Pl. ÚS 43/13 of 25 March 2014
Annulment of the "Spa" Decree

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

On 25 March 2014, in case file no. Pl. ÚS 43/13, the Plenum of the Constitutional Court, consisting of the Chairman of the Court and Judge Rapporteur, Pavel Rychetský and Judges Stanislav Balík, Ludvík David, Jaroslav Fenyk, Jan Filip, Vlasta Formánková, Ivana Janů, Vladimír Kůrka, Jan Musil, Vladimír Sládeček, Radovan Suchánek, Kateřina Šimáčková, Milada Tomková, Jiří Zemánek and Michaela Židlická, ruled on a petition from a group of 21 senators of the Senate of the Parliament of the Czech Republic, represented by JUDr. Milan Čichoň, attorney, with his registered address in Ostrava - Poruba, Hlavní třída 1196, seeking annulment of Decree no. 267/2012 Coll., on Setting an Indications List for Spa Rehabilitation Treatment Care for Adults, Children and Adolescents, or, in the alternate, seeking annulment of § 2 par. 2 of that Decree, with the participation of the Ministry of Health as a party to the proceeding and Mgr. Anna Šabatová, Ph.D., the Public Defender of Rights, as a secondary party to the proceeding, as follows:

Ministry of Health Decree no. 267/2012 Coll., on Setting an Indications List for Spa Rehabilitation Treatment Care for Adults, Children and Adolescents, is annulled as of the end of 31 December 2014.

REASONING

I.
Summary of the Petition

1. On 23 August 2013 the Constitutional Court received a petition from a group of 21 senators (the "petitioner"), represented by Senator MUDr. Mgr. Vladimír Plaček, seeking annulment of Ministry of Health Decree no. 267/2012 Coll., on Setting an Indications List for Spa Rehabilitation Treatment Care for Adults, Children and Adolescents, (the "contested decree"), or, in the alternate, the annulment of § 2 par. 2 of the contested decree.

2. The petitioner believes that the Indications List for Spa Rehabilitation Treatment Care for Adults, Children and Adolescents (the "Indications List") should have been regulated by a statute, or in the form of an appendix to a statute. The provision of spa rehabilitation treatment care falls within the right to free health care on the basis of public health insurance under Art. 31 of the Charter of Fundamental Rights and Freedoms (the "Charter"), under which setting the scope in which such care is covered by public health insurance is reserved to a statute approved through democratic parliamentary debate, and cannot be provided by merely a sub-statutory legal regulation.

3. In relation to § 2 par. 2 of the contested decree, under which the last treatment stay in a defined period before the decree went into effect is considered to be the basic treatment stay, and thus all further treatment stays corresponding to the same indication are considered repeat stays, the petitioner objects that this is inconsistent not only with Art. 79 par. 3 of the Constitution of the Czech Republic (the "Constitution"), but also with the principles of predictability of law, legitimate expectation, and legal certainty. The petitioner believes that the contested provision regulates legal relationships that arose before it went into effect in an unconstitutional manner, because it interferes in the legitimate expectation of patients who have a further, or repeat treatment stay. They can no longer rely on having

the stay covered by public health insurance, and are forced to pay it out of their own resources, which is necessarily reflected in their property sphere.

4. According to the petitioner, the significant restriction of the possibility of repeat treatment, in particular, which resulted from the contested decree, is a cause of the decrease in the use of spa facilities and the related decline in the quality of spa care. This situation can have a negative influence on citizens‘ health, because treatment procedures have their positive effect with the passage of time, with long-term and repeated application. For that reason, the petitioner believes that the contested decree affects the very existence or actual exercise (the essential content) of the right to protection of health and the right to free health care on the basis of public insurance, and therefore it conflicts with Art. 4 par. 4 in conjunction with Art. 31 of the Charter. It believes that this limitation of this fundamental right will not stand in terms of the principle of proportionality and that it can be described as discriminatory. It also states that the violation extends to the right to do business under Art. 26 of the Charter.

II.
The Course of Proceedings before the Constitutional Court

5. The Constitutional Court, pursuant to § 69 par. 1 and 3 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations (the "Constitutional Court Act") sent the petition to the Ministry of Health (the "Ministry") as a party to the proceeding and to the Public Defender of Rights, who is entitled to join the proceeding as a secondary party.

II./a
Brief from the Ministry of Health

6. The brief from the Minister of Health, MUDr. Martin Holcát, MBA, of 3 October 2013, states that the Ministry of Health issued the contested decree under Art. 79 par. 3 of the Constitution on the basis of § 33 par. 2 of Act no. 48/1997 Coll., on Public Health Insurance and Amending and Supplementing Certain Related Acts, as amended by Act no. 369/2011 Coll., (the "Public Health Insurance Act"). The possibility of providing spa care as covered care arises from the cited statutory provision, and the contested decree only determines the indication prerequisites, which are of a specialized medical nature. The decree itself however does not set limits on the fundamental rights and freedoms. It does not directly apply to the right to protection of health, does not in any way regulate the conditions under which authorization can be obtained to provide health care services, nor does it prevent providers from offering such services, whether they are covered or not covered by public health insurance. If an insured person's state of health required the provision of spa care, a proposal for such care is issued for him, but it can be covered by health insurance only after the reviewing physician of the relevant health insurance company confirms it. In view of the process of preparation and approval of the contested decree, including the appropriate comment proceeding, which the Minister summarized in detail, the claim that its approval process lacked democratic debate should not stand.

7. As regards the objection of retroactivity, the Minister stated that the contested decree newly distinguishes between basic and repeat treatment stays; patients must first have a basic stay, and only after that a possible repeat stay or stays. Because the previous Decree no. 58/1997 Coll., which sets the indications list for spa care for adults, children, and adolescents did not contain these terms, it was necessary to ensure continuity in the decision making on proposals for spa rehabilitation treatment care. It is precisely for this purpose that the transitional provision, § 2 par. 2 of the contested decree, which the petitioner seeks to have annulled in its alternate proposed judgment, defined a basic treatment stay in relation to previous stays. The fact that this provision applies to the period from 2009 to 2012 is intended to reflected the longest period provided in the indications list as a condition for beginning a repeat stay, which, in indication I/1 (malignant tumors) was a period of 36 months. A patient who, for example, completed treatment for tumors in 2010 and subsequently had spa care under earlier regulations will thus be able to have a repeat stay, because based on the cited provision his previous stay will be considered a basic stay under the new decree. In contrast, if this provision

were annulled, or had not been in the decree previously, that patient would first have to meet the conditions provided for a basic stay, including beginning treatment within 12 months after completing comprehensive treatment for tumors, which, however, in view of the passage of time, might no longer be possible. In such a case, the patient would be damaged by the new decree. The Minister adds that the legal-technical method applied, or the legislatively-technical reflection of the insured person's position under the new legislative framework, is nothing unusual in the Czech legal order [cf., e.g., § 98 par. 1 of Act no. 111/1998 Coll., on Universities and Amending and Supplementing Other Acts (the Universities Act) or § 59 of Act no. 85/1996 Coll., on Advocacy], and its purpose is to strengthen the principle of legal certainty within the coverage framework in the public health insurance system. This is not a violation of the ban on true retroactivity.

8. The indications list is an important specialist element for health care services providers when prescribing spa care for insured persons, and the reasons for adopting it were purely professional. The purpose of the new regulation, which replaced the previous Decree no. 58/1997 Coll., was to reflect the current medical knowledge and practices, including the possibilities of pharmacotherapy, as well as ensuring effective provision of spa rehabilitation treatment care, efficient use of health insurance funds, reserving funds for the treatment of those insured persons where there is an expectation of a significant contribution for improving or maintaining health, defining the scope of comprehensive spa rehabilitation treatment care for situations after serious injuries, operations, and treating serious illness and expanding co-paid care. Acute care today has available minimally invasive procedures that are patient-friendly, a number of illnesses can be timely diagnosed with the use of modern diagnostic technologies and then timely treated, or their progress can be prevented with modern pharmaceuticals. Thus, the need for subsequent spa rehabilitation treatment care for a number of illnesses has changed, both in terms of the length of treatment and repeating treatment stays.

9. The Minister also emphasizes that the contested decree was prepared on the principle of setting uniform conditions for the provision of spa rehabilitation treatment care. Defined spa locations have available a local natural healing source, which has certain chemical and physical properties, thanks to which it has beneficial effects on the treatment of illness with a particular diagnosis. All places that have available a proven source with the given healing properties and for which the Ministry has issued a permit for use of the source under Act no. 164/2001 Coll., on Natural Healing Sources, Sources of Natural Mineral Waters, Natural Treatment Spas and Spa Locations, and Amending Certain Related Acts (the Spas Act), as amended by later regulations, are included in the indications list. This is intended to achieve an objective, equal and transparent approach to providing health care services. In addition, in a number of places the range of illnesses that can be treated has been expanded. In his brief, the Minister explains the professional reasons that led to setting a basic period of a treatment stay for adults at 21 days, and points out that in the majority of indication subgroups this can be extended at the proposal of a physician, and in view of the patient's state of health. Thus, there is an opportunity to individually determine the length of a patient's treatment stay in view of his particular state of health, and thus also for purposeful expenditure of funds for appropriate treatment. In the case of a repeat treatment stay, the length was set at 14 to 21 days. The repeat stay is provided as a follow-up to the basic stay, where the patient's condition is no longer serious, for example, directly following acute in-patient care. With child patients the minimum term of a treatment stay is set at 28 days.

