

2009/08/28 - II. ÚS 2894: POLICE SEARCH AT ATTORNEY OFFICE

HEADNOTES

The obligation to maintain confidentiality is the basic precondition for the provision of legal aid and thus a necessary condition for a democratic society to function. The practice of the profession of an attorney at law is based on a confidential relationship between the attorney at law and the client, and on the trust of the client in the confidentiality of the attorney at law. The Constitutional Court has stated earlier that this is in no instance a privilege of the attorney at law which should be the basis for exemption from a generally valid and binding legal order, but it is an obligation imposed on the attorney at law in the interests of their clients and for their protection. In such a sense, professional secret and maintaining the same by the attorney at law is endowed with relevant protection, this particularly in situations when such an obligation by the attorney at law may be endangered, for example, precisely in cases such as a search of a home of an attorney at law or at their office. The rights of third parties are, within this procedure, in the first place protected by the representative of the Association, the task of whom is to voice their opinion on the nature of the documents seized and the possibility of their release. The reasons for which the representative of the Association might refuse to give consent to familiarisation with the documents may be reviewed solely by a court, this only upon a petition to this effect, the contents of which are defined by paragraph 4 of the above-specified provisions, and which must be filed within a period of 15 days from the refusal to grant consent from the representative of the Association.

The course of a term of 15 days for filing a petition pursuant to § 85b paragraph 3 of the Criminal Procedure Code, whereby dissent of the representative of the Association could possibly be overruled, results from the provisions of § 60 paragraph 1 of the Criminal Procedure Code, according to which the term specified in days does not include that day on which the event determining the commencement of the term (refusal of the consent) took place. This term must be observed by the petitioner, since the procedure pursuant to § 61 paragraph 1 of the Criminal Procedure Code, whereby the court might possibly restore the term, is, due to the nature of the case, inapplicable here, as this is not a remedy of a defendant or their defence counsel, and also, the provisions of § 85b paragraph 6 of the Criminal Procedure Code explicitly bar prolongation of such a term through the action of a court according to § 59 paragraph 4, the fourth sentence of the Criminal Procedure Code. As the term in the case under consideration commenced on 19 June 2008, it ceased on 3 July 2008. From the provisions of § 85b paragraph 6 of the Criminal Procedure Code it may be inferred that solely within this period of time it was possible to file a faultless petition which the court could hear, since the possibility of removing errors in the petition in an additionally provided term was thereby unambiguously eliminated.

The opposite interpretation of the provisions in question has deviated from the standards of interpretation and thus also from the boundaries of constitutionality.

Breaking the independence of an attorney at law without statutory reasons then means an infringement both of the rights of the clients and of synallagmatically established obligations and rights of the attorney at law related to the practice of their profession. In the given case, the matter concerns not only detaining the computers and related equipment, but also the information and documents stored on such computers, which the attorney at law is obliged by law to reasonably keep on file with respect to the provision of legal services (§ 25 paragraph 1 of the Act on the Legal Profession), and which they necessarily need for the proper practice of the legal profession. Clearly, these circumstances necessarily restrain the complainant in his activities and ability to discharge his obligations in the provision of legal aid, this beyond the scope of fulfilling the purpose of the criminal proceedings (§ 1 paragraph 1 of the Criminal Procedure Code). Therefore, as a consequence, the above-specified course of action taken by the Municipal Court in Prague also represents an infringement of the complainant's right to engage in commercial and economic activity under Article 26 paragraph 1 of the Charter. The point is that this right includes also the obligation on the part of the bodies involved in criminal proceedings to respect the attorney at law's obligation to maintain confidentiality, serving to protect the clients of the attorney at law, and thus the confidentiality of the attorney at law as a precondition for the practice of the legal profession, the same forming the attorney at law's business.

**CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT**

IN THE NAME OF THE REPUBLIC

A Panel of the Constitutional Court, consisting of Chairman Stanislav Balík and Justices Dagmar Lastovecká and Jiří Nykodým, adjudicated, in the legal case of complainant JUDr. Ji. T., attorney at law, represented by JUDr. Josef Doucha, attorney at law with a registered office at Rovná 280, Vestec, Prague-West District, on a constitutional complaint against "other encroachment by a body of public power" - a procedure taken by the Municipal Court in Prague in proceedings administered under file No. Nt 603/2008 on a petition for substitution of consent from a representative of the Czech Bar Association pursuant to § 85b paragraph 3 of the Criminal Procedure Code, with participation by the Municipal Court in Prague as a party to the proceedings, and (1) the Czech Bar Association and (2) the High Public Prosecutor's Office in Prague as secondary parties to the proceedings, as follows:

I.) The Constitutional Court enjoins the Municipal Court in Prague from continuing to violate the constitutionally guaranteed rights of the complainant

guaranteed by Article 36 paragraph 1, Article 26 paragraph 1, and Article 11 paragraph 1 of the Charter of Fundamental Rights and Basic Freedoms.

II.) The Constitutional Court orders the Municipal Court in Prague to cease inhibiting the Czech Bar Association from returning to the complainant the deposited documents seized during searches held on 18 June 2008 and specified in detail in records on conducting the searches dated 18 June 2008, ČTS: OKFK-182/TČ-2008-18 and ČTS: OKFK-182/TČ-2008-18-B.

REASONING

I.

