2010/04/07 - I. ÚS 22/10: RIGHT TO FREE DEFENSE COUNSEL

HEADNOTES

The High Court acted arbitrarily, when, in a procedure violating Art. 2 par. 2 of the Charter (point 15), did not recognize the complainant's entitlement, on grounds of failure to meet the burden of proof, consisting of failure to document lack of assets (point 24) and possible other documents (gifts from relatives), without, however, asking the complainant to supplement them (points 16 and 23), which led to violation of the complainant's fundamental right guaranteed in Art. 6 par. 3 let. c) of the Convention (point 16). In this case we also cannot overlook the fact that in the criminal proceeding as a whole, i.e. in the decision making on payment of the costs of the proceeding, the investigatory principle applies [see, e.g. Supreme Court resolution of 4 January 1991 file no. 1 To 56/90].

The Constitutional Court does not share this restrictive concept of "justified expenses," because in its opinion it is necessary to assess human life and a person's personality much more complexly, including, among other things, from the point of view of the right to privacy (points 17 and 18). However, it is evident from the very nature of that right, that their content cannot be defined so as to cover all the possibilities that come into consideration, because it is each individual person that gives this right a specific content. Therefore, it is the duty of the courts to review the unique aspects of each case so that, apart from observing the guarantees of a fair trial, the individual's other fundamental rights are also preserved, in this case the right to a private life.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

On 7 April 2010, a panel of the Constitutional Court, consisting of chairwoman Ivana Janů and judges František Duchoň and Eliška Wagnerová (judge rapporteur), decided in the matter of a constitutional complaint from the complainant H. R., represented by JUDr. Jiří Baudys, attorney, with his registered address at Smetanova 17, 602 00 Brno, against a decision by the High Court in Olomouc of 21 October 2009 ref. no. 3 To 105/2009-1861, with the participation of the High Court in Olomouc as a party to the proceeding, with the consent of the parties without a hearing, as follows:

I. By failing to respect the principle contained in Art. 2 par. 2 of the Charter of Fundamental Rights and Freedoms, resolution of the High Court in Olomouc of 21 October 2009, ref. no. 3 To 105/2009-1861, violated the complainant's fundamental rights guaranteed in Art. 6 par. 3 let. c) and Art. 8 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

II. Therefore, that decision is annulled.

REASONING

I.

1. In her constitutional complaint submitted to the Constitutional Court on 6 January 2010, i.e. within the deadline of 60 days from delivery of the contested decision (§ 72 par. 3 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, the "Act on the Constitutional Court"), the complainant sought the annulment of the abovementioned decision of the High Court in Olomouc, claiming that it violated her fundamental rights guaranteed in Art. 90 of the Constitution of the Czech Republic, in Part Five of the Charter of Fundamental Rights and Freedoms (the "Charter") and in Art. 6 of the European Convention for the Protection of Human Rights (the "Convention").

2. In the constitutional complaint, the complainant stated that her fundamental rights were violated by the actions of the High Court in Olomouc, which denied her complaint against a decision by the Regional Court in Brno of 26 June 2009 file no. 11 T 29/2000, which ruled that the complainant is not entitled to defense counsel for free or for a reduced fee, on the grounds that she is needlessly making payments for internet access and cable television, and did not prove that she has no assets in real estate or securities. The complainant disagrees with this conclusion, because she believes that the applicable principle is that one need not prove what does not exist. The complainant added that there is no body in the Czech Republic that would issue a certificate of poverty. According to the complainant, the High Court had sufficient information demonstrating her poverty, as it is quite obvious from the criminal file that she owes over 10 million crowns due to her criminal activity, she is a complete invalid, and has difficulty covering her living expenses. In the complainant's opinion, the payments for internet access and cable television cited by the High Court are not a luxury, but a necessity for someone who is a complete invalid. The complainant concluded that she had properly documented her financial situation, which justifies her entitlement to free defense counsel, and if the court believed that her statements and presented evidence were inadequate, it should have called on her to complete them.

3. Therefore, in view of the foregoing, the complainant proposed that the Constitutional Court issue a judgment annulling the cited decision of the High Court in Olomouc.

4. The Constitutional Court called on the party to the proceeding to respond to the constitutional complaint. The High Court in Olomouc, represented by the appropriate panel chairman, JUDr. Libor Los, referred to the reasoning of the contested decision. The High Court stated that the key reason for not recognizing entitlement to free defense counsel was that the complainant did not credibly prove the entitlement. It was not objectively determined in the criminal proceeding, including because of the complainant's attitude, how the money acquired through her criminal activity was used, or whether the complainant still

has access to it. In the High Court's opinion, the complainant, given the amount of her disabled pension, which is not sufficient even to cover the obligations the complainant cites, undoubtedly had at her disposal other funds that she did not indicate or document in her application. The High Court in Olomouc concluded that the complainant's fundamental rights were not violated, and therefore proposed denying the constitutional complaint as being obviously unjustified.

5. Under § 44 par. 2 of the Act on the Constitutional Court, the Constitutional Court may, with the consent of the parties, waive a hearing if it cannot be expected to clarify a matter further. The parties consented, and a hearing was waived.

II.

6. In this matter, the Constitutional Court did not request the file from the Regional Court in Brno, file no. 11 T 29/2000, because it concluded that the statements of the parties and the documentary evidence presented by the complainant would suffice to reach a decision in the matter. From these documents, the Constitutional Court determined the following facts, decisive for the proceeding on the constitutional complaint.