10. The Minister does not consider relevant the argument that spa facilities are not full, for the reason that the purpose of the indications list is not to fill the spas, but to professionally define the prerequisites and conditions for providing spa care covered by the public health insurance system. The decline in patient numbers is affected by several unquestionable factors, including the ability of people to pay for spas, the influence of the labor market, which does not always permit income-earning groups to have a long spa stay in a period of incapacity to work or vacation, and the strengthening of the effectiveness of treatment through the approval of proposals by health insurance companies. It happened gradually in past years, and it is up to all the involved subjects (including health insurance companies, doctors who propose spa rehabilitation treatment, and the providers) to respond to it. Despite the foregoing, the care in question continues to be available for all patients for whom treatment was proposed and approved. The Ministry has not received any signals that these patients

did not get into spas or that they had to wait for them. At the same time, it cannot be overlooked that rehabilitation care is also provided outside the spa system, e.g. in specialized treatment institutions or through out-patient care by specialists. It is up to the treating physician, what form of care he proposes for a patient, in view of his current and overall state of health. The fundamental thing is always to take an individual approach to a particular patient. In concluding his brief the Minister denied that the contested decree was discriminatory. Those who fall into the same indication group or subgroup are provided the same care. Nor is it clear from the petition what is supposed to violate Art. 26 of the Charter.

II./b
Brief from the Public Defender of Rights

11. On 12 September 2013, that is by the ten-day deadline, the Constitutional Court received notification from the then – the Public Defender of Rights, JUDr. Pavel Varvařovský, that he was joining this proceeding as a secondary party under § 69 par. 3 of the Constitutional Court Act. In his subsequent brief of 30 September 2013 he stated that he agreed with the petitioner's arguments. According to the Constitutional Court's settled case law, a sub-statutory legal regulation cannot interfere in matters reserved to statutes, i.e. to set primary rights and obligations, which, however, the contested decree does not respect. By setting what is considered to be covered care and what is not, it exceeds the scope of a sub-statutory regulation. As regards § 2 par. 2, the Public Defender of Rights believes that this provision regulates legal relationships that arose before the contested decree went into effect, and thus can be described as being impermissibly retroactive. Not only is it in conflict with the principles of predictability of law and legal certainty, but in the case of the first drawing of a treatment stay when the new decree is in effect, which stay however is not chronologically the first, based on this provision there is also interference in the legitimate expectation of insured persons whose spa rehabilitation treatment care is not covered by public health insurance. For these reasons he proposes that the Constitutional Court annul the contested decree.

II./c
The Petitioner's Response

12. These briefs were sent to the petitioner, which answered them in its response of 29 October 2013. Primarily it stated that it maintains its petition and considers it to be well-founded. In its opinion, the system of basic and repeat treatment stays cannot be described as advantageous for the citizens. The decree does allow extending a stay, but in practice this possibility is used very little by the reviewing doctors. The fact that there is continuous improvement in treatment procedures changes nothing about the fact that a spa rehabilitation treatment stay has an effect precisely with repeated and long-term application. However, that cannot take place given the palpable decline in patients that threatens the continued operation of spa facilities, which, according to statements from these facilities published in the media, is caused precisely by the contested decree. In addition, the decree also leads to breach of the principle of the legitimate expectation of citizens, because in the newly-introduced system of basic and repeat treatment stays they cannot rely on having their treatment covered by health insurance. The Ministry should have introduced the system so that it would not affect legal relationships retroactively. This is the fundamental key factor in the entire matter. Its argument that annulling the transitional provisions will damage the rights of existing patients who will not be able to have repeat treatment stays without setting a basic treatment stay actually confirms the retroactive effect of the contested decree. The petitioner believes that annulling the cited provision will not violate patients' rights, because the Constitutional Court Act permits to suspend the enforceability of a judgment in the petitioner's favor. The Ministry will thus have time to prepare a legal regulation or part thereof in a manner so as to be constitutional. In the closing part of its response the petitioner repeated its claim that the contested decree limits the right to protection of health under Art. 31 of the Charter and that the indications list should have been part of an appendix and not part merely of an implementing legal regulation.

13. In a filing of 23 December 2013 the petitioner supplemented its arguments with a memorandum from the Association of Spas of the Czech Republic and the Association of Treatment Spas of the Czech Republic, which, in its opinion, proves the facts that the petitioner alleges.

II./d
Hearing

14. Pursuant to § 44 of the Constitutional Court Act, the Constitutional Court ruled in the matter without holding a hearing because a hearing could not be expected to further clarify the matter.

III.
Review of whether the decree was issued on the basis of law and within its bounds

15. The Constitutional Court states that it is competent to review the subject petition, which was submitted by a petitioner with standing [§ 64 par. 2 let. b) of the Constitutional Court Act], is admissible and meets all the statutorily provided requirements. Thus, it could to turn to a substantive review of the contested decree, and, in accordance with § 68 par. 2 of the Constitutional Court Act it first considered the question of whether it was adopted and issued in a constitutional manner and within the bounds of constitutionally provided competence.

16. Art. 79 par. 3 of the Constitution entrusts to ministries and other administrative offices the authority to issue sub-statutory legal regulations; however, they can be implemented only on the basis of and within the bounds of a statute, if they are authorized thereto by statute. The cited provision must be interpreted narrowly in the sense that the authorization must be specific, unambiguous, and clear [cf. judgment of 21 June 2000 file no. Pl. ÚS 3/2000 (N 93/18 SbNU 287; 231/2000 Coll.)]. If that is so, the Constitutional Court reviews whether the sub-statutory legal regulation was issued by a state body authorized thereto and within the bounds of its competence, i.e., whether, in exercising this authority, it acted within the bounds and on the basis of the law (*secundum et intra legem*), and not outside it (*preater legem*). Simply said, the issue is that in a situation where, according to the statute, X is supposed to take place, the regulation should not provide for Y, but for X1, X2, X3. The authorization provision must make clear the legislature's will to regulate beyond the statutory standard. However, even in that case the sub-statutory regulation may not interfere in matters that are reserved for regulation only by statute (the "statutory reservation") [cf. judgment of 18 August 2004 file no. Pl. ÚS 7/03 (N 113/34 SbNU 165; 512/2004 Coll.), judgment of 22 October 2013 file no. Pl. ÚS 19/13 (396/2013 Coll.)].

III./a
Statutory Authorization under § 33 par. 2 of the Public Health Insurance Act

17. The first sentence of the contested decree indicates that it was issued on the basis of § 33 par. 2 of the Public Health Insurance Act, which authorizes the Ministry of Health to set by decree an indications list for spa rehabilitation treatment care, that is, illnesses for which spa rehabilitation treatment care can be provided, the indication requirements, the medical criteria for providing comprehensive or co-paid spa rehabilitation treatment care for individual illnesses, the length of a treatment stay, and the indication focus of spas.

18. The purpose of an indications list is to define in detail under what conditions and in what scope spa rehabilitation treatment care is a health care service that is covered by public health insurance [§ 13 par. 2 let. a) of the Public Health Insurance Act]. This is supplementation of the (general) legislative framework contained in § 33 of the Public Health Insurance Act, where under paragraph 1 such care is a covered service if it is provided as an essential part of the treatment process and it is recommended by the patient's treating physician and confirmed by the reviewing physician of the relevant insurance company.

19. Under § 33 par. 3 of the Public Health Insurance Act, spa rehabilitation treatment care is provided and paid as either comprehensive or co-paid. Comprehensive spa rehabilitation treatment care is defined in paragraph 4 as continuing on from in-patient care or specialized out-patient health care, and it is aimed at completing treatment, preventing the onset of invalidity and lack of self-sufficiency or at minimizing the extent of invalidity. It is fully covered by the insurance company. A spa facility calls an insured person to begin such care, in order of urgency, at the proposal of a physician from the registering care provider or, in case of hospitalization, the treating physician of the spa care facility. The insured person who is first in the order or urgency is called to begin care no later than one month from the date that the proposal is issued, or, upon agreement between the treating, inspecting, and spa physicians, is transferred to the health care facility of the provider of spa rehabilitation treatment care directly from the health care facility of the in-patient care provider. In the second order of urgency, a patient is called no later than within three months; children and adolescents within six months from the date of the proposal. Co-paid spa rehabilitation treatment care is defined by paragraph 5, under which it is provided above all to patients with chronic illnesses, unless the conditions in paragraph 4, i.e. for provision of comprehensive spa rehabilitation treatment care, have been met. For co-paid spa rehabilitation treatment care only the insured person's diagnosis and treatment is paid by public health insurance, but not other expenses, i.e. the patient's accommodation and food in the spa facility. It can be provided once every two years, unless the reviewing physician decides otherwise. Children and adolescents up to 18 years of age are provided spa rehabilitation treatment care under paragraph 4, unless it is provided paragraph 5 at the request of the parents. With occupational illnesses and other work-related injury to health such care is provided under paragraph 4, if the appropriate occupational illness specialist recommended it or confirmed the indication.

