by the number "3," of the Act on State Historical Preservation can be considered unconstitutional (also in view of previous court decisions in analogous matters, e.g. decisions by the High Court in Prague of 30 August 2001, file no. 7 A 13/99 and the Supreme Administrative Court of 28 April 2004, file no. 6 A 106/2002). However, according to the party to the proceedings, the present petition does not do so, and the entire argument is basically built on the fact that in this matter there is no other applicable legal framework which the administrative body would be required to observe.

In the conclusion of his statement, the Chairman of the Senate states that is it up to the Constitutional Court to evaluate the constitutionality of the contested provision of § 44 of Act no. 20/1987 Coll., on State Historical Preservation, and make a decision in the matter.

III.
Wavier of Hearing

Under § 44 par. 2 of Act no. 182/1993 Coll., as amended by later regulations, the Constitutional Court, with the consent of the parties, may waive a hearing, if it can not be expected to clarify the matter further. In view of the fact that all the parties, that is, the petitioner, in the filing of 6 April 2005, and other parties in the statement from the

Chairman of the Chamber of Deputies of the Parliament of the Czech Republic, dated 12 April 2005, and the statement from the Chairman of the Senate of the Parliament of the Czech Republic, dated 8 April 2005, agreed to waive a hearing, and also in view of the fact that the Constitutional Court believes that a hearing can not be expected to clarify the matter further, a hearing in this matter was waived.

IV.

Text of the Contested Legal Regulation

Under § 44 of Act no. 20/1987 Coll. "general regulations on administrative proceedings do not apply to proceedings under § 3, 6, 8 and § 21 par. 2 and 4," and § 3 of the Act, as amended by later regulations, regulates designation of things as cultural monuments.

V.

Conditions for the Active Standing of the Petitioner

The petition to annul the phrase "3," in § 44 of Act no. 20/1987 Coll., on State Historical Preservation was filed by the Supreme Administrative Court under § 64 par. 3 of Act no. 182/1993 Coll., as amended by later regulations.

As has already been narrated, in the matter file no. 6 A 102/2001 the Supreme Administrative Court is deciding on a petition from O. M., seeking the annulment of a decision by the Ministry of Culture of 17 September 2001, file no. 5381/1998, designating a set of drawings and graphics owned by the petitioner as a cultural monument. The Supreme Administrative Court, after concluding, in connection with its decision making activity according to Art. 95 par. 2 of the Constitution, that the phrase "3," in § 44 of Act no. 20/1987 Coll., on State Historical Preservation, which is to be applied in resolving the matter file no. 6 A 102/2001, is inconsistent with Art. 2 par. 3 of the Constitution, Art. 2 par. 2, and with Art. 36 par. 1 of the Charter, the Supreme Administrative Court, by resolution of 5 April 2004, file no. 6 A 102/2001-37, suspended proceedings in the matter under § 48 par. 1 let. a) of the Administrative Procedure Code, and submitted the petition for review of a norm to the Constitutional Court.

A procedural requirement for the active standing of a general court, under § 64 par. 3 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, is that there be a relationship between the proposed annulment of a statutes, or its individual provisions, and the subject matter of the source proceedings which establishes decision-making grounds for evaluation of the matter by the general court. Under § 75, § 76, § 78 of the Administrative Procedure Court, the review of a contested decision in proceedings on a complaint against a decision by an administrative body includes review of

the claimed defects in the administrative proceedings, and § 44 of the Act on State Historical Preservation is a fundamental starting point for such evaluation in the proceedings in question. Therefore, we can state that the petitioner has met the requirements for active standing in proceedings on review of a norm.

VI.

Constitutionality of Jurisdiction and the Legislative Process

Under § 68 par. 2 of Act no. 182/1993 Coll., as amended by later regulations, the Constitutional Court, when making decisions in proceedings to annul statutes and other legal regulations, evaluates the content of these regulations in terms of their consistency with the constitutional order, or statutes, in the case of a different legal regulation, and determines whether they were passed and issued within the bounds of constitutionally provided jurisdiction and in a constitutionally prescribed manner.