By a timely constitutional complaint which meets conditions established by Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations (hereinafter referred to only as the “Act on the Constitutional Court”), the complainant protests against “other encroachment by a body of public power”; that is the procedure taken by the Municipal Court in Prague in proceedings administered under file No. Nt 603/2008 on a petition for substitution of consent from a representative of the Czech Bar Association under § 85b paragraph 3 of the Criminal Procedure Code, and demands that the Constitutional Court declare that through the course of actions taken by the Municipal Court in Prague, which in the case administered under file No. Nt 603/2008 unreasonably ordered a public session and thus hindered the secondary party from releasing documents in both printed and electronic form, the fundamental rights of the complainant established by Article 2 paragraph 2, Articles 11 and 13, Article 36 paragraph 1, and Article 40 paragraph 2 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter referred to only as the “Charter”) were violated. The complainant further demands that the Constitutional Court enjoin the Municipal Court in Prague from continuing to order a public session, and order the Municipal Court in Prague to allow the Czech Bar Association to return the seized documents in both printed and electronic form. At the same time, the complainant proposes that the Constitutional Court, pursuant to § 80 paragraph 1 of the Act on the Constitutional Court, order the Municipal Court in Prague to cease continuing in such an act of encroachment until the time a decision is taken on this complaint, as possible violation of the privileged relationship would represent a serious detriment to the clients of the complainant and attorneys at law Mgr. D. T. and Mgr. R. N., who practise the legal profession together with the complainant. According to the complainant, such detriment would not be later reparable in any way.

The complainant states in the constitutional complaint that criminal prosecution for the criminal act of evading tax, a fee or similar mandatory payment pursuant to § 148 paragraph 1, paragraph 4 of the Criminal Code, is being conducted against him and other persons, within the scope of which searches of his home and locations at the registered office of the law firm in which he practises the legal profession took place on 18 June 2008. During these searches, documents and computers which were used not only by the complainant, but also by Mgr. D. T. and Mgr. R. N, attorneys at law who work in an association with the complainant, were seized. These searches were conducted in the presence of a representative of the

Czech Bar Association, Mgr. T. R., who, pursuant to § 85b paragraph 2 of the Criminal Procedure Code, refused to grant consent for the body carrying out the searches to familiarise themselves with the contents of the documents seized. Therefore, the documents in question (including data stored on computers and mobile telephones) were sealed and handed to the Czech Bar Association, with which they have remained deposited until now. As is further declared by the complainant, on the basis of the petition pursuant to § 85b of the Criminal Procedure Code for substitution of consent from the representative, dated 14 July 2008, the Municipal Court in Prague ordered, in case file No. Nt 603/2008, public sessions for the purpose of becoming familiarised with the contents of the documents pursuant to § 85b paragraph 7 of the Criminal Procedure Code. The complainant, however, is of the opinion that the above-specified petition dated 14 July 2008 was filed clearly after the term of 15 days, when such a term is established for filing the same by § 85b paragraph 5 of the Criminal Procedure Code, and, therefore, it is indubitable that the course of actions taken by the Chairwoman of the Panel of the Municipal Court in Prague is unlawful, since § 85b paragraph 6 of the Criminal Procedure Code imposed an obligation on her not to take such a petition into consideration. The complainant is convinced that such provisions contain a normative order whereby the legislature did not leave it to the court to decide whether they would proceed in such way or not. After the complainant became convinced of the lateness of the petition, he sent the Czech Bar Association a request for returning the documents seized, and at the same time sent the Municipal Court in Prague a demand for cancellation of the public sessions which had been ordered. In connection with the above request by the complainant, the Czech Bar Association subsequently sent an enquiry to the Court as to whether the public sessions ordered would be cancelled. The Chairwoman of the Panel of the Municipal Court in Prague responded to the same on 13 November 2008, specifying that she had considered the petition dated 14 July 2008 as filed in a timely manner, and, therefore, asked that the Czech Bar Association submit the seized documents. According to the complainant, the Czech Bar Association is at present in such a situation that, with respect to the attitude of the court, the Association cannot without unease discharge its statutory obligation and return the items seized, without exposing the complainant to the risk of further searches of his home and other premises and possible placement in custody once again.

In his constitutional complaint, the complainant claims that the legal secret, or obligatory confidentiality, is not a privilege on the part of attorneys at law, but an obligation imposed on attorneys at law in the interest of their clientele and for protection of the same. That is also why clear rules under which it is possible to consult documents which form the subject of the privileged relationship were incorporated in the Criminal Procedure Code. The complainant refers to the fact that the provisions in question do not concern documents important for criminal proceedings, as said courts probably mistakenly believe, but actually documents which may contain facts covered by attorney confidentiality, or documents which, on the contrary, do not contain such facts. The regulation in question does not serve to substitute for consent from a client to the provision of information which the attorney at law maintains in confidentiality. The complainant emphasises that he necessarily needs the impounded documents for proper practice of the legal profession. In addition, the impounded computers and related equipment are of no small value, and when the court, contrary to the law, still detains such items

through the Czech Bar Association, the court also infringes the right of ownership.

In the constitutional complaint, the complainant also includes arguments against the actual criminal prosecution of himself and states that he did not commit the criminal act for which he is prosecuted, and for this reason the violation of the principle of obligatory attorney confidentiality is unjustified. The complainant infers that had the Municipal Court in Prague taken the above facts into consideration, they would have ascertained that the petition filed pursuant to § 85b paragraph 3 of the Criminal Procedure Code is manifestly unjustified.

To exemplify the situation which arose, the complainant also states that by ordering public sessions, the Municipal Court in Prague also violated the rights of attorneys at law Mgr. D. T. and Mgr. R. N., who practise the legal profession together with the complainant. Also their documents were seized, in spite of the fact that the bodies carrying out the search had been repeatedly warned about this fact.

II.

