2006/07/13 - I. ÚS 85/04: NON-PECUNIARY DAMAGE COMPENSATION

HEADNOTES

The Constitutional Court considered the question of compensation for non-pecuniary damage as part of the compensation of damages whose scope is generally formulated in § 442 par. 1 of the Civil Code in judgment file no. Pl. ÚS 16/04 (promulgated as no. 265/2005 Coll.). It concluded that the current legislative concept of damage as pecuniary damage does not permit such an interpretation, although it does not rule out an individual seeking compensation for non-pecuniary damage consisting of interference in personality rights through protection of personality under § 11 and § 13 of the Civil Code. However, in terms of the current legislative framework, this is a different claim than compensation of damage.

However, these conclusions arising from the judgment by the plenum of the Constitutional Court must be corrected in the area of compensation of damages for previous unlawful limitation of personal freedom, where the claim for compensation is constructed not only in the area of simple law, but also by the Convention on the Protection of Human Rights and Fundamental Freedoms, in Art. 5 par. 5, which is, under Art. 10 of the Constitution of the CR, a directly applicable norm in the domestic legal order of the CR, and which must be given priority in application before statutes.

Regardless of how the content of the institution of compensation of damage is treated by the domestic legislature, the case law of the general courts and the constitutional court, or domestic civil doctrine, in domestic application of the Convention one must start with the concept of compensation of damage as it is treated by the national European constitutional courts and supreme courts, whose case law gives rise to the case law of the ECHR. As regards specifically state liability for limiting personal freedom, and thus the relationship of the domestic civil law of offenses and Article 5 par. 5 of the Convention, the situation in individual European states is that the classic dogmatics of civil legal institutions gave way to direct application of Article 5 par. 5 of the Convention, which is interpreted fully autonomously by the national courts. The Constitutional Court also bases this position on the case law of the European Court of Human Rights (the "ECHR"), which has consistently ruled that the Convention's institutions can have completely autonomous content and a scope not dependent on their legal classification under domestic law.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Constitutional Court decided, on 13 July 2006, without a hearing, without the presence of the parties, in a Panel composed of Chairman František Duchoň and judges Vojen Güttler and Eliška Wagnerová (judge rapporteur) in the matter of a constitutional complaint from J. Ch., represented by JUDr. L. M., attorney, against decisions by the Supreme Court of the CR of 25 November 2003, file no. 25 Cdo 1727/2003, by the Municipal Court in Prague of 31 October 2002, file no. 22 Co 421/2002, and by the District Court for Prague 2 of 21 March 2002, file no. 14 C 113/2001, with the participation of the Supreme Court of the CR, the Municipal Court in Prague, and the District Court for Prague 2, as parties to the proceedings, as follows:

I. The decisions of the Supreme Court of the CR of 25 November 2003, file no. 25 Cdo 1727/2003, of the Municipal Court in Prague of 31 October 2002, file no. 22 Co 421/2002, and of the District Court for Prague 2 of 21 March 2002, file no. 14 C 113/2001, violated the petitioner's fundamental right guaranteed by Art. 5 par. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms.
II. Therefore, those decisions are annulled.

REASONING

I.

In his constitutional complaint, which met all the requirements of content and form specified by Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations (the "Act on the Constitutional Court"), the petitioner contested the decisions by the general courts specified in the introduction.

The decision by the District Court for Prague 2 denied the complaint against the Czech Republic – the Ministry of Justice – in which the petitioner sought payment of the amount of CZK 304,356 on the grounds of state liability for damage caused by an unlawful decision and incorrect official procedure under Act no. 58/1969 Coll. The decision by the Municipal Court in Prague confirmed the decision of the trial court. The contested decision by the Supreme Court of the CR denied the petitioner's appeal in the amount of CZK 36,140, and rejected the remainder of it as impermissible.

As the petitioner described in more detail in the constitutional complaint, he sought payment of the abovementioned amount as compensation of damage for a prison sentence that he served, on the following grounds. A decision by the District Court in Kolín of 10 July 1991, file no. 1 T 68/91, sentenced the petitioner, for the crime of evading civil service, under § 272c par. 1 of the Criminal Code, to a non-

suspended prison sentence of 6 months. The decision by the Regional Court in Prague of 27 August 1991, file no. 5 To 295/91, changed the sentence to a suspended one. A decision by the District Court in Kolín of 10 April 1992, file no. 1 T 8/92, sentenced the petitioner again, for the same crime, to a non-suspended prison sentence of 8 months. Thus, on that basis, by decision of the District Court in Kolín of 5 October 1992, file no. 1 T 68/91, i.e. in the first trial, the originally imposed suspended sentence was changed into a non-suspended sentence. The petitioner served both sentences.