20. To evaluate whether the contested decree exceed the bounds of statutory authorization, it is desirable to summarize its content, though it is not necessary to quote it in its entirety. The indications list for spa rehabilitation treatment care, which is contained in an appendix, consists of a general part (part I of the appendix) and two indications lists, the first of which concerns care for adults (part II of the appendix) and the second care for children and adolescents (part III of the appendix). Both are divided into eleven indication groups, and those into indication sub-groups, which de facto form a certain closed list of illnesses (e.g., the group of oncological illnesses contains the sub-group malignant tumors; the group circulatory system illnesses contains several subgroups, which include symptomatic cardiac ischemic illness or post-myocardial infarct conditions). Thus, through these sub-groups, a list is set of illnesses for which patients can be provided spa rehabilitation treatment care covered by public health insurance.

21. The contested decree distinguishes between basic and repeat treatment stays. Although it does not define these terms further, one can conclude from the manner in which it uses them that their purpose is to distinguish the first and possible further treatment stays for the same indication, in order to set different conditions under which these stays will be covered. A patient must begin a basic treatment stay in a time period typically based on the determination of the relevant diagnosis, performance of treatment, or termination of treatment in a health care facility. In the case of a repeat treatment stay it is necessary that it begin in a specified time period after the end of the basic stay or a repeat spa stay. For the sake of completeness, we must add that in some cases this time period is not set, which means that the indications list conditions a treatment stay solely on the continuation of the indication.

22. Basic and repeat treatment stays can take the form of comprehensive spa rehabilitation treatment care (labeled as K in the contested decree) or co-paid spa rehabilitation treatment care (labeled as P in the contested decree). The general provisions of the contested decree (part I of the appendix point 2) provide that the length of a basic treatment stay is 21 days for adults and 28 days for children and adolescents; if spa rehabilitation treatment care for a particular indication is provided as comprehensive care, the head physician of the health care provider's facility can propose extension of the care, depending on the particular condition of the insured person, for indications marked in the indications list. Extension and the length of extension are subject to the consent of the reviewing physician from the relevant insurance company. The length of a repeat treatment stay in the form of comprehensive spa rehabilitation treatment care is set in the same manner as for a basic treatment stay,

including the possibility of extension (part I of the appendix point 3). However, if the repeat treatment stay is in the form of co-paid spa rehabilitation treatment care, the length is set according to the proposal of the recommending physician, at 14 or 21 days. If care is provided for 14 days, the head physician of the facility of the spa rehabilitation treatment care provider can, depending on the patient's particular condition, propose an extension to 21 days. This extension is subject to the consent of the reviewing physician from the relevant health insurance company.

23. The foregoing indicates that the indications list determines for each indication sub-group whether the insured person's basic or repeat treatment stay will be covered by public health insurance as comprehensive or co-paid spa rehabilitation treatment care (i.e. whether the entire stay will be covered, or only diagnosis and treatment), when the stay must begin for that purpose, how long it is supposed to be, and whether it can be extended. However, this does not exhaust the legal regulation contained in the decree. The contested decree sets, for individual indication groups or sub-groups, further conditions on which the coverage of spa rehabilitation treatment care by public health insurance depends: what examination is to precede the proposal for a treatment stay, as well as additional specialized criteria for providing spa rehabilitation treatment care (the specialization of the treating physician who recommends the care and securing health care in the health care facility of the provider of spa rehabilitation treatment care). These are also defined in the negative, through contraindications, a list of the patient's conditions, or other circumstances that rule out effective provision of the relevant care (the general definition is contained in part I point 7). The indications list sets natural treatment sources for individual indication groups and determines a suitable spa location. Finally, the contested decree regulations the requirements of a proposal for spa rehabilitation treatment care (part I point 6 of the indications list), which is connected to the fact that the scope of data contained in it is based on the conditions set in the indications list.

24. Based on these findings, the Constitutional Court concluded that the contested decree was issued on the basis of and within the bounds of the statutory authorization contained in § 33 par. 2 of the Public Health Insurance Act. It is evident that setting a list of illnesses for which the spa rehabilitation treatment care provided is covered by public health insurance, including other conditions that must be met for entitlement to this coverage, and its scope, falls under the content of the indications list for spa rehabilitation treatment care, or under individual items that are expressly set forth in the authorization provision. This fact was not in any way disputed by the petitioner. Of course, that conclusion does not yet mean that the contested decree was issued in accordance with Art. 79 par. 3 of the Constitution. The bounds set by law must also be considered to include any statutory reservation arising directly from the constitutional order that prevents certain legal relationships from being subject to sub-statutory legal regulation.

III./b
Statutory Reservation under Art. 31 of the Charter

25. Under the second sentence of Art. 31 of the Charter citizens have the right, on the basis of public health insurance, to free health care and to medical aids under conditions provided by law. This is a fundamental right with the nature of a social right, which means that the purpose of it being enshrined in the Constitution is not to define space for an individual's freedom, in which the public authorities may not interfere, but a guarantee that in certain cases the state will actively take steps to ensure conditions for the individual's dignified life and equal opportunities. Constitutionally guaranteed social rights do not function directly in relation to individuals. Their content is the obligation of the state to provide, on the level of sub-constitutional law, effective means for achieving a particular aim, which is the essence and significance (or the essential content) of the social right, and subsequently to implement it through its bodies. It is the sub-statutory legal regulation that really answers the question of what and under what conditions an individual may seek on the basis of this fundamental right, that is, what the bounds of this fundamental right are. This also corresponds to Art. 41 par. 1 of the Charter, under which, some fundamental rights contained in Chapter Four of the Charter (i.e., economic, social and cultural rights), including the rights under Art. 31, can be exercised only within

the bounds of the statutes that implement these provisions. In view of their general nature, no other approach would even be possible.

26. Art. 4 par. 2 of the Charter indicates that limitations may be placed upon the fundamental rights and freedoms only by law and under the conditions prescribed by the Charter. The purpose of this exclusive authorization for the legislature is to prevent the executive branch from "implementing its own ideas about how and how much the fundamental rights may be limited. Giving this authorization to a democratically elected parliament is intended to ensure that limitation of the fundamental rights will be done only after democratic parliamentary discussion, and moreover the limitation of a fundamental right also receives democratic feedback" (Wagnerová, E., Šimíček, V., Langášek, T., Pospíšil, I. and collective of authors. Listina základních práv a svobod. Komentář. [The Charter of Fundamental Rights and Freedoms. Commentary.] Prague: Wolters Kluwer ČR, a. s., 2012, p. 128). Thus, with social rights as well the legislature is authorized to decide what an individual can seek on their basis. However, its discretion in this regard is not unlimited, because its limitations arising from the constitutional definition of social rights, which defines their essence and significance, which statutes must be preserved (Art. 4 par. 4 of the Charter). The law may not deny this right or empty it of meaning. Any interference in the essence of a social right must comply with the principle of proportionality.

27. The statutory reservation under Art. 4 par. 2 of the Charter does not rule out that a limitation on a social right, which applies to how an individual can exercise it, may be further regulated by a sub-statutory legal regulation under Art. 78 of the Constitution or on the basis of statutory authorization under Art. 79 par. 3 of the Constitution. However, this cannot restrict or expand the content of the right arising from the statutory regulation. In its judgment of 16 October 2001 file no. Pl. ÚS 5/01 (N 149/24 SbNU 79; 410/2001 Coll.) the Constitutional Court stated that it is not a violation of the statutory reservation under Art. 4 par. 1 and 2 of the Charter, if a sub-statutory legal regulation "provides specifics for issues whose basic features are already regulated by statute. The contrary conclusion, which would require all obligations to be set directly and exclusively by statute would obviously lead to absurd results, denying the purpose of secondary (and in some cases even primary) norm creation, as part of the concept of each legal norm is the definition of certain rights and obligations of those to whom it is addressed." What is mean by these fundamental features depends, just like the degree of permissibility of this making concrete, on the nature of the obligation in question, or its corresponding right. Moreover, in some cases the constitutional framers set the special statutory reservation for determination of the limitations of a fundamental right, with which it either tightened the cited general rules for regulating limitations on fundamental rights by a sub-statutory legal regulation, or even ruled out such regulation [cf. e.g., judgment of 23 July 2013 file no. Pl. ÚS 13/12 (259/2013 Coll.), points 27 and 28].

28. The essence of the constitutionally guaranteed right to free health care is the state's obligation to create a public health insurance system and through it to ensure citizens a fair method, i.e. including preventing the creation of possible inequalities, of access to health care of appropriate quality [cf. resolution of 5 May1999 file no. Pl. ÚS 23/98 (U 33/14 SbNU 319)]. On the basis of this system, all insured persons should be entitled to examination and treatment corresponding to their objectively determined needs and requirements of the requisite level and medical ethics [cf. judgment of 4 June 2003 file no. Pl. ÚS 14/02 (N 82/30 SbNU 263; 207/2003 Coll.), judgment file no. Pl. ÚS 19/13, point 52].