From the files of the Municipal Court in Prague, file Nos. Nt 601/2008, Nt 602/2008 and Nt 603/2008, which the Constitutional Court requested in order to hear and adjudicate the matter, the Constitutional Court ascertained the following:

On the basis of a resolution by the Police of the Czech Republic, Department for Detection of Corruption and Financial Criminality, the Criminal Police and Investigation Service, Tax and Money Laundering Section, dated 16 June 2008, ref. No. OKFK-182-59/TČ-2008-18-B, the criminal prosecution of the complainant (together with other defendants) was initiated for the criminal act of evading tax, a fee or similar mandatory payment under § 148 paragraph 1, paragraph 4 of the Criminal Code, committed in the form of aiding and abetting under § 9 paragraph 2 of the Criminal Code. The complainant is supposed to have committed this act by signing, on the basis of the power of attorney, on 16 March 2007 in Prague, on behalf of the company Letka Team, a. s., a contract on the sale of cigarettes, while he was aware at the time of the sale that the given company would not return the value added tax from such a transaction; Letka Team, a. s., with the intention of concealing that such a taxable transaction had taken place, did not declare in their VAT return for March 2007 such tax and did not pay such tax to the tax administrator, whereby the company caused the Czech Republic, represented by the Tax Office in Pardubice, a loss of CZK 118,833,833.20.

On 18 June 2008, on the basis of orders for searches pursuant to § 83 paragraph 1 of the Criminal Procedure Code issued by the District Court for Prague 8 on 17 June 2008 under file No. Nt 1507/2008, searches with respect to the above-specified criminal case were carried out at the premises of a house in L., owned by Mgr. V. T. S., and the premises of the “T. a PARTNEŘI” law office, and at premises belonging to the same. The above searches were conducted in the presence of Mgr. T. R., an attorney at law, appointed on 17 June 2008 by the Czech Bar Association (hereinafter referred to also as the “Association”) to be the representative of the Association assigned to the search of the house and the search of other premises at

which the attorney at law practises the legal profession, pursuant to § 85b paragraph 1 of the Criminal Procedure Code. With respect to the fact that documents (specified in records on execution of a search dated 18 June 2008) which might contain facts covered by the obligation on the part of the attorney at law to maintain confidentiality were seized at the given premises, and JUDr. J. T. did not grant consent for their release, the police body carrying out the search requested that such consent to familiarisation with the contents of the documents be given by the representative of the Association, in accordance with § 85b paragraph 1, part two, of the Criminal Procedure Code. The representative of the Association did not agree to such a request and refused to grant consent. Subsequently, said documents, computers and related equipment seized, including data carriers, were registered, secured, sealed and (with respect to technical problems) handed over on 20 June 2008 to the Association at its office on Národní 16, Prague 1.

As the Constitutional Court further ascertained from the files, the District Court for Prague 8, on 25 June 2008, forwarded to the Municipal Court in Prague, as the materially competent court, a memorandum from the Police of the Czech Republic, Department for Detection of Corruption and Financial Criminality, the Criminal Police and Investigation Service, Tax and Money Laundering Section, dated 19 June 2008 (amended with a filing dated 24 June 2008), entitled “demand for filing a petition according to § 85b paragraph 4 of the Criminal Procedure Code”, in which the police body proposes that the District Court for Prague 8, in relation to more closely specified items, file a petition pursuant to § 85b paragraph 3 of the Criminal Procedure Code (with reference to § 85b paragraph 4 of the Criminal Procedure Code) with its court of immediate superiority for issue of a decision, whereby the court would substitute for consent from the representative of the Association. The above-mentioned demand devolved to the Municipal Court in Prague under file No. Nt 601/2008, and the judge of the same court responded to the same promptly in her notification dated 26 June 2008, in which she declared that the filing cannot be taken into account. According to the judge of the Municipal Court, it was in no way possible, with reference to the wording of § 85b paragraphs 4 and 6 of the Criminal Procedure Code, to evaluate the forwarded demand by the police body as a petition pursuant to the provisions quoted, be it by designation or contents, and she pointed out that in this specific case, the District Court for Prague 8 is solely competent to file the petition.

On 27 June 2008, the Municipal Court in Prague received another memorandum on the case in question, this time directly from a judge of the District Court for Prague 8, entitled “demand for procedure pursuant to § 85b paragraph 4 of the Criminal Procedure Code”. As is clear from the petition, the contents of the same were identical to those of the previous demand by the police body, only they had been amended with reasons for substituting consent from the representative with a decision by a court, which, in the opinion of the judge of the District Court, consisted of the circumstance that facts important for criminal proceedings could be ascertained from the items seized during the searches; these in particular with regard to documenting said criminal activities and the shares of the individual perpetrators in committing the same. According to the judge of the Municipal Court, to whom the case was newly allocated under file No. Nt 602/2008, it was not possible to grant the petition. As she declared in the reasoning for her

notification dated 30 June 2008, conditions pursuant to § 85b paragraph 4 of the Criminal Procedure Code were not met with respect to any of the documents seized. In her opinion, the petition in particular lacked identification of which specific circumstances should be ascertained from the documents seized, and what specifically remains to be clarified in connection with the criminal activities for which the complainant is being prosecuted, and through the use of which pieces of evidence such clarification is to be conducted, so that infringements of the rights of the clients of the complainant are really prevented to the maximum degree. At the same time she expressed her doubt whether the condition to justify the procedure pursuant to § 85b paragraph 3 et seq. of the Criminal Procedure Code had actually been met at all, when the relevant files do not make it clear whether qualified denial of consent from the representative of the Association actually took place, and whether the petition above had not thus been filed early.

