I.ÚS 2482/13 of 26 May 2014
"Joint Custody"

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

The Constitutional Court, in its Chamber consisting of the Presiding Judge Kateřina Šimáčková (Judge Rapporteur), Judge Ivana Janů and Judge Ludvík David, held in the matter of the constitutional complaint filed by the complainant J. K., represented by JUDr. Monika Forejtová, Ph.D., attorney with the head office in Prague 2, Náplavní 2013/1, directed against the decision of the District Court of Prague 2, issued on 29 November 2012, file reference 21 P 9/2012-364, 21 PA Nc 48/2012, 21 P and Nc 80/2012, and 21 P and Nc 141/2012, and the decision of the Municipal Court in Prague, issued on 13 May 2013, file reference 19 Co 85/2013-413, with the participation of A. K., secondary party, represented by JUDr. Jana Marečková, attorney with the head office in Ondříčkova 16, 130 00 Prague 3, as follows:

I. The Decision of the District Court of Prague 2, issued on 29 November 2012, file reference 21 P 9/2012-364, 21 PA Nc 48/2012, 21 P and Nc 80/2012, and 21 P and Nc 141/2012, and the Decision of the Municipal Court in Prague, issued on 13 May 2013, file reference 19 Co 85/2013-413, violated the complainant's fundamental rights as guaranteed in Art. 10, para. 2 and Art. 32, para. 4 of the Charter of Fundamental Rights and Freedoms and Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

II. For these reasons, these decisions shall be annulled.

REASONING

I.
Summary of the proceedings

1. The complainant is a father of two minors born X. and Y. (at the time, thus 11 and 9 years old). As implied in the constitutional complaint, the attached documents and the requested file of the District Court of Prague 2, file reference 21 P 9/2012, in November 2008, the mother and both minor children abandoned the matrimonial home, whereupon both parents actually carried out joint custody of the minor for approximately a year.

2. Subsequently, the complainant filed a petition seeking to have the custody of the minors arranged for the period before and after the divorce, while seeking to have the existing status maintained and to have the minors entrusted to the joint custody of both parents. The mother did not agree with this proposal, seeking to have the custody of the minors granted, while the guardian ad litem supported her petition as well. The custody arrangement of the minors for the period before and after the divorce was determined by the decisions of the District Court of Prague 4 (specifically, the Decisions of the District Court of Prague 4, file reference 14 Nc 226/2009-91, issued on 17 December 2009, and file reference 14 Nc 226/2009-120, issued on 14 January 2009), also upheld by the court of appeal (by means of the Decision of the Municipal Court in Prague, file reference 23 Co 103/2010-146, issued on 14 April 2010), and not deemed as conforming to the Constitution by the Constitutional Court, which in this respect dismissed the constitutional complaint filed by the complainant as manifestly ill-founded in its Resolution file reference II. ÚS 2807/10, issued on 13 January 2011. By means of the above decisions, the District Court of Prague 4 granted the custody of the minors to the mother, determined the amount of the father's maintenance duty and ruled on his contact with the minors. The

reasoning behind the decision shows clearly that these are based, in particular, on the expert opinion and that they identically consider, owing to the role of the mother in the life of pre-school and early-school-age children, joint custody as more suitable at a later age of the minors.

3. In May 2012, the complainant petitioned to have the custody modified, seeking to have the minors entrusted to the joint custody of both parents, while also seeking a reduction in the maintenance that he was due to pay on behalf of both minors. In this application, he pointed out, in particular, that there had been an improvement in the communication between him and the mother of the minors, that he had changed jobs, that he was a sole trader and had more time to spend with the minors, and that the minors had already reached school age and that they thus needed a male element for their healthy development, i.e. the father who would help them with their school work in a suitable form. The mother of the minors did not agree with the petition, and the guardian ad litem merely recommended extending the contact of the father with the minors.

4. The District Court of Prague 2 held on the complainant's petition in its decision issued on 29 November 2012, file reference 21 P 9/2012-364, 21 PA Nc 48/2012, 21 P and Nc 80/2012, and 21 P and Nc 141/2012 (hereinafter only as "the Decision of the District Court of Prague 2 issued on 29 November 2012, file reference 21 P 9/2012-364"), dismissing his petition to have the minors entrusted to the custody of both parents and to reduce the maintenance, while it nevertheless stated that there had been a certain change in the situation and the contact of the father with the minors was slightly extended. As implied in the reasoning behind the decision, the District Court of Prague 2 proceeded from the persuasion that the changes in the situation alleged by the father, and which were duly established within the proceedings, did not legitimise a new decision on the environment in which the minor children would grow up. In addition, it also referred to the interview of the guardian ad litem with the children, who expressed their satisfaction with the existing custodial arrangements. This decision was appealed by both the father and mother of the minors.

5. The justification of the appeal was assessed by the Municipal Court in Prague, which, in its decision issued on 13 May 2013, file reference 19 Co 85/2013-413, held on increasing the maintenance duty and restricting the complainant's contact with the minors. The court of appeal proceeded fully from the facts established by the first instance court, not subject to any change in the appellate proceedings. What it only reproached to the first instance court was the incorrect legal assessment of the issue of the change in the contact of the father with the minors, as the extent of the contact had not been assessed in terms of the interest of the minors in a stable upbringing environment for growing up and had been extended too extensively, and the increase in maintenance, which ought to have been provided owing to the school attendance of both minors and their leisure activities.

II.
Summary of the constitutional complaint

6. By means of a constitutional complaint, filed in a timely manner and complying with other formal requirements as prescribed by Act No. 182/1993 Coll., on the Constitutional Court, as amended (hereinafter only as the "Constitutional Court Act"), the complainant seeks the annulment of the decision of the District Court of Prague 2, issued on 29 November 2012, file reference nd21 P 9/2012-364, 21 PA Nc 48/2012, 21 P and Nc 80/2012, and 21 P and Nc 141/2012 and the decision of the Municipal Court in Prague, issued on 13 May 2013, file reference 19 Co 85/2013-413, with the reasoning that they had violated his fundamental rights and freedoms as guaranteed in Art. 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter also only as the "European Convention" or "ECHR"), Art. 10, para. 2, Art. 32, para. 4, and Art. 36 of the Charter of Fundamental Rights and Freedoms (hereinafter only as the "Charter"), and Art. 3, para. 1 of the Charter in association with Art. 14 of the ECHR, and that there had been a violation of the Convention on the Rights of the Child, which is part of the constitutional order of the Czech Republic.

7. According to him, the complainant's fundamental rights were violated in four areas. First, the complainant alleges that the decisions of the ordinary courts are not supported by tested evidence and

that these courts incorrectly established the facts of the case, thus violating the complainant's right to a fair trial. The complainant maintains that both the District Court of Prague 2 and the Municipal Court in Prague, which fully proceeded from the facts established by the first instance court, based their decision on a three-year-old expert opinion, which it even failed to take into consideration, as the expert witness appointed by the court expressly stipulated in it that both minor children agreed with the joint custody and that it would be in their interest, as well as on the interview of the guardian ad litem with the minors, in which they both stated that they agreed with the joint custody. According to the complainant, his financial situation was not properly established, as the courts had failed to perform a qualified estimate of his income and expenses, and yet the maintenance was increased by the court of appeal. And finally, in his view, the complainant's right to a fair trial was violated in particular owing to the fact that the ordinary courts had failed to hear the minor children themselves but only by means of the guardian ad litem, even though the case did not show any exceptional character, as specified in § 100, para. 4 of Act No. 99/1963 Coll., Civil Procedure Code, as amended by Act No. 404/2012 Coll. (hereinafter only as the "CPC").