7. By decision of the Regional Court in Brno of 13 December 2007 file no. 11 T 29/2000 the complainant was convicted, with legal effect, of the crime of fraud under § 250 par. 1 and 4 of Act no. 140/1961 Coll., the Criminal Code, as in effect until 31 December 2009 (the "CC"), the crime of larceny under § 247 par. 1 let. a), let. b) of the CC, for which, and simultaneously for the crimes of embezzlement under § 248 par. 1 of the CC and fraud under § 250 par. 1 and 2 of the CC, of which she was found guilty, with legal effect, by decision of the Regional Court in Brno of 16 November 2004 file no. 11 T 29/2000, in connection with resolution of the High Court in Olomouc of 26 July 2006 file no. 3 To 84/2006, she was given, under § 250 par. 4 of the CC, in connection with § 35 par. 1 and § 40 par. 1 of the CC, an aggregate prison sentence of three years, suspended under 60a par. 1 and 2 of the CC for a probation period of five years. The complainant was given the milder sentence as compensation for detriment incurred as a result of the total length of the criminal proceeding.

8. Resolution of the Regional Court in Brno of 12 June 2009 ref. no. 11 T 29/2000-1791, in conjunction with resolution of the High Court in Olomouc of 21 October 2009 file no. 3 To 104/2008, granted the complainant's defense counsel, appointed by resolution of the Municipal court in Brno of 9 October 1998 file no. Nt 789/98, an entitlement to a fee and cash expenses incurred in connection with the work performed when defending the complainant, in an amount of CZK 421,396.70.

9. On 22 June 2009 the complainat applied to the Regional Court in Brno "for free defense counsel." In her application, she stated that she received a full invalid pension in the amount of CZK 8,374, from which CZK 4,878 covers housing expenses, CZK 1,299 for execution [of the judgment], CZK 500 for a health insurance payment, and CZK 500 for the Regional Court in Brno. The complainant stated that her invalid pension is not even sufficient to cover these obligations, and she is therefore forced to rely on the assistance of her relatives. The complainant

attached to her application a SIPO [combined bill payment] document with an itemization of her payments for housing totaling CZK 4,878, including rent of CZK 3,919, cable television for CZK 209, internet for CZK 490, gas CZK 80, Czech Television and Czech Radio subscription fee CZK 180. The complainant also attached postal payment orders document other abovementioned payments of obligations, and a payment receipt document the amount of her invalid pension.

10. Resolution of the Regional Court in Brno of 26 June 2009 file no. 11 T 29/2000 decided, under § 33 par. 2 a contrario Act no. 141/1961 Coll., on Criminal Procedure (the "CPC"), that the complainant is not entitled to defense counsel for free or for a reduced fee. As reasons to not recognize the complainant's entitlement to free defense counsel, the Regional Court stated that the complainant did not submit documents necessary to verify that she had insufficient funds to pay defense costs.

11. The complainant filed a complaint against that resolution of the Regional Court, in which she stated that she does not know what other documents demonstrating her lack of assets she should have submitted to the court, when the court took into account only the document of her income and did not consider documents demonstrating her expenses, and the court did not call on the complainant to submit additional documentation. Together with her complaint, the complainant submitted further documents, a notice of her pension amount, a notice of withholding from her pension, confirmation of her rent, payment calendars for the health insurance company and the Regional Court in Brno, and a report from the Probation and Mediation Service of the Czech Republic on probation supervision, which states that the complainant has additional expenses of CZK 1,500 a month for medication, and that she has no source of income other than her disability pension.

12. In the resolution contested by the constitutional complaint, resolution of 21 October 2009 file no. 3 To 105/2009, the High Court in Olomouc, pursuant to § 148 par. 1 let. c) of the CPC, denied the complainant's complaint. The High Court stated that the purpose of § 33 of the CPC is, above all, to ensure the right to a defense enshrined in Art. 40 par. 3 of the Charter so that a possible lack of assets does not prevent a defendant from exercising the right to defend himself with a defense attorney of his choice. This situation must be differentiated from a circumstance where these conditions were properly ensured and only subsequently, after the end of criminal proceedings, and only for economic or social reasons, one cannot assume that the defendant is able to pay the state expenses incurred for his defense in accordance with § 152 par. 1 let. b) of the CPC. However, in the complainant's case this right was ensured, as defense counsel was appointed for her, and the complainant made use of his services for the entire time of the criminal proceeding. The High Court stated that the submitted documents do indicate that the complainant is a disability pensioner with a full disability pension, but there are items among the expenses she documented that could be considered discretionary (e.g., high fees for internet and cable television). In the High court's opinion it is obvious that the complainant must have at her disposal regular unspecified funds, which she draws on for her living expenses. Thus, in the High Court's opinion the complainant did not properly explain and did not document all the information about how, for how long, and particularly in what extent she

receives financial assistance from her relatives, or where she obtains such funds, or generally her lack of assets in terms of ownership of real estate or other property (significant personal property, securities, any uncollected receivables from business activities, etc.). It is not the duty of the courts to determine or verify the defendant's financial status, when that obligation is imposed on the complainant directly by the law in § 33 par. 2 and 3 of the CPC. Thus, the High Court concluded that the complainant did not meet the burden of proof, as she did not properly document her application to be entitled to free defense counsel.

III.

13. After the Constitutional Court stated that the constitutional complaint is admissible (§ 75 par. 1 of the Act on the Constitutional Court a contrario), was filed on time and meets the other legal requirements [§ 30 par. 1, § 72 par. 1 let. a) of the Act on the Constitutional Court], it turned to a review on the merits, and concluded that it was justified. Although the complainant, in the constitutional complaint, alleged violation of the right to a fair trial, the Constitutional Court concluded that the affected fundamental right, which had been violated by the ordinary courts, is, in addition to that right, also the right to respect for family and private life, under Art. 8 of the Convention. It is clear from the Constitutional Court's settled case law that it is bound by the proposed judgment in the petition, not by the reasoning therein, and that it is authorized to review violation of constitutionally guaranteed fundamental rights other than those that the complainant raised in the constitutional complaint [see, e.g., judgment file no. II. ÚS 259/05 of 21 March 2006 (N 65/40 SbNU 647), all decisions of the Constitutional Court are available at http://nalus.usoud.cz].