If the Constitutional Court, when reviewing a norm, assesses the jurisdiction of a norm-creating body and the constitutionality of the norm-creating process, its starting point is § 66 par. 2 of the Act on the Constitutional Court, under which a petition in proceedings to annul statutes and other legal regulations is impermissible if the constitutional act or international treaty with which the reviewed regulations are claimed to be inconsistent by the petition ceased to be in effect before the petition was delivered to the Constitutional Court. It follows from this that with legal regulations issued before the Constitution of the Czech Republic, no. 1/1993 Coll. went into effect, the Constitutional Court is authorized to review only whether their content is consistent with the existing constitutional order, but not the constitutionality of the process of their creation and observance of norm-creating jurisdiction (see judgments file no. Pl. ÚS 9/99, Pl. ÚS 10/99, Pl. ÚS 7/2000, and Pl. ÚS 40/02).

Thus, after making that finding in this matter, the Constitutional Court limits itself to stating that Act no.. 20/1987 Coll., on State Historical Preservation, went into effect on 1 January 1988, in the period before the Constitution of the Czech Republic, no. 1/1993 Coll. went into effect, and none of the amendments to it apply to the contested § 44.

VII.

Consistency of Content of the Contested Statutory Provision with the Constitutional Order (Constitutionality of Ruling Out General Regulations on Administrative Proceedings)

The Constitutional Court stated its legal opinion on constitutional aspects of the issue of ruling out general regulations on administrative proceedings in judgment file no. Pl. ÚS 14/96. It stated that meeting the constitutional postulate under which state power can be

exercised only in cases, within the bounds, and in the manner provided by law (Art. 2 par. 3 of the Constitution, Art. 2 par. 2 of the Charter), is a guarantee against abuse of state power, and it results in a requirement for a statutory basis for its application (in the present matter, whether in the form of the Administrative Procedure Code or another independent norm). According to the Constitutional Court, ruling out the application of general regulations on administrative proceedings when no others exist also creates inconsistency with Art. 36 par. 1 of the Charter, which governs everyone's right to due process in the exercise of his rights.

As already stated, Act no. 20/1987 Coll., on State Historical Preservation, was passed by the Czech National Council on 30 March 1987, and went into effect on 1 January 1988, and none of the amendments to it after the fall of the communist regime applied to the contested § 44.

According to the background report to § 44 of the government draft of the Czech National council Act on State Historical Preservation (publication no. 8, Czech National Council 1986-1990): "designating a thing as a cultural monument does not affect the specific rights of its owners, and therefore there are no grounds for applying the Administrative Procedure Code. In addition, the communist society has a special interest in the preservation and culturally political application of cultural monuments which can not be subject to the position and the personal viewpoints of their owners. Nevertheless, even if general regulations on administrative proceedings are ruled out, the relevant provisions of the Act set forth the entitlement of the owners to respond to a petition to designate things as cultural monuments or the basis for doing so."

The entire concept of the Act on State Historical Preservation, reflecting period and ideological axioms, arises from the absolute prevalence of the public (state) interest and denial of protection of individual rights, in this context property rights. This approach led to the contradictory position that designation of a thing as a cultural monument, which is connected to restriction of the owners rights to use or dispose of it, "does not affect the specific rights of its owners," due to which the legislature at the time found no grounds to apply the Administrative Procedure Code in the proceedings. Another argument in the concept at the time, which contradicts the first argument, under which restriction of an owner's right to use or dispose of a thing does not affect his property rights, is the argument of the clear dominance of the "communist society's special interests" which "can not be subject to the position and the personal viewpoints of their owners."

Thus conceived, the purpose of § 44 of the Act on State Historical Preservation can only be considered inconsistent with the constitutional protection of property rights under Art. 11 of the Charter and Art. 1 of the Protocol to the Convention.