8. Second, the complainant challenges the decision of the Municipal Court in Prague owing to its unpredictability, i.e. owing to an extreme inconsistency between the established facts adopted from the conclusions of the first instance court without reserve and the resulting legal conclusions, which were completely inconsistent with the decision of the first instance court. The complainant believes that this so-called surprising decision violated the predictability principle of judicial decisions and consequently that he was denied justice.

9. Third, the complainant believes that the ordinary courts failed to act in the best interest of the minors, as without any statutory support or reasoning based on the tested evidence and contrary to the statements of both minors made in the interview with the guardian ad litem, they preferred the sole custody of one of the parents to joint custody. The complainant finds another violation of the principle of the child's best interest owing to the fact that the ordinary courts considered the change in the circumstances that is presumed for modifying a decision on exercising the parental rights and duties in Act No. 94/1963 Coll., Family Act, as amended (hereinafter only as the "Family Act"), and which was established by the complainant (the minors' higher age, their school attendance, improving the communication with the mother, and a change in the complainant's job providing him with more time flexibility) as insufficient for entrusting the minors to the joint custody of both parents. According to the complainant, by adopting this procedure, the ordinary courts violated not only his right to the protection of private and family life, but also the corresponding right of the minors to private life and parental upbringing and care.

10. Fourth, the complainant believes that he was disadvantaged owing to his sex, i.e. that he is the father, not the mother, of the minors. In this context, he states, in particular, that there are no objective obstacles that would hamper the proposed joint custody and owing to which he should be excluded from the possibility to contribute to the minors' upbringing to the same extent as contributed by their mother, and the decisions of the ordinary courts are thus based on merely an unjustified assumption that keeping the minors in the sole custody of their mother would be in their interest.

III.
Summary of the requested statements

11. In the instant case, the Constitutional Court requested the statement of the Municipal Court in Prague, the District Court of Prague 2, the secondary party A. K., and the secondary party of the Municipal Authority of Prague 2. The Municipal Authority of Prague 2 waived its position of the secondary party by failing to submit its statement within the prescribed term.

12. In her statement, the secondary party A. K., represented by JUDr. Jana Marečková, attorney with the head office at Ondříčkova 16, 130 00 Prague 3, maintained that she did not believe that the complainant applied his argumentation in a justified manner. The secondary party is of the opinion that the complainant, by means of his constitutional complaint, merely continues to challenge the

decision of the trial court and the court of appeal. She also referred to the Resolution of the Constitutional Court, file reference II. ÚS 2807/10, issued on 13 January 2011, in which the Constitutional Court dismissed the complainant's constitutional complaint as manifestly ill-founded, while pointing out the fact that the complainant did not deliberately attach this resolution to the instant constitutional complaint, while he attached to it the decisions of the courts assessed as conforming to the Constitution in this resolution. In addition, the secondary party emphasised that every court procedure represented a psychological strain on the minors and that in the following year, both minors would reach the age when, owing to the degree of their development, they would be able to contact the complainant at any time they wish to do so. For this reason, she considers the complainant's constitutional complaint as an attempt to share the children mathematically "in halves". The secondary party motions either to dismiss the constitutional complaint as manifestly ill-founded or to dismiss it on the merits.

13. The District Court of Prague 2 merely sent to the Constitutional Court the requested docket, file number 21 P 9/2012, in which it established a statement on the constitutional complaint on pages 449 to 451. In this statement, it fully referred to the reasoning behind its decision and added that implementing joint custody arrangements would not be consistent, in the instant case, with the best interest of the children. It also referred to the fact that in its decision-making, it took into account the attitude of the minors themselves, with whom an interview was conducted by a guardian ad litem owing to their younger age, and that the father had been granted extensive contact with the minors, which enabled the father to contribute to their education in a sufficient manner.

14. In its statement, the Municipal Court in Prague referred to the reasoning behind its decision issued on 13 May 2013, file reference 19 Co 85/2013-413, and maintained that its decision-making proceeded from the facts established by the first instance court and paid attention, above all, to the interest of the minor children, taking into account their age and the situation of both parents. It emphasises that in the case of the joint custody, what should be particularly taken into consideration is whether both parents are capable of and willing to agree on the possibility of joint custody arrangements in the interest of the children.

IV.
Dispensing with the oral hearing

15. Pursuant to the provisions of § 44 of the Act on the Constitutional Court, the Constitutional Court held in the matter without listing an oral hearing, since it was not possible to expect that any such hearing would further contribute to the clarification of the matter.

V.
Legal framework

V/a
Scope of the review of the Constitutional Court

16. Pursuant to Art. 83 of the Constitution of the Czech Republic, the Constitutional Court is the judicial body responsible for the protection of constitutionality. It exercises its authority, inter alia, in such a manner that pursuant to Art. 87, para. 1, letter d) of the Constitutional, it has jurisdiction over constitutional complaints against final decisions or other encroachments by public authorities infringing constitutionally guaranteed fundamental rights and freedoms. However, the Constitutional Court is not part of the system of ordinary courts and as such, it is not competent to appellate review of their decisions. The authority of the Constitutional Court serves to review decisions against which a complaint is directed exclusively in terms of compliance with constitutional law principles.

17. For this reason, the Constitutional Court may, under no circumstances, anticipate the decision regarding to whom the custody of a child is to be granted or assess the evidence within the proceedings on the constitutional complaint. As already held by the Constitutional Court [for instance,

see paragraph 20 of the Judgment file reference III. ÚS 1206/09, issued on 23 February 2010 (N 32/56 SbNU 363)], its task is primarily to evaluate whether the ordinary courts through such decisions violated any fundamental rights and freedoms of the complainant. Such violations could occur in particular by the courts excessively failing to respect the very provisions of a common enactment, whereas failing to respect the content and meaning of the applicable statutory provisions amounts to an overlap to the constitutional level also owing to the fact that the constitutional enactment is implemented and specified by means of the relevant sub-constitutional regulation [see paragraph 17 of the Judgment file reference I. ÚS 266/10, issued on 18 August 2010 (N 165/58 SbNU 421)]. In addition, when reviewing the decisions of the ordinary courts concerning the custody of a child, the Constitutional Court always assesses whether proceedings before the court were held and the measures adopted in the best interest of the child (see, inter alia, Art. 3 of the Convention on the Rights of a Child), whether all necessary evidence was collected for the purposes of determining the best interest of the child, whereas it is the court, rather than the parties themselves, who is responsible for collecting the evidence, and whether any decisions issued within the proceedings were provided with appropriate reasoning to this effect.