On 14 July 2008, the Municipal Court in Prague received a third petition (drawn up and dated on the same day), whereby the judge of the District Court for Prague 8 repeatedly proposed that the Municipal Court in Prague decide pursuant to § 85b paragraph 3 of the Criminal Procedure Code. This petition was dealt with by the Municipal Court in Prague under file No. Nt 603/2008. In the petition specified above, the judge of the District Court firstly dealt with the requirement for identification and specification of particular documents which were to be, in a manner detailed in § 85b paragraph 3 of the Criminal Procedure Code, made accessible to the police body for study, and stated that this requirement was, with respect to the extraordinarily large volume of data, completely unrealistic. Therefore, they proposed that a public session pursuant to § 85b paragraph 7 of the Criminal Procedure Code be ordered in the given case for the purpose of familiarisation with the documents through a full text search for key words related to the act for which the criminal prosecution had been initiated. At the same time they informed the court that, on 9 July 2008, a statement by the Association, confirming that at that time the police body was not entitled to familiarise itself with the contents of the documents which had been seized during the searches, was delivered to the relevant police body.

As was further ascertained by the Constitutional Court from the contents of the files, in the case of the petition administered under file No. Nt 603/2008, the Municipal Court in Prague ordered public sessions to be held on 19th, 21st, 26th and 28th August 2008, and at the same time requested the Association to submit the documents seized. Due to the impossibility of an official takeover of these seized items in sealed packages, the public session was, on 19 August 2008, adjourned indefinitely for the purpose of detailing reports on handing over the items. Therefore, the Association was on 20 August 2008 requested by the court that they, by 5 September 2008, in co-operation with the police investigator and the Public Prosecutor, specify the contents of packages Nos. 1 to 9. To this request, the Association responded with a letter dated 2 September 2008, wherein they informed the Court that they could not oblige the request as through such an act the law would be violated. They stated that the only task of the Association, once the sealed packages containing the seized documents had been handed over to them, was to deposit the same in such a way that no person had access to them, and to hand over the same to the court upon request. In the meantime, the Association cannot in any way handle the documents, in particular they must not

disturb the documents' security precautions (the seals), this not even in the presence of or in co-operation with the bodies of the police and the Public Prosecutor, and subsequently repeatedly safeguard these documents. The file further shows that on the same date, the complainant himself submitted his opinion to the request, and, with reference to the wording of § 85b paragraph 6 of the Criminal Procedure Code, objected that specification of the contents of the packages may result in a single possible situation, this being amendment to the petition, while the court, under the given circumstances, must not take such a petition into consideration any longer anyway. On the same day, the complainant was informed by the Chairwoman of the Panel of the Municipal Court that the petition under consideration possessed all the necessary requirements pursuant to § 85b paragraph 4 of the Criminal Procedure Code, and that she insisted on the contents of the sealed packages being made more specific.

By a notification dated 8 September 2008, the Association was again requested to submit the seized documents for a public session held on 2nd, 4th, 8th and 11th December 2008. On the basis of this request, the complainant sent, on 12 September 2008, a request, justified in detail, to the Municipal Court in Prague, in which he proposed that the court remedy its hitherto course of action, annul the public session already ordered, and immediately inform the petitioner and the Association that it does not take into consideration the petition dated 14 July 2008 due to the same being late.

On 8 October 2008, the Association sent to the Municipal Court in Prague a request that the Court declare whether it would actually consider the petition dated 14 July 2008 as one that had been filed late. The Association particularly emphasised that it was obliged, pursuant to § 85b paragraph 2 of the Criminal Procedure Code, to return the seized documents to the attorney at law after the term, according to paragraph 5 of the same provisions, for filing the petition expired with no effect. The Association was requested by the complainant to return the same. In the opinion of the Chairwoman of the Panel of the Municipal Court, communicated to the Association in a memorandum dated 13 November 2008, the petition could not be considered late.

By a letter dated 27 November 2008, the Association informed the Court that, with respect to the fact that a constitutional complaint had been filed regarding the course of action taken by the Municipal Court in Prague in case file No. Nt 603/2008, in which the lateness of the petition being considered is claimed, the Association should not submit the documents safeguarded and deposited with the same to the public sessions ordered and should wait for the decision of the Constitutional Court. At the same time it added that the Association would neither release such documents to the complainant, so that the Association would not obstruct the results of the criminal proceedings should the Constitutional Court not grant the constitutional complaint. The Chairwoman of the Panel, by a letter dated 27 November 2008, informed the Association that she insisted on having said documents submitted, since she by then had not received any decision by the Constitutional Court dictating that the Court remain inactive. In spite of such a request, the seized documents were not presented by the Association during the public session held on 2 December 2008, and the session was adjourned indefinitely. Since the Association did not observe the request by the Court, the

Municipal Court in Prague, during its session, imposed on the President of the Association a procedural fine of CZK 30,000. A complaint was filed against such a fine there and then; the High Court in Prague decided on such a complaint and ruled that the fine at the given amount should be imposed upon the Association directly, not the President of the Association.

III.

Pursuant to the provisions of § 42 paragraph 4 of the Act on the Constitutional Court, the Constitutional Court asked a party to the proceedings, the Municipal Court in Prague, and the secondary parties to the proceedings, (1) the Czech Bar Association, (2) the District Court for Prague 8, (3) the High Public Prosecutor's Office in Prague, and (4) the Police of the Czech Republic, Department for Detection of Corruption and Financial Criminality, to submit opinions on the constitutional complaint being examined.

On the basis of this request, the Chairwoman of the relevant Panel of the Municipal Court in Prague submitted, on 27 February 2009, her opinion on the constitutional complaint filed. She informed the Constitutional Court that she considered the petition by the District Court for Prague 8 submitted on 24 June 2008, and thereafter with clarifications as required by the chairwomen of panels in their notifications, to be a petition filed within the term specified in § 85b, paragraph 5 of the Criminal Procedure Code. She does not consider the filings dated 27 June 2008 and 14 July 2008 to be new filings, with respect to the contents of the filing dated 24 June 2008 and requests by her colleagues for amending such a petition. In terms of their merits, they form one single petition. The Chairwoman of the Panel, as she stated herself, did not comment on other objections of the complainant.