14. The role of the Constitutional Court is only to protect constitutionality, and not to review "ordinary" legality (Art. 83 of the Constitution). The Constitutional Court is not authorized to review the correct application of "ordinary" law. It is authorized to intervene in the decision making activity of the ordinary courts only if a legally effective decision by these bodies of public authority violated a complainant's fundamental rights or freedoms guaranteed by the constitutional order of the Czech Republic, because the fundamental rights and freedoms define not only the framework of the normative content of the applied legal norms, but also the framework for constitutionally conforming interpretation and application of them.

15. Art. 2 par. 3 of the Constitution of the CR, or Art. 2 par. 2 of the Charter provides that state authority can be exercised only in the cases, within the bounds, and in the manner set forth by law, naturally while respecting the principle of proportionality arising from the requirement of a law-based state (Art. 1 par. 1 of the Constitution of the CR). If that does not occur, the conduct or action of the state authority is arbitrary. As the Constitutional Court has repeatedly emphasized, not every violation of the norms of ordinary law, when applied or interpreted, also causes violation of an individual's fundamental right. However, violation of one of the norms of ordinary law as a result of arbitrariness (e.g. through failure to respect a mandatory norm) or as a result of an interpretation that is extremely inconsistent with the principles of justice, may interfere in an individual's

fundamental right or freedom [see, e.g. judgment file no. III. ÚS 346/01 of 14 March 2002 (N 30/25 SbNU 237)]. The Constitutional Court will always intervene if it finds an element of arbitrariness in the actions of the ordinary courts. For example, in judgment I. ÚS 534/03 it stated: "Such violation of the complainant's fundamental rights and freedoms also takes place if the ordinary court overlooks the importance of the prohibition of arbitrariness, a viewpoint from which one must approach the interpretation of all procedural principles and rules provided by the ordinary law. The Constitutional Court also reviews the decisions of the ordinary courts if it finds that the interpretation of regulations by the ordinary courts is so extreme that it deviates from the bounds of constitutionality. That is also the case if the ordinary courts interpret a particular statutory provision so expansively that it establishes an individual's duty to act beyond the scope of the law, which constitutes violation of Art. 4 par. 1 of the Charter. The Constitutional Court has already ruled (e.g., judgment file no. I. ÚS 546/03) that Art. 4 par. 1 of the Charter has two dimensions; the first makes more precise the effect of Art. 2 par. 2 of the Charter on individual persons, and the second is the structural principle of a democratic, law-based state under which the state authority can be exercised only in cases and within the bounds provided by law, and in a manner provided for by law. Likewise, the setting of obligations by a court is limited by the law, and requires the observance of the fundamental rights and freedoms." In the Constitutional Court's opinion, there is also arbitrariness in a case where the ordinary courts do not meet their obligation to duly, i.e. adequately, rationally, and logically justify their decisions in the relevant aspect [e.g., judgment file no. I. ÚS 534/03 of 13. 9. 2004 (N 126/34 SbNU 285),]; also, if a decision shows extreme inconsistency between the legal conclusions and the evidence presented and factual conclusions drawn from it; also if the interpretation and application of "ordinary" law is extremely inconsistent with the principles of justice [e.g. as a result of exaggerated formalism – see, e.g., judgment file no. III. ÚS 94/97 of 26 June 1997 (N 85/8 SbNU 287)].

16. Art. 36 par. 1 of the Charter guarantees everyone the opportunity to assert, through the legally prescribed procedure, his rights before an independent and impartial court. Likewise, Art. 6 par. 1 of the Convention, which guarantees everyone the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal, enshrines the general principle of a fair trial. The right to legal assistance under Art. 37 par. 2 of the Charter is considered a general provision, on which the right to a defense under Art. 40 par. 3 of the Charter is also based. Art. 6 par. 3 of the Convention enshrines the minimal rights of a defendant concerning his right to a defense, including the right to free legal assistance, whereby that provision of the Convention makes specific the general principle of a fair trial arising from Art. 6 par. 1 of the Convention [see judgment file no. I. ÚS 669/03 of 31 March 2004 (N 47/32 SbNU 441), the judgment Delta vs. France of 19 December 1990 or F. C. B. vs. Italy of 28 December 1991]. The rights arising from this provision must be interpreted not in a restrictive manner (see judgment Golder vs. United Kingdom of 21 February 1975), but with the application of constitutional law interpretation in view of the guarantees of a fair trial [see file no. I. ÚS 592/2000 (N 15/25 SbNU 115)]. Along with the presumption of innocence (Art. 40 par. 2 of the Charter), one of the most important fundamental rights of persons who are being prosecuted in criminal proceedings is the right to a defense (Art. 37 par. 2 and Art. 40 par. 3 of the Charter), which also includes the right to a

defense counsel for free or for a reduced fee. Its main purpose is to reach a fair decision. This is a right that is not only for the benefit and in the interest of the prosecuted person, but undoubtedly also in the interest of a democratic law-based state, founded on respect for the rights and freedoms of man and the citizen (Art. 1 par. 1 of the Constitution). Therefore, if the state is to ensure provision of these constitutionally guaranteed rights, it must create in the criminal procedure law procedural guarantees for the position of the defense counsel and the defendant.