V/b
Criteria for granting the custody of a child

18. Within the proceedings whose aim is to decide who is to be granted the custody of the child, for the purposes of decision-making in the best interest of the child, it is necessary, in the case of all persons showing genuine interest in having the custody of the child granted [for the need of a coherently expressed interest in the child, see the Judgment of the Grand Chamber of the European Court of Human Rights (hereinafter only as the "ECHR") in the case of Scozzari and Giunta v. Italy, issued on 13 July 2000, No. 39221/98 a 41963/98, sections 223 et seq.], to individually assess all the relevant criteria and if they are all met to an identical extent in all these persons, it is desirable to entrust the child in the shared or joint custody of these persons or to adopt measures that will allow to take such a procedure in the future. In the event that granting the custody of the child to each of these persons is in his or her best interest, then it is commonly in his or her best interest when the custody is granted to all these persons at the same time, as this is the only manner in which the general development of the child can be ensured and only such a procedure may minimise the interference with the family life of the child and the persons seeking to have his or her custody granted (as for the possible classification of merely intended family life within the ambit of Art. 8 of the European Convention, see, for instance, the ECHR Judgment in the case of Schneider v. Germany issued on 15 September 2011, No. 17080/07, paragraph 81, or in the case of Anayo v. Germany issued on 21 December 2010, No. 20578/07, paragraph 57).

19. The criteria that ordinary courts must take into consideration in terms of the need to decide in the child's best interest within the proceedings on custodial arrangements include, in particular (1) the existence of a blood relation between the child and the person seeking to have their custody granted; (2) the degree of maintaining the identity of the child and their family relationships in the case of granting their custody to a specific person; (3) the capacity of the person seeking to have the custody of the child granted to ensure their development and physical, educational, emotional, material, and other needs; and (4) the child's wish [cf. also para. 52 et seq. of the General comment No. 14 of the Committee on the Rights of Children on the right of the child to have his or her best interests taken as primary consideration, 2003, CRC/C/GC/14.].

20. As for the first criterion, the existence of the blood relation between the child and the person seeking to have their custody granted, it is necessary to proceed from the fact that the family represents, in the first place, a biological connection and then a social institution [Judgment file reference II. ÚS 568/06, issued on 20 February 2007 (N 33/44 SbNU 399); as for the need to protect the biological relation between the parent and the child, cf. also the ECHR Judgment in the case of Keegan v. Ireland issued on 26 May 1994, No. 16969/90; or the ECHR Judgment in the case of C. v. Finland issued on 9 May 2006, No. 18249/02]. At the same time, though, it needs to be pointed out that a mere biological kinship between the specific person and the child without any other legal or

factual elements does not yet represent family life pursuant to Art. 8 of the European Convention and that cohabitation of the child and the specific person is a general requirement (ECHR Judgment in the case of Schneider v. Germany issued on 15 September 2011, No. 17080/07, paragraph 80, or in the case of Anayo v. Germany issued on 21 December 2010, No. 20578/07, paragraph 56).

21. Another criterion consists in the degree of maintaining the identity of the child and their family relationships in the case of granting their custody to a specific person. In the case of any interference with the family life, ordinary courts must attempt to minimise any such interference, i.e. (a) that the child is not separated mainly from those persons to whom they have a strong attachment, where they have lived for a long time, and where they feel they have their home (the ECHR Judgment in the case of Hokkanen v. Finlad issued on 23 September 1994, No. 19823/92, paragraph 64, or in the case of Maire v. Portugal issued on 26 June 2003, No. 48206/99, paragraph 77), and from their siblings (the ECHR Judgment in the case of Mustafa and Armagan v. Turkey issued on 6 April 2010, No. 4694/03); and (b) that the custody is granted to the person that acknowledges the role and importance of the other close relatives in the life of the child and that will not prevent the child from contact with such persons [see paragraph 28 of the Judgment file reference III. ÚS 1206/09, issued on 23 February 2010 (N 32/56 SbNU 363); or the ECHR Judgment in the case of Diamante and Pelliccioni v. San Marino issued on 27 September 2011, No. 32250/08, paragraph 183]. At the same time, what must also be minimised is, inter alia, the interference with the private life of the child as a unique individual with their own identity, consisting of, inter alia, nationality, religious beliefs, or cultural and language affiliation.

22. As for the criterion of the capacity of the person seeking to have the custody of the child granted to ensure their development and physical, educational, emotional, material, and other needs, it is necessary to assess, in particular, the age, health, material security, educational and intellectual capacities and moral integrity of the specific person and their behaviour towards the child (the ECHR Judgment in the case of Lyubenova v. Bulgaria issued on 18 October 2011, No. 13786/04, paragraph 73).

23. As for the child's wish, the Constitutional Court states that provided that the child has reached sufficient intellectual and emotional maturity, it is necessary to consider their wish as an essential guideline in searching for their best interest. At the same time, however, it is impossible that ordinary courts should adopt the attitude of the minor child as such and that they should base their decision merely on their wish, rather than on diligent and comprehensive assessment of their interests (Judgment file reference II. ÚS 4160/12, issued on 23 April 2013 or the ECHR Judgment in the case of C. v. Finland issued on 9 May 2006, No. 18249/02, paragraphs 57-59). Similarly, it is impossible that the child's wish should be ascertained using inappropriate questions such as "Who would you like to live with?". The child's wish must be ascertained in a comprehensive manner, i.e. mainly in the form of indirect questions (particular in the case of younger children), and ideally in an informal environment (i.e. not in a courtroom but for instance, in the judge's office or elsewhere). In this respect, the Constitutional Court states that the older the child is, the more weight should be attached to his or her opinion. In other words, the opinion of a three-year-old child carries significantly less weight than the opinion of a fifteen-year-old teenager. In the case of younger children, mainly preschool children, the ordinary court must assess their opinion, taking into account their age and intellectual maturity [cf. Judgment file reference I. ÚS 2661/10, issued on 2 November 2010 (N 219/59 SbNU 167), paragraph 54].

24. With respect to determining the child's wish, the Constitutional Court also emphasises that if the sole custody of the child had previously been granted to one of the parents and what is newly being examined is the possibility of modifying the situation for upbringing into joint custody, it is possible that the parent who has had the child in their custody to date has attempted to manipulate the child's wish (cf. the ECHR Judgment in the case of C. v. Finland issued on 9 May 2006, No. 18249/02, paragraph 58), whereas it is the task of ordinary courts to eliminate such manipulation if possible.