In its statement dated 17 March 2009, the Czech Bar Association stated that the constitutional complaint by the complainant is justified. They believe that, in relation to the criminal prosecution of the complainant, the bodies involved in criminal proceedings markedly erred as concerns the seized documents, including information carriers. As for the Association's position in the given case, they stated that as an entity exercising public administration the Association is obliged to see that legal regulations are observed, must not proceed or make decisions unlawfully, or participate in unlawful procedures and unlawful decisions of other bodies. The fact that the Association is a special entity within criminal proceedings, endowed with certain powers, results from § 85b paragraph 2 of the Criminal Procedure Code, under which the Association shall return to the attorney at law documents without delay after the term for filing the petition pursuant to paragraph 5 ceases without any effect. The Association needs neither instruction nor consent from a court to proceed in such a way; that means that the Association makes such a decision totally independently after its own assessment of the given circumstances. The Association in its statement objects that firstly, with sufficient time in advance, it notified the court of doubts on compliance with the term for filing the given petition. Only when the court declared that they insisted on submitting the documents and other items, and only when the complainant proved that he had filed a constitutional complaint concerning the actions taken by the court, when the Association believes such a constitutional complaint is justified,

the Association elected to follow such a course of action which eliminated its participation in actions by relevant bodies not in compliance with the law. The Association notified the court of this opinion and the reasons therefor. In spite of this, the court asked the Association to submit the given documents and when such a request was not met, the court imposed a fine on the President of the Association. Upon a complaint by the President of the Association, the resolution that imposed the fine was annulled by the High Court in Prague, and substituted with one imposing the fine on the Association. However, such procedure is also in conflict with the law and constitutional principles, as the same forces a body of public administration to proceed unlawfully. At the end of its statement, the Association proposed that the Constitutional Court grant the constitutional complaint of the complainant.

The High Public Prosecutor's Office in Prague, in its statement dated 19 March 2009, firstly incorporated their doubts regarding the actual refusal of consent from a representative of the Association, the vagueness of which then had influence, in the opinion of the High Public Prosecutor's Office, on the following procedures taken by the Municipal Court in Prague. Furthermore, the High Public Prosecutor's Office in Prague referred to incorrect measures taken by the Association when taking receipt of the seized documents from the police body, when, according to the Prosecutor's Office, the Association unreasonably refused to sign the handover documentation prepared, which, in consequence, resulted in the fact that such receipt did not take place in respect of the seized items between the Association and the Municipal Court in August 2008, prior to the actual public session. The High Public Prosecutor's Office in Prague expressed the opinion that the course of action taken by the Municipal Court in case file No. Nt 602/2008 had no support in the provisions of the Criminal Procedure Code; the petition complied with all the statutory requirements, and no more detailed identification was at all objectively possible, taking into account the fact that the same documents were sealed and handed over to the Association. The High Public Prosecutor's Office in Prague, therefore, infers that the Municipal Court was not entitled to declare that it would not take the given petition into account. In addition, the filing dated 14 July 2008 contains only information which is not compulsory for proper filing of a petition; such a filing only newly proposed a procedure for assessing the seized documents during a public session, which the judge of the Municipal Court would be able to manage in terms of the capacity of such an office. The High Public Prosecutor's Office in Prague is of the opinion that the petition dated 27 June 2008 was faultless from the procedural viewpoint, and the following petition dated 14 July 2008 was merely a specification of the original one. The Municipal Court is obliged to make a decision on the petition. The fact that the judge of the Municipal Court intends to hold a further public session on the seized documents, pursuant to § 85b of the Criminal Procedure Code, cannot cause any violation of the constitutionally guaranteed fundamental rights and basic freedoms of the complainant. Therefore, the High Public Prosecutor's Office in Prague proposed that the Constitutional Court should completely dismiss the constitutional complaint by the complainant. At the end of its statement, the High Public Prosecutor's Office in Prague raised an objection of prejudice on the part of constitutional justice Stanislav Balík for reasons specified in § 36 paragraph 1 of the Act on the Constitutional Court.

The District Court for Prague 8 and the Police of the Czech Republic, Department

for Detection of Corruption and Financial Criminality have waived, by letters dated 16 and 19 March 2009 respectively, their positions as secondary parties in proceedings on the constitutional complaint.

IV.

On 6 May 2009, the Constitutional Court decided on the objection of prejudice on the part of Justice Stanislav Balík, raised by the High Public Prosecutor's Office in Prague, in such a way that Justice Stanislav Balík was not excluded from the hearing of the case administered by the Constitutional Court under file No. II. ÚS 2894/08.

V.

As for the petition by the complainant for the issue of a preliminary injunction, the Constitutional Court could not grant the same. Through a petition for a preliminary injunction under § 80 of the Act on the Constitutional Court, the complainant demanded that the Constitutional Court should issue a decision whereby the Constitutional Court would impose on the Municipal Court in Prague that the same court, until a decision is made on the constitutional complaint, should not continue in such infringement. However, as is implied from the very nature of the case in which the petition was filed, granting such a petition would effectively mean a decision on the merits of the case, and any further proceedings on the constitutional complaint would thus become completely groundless.

VI.

Pursuant to the provisions of § 72 paragraph 1, clause a) of the Act on the Constitutional Court, a constitutional complaint may be submitted by a natural person or legal entity if they allege that their constitutionally guaranteed fundamental right or basic freedom was violated by a legally effective decision, measure or some other encroachment by a body of public power. In the matter under assessment, the complainant protests against "other encroachment by a body of public power", specifically against the procedure applied by the Municipal Court in Prague in the case administered under file No. Nt 603/2008, on a petition for substitution of consent from a representative of the Czech Bar Association under § 85b paragraph 3 of the Criminal Procedure Code, when such a court unreasonably ordered a public session and thus hindered the secondary party from releasing documents in both printed and electronic form.