The Constitutional Court is aware of the constitutional protection of cultural wealth, in the sense of protection of a public good or interest (Art. 34 par. 2 of the Charter). In a number of its decisions it has expressed the opinion that conflict arises at the constitutional law

level not only between the fundamental rights and freedoms themselves, but also between the fundamental rights and freedoms and other constitutionally protected values – public goods or interests (file no. Pl. ÚS 15/96, III. ÚS 256/01). This conflict is evaluated by applying the principle of proportionality, a necessary component of which is the maxim arising from Art. 4 par. 4 of the Charter, under which, even if fundamental rights and freedoms are restricted due to a conflicting public good or interest taking precedence, their essence and significance must be preserved.

It follows from the foregoing that the exclusion of general regulations for administrative proceedings from decision making on designating a thing as a cultural monument, as established in § 44 of the Act on State Historical Preservation, is also inconsistent with the consequences of evaluating that legal regulation according to the principle of proportionality and Art. 4 par. 4 of the Charter.

The party to the proceedings makes two arguments supporting the constitutionality of § 44 of Act no. 20/1987 Coll. The first is a reference to the case law of the general courts and of the Constitutional Court; the first is a claim that ruling out general regulation of administrative proceedings when deciding on designating a thing as a cultural monument does not result in a complete absence of procedural regulation, because § 3 of Act no. 20/1987 Coll., as amended by later regulations, as well as § 1 of Decree no. 66/1988 Coll., as amended by Decree no. 538/2002 Coll., set forth certain clauses in this context.

Insofar as the Senate's statement refers to Constitutional Court judgment file no. I. ÚS 35/94, it must be emphasized that the subject of that judgment was evaluation whether the institution of designating a thing as a cultural monument was materially consistent with Art. 11 of the Charter, but not the question of ruling out the general regulations of administrative proceedings without replacing them with special regulations.

In its decision of 30 August 2001, file no. 7 A 13/99, the High Court in Prague concluded that " the fact that Act no. 20/1987 Coll., on State Historical Preservation, does not permit an appeal against a decision designating a thing as a cultural monument (§ 3 and § 44 of the Act) does not make the Act inconsistent with the Constitution or with international treaties, specifically with Article 6 of the Convention," because "Act no. 20/1987 Coll. does not rule out the possibility of the matter being evaluated by an independent body under Article 6 of the Convention (in the context of the Czech Republic, by a court)." Generally, as regards proceedings to designate a thing as a cultural monument, the court concluded that "even if § 44 of Act 20/1987 Coll., on State Historical Preservation, rules out application of the Administrative Procedure Code to proceedings to designate things as cultural monuments (§ 3 of the Act), an administrative body in such proceedings must observe the fundamental principles of administrative proceedings."

In its judgment of 28 April 2004, file no. 6 A 106/2002, in response to the plaintiff's objection that the legal regulation of designation of a thing as a cultural monument is very incomplete and rules out application of the Administrative Procedure Code, the Supreme

Administrative Court referred to the legal opinion in the decision of the High Court in Prague of 30 August 2001, file no. 7 A 13/99-28. Therefore, in the adjudicated matter it considered relevant not the act whether the defendant (the Ministry of Culture) acted according to the Administrative Procedure Code, but whether it respected the rights of the owner of the building in question (the plaintiff), finding support precisely in the fundamental principles of administrative proceedings. In this regard, the Supreme Administrative Court determined that the defendant informed the plaintiff in writing that a petition had been filed to designate the building as a cultural monument (§ 3 par. 2 of the Act on State Historical Preservation), permitted him to present his arguments and submit evidence, which it subsequently duly considered, and therefore the Court concluded that the defendant observed the fundamental principles of administrative proceedings.