The Minister of Justice filed a complaint about violation of the law against the second conviction in favor of the petitioner, which the Supreme Court of the CR, in its decision of 25 April 1996, file no. 2 Tzn 10/96, decided by giving an academic verdict that declared merely a formal violation of the law (according to the Supreme Court of the CR, instead of the definition under § 272c par. 1 of the Criminal Code, the definition under § 272d par. 3 of the Criminal Code should have been used) and not annulling the contested decision. Based on a constitutional complaint from the petitioner, the decision of the Supreme Court of the CR was annulled by Constitutional Court judgment of 20 March 1997, file no. I. ÚS 184/96, on the grounds of violating the principle "ne bis in idem." However, in new proceedings the Supreme Court of the CR did not respect the legal opinion of the Constitutional Court, and again made the same decision. Constitutional Court judgment of 2 April 1998, file no. III. ÚS 425/97, annulled this decision of the Supreme Court of the CR as well, on the grounds that it violated the binding nature of the Constitutional Court's judgments under Art. 89 par. 2 of the Constitution of the CR. In its decision of 25 August 1999, file no. 4 Tz 102/98, the Supreme Court of the CR finally granted the complaint about violation of the law, and annulled the decision of the District Court in Kolín of 10 April 1992, file no. 1 T 8/92, the decision of the Regional Court in Prague of 16 June 1992, file no. 5 To 188/92, and "all other decisions connected to the content of this decision, if, in view of the change caused by annulling it, they have lost their foundation." The Supreme Court of the CR then stopped the criminal prosecution of the petitioner under § 11 par. 1 let. f) of the Criminal Procedure Code.

As the petitioner stated, on the one hand he was satisfied with this decision, because it definitively stopped his second criminal prosecution, but on the other hand he believed that the decision's verdict is indefinite, insofar as it did not expressly specify which particular decisions can be considered connected in content, given the existence of the decision by the District Court in Kolín of 5 October 1992, file no. 1 T 68/91, which, in connection to the annulled decisions, changed the sentence in the first trial from a suspended sentence to a non-suspended sentence. Because of this, he again filed a constitutional complaint against the decision of the Supreme Court of the CR, which was denied by Constitutional Court decision of 15 February 2000, file no. III. ÚS 454/99, on the grounds that the contested decision did not violate the petitioner's rights. As regards his concerns regarding interpretation of which decisions were annulled, for purposes of a "damages provision," the Constitutional Court then concluded that such reservations are premature. In the Constitutional Court's opinion, only if subsequent proceedings, including the petitioner's intended exercise of rights to compensation, violated his constitutionally guaranteed rights, would it be appropriate to review legally effective decisions about them. The petitioner thus

believes that the situation foreseen in the Constitutional Court's decision has come to pass, because his claims were denied in the decisions now being contested. According to the petitioner, 3 disputed questions were addressed in these proceedings: (1.) whether a citizen who was sentenced several years ago has a claim for compensation of lost wages, adjusted or not adjusted for present value, (2.) whether a citizen has a right to damages for non-pecuniary damages or just satisfaction, and (3.) which decisions can be considered to be decisions connected in content to the decisions expressly annulled by the Supreme Court of the CR in proceedings on the complaint about violation of the law. The petitioner specifically stated, that in a fair trial under Art. 6 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, when setting compensation for lost earnings one can not use as a basis only the earnings which the unjustly convicted person received before imprisonment, but that this amount must be appropriately adjusted for present value. In this case the courts refused to award the petitioner the requested amount of CZK 5,000 per month, on the grounds that the amount awarded, CZK 3,973 per month, corresponded to the petitioner's earnings at the time, and definitely exceeded the minimum wage provided by Order no. 53/1992 Coll. as amended, i.e. CZK 2,000 per month. The petitioner objects, however, that the price level of 1992 is completely different from today's, and the amount of that time, if paid out today, has nowhere near the purchasing power that it had then. In the petitioner's opinion compensation of lost earnings should never be lower than the minimum wage in effect on the date when the compensation is paid out. The petitioner considers the fact that the courts refused to award the petitioner compensation of adjusted wages to be violation of Art. 4 par. 4 of the Charter of Fundamental Rights and Freedoms, because in the petitioner's opinion the essence and significance of the right to damages were not preserved, when disproportionately low compensation was awarded. As regards the claim for compensation of non-pecuniary damage, the general courts rejected that claim, with reference to the previous case law of the Supreme Court of the CR, which explained the lack of justification for such a claim. However, the petitioner claims that the European Court of Human Rights recognized a claim for compensation of non-pecuniary damage in the case Tsirlis and Kouloumpas v. Greece, which was analogous with the petitioner's case (the petitioners refused on religious grounds to perform military service, were imprisoned for their refusal, and in further proceedings proved that their imprisonment was unlawful). Similarly, in the case Pincová and Pinc v. the Czech Republic, and in other cases, the ECHR awarded petitioners compensation for non-pecuniary damage under Art. 41 of the Convention. Therefore, the petitioner made his claim before the general courts for compensation of non-pecuniary damage for the total period of imprisonment, in the amount of CZK 260,000. Insofar as the claim was denied by the contested decisions, the petitioner believes that this violated Art. 5 par. 5, in connection with Art. 41 of the Convention.

Last, but not least, in the petitioner's opinion, Art. 36 par. 3 of the Charter was violated by denial of the claim for compensation of damages for the period when the petitioner served the prison sentence of 6 months on the basis of the first conviction, or on the basis of the suspended sentence being converted to a non-suspended sentence, which was done by decision of the District Court in Kolín of 5 October 1992, file no. 1 T 68/91. According to the petitioner, it is a question of evaluating whether that decision is such a decision connected in content to the

decisions that were annulled by the Supreme Court of the CR. The petitioner believes that the decision to transform the sentence, if it was based on the verdict which was later annulled, lost its basis, and was de facto annulled as a connected decision. In contrast, according to the petitioner, the general courts believe that the decision transforming the sentence will stand independently even after the annulment of the second conviction.