25. The intellectual and emotional maturity of the child is decisive also when assessing the related question of who is to ascertain the child's wish, i.e. whether it must be done by the ordinary court itself or whether it suffices if the ordinary court does so by means of an office for social and legal protection of children, an expert opinion or through a guardian ad litem. The Constitutional Court is aware that the new Civil Code prescribes, in 867, para. 2 in fine, that "a child of over twelve years of age is deemed to be capable of receiving information, forming their opinion and communicating any such opinion" (highlighting added); nevertheless, it considers reaching the age of 12 years as the lowest possible limit and states that the sufficient intellectual and emotional maturity when the child is already capable of comprehensibly presenting their opinion before court without suffering any substantial damage must be assessed on a case-by-case basis (for instance, it is impossible to exclude that a nine-year-old child will be so intellectually and emotionally mature that they could be heard before the court), whereas most children are capable of expressing themselves on their future upbringing arrangements already upon reaching the age of 10 years. After reaching this age limit, unless there are any particularly important circumstances, it is necessary to ascertain the child's wish directly before the court [cf. the ECHH Judgment in the case of Havelka and others v. Czech Republic issued on 21 June 2007, No. 23499/06, paragraph 62 (where the minors were 11, 12 and 13 years old); Judgment file reference I. ÚS 2661/10, issued on 2 November 2010 (N 219/59 SbNU 167), paragraphs 51-53 (where the minor girl was a primary school pupil in Grade 4); or Judgment file reference III. ÚS 3007/09, issued on 26 August 2010 (N 172/58 SbNU 503; where the minor girl was 15 years old)]. In the case of younger children, it is usually sufficient to ascertain their opinion by means of an office for the social and legal protection of children, an expert opinion or a guardian ad litem; yet even in these cases, it still applies that the expert opinion or the statement of the office for the social and legal protection of children do not carry more weight than the law, and the ordinary courts must, when assessing the child's opinion, carry out an individual legal consideration taking into account all the relevant facts (see § 26, para. 4 of the Family Act and § 907, para. 2 and 3 of the new Civil Code)].

26. In the event of deciding on entrusting the child into the joint custody of the parents, the assumption that the main interest of the child is that the child is under the care of both parents must be followed [see, inter alia, paragraph 28 of the Judgment file reference III. ÚS 1206/09, issued on 23 February 2010 (N 32/56 SbNU 363) or similarly, paragraph 25 of the Judgment file reference I. ÚS 266/10, issued on 18 August 2010 (N 165/58 SbNU 421)], where each of them provides the child with loving care and each of them contributes to the personality development of the child. In this respect, the Constitutional Court adds that granting the custody of children is a polycentric issue. To a large extent, the answer to this question reflects the society's view on the upbringing of children, and for this reason, the Constitutional Court attaches a lot of weight here to the attitude of the legislature, which best reflects the views of the citizens of the Czech Republic. The legislature expressed its will in Act No. 91/1998 Coll., which incorporated into the Family Act the new § 26, para. 2, in the wording as follows: "If both parents are able to bring up the child and are interested in the upbringing, the court may put the child into common or joint custody of both parents if it is compatible with the child's interest and if it leads to a better security of his or her needs." This implies that if both parents are capable of bringing up a child and are interested in the upbringing (§ 26, para. 2 of the Family Act) and if both of them, apart from the due care, have so far taken care of the child's emotional, intellectual and moral upbringing (§ 26, para. 5 of the Family Act), entrusting the child into joint custody should be a rule, whereas any other solution consists in an exemption requiring justification why a different solution is in the child's interest. Apparently, this amendment to the Family Act reflects a shift in the perception of the role of the father and mother in children's upbringing, the increased involvement of fathers in a child's care even at his or her youngest age, the increasing number of fathers taking parental leave, and the attempt to allow for "dual-career" marriages. In other words, the child's upbringing is no longer necessarily solely or predominantly in the hands of the mother, which must also be reflected in dealing with the situation when marriages break down and when it is necessary to arrange for the custody of minor children. For the purposes of completeness, the Constitutional Court adds that the new legal regulation of exercising parental responsibility following divorce, as specified in § 907 of Act No. 89/2012 Coll., Civil Code (hereinafter only as the "new Civil Code"), which took effect in the interim between issuing the decisions of the ordinary courts in the instant case, has not modified these principles at all.

27. On the other hand, joint custody is not only a right of parents but also their duty (cf. Judgment file reference I. ÚS 238/05, issued on 17 January 2006 (N 15/40 SbNU 123); or Resolution file reference II. ÚS 278/08, issued on 12 June 2008, paragraph 6). In the same manner as preventing the entitled parent from contact with the child is considered as a change in the situation which may lead to a new decision on custodial arrangements, provided any such prevention is repeatedly groundless (§27, para. 2 of the Family Act or § 889 of the new Civil Code), when one of the parents groundlessly fails to use the joint custody and leaves the minor child repeatedly in the custody of the other parent despite the fact that they should take care of the child themselves pursuant to the joint custody arrangements is also considered to be a change in the circumstances. In other words, if the parent who has a child in joint custody repeatedly and groundlessly fails to take the child into their care, thus in fact failing to use the joint custody, they may lose their right to the joint custody, as such conduct is inconsiderate not only to the other parent but mainly to the child.

28. In addition, the Constitutional Court and the ECHR stated on a number of occasions that ordinary courts may not exclude joint custody owing to the fact that one of the parents does not agree with such custodial arrangements as they wish to have the child in sole custody [see Judgment file reference III. ÚS 1206/09, issued on 23 February 2010 (N 32/56 SbNU 363), paragraph 23; Judgment file reference I. ÚS 266/10, issued on 18 August 2010 (N 165/58 SbNU 421), paragraphs 24-29; of the ECHR Judgment in the case of Zaunegger v. Germany issued on 3 December 2009, No. 22028/04, paragraphs 60 et seq.]. On the other hand, it remains true that unless the parent's disapproval is merely based on clearly irrational or non-reviewable reasons, ordinary courts must sufficiently ascertain the reasons why the parent is unwilling to cooperate with the other parent on common or joint custody, whereas it is possible to consider as relevant only those reasons that are capable of intensive negative infringement of the interests of the child (see paragraphs 28 and 29 of Judgment file reference III. ÚS 1206/09), and they must possibly adopt such measures that will allow entrusting the child into the shared or joint custody of both parents in the future.

29. As for (not) entrusting the child into the joint custody of both parents in the situation when courts have previously decided on custodial arrangements of the child or when they have previously approved the agreements of the parents on the exercise of their parental rights and duties, it is also essential whether there has been a sufficient change in the circumstances (see § 28 of the Family Act) and whether with respect to such a change, it is necessary to protect the child's interests by means of changing the existing custodial arrangements, and whether ordinary courts have sufficiently dealt with examining the possible need to review the existing custodial arrangements as a consequence of changing circumstances. Unless the court modifies the custodial arrangements at the moment when the interest of the child in the stable environment for upbringing is outweighed by the importance of the occurring change in the circumstances, and if it labels the change in the circumstances as insignificant without any further examination, it may lead to the violation of the right of the child and their parents to respect for private life.

30. In the event that ordinary courts, within the first proceedings on custodial arrangements, base their decision on circumstances the change in which is foreseeable (the age of the children, the workload of the parents, etc.), then in terms of the legitimate expectations of the parties and the need to prevent repeated petitions seeking modifications in custodial arrangements, it appears desirable that ordinary courts, already within the decision taken in these first proceedings, provide a sufficiently definite specification of conditions under which the prescribed arrangements should be reviewed (cf. paragraph 84 of the General comment No. 14 of the Committee on the Rights of Children on Art. 3 of the Convention on the Rights of a Child, 2003, CRC/C/GC/14, according to which those deciding on the child's best interest "should not only assess the physical, emotional, educational and other needs [of the child] at the specific moment of the decision, but should also consider the possible scenarios of the child's development, and analyse them in the short and long term"). However, meeting these conditions on their own may not justify the change in the custodial arrangements of the child, but rather it must be merely considered, in terms of the foreseeable change in circumstances, as a

condition sine qua non of adopting a completely new review of the case at hand independent of any previous decision.