29. Setting conditions that define the content of the right to free health care based on public insurance is reserved to statutes by the second sentence of Art. 31 of the Charter; as a result it is ruled out for the legislature to authorize an executive body, for that purpose, to issue a sub-statutory legal regulation of lesser legal force than a statute. As the Constitutional Court has repeatedly stated in the past, these conditions include the scope of health care to which this right creates an entitlement, and the manner in which it is provided [cf. judgment of 10 July 1996 file no. Pl. ÚS 35/95 (N 64/5 SbNU 487; 206/1996 Coll.), judgment of 20 June 2013 file no. Pl. ÚS 36/11 (238/2013 Coll.)].

30. Spa rehabilitation treatment care is one of the forms of health care [§ 13 par. 2 let. a) of the Public Health Insurance Act], and thus the right to its provision falls within the second sentence of Art. 31 of the Charter. Therefore, in this case too the answer to the question of whether a citizen is entitled to have it provided free on the basis of public health insurance or whether he must pay for it himself should be given by the implementing statute directly, after determination of the facts (in particular the insured person's state of health). Under the Public Health Insurance Act, this care can be considered covered care if

- it corresponds to the insured person's state of health and the aim that is to be achieved by providing it, that is, completing treatment, preventing the onset of invalidity and non-self-sufficiency or minimization of the scope of invalidity, and is appropriately safe for the insured person [§ 13 par. 1 let. a), § 33 par. 4],

- is in accordance with the present available medical science [§ 13 par. 1 let. b)],

- there is proof of its effectiveness for the purpose for which it is provided [§ 13 par. 1 let. c)]

- and it is an essential component of the treatment process (§ 33 par. 1),

All of which are conditions whose evaluation depends on expert medical evaluation, and which, from a practical standpoint, need to be made more specific. The statutory reservation under Art. 31 of the Charter of course does not prevent a sub-statutory legal regulation, for this purpose, from specifying in more detail when these conditions can be considered to have been met, and thereby allowing greater certainty to be reached regarding the scope of free spa rehabilitation treatment care between the participants to legal relationships, i.e. patients, spa facilities, and health insurance companies. Of course, the authorization under § 33 par. 2 of the Public Health Insurance Act goes further in some ways and authorizes the Ministry of Health to set, by sub-statutory legal regulation, further conditions for the exercise of this constitutionally guaranteed social right, which, in comparison with the statutory framework, further narrow this scope. As a result, in order for spa rehabilitation treatment care to be covered by public health insurance, not only the conditions provided by statute must be met, but also those which are set by decree, above and beyond their scope, although based on and within the bounds of statutory authorization.

31. The last-named group of conditions undoubtedly includes a limitation on the length of a treatment stay and the possibility to extend or repeat it, as well as limitation of the time by when the patient must begin the treatment, or by when he must begin a repeat treatment. These limitations are regulated separately for each indication sub-group, and the consequence of them is that a treatment stay is not covered by a public health insurance company to the extent that it exceeds the given parameters. Unless the decree provides otherwise, spa rehabilitation treatment care cannot be provided for free beyond that scope, regardless of the opinion of the treating or reviewing physician, or whether the general statutory conditions have been met under § 13 par. 1 and § 33 par. 1 of the Public Health Insurance Act. Failure to begin a basic or repeat treatment stay by the given deadline has the same consequence.

32. These time limitations quite obviously cannot be considered a mere specification of the conditions contained in § 13 par. 1 and § 33 par. 1 of the Public Health Insurance Act, which must be met if health care is to be provided for free on the basis of public health insurance, and which are purely specialist criteria that can be evaluated by a treating physician or reviewing physician. Their purpose is such regulation of the provision of this care as will allow finding a balance between the requirements both for the effectiveness of the treatment, that is, for the covered stay in a spa facility to really fulfill its presumed treatment function, and its effectiveness and economic affordability, in view of other available treatment possibilities and the overall amount of funds in the health care system. The Constitutional Court emphasizes that the interest in finding this balance is completely legitimate. However, reaching it requires balancing not only medical, but also economic perspectives, which must be seen as having the nature of political decision making, in which the purposefulness of individual

possible alternatives is evaluated for the purpose of selecting one of them. Thus, this involves different limitations on the right to free health care on the basis of public health insurance (or, more precisely, limitations set for a different purpose) than those that arise from the abovementioned provisions of the Public Health Insurance Act. Therefore, they can be set, in accordance with the statutory reservation in Art. 31 of the Charter, only on the basis of a decision by the Parliament of the Czech Republic, which the contested decree does not respect.

33. The fact that the Ministry of Health, in setting the length of a treatment stay and the possibility of beginning one, made this political decision concerning the scope of spa care provided for free can be clearly illustrated by the fact that the adoption of the contested decree led to a marked reduction in the basic length of a treatment stay, from 28 to 21 days, without any change in the statutory framework. At the time of the Constitutional Court's deliberations in this matter the Ministry again considered returning to the original length of a treatment stay, and cited as one of the publicly presented reasons for that step the fact that the spas are an important regional employer, and leaving the situation as it was under the contested decree would escalate the growth of unemployment (Vláda premiéra Sobotky přijme opatření pro záchranu českého lázeňství [PM Sobotka's Government Will Take Measures to Save Czech Spas], government press release of 21 February 2014, published at www.vlada.cz). Thus the announced change in the conditions for covering spa rehabilitation treatment care would take into account purposes which the Public Health Insurance Act does not at all expect to be achieved through sub-statutory norm creation.

34. For these reasons the Constitutional Court concluded that the contested decree goes beyond the framework of the statute in setting the bounds in which one can exercise the right to free health care on the basis of public health insurance, because of which it is inconsistent with the statutory reservation under Art. 31 of the Charter and also with the authorization under Art. 79 par. 3 of the Constitution. This ground for derogation must be applied to the full text of the decree, because the parts to which it applies cannot be separated from the remaining parts of the decree without the Constitutional Court thereby changing the conditions for exercising the right to free health care.

35. Apart from finding the petition justified, the Constitutional Court also found grounds for postponing the enforceability of its judgment. If the contested decree were annulled immediately, the economic instruments for regulation the provision of spa rehabilitation treatment care would cease to exist, which could be reflected in an unpredictable manner in the related demands on public health insurance funds, and, in an extreme case, lead to destabilizing this sector of health care. At the same time, the degree of legal certain concerning the scope in which the provision of this care is covered by public health insurance would decrease considerably. In a situation where the legislature, in § 33 par. 2 of the Public Health Insurance Act, evidently expressed its will that such further regulation should exist, the Constitutional Court considers it desirable to give it appropriate space to prepare a new framework. Postponing enforceability until 31 December 2014 can be considered sufficient for Parliament to respond to the legal conclusions in this judgment and, if it still finds the limitations on the fundamental right established by the contested decree to be purposeful, to discuss within the standard deadlines a bill that would create an appropriate legal basis for them in accordance with Art. 31 of the Charter. This conclusion also applies, of course, for other potential limitations on the scope of spa rehabilitation treatment care provided for free that would rule out its coverage by public health insurance despite the fact that otherwise (based on expert medical evaluation) the general statutory conditions would be met under § 13 par. 1 and § 33 par. 1 of the Public Health Insurance Act. If the legislature concluded that a new definition of authorization under § 33 par. 2 of the Public Health Insurance Act was necessary, it would be desirable for it to also require a draft of the implementing regulation (§ 86 par. 4 of Act no. 90/1995 Coll., on the Rules of Procedure of the Chamber of Deputies), if it is not presented together with the bill, in order to prevent potential inconsistency with Art. 31 of the Charter.

36. The postponement of enforceability cannot be interpreted to mean that while it lasts the contested decree is not inconsistent with the constitutional order; however, this fact has no effect on further application of the decree, because ruling it out would, in terms of the state's obligation to meet the

purpose of the fundamental right to free health care under Art. 31 of the Charter, lead to a situation that would be as a whole less favorable for patients than is the case under the present legal framework. The Constitutional Court is aware that this judgment does not in any way affect the validity of the authorizing provision, § 33 par. 2 of the Public Health Insurance Act, and therefore it cannot be ruled out that the Ministry of Health may, by decree, before the date when this judgment becomes enforceable, amend or replace the contested decree. There may be substantive and legitimate grounds for that. However, if it were to occur, it cannot be presumed that the Constitutional Court would automatically rule on a postponement of enforceability in any new proceeding. In particular, it would not have to do see if the new decree set limitations on the fundamental right that were stricter than the current ones.

37. Because the contested decree remains in effect for a transitional period as a result of the postponement of the enforceability of this judgment, the Constitutional Court also reviewed the petitioner's other objections that were directed against the content of the decree. A finding of another ground for derogation could, depending on its nature, lead to not applying the postponement of enforceability as regards certain parts of the contested decree [cf. judgment of 19 April 2011 file no. Pl. ÚS 53/10 (N 75/61 SbNU 137; 119/2011 Coll.)].