The petitioner claims that this could be so only if the reason for transforming the sentence was a fact other than the petitioner's second conviction. However, if the only reason for transforming the sentence was the conviction of the petitioner by the decisions that were annulled as being unlawful, then it is a connected decision.

In the contested decision, the Supreme Court of the CR stated that a decision connected in content can be only a decision issued in the criminal matter in which it was stated that the law was violated. According to the petitioner, the Supreme Court of the CR thus took such a formalistic approach to evaluating the matter, that it ignored the purpose of the decision by the District Court in Kolín of 5 October 1992, i.e. to comprehensively connect to the conclusions of the decision issued in the petitioner's second conviction.

Therefore, the petitioner proposed that the Constitutional Court annul all the contested decisions. In his supplement to the constitutional complaint of 20 June 2006, the petitioner emphasized that in the meantime compensation for non-pecuniary damage had been expressly enshrined in § 31a of Act no. 82/1998 Coll., as amended by Act no. 160/2006 Coll. Compensation for non-pecuniary damage is awarded for unlawful decisions and for incorrect official procedure. And, in the petitioner's matter, at least six unlawful decisions were issued that were later annulled.

Upon being called to do so by the Constitutional Court, the other parties to the proceedings provided their responses to the constitutional complaint.

The panel chairwoman of the Supreme Court of the CR stated that in the constitutional complaint the petitioner repeats the same objections which he raised in the appeal proceeding. In view of the fact that the appeal was not permissible up to the amount of CZK 8,216 (the amount requested as adjustment for present value of compensation for lost earning), because the amount was under CZK 20,000, and the question of compensation for non-pecuniary damage or just satisfaction was not – in view of the previous case law – found to have fundamental legal significance, these parts of the appeal were denied as being impermissible. Therefore, in the contested decision the appeals court addressed only the question of whether the decision that the suspended prison sentenced would be served is a decision connected in content to the annulled decision to convict in another criminal matter. The legal opinion stated by the appeals court concerning this question corresponds to criminal law theory and practice, and this decision did not violate Art. 36 par. 3 of the Charter. As to details, the chairwoman referred to the reasoning of the contested decision, or to case law in criminal matters. In view of this, in her opinion the petitioner's fundamental rights were not violated, and therefore she proposed that the constitutional complaint be denied.

As regards the petitioner's claim to adjustment of his lost earnings and compensation for the period of the first prison sentence served, the panel chairwoman of the Municipal Court in Prague referred to the reasoning of the contested decisions, and also expressed the belief that the Municipal Court duly considered the petitioner's claim in accordance with procedural and substantive legal regulations, and that the reasoning adequately explained the legal conclusion on which it based its decision. As regards the claim to compensation for non-pecuniary damages and the reference to Art. 5 par. 5 and Art. 41 of the Convention and the ECHR decisions, the Municipal Court stated that at that time compensation under Art. 5 par. 5 of the Convention was governed by Act no. 58/1969 Coll. However, neither the Charter nor the Convention provides that this compensation means anything other than compensation of damages. Compensation under Art. 5 par. 5 of the Convention means "compensation," i.e. a replacement for damage, not "satisfaction," i.e. satisfaction or replacement for non-pecuniary damage. In support of these arguments, the Municipal Court in Prague pointed to a passage from the ECHR judgment in the matter Tsirlis and Kouloumpas v. Greece: in order for the ECHR to proceed under Art. 41 of the Convention, there would have to be, in relation to violation of Art. 5 par. 5 of the Convention, a case where domestic law did not provide "an enforceable claim for compensation before the domestic authorities." According to the Municipal Court, it was due to this absence that Greece was sentenced to make payments; the petitioner derives his claim from those amounts. The Municipal Court in Prague believes that under the settled case law of the ECHR the point is that the effective exercise of a right must be ensured in a sufficiently certain manner. The municipal court believes that the Czech legal order meets these requirements, both by Act no. 58/1969 Coll., which governed the adjudicated matter, and by Act no. 82/1998 Coll. The provision of § 20 of Act no. 58/1969 Coll. expressly refers to the provisions of the Civil Code, where, under § 442 par. 1 the petitioner has a right both to compensation of actual damages (damnum emergens) and to lost earnings (lucrum cesans), i.e., in the municipal court's opinion, everything which isconsdiered to be compensation of damages (including compensation under Art. 5 par. 5 of the Convention), and not to compensation of non-pecuniary damage, as the petitioner believes.

For these reasons the Municipal Court in Prague proposed that the Constitutional Court deny the constitutional complaint.

In her position statement, the panel chairwoman of the District Court for Prague 2 referred to the reasoning of the judgments by the trial and appeals courts, and said that she finds the constitutional complaint to be unjustified.

The secondary party, the Czech Republic, represented by the Ministry of Justice, did not respond to the constitutional complaint by the specified deadline, and gave up its status as a secondary party. For purposes of evaluating the constitutional complaint the Constitutional Court also requested the relevant files, those being the file of the District Court for Prague 2, file no. 14 C 113/2001, and files of the District Court in Kolín concerning both previous criminal trials, i.e. file no. 1 T 68/91 and file no. 1 T 8/92.