V/c
Right to a fair trial

31. When reviewing decisions of ordinary courts concerning the child's custody, the Constitutional Court also examines whether the proceedings in which it was decided on (not) modifying the decision or the agreement of the parents on the exercise of their parental rights and duties and on (not) entrusting the child into the joint custody of both parents complied with the requirements of the right to a fair trial pursuant to Art. 6 of the European Convention and Art. 36, para. 1 and Art. 38, para. 2 of the Charter. In particular, ordinary courts must at every stage of the proceedings consider what evidence needs to be tested with respect to the application pleading and possibly whether and to what extent the existing status of testing the evidence needs to be complemented, and they are obliged to decide on not testing the submitted evidence or to assess the effect of individual pieces of evidence on the final decision not arbitrarily and to provide sufficient reasoning of both [for instance, cf. Judgments file reference IV. ÚS 582/01, issued on 22 April 2002 (N 52/26 SbNU 63) and file reference I. ÚS 704/06, issued on 29 August 2007 (N 134/46 SbNU 259) or the ECHR Judgment in the case of Mustafa and Armagan Akin v. Turkey issued on 6 April 2010, No. 4694/03, paragraph 22; as for the issues of omitted evidence, see, inter alia, Judgment file reference III. ÚS 61/94, issued on 16 February 1955 (N 10/3 SbNU 51)].

32. Violating the right to a fair trial may also consist in issuing a so-called surprising decision by a higher instance court, which means a decision which could not be anticipated on the basis of established facts (Judgment file reference II. ÚS 4160/12, issued on 23 April 2013). This takes place, in particular, when one party to the proceedings submits argument A, the second party to the proceedings submits argument B, and the first instance court identifies with one of the parties; nevertheless, the appellate court holds, without any warning, on the basis of argument C (by either a quashing or upholding decision, or a decision overturning the first instance court decision), without pointing out the possibility of any such arguments to the parties. In the event that the higher instance court adopts a different legal view than the one that served as the basis for the decision of the first instance court, it must, in principle, allow the parties to the proceedings to submit a statement on the new legal view or possibly to furnish evidence that was not relevant in relation to the existing legal view (see Judgment file reference II. ÚS 1835/12, issued on 5 September 2012 or Judgment file reference II. ÚS 4160/12, issued on 23 April 2013). Above all, this applies when (as mentioned above) the higher instance court applies a legal view which was not held by either party or by the first instance court and thus was not presented in the case at hand. In this respect, it also needs to be pointed out that it is inadmissible, in principle, that the appellate court, wishing to derogate from the evidence assessment as performed by the first instance court, assesses such evidence differently without reiterating it [see Judgment file reference ÚS 3725/10, issued on 3 August 2011 (N 139/62 SbNU 175); or the ECHR Judgment in the case of C. v. Finland issued on 9 May 2006, No. 18249/02, paragraph 67 I association with paragraphs 57-58]. On the other hand, it needs to be pointed out that not every decision of the appellate court derogating from the first instance court decision is a surprising decision. The fact that the appellate court may assess the matter differently from the first instance court is not surprising on its own; in fact, it is an inherent element of the appellate proceedings. As a result, other circumstances (see above) are essential to be able to speak of a surprising decision.

33. In addition, the Constitutional Court emphasises that the cases concerning the custody of children must be heard as quickly as possible, whereas any delays in the proceedings may be tolerated on condition that the total length of the proceedings is not excessive (the ECHR Judgment in the case of Nuutinen v. Finland issued on 27 June 2000, No. 32842/96, paragraph 117 et seq., or for instance, in the case of Mezl v. Czech Republic issued on 9 January 2007, No. 27726/03, paragraph 94). In fact, the course of time may have irreversible consequences for the relationship between the child and the parent, with whom the child does not live in this time, and the courts are thus obliged, using all means

available to them in the relevant procedural regulations, to ensure a timely decision in the matter even in the situation when the parties to the proceedings contribute to the delays [Judgment file reference I. ÚS 91/03, issued on 7 December 2004 (N 184/35 SbNU 435)]. For the same reasons, the decision must also be enforced as soon as possible after being issued (for instance, the ECHR Judgment in the case of Hokkanen v. Finland issued on 23 September 1994, No. 19823/92, paragraph 56, or in the case of Santos Nunes v. Portugal issued on 22 May 2012, No. 61173/08, paragraph 76), and it is necessary to employ any available enforcement means which may still be deemed appropriate in terms of attempting to minimise the interference with the fundamental rights of the affected party in the specific situation [paragraph 33 of Judgment file reference II. ÚS 3765/11, issued on 13 March 2012 (N 52/64 SbNU 645) or for instance, the ECHR Judgment in the case of Kříž v. Czech Republic issued on 9 January 2007, No. 26634/03, paragraph 91]. Failure to enforce the decision resulting in the long-term separation of the child from the parent cannot be used to the detriment of this parent, as the state must actively attempt to maintain/renew the relationship between the parent and the child (for instance, the ECHR Judgment in the case of Amanalachioai v. Romania issued on 26 May 2009, No. 4023/04, paragraphs 81 and 82, or in the case of Lyubenova v. Bulgaria issued on 18 October 2011, No. 13786/04, paragraph 59-61).

V/d
Prohibition of discrimination pursuant to Art. 3, para. 1 of the Charter and Art. 14 of the European Convention

34. In its case law, the Constitutional Court distinguishes between direct and indirect discrimination.

35. The Constitutional Court outlined, in a concise manner, its test of direct discrimination in its Judgment fie reference Pl. ÚS 49/10, issued on 28 January 2014, where it states as follows:

"34. The test of direct discrimination consists of the following steps that may be expressed in the form of questions: (1) Are they comparable individuals or groups?; (2) Are they treated disparately on the basis of prohibited reasons?; (3) Is the disparate treatment to the detriment of the complainant (by means of imposing a burden or denying the good)?; (4) Is any such disparate treatment justifiable, i.e. (a) does it pursue any legitimate interest and (b) is it proportional? [cf. Judgment file reference Pl. ÚS 53/04, issued on 16 October 2007 (N 160/47 SbNU 111; 341/2007 Sb.), paragraph 29; Judgment file reference II. ÚS 1609/08, issued on 30 April 2009 (N 105/53 SbNU 313); Judgment file reference Pl. ÚS 4/07, issued on 1 December 2009 (N 249/55 SbNU 397; 10/2010 Coll.); the Judgment of the Grand Chamber of the ECHR in the case of D.H. v. Czech Republic issued on 13. 11. 2007 č. 57325/00, § 175; the Judgment of the Grand Chamber of the ECHR in the case of Carson v. United Kingdom issued on 16 March 2010, No. 42184/05, § 61; Wagnerová, E. et al. Listina základních práv a svobod. Komentář [Charter of Fundamental Rights and Freedoms. Commentary.]. Prague: Wolters Kluwer ČR, 2012, p. 101; or Kmec, J., Kosař, D., Kratochvíl, J., Bobek, M. Evropská úmluva o lidských právech. Komentář [European Convention on Human Rights. Commentary]. Prague: C. H. Beck, 2012, p. 1214). In addition, the case law of the European Court of Human Rights concerning the prohibition of discrimination implies that the justifiability of disparate treatment also depends on the reason for any such disparate treatment. Any disparate treatment on the grounds of race or ethnical origin, sex, sexual orientation, nationality, or origin of the child must then be substantiated with compelling justification [for instance, cf. the ECHR Judgment in the case of Ponomaryov and others v. Bulgaria issued on 21 June 2011, No. 5335/05 (nationality); the above-quoted Judgement of the Grand Chamber in the case of D. H. v. Czech Republic, § 176 (race); or the Judgment in the case of Ünal Tekeli v. Turkey issued on 16 November 2004, No. 29865/96, § 53 (sex)], whereas there has been less intense review of the European Court of Human Rights concerning other reasons for disparate treatment. It is thus possible to distinguish even the fifth step of the direct discrimination test, focusing on the degree of "suspiciousness" of the reason."