17. As the Constitutional Court stated in its judgment file no. II. ÚS 2048/09 of 2 November 2009 (as yet unpublished): "The fundamental right to an undisturbed private personal life (Art. 10 par. 2 of the Charter) enjoys quite special respect and protection in the liberal democratic states. The right to an inviolable private sphere is the cornerstone of the liberal tradition, on which stand the foundations of modern politics and modern law, which also stood at the birth of the modern ideas of fundamental rights and freedoms." Ensuring the autonomous sphere of the individual is the most reliable guarantee of individual independence and human freedom. Protection of the right to an undisturbed private life also covers protection of the individual's mental health, mental integrity, and mental stability (see Hubálková, E.: Evropská úmluva o lidských právech a Česká republika. [The European Convention on Human Rights and the Czech Republic] Prague: Linde, 2003, p. 202). The fundamental right to an uninterrupted private life as a subjective public right, then, in accordance with the case law of the European Court of Human Rights, also protects the individual's right to identity and personal development, the right to establish and develop human relationships (see the judgment Friedl vs. Austria of 31 January 1995, in more detail Buxton, R.: Private Life and the English Judges, Oxford Journal of Legal Studies, vol. 29, no. 1, p. 413 et seq.). In the judgment of 16 December 1992 in the case Niemietz vs. Germany the European Court of Human Rights (the "ECHR"): "… it would be too restrictive to limit the notion [of private life] to an 'inner circle' in which the individual may live his own personal life as he choose and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings." Thus, the right to privacy must necessarily include the right to form relationships with other people and the external world (Kilkelly, U.: The right to respect for private and family life. Human rights handbooks, No 1. Strasbourg: Council of Europe, 2003, p. 11).

18. The Constitutional Court also ascribed to this concept of the right to a private life, when it stated in its judgment file no. II. ÚS 517/99 that: "[T]he right to protection of personal privacy is the right of a natural person to decide according to his own deliberation whether, or to what extent and in what manner, the facts of his own personal privacy are to be made accessible to other subjects, and at the same time to defend oneself against (resist) unjustified interference in that sphere by other persons. Excessive emphasis on the positive component of the right to protection of one's private life leads to inappropriately narrowing of protection to merely seeing to it that the facts of a person's private life not be [disclosed] without his consent or without reasons recognized by the law, and thus the integrity of the internal sphere, which is essential for positive personal development, not be violated. The Constitutional Court does not share this narrowed understanding, because respect for private life must, to a certain

degree, include the right to form and develop relationships with other human beings. Respect for private life, thus understood, includes the commitment of the state to act in a manner that permits the normal development of these relationships" [see judgment file no. II. ÚS 517/99 of 1 March 2000 (N 32/17 SbNU 229)].

IV.

19. The essence of the constitutional complaint was the complainant's objections regarding the actions of the High Court, which, without calling on the complainant to complete her filing, assessed the documents she submitted regarding her lack of assets as inadequate for recognizing an entitlement to a free defense, or reimbursement of the costs of the state-appointed defense counsel.

20. As stated above, a component of the right to a defense is the right to free legal assistance. The content of the right to a defense, as one of the fundamental guarantees of a fair trial (point 16 or the judgment Ekbatani vs. Sweden of 26 May 1988), has its positive and negative elements. The positive is the right of the accused (also the defendant, convicted, suspected and other persons) to defend himself or be defended by a chosen defense attorney, or the right to ask to have an attorney appointed. The negative element is the obligation of the defendant in cases of so-called "necessary defense" to "tolerate" a defense counsel (even if he does not wish one) and the obligation of all bodies active in the criminal proceeding to heed these rights in the context of the entire criminal proceeding. The content of the right to free legal assistance is the right of the defendant, if he cannot himself, due to lack of assets, fully or partly pay the costs of his defense, to a defense counsel for free or for a reduced fee, or, upon proof of lack of assets, the obligation of the court to rule that the state will fully or partly cover the defense costs. A right directly related to the right to a defense, including the right to free legal assistance, is the right of legitimate expectation of defense counsel under Art. 1 of the Protocol to the Convention to compensation and reimbursement of expenses, including in the event that the defense counsel's activities are the exercise of the right to a defense for an iindigent person [see, e.g., judgment file no. IV. ÚS 167/05 of 26 April 2005 (N 94/37 SbNU 277) or judgment file no. II. ÚS 3201/08 of 6 February 2009].

21. We can conclude from the settled case law of the ordinary courts that the court can recognized the abovementioned entitlement to free defense counsel at any time during the proceeding, or even after the end of the criminal prosecution (see, e.g., resolution of the Regional Court in Hradec Králové of 24 October 2006 file no. 13 To 477/2006, published in the Collection of Court Decisions and Opinions as number 19, volume 2008), and the exercise of this entitlement is not subject to any preclusive or limitations period (note, however, if the defendant had chosen defense counsel, then exercise of this entitlement is de facto limited by the preclusive period provided in § 151 par. 2 of the CPC). Apart from reflecting the possibility of change in the social and economic status of the defendant, the time period thus set for exercising the entitlement to a free defense reflects [the principle of] the presumption of innocence (Art. 40 par. 2 of the Charter), because until the defendant is convicted with legal effect, he cannot fairly be required to "presume" he will be convicted and accordingly be required to pay the costs of

state-appointed defense counsel [see § 152 par. 1 let. b) of the CPC; it is obvious from the nature of the matter that this consideration is relevant only with a court-appointed defense counsel, where the payment of defense costs is a matter between the state and the defense counsel, and then between the convicted person and the state, whereas with a chosen defense attorney one can assume that in the course of making arrangements for the defense, the attorney and the defendant actively address the question of payment of defense costs, where in the event of an acquittal one can proceed under of Act no. 82/1998 Coll., on Liability for damage Caused in the Exercise of State Authority through a Decision or Incorrect Official Procedure and amending Czech National Council Act no. 358/1992 on Notaries and Their Activities]. This conclusion is also supported by the fact that the defendant will learn the actual amount of costs of the appointed attorney only after the attorney exercises the entitlement under § 151 par. 2 of the CPC and only then is able to make an informed assessment of whether his financial position permits him to pay them to the state.

