2010/09/29 - PL. ÚS 32/08: DISCIPLINARY PROCEEDINGS DURING IMPRISONMENT

HEADNOTES

The general exclusion of the decisions issued within disciplinary proceedings from judicial review (with the exceptions referred to above) without their differentiation from the perspective of infringement of the prisoner's fundamental human rights is inconsistent with the constitutional guarantee of the right to fair trial in accordance with Article 36, para. 1 and 2 of the Charter. Hearing the complaint against the imposition of the disciplinary punishment by the Prison Service bodies does not meet the requirements for the protection of rights before an independent and impartial tribunal. In accordance with Article 36, para. 2 of the Charter, refusing court protection is impossible in the case of decisions affecting fundamental rights and freedoms.

The unconstitutionality of the provisions of Section 76, para. 6 of Act No. 169/1999 Coll. shows, in particular, in the fact that on its basis, decisions issued within disciplinary proceedings are generally excluded from judicial review, with the only decisions concerning property being exempt (see above). Paradoxically, higher protection is thus granted to cases of infringement of property rights, whereas the domain of infringements of the individual's personal sphere is left without the possibility of judicial review. The impact of certain disciplinary punishments amounts to a severe infringement of the prisoner's fundamental rights and freedoms beyond the limits prescribed by law and concerning imprisonment. The decisions imposing such disciplinary punishments cannot be excluded from court jurisdiction in the situation when they affect the fundamental rights and freedoms (Article 36, para. 2 of the Charter). In this respect, judicial review may exclude arbitrariness when imposing certain most severe disciplinary punishments, thus excluding their adverse consequences in the case of a potential decision concerning parole.

It is not the aim to achieve judicial review for all disciplinary punishments but only for those that significantly affect the prisoner's personal integrity. This type of legal regulation is allowed by Article 36, para. 4 of the Charter. In the given case, introducing a wider judicial review would not paralyse the activity of the Prison Service bodies, nor would it have an impact on the operating flexibility and effectiveness of the imposed disciplinary proceedings, since the Imprisonment Act does not grant a suspensory effect to the complaint against the decision on imposing a disciplinary punishment (with the exemption of the disciplinary punishment on forfeiture of property), nor does an administrative action suspend any decisions in this area.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

JUDGMENT
On 29 September, under the file reference Pl. ÚS 32/08, the Constitutional Court Plenum, composed of Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Pavel Rychetský, Miloslav Výborný, Eliška Wagnerová, and Michaela Židlická adjudicated upon the petition filed by the Supreme Administrative Court on 10 November 2008 to abolish Section 76, para. 6 of Act No. 169/1999 Coll., on Imprisonment and on Amendments of certain Related Acts, as amended, as follows:

The provisions of Section 76, para. 6 of Act No. 169/1999 Coll., on Imprisonment and on Amendments of certain Related Acts, in the wording: "Unless stated otherwise in this Act, decisions issued within disciplinary proceedings shall not be subject to judicial review.", shall be annulled as of 30 June 2011.

REASONING

I.
1. The Supreme Administrative Court filed a petition seeking to have the afore-mentioned text of Section 76, para. 6 of Act No. 169/1999 Coll., on Imprisonment and on Amendments of certain Related Acts annulled, due to its collision with the constitutional order of the Czech Republic. The petition was filed in connection with the decision on the cassation complaint filed by plaintiff A. Ž. (hereinafter referred to as "plaintiff") directed against the defendant – Prison Service of the Czech Republic, filed against the resolution issued by the Municipal Court in Prague on 19 October 2006, file reference 10 Ca 297/2006-23, dismissing as inadmissible the action of A. Ž. against the decision of the Prison Service issued on 21 October 2004. The above decision awarded the plaintiff disciplinary punishment in accordance with Section 46, para. 1 and para. 3, letter f) of Act No. 169/1999 Coll., on Imprisonment and on Amendments of certain Related Acts (hereinafter referred to as "Imprisonment Act"), resulting in his being placed in a confinement unit of the correctional facility for the period of 5 days. The reasoning behind the decision being that the plaintiff violated Section 28, para. 2, letter j) and para. 3, letter b) of the Imprisonment Act, by possessing forbidden objects that could – due to their nature – cause damage to health or endanger someone's life.

2. The plaintiff filed a complaint against the award of the disciplinary punishment, which was dismissed by the decision of the Prison Service on 21 October 2004. The plaintiff contested this decision by filing an action within administrative justice, since he did not agree with the conclusion of the Prison Service concerning the fact that conditions for the award of the afore-mentioned disciplinary punishment had been met. In its resolution issued on 19 October 2006, file reference 10 Ca 297/2006-23, the Municipal Court in Prague dismissed his action as inadmissible. It

relied on the legal regulation contained in Section 76, para. 6 of the Imprisonment Act, wherein decisions of the Prison Service within the disciplinary proceedings were excluded from judicial review, with the exemption of the disciplinary punishment of forfeiture of property and decisions on seizure of property. On the grounds of this jurisdiction exclusion, the action was dismissed as inadmissible pursuant to Section 46, para. 1, letter d) of Act No. 150/2002 Coll., the Code of Administrative Justice.

3. The plaintiff filed a cassation complaint against this resolution of the Municipal Court in Prague, alleging that excluding the judicial review in the case concerning the award of a disciplinary punishment was, in his case, inconsistent with Article 36, para. 2 of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the "Charter"). This is in fact a penalty imposed by an administrative body which factually affects the severity of imprisonment. In particular, it excludes the possibility of transfer into correctional facility with a more lenient security regime in accordance with Section § 39b of the Criminal Act. Another consequence lies in precluding a conditional discharge from imprisonment.