If the Constitutional Court grants the constitutional complaint aimed against other encroachment by a body of public power, the Constitutional Court shall "enjoin the authority from continuing to infringe this right or freedom and order it, to the extent possible, to restore the situation that existed prior to the infringement" [§ 82 paragraph 3, clause b) the Act on the Constitutional Court].

The Constitutional Court has previously adjudicated (for example, file No. IV. ÚS

349/99 at <http://nalus.usoud.cz/>) that within the stage of preparatory proceedings, a procedural action or a decision, such as a resolution on initiation of a criminal prosecution or a decision on placement in custody, may be subjected to review by the Constitutional Court only under a circumstance of infringement of fundamental rights and basic freedoms taking place which would not be reparable otherwise (such as, for example, placement in custody, detention, detention and opening of consignments and suchlike). The point is that the system of constitutional judiciary is based in particular on the principle of reviewing cases which have been legally effectively concluded, in which unconstitutionality cannot be remedied in any other way, that is firstly through procedural means which are provided by the relevant procedural norms regulating any given proceedings. The powers of the Constitutional Court thus especially relate to legally effective decisions by bodies of public power. The right to review some other encroachment by a body of public power is given only under the condition of a remedy being unfeasible in any other manner. The term “other encroachment” by a body of public power must be understood in such a way that the same represents endangerment of the existing status, when such an attack in itself is not an expression or a result of proper decision-making powers of such bodies, as such exceeds standard review proceedings or other types of proceedings and, therefore, such an attack cannot be opposed in any other way than through a constitutional complaint.

The Constitutional Court states that the facts mentioned above make it possible to conclude that the contested decision is, in relation to the complainant, of the nature of “other encroachment” by a body of public power and is capable of infringing the fundamental rights of the complainant, while no means of remedy is available to the complainant other than a constitutional complaint. Therefore, the Constitutional Court has subjected the course of action employed by the court to substantive review and concluded that the constitutional complaint is justified.

The Constitutional Court wishes to say that it has, in earlier decisions, dealt with the conditions of actions of bodies involved in criminal proceedings during searches of homes and searches of other premises at which an attorney at law practises the legal profession. In its Resolution dated 21 January 1999, file No. III. ÚS 486/98, the Constitutional Court responded, inter alia, to an objection that through steps taken by a police body during a search of other premises, the provisions of § 21 of the Act on the Legal Profession, regulating the obligation of the attorney at law to maintain confidentiality on all facts of which they learn in connection with the provision of legal services, were violated. The Constitutional Court stated that the statutory obligation to maintain confidentiality pertaining to the attorney at law is an obligation imposed by the state, and, therefore, also a generally protected one (§ 21 of the Act on the Legal Profession). At the same time, the Constitutional Court emphasised that it is not a privilege of the attorney at law which should establish an exemption from the generally valid legal order, but it is an obligation imposed on the attorney at law in the interest of their clientele and for the protection of the same, and such an obligation, in this sense and to this scope, also enjoys appropriate protection. In the decision specified above, the Constitutional Court also stated that if, in contradiction with the procedural state of the case, the police bodies detain a computer’s central processing unit removed from the attorney at law within the scope of a search, even though such a unit should have

been released, then such a fact relates not only to the constitutionally guaranteed fundamental right pursuant to Article 36 paragraph 1 of the Charter, but also the right established by Article 11 paragraph 1 of the Charter.

This decision was followed by a Resolution of the Constitutional Court dated 28 March 2002, file No. IV. ÚS 2/02 (published in Collection of Judgments and Rulings of the Constitutional Court, Volume 25, No. 11, p. 385 et seq.), in which the Court stated that in executing a search of other premises, when order for the same was based on compliance with statutory conditions, computers, relevant equipment and recording media, and possibly copies of the same may be seized as items important for criminal proceedings, even when there is a possibility that the seized information carriers contain, in addition to records on facts important for criminal proceedings, also information on facts which do not relate to criminal proceedings under progress, and to which the state-imposed or state-acknowledged obligation to maintain confidentiality relates. At the same time the Court emphasised, however, that it is self-evident that it is necessary to proceed in accordance with the principles of proportionality and restraint (§ 2 paragraph 1 and § 52 of the Criminal Procedure Code) which consist of the fact that bodies involved in criminal proceedings will infringe the fundamental rights and interests protected by law on the part of such persons against whom criminal proceedings are not administered to the least possible extent.

The provision of sufficient safeguards of national law for the protection of a confidential relationship between the attorney at law and their clients was commented on, when interpreting Article 8 of the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to only as the “Convention”), also by the European Court of Human Rights, which, for example in the case of *Niemitz v. Germany* (Judgment dated 16 December 1992, A/251-B, § 30), dealt with a search undertaken at an office of an attorney at law and, amongst other points, emphasised the necessity of procedural safeguards against disproportional infringements of professional secret, non-compliance with which may have an adverse impact on proper execution of justice and on the trust of clients towards the attorney at law.

VII.

As an introduction it is necessary to state that, as results from the appended files, the searches in question were ordered in accordance with the provisions of § 83 of the Criminal Procedure Code. The order for such searches was issued within the scope of the preparatory proceedings by a judge, was given in writing, the premises at which the searches were to be executed were specified, and the order was substantiated. The constitutional complaint was not aimed against the orders for the execution of the searches alone.