36. However, indirect discrimination is also considered to be inconsistent with Art. 3, para. 1 of the Charter by Constitutional Court, yet it has held on it in a smaller number of judgments than in the case of direct discrimination (for instance, cf. Judgment file reference Pl. ÚS 27/12, issued on 7 January

2013, paragraph 53; Judgment file reference II. ÚS 1609/08, issued on 30 April 2009 (N 105/53 SbNU 313); Judgment file reference Pl. ÚS 29/08, issued on 21 April 2009 (N 89/53 SbNU 125; 181/2009 Coll.), paragraphs 56-57; Judgment file reference Pl. ÚS 83/06, issued on 12 March 2008 (N 55/48 SbNU 629; 116/2008 Coll.), paragraphs 189). The prohibition of indirect discrimination has also been inferred by the European Court of Human Rights in the case of Art. 14 of the European Convention (for instance, cf. the Judgment of the Grand Chamber of the ECHR in the case of D. H. v. Czech Republic issued on 13 November 2007, No. 57325/00, paragraphs 184-195; the ECHR Judgment in the case of Hugh Jordan v. United Kingdom issued on 4 May 2001, No. 24746/94, paragraph 154; or the ECHR Judgment in the case of Zarb Adami v. Malta issued on 20 June 2006, No. 17209/02, paragraph 76). These decisions may imply the test of indirect discrimination consisting of the steps outlined below. Initially, the burden of proof rests upon the complainant who (1) shall establish, using statistics or otherwise, that a seemingly neutral criterion has a substantially stronger effect on the protected group (defined pursuant to ethical, racial, sex or any other "suspicious" criteria mentioned in Art. 3, para. 1 of the Charter), and (2) shall establish that they are a member of any such protected group at the same time. Establishing these two conditions serves as an assumption of indirect discrimination with respect to all members of the protected group. This shifts the burden of statement and proof onto the other party who is obliged to either (3) deny any of the two above established statements (for instance, by establishing that this does not give rise to a significant impact onto the protected group, or that its actual reason consists in something completely different from the prohibited discriminatory reason, or that the complainant does not belong to the specified group, etc.), or (4) they must establish that there is objective and reasonable justification for disproportional disadvantage of the protected group.

VI.
Assessment of the constitutional complaint

37. Having assessed the contested decisions using the above-mentioned perspectives, the Constitutional Court concluded that the constitutional complaint is well-founded as a whole.

VI/a
On joint custody

38. As for the decision not to entrust the minors to the joint custody of both parents, the Constitutional Court states that the ordinary courts failed to decide in the best interest of the child and insufficiently protected the complainant's right to respect his private life and the right to parental upbringing and care. Actually, despite the fact that the complainant met all the criteria relevant for deciding on to whom the custody of the child is to be granted to the same extent as the mother of the minors (as he is the biological father of the minors, has a strong emotional connection with them and maintains regular and close contact with them, and is capable of securing their development and all their needs), the ordinary courts did not proceed from the assumption that it is in the interest of the child to be in the custody of both parents, and failed to attempt this state unless this was in direct contradiction to the interest of the minors [a contrario, Judgment file reference III. ÚS 1206/09, issued on 23 February 2010 (N 32/56 SbNU 363), paragraph 28; Judgment file reference I. ÚS 266/10, issued on 18 August 2010 (N 165/58 SbNU 421), paragraph 25; and the will of the legislature embodied in § 26, para. 2 of the Family Act or in § 907, para. 1 of the new Civil Code; for more detail, see paragraph 24 of this Judgment].

39. Even though the ordinary courts state the contrary in the reasoning behind their decisions, the Constitutional Court states that the ordinary courts failed to hold in favour of the complainant and failed to entrust the minor daughters in the joint custody of both parents, in principle, solely due to the fact that in their view, the parents were unable to come to an agreement on their upbringing, whereas the ordinary courts failed to ascertain sufficiently whether the unilateral unwillingness of the mother of the minors did not tend to represent a disagreement with joint custody, which may not be, on its own, the reason for excluding such arrangements [see Judgment file reference III. ÚS 1206/09, issued on 23 February 2010 (N 32/56 SbNU 363), paragraph 23; Judgment file reference I. ÚS 266/10, issued on 18

August 2010 (N 165/58 SbNU 421), paragraphs 24-29; or the ECHR Judgment in the case of Zaunegger v. Germany issued on 3 December 2009, No. 22028/04, paragraphs 60 et seq., all quoted above in paragraph 28 of this Judgment]. As already mentioned above (see paragraphs 26-28 of this Judgment), in the situation when both parents take an active interest in their children, are equally able and willing to take care of their health and of their physical, emotional, intellectual, and moral development and when these children have an equally close emotional relationship to both parents, joint custody cannot be excluded merely on the basis of assessing the relationship between the parents. In the event of insurmountable conflicts between both parents, ordinary courts must then actively attempt to improve their relationship, for instance by means of ordering mediation or family therapy in the interest of the children (in this respect, see analogically, for instance, the ECHR Judgment in the case of Amanalachioai v. Romania issued on 26 May 2009, No. 4023/04, paragraph 81 and 82, and in the case of Lyubenova v. Bulgaria issued on 18 October 2011, No. 13786/04, paragraphs 59-61). Nevertheless, the ordinary courts failed to do even this and the appellate court even overturned the section of the first instance court decision where the father's contact with the minor children had been slightly extended. Owing to the fact that the ordinary courts excluded joint custody due to the disagreement between the parents without a more detailed examination of the reasons for such disagreement, as a result of which they attributed the disagreement of the parents solely to the detriment of the complainant, the ordinary courts acted contrary to the best interest of the child, thereby violating Art. 3, para. 1 of the Convention on the Rights of the Child, while also violating the complainant's right to family life pursuant to Art. 10, para. 2 of the Charter and Art. 8 of the European Convention, and his right to the care and upbringing of children pursuant to Art. 32, para. 4 of the Charter.