4. Within its preliminary ruling on the matter in the instant case, the Supreme Administrative Court (hereinafter referred to as the "petitioner") held that the provisions of Section 76, para. 6 of the Imprisonment Act excluding decisions issued within the disciplinary proceedings (with the exemption of the disciplinary punishment of forfeiture of property and decisions on seizure of property) from judicial review were inconsistent with the constitutional order of the Czech Republic. For this reason, pursuant to Article 95, para. 2 of the Constitution of the Czech Republic and Section 64, para. 3 of Act No. 183/1993 Coll., on the Constitutional Court, as amended (hereinafter referred to as the "Act on the Constitutional Court", it filed a petition seeking to have this provision annulled for the reasons mentioned below.

5. Imprisoned persons are obliged to conform to the regime of imprisonment in accordance with the effective decision issued within the criminal proceedings. Even though this punishment is traditionally referred to as "imprisonment", it is in fact a restriction of personal freedom the extent of which is prescribed by law. This conclusion has been drawn from the wording of the Imprisonment Act, wherein provisions of Section 27 distinguish between restricting and divesting certain rights for the period of imprisonment. Similarly, additional measures interfering with the prisoners' rights are only admissible within the limits defined by law. With respect to their severity, the procedure of imposing them should not be lacking in adequate instruments of defence, eliminating any arbitrariness or inadequateness.

6. The submitted matter lies in examining the disciplinary punishment imposed on the prisoner in the course of imprisonment by the Prison Service of the Czech Republic, also in relation to Article 6, para. 1 of the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "Convention"). The petitioner referred to certain judgments of the European Court of Human Rights (hereinafter referred to as the "ECHR") relating to this area. The test applied by the ECHR examining the nature of the sanction, i.e. whether a certain sanction is "criminal", was formulated in the judgment of the court in the case of "Engel and others versus the Netherlands", issued on 8 June 1976. In this

judgment, the ECHR attempted to define the border between the “criminal” and “disciplinary” areas. In the judgment in the case of “Campbell and Fell versus the United Kingdom”, issued on 28 June 1984, series A No. 80, the ECHR dealt with the border between the disciplinary and criminal area within the prison environment, holding that the principles set out in the “Engel” judgment applied to the prison environment as well.

7. The petitioner alleged similarity between the sanctions imposed in the course of imprisonment in accordance with Section 43, para. 1 (sic – correctly: Section 46, para. 3), letters f), g), and h) of Act No. 169/1999 Coll., and the sanctions which the ECHR recognised as falling within the scope of Article 6, para. 1 of the Convention. As a result, the existing system of the means of remedy against the decision on imposing disciplinary sanctions imposed in accordance with Section 46, para. 3, letters f), g), and h) of the Imprisonment Act is obviously inconsistent with Article 6, para. 1 of the Convention. The petitioner emphasised that within the ECHR judgment in the case of “Engel and others versus the Netherlands”, the ultimate national instance deciding on the complaint against disciplinary punishments was the Supreme Military Court. Contrary to the legal regulation in the Czech Republic, the complainants were provided with the protection on another level of review, i.e. before a court (even though it was a military court).

8. The petitioner pointed to the fact that the complaint filed in accordance with Section 52 of the Imprisonment Act, the decision on which falls within the competence of the prison director (or an authorised employee of the Prison Service), cannot be considered in relation to the severity of some of the imposed sanctions to be an appropriate protection guaranteeing an independent review of the imposed disciplinary punishment. The petitioner does not consider the prisoner’s option to defend their rights before the supervising public prosecutor as equal to the prisoner’s position within the court proceedings, since the prisoner does not hold the position of a party to the dispute. Furthermore, the supervision of the public defender of rights cannot be perceived as an adequate protection owing to the “facultative” nature of their recommendations which the Prison Service is not obliged to accept. The issue of the provisions of Section 76, para. 6 of the Imprisonment Act thus lies in the exclusion of judicial review for all disciplinary punishments (with the exemption of forfeiture of property) without any further differentiation according to the severity and consequences, whereas at least some of these punishments interfere with the fundamental rights and freedoms in accordance with the Charter, and therefore, the review should not be excluded from the jurisdiction in general.

9. The prisoner’s right to freedom of movement and residence is thus only limited, as expressly stipulated within 27, para. 2 of the Imprisonment Act. The petitioner claims that in the course of imprisonment, the prisoner cannot be exposed to arbitrariness or abuse of the position of the Prison Service staff. Imposing a punishment consisting in placing the prisoner into a confinement unit or solitary confinement could result (with the presence of the afore-mentioned negative phenomena), in significant infringement of the right protected by Article 7, para. 2 of the Charter, according to which no one may be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. It could also result in the violation of Article 10, para. 1 of the Charter, according to which everyone has the

right to demand that their human dignity be respected. The petitioner also referred to the provisions of Section 27, para. 4 of the Imprisonment Act, according to which “on limitations that shall be applied to a person in imprisonment or to persons under criminal proceedings, providing that reasons of custodial sanctions have been met, the court shall decide in compliance with a special act.” It is thus a question whether this provision is not directly inconsistent with Section 76, para. 6 of the same Act.