The Constitutional Court determined from the reasoning of the contested decisions that both the trial and the appeals court, in evaluating the claims for compensation

of damage, relied on § 20 of Act no. 58/1969 Coll. in connection with § 442 par. 1 of the Civil Code, i.e. the fact that in the relevant proceedings the petitioner can be awarded actual damages and lost profits. Lost profits, or, in the petitioner's case, lost earnings, is understood to mean the actual amount of earnings which the petitioner actual received at the time of serving his sentence. According to the general courts, one can not agree with the petitioner's arguments regarding adjustment of wages, if the compensation for lost earnings is paid at any later time. The trial and appeals courts then concluded from the definition of damages that the petitioner likewise can not be awarded compensation for non-pecuniary damage, and, according to the general courts, one can not by analogy apply Art. 41 of the Convention and award the petitioner "just satisfaction."

As regards the claims connected to serving the six-month prison sentence imposed on the petitioner per the decision to transform the suspended sentence into a non-suspended sentence, both the trial and the appeals courts concluded that in the first criminal proceedings the petitioner was not cleared of the complaint, nor was the prosecution against him stopped. Thus, the basic requirement for exercising a claim for compensation of damages was not met, because the relevant legally effective decision was not annulled due to unlawfulness. The decision to transform the sentence can not then be considered a decision which is connected in content. In deciding whether the petitioner proved himself in the probation period under § 60 of the Criminal Code, the decisive element is the convicted person's behavior, not the fact that he was convicted in different criminal proceedings. Thus, it is sufficient that in the probation period the petitioner repeatedly engaged in the same conduct, i.e. did not live an orderly life. According to the trial and appeals courts, the fact that he engaged in this conduct was not questioned even by the decision of the Supreme Court of the CR that annulled the later decisions. The Supreme Court of the CR stated only that criminal prosecution under § 11 par. 1 let. f) of the Criminal Procedure Code was impermissible.

From the reasoning of the contested decision by the Supreme Court of the CR, the Constitutional Court determined that the appeals court first, for purposes of evaluating the permissibility of the appeal, separated the individual claims exercised by the petitioner. It partly denied the claim due to impermissibility; it denied the part concerning the claim arising from the request to adjust wages on the grounds that the amount requested was under CZK 20,000, and denied the part concerning the claim for compensation of non-pecuniary damages, with reference to the settled case law of the Supreme Court of the CR. It then considered on the merits only the claim connected to serving the prison sentence imposed per the decision to transform the sentence. The decision's reasoning indicates that the Supreme Court of the CR concluded that the decision to transform the sentence can not be considered a decision connected in content. "In annulling other decisions connected in content under § 269 par. 2 of the Criminal Procedure Code, the rule is that all further decisions are annulled that are connected in content (internally) to the annulled legally effective decision to convict. Even if the law does not expressly state in that section that decisions 'in the same criminal matter' are to be annulled, there is no doubt that the statement about annulling further decisions is dependent on the statement under § 268 par. 2 of the Criminal Procedure Code, i.e. the statement that said that the reviewed decision violated the law. It is clear from these provisions that only those decisions are annulled that

were issued in the criminal matter in which it was ruled that the law had been violated." Therefore, the Supreme Court of the CR concluded that "if the decision file no. 1 T 68/91 sentencing the petitioner to a prison sentence of 6 months was not annulled, then neither can the subsequent (and related to this decision in content) decision of the court, file no. 1 T 68/91, stating that the defendant shall serve a prison sentence of 6 months … ."

From the decision by the District Court in Kolín of 5 October 1992, ref. no. 1 T 68/91-76, the Constitutional Court determined that it decided, under § 60 par. 1 of the Criminal Procedure Code, as amended, that the defendant would serve a prison sentence of 6 months. The reasoning of the decision states: "As the court determined from the file 1 T 8/92 of the District Court in Kolín, the defendant was sentenced again for conduct engaged in from 11 July 1991 and ending on 10 April 1992 to a non-suspended prison sentence of eight months, for a crime under § 272c/1 of the Criminal Code."

II.

The Constitutional Court first had to consider whether the constitutional complaint was permissible (§ 75 par. 1 a contrario of the Act on the Constitutional Court, in the version before it was amended by Act no. 83/2004 Coll.) and whether it was filed on time as regards all the contested decisions (§ 72 par. 2 of the Act on the Constitutional Court, in the version before it was amended by Act no. 83/2004 Coll.). This is because the decision by the Supreme Court of the CR led to separate evaluation of the petitioner's individual claims, and part of the petitioner's appeal was considered impermissible, with reference to § 237 par. 2 let. a) of the CPC and § 237 par. 1 let. c) of the CPC. In that situation, the Constitutional Court could conduct constitutional law review only of those parts of the claims that the Supreme Court considered on the merits, or where it denied the appeal on the grounds that it did not find the issue to be of fundamental legal significance (cf. the Constitutional Court announcement published as no. 32/2003 Coll., inserted into § 72 par. 4 and § 75 par. 1, the sentence after the semi-colon, of the Act on the Constitutional Court, with effect as of 1 April 2004). The constitutional complaint against the remaining parts of the claims would be, as regards the verdict of the trial and appeals courts, as a result of impermissibility of the appeal ex lege [§ 237 par. 2 let. a) of the CPC] filed after the deadline specified by law.