40. From the constitutional law perspective, what does not stand the test is the part of the arguments of the ordinary courts in which these courts assessed whether there had been a change in the circumstances which could lead to a review of the existing custodial arrangements of the minor children. The Constitutional Court states that the decisions of both courts are based on relatively cautious consideration whether the change in the circumstances had actually taken place and whether that change was to such an extent as a result of which it would be justifiable to modify the previous decision on the custodial arrangements of the minors; nevertheless their arguments fail to meet the requirements prescribed in Art. 3, para. 1 of the Convention on the Rights of the Child, Art. 8 of the European Convention, and Art. 10, para. 2 and Art. 32, para. 4 of the Charter.

41. In its decisions issued in 2009 and 2010, the District Court of Prague 4 granted the custody of both minor girls for the period until and after the divorce to the mother (secondary party), and these decisions were subsequently upheld by the Municipal Court in Prague (see paragraph 2 of this Judgment). The decisions of the District Court of Prague 4 and the Municipal Court in Prague based their reasoning mainly on the expert opinion, on the basis of which they concluded that due to the role of the mother in the life of the children of pre-school and early-school age, the joint custody would be more appropriate when the minors were older. When in 2012, at the time when both minor children had been attending primary school for a number of years, the complainant filed an application for the modification of the custodial arrangements, seeking to have the minors entrusted to joint custody, the ordinary courts stated in their decisions that the joint custody was out of the question due to the interest of the minors in the stable environment for upbringing. In other words, in 2009, the complainant's children were too young to be entrusted to the joint custody, while in 2012, they were too "embedded" in the upbringing environment of the mother.

42. Using this line of arguments, however, the ordinary courts denied the purpose of the legal regulation, as well as the established case law of the European Court of Human Rights (cf. paragraphs 18-26 of this Judgment including the quoted case law). Should the line of arguments of the ordinary courts be taken literally, it would be practically never possible to grant the custody of the children to the father at their pre-school or early-school age, as the first decision (due to the age of the children, in favour of the mother) would also be the final decision. However, the approach of the legislature and the case law of the Constitutional Court and the European Court of Human Rights is exactly the opposite: it is in the best interest of the child to be, above all, in the custody of both parents and

provided all the statutory conditions have been met (i.e. both parents are equally able and willing to take care of their health and of their physical, emotional, intellectual, and moral development and when these children have an equally close emotional relationship to both parents), then entrusting the children in the joint custody of both parents is a rule, rather than an exception [see Judgment file reference III. ÚS 1206/09, issued on 23 February 2010 (N 32/56 SbNU 363), paragraph 28; Judgment file reference I. ÚS 266/10, issued on 18 August 2010 (N 165/58 SbNU 421), paragraph 25; § 26 of the Family Act, and § 907, para. 1 of the new Civil Code; for more detail, see paragraph 26 of this Judgment]. This must also be reflected in the burden of proof: once the complainant establishes he is capable of bringing up the minors, is interested in their upbringing, takes care of their upbringing in the emotional, intellectual and moral perspective, and the minors have a close emotional relationship to him, the precondition for entrusting the minors into joint custody has been met. This shifts the burden of statement and proof onto the secondary party (the mother) and the ordinary court, which is obliged to deny that the above-mentioned conditions are met or state and establish the substantial reasons excluding the joint custody. However, the ordinary courts took an exactly opposite approach, as they presumed that the status quo (granting the custody of the minors to the mother) was a prima facie suitable solution and it was up to the complainant to disprove that.

43. The Constitutional Court also notes that even though in the case of judicial decisions, especially concerning matters as individual as child custody disputes, it is impossible to talk about the binding nature of the case law, it is obvious that on condition that the previous court decisions referred to, in relation to the impossibility to entrust the minors to the joint custody of both parents, mainly the low age of the minors, the complainant expected quite reasonably and legitimately that removing seemingly the only obstacle (as implied in the wording of the reasoning) would necessarily lead to the modification of the custodial arrangements of the minors. As a result, once this change was later labelled as insufficient, it casted serious doubts on the principle of predictability of court decisions. At this point, the Constitutional Court emphasises that with respect to the legitimate expectations of the parties to the proceedings and the need to prevent recurring petitions seeking to have the custodial arrangements modified, it is desirable that ordinary courts, already within the decision in the first proceedings on custodial arrangements, sufficiently define the conditions under which the introduced arrangements may be reviewed (cf. paragraph 29 of this Judgment and mainly paragraph 84 of the General comment No. 14 of the Committee on the Rights of Children on Art. 3 of the Convention on the Rights of a Child, 2003, CRC/C/GC/14). Therefore, if the ordinary courts included a higher age of the minors as the primary condition for entrusting them into the joint custody in their decisions issued in 2009 and 2010, then once the complainant's minor children have reached the higher age, the ordinary courts are obliged to state very significant reasons why meeting this previously stipulated (and only) condition is not sufficient. The interest of the minor in a stable environment for upbringing on its own does not represent such a substantial reason, since (as mentioned above in paragraph 42 of this Judgment), it would deny the purpose of the statutory regulation and the whole institute as it is interpreted by the Constitutional Court and the European Court of Human Rights.

44. On the contrary, the Constitutional Court considers as ill-founded the part of the constitutional complaint concerning the inadequacy of ascertaining the opinion of the minors. The opinion of the minors was ascertained merely by means of their guardian, without the ordinary courts providing more detailed reasons in their decisions as to why they had not heard the minors themselves; nevertheless, due to the age of both minors, the Constitutional Court [a contrario, the ECHR Judgment in the case of Havelka and others v. Czech Republic issued on 21 June 2007, No. 23499/06, paragraph 62 (where the minors were 11, 12 and 13 years old); or Judgment file reference III. ÚS 3007/09, issued on 26 August 2010 (N 172/58 SbNU 503) (where the minor girl was 15 years old)] does not consider such an approach as contrary to the constitution. At the time of issuing the first instance court decision, the older minor was 9 years old and the younger minor 7 years old. As mentioned above by the Constitutional Court in paragraph 25 of this Judgment, in the case of children under 10 years, it is not commonly necessary to ascertain the child's wish directly before the court, as it is sufficient to ascertain their opinion by means of an office for social and legal protection of children, an expert opinion or through a guardian. Within the proceedings before the appellate court, the older daughter was already 10 years old, yet the appellate court proceeded from the established facts arrived at the

first instance court, without testing any further evidence. Therefore, the complainant's rights in this respect were not interfered with in the appellate proceedings either. From the constitutional law perspective, it would be more appropriate if ordinary courts expressly stipulated why the children had not been heard directly before the court; nevertheless due to the young age of the minors and the fact that their opinion had been properly ascertained in a different manner (a contrario, paragraph 31 et seq. of Judgment file reference I. ÚS 3304/13, issued on 19 February, where their opinion had not been ascertained at all), in the instant case, this deficiency was not so intense that it would amount to the violation of the fundamental rights of the complainant. It may thus be summarised that in the instant case, the ordinary courts sufficiently ascertained the interest of the minors, and in this respect, there was thus no violation of the rights pursuant to Art. 3, para. 1 of the Convention on the Rights of the Child, Art. 10, para. 2 and Art. 32, para. 4 of the Charter, or Art. 8 of the European Convention. Yet in this respect, the Constitutional Court points out the fact that in the course of the litigation before the ordinary courts and the Constitutional Court, the older minor reached the age of 11 years, i.e. the age in which her opinion needs to be, in principle, heard directly by the courts (see paragraph 25 of this Judgment), and with respect to the derogatory judgment, the ordinary courts are thus obliged to ascertain their opinion directly in the further proceedings rather than by means of other persons as was previously done. In the same manner, the ordinary courts must assess whether the younger child, who reached the age of 9 years in the interim, was intellectually and emotionally mature enough to be heard directly before the court (for more detail, see again paragraph 25 of this Judgment).