10. The petitioner also referred to the inconsistency of the legislature’s procedure, who expressly allowed judicial review only in the case of imposing a disciplinary punishment of forfeiture of property (Section 52, para. 4 of the Imprisonment Act). This results in a situation when, given the existing legal regulation, the court may review the correctness of imposing a disciplinary punishment of forfeiture of property of negligible value, yet such possibility is excluded, for instance, when preventing the reception of a package of high value or when taking a decision on placing the prisoner into solitary confinement. Furthermore, it is impossible to overlook the impact of the imposed disciplinary punishment onto decision-making concerning the potential parole granted to the prisoner. In accordance with the established court practice, when deciding on the prisoner’s application concerning the parole, the court always takes into account the prisoner’s conduct in the course of serving the sentence. Imposing a disciplinary punishment therefore determines the court’s consideration on the prisoner’s conduct. In case of a dismissal, a subsequent application for parole can only be submitted upon the expiration of one year.

II.
11. In accordance with the provision of Section 69, para. 1 of the Act on the Constitutional Court, the Constitutional Court asked for the statement of the Chamber of Deputies and the Senate of the Parliament of the Czech Republic.

12. In his short statement, the Chairman of the Chamber of Deputies stated that the contested provision of the Imprisonment Act had remained without any amendments since its adoption. In accordance with the government bill, the wording of the provisions of Section 76, para. 6 of Act No. 169/1999 Coll. was as follows: “Decisions issued within disciplinary proceedings shall not be subject to judicial review; this shall not apply to decisions on forfeiture or seizure of property, whose review may be sought within the extent and under the conditions prescribed by a special regulation.” (It is the Civil Procedure Code that serves as the special regulation.) On the basis of proposed amendments contained in the resolution of the Committee on Petitions and the Committee for Defence and Security, the provisions of Section 76, para. 6 were amended into the current wording. The statement of reasons concerning the provisions of Section 76, para. 6, referred to, in relation to excluding the decisions issued within disciplinary proceedings from judicial review, (the then effective) wording of Section 248, para. 2, letter f) of the Civil Procedure Code.

13. The Chairman of the Senate of the Parliament of the Czech Republic stated, in a similar manner, that the contested provision had not been subject to any legislative amendment over the existing period of its effect. Even though the Senate committees took up different approaches to the bill, the consideration

focused, in particular, on the issues of newly established or amended legal institutes of serving a prison sentence. No attention was expressly paid to the issues of judicial review of decisions issued within the disciplinary proceedings.

III.
14. In accordance with Article 87, para. 1, letter a) of the Constitution of the Czech Republic, the Constitutional Court has jurisdiction to annul statutes or individual provisions thereof if they are in contradiction with the constitutional order. Within these proceedings, the Constitutional Court assesses the contents of the statute or any other legal regulation from the perspective of their conformity to the norms of the constitutional order, examining whether they have been adopted and issued within the ambit of the powers set down in the Constitution and in the constitutionally prescribed manner (Section 68, para. 2 of the Act on the Constitutional Court). The statements of both Chambers of the Parliament of the Czech Republic imply that Act No. 169/1999 Coll. was adopted and issued in the constitutionally prescribed manner and within the ambit of the powers set down in the Constitution of the Czech Republic.

IV.
15. Having established this, the Constitutional Court proceeded to assess the wording of Section 76, para. 6 of Act No. 169/1999 Coll., on Imprisonment and on Amendments of certain Related Acts, from the perspective of its conformity to the constitutional order of the Czech Republic, concluding that the petition was legitimate. The wording of the provision whose annulment was petitioned for is as follows: “Unless stipulated otherwise within this Act, decisions issued within the disciplinary proceedings shall not be subject to judicial review.”

16. For the purposes of clear explanation of the given issues, it is suitable to point out the related provisions. In particular, these include Section 46, para. 1 of the given Act, according to which “disciplinary trespass means culpable breach of commitment laid by the law or of obligation that has been laid down on its basis, of order or discipline in the course of the imprisonment.” According to paragraph 2 of the same provision, it applies that “for the sake of disciplinary trespass disciplinary punishment can be imposed on the prisoner. The disciplinary punishment shall not be imposed when hearing of the case of disciplinary trespass with the prisoner is sufficient to achieve the goal that is followed up”. Section 46, para. 3 of the same Act contains the list of disciplinary punishments as follows: warning, reduction of pocket money by up to one third for the period up to three calendar months, prohibition of receiving one package in the course of a calendar year, fine up to 1,000 CZK, forfeiture of an item, placement into a confinement unit for a period up to 28 days excepting time dedicated to performing assigned tasks of the treatment, all day placement into a confinement unit for a period up to 20 days, placement into a solitary confinement for a period up to 20 days, and deprivation of benefits resulting from previous reward.

17. According to Section 52 of the afore-mentioned Act, the prisoner is entitled to file a complaint against the imposition of a disciplinary punishment within 3 days after the notification of such imposition. It is a complaint against imposing the disciplinary punishment of forfeiture of an item only that has a suspensory effect. The perpetrator of the disciplinary trespass or the person directly affected by the

decision on forfeiture of an item are entitled to file a complaint against the decision within 3 days after the notification of such decision, which has a suspensory effect. The prison director or an authorised employee of the Prison Service shall make the decision on the complaint within 5 working days following the submission. The employee who imposed the disciplinary punishment or decided on the forfeiture of an item cannot be authorised to issue a decision on the complaint. The Director General of the Prison Service shall decide on the complaint filed against the decision of the prison director. The review of the decision on the forfeiture or seizure of an item before court may only be sought under the conditions prescribed by a special legal regulation in the same extent to which the review is permissible within the trespass proceedings.