IV.
Objection that § 2 par. 2 of the contested decree is inconsistent with the prohibition of retroactivity and protection of legitimate expectation

38. The petitioner seeks annulment of the transition provision § 2 par. 2 of the contested decree, because it considers it to be inconsistent with the prohibition of retroactivity and the protection of legitimate expectation. That provision reads:

"The insured person's last treatment stay that took place under the previous legal regulations in the period from 1 October 2009 until the date when this decree enters into effect is consider to be a basic treatment stay under this decree. A further treatment stay corresponding to the indication on the basis of which the treatment stay in the first sentence took place is considered to be a repeat stay under this decree."

39. The cited provision determines the rules for classifying a treatment stay that took place on the basis of a proposal issued when the previous decree, no. 58/1997 Coll. was in effect, as either a basic or repeat treatment stay under part I points 2 and 3 of the appendix of the contested decree. This classification, which did not exist under the previous decree, is desirable (perhaps even essential) as regards treatment stays that already took place, because it makes it possible to derive the deadline for beginning a repeat stay from the last treatment stay with the same indication, regardless of whether it took place under the previous decree or the of the contested decree. Thus, a situation cannot arise where this stay would not be taken into account, which, for a large number of insured persons who had a treatment stay in the past, means that they are not subject to an additional condition, unfulfillable for them, that they begin a further treatment stay by the deadline for a basic stay under the contested decree, typically derived from the setting of the relevant diagnosis, performance of surgery or completion of treatment in a health care facility. Therefore, we can agree with the arguments of the Ministry of Health, that in a number of cases the absence of this transitional provision would make patients' access to spa rehabilitation treatment care more difficult or even impossible.

40. The prohibition on retroactivity (retroactive effect) of legal norms and the principle of legal certainty are conceptual elements of the principles of a state governed by the rule of law under Art. 1 par. 1 of the Constitution [cf. judgment of 8 June 1995 file no. IV. ÚS 215/94 (N 30/3 SbNU 227), judgment of the Constitutional Court of the Czech and Slovak Federal Republic of 10 December 1992 file no. Pl. ÚS 78/92 (judgment no. 15, Sbírka usnesení a nálezů Ústavního soudu ČSFR [Collection of Decisions of the Constitutional Court of the CSFR], Prague: Linde Praha, a. s., 2011, p. 92)]. In its previous decisions, the Constitutional Court defined the difference between the terms true and false

retroactivity, and on a general level defined the conditions under which the retroactive effect of a particular legal norm can be admissible. In a case of true retroactivity, a legal norm creates the creation of legal relationships before it entered into effect under conditions that it provided subsequently, or it establishes a change in legal relationships that were created under the old framework, even before the new legal regulation enters into effect. In contrast, false retroactivity presumes that a new statute does not establish legal consequences for the past; however, it classifies facts that arose in the past legally as a condition for a future legal consequences, or modifies, for the future, legal consequences established under earlier regulations [regarding the definition of these terms, cf., in particular, judgment of 4 February 1997 file no. Pl. ÚS 21/96 (N 13/7 SbNU 87; 63/1997 Coll.), judgment of 12 March 2002 file no. Pl. ÚS 33/01 (N 28/25 SbNU 215; 145/2002 Coll.) or judgment of 19 April 2011 file no. Pl. ÚS 53/10 (N 75/61 SbNU 137; 119/2011 Coll.), points 144 to 149; also Tilsch, E. Občanské právo. Všeobecná část. [Civil Law. General Part] Prague: Všehrd, 1925, pp. 72–79, Procházka, A. Základy práva intertemporálního se zřetelem k § 5 obč. zák. [Foundations of Intertemporal Law with Regard to § 5 of the Civil Code] Brno: Barvič & Novotný, 1928, p. 70].

41. The Constitutional Court states that § 2 par. 2 of the contested decree does not establish or change with retroactive effect legal relationships arising in the past in relation to the provision of spa rehabilitation treatment care. The legal fiction that a treatment stay that took place in the past is considered as a basic or repeat stay under the new statute has legal meaning only into the future, for evaluating the entitlement to free provision of this care on the basis of a proposal issued when the contested decree is in effect. For that reason, the relevant provision quite obviously does not involve true retroactivity.

42. As regards false retroactivity, we must state that the transition provision, § 2 par. 2 of the contested decree, in no way defines the scope of spa rehabilitation treatment care to which insured persons are newly entitled, which means that there could not have been any change in the related legal relationships on that basis. Therefore, if one can deliberate about the effects of false retroactivity, they cannot be connected to this provision, but to the new indications list as a whole, or with individual items in it, that led, with a number of indications, to a change (that is, narrowing) in the scope of covered care. However, in that case the petitioner's objection could not be considered justified.

43. In contrast to true retroactivity, which is fundamentally impermissible, on the assumption that it is simultaneously tied to interference in the principle of confidence in the law, legal certainty, or protection of acquired rights [cf. judgment file no. Pl. ÚS 21/96, judgment of 13 March 2001 file no. Pl. ÚS 51/2000 (N 42/21 SbNU 369; 128/2001 Coll.), judgment of 6 February 2007 file no. Pl. ÚS 38/06 (N 23/44 SbNU 279; 84/2007 Coll.)], with false retroactivity we can say that it is generally permissible, though not without exception [cf. judgment file no. Pl. ÚS 53/10, bod 147, judgment of 15 May2012 file no. Pl. ÚS 17/11 (N 102/65 SbNU 367; 220/2012 Coll.), point 53]. It is always consistent with the principle of protection confidence in the law if it is suitable and necessary to achieve an aim pursued by a statute and, if, in the overall balancing of "disappointed" confidence and the importance of and urgency of the reasons for legal change, the limit of tolerability is preserved (cf. decision of the German Constitutional Court of 7 July 2010 file no. 2 BvL 14/02, bod 58). In the Constitutional Court's opinion, these conditions have undoubtedly been met in the case of the contested decree. The entitlement to provision of spa rehabilitation treatment care does arise to insured persons on the basis of their compulsory participation in public health insurance, and the scope of it is always derived from the valid legislative framework. Therefore, individual insured persons had to be aware that in future the relevant norm-creator (whether the legislature or the ministry) might change it, as a result of which they also could not have any legitimate expectation that this entitlement would continue to exist unchanged, or confidence that the existing legislative framework would be preserved.

V.
Objection of impermissible interference in the essence of rights under Art. 31 and Art. 26 par. 1 of the Charter

44. The petitioner's other objections can be briefly summarized to the effect that the considerable limitation on covered spa rehabilitation treatment care, which occurred on the basis of the contested decree, from an economic viewpoint negatively (even existentially) affects the providers of spa care, and thereby the very possibility of exercising the right to free provision of health care. For that reason, it was alleged to interfere in an impermissible manner in the essential content of fundamental rights under Art. 26 and 31 of the Charter.

45. The Constitutional Court states first of all that the contested decree, in contrast to the previous decree no. 58/1997 Coll., in many ways brought a reduction in the scope of spa rehabilitation treatment care that is covered by public health insurance. As a fundamental change, we can point to, above all, the reduction of the basic length of a spa stay from 28 to 21 days, as well as the limitation of the time periods when a patient can begin a repeat spa stay. Nonetheless, we must emphasize that these changes in and of themselves do not cause inconsistency with the right to free health care under Art. 31 of the Charter or the right to do business under Art. 26 of the Charter. These rights can be exercised only within the bounds of the statutes that implement them, and the legislature has relatively wide discretion in specifically defining the content and manner of implementation of these statutes, including the possibility of amending them (cf. judgment file no. Pl. ÚS 19/13, bod 49).

46. As part of evaluating whether the cited rights were violated, the Constitutional Court standardly applies the reasonableness test [regarding this test, cf. judgment of 5 October 2006 file no. Pl. ÚS 61/04 (N 181/43 SbNU 57; 16/2007 Coll.), judgment of 12 March 2008 file no. Pl. ÚS 83/06 (N 55/48 SbNU 629; 116/2008 Coll.), judgment of 24 April 2012 file no. Pl. ÚS 54/10 (N 84/65 SbNU 121; 186/2012 Coll.), point 48, or judgment file no. Pl. ÚS 19/13, points 50 and 51]; in the first two steps it reviews whether there was interference in their essence, or essential content. Nonetheless, it did not find grounds for such a statement in the present matter, because the reduction in scope of spa rehabilitation treatment care that is covered by public health insurance neither makes impossible the conduct of business in the field of providing spa care, nor does it make the care inaccessible to patients. The fact that this change appeared in varying degrees of intensity with regard to individual spa facilities changes nothing about that conclusion. Even the petitioner did not present any specific claim to support an opposite conclusion. The contested decree also pursued the aim of re-evaluating the scope of spa rehabilitation treatment care provided for free, with regard to current medical knowledge and procedures and more efficient use of funds from health insurance, that is, an aim which cannot be considered illegitimate in terms of the cited fundamental rights (although such re-evaluation cannot be done through a sub-statutory legal regulation, unless statutory conditions for it are created), and because the regulation contained in it cannot be described as unreasonable, it also passed the third and fourth steps of the reasonableness test.