22. In interpreting the purpose of the right to free legal assistance, the High Court concluded that this right de facto serves only to secure the right to a defense at the stage of choosing or appointing an attorney, and if this right was secured, one cannot, due only to the subsequent lack of assets of the defendant, or the inability to pay the defense costs, grant the defendant an entitlement to free defense counsel (point 12). Thus, the High Court a priori ruled out the possibility of exercising the entitlement to free legal assistance even in the stage after the criminal proceeding ends, without that conclusion having any support in the Criminal Procedure Code (point 20). However, in the Constitutional Court's opinion that procedure must be considered arbitrariness (point 15), because the High Court, without a basis in the law, limited the complainant's fundamental right to free legal assistance [Art. 6 par. 3 let. c) of the Convention] inconsistently with its essence and purpose (point 16, 20 and 21), when it concluded that the right is "exhausted" by the mere appointment of a legal representative (regarding that, see the judgment in the case Artico vs. Italy of 13 May 1980, where the ECHR stated: "[A]rticle 6 § 3c) speaks of 'assistance' not 'appointment.' Mere appointment does not ensure effective assistance").

23. The provisions of § 33 par. 2 and 3 of the CPC make specific the defendant's fundamental right to a free defense or a defense for a reduced fee (point 16), or sets forth the manner in which this fundamental right is implemented. In the event of a so-called "obligatory" decision on the defendant's entitlement to defense counsel for free or for a reduced fee, the defendant must document that he does not have sufficient means to pay the defense costs. The defendant's petition , apart from the general requirements for a petition (§ 59 of the CPC), must contain attachments that are to support it. It is obvious from the wording of this provision that the legislature chose a relatively abstract formulation, leaving it to the discretion of the decision making body (a judge in the preliminary proceeding, and the chairman of the panel in the proceeding before the court), whether the petitioner properly justified his entitlement, or whether he submitted sufficient credible documents.

24. This case undoubtedly involves reflecting the obligation to make claims (moreover, in a criminal proceeding, interrupted by the court's obligation to

decide, optionally, on the defendant's entitlement even without a petition from him, if the evidence gathered indicates that it is justified) and to prove (attach appendices justifying the petition) the entitlement to defense counsel for free or for a reduced fee. However, the obligation to make claims and, especially, submit proof, has its limits, which include the rule that "non-existence does not require proof," based on the so-called "negative evidence theory," because no one can fairly be asked to prove the actual non-existence of a particular legal fact (see Winterová, A.: Civilní právo procesní [Civil Procedure Law], 4th ed. Prague: Linde, 2004, p. 279). The negative evidence theory, which results in transferring the burden of proof to the other party (or to the decision making body), is applied only when the non-existence that is subject to review is of a permanent character (see Svoboda, K.: Dokazování [Evidence]. Prague: ASPI - Wolters Kluwer, 2009, p. 29). In this regard, we can cite, e.g. the decision of the Supreme Administrative Court of 26 July 2006, file no. 3 Azs 35/2006, which addressed a matter of the same kind, and in which the Supreme Administrative Court concluded: "[T]he actions of the Regional Court, which denied the petition to appoint an attorney (§ 35 par. 7 of the Administrative Procedure Code) on the grounds that the complainant did not prove the claims of his financial situation with documentary evidence, and that these claims by the complainant was that she had no assets or income, is defective, and is the grounds for annulling that decision. The Regional Court's actions denied the 'negative evidence theory,' under which a non-existent fact cannot be proved by evidence."

25. As indicated by the reasoning of the contested decision (point 12) and from the statement by the High Court (point 4), the key reason for not recognizing the complainant's entitlement to a free defense, i.e. not meeting the burden of proof. The complainant, claiming her lack of assets, submitted to the court, together with the petition, documents proving her income and costs, and that she has no other assets or income (which was also documented by the report from the Probation and Mediation Service, point 11). The Constitutional Court adds that, if the High Court concluded that the complainant did not properly document her entitlement, or that the evidence submitted is insufficient for a decision on her petition, it had an obligation, under § 59 par. 4 of the CPC, to ask the complainant to supplement it, of course, with the limitations arising from the negative evidence theory. In the Constitutional Court's opinion, the High Court acted arbitrarily, when, in a procedure violating Art. 2 par. 2 of the Charter (point 15), did not recognize the complainant's entitlement, on grounds of failure to meet the burden of proof, consisting of failure to document lack of assets (point 24) and possible other documents (gifts from relatives), without, however, asking the complainant to supplement them (points 16 and 23), which led to violation of the complainant's fundamental right guaranteed in Art. 6 par. 3 let. c) of the Convention (point 16). In this case we also cannot overlook the fact that in the criminal proceeding as a whole, i.e. in the decision making on payment of the costs of the proceeding, the investigatory principle applies [see, e.g. Supreme Court resolution of 4 January 1991 file no. 1 To 56/90: "If the first level court is deciding after a convicting decision under § 155 par. 1 of the Criminal Procedure Code has gone into effect on the obligation of the defendant to pay the fees and incurred costs paid by the state to the appointed attorney, it is required to determine whether the defendant has sufficient means to pay these expenses; this means, in particular, that it is required to determine the financial situation and earning possibilities of the

convicted person. If it finds that the convicted person does not have sufficient means to pay the costs of the necessary defense, and is therefore entitled to defense counsel for free (§ 33 par. 2, § 152 par. 1 let. b) of the Criminal Procedure Code), it shall issue a decision that, for that reason, he is not required to pay the fee and incurred costs paid by the state to the appointed defense attorney."].