V.
18. In the past, the Constitutional Court has already dealt with, on a number of occasions, the issues of judicial review from the perspective of maintaining the constitutional guarantee of due process. What all its judgments have in common is that they have dealt with the constitutionality of the decisions excluded from judicial review. Summarising this case law results in the conclusions listed below.

19. In the Judgment file reference Pl. ÚS 9/2000, issued on 17 January 2001 (N 8/21 Collection of Judgments 55; 52/2001 Coll.), upon adjudicating the constitutionality of the so-called administrative punishment, the Constitutional Court emphasised that the person affected must have a possibility to seek the court review of a decision taken against them. The review cannot be denied in the case when the decision concerns the fundamental rights and freedoms in accordance with the Charter, the Constitution of the Czech Republic and international treaties in accordance with Article 10 of the Constitution of the Czech Republic.

20. Furthermore, the Constitutional Court dealt with respecting the guaranty contained in Article 6 of the Convention from the perspective of judicial review in connection with the decision on disciplinary penalties. In its Judgment issued on 23 November 1999, file reference Pl. ÚS 28/98 (N 161/16 Collection of Judgments 185; 2/2000 Coll.), it held that denying the protection in the matters of reviewing the decisions issued by public administration bodies was not possible in cases concerning the fundamental rights and freedoms in accordance with the Charter, the Constitution of the Czech Republic and international treaties in accordance with Article 10 of the Constitution of the Czech Republic. Any other procedure is inconsistent with Article 36, para. 2 of the Charter and Article 4 of the Constitution of the Czech Republic.

VI.
21. The issues concerning the right to a due process in the sense of the “right to a hearing”, applying Article 6, para. 1 of the Convention, are also dealt with in the case law of the European Court of Human Rights. In the Judgment on the case of “Engel and others versus the Netherlands”, issued on 8 June 1976, it set out a test applied by the Court when assessing the nature of the sanction, attempting to determine the border between the “criminal” and “disciplinary” areas. According to its conclusions, it is necessary to determine, in particular, whether the offence-defining provision belongs, in accordance with the legal system of the defendant

state, to the area of criminal law, disciplinary law or both. However, this represents a basic starting point only. It is the essence of the offence that is of greater importance, especially the severity of the sanction that the person faces. In the "Engel" case, the Court assessed the sanctions imposed on persons doing their compulsory military service in the Netherlands, taking the form of a light and aggravated arrest, committal to a disciplinary unit, and temporary strict arrest. The servicemen on whom a disciplinary penalty was imposed defended themselves by filing a complaint to the complaints officer, whose decision was subsequently reviewed by the Supreme Military Court. In the given case, the ECHR emphasised that the imposed punishments would have undoubtedly been deemed a deprivation of liberty if they had been applied to a civilian. When imposed upon a serviceman, though, they may not possess these characteristics. Disciplinary punishments imposed in the course of military service exceed the scope of effect of Article 6, para. 1 of the Convention only on condition that "they do not take the restrictions that clearly deviate from the normal conditions of life within the armed forces". On the basis of this criterion, the ECHR recognised as deprivation of personal liberty the sanctions of aggravated arrest and committal to a disciplinary unit, rather than simple or strict temporary arrest. It held that in order for the State to be exempt from the basic liability to provide a fair trial in criminal matters, it is not sufficient to qualify certain wrongdoings as disciplinary.

22. Another ECHR judgment concerning this area is the Judgment on "Campbell and Fell versus the United Kingdom", issued on 28 June 1984, series A No. 80. In the instant case, the Court dealt with the distinction between the disciplinary and criminal area also in the military environment, holding that "The Convention is not opposed to the Contracting States creating or maintaining a distinction between criminal law and disciplinary law and drawing the dividing line, but it does not follow that the classification thus made is decisive for the purposes of the Convention ... justice cannot stop at the prison gate and there is, in appropriate cases, no warrant for depriving prisoners of the safeguards of Article 6. It follows that the principles set forth in the Engel and Others judgment are also relevant, mutatis mutandis, in a custodial setting."

23. The provisions of Section 76, para. 6 of Act No. 169/1999 Coll., on Imprisonment and Amendments of certain Related Acts, contested by the petitioner, thus do not respect the principles on which the ECHR case law is based when interpreting and applying Article 6, para. 1 of the Convention, according to which everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, deciding on their civil rights or obligations or the lawfulness of any criminal charges pressed against them.

VII.

24. After assessing the content of Section § 76, para. 6 of Act No. 169/1999 Coll., on Imprisonment and Amendments of certain Related Acts, from the perspective of constitutional guarantees of fair trial, the Constitutional Court came to the following conclusions. In conformity with Article 1 of the Constitution of the Czech Republic, the Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens. In accordance with Article 4 of the Constitution of the Czech

Republic, the fundamental rights and basic freedoms enjoy the protection of judicial bodies. Undoubtedly, the right to judicial protection ranks among the fundamental characteristics of the state governed by the rule of law.

25. With respect to Article 36, para. 1 of the Charter, everyone may assert, through the prescribed procedure, their rights before an independent and impartial court or, in specified cases, before another body. According to paragraph 2 of the same Article, unless a law provides otherwise, a person who claims that his or her rights were curtailed by a decision of a public administrative authority may turn to a court for review of the legality of that decision. However, judicial review of decisions affecting the fundamental rights and freedoms listed in this Charter may not be removed from the jurisdiction of courts.