VI/b
To the contested procedural errors within the scope of the right to a fair trial

45. The Constitutional Court considers the complainant's objections concerning the insufficiency of establishing the facts as ill-founded.

46. First, the complainant stated in his constitutional complaint that the District Court of Prague 2 and the Municipal Court in Prague based their decisions on a three-year-old expert opinion and that both courts insufficiently ascertained the financial situation of the complainant. The Constitutional Court concludes that this statement is not supported in the file. The fact that the ordinary courts, in their decision-making, somehow took into consideration the expert opinion produced in the course of the previous proceedings is not implied in the reasoning behind the contested decisions or in the content of the requested file either. In addition, the Constitutional Court did not agree with the objection that the first instance court, from which the conclusions concerning the factual circumstances were fully adopted by the appellate court, insufficiently ascertained the complainant's financial situation owing to the fact, among other things, that at the time of issuing the decision, it could not have the complainant's 2012 tax return available, which the complainant uses to support his argument in his constitutional complaint.

47. Second, the complainant considers the decision of the appellate court to be a surprising one. However, the Constitutional Court states that the decision of the Municipal Court in Prague may not be deemed surprising in the context of its case law (cf. paragraph 32 of this Judgment for the issues concerning surprising decisions), since the appellate court increased the maintenance to the complainant and restricted his contact with the minors, thereby derogating from the legal view of the first instance court; nevertheless, the appellate court did not derogate from assessing the evidence tested by the first instance court [a contrario Judgment file reference I. ÚS 3725/10, issued on 3 August 2011 (N 139/62 SbNU 175], nor did it support its decision on an unexpected legal opinion which could not be anticipated by the complainant (a contrario Judgment file reference II. ÚS 4160/12, issued on 23 April 2013). The appellate court went along with the legal opinion of the minors' mother, of which the complainant had been aware since the first instance court proceedings. In effect, the complainant thus commented on this "new" legal opinion for the whole course of the proceedings before the appellate court, as all the arguments concerning the legitimacy of his request to reduce the maintenance and to extend the contact with the minors reacted to the legal opinion of the mother of the minors. It may thus be summarised that the complainant was granted the possibility to comment on the legal opinion of the appellate court, whereas there occurred no need to furnish any

new evidence, which was not significant in relation to the legal opinion of the first instance court (a contrario Judgment file reference II. ÚS 1835/12, issued on 5 September 2012 or Judgment file reference II. ÚS 4160/12, issued on 23 April 2013). For this reason, the Constitutional Court concluded that the decision of the Municipal Court in Prague did not violate the right to a fair trial for this reason either.

48. Third, as for the objection concerning the sufficiency of ascertaining the opinions of the minors, the Constitutional Court assessed it pursuant to Art 8 of the European Convention and Art. 10, para. 2 and Art. 32, para. 4 of the Charter, taking into account Art. 3, para. 1 of the Convention on the Rights of the Child, and in this respect, there thus appears no separate issue pursuant to Art. 36, para. 1 of the Charter or Art. 6 of the European Convention (similarly, cf. the ECHR Judgment in the case of C. v. Finland issued on 9 May 2006, No. 18249/02, paragraph 67).

49. As a result, there was no violation of Art. 36, para. 1 of the Charter or Art. 6 of the European Convention.

VI/c
Prohibition of discrimination

50. Due to the fact that the complainant's arguments raised in relation to Art. 3, para. 1 of the Charter and Art. 14 of the European Convention are in fact identical to his arguments in relation to Art. 8 of the European Convention and Art. 10, para. 2 and Art. 32, para. 4 of the Charter, the Constitutional Court holds that there appears no separate issue under Art. 3, para. 1 of the Charter and Art. 14 of the European Convention. Merely as an obiter dictum, the Constitutional Court notes that in his constitutional complaint, the complainant did not state whether he objected to gender-related direct or indirect discrimination. If he had direct discrimination in mind, he did not include in the constitutional complaint what he inferred the gender-related direct discrimination from, as the ordinary courts did not expressly mention the gender as the reason for keeping the minors in the custody of the mother. If the complainant had indirect discrimination in mind, then he failed to submit any statistics or any other evidence which would demonstrate that seemingly neutral criteria applied by both ordinary courts would have a significantly stronger impact on fathers than mothers (a contrario, the Judgment of the ECHR Grand Chamber in the case of D. H. v. Czech Republic issued on 13. November 2007, No. 57325/00, paragraphs 178-180 and 185-195).

VII.
Summary

51. For the reasons mentioned above, the Constitutional Court concluded that the decision of the District Court of Prague 2, issued on 29 November 2012, reference number 21 P 9/2012-364, 21 PA Nc 48/2012, 21 P and Nc 80/2012, and 21 P and Nc 141/2012 and the decision of the Municipal Court in Prague, issued on 13 May 2013, file reference 19 Co 85/2013-413 are contrary to Art. 10, para. 2 and Art. 32, para. 4 of the Charter and Art. 8 of the European Convention, interpreted pursuant to Art. 3, para. 1 of the Convention on the Rights of the Child. For this reason, pursuant to § 82, para. 1 of the Constitutional Court Act, the Constitutional Court has granted the constitutional complaint and annulled the above-mentioned decisions of the District Court of Prague 2 and Municipal Court in Prague.

52. In the subsequent proceedings, the ordinary courts shall decide on the custody of both minors on the grounds of the criteria specified in paragraphs 18-30 of this Judgment. Owing to the fact that in the course of the litigation before the ordinary courts and the Constitutional Court the older child reached the age when it is in principle necessary to hear his opinion directly before the court (see paragraph 25 of this Judgment), the ordinary courts are now obliged to ascertain the opinion of the older child directly rather than by means of other persons as before. Similarly, the ordinary courts must assess whether the younger child, who in the meantime reached the age of 9 years, is also sufficiently intellectually and emotionally mature to be heard directly before the court. In addition, the

Constitutional Court emphasises that the ordinary courts must decide on the custody of the minors as quickly as possible in order to prevent any further violation of the fundamental rights of the minors and the complainant (see paragraph 33 of this Judgment). Merely as an obiter dictum, the Constitutional Court adds that the ordinary courts must take into consideration § 3028, para. 2 in association with § 867 and § 906-907 of the new Civil Code, and that these provisions must be interpreted, whenever possible, in a constitutionally conforming manner, i.e. in accordance with the conclusions contained in this Judgment.

Instruction: The Judgments of the Constitutional Court cannot be appealed.
In Brno, 26 May 2014