Nonetheless, the Constitutional Court has already in the past deemed such actions by the Supreme Court of the CR to be inconsistent with the right to a fair trial, when, as a result of division of individual claims, it happens that each is subject to a different procedural regime (cf. the judgment in the matter file no. II. ÚS 117/04, as yet unpublished, available in electronic form at www.judikatura.cz). Such action by the Supreme Court of the CR is also inconsistent with the principle of foreseeability of law, because a party to the proceedings, when filing an appeal, can not with any certainty predict how the claim will be structured by the Supreme Court of the CR and therefore for which part he must, because the appeal is impermissible, file a constitutional complaint against the decision of the appeals court.

In view of this, the Constitutional Court could not accept such action by the Supreme Court of the CR, and therefore it considered the constitutional complaint to be permissible and timely filed in its full scope.

III.

The Constitutional Court, in accordance with § 44 par. 2 of the Act on the Constitutional Court, requested consent from the parties to the proceedings to waive a hearing, because it concluded that a hearing could not be expected to further clarify the matter.

After conducting its proceedings, the Constitutional Court then concluded that the constitutional complaint is justified, both in the part of objections to the general court's conclusions that it is impossible to award the petitioner compensation of non-pecuniary damage, and in the part of objections to the decision not to award damages for serving the 6 month prison sentence that the petitioner was given by the decision to transform the original suspended sentence in the first criminal proceedings.

IV.

First of all, the Constitutional Court states that is the judicial body for protection of constitutionality (Art. 83 of the Constitution of the CR). Therefore, it is not party of the general courts, and is not above them in their hierarchy. The task of the Constitutional Court is to review the decision making activity of the general courts, but only in situations where their decisions interfere in the constitutionally guaranteed fundamental rights and freedoms of individuals.

This indicates that the Constitutional Court's point of reference is not simple law, but the constitutionally guaranteed fundamental rights arising both from the Charter of Fundamental Rights and Freedoms and from international treaties on human rights and fundamental freedoms. As the Constitutional Court has already stated many times, fundamental rights and freedoms in the area of ordinary law function like regulatory ideas, which is why the complexes of ordinary law norms are tied to them in terms of content. The interpretation and application of the norms of ordinary law can not be performed completely autonomously, that is without regard to the protection of an individual's fundamental rights arising from the norms of the constitutional order of the CR.

The Constitutional Court evaluated the contested decisions by the general courts from these points of view, and concluded that their conclusions regarding evaluation of the petitioner's claims for compensation of non-pecuniary damage and damage for serving a 6 month prison sentence will not stand in light of protection of the petitioner's fundamental rights.

A.

The reasoning of the contested decisions indicates that the general courts denied the petitioner's claim to compensation of non-pecuniary damage because the applied statute, Act no. 58/1969 Coll., just like Act no. 82/1998 Coll., is based on the requirement of compensation of pecuniary damage, which, under § 442 par. 1 of the Civil Code, is understood to mean actual damage (damnum emergens) and lost profits (lucrum cessans). The general courts also concluded that this framework is consistent with Art. 5 par. 5 of the Convention, i.e. it represents the implementation of a claim to compensate a person whose personal freedom was restricted in conflict with Art. 5 par. 1 to 4 of the Convention.

In its decisions, the Constitutional Court has already formulated the belief that criminal prosecution and the sentence arising from it are serious interference in an individual's freedom, and also lead to other negative consequences for an individual's personal life and destiny (most recently, cf. judgment file no. IV. ÚS 335/05, as yet unpublished, available in electronic form at www.judikatura.cz). Criminal prosecution and serving a sentence thus interfere in an individual's private life, in his honor and good reputation, i.e. they are also capable, in addition to violating the right to personal freedom guaranteed in Art. 8 par. 1 of the Charter, of restricting or violating the individual's right to respect for and protection of his private and family life, dignity, personal honor, and good reputation, as guaranteed in Art. 10 of the Charter. Thus, it is indisputable that criminal prosecution, or serving a sentence, that was implemented in conflict with the law, or the constitutional order of the CR, can lead to , besides material damages (the value by which the injured party's assets were reduced or by which possible increase of property was reduced) the creation of non-pecuniary damage.

The Constitutional Court considered the question of compensation for non-pecuniary damage as part of the compensation of damages whose scope is generally formulated in § 442 par. 1 of the Civil Code in judgment file no. Pl. ÚS 16/04 (promulgated as no. 265/2005 Coll.). In that decision the Constitutional Court specifically considered the question of whether that provision, defining the compensation of damages, can be interpreted so that it could also include a claim for compensation of non-pecuniary damage consisting of the killing of a close relative. It concluded that the current legislative concept of damage as pecuniary damage does not permit such an interpretation, although it does not rule out an individual seeking compensation for non-pecuniary damage consisting of interference in personality rights through protection of personality under § 11 and § 13 of the Civil Code. However, in terms of the current legislative framework, this is a different claim than compensation of damage.

In this regard, the Constitutional Court then appealed to the legislature, and stated that from a legislative standpoint it would be more correct to abandon the existing concept of damage as property damage and consider damage to also include damage caused by effects on the bodily and spiritual integrity of the injured party. As the Constitutional Court noted, this concept is also in line with the principles of European law on offences, which define damage as property or non-property damage. These principles, although they are based in private initiative, have a

significant effect on the legislation of European states, which have gradually been adapting to this concept. However, in that decision the Constitutional Court confirmed that de lege lata claims for compensation of non-pecuniary damage are exercisable not as compensation of damage, whose the components are defined by § 442 par. 1 of the Civil Code, but through protection of personality under § 11 and § 13 of the Civil Code.