26. In the instant case, the key question is whether some of the decisions on imposing a disciplinary punishment (see above) are decisions affecting the fundamental rights and freedoms in accordance with the Charter. This may be implied by the wording of the Charter articles mentioned below. The provisions of Article 1 of the Charter stipulate that all people are free and equal in their dignity and rights. The Charter establishes the principle that any limitations of fundamental rights and freedoms prescribed by law must apply in the same way to all cases which meet the specified conditions. When employing the provisions concerning limitations upon the fundamental rights and freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations shall not be misused for purposes other than those for which they were enacted (Article 4, para. 3 and 4 of the Charter). Article 7, para. 2 of the Charter stipulates that no one may be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.

27. The provisions of Section 27 of the Imprisonment Act regulate the limitations and deprivation of certain rights of prisoners. As a matter of principle, during the imprisonment, prisoners are obliged to submit to a limitation of certain rights and freedoms the execution of which would be in conflict with the purpose of the imprisonment or that cannot be applied with respect to the imprisonment. The Act enumerates the rights and freedoms subject to limitations and of which the prisoner is deprived during the imprisonment. This implies that any further limitations imposed on rights and freedoms exceed the scope of limitations enumerated by law. Some of the decisions on disciplinary punishments represent such further limitations of the prisoner’s status and may, depending on the character and severity of the sanction, amount to a substantial infringement of their fundamental rights and freedoms (e.g. being placed in a confinement unit for the period of up to 28 days or all-day placement in a confinement unit or solitary confinement). For the reasons mentioned above, such decisions must be regarded as decisions affecting fundamental rights and freedoms. For this reason, they cannot be removed from the jurisdiction of courts (Article 36, para. 2 of the Charter).

28. The deficiency of the existing legal regulation lies in the fact that it does not distinguish between individual disciplinary punishments from the perspective of the severity of their impact onto the prisoner’s status. In fact, based on the application of Section 76, para. 6 of the Imprisonment Act, the judicial review is excluded in

the case of all decisions imposed within disciplinary proceedings (with the exemption of decisions on forfeiture or seizure of property). The legal exclusion of the judicial review applies both to disciplinary punishments of a lighter nature (such as a warning, pocket money reduction, or penalty), and disciplinary punishments which undoubtedly and substantially infringe upon the prisoner's rights and freedoms (placement into a confinement unit for the period of up to 28 days, all-day placement into a confinement unit for the period of up to 20 days, or placement in solitary confinement for the period of up to 20 days), amounting to significant extension of the existing freedom restriction. The manner of serving these punishments is regulated in detail within Section 49 of the same Act. Within the disciplinary punishment of placement into solitary confinement, the prisoner does not work, does not participate in the treatment programme, is not allowed to smoke, read daily press, books or any other publications except legal, educational or religious literature, and is not allowed to purchase foodstuffs and personal items except toiletries. They are not allowed to rest in bed outside the period specified within the internal rules. The same procedure is adopted in the case of a disciplinary punishment of placement into a confinement unit, with the difference that the prisoner is obliged to carry out cleaning work and work necessary to ensure the ordinary operation of the prison.

29. Excluding the decisions issued within disciplinary proceedings from judicial review, while not differentiating their severity, cannot withstand the test from the perspective of the requirements of Article 36, para. 2 of the Charter and Article 6, para. 1 of the Convention, as mentioned above. The paradox of the current legislation consists in the fact that judicial review is admissible in matters concerning property (forfeiture or seizure of property), while it is excluded in matters concerning serious infringement of the essentially personal sphere of the prisoner (placement in a confinement unit or placement in solitary confinement). The property thus enjoys higher protection that the personal sphere of an individual, albeit a prisoner.

30. Imposition of a disciplinary punishment also has an impact on parole. When deciding on the prisoner's application, courts take into account the prisoner's behaviour in the course of imprisonment. The imposed disciplinary punishments may thus affect the court's decision in this respect.

31. To sum up, the existing system does not grant the prisoner, due to the exclusion of judicial review, efficient procedural protection against the decision imposed within the disciplinary proceedings. This has also been mentioned in the professional literature when examining the prepared bill on imprisonment: "… the bill provides prisoners with a relatively broad possibility "to make a complaint", but on the other hand, a relatively narrow possibility to initiate, by their own act, administrative or court proceedings in which their objections would have to be decided upon by an independent and impartial body without the need to file with the Constitutional Court immediately". (V. Mikule and O. Novotný in publication "Vězeňství a právo" / Prison Service and Law, in Pocta D. Hendrychovi k 70. Narozeninám / Honour to D. Hendrych to his 70th Birthday, C. H. Beck, 1997, pp. 232–237).

32. The general exclusion of the decisions issued within disciplinary proceedings from judicial review (with the exceptions referred to above) without their differentiation from the perspective of infringement of the prisoner's fundamental human rights is inconsistent with the constitutional guarantee of the right to fair trial in accordance with Article 36, para. 1 and 2 of the Charter. Hearing the complaint against the imposition of the disciplinary punishment by the Prison Service bodies does not meet the requirements for the protection of rights before an independent and impartial tribunal. In accordance with Article 36, para. 2 of the Charter, refusing court protection is impossible in the case of decisions affecting fundamental rights and freedoms. The unconstitutionality of the provisions of Section 76, para. 6 of Act No. 169/1999 Coll. shows, in particular, in the fact that on its basis, decisions issued within disciplinary proceedings are generally excluded from judicial review, with the only decisions concerning property being exempt (see above). Paradoxically, higher protection is thus granted to cases of infringement of property rights, whereas the domain of infringements of the individual's personal sphere is left without the possibility of judicial review. The impact of certain disciplinary punishments amounts to a severe infringement of the prisoner's fundamental rights and freedoms beyond the limits prescribed by law and concerning imprisonment. The decisions imposing such disciplinary punishments cannot be excluded from court jurisdiction in the situation when they affect the fundamental rights and freedoms (Article 36, para. 2 of the Charter). In this respect, judicial review may exclude arbitrariness when imposing certain most severe disciplinary punishments, thus excluding their adverse consequences in the case of a potential decision concerning parole.