In its case law, the Constitutional Court has spoken on the question of the constitutionality of the system of appeals. In its judgment file no. Pl. ÚS 15/01 it stated in this regard: "The system of appeals levels is the result of balancing, on the one hand, the effort to achieve the sovereignty of law, and on the other hand, efficiency in decision making and legal certainty." The Constitutional Court thus shares the opinion of the High Court in Prague that the lack of two levels in administrative proceedings, given the existence of judicial review, does not by itself make that procedural framework inconsistent with the safeguards contained in Art. 6 of the Convention and Art. 36 of the Charter (this maxim is illustrated in court proceedings by the unconstitutionality of so-called "surprise decisions," which, by eliminating a second level of review, deprive the parties to proceedings of the right to present factual and legal arguments (see judgments file no. III. ÚS 139/98, I. ÚS 336/99, III. ÚS 377/01, II. ÚS 532/02, I. ÚS 220/04 and others)). However, the view that the lack of two levels in administrative proceedings is not in itself unconstitutional does not lead to the conclusion that, consequently, ruling out general regulations on administrative proceedings combined with the lack special regulations likewise does not establish inconsistency with the legal order. The reason for the distinction is the fact that the lack of two-level proceedings in itself is not unconstitutional in the case of explicit regulation of administrative proceedings, while the subject of the adjudicated matter is the constitutionality of the absence of explicit regulation of administrative proceedings in their entirety.

Both of these decisions also state the view that, given the absence of explicit regulation of administrative proceedings, an administrative body is required to observe the fundamental principles of administrative proceedings, and these are recognizable not only from doctrine, but also a posteriori from the case law of decisions in administrative court proceedings.

This argument comes from the concept of an unwritten framework for the entire complex of procedural law. However, that concept conflicts with the constitutional maxim that state power can be exercised only in the manner provided by law (Art. 2 par. 3 of the Constitution, Art. 2 par. 2 of the Charter). The maxim of a statutory basis for the exercise of state power, or written procedural law, does not rule out fine-tuning it through case

law, or decisions by administrative bodies; however, it makes constitutionally unacceptable the absence of explicit statutory procedural regulation in its entirety.

The absence of procedural regulations for administrative proceedings can be compensated for by the decision making activities of administrative courts and the case law of courts through the use of analogy. However, in this regard legal doctrine takes very diverse positions. Petr Průcha rejects analogy generally: “For the application and interpretation of norms in administrative law, the use of analogy does not come into consideration, which in a way arises directly from their nature.” (P. Průcha, Správní právo. Obecná část. [Administrative Law. General Part.] Brno 2003, p. 70). Petr Hajn also takes a restrained attitude to analogy in administrative law: “Analogy as a legal institution serves to bridge gaps in the law and is applied particularly in private law. In public law and in administrative proceedings, we must observe considerable restraint when applying this institution ." (P. Hajn, Analogie jako právní institut a jako způsob usuzování. Několik poznámek k analogii v právu (nejen) správním. [Analogy as a Legal Institution and as a Method for Deciding. Some Comments on Analogy in Administrative (and Other) Law]. Právník [The Lawyer], no. 2, 2003, p. 123). With regard to Art. 2 par. 3 of the Constitution and Art. 2 par. 2 of the Charter, Milan Kindl formulates the principle that “in public law analogy can not be used to the disadvantage of someone who does not exercise public power,” from which it follows that “it may be used to his benefit” (M. Kindl, Malá úvaha o analogii ve veřejném právu [A Few Thoughts on Analogy in Public Law]. Právník [The Lawyer], no. 2, 2003, p. 133). A similar position is taken by Vladimír Sládeček: “It may seem that the scope for using analogy in administrative or public law is hopelessly limited, or completely eliminated by the enshrining of constitutional principles – the limits for exercising public (state) power (namely, Art. 2 par. 3 of the Constitution, Art. 2 par. 2 and Art. 4 par. 1 of the Charter). However, that does not mean it is completely impossible to apply analogy, thought it evidently should not be a frequent phenomenon ... the use of analogy of statutes or analogy of laws in administrative law (whether substantive or procedural) can be considered if it is (clearly) to the advantage of the party to the proceedings or the legal relationship of administrative law.” (V. Sládeček, Obecné správní právo [General Administrative Law]. Prague 2005, p. 130). According to Vladimír Vopálka, “if the regulations are insufficient, there is no choice but to rely, using analogy, on certain institutions of the Administrative Procedure Code, provided, of course, that this is not ruled out by the nature of the matter, and on certain principles of administrative (procedural) law (D. Hendrych and collective of authors, Správní právo. Obecná část [Administrative Law. General Part]. 5th ed., Prague 2003, p. 359).