47. The legislature is authorized in its discretion to broaden or narrow the scope in which citizens have a right to free health care on the basis of public health insurance under Art. 31 of the Charter, not excluding spa care (cf. judgment file no. Pl. ÚS 14/02); likewise, it can also change the conditions for doing business in the field of providing such care, which undoubtedly happened as a result of limiting the scope of covered spa care. Therefore, these rights cannot be interpreted to mean that they guarantee that the network of spa facilities in its present form will be preserved and that spa care cannot be replaced in time with other specialized methods that are shown to be more effective in terms of the desired effects. It remains to be added that the existence of reasons for such a change, as well as, in contrast, for greater support for spa facilities, which may include, e.g., the tradition of the spa system, development of tourism or employment in the particular region, is a political issue, which is why the responsibility for answering it lies first of all with the Parliament of the Czech Republic and the government, and not with the Constitutional Court, which is not authorized to re-evaluate their decisions from these viewpoints.

VI.
Conclusion

48. In conclusion, the Constitutional Court emphasizes that its review of the content of the contested decree, apart from the question of its possible retroactive effects (Art. 1 par. 1 of the Constitution), was limited to evaluating its consistency with the fundamental rights under Art. 26 and 31 of the Charter, exclusively from the viewpoint of the petitioner's general objection. Therefore, the foregoing conclusions cannot be interpreted to mean that they rule out the possibility of future successful application of other possible objections that would be capable of establishing that the decree is inconsistent with the last cited provisions.

49. In view of the fact that the contested decree was issued in conflict with Art. 79 par. 3 of the Constitution and Art. 31 of the Charter, the Constitutional Court pursuant to § 70 par. 1 of the Constitutional Court Act, granted the petition and ruled that this decree is annulled as of the end of 31 December 2014.

Chairman of the Constitutional Court:
JUDr. Rychetský /signed/

Dissenting opinions to the decision of the Plenum, pursuant to § 14 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, were adopted by Judges Stanislav Balík, Vladimír Kůrka and Michaela Židlická and a dissenting opinion to the reasoning was adopted by Judge Jan Filip.

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1. Dissenting opinion of Judge Stanislav Balík

My dissenting opinion is directed at the verdict and the reasoning of the judgment.

At the beginning I recommended in vain that the Constitutional Court wait this time, and thereby open space for extra-judicial handling of the matter; only subsequently, when I did not succeed in that, I proposed that the petition be denied, all for the following reasons.

x x x

In the course of this proceeding I asked myself figuratively whether the Constitutional Court is to be an eternally surly and preachy Old Man Know-Nothing, or, in contrast, a wise, fairy-tale-like grandfather who delights in every clever and thoughtful step taken by his grandson.

I traditionally prefer that wise grandfather, and moreover I managed to keep fresh in my memory a thoughtful paragraph from the Constitutional Court's resolution of 12 November 2013 file no. Pl. ÚS 9/13, which reads:

"It is appropriate to add that in this matter the Constitutional Court did not consider it useful to reach a decision after it learned that the legislature and the government are preparing an amendment to the contested Act. Having countless times in its case law, in proceedings on constitutional complaints, pointed to the principle of subsidiarity, it concluded that, depending on the circumstances of the particular case, this principle can basically be taken into consideration when reviewing norms as well. Thus, it is important here that the legislature actively took part in the revision and amendment of the contested legislative framework after filing a petition for its derogation with the Constitutional Court, and giving the legislature an opportunity to deal with the objections raised by the petitioners in this proceeding itself appears to be fully consistent with the principles of procedural economy."

Was it not worth asking this time, whether it was true, what was generally suspected, that the issue regulated by the contested decree is to be subject to government discussion on measures to save the Czech spa system, or what legal framework the government intends to initiate in this regard?

Does the Constitutional Court perhaps consider the government and the legislature to be a priori insufficiently potent to try themselves to deal with the petitioners' objections?

Accordingly, per the Civil Procedure Code:

What judge in a general court does not lead the parties to settle?

What judge in a general court, having been asked by the parties to provide time for them to attempt an extra-judicial solution, would not postpone the proceeding?

Let us remember the needless and laborious rush in this matter next time we hear whining about the Constitutional Court being overloaded …

x x x

Fiat iustitia, pereat mundus.

Since the days of Královna Koloběžka I. ["Queen Scooter" – a filmed story from 1984] [cf. judgment of the Constitutional Court of 1March2011 file no. Pl. ÚS 55/10 (N 27/60 SbNU 279; 80/2011 Coll.)] it has become the fashion to annul legal regulations on formal grounds, regardless of the fact that their content is constitutional.

Thus, in the present matter we can summarize that

- a decree was annulled whose content fully withstood the reasonableness test,

- a regulation that was unconstitutional only because of its form was left in effect until 31 December 2014, because it was considered unreasonable to annul it immediately and thereby evidently create chaos.

I can draw only one conclusion.

Farewell, reason!

Doesn't a general court judge remember that he is not even bound by a decree that violates a statute?

Let us try to guess – what will happen during the period until 31 December 2014 with a judge's, even a physician's subjective sense of being bound by the contested degree, which will be openly considered unconstitutional as of the promulgation of this judgment?

x x x

I perceive an increasing tendency to annul sub-statutory regulations using the excuse of the special statutory reservation.

Judge Jan Musil, in his dissenting opinion to Constitutional Court judgment of 23 July 2013 file no. Pl. ÚS 13/12 (259/2013 Coll.) aptly state, among other things:

"I am aware that in such a delicate area of social relationships, as the issue of tolerance, or, on the contrary, criminalization of drugs, there may be concerns that the intervention of the executive branch (in this case, the government) could influence crime policy (whether by tightening or liberalizing the

consumption of drugs). Of course, such intervention, if it were done against the will of Parliament, is easily corrected through the usual means of parliamentary balancing of the government, and primarily by the fact that the legislature still has at its disposal the ability to amend or annul the statutory authorization contained in § 289 of the Criminal Code."

I agree fully with Jan Musil.

I myself wrote in my dissenting opinion to Constitutional Court judgment of 20 June 2013 file no. Pl. ÚS 36/11 (238/2013 Coll.): "how, in any health care system, any particular case always depends on the doctor's professional ethics and the patient's trust.

My starting point is not skepticism, suspicion of doctors and health care facilities, the idea that health care is an unfair business. Personally, and from my family and friends, I have only the best experiences with the Czech health care system.

Will a change in the form of a legal regulation help to remove the eternal lack of trust?

Will 281 legislators carefully read specialized medical journals so that they can vote on alternatives of health care services?

Ad absurdum – would it not be most persuasive to decide about the alternatives in a referendum?

In fact, it always starts and ends with the true experts. There is no choice but to agree with their recommendation, because laypeople's lack of knowledge will have to be supplemented with trust.

Wouldn't the legislature – if the reviewed legislative framework had not been annulled – still have had the ability to "overcome" by statute any obvious arbitrariness or excess manifested in a legal regulation of lesser force?

So today, for the third time, in vain …

Soon the statutory reservation may become an evergreen, and some activist thesis writer /Ph.D. candidate will take the time to put together a complete list of implementing regulations that would be worth trying to contest through a petition to the Constitutional Court. I only hope that he will warn the potential petitioners in somewhat larger type not to make this schoolboy mistake, and next time, in their proposed judgment, also contest the authorizing provision, because otherwise they will lead the Constitutional Court to forget its otherwise favored petitology in its obedient zeal.

Will we not then perhaps see formulations like "the Constitutional Court points to the principle of the priority of constitutional interpretation over derogation, which it applied in a number of its decisions [e.g., judgment file no. Pl. ÚS 5/96 of 8 October 1996 (N 98/6 SbNU 203; 286/1996 Coll.), judgment file no. Pl. ÚS 19/98 of 3 February 1999 (N 19/13 SbNU 131; 38/1999 Coll.), judgment file no. Pl. ÚS 15/98 of 31 March 1999 (N 48/13 SbNU 341; 83/1999 Coll.), judgment file no. Pl. ÚS 4/99 of 16 June 1999 (N 93/14 SbNU 263; 192/1999 Coll.), judgment file no. Pl. ÚS 10/99 of 27 October 1999 (N 150/16 SbNU 115; 290/1999 Coll.), judgment file no. Pl. ÚS 41/02 of 28 January 2004 (N 10/32 SbNU 61; 98/2004 Coll.), resolution file no. Pl. ÚS 92/06 of 3 April 2007 (available at http://nalus.usoud.cz)]. Thus, from many possible interpretations of the statute it is necessary in each case to use only an interpretation that respects constitutional principles (if such an interpretation is possible), and to annul a statutory provision due to unconstitutionality only if the provision in question cannot be used without violating constitutionality (the principle of minimizing interference in the powers of other state authorities). Based on the foregoing, the Constitutional Court believes that there is in this present case room for a constitutional interpretation of the contested authorizing provision"?