33. In this respect, it is also possible to rely on the specific circumstances of the case of the plaintiff, established from the file reference 9 As 2/2008 of the Supreme Administrative Court. The prisoner was given a disciplinary punishment in the form of placement into a confinement unit for the period of 5 days since "he had owned prohibited objects whose character could damage health or jeopardise life." According to the Prison Service, these objects included an amateurishly made transformer and an amateurishly made AA batteries case." According to the plaintiff, it was not a transformer but mere non-functional electronic components which he had found in the courtyard where they were left in large numbers. This dispute on the character of the afore-mentioned components was not dealt with at all in the subsequent stages of the proceedings, thus leaving doubts concerning the reason itself for imposition of the disciplinary punishment.

34. On the basis of the afore-mentioned findings, the Plenum of the Constitutional Court concluded that the provisions of Section 76, para. 6 of Act No. 169/1999 Coll. are in contradiction with Article 36, para. 1 and 2 of the Charter. They do not as much as meet the criteria of the fair trial guaranteed in Article 6, para 1 of the Convention on the Protection of Human Rights and Fundamental Freedoms. For this reason, the Plenum decided to annul it in accordance with Section 70, para. 1 of the Act on the Constitutional Court without an oral hearing, applying Section 44, para. 2 of the same Act, since the parties to the proceedings had consented to dispense with the oral hearing.

35. It is not the aim to achieve judicial review for all disciplinary punishments but only for those that significantly affect the prisoner's personal integrity. This type

of legal regulation is allowed by Article 36, para. 4 of the Charter. In the given case, introducing a wider judicial review would not paralyse the activity of the Prison Service bodies, nor would it have an impact on the operating flexibility and effectiveness of the imposed disciplinary proceedings, since the Imprisonment Act does not grant a suspensory effect to the complaint against the decision on imposing a disciplinary punishment (with the exemption of the disciplinary punishment on forfeiture of property), nor does an administrative action suspend any decisions in this area.

36. Within the proceedings on reviewing legislative norms, the Constitutional Court acts as the so-called negative legislature, authorised only to annul the contested legal regulation. In order to remove the unconstitutionality of the contested provisions of Act No. 169/1999 Coll., a positive response of the legislature is required, whose aim is adopting a constitutionally conforming legal regulation of the differentiated review of decisions on imposed disciplinary punishments in those cases when the imposed punishment substantially affects the personal integrity of an individual, albeit a prisoner. The legislature will also have to solve the issue of practicality and efficiency of the review procedure, i.e. whether jurisdiction will be granted to ordinary courts where criminal proceedings take place or whether such cases will be heard before administrative courts. For this reason, the Constitutional Court has deferred the effect of the annulment of the contested provisions until 30 June 2011 in order to provide the Parliament of the Czech Republic a sufficient period of time to adopt adequate legislation.

In accordance with Section 14 of Act No. 182/1993 Coll., on the Constitutional Court, as amended, Plenum Judges Pavel Holländer and Jiří Nykodým expressed their dissenting opinions to the Plenum Judgment.

1. Dissenting opinion of Judge Pavel Holländer

The dissenting opinion filed to the Judgment of the Constitutional Court, file reference Pl. ÚS 32/08, which annuls the provisions of Section 76, para. 6 of Act No. 169/1999 Coll., on Imprisonment and Amendments of certain Related Acts, is based on the following arguments.

The derogation reason of the Judgment consists in "general exclusion of the decisions issued within disciplinary proceedings from judicial review with the only exception of decisions related to property", which means that "paradoxically, higher protection is thus granted to cases of infringement of property rights, whereas the domain of infringements of the individual's personal sphere is left without the possibility of judicial review. The impact of certain disciplinary punishments amounts to a severe infringement of the prisoner's fundamental rights and freedoms beyond the limits prescribed by law and concerning imprisonment." In accordance with the majority vote, "it is not the aim to achieve judicial review for all disciplinary punishments but only for those that significantly affect the prisoner's personal integrity … In the given case, introducing wider judicial review would not paralyse the activity of the Prison Service bodies, nor would it have an impact onto the operating flexibility and effectiveness of the imposed disciplinary proceedings, since the Imprisonment Act does not grant a suspensory effect to the complaint against the decision on imposing a disciplinary punishment (with the

exemption of the disciplinary punishment on forfeiture of property), nor does an administrative action have a suspensory effect in this area." As a result of the afore-mentioned, the Judgment considers the provisions of Section 76, para. 6 of the Imprisonment Act as inconsistent with Article 36, para. 1 and 2 of the Charter of Fundamental Rights and Freedoms and with Article 6, para. 1 of the Convention on the Protection of Human Rights and Fundamental Freedoms. As obiter dictum in its Judgment, the Constitutional Court adds that "the legislature will also have to solve the issue of practicality and efficiency of the review procedure, i.e. whether jurisdiction will be granted to ordinary courts where criminal proceedings take place or whether such cases will be heard before administrative courts".