26. We must consider quite unacceptable the opinion of the appeals court (point 4), which, without any relevant grounds or facts determined in the criminal proceeding, assumed that the complainant must still have at her disposal the funds acquired by criminal activity.

27. The Constitutional Court is familiar with the decision making practice of the ordinary courts which, for assessing necessary expenses when deciding on recognizing an entitlement to a free defense, waiver of court fees etc., consider as "justified expenses" (in the sense of necessary expenses) only those that serve directly for payment of basic living needs (housing, clothing, food, medicines), or those which the applicant is required to pay (execution [of judgments], support payments, etc.). However, the Constitutional Court does not share this restrictive concept of "justified expenses," because in its opinion it is necessary to assess human life and a person's personality much more complexly, including, among other things, from the point of view of the right to privacy (points 17 and 18). However, it is evident from the very nature of that right, that their content cannot be defined so as to cover all the possibilities that come into consideration, because it is each individual person that gives this right a specific content [e.g., Lord Rodger stated that "article 8(1) protects those features of a person's life which are integral to his identity. For those for whom it is a core part of their lives, hunting, too, can be said to be integral to their identity." (Countryside Alliance, n26, point 101, available at www.publications.parliament.uk]. Therefore, it is the duty of the courts to review the unique aspects of each case so that, apart from observing the guarantees of a fair trial, the individual's other fundamental rights are also preserved, in this case the right to a private life [G. Dürig (G. D., Der Grundrechtssatz von der Menschenwürde, Archiv des öffentlichen Rechts 81, 1956, p. 127) formulated the well-known theory of the object, which was adopted in the case law of the German Constitutional Court, connected to questions of human dignity. According to this theory human dignity is violated when state authority places a particular individual into the role of an object, where he becomes a mere means, and is reduced to the form of a fungible value. One can conclude that a person not only the object of social "relationships," but also becomes the object of the law, if he is forced to subject to it completely in its interpretation and application, i.e. without taking into account his individual interests, or fundamental rights]. In addition to the subjective factors on the part of the individual, when evaluating whether expenses are "usual or justified" it is also necessary to take into account objective factors, which include, among other things, technological developments (e.g. mobile telephones, the internet) and related changes in methods of communication, obtaining information, contacts with government offices, association, etc., or the development of technologies, through which the individual's right to personal development, relationship with other people and the outside world, i.e. the right to a private life, is realized (point 17).

28. The High Court concluded that the documents that the complainant submitted can support a conclusion that among her expenses are items of a purely discretionary nature, “high payments for internet and cable television.” In other words, the High Court concluded that, although the complainant, as a disability pension, has insufficient available funds, her income, from which, however, she pays higher than standard discretionary services every month, permits her in future to pay the costs of a defense on a payment schedule (point 12). The Constitutional Court adds that this interpretation, within the framework of the maxims of the right to a private life delineated by the European Court of Human Rights (point 17) and the Constitutional Court (point 18 and 27) leads to intervention in the complainant’s personal sphere and thus to violation of Art. 8 par. 1 of the Convention.

29. Therefore, for the abovementioned reasons the Constitutional Court granted the constitutional complaint under § 82 par. 2 let. a) of the Act on the Constitutional Court and the annulled the decision contested by the constitutional complaint under § 82 par. 3 let. a) of the Act on the Constitutional Court.

Instruction: Decisions of the Constitutional Court cannot be appealed (§ 54 par. 2 of the Act on the Constitutional Court).

Dissenting opinion of justice Ivana Janů

Under § 22 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, I am filing a dissenting opinion to the verdict, as well as the reasoning of Constitutional Court judgment file no. I. ÚS 22/10. I am not mentioning all the problematic points in the reasoning, but only those that I consider to be the key ones.

The judgment states, in point I. of the verdict, that failure to respect the principle contained in Art. 2 par. 2 of the Charter (state authority can be exercised only in the cases, bounds, and manner prescribed by law) in the High court resolution contested by the constitutional complaint violated the complainant’s fundamental rights guaranteed in Art. 6 par. 3 let. c) and Art. 8 par. 1 of the Convention, i.e. the right to a defense and the right to respect for her private and family life. The High Court is alleged to have violated the right to a defense by concluding that the right is “exhausted” by the mere appointment of a legal representative, and by failing to observe the negative evidence theory (meaning the negative theory of dividing the burden of proof). The right to a private and family life also includes the right to form relationships with other people and the outside world; as indicated in point 28 of the reasoning, that right was violated by the fact that the complainant could not afford to pay the high fees for internet and cable television.

I cannot agree with this approach to the right to a defense or the right to a private and family life. On the contrary, I consider the legal opinion expressed in the contested decision of the High Court in Olomouc to be correct and constitutional.

The purpose of the right to a defense, in the part that concerns the defense of a defendant by defense counsel, consists of providing qualified legal assistance to a person who is being criminally prosecuted on suspicion of committing a crime. It is

first of all up to the defendant whether to defend himself or through defense counsel; however, in cases of so-called "required defense" the defendant must have a defense counsel, even if he did not choose him. In both situations there is a fundamental requirement that the defendant's insufficient assets not prevent the conduct of a defense by an attorney (if he wants or must have one). This is expressed both in the Convention for the Protection of Human Rights, in Art. 6 par. 3 let. c) ("… if he does not have funds to pay an attorney, he must be provided at no cost, if the interests of justice so require"), and in the last sentence of Art. 40 par. 3 of the Charter of Fundamental Rights and Freedoms ("The law provides in which cases the defendant has the right to the assistance of counsel at no cost."). Thus, the right to a defense for free cannot be artificial separated from the conduct of a defense in an ongoing proceeding; this is meant to ensure that a person who does not have funds to pay a defense attorney may nevertheless be represented by an attorney.