A propos, is it really so that all provisions of the contested decree violate the somewhat apologetically construed special statutory reservation?

x x x

I almot forgot.

But the issue is the spa system!

In matters related to health care, the Constitutional Court has long since moved from the principle of minimizing interference to the science of maximizing interference.

The fate of the contested decree, which is not historically the first sub-statutory regulation in this field, shows that the Constitutional Court will soon, in the interests of legal certain, accept a new principle, that reads:

"Quod licet Ministro, non licet ministro."

Do you also recall how the Constitutional Court, in its judgment of 20 June 2013 file no. Pl. ÚS 36/11, also set a longer interim legislative period?

"At the same time, *vacantia legis* period was set until the end of 2013, because the co-payment for inpatient care is currently a not insignificant income to the providers of health care services, and its immediate disappearance would cause an economic burden on them without reason and economically. The legislature is thus given time to establish the parameters of payment within the intent of this judgment."

Couldn't even the Constitutional Court use a certain degree of self-reflection?

x x x

The wise grandfather mentioned above would certainly read his grandson Jan Werich's genial Fimfárum. In the story about Paleček ["Little Thumb"] they would then together find the advice that the robber leader František Jizva ["Frank Scar"] bestowed on his comrade Krvežíznivému ["Bloodthirsty"] after the latter rattled about Paleček:

"We should have squashed him, crushed him, smashed him!"

Let the full-text answer be an inseparable part of this dissenting opinion … (cf. WERICH, Jan. Fimfárum. Prague: Albatros, 1997, p. 102) …

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2. Dissenting opinion of Judge Vladimír Kůrka

The reasons why I did not agree with the majority of the Plenum on a derogatory judgment come from my disagreement with the key conclusion, formulated in point 34, that the contested decree no. 267/2012 Coll., on Setting an Indications List for Spa Rehabilitation Treatment Care for Adults, Children and Adolescents, (the "decree") "goes beyond the framework of the statute in setting the bounds in which one can exercise the right to free health care on the basis of public health insurance," because of which it is inconsistent with the "statutory reservation" under Art. 31 of the Charter of Fundamental Rights and Freedoms (the "Charter").

First of all, in my opinion such conflict did not arise in this matter, because the statutory regulation required by Article 31 of the Charter is the Act no. 48/1997 Coll., on Public Health Insurance, and Amending and Supplementing Certain Related Acts, as amended by later regulations, (the "Public Health Insurance Act"), namely in the provisions of § 13 par. 1 let. a) to c), par. 2 let. a) and § 33 par. 1; the decision on providing (covered) spa care is entrusted to the relevant doctor, who decides

according to the guidelines expressed in § 13 par. 1 let. a) to c) and also takes into account whether the case involves "spa rehabilitation treatment care provided as an essential component of the treatment process" under § 33 par. 1 of the Public Health Insurance Act. Thus, with the difference that his decision has to be confirmed by another physician, the reviewing physician, this is the same as in any case of deciding on covered services of any other form of health care. From that viewpoint, the decree, issued on the basis of authorization under § 33 par. 2 of the Public Health Insurance Act, plays the role of a mere explanatory specialized guideline to ensure unity in decision making, an strictly speaking it would (otherwise) not even be necessary (cf. the specific methodology of treating individual illnesses; if a physician decides on a treatment procedure only on the basis of "available medical science,", he is certainly not threatened by the statutory reservation, and the question arises why he should be in the case of an assessment that spa care is or is not part of the treatment process).

Starting with what the majority of the Plenum recognizes in point 30, that "the statutory reservation under Art. 31 of the Charter of course does not prevent a sub-statutory legal regulation, for this purpose, from specifying in more detail when these conditions can be considered to have been met, and thereby allowing greater certainty to be reached regarding the scope of free spa rehabilitation treatment care between the participants to legal relationships, i.e. patients, spa facilities, and health insurance companies" [cf. also the Constitutional Court's lenient opinion expressed in judgment file no. Pl. ÚS 5/01 of 16 October 2001 (N 149/24 SbNU 79; 410/2001 Coll.)], I am – beyond that – (unlike the majority) of the opinion that the contested decree involved such specification.

I do not share the opinion that deviating from possible "specification" means "a limitation on the length of a treatment stay and the possibility to extend or repeat it, as well as limitation of the time by when the patient must begin the treatment, or by when he must begin a repeat treatment," as stated in point 31. They majority of the Plenum finds the key argument in favor of this conclusion to be that in these aspects the decree exceeds the otherwise permissible bounds of regulation specialized issues, namely the effectiveness of treatment, and acquires the dimension of finding a balance in relation to "economic affordability," which must be "seen as having the nature of political decision making" (point 32). However, one can set against that the equally strong claim that this too basically involves primarily specialized decision making (by the relevant doctor), as in all other cases of deciding on the particular item of health services under § 13 par. 1 of the Public Health Insurance Act, because here to the "economic affordability" of treatment is at play. It would be difficult to find a determinative difference between setting, e.g. post-operative hospitalization of 21 days, on the one hand, and setting the same period of a rehabilitation treatment stay on the other hand; in the first case as well the physician must also take into consideration those circumstances which the majority of the Plenum considers to have signs of "political" decision making, and here and there the physician has the ability to extend the originally set "treatment stay" (depending on the particular situation) or decide to repeat it. It is true that in the case of rehabilitation treatment care the decree provides a certain guideline; nevertheless, there is no reason to suspect that it is not based on specialist viewpoints.

As regards determining "the deadline, by when the patient must begin the treatment stay, or by when he must begin a repeat stay," the same obviously applies, and is connected to the (specialist) requirement that the rehabilitation treatment be effective.

Thus, the statutory reservation does not apply, even from the starting points of the majority's arguments.

It is worth adding that the centrally criticized "limitation of the length of a treatment stay" from 28 to 21 days of a basic period (the obvious motive for the petition seeking derogation) is in and of itself an inappropriate concept, insofar as it is applied to the decree that was previously in effect, but which not only logically suffers the same constitutional law defects (concluded by the majority of the Plenum) as the current one, but – from a substantive standpoint, and above all – it cannot mean, without anything further, that the (longer) period set by it would be a period determined (professionally) "correctly," i.e. that it will also stand with regard to subsequently developed treatment methods. Thus, strictly speaking this is not primarily a "restriction," but a new (different) determination.

This is even a determination that the majority of the Plenum recognized as constitutional, which does not cause "inconsistency with the right to free health care under Art. 31 of the Charter," or "with the right to do business under Art. 26 of the Charter" (point 45), because "the reduction in scope of spa rehabilitation treatment care that is covered by public health insurance neither makes impossible the conduct of business in the field of providing spa care, nor does it make the care inaccessible to patients" (point 46).

Insofar as the majority of the Plenum also states in the judgment (point 46) that the contested framework of the decree "pursued the aim of re-evaluating the scope of spa rehabilitation treatment care provided for free, with regard to current medical knowledge and procedures and more efficient use of funds from health insurance, that is, an aim which cannot be considered illegitimate in terms of the cited fundamental rights" (note: under Art. 31 and Art. 26 of the Charter), the question also arises what was to be achieved thereby (more trivially: if the petitioning senators had know this in advance, whether they would have proposed annulment of the decree). On the basis of the adopted judgment, substantively nothing has to happen – only to tip the decree over into a statute …

In my opinion the petition from the group of senators should have been denied.

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3. Dissenting opinion of Judge Michaela Židlická

The judgment in the matter file no. Pl. ÚS 43/13 when interpreting the statutory reservation under Art. 31 of the Charter takes as its starting point judgment file no. Pl. ÚS 36/11 of 20 June 2013 (238/2013 Coll.) in the matter of above-standard health care, to which I filed a dissenting opinion. In that, I expressed the belief that the exceptional developments in medical science that have taken place in recent years (and this trend continues), is a quantitative novum that requires a new look at the financing of health care. I belive that this view is relevant in the present matter as well.

One of the consequences of introducing new and more effective treatment methods is, among other things, shortening the time necessary to treat patients. In terms of the right to protection of health under Art. 31 of the Charter, it is the result that should be decisive, i.e. the improvement in the patient's state of health, not the means, i.e. an entitlement to be treated for a particular set period. Thus, if the technical possibilities change so much that the same result can be achieved with a patient in a shorter time, then the contested legal framework in fact does not represent any "change in scope" of covered spa care, because the patient's state of health will improve to the same degree as before. On the contrary, leaving spa care in the existing scope would expand treatment beyond the framework set previously. Thus, if a change in the scope of the provision of spa care is justified by the higher effectiveness of the treatment, there is no political decision, in the sense, that patients should be provided less or more; on the contrary, this is a measure that is aimed at preserving the existing level of care. In these circumstances, in contrast to the majority opinion, I do not consider regulation of this issue through a sub-statutory legal regulation to be unconstitutional. As regards the economic effect of the measure in question, an argument also applied by the majority opinion, then I do not believe that any measure of the constitutional order gives the state an obligation to guarantee a certain level of profit to the operators of spa facilities. The contested legal framework would not in any way prevent the legislature from adopting a measure aimed at increasing the scope of spa care, if it considered that necessary from a political viewpoint.