In the given case, the essence of the objections of the complainant consists of the fact that within the scope of the searches at the residence of the attorney at law and the premises of his office, on 18 June 2008, written and other documents were seized, with respect to which the representative of the Association did not grant consent pursuant to § 85b paragraph 1 of the Criminal Procedure Code; it was

possible to substitute such consent only through a decision of a court upon a petition by the body which ordered said search to take place. The complainant is convinced that the repeated petition, which is registered by the Municipal Court in Prague under file No. Nt 603/2008, was filed late, pursuant to § 85b paragraph 5 of the Criminal Procedure Code. According to the complainant, therefore, the court should have proceeded pursuant to § 85b paragraph 6 of the Criminal Procedure Code, should not have taken the petition into account and should not have ordered a public session for hearing such a petition. Therefore, the Constitutional Court dealt with the fact whether the course of action employed by the Municipal Court in Prague in case file No. Nt 603/2008, or the interpretation of the provisions of § 85b paragraph 6 of the Criminal Procedure Code employed by the same court, constituted or not an inadmissible infringement of the complainant's constitutionally guaranteed rights.

As has already been emphasised in the case law of the Constitutional Court, the reference criterion for the Constitutional Court is not constituted by ordinary law, but constitutionally guaranteed fundamental rights resulting both from the Charter and from international treaties on human rights and basic freedoms. The fundamental rights and freedoms in the sphere of ordinary law indeed function as regulative ideas, wherefore the complexes of norms for ordinary law work as a sort of contentual superstructure. Interpretation and application of norms of ordinary law cannot be conducted totally autonomously, that is irrespective of the protection of the fundamental rights of an individual resulting from norms of the constitutional order of the Czech Republic.

Interpretation and application of regulations of general law is unconstitutional if the same inadmissibly aggrieves any of the fundamental rights and basic freedoms, possibly omits other possible interpretation - a constitutionally conforming one - or is an expression of clear and unjustified aberration from the standards of interpretation as respected in judicial practice (and so represents unpredictable arbitrariness in interpretation), or is in conflict with the generally shared principles of fairness (cf. decision in case file No. III. ÚS 269/99).

In the case under consideration the Constitutional Court found out that on 18 June 2008, on the basis of orders for searches pursuant to § 83 paragraph 1 of the Criminal Procedure Code, the above-specified searches at the premises of the house and law office of the complainant were conducted. A properly appointed representative of the Association was present at the searches mentioned above. With respect to the nature of the documents seized, the release of which was not approved by the complainant, the police body conducting the search asked that consent be granted by the representative of the Association with respect to familiarisation with the contents of said documents. The representative of the Association refused to grant such consent. The Constitutional Court further ascertained that subsequently the seized documents were handed to the Association. Thereafter, three petitions pursuant to § 85b paragraph 3 of the Criminal Procedure Code were consecutively sent to the Municipal Court in Prague. The Municipal Court in Prague decided on the first petition, dated 19 June 2008, administered under file No. Nt 601/2008, by a Notice dated 26 June 2008 and ruled that said filing should not be taken into consideration. As for the second petition, dated 26 June 2008, administered under file No. Nt 602/2008, the Municipal Court

in Prague, in a Notice dated 30 June 2008, stated that again the petition could not be granted, this for uncertainty of the same. The petition, third in the sequence, filed with the Municipal Court in Prague on 14 July 2008, is administered under file No. Nt 603/2008 and is the subject of the constitutional complaint presently under examination.

According to § 85b paragraph 1 of the Criminal Procedure Code, when a search of a home or search of other premises is conducted with respect to premises at which an attorney at law practises the legal profession, if such premises may hold documents which contain facts covered by the obligation of an attorney at law to maintain confidentiality, the body conducting the official act is obliged to request participation by the Czech Bar Association; the body conducting the official act is entitled to familiarise themselves with the contents of such documents only in the presence of and upon consent from a representative of the Association, who is appointed by the President of the Association from amongst the number of its employees or attorneys at law. The standpoint of such a representative of the Association must be specified in the record pursuant to § 85 paragraph 3 of the Criminal Procedure Code. According to § 85b paragraph 2 of the Criminal Procedure Code, should the representative of the Association refuse to grant consent according to paragraph 1, the documents must be, in the presence of the body conducting the official act, the attorney at law and the representative of the Association, safeguarded in such a way that no person may familiarise themselves with the contents of such documents, or destroy or damage the same; immediately thereafter, the given documents must be handed over to the Association.

In accordance with § 85b paragraph 3 of the Criminal Procedure Code, in the case specified in paragraph 2, the first sentence, consent from a representative of the Association may be substituted, upon a petition from the body which ordered the search of a home or search of other premises, with a decision of a judge of a court of immediate superiority employing a chairperson of a panel or a judge, who is entitled, pursuant to § 83 paragraph 1 and § 83a paragraph 1, to order a search of a home or a search of other premises. According to § 85b paragraph 5 of the Criminal Procedure Code, such a petition must be filed within a period of 15 days from the date when the representative of the Association refused to grant consent to familiarisation with the contents of the documents.

According to § 85b paragraph 6 of the Criminal Procedure Code, the judge shall not take into consideration a petition which does not contain all the items required or which is incomprehensible or uncertain; the provisions of § 59 paragraph 4, the third and fourth sentences, shall not be applied. The judge proceeds analogously if the petition is filed late or by a person who is not entitled to file such a petition. The judge shall inform without delay the petitioner and the Association of this course of action. According to § 59 paragraph 4, the third and fourth sentences of the Criminal Procedure Code, if (note: the filing) fails to meet the above requirements, the body involved in criminal proceedings shall return the same to the sender, if the sender is known, so that the same may be amended, together with relevant instructions on how to rectify the deficiencies. At the same time, they shall specify a term for such rectification.

The obligation to maintain confidentiality is the basic precondition for the

provision of legal aid and thus a necessary condition for a democratic society to function. The practice of the profession of an attorney at law is based on a confidential relationship between the attorney at law and the client, and on the trust of the client in the confidentiality of the attorney at law. The Constitutional Court has stated earlier that this is in no instance a privilege of the attorney at law which should be the basis for exemption from a generally valid and binding legal order, but it is an obligation imposed on the attorney at law in the interests of their clients and for their protection. In such a sense, professional secret and maintaining the same by the attorney at law is endowed with relevant protection, this particularly in situations when such an obligation by the attorney at law may be endangered, for example, precisely in cases such as a search of a home of an attorney at law or at their office.