In this matter a defense attorney was appointed for the complainant, i.e. the complainant was provided qualified legal assistance during the criminal proceeding conducted against her. I believe that this also fulfilled her constitutionally guaranteed right to a defense. If the complainant finds, only two years after the guilty verdict – evidently motivated by the fact that the amount of the attorney's fee and costs incurred was set, and she will now have to pay it to the state under § 152 par. 1 let. b) of the Criminal Procedure Code – that she does not have sufficient funds to pay the costs of the defense that was provided for her, and her request is not granted, this cannot be seen as violation of her right to a defense; the defense was provided to her, which even the complainant herself does not in any way question. One cannot draw a different conclusion from the Charter either, because, although it maintains the possibility of defending oneself through a defense attorney, regarding cases of free defense it refers to the law [i.e., now to § 33 par. 2 and 3, § 152 par. 1 let. b) of the Criminal Procedure Code]. The Convention also requires as a condition for a free defense that the interests of justice require it; in my understanding of justice, there is nothing unjust about it if a person convicted with legal effect for committing a number of property crimes, through which she caused damage to others of approximately CZK 10,000,000, is given an obligation to pay the costs of her court-appointed defense attorney. A defense was provided to her, and the question now is only whether the costs will finally be born by the complainant or the state.

I consider quite unacceptable extending the right to a private and family life – violation of which the complainant did not even allege – to decision making on free defense counsel, moreover, understood so as to guarantee everyone the right to be in contact with others through cable television and the internet (in particular points 27 and 28 of the reasoning). In this way of thinking every decision by a court that affects a person's property sphere so much that he will not be able to afford fees for cable television and internet would be seen as violation of the right to a private and family life. It is then a question whether, in the spirit of this logic, the rights of socially weak (and criminally blameless) persons, who cannot afford internet and cable television, are not massively violated. That, of course, is an obviously absurd conclusion; it cannot be otherwise, because the concept of the right to a private and family life on which the majority opinion is based is obviously curious and absurd.

In this regard, I consider it important to also point to the manner of working with the legal opinions stated in other decisions in the text of the majority opinion. I have nothing against a conclusion that the right to privacy must also include the right to form relationships with other people and the outside world (points 17 and 18 of the reasoning); however, the case law of the European Court of Human Rights and of the Constitutional Law made that conclusion in quite different cases (see, e.g., the factual basis of the cited decisions in the Niemietz case and in II. ÚS 517/99).

Likewise, Lord Rodger's statement (point 27 of the reasoning) concerns a completely different issue, literally miles away from the problem addressed here. The upper house of the British Parliament (the House of Lords) reviewed a law concerning a particular kind of hunt – fox hunting – for compatibility with Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The appeals court consisted of 5 judges, and none of them, not even Lord Rodger of Earlsferry, cited in point 27, concluded that the abovementioned law violated the right to respect for a private and family life, as was objected by the petitioner. However, this decision also stated a number of other inspiring opinions, which obviously do not fit the concept of the majority opinion, and therefore it does not mention them. Therefore I consider it appropriate to pause at Art. 8 of the Convention.

Art. 8 of the Convention reads:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

There are inspiring thoughts on this article in the opinion of Baroness Hale of Richmond (p. 40), (footnote no. 1), so I will point out at least some of these thoughts:

"110. The spirit of liberty is that spirit which is not too sure that it is right; the spirit of liberty is that spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weights their interests alongside its own without bias;… [(Learned Hand, "The spirit of liberty," in The Spirit of Liberty, Papers and Addresses of Learned Hand, edited by Irving Dilliard, 3rd ed., 1960, p. 190).]"

The baroness also poses these questions:

"110. When does the freedom to do as one pleases become a human right? How broadly should we construe the scope of the rights and fundamental freedoms to us all in the European Convention on Human Rights?"

… In her opinion, “111. …there is no human right to be left alone to do as one likes; the Convention has defined some specific rights which can only be interfered with in specified circumstances; there is a great deal of flexibility and room for development on both sides of the scales; but the more broadly one construes the right, the greater the latitude one must allow the democratically elected legislature to strike the balance between the interests of those who wish to pursue a particular activity and the interests of those who wish to prevent them.”

“114. This is all elementary now. But it is worth repeating because the purpose of such human rights instrument [the Convention] is to place some limits upon what a democratically elected Parliament may do: to protect the rights and freedoms of individuals and minorities against the will of those who are taken to represent the majority. Democracy is the will of the people, but the people may not will to invade those rights and freedoms which are fundamental to democracy itself. To qualify as such a fundamental right, a freedom must be something more than the freedom to do as we please, whether alone or in company with others.”

“115. The right to respect for our private and family life, our homes and our correspondence, guaranteed by article 8, is the right most capable of being expanded to cover everything that anyone might want to do. My noble and learned friend, Lord Rodger of Earlsferry, has made a powerful case for article 8 to include almost any activity which is taken sufficiently serious by the people who engage in it.”