I believe that in the present matter the Constitutional Court should have inclined to the self-limiting principle and considered more carefully whether derogation of the contested sub-statutory norm is really the only and necessary path to achieving the declared aims.

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4. Dissenting opinion of Judge Jan Filip to the reasoning of the judgment

Pursuant to § 14 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, I file a dissenting opinion to the reasoning of judgment file no. Pl. ÚS 43/13.

The subject matter of the proceeding was evaluation of whether decree no. 267/2012 Coll., on Setting an Indications List for Spa Rehabilitation Treatment Care for Adults, Children and Adolescents was consistent with the authorizing provision of § 33 par. 2 of Act no. 48/1997 Coll., on Public Health Insurance, and Amending and Supplementing Certain Related Acts, as amended by later regulations, (the "Public Health Insurance Act"). I consider the annulling judgment to be consistent with the Constitutional Court's existing case law in matters of statutory reservation in the area of defining conditions for providing free health care; however, the reasoning uses the legal path to "treat" the business problems of our spa system, rather than giving sufficient instructions for constitutionally and legally conforming procedure to follow in issuing a new decree.

1. I believe that the reasoning of the judgment should take a clear position on the background to the petition, which was not motivated by an attempt to remove an unconstitutional situation, but by an attempt to use the petition to address the issue of declining occupancy (and thereby prosperity) of spa facilities and the threat of liquidation for some of them. It is all too apparent from the petition to annul the decree that the petitioners would not mind at all if this issue continued to be regulated by a decree, on condition that the length of a covered treatment stay will not be reduced by 7 days (i.e., 25%) compared to the existing situation. Although it would be unconstitutional to establish, e.g., a covered stay of 35 days, the petitioner would undoubtedly not present such a proposal. All the more so, if the original scope (length of a covered stay) is reinstated, the petitioners will no longer mind the unconstitutionality. The same solution could also have been achieved by, e.g., creating suitable conditions (e.g., visa conditions) for attracting a foreign clientele (Arab states, the Russian Federation); although that would not involve the issue of the constitutionality of the decree, but the occupancy of the spas.

2. Yet, the idea that meeting the statutory reservation will resolve the matter, constitutionally speaking (points 25 et seq.), provides only a partial answer (if any) to the issue at hand, which revolves around the length of a stay. This is not only a matter of constitutionality, but of medical evaluation and the efficiency and profitability of spa operations. In order for the Constitutional Court to be able to evaluate the possibility of limiting (point 26 of the reasoning) entitlements to spa care in both alternatives, it would first have to explain what is being limited, and what is being subjected to conditions. After all, Art. 4 par. 2 of the Charter of Fundamental Rights and Freedoms (the "Charter") is aimed at the possibility of limiting the self-exercising rights and freedoms that are positivized by the Charter, whereas Art. 41 par. 1 of the Charter involves a different kind of issue. The reference to conducting the reasonableness test (in contrast to the proportionality test) concerns this difference (point 46 of the reasoning) only partly; it can be applied to the content, but less so to the form of regulation. We cannot here more closely analyze the foundations of the concept of fundamental rights and freedoms in terms of whether definition of their limits is also part of their content. According to the "internal" theory, a right or freedom reaches only so far (für sich) as their socially acceptable and defined limits (then the fundamental right of a treatment stay would be 21 days). According to the "external" theory of content a certain right or freedom exists by itself (an sich), whereas the limits are something imposed from outside (e.g., precisely a society's economic possibilities), which does not decide their scope (then the fundamental right of a treatment stay would be the time needed for rehabilitation corresponding to the patient's state of health and the abilities of medical science in the context of human dignity). Nonetheless, this question will come up constantly, because it is precisely with the right defined in Art. 41 par. 1 of the Charter that this problem is most significant. Thus, the issue is first of all to defined what is standard [see judgment file no. Pl. ÚS 36/11 of 20 June 2013 (238/2013 Coll.) concerning "above-standard" care]. Without that, we cannot correctly reach a conclusion on the boundaries of limiting spa rehabilitation treatment care under § 13 par. 2 of the Public Health Insurance Act.

3. The Charter requires a statute to regulation the conditions for providing health care, which undoubtedly includes spa rehabilitation care. However, it says nothing about its scope or the condition

that it be defined by statute, because that is a matter that certainly must be legal regulated from a number of viewpoints in the interest of it being provided fairly, but is difficult to answer from the positions of constitutionality or legality. That only comes into play through § 13 par. 2 of the Public Health Insurance Act. The foundational judgment file no. Pl. ÚS 35/95 of 10 July 1996 (N 64/5 SbNU 487; 206/1996 Coll.) did say that defining the statutory definition of the content and the scope of conditions and the manner in which a citizen exercises his right to free health care can only be done by statute; however, this cannot change anything about the fact there is simply a difference between a condition for providing care and the scope of that care. This is a political question (the "political question doctrine") or a medical one [cf. judgment file no. Pl. ÚS 5/04 of 25. 9. 2007 (N 147/46 SbNU 443), point 45, on the issue of securing medical emergency services]. It basically cannot be answered either by decree or by statute, because it is a matter for specialized medical evaluation (this is set in § 33 par. 1 of the Public Health Insurance Act – the recommendation of a physician and confirmation of an reviewing physician) and the economic possibilities of health insurance companies, not deriving possibilities along the path from a legal regulation of higher legal force to the lower levels of the legal order. There is no doubt that in managing financial resources it is the legislature (and before that, the voter) who decides what resources to expend in this area, while the implementing regulation can only move within the bounds set by the legislature (i.e. political bounds).

4. Finally, it is impossible not to see that Art. 31, second sentence, of the Charter speaks of the conditions for providing free health care. However, the reasoning of the judgment does not answer the question whether the length of a covered or co-paid spa stay can be considered such a condition at all. In my opinion, a condition can be the other safeguards set forth in the authorizing provision, § 33 par. 2 of the Public Health Insurance Act – that is, defining the illness for which spa rehabilitation treatment care can be provided, the indication prerequisites, specialized criteria for providing spa rehabilitation treatment care with individual illness, and the indication focus of individual spa locations. Each of these has its medical ratio, whereas this unfortunate length of stay brings back into play economic (i.e. also political) and medical criteria, but not constitutional law criteria. Yet, as was already emphasized, this is not a condition that is reserved to statute by Art. 31 of the Charter, but the scope, which is set only in the introductory part of § 13 par. 2 of the Public Health Insurance Act, which is directly connected to the authorization provision of § 33 par. 2 of the Public Health Insurance Act. The Constitutional Court also states in point 45 of the reasoning that there was a reduction in the scope of spa care, but that, on the basis of the authorizing provision, is set by an implementing regulation. Because the reasoning did not take a position on the problem of the authorization itself, that is whether an administrative office can take as its starting point only § 33 par. 2 of the Public Health Insurance Act, or whether it can, in terms of its own boundaries, take into account its remaining content (which should apply to the government).

5. Although the statute says that it will define not only the conditions, but also the scope, of care, in fact it fails to set such a scope in the case of the length of a treatment stay. It leaves that to an implementing regulation, without setting any criteria that the ministry is to follow when setting the length of stay. This arises not only from the express instruction of the legislative rules of the government, but directly from Art. 79 par. 3 of the Constitution of the Czech Republic. Moreover, it is not clearly distinguished whether scope does not also partly mean those conditions. Therefore, newspaper headlines á la "Constitutional Court sets spa stay at 28 days" will only be a clear illustration of the whole problem, on a similar level as the misleading information that the Constitutional Court annulled fees for hospital stays.

6. I ask myself what purpose there is then in evaluating these proposals by merely referring to statutory reservation, which, moreover, is not directed at the scope, but the conditions for providing free care, when in fact questions of a completely different (non-legal) nature are being addressed, which is actually not a matter for the Constitutional Court. The basic problem, that the petitioner left aside the authorizing provision, indicates that the new decree based on the constitutionally controversial text of § 33 par. 2 of the Public Health Insurance Act will cause another problem.

7. Finally, it is appropriate to note that in his brief the Minister of Health offered a number of arguments for evaluating that scope. These certainly cannot be compared to the legendary effective methods of shortening a treatment stay of malingerers in the garrison prescribed by Doctor Grünstein, who didn't want to hold anyone back from going to the battlefield even by one single day. [In Jaroslav Hašek's book The Good Soldier Švejk.] Insofar as the reasoning also considers economic questions, it should have also addressed his arguments, because it concludes (point 45 of the reasoning), that, in comparison with the previous decree no. 58/1997 Coll., which sets the indications list for spa care for adults, children, and adolescents, in many respects there was a reduction in the scope of spa rehabilitation treatment care. Was the previous regulation the standard then? Was it then necessary to mention the reasonableness test, as that is in any case inadequate for evaluating the chosen or prescribed form of legal regulation? As stated above, even 35 days would be an unconstitutional solution, not in view of violation of § 13 par. 1 of the Public Health Insurance Act, but precisely in view of the chosen form of sub-statutory regulation.