In accordance with the statement of reasons related to the draft Criminal Code (Act No. 40/2009 Coll.), "the purpose of criminal sanctions – punishments and protection measures (the existing Section 23 of the Criminal Act) is no longer expressly stipulated in the draft Criminal Code (its definition has been left to criminal science), being replaced with a reflection of general principles of punishment in the individual provisions concerning criminal sanctions … The purpose of punishment then arises not only from these general principles but also from the overall concept of the Criminal Code, and particularly from the individual provisions governing the imposition of criminal sanctions … Similarly, the general principles for imposition of sanctions are not defined by the law but they are directly reflected in the wording of individual provisions governing the general approaches to imposing criminal sanctions, as well as specific punishments and protection measures and their imposition". Among these principles, the statement of reasons includes the principle of legality, the principle of proportionality (adequacy and appropriateness) related to the sanction for a committed crime, the principle of individualisation of applied sanctions, the principle of the sanction personality, the principle of incompatibility of certain types of sanctions with the same offender, and the principle of humanity of sanctions. Furthermore, it points out the reflection of the purpose of the sanctions with the perspective of imposing them: "The new concept of the purpose of sanctions, ensuring their proportionality, effectiveness and deterrent effect, is expressed in the statutory criteria of their imposition, which are contained in specific proposed provisions of the Criminal Code, governing both general assumptions and principles of imposing sanctions, as well as conditions of imposing individual sanctions".

In the provisions of Section 27, para. 1 of the Imprisonment Act, the legislature established the prisoner's obligation to submit, during the imprisonment, a limitation of certain rights and liberties the execution of which would be in conflict with the purpose of the imprisonment or that cannot be applied with respect to the imprisonment. After adopting the new Criminal Code, this envisages weighing the purpose of a prison sentence, contained only implicitly in the statutory regulation, and those fundamental rights and freedoms the exercise of which would be in contradiction with such purpose or which cannot be applied due to serving such a sentence.
In this respect, the Judgment did not raise the question concerning the relation between the imposition of disciplinary punishments and meeting the purpose of imprisonment and whether these punishments (and to what extent) extend or deepen the area of fundamental rights and freedoms which are inconsistent with the purpose of serving the punishment or which cannot be applied due to serving

the punishment. It did not raise the question of whether even such potential extension or broadening falls (or does not) within the scope as defined by Section 27, para. 1 of the Imprisonment Act.

Satisfying the principle of humanity of imprisonment and related protection of human dignity also requires the mechanism of external supervision over the imprisonment. At present, the law entrusts this external supervision to the public prosecution (Section 78 of the Imprisonment Act), as well as to the public defender of rights (Section 1, para. 3 and 4 of Act No. 349/1999 Coll., on the Public Defender of Rights, as amended).

For the purposes of achieving the aims intended by the institute of disciplinary punishments in the course of imprisonment, which also include individual and general prevention, expeditiousness, immediacy and promptness of their imposition are essential. In its Judgment, against which this dissenting opinion is directed, the Constitutional Court failed to submit to the proportionality test the colliding purpose of the punishment and extensions and limitations associated with imposing disciplinary punishments, nor even these limitations and efficiency of the existing means of external supervision over the protection of rights.

Provided that the judicial review excluding a suspensory effect of the imposed disciplinary punishments is subsequently taken into consideration (since otherwise, these would usually lose their purpose), this leads to the question of efficiency and purpose of such review (which would be conceivable on the level of satisfaction only or on the level of consequences for deciding on parole). The consideration on potentially granting the jurisdiction to administrative courts then establishes a possibility of post-modern abandonment of the division of courts into civil, criminal and administrative courts, and granting the jurisdiction to administrative courts, the application of which cannot neglect criminal aspects, either. Finally, provided that the term of “legislative optimism” has become part of the legal jargon since the 1990s, in the instant case (as well as in a number of others), we have been confronted with another similar phenomenon: justice optimism, i.e. an often naïve idea that every social problem or every instance of exercise of rights must be associated with the jurisdiction of courts. The justice has been turning into a dinosaur, which – as expressed by Yevgeny Yevtushenko – “resembles a clumsy dinosaur with rachitic little legs, bent under the weight of the trunk, and with a tiny brain located too far from the tail.” 1)

The legal opinion of the Constitutional Court, expressed in its Judgment file reference Pl. ÚS 5/94, issued on 30 November 1994 (N 59/2 Collection of Judgments 155; 8/1995 Coll.), may serve as a certain starting point for the deliberation over the proportionality test, which associated the severity of decisions on transferring the prisoner from one prison type to another with the need of judicial review. This could imply the consequence, according to which in the case when a disciplinary punishment in accordance with Section 46, para. 3 of the Imprisonment Act comparably amounts to limitations of fundamental rights due to its severity, adequate court protection must be required (e.g. in the case of a disciplinary punishment of placing the prisoner in solitary confinement for the period of up to 20 days).

With respect to the afore-mentioned, I do not consider the provisions of Section 76, para. 6 of Act No. 169/1999 Coll., on Imprisonment and Amendments of certain Related Acts, in their integrity, as inconsistent with the constitutional order. Furthermore, I cannot identify with the applied test of their constitutionality, as outlined in the reasoning behind the Judgment, file reference Pl. ÚS 32/08.

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1) Y. Yevtushenko, Literárny týždenník (Literature Weekly), Vol. 32, 1989, p. 11.