However, these conclusions arising from the judgment by the plenum of the Constitutional Court must be corrected in the area of compensation of damages for previous unlawful limitation of personal freedom, where the claim for compensation is constructed not only in the area of simple law, but also by the Convention on the Protection of Human Rights and Fundamental Freedoms, in Art. 5 par. 5, which is, under Art. 10 of the Constitution of the CR, a directly applicable norm in the domestic legal order of the CR, and which must be given priority in application before statutes.

This approach must generally be chosen when the grounds for compensation of damages are punishable conduct by an individual or legal entity, i.e. conduct which is inconsistent with the law, with good morals, with public order. Authoritative determination of such conduct is much more dependent on cooperation by the state, compared to a situation involving compensation of damages on the grounds of violation of contractual provisions. So, for example, the German Constitutional Court (BVerfG), in its decision of 15 January 1958 (BVerfGE 7, pp. 198, 206) declared that the civil law of offenses belongs to "those legal norms of private law which contain a mandatory legal framework, and therefore are part of the ordre publique in the wider sense, i.e. that they contain principles which apply to private law relationships on the grounds of public interest, and therefore their applicability is not subject to private arrangements. Thanks to their purpose, these provisions are not as closely related to public law, but are a direct supplement to public law. Therefore, these provisions must be especially open to the influence of constitutional law."

The Greek Supreme Court (Areios Pagos) also did not hesitate to turn directly to the constitution when dealing with compensation of damages due to punishable conduct. In one of its decisions [Areios Pagos 81/1991, EllDik 32 (1991), p. 1215], referring to Article 5 of the Greek constitution, it stated that "the fundamental principle, under which every action or failure to act which results in culpable causation of damage binds the damaging party to compensate the damage, not only if his action or failure to act violates a particular legal provision, but also if it violates the general spirit of our legal system, which requires that the conduct of commercial actions may not lead to a breach of the public order."

As regards specifically state liability for limiting personal freedom, and thus the relationship of the domestic civil law of offenses and Article 5 par. 5 of the Convention, the situation in individual European states is that the classic dogmatics of civil legal institutions gave way to direct application of Article 5 par. 5 of the Convention, which is interpreted fully autonomously by the national courts. So, for example, the Netherlands Supreme Court (Hoge Raad), in one case directly relied on Art. 5 par. 5 of the Convention and found the state liable for the conduct of a state prosecutor, involving flawed interpretation of a statutory provision (HR 11

October 1991, NedJur 1993, No. 165, p. 516).

The German Supreme Court (BGH), in an older decision (BGH 31 January 1966, BGHZ 45, p. 58), evaluated a claim based on Art. 5 par. 5 of the Convention as "a case of objective [state] liability requiring illegal conduct [by it]." The current German and Austrian supreme courts' case law (BGH 26 November 1992, VersR 1993, p. 972, 975-6; OGH 7 October 1992, ÖJZ 1993, p. 276) awards, without anything further, compensation for pain and suffering, directly applying Art. 5 par. 5 of the Convention.

The Danish Western Court of the first level went so far as to, in the case of a person erroneously imprisoned for seven years, granted the person's claim by awarding compensation for damages in an amount equivalent to 300,000 pounds for the injustice suffered (VLD 24 June 1994, UfR 1994 A, p. 751).

The abovementioned examples show that the state liability for a limitation of personal freedom of an individual by judicial authorities that is in any way flawed is penalized by court case law through awarding compensation of non-material damages to the person, regardless of the domestic legal framework, because domestic courts directly apply Art. 5 par. 5 of the Convention. Therefore, the Constitutional Court sees no reason not to take this European legal opinion into consideration.

The Constitutional Court also bases this position on the case law of the European Court of Human Rights (the "ECHR"), which has consistently ruled that the Convention's institutions can have completely autonomous content and a scope not dependent on their legal classification under domestic law. So, or example, the ECHR approached the interpretation of the content and scope of property rights which enjoy protection under Art. 1 of the Protocol to the Convention, and whose content and scope need not be identical with the concept of property rights under the legal systems of the parties to the Convention (cf., e.g., the decision of the Grand Chamber of 5 January 2000, Beyeler v. Italy, 33202/96: § 100, or the decision by the First Section of 19 June 2001, Zwierzyński v. Poland, 34049/96: § 63 or the decision by the Grand chamber of 22 June 2004, Broniowski v. Poland, 31443/96: § 129).

Regardless of how the content of the institution of compensation of damage is treated by the domestic legislature, the case law of the general courts and the constitutional court, or domestic civil doctrine, in domestic application of the Convention one must start with the concept of compensation of damage as it is treated by the national European constitutional courts and supreme courts, whose case law gives rise to the case law of the ECHR. Thus, without regard for the anachronism of the Czech legal framework which the Constitutional Court accepted in the abovementioned judgment, and only called on the legislature to harmonize domestic legislation with the European understanding of the law of offenses, this concept of damage and compensation can not be extended to interpreting the Convention's norms.