Even from this overview of doctrinal opinions, in all their variety, one can conclude that if doctrine permits the use of analogy in administrative proceedings at all, then it does so only limited by certain conditions – only in a limited scope, for the purpose of bridging gaps in procedural regulations, and only to the benefit of the rights of parties to the administrative proceedings. However, one can not conclude form these opinions that it could be considered acceptable to use analogy to create procedural regulation for administrative proceedings in their entirety.

The Constitutional Court's legal opinion stated in judgment file no. Pl. ÚS 14/96 is thus in agreement with the general results of doctrinal positions.

Finally, the party to the proceedings objects against the justification of the petition from the Supreme Administrative Court with the claim that ruling out the general framework of administrative proceedings in deciding on designating a thing as a cultural monument does not result in complete absence of statutory procedural regulation because § 3 of Act no. 20/1987 Coll., as amended by later regulations, as well as § 1 of Decree no. 66/1988 Coll., as amended by Decree no. 538/2002 Coll., provides certain clauses in this regard.

Under § 3 par. 2 of the Act on State Historical Preservation the Ministry of Culture shall notify the owner in writing that a petition has been filed to designate a thing as a cultural monument, or that it intends to designate a thing as a cultural monument on its own initiative, and shall permit him to respond to the petition or other instigation. Paragraph 4 of that section provides the obligation of the Ministry of Culture to give written notice of designation of a thing as a cultural monument to its owner, the Regional Office, the Municipal Office of a municipality with expanded jurisdiction, and the expert organization of state historical preservation, and, in the case of archeological finds, also the Academy of Sciences of the Czech Republic; The Ministry has this obligation also if it did not find grounds to designate a thing as a cultural monument. Paragraph 5 establishes the owner's obligation to cooperate in providing relevant information to the Ministry for purposes of designating things as cultural monuments, and paragraph 6 of the Act on State Historical Preservation contains a reference to more detailed procedural regulation by a general legal regulation. The party to the proceedings considers that to be § 1 of Decree no. 66/1988 Coll., as amended by Decree no. 538/2002 Coll., under which the Ministry of Culture designates real and personal property, or sets of its, as cultural monuments on its own initiative or that of others; before designating a thing as a cultural monument it may, in addition to a statement under § 3 par. 1 of the Act, also require an assessment from expert, scientific, and artistic organizations. It also provides details on the mandatory cooperation of the owner under § 3 par. 5 of the Act on State Historical Preservation.

Although § 3 of the Act on State Historical Preservation contains certain procedural norms, in terms of the complete content of regulation of administrative proceedings this is only a torso; it is a minimal part of such regulation, which can not under any circumstances claim that it aims to be complete (possibly with the presence of certain gaps). The provision of § 1 of Decree no. 66/1988 Coll., as amended by Decree no. 538/2002 Coll., does not meet the requirement arising from Art. 2 par. 2 of the Constitution and Art. 2 par. 2 of the Charter regarding the legal force of a legal regulations which sets forth the manner of exercising state power.

Thus, since even the incomplete regulation contained in § 3 of the Act on State Historical Preservation changes nothing about the fundamental absence of special regulations for proceedings to decide on designating a thing as a cultural monument (after ruling out the application of general regulations of administrative proceedings), this incomplete statutory regulation is not capable of reversing the conclusion that the phrase "3," in § 44 of Act no.

20/1987 Coll. is inconsistent with Art. 2 par. 3 of the Constitution and Art. 2 par. 2 of the Charter.

On the basis of the grounds thus set forth, the ruling out of general regulations for administrative proceedings in decision making on designating a thing as a cultural monument must be considered inconsistent Art. 11 par. 1 and Art. 1 of the Protocol to the Convention read in connection with Art. 4 par. 4 of the Charter, as well as with Art. 2 par. 3 of the Constitution and with Art. 2 par. 2 of the Charter.

Based on the foregoing, the Constitutional Court annulled the phrase "3," in § 44 of Act no. 20/1987 Coll. as of the day this judgment is promulgated in the Collection of Laws.

Notice: Decisions of the Constitutional Court cannot be appealed.

Brno, 26 April 2005