“116. … the Strasbourg jurisprudence has not gone so far in its interpretation of the rights protected by article 8; …. Article 8, it seems to me, reflects two separate but related fundamental values. One is the inviolability of the home and personal communications from official snooping, entry and interference without a very good reason. It protects a private space, whether in a building, or through the post, the telephone lines, the airwaves or the ether, within which people can both be themselves and communicate privately with one another. The other is the inviolability of a different kind of space, the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people. This is fundamentally what families are for and why democracies value family life so highly. Families are subversive. They nurture individuality and difference. One of the first things a totalitarian regime tries to do is to distance the young from the individuality of their own families and indoctrinate them in the dominant view. Article 8 protects the private space, both physical and psychological, within which individuals can develop and relate to others around them. But that falls some way short of protecting everything they might want to do even in that private space; and it certainly does not protect things that they can only do by leaving it and engaging in a very public gathering and activity.”

Note: Which means the shift to protection of Art. 11 Freedom of assembly and association.

“117. Article 11, on the other hand, is very much concerned to protect such gatherings. … Why then should it not protect the right of hunting people not only to get together but also to pursue their sport together?”

“118. … On this view, the right of the hunt and its followers to gather together publicly to demonstrate in favour of their sport and against the ban … is protected by article 11. But the right to chase and kill the fox or the stag or the mink … is not.”

That covers the right to a private and family life and fox hunting.

Point 21 of the reasoning also states, with reference to settled case law, that a court may recognize the right to a free defense at any time during the proceedings or even after the end of criminal prosecution; it cites as an example of this settled case law the decision published as R 19/2008. Of course, that case does not at all address the period when the right a free defense can be recognized. It addresses only the question of whether a defendant for whom this right was recognized is a person authorized to file a complaint against a decision on the amount of the fee of the appointed defense attorney.

I also have reservations about the subjectivizing concept of the presumption of innocence (point 21 of the reasoning), based on the consideration that a defendant for whom a defense attorney was appointed cannot presuppose that he will be convicted. On the contrary, I consider the presumption of innocence to be an objective category that applies not to the inner belief of the defendant – who, after all, knows whether he committed something or not – but to third parties and state authorities, whom it requires to look upon the defendant as innocent until such time as he is pronounced guilty with legal effect. The reasoning in the majority opinion applies the subjectivizing concept of the presumption of innocence only to the appointed defense attorney; if this argument were taken with all its consequences, it would mean – absurdly – that a defendant who selected a defense attorney and ‘active addressed” with that attorney the question of the defense costs thereby actually indirectly admits that he committed a crime. That is, naturally, nonsense, but it clearly demonstrates the faultiness of the initial subjectivizing concept of the presumption of innocence and the incorrect concept of the relationship between a selected or appointed defense attorney.

I also do not consider it correct that the Constitutional Court, without requesting the file (sic!) in point 26 of the reasoning criticizes the High Court because it “without any relevant grounds of facts determined in the criminal proceeding, or evidence, assumed that the complainant must still have at her disposal funds obtained through criminal activity.” Without being familiar with the file, such criticism is, at a minimum, very daring.

It is not quite clear to me why the majority opinion in point 20 mentions the “right to legitimate expectation,” as regards the fee of an appointed defense attorney. For one thing, this question was not the subject matter of the constitutional complaint, and for another, it is clear from the file in the case file no. 11 T 29/2000 – which I requested – that the defense attorney’s fee was already assigned to the state with legal effect and partly paid in advance (see pp. 1852 et seq.).

Finally, I emphasize with regard to point 24 that the negative theory of dividing the

burden of proof – regardless of the fact that this is a theory of civil, not criminal, trials – is considered to be overcome in the procedural literature. Here it is sufficient to cite, for example, the monograph Macur, J. Dělení důkazního břemene v civilním soudním sporu. [Division of the burden of proof in a civil trial.] Brno: MU, 1996, pp. 31-35. Nor is there any different conclusion in the cited civil procedure textbook, because it cites the negative theory of dividing the burden of proof only in the context of review of individual theoretical concepts. Likewise, the reference to the Supreme Administrative Court case of 26 July 2006, file no. 3 Azs 35/2006, published as no. 951/2006 Coll. of Decisions of the Supreme Administrative Court, is not persuasive, because there this theory was used in a situation that involved review of a decision by an administrative body in a matter of asylum; in terms of verifying his financial situation, the status of an asylum seeker is different from a normal situation. The conclusion that the negative theory of dividing the burden of proof in a civil proceeding has been overcome clearly arises from valid regulations: e.g., under § 420 par. 3 of the Civil Code, a person who proves that he did not cause damages is freed from liability for damages; however, in terms of the negative theory of dividing the burden of proof, such proof would not be possible, and the entire provision would cease to make sense.

In this regard we can pause at the claim in the constitutional complaint that, in order to prove that she has no real estate assets, the complainant cannot, by the deadline for the complaint, obtain "statements from ca. 100 Real Estate Registration Offices existing in the country." Such a claim is distorted. Upon the request of an individual or legal entity, any Real Estate Registration Office will issue a confirmation that the applicant, who is identified by a valid identity card and birth registration number, does not own (or co-own) any real estate in the CR listed in the real estate register. Thus, upon completing the necessary form and paying a fee of CZK 50, the complainant could have obtained confirmation that she does not own anything in the CR. Incidentally, this is an ordinary, routine matter, because the same form is required by, e.g. some municipalities from persons wishing to buy municipally-owned apartments.

For these reasons I do not consider the majority opinion acceptable, and I believe that the constitutional complaint should not have been granted, certainly not on the basis of the arguments set forth in the reasoning of the majority judgment.

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Footnote 1) Points 110-118: quoted by the dissenting judge from Opinions of the Lords of Appeal for Judgment in the case Countryside Alliance and others: Session 2007-08 [007] UKHL 52. Available at www.publications.parliament.uk.