Yet, the ECHR case law understands damage as pecuniary damage and non-pecuniary damage, including in interpretation and application of a claim for

compensation of damage under Art. 5 par. 5 of the Convention (cf. Repík, B.: Evropská úmluva o lidských právech a trestní právo [The European Convention on Human Rights and Criminal Law]. Orac, Praha 2002, p. 253: "Of course, a requirement for a claim is that damage has been incurred which is in a causation relationship with violation of Art. 5 par. 1 to 4. Thus, the damage compensated is material as well as non-material, moral, e.g. injury to reputation, moral hardship, more difficult social functioning, etc."). In interpreting Art. 5 par. 5 of the Convention, the ECHR in relevant decisions takes as its starting point that the demand for compensation covers both material damage and non-material damage ("pecuniary or non-pecuniary damage to compensate", cf. the decision Wassink v. The Netherlands, par. 38). In the decision Tsirlis and Kouloumpas v. Greece the ECHR found it was a violation of Art. 5 par. 5 of the Convention that Greece did not provide the petitioners any compensation for the limitation of their personal freedom that was implemented inconsistently with Art. 5 par. 1 let. a) of the Convention. In that decision, the ECHR expressly stated that "The Court observes that Mr. Tsirlis and Mr. Kouloumpas spent thirteen and twelve months, respectively, in what was unlawful detention. … The very fact of their deprivation of liberty must have produced damage of both pecuniary and non-pecuniary nature" (cf. par. 80 of the decision). The Greek domestic legislation contained Art. 540 par. 1 of the Criminal Code, which expressly provided the obligation to compensate non-material damage as well (cf. par. 48 of the decision: "Article 540 para. 1: Persons who have been unfairly … detained on remand must be compensated for any pecuniary loss they have suffered as a result of their detention. They must also be compensated for non-pecuniary loss…").

In the decision Shilyayev v. Russia, although the ECHR did not find violation of Art. 5 par. 5 of the Convention, nonetheless, it cited as decisive criteria for evaluating the specific amount of damage, the nature of the matter, the total length of deprivation of liberty, and consequences affecting the petitioner's personal sphere ("the nature of the criminal case against him, total length of his detention and personal after-effects," cf. par. 21 of the decision).

Thus, it is indisputable that in the context of application of the Convention, whether at the national or European level, the concept of damage is understood as both pecuniary and non-pecuniary damage.

This conclusion can also be supported by historical interpretation of the Czech legal framework. On 27 April 2006 Act no. 160/2006 Coll. went into effect, which amended Act no. 82/1998 Coll., on Liability for Damage Caused During the Exercise of State Authority by a Decision or Incorrect Official Procedure, as amended by later regulations. This Act inserted into the Czech legal order a claim for compensation of non-pecuniary damage, which was incurred as the result of an unlawful decision or incorrect official procedure. The background report to the Act clearly indicates that the legislature was motivated, among other things, by deficiencies in the domestic framework in relation to Art. 5 par. 5 of the Convention. The background report states: "Thus, not one of these [previous] amendments to the law concerned the essential problem which relates to compensation of damages in the case of non-pecuniary (non-material) damage. This concept is not unknown in the Czech legal order, because, e.g. § 43 of the Criminal Procedure Code speaks of moral or other (in this sense, non-material) damage

caused by the perpetrator of a crime to the victim ... Likewise, theory (just like many foreign legal systems) knows this concept, and gives it the meaning of damage other than pecuniary (material), i..e moral, conceptual, non-pecuniary damage (e.g., in French law, “le dommage moral”), for which the victim is entitled to monetary – pecuniary – satisfaction (compensation). This non-pecuniary damage may be part of injury to health (e.g. pain, more difficult social involvement) or may arise from violation of a right … The amendment of Act no. 82/1998 Coll. aims to cover that second component of non-property damage. Even if the non-material detriment is defined separately from damage as such (i.e. separately from material damage), the provisions of the law regarding compensation of damage apply to it fully.”

As regards the deficiencies of the previous legal framework in relation to Art. 5 par. 5 of the Convention, the background report stated that “Act no. 82/1998 Coll. does not permit sufficient compensation for illegal deprivation of freedom, which is nevertheless guaranteed in Art. 5 par. 5 of the European Convention on Human Rights. That provision requires that the right to compensation exist in the legal order for cases of any violation of Art. 5 par. 1 to 4 of the Convention, although the legal framework contained in Act no. 82/1998 Coll. does not meet the requirement of the Convention.”

In other words, the motivation for enacting this legal framework was, among other things, to bring the domestic legal framework into accordance with the Convention’s requirements. It is indisputable that the new legal framework does not establish the entitlement to compensation of non-pecuniary damage, but merely declares its existence at the level of the domestic legal framework. As stated above, that entitlement was established in the foregoing period by Art. 5 par. 5 of the Convention, which is a “self-executing” provision that is directly applicable over domestic statutes. Insofar as the previous legal framework (regardless of whether it was contained in Act no. 82/1998 Coll. or Act no. 58/1969 Coll.) permitted only the compensation of pecuniary damage, it was the duty of the courts, whose protection an individual’s fundamental rights enjoy, to give priority in application to Art. 5 par. 5, using the meaning that arises from ECHR case law.