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2. Dissenting opinion of Judge Jiří Nykodým

I disagree with the adopted Judgment annulling the provisions of Section 76, para. 6 of Act No. 169/1999 Coll., on Imprisonment and Amendments of certain Related Acts, for the reasons as follows:

Undoubtedly, decisions issued within disciplinary proceedings against the prisoner serving a sentence may significantly affect their fundamental rights. Nevertheless, this is implied in the very fact of awarding the prison sentence. The manner of serving the sentence is a consequence of conviction which took place on the basis of a court's decision, delivered after a due process of law. Serving the sentence includes the obligation to submit to a certain regime which substantially affects the prisoner's personal freedom, and consequently other fundamental rights and freedoms. All these limitations are thus a result of the decision of the sentencing court. The possibility to impose disciplinary punishments is not an expression of arbitrariness on the side of prison guards, but it is governed by the law and related subordinate legislation. Apart from hierarchical supervision of the bodies of the Prison Service of the Czech Republic, it is also subject to supervision by the public prosecution, the Ministry of Justice and the public defender of rights. For this reason, I believe that there is sufficient protection of the prisoner against arbitrariness when imposing disciplinary punishments.

It cannot be overlooked that a decision issued within disciplinary proceedings is usually an immediate response to a breach of discipline, where the speed of imposing the punishment and its quick enforcement serves as a guarantee of maintaining the required discipline. It remains unclear whether the judicial review, preferred in the Judgment, should have a suspensory effect. If so, it could result in completely absurd consequences that by the time of issuing a court decision, for instance, the disciplinary punished prisoner would have been released due to the expiration of the imprisonment period. This could also result in a situation when prisoners whose sentence is about to end would become practically uncontrollable. They would be aware that they in fact could no longer be punished for their disciplinary offences. If it does not have the suspensory effect, as implied in the Judgment, one must question the sense or efficiency of such measure.

Section 29 of the reasoning behind the Judgment reads that the paradox of the current legislation consists in the fact that judicial review is admissible in matters concerning property (forfeiture or seizure of property), while it is excluded in matters concerning serious infringement of the essentially personal sphere of the prisoner (placement in a confinement unit or placement in solitary confinement); and property thus enjoys higher protection than the personal sphere of a human being, albeit a prisoner. This is not a paradox at all, though. A prison sentence is a targeted intervention in individual rights, and it encompasses an obligation to submit to the regime of serving such sentence, which is prescribed by law, including the obligation to submit to the regime of disciplinary punishment

consisting in toughening the restriction of personal freedom as a result of breach of the discipline required by law. The fact that a means of judicial protection of property makes sense in this case, since it is impossible to extend the consequences of the restriction of personal freedom beyond the period of a prison sentence. Due to its nature, removal of property is a permanent measure affecting the property sphere. The fact that the Imprisonment Act, in its Section 52, para. 4, allows the judicial review of the decision on requisition or forfeiture of property is thus a mere logical consequence of the fact that requisition or forfeiture of property exceeds the restriction of the prisoner's personal freedom, which is included in the court's decision awarding a prison sentence, and interferes with another fundamental right to own property, and such intervention on its own is not covered in the court's decision on punishment.

The main argument in favour of the judicial review of some disciplinary punishments indicated in the Judgment is more effective defence against their vexatious imposition. I do not believe that judicial review will be a more effective means than the criminal liability of the guard member for misuse of powers and their liability for the disciplinary offence. For this reason, it is not necessary, in my opinion, to introduce further protection against something that is already punishable by law. Paraphrasing the quote from the ECHR Judgment in the case of Campbell and Fell versus the United Kingdom No. 7819 and 7878/77, issued on 28 June 1984 and included in section 22 of the Judgment, justice does not stop at the prison gate and prisoners are not deprived of protection in accordance with Article 6 of the Convention; it is just that such protection does not necessarily have to be provided in the form of the judicial review of disciplinary punishment.
The effort to submit almost any decision issued by a public authority to judicial review achieves absurd proportions, and there is no guarantee that it is just this particular review that will provide more efficient protection of prisoners' human rights and freedoms compared to the existing system of protection. This includes both the possibility to file a complaint against the disciplinary sanction and the possibility to turn to the public prosecution, the Ministry of Justice, and the public defender of rights. Besides, it remains unclear whether courts should determine only whether the sanction imposed by the prison guard does not amount to vexatious conduct or whether they should examine all the factual circumstances preceding the imposition of a disciplinary punishment, or whether the imposed disciplinary punishment corresponds to the established conduct or not, with the possibility to modify the imposed sanction. In other words, will it be the review of "lawfulness" or the review in full jurisdiction? In any case, it will result in further extension of the already comprehensive agenda of general courts with possible implications for the course of any other proceedings.

The idea that judicial review is an all-remedying solution to achieve justice is also irrational. Quite naturally, every court decision involves doubts of the parties to the proceedings concerning its correctness, being essentially the same as in relation to decisions that are due for review. In the eyes of the parties to any court proceedings, the result is usually perceived so that one injustice is being replaced with another one, depending on who is affected by the decision. For this reason, the attempt to seek justice cannot run to extremes. It is simply too much of a good thing, as it is quite aptly put in the book Ecclesiastes: "There is a just man that perisheth in his righteousness, and there is a wicked man that prolongeth his life in

his wickedness. Be not righteous over much; neither make thyself over wise: why shouldest thou destroy thyself?" (Ecclesiastes 7, 15–16).