Thus, if the general courts concluded in this case that the petitioner could not be granted a claim for non-pecuniary damage under Act no. 58/1969 Coll., whose § 20 refers, concerning the scope of damage, to § 442 par. 1 of the Civil Code, that conclusion may be consistent with the Constitutional Court’s conclusions stated in the abovementioned judgment by the plenum, but it will not stand in light of the concept of compensation of damage which arises from Art. 5 par. 5 of the Convention, which the general courts must apply before statutes.

B.

The Constitutional Court’s previous judgment in the petitioner’s matter, file no. I. ÚS 184/96, clearly stated that it is inconsistent with the principle ne bis in idem for the petitioner to be prosecuted and punished twice for the same act. This conclusion must also be applied to the situation if further decisions, concerning the

same act, were tied to the annulled legally effective decisions, and if those further decisions were in a causal relationship to the transformation of the sentence originally imposed. It would be inconsistent with the sense of the abovementioned Constitutional Court judgment if decisions were to remain untouched which directly, i.e. in a direct causal relationship, connected to decisions which violated the principle ne bis in idem, if those decisions mean an increasing of the sentence originally imposed. This is all the more so if the individual's liberty was restricted on the basis of those facts. The contrary approach would actually mean a continuation of the double punishment of the petitioner, because the original sentence would not have been changed but for the further criminal prosecution and his conviction.

Only while respecting these starting points, is it necessary in the given matter to interpret § 269 par. 2 of the Criminal Procedure Code, as regards the definition of the scope of the decisions which were connected in content to the decisions annulled by the Supreme Court of the CR in proceedings on a complaint about violation of the law. In other words, decisions that were issued in a direct causal relationship with decisions that were later annulled due to illegality or unconstitutionality must be considered decisions connected in content. If the reason for issuing a decision lay directly in the existence of decisions, though issued in different proceedings, which were later annulled due to illegality, that decision must be considered a decision connected in content.

In this case the petitioner was given a suspended prison sentence of 6 months in the first proceeding. In the following proceeding the petitioner was convicted for the same crime, and was given a non-suspended prison sentence of 8 months. Related to that decision in time and in a causal relationship was the decision by the District Court in Kolín, whose reasoning makes it evident that it was issued in direct connection with the petitioner's second conviction. The direct reason for the transformation of the sentence was the existence of other legally effective decisions which found the petitioner guilty of committing the same crime and sentenced him to a non-suspended prison sentence. If these decisions were later expressly annulled due to violating the principle ne bis in idem, that conclusion must also be applied to the decision to transform the sentence, i.e. the decision by the District Court in Kolín of 5 October 1992, ref. no. 1 T 68/91. In this case a contrary conclusion would mean inconsistent application of the principle ne bis in idem, because the petitioner was required to serve the non-suspended prison sentence of 6 months only on the basis of the further criminal conviction.

The general courts were required to reflect this conclusion in their interpretation of the relevant provisions of Act no. 58/1969 Coll., on Liability for Damage Caused by a Decision by a State Body or Incorrect Official Procedure so that the petitioner was compensated for damage caused by the serving of that sentence. In this regard we can not accept the opinion that, even if § 1 par. 1 of that Act were to be followed, the fundamental prerequisite for exercising a claim for compensation of damages had not been met, i.e. that the legally effective decision which caused the damage was annulled due to illegality. This is because evaluation of the group of decisions annulled in proceedings on a complaint about violation of the law depends precisely on the abovementioned interpretation of § 269 par. 2 of the Criminal Procedure Code, because the decision by the Supreme Court of the CR of

25 August 1999 expressly annulled decisions connected in content to the decision by the Regional Court in Prague of 16 June 1992 file no. 5 To 188/92 and the decision by the District Court in Kolín of 10 April 1992, file no. 1 T 8/92, insofar as, in view of the change which happened by the annulment, those decisions ceased to have any basis.

As stated above, in this case this interpretation must be done precisely with regard to the grounds which led to annulling the decision on the petitioner's second conviction. The Constitutional Court considers the interpretation performed by the general courts to be excessively formalistic, and, moreover, one that misses the purpose of final criminal law decision, and therefore it can not be accepted.

For these reasons the Constitutional Court concluded that the contested decisions, which denied the petitioner's claim for compensation of damages related to serving his prison sentence of 6 months, violated the petitioner's fundamental right guaranteed in Art. 5 par. 5 of the Convention.

C.

As regards the petitioner's objection regarding the failure to award compensation of lost earnings at the adjusted level, the Constitutional Court states that the general courts will have to address this issue within their decision-making on compensation of non-pecuniary damage. In setting the amount of compensation, it will undoubtedly be necessary to take into account the period when payment of compensation of this damage was denied to the petitioner, as well as the fact that flagrant errors were committed by the general courts, and especially by the Supreme Court of the CR, in handling the complaint about violation of the law filed in favor of the petitioner, which had the result of significantly extending the total period of the proceedings, which is related to the conditions for recognition and actual payment of compensation of non-pecuniary damage.

In view of the abovementioned conclusions concerning violation of Art. 5 par. 5 of the Convention on the Protection of Human Rights and Fundamental Freedoms, the Constitutional Court granted the constitutional complaint under § 82 par. 2 let. a) of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, and annulled the contested decisions of the District Court for Prague 2, the Municipal Court in Prague, and the Supreme Court of the CR, under § 82 par. 3 let. a) of that Act.

Instruction: Decisions of the Constitutional Court can not be appealed.

Brno, 13 July, 2006