As is implied from the explanatory report to the amendment to the Criminal Procedure Code, made by Act No. 79/2006 Coll., the provisions of § 85b mentioned above, which regulate the course of action taken by state bodies conducting searches and by the Association in the case that the documents seized could be covered by the obligation on the part of the attorney at law to maintain confidentiality, were incorporated in the Criminal Procedure Code in the interest of protection and legal certainty of clients of the given attorney at law. The rights of third parties are, within this procedure, in the first place protected by the representative of the Association, the task of whom is to voice their opinion on the nature of the documents seized and the possibility of their release. The reasons for which the representative of the Association might refuse to give consent to familiarisation with the documents may be reviewed solely by a court, this only upon a petition to this effect, the contents of which are defined by paragraph 4 of the above-specified provisions, and which must be filed within a period of 15 days from the refusal to grant consent from the representative of the Association. It is necessary to emphasise that possible substitution of consent from a representative of the Association with a decision by a judge can be in no case interpreted as a possibility of relieving the attorney at law of the obligation to maintain confidentiality concerning data contained in the documents seized. The reason for substituting such consent generally consists only of the fact that the obligation to maintain confidentiality does not apply to such documents.

In the matter now under consideration, there is no need to doubt that the representative of the Association on the day when the searches took place, that is 18 June 2008, refused to grant consent for familiarisation by the police body conducting the home search with the contents of the documents seized. In spite of the fact that the relevant records on the searches do not contain a specific refusal of the given consent of the representative of the Association (the representative of the Association only stated “that he believes that the seized documents should be handed by the police body to the Association”), such a circumstance must be interpreted in such a way that if the representative of the Association did not grant the consent explicitly, then such consent was not granted at all. The course of a term of 15 days for filing a petition pursuant to § 85b paragraph 3 of the Criminal Procedure Code, whereby dissent of the representative of the Association could possibly be overruled, results from the provisions of § 60 paragraph 1 of the Criminal Procedure Code, according to which the term specified in days does not include that day on which the event determining the commencement of the term

(refusal of the consent) took place. This term must be observed by the petitioner, since the procedure pursuant to § 61 paragraph 1 of the Criminal Procedure Code, whereby the court might possibly restore the term, is, due to the nature of the case, inapplicable here, as this is not a remedy of a defendant or their defence counsel, and also, the provisions of § 85b paragraph 6 of the Criminal Procedure Code explicitly bar prolongation of such a term through the action of a court according to § 59 paragraph 4, the fourth sentence of the Criminal Procedure Code. As the term in the case under consideration commenced on 19 June 2008, it ceased on 3 July 2008. From the provisions of § 85b paragraph 6 of the Criminal Procedure Code it may be inferred that solely within this period of time it was possible to file a faultless petition which the court could hear, since the possibility of removing errors in the petition in an additionally provided term was thereby unambiguously eliminated.

The Constitutional Court declares that when the petition in the case under consideration was filed on 14 July 2008 with the Municipal Court in Prague, then it was not possible to consider said petition, with respect to the unambiguous interpretation of the provisions of § 85b paragraph 6 of the Criminal Procedure Code, to be a mere amendment to previous petitions, which the court earlier had not taken into consideration and on which the court had not decided at all, but a separate petition, where the requirements for such a petition and the terms and conditions for filing the same should have been examined by the court as to the date of the filing of the petition. When such petition was, as detailed above, filed late, the Municipal Court in Prague should not have taken the same into account and dealt with the same, of which the court should have informed the Association and the complainant without delay. The opposite interpretation of the provisions in question, employed by the Municipal Court in Prague in its actions taken in the case being adjudicated, has deviated from the standards of interpretation and thus also from the boundaries of constitutionality. The Municipal Court in Prague interpreted the provisions above not only in contradiction with the purpose of the same, but also in conflict with their linguistic interpretation, whereby the court inadmissibly infringed the complainant's constitutionally guaranteed right to judicial protection according to Article 36 paragraph 1 of the Charter.

The relevant records on conducting the searches further make it clear that during the same, almost ten computers were detained, as well as hard disks and mobile phones, which, in conflict with the above-specified procedural state of the case, it has not been possible to return to the complainant to the present time, whereby also the complainant's constitutionally guaranteed right to own property pursuant to Article 11 paragraph 1 of the Charter has been undoubtedly aggrieved.

In this connection it is impossible to omit that the complainant has in no way lost his authorisation to practise the legal profession. The complainant, on a permanent basis and for a fee, provides legal aid as an attorney at law as his vocation; within his activities, liabilities (and receivables) arise or may arise towards clients, the rights and legitimate interests of whom he is obliged to protect and enforce (§ 16 of the Act on the Legal Profession). The nature of his activities, therefore, relates to both the interests of the complainant and those of other parties. The provisions of § 3 paragraph 1, the first sentence of the Act on the Legal Profession, establish the fundamental principle for practising the legal profession, that is independence

of the attorney at law. This independence works primarily to the benefit of clients of the attorney at law, and is not a privilege of the attorney at law, but rather its protection is the attorney's obligation relating to the practice of their profession. Breaking the independence of an attorney at law without statutory reasons then means an infringement both of the rights of the clients and of synallagmatically established obligations and rights of the attorney at law related to the practice of their profession. In the given case, the matter concerns not only detaining the computers and related equipment, but also the information and documents stored on such computers, which the attorney at law is obliged by law to reasonably keep on file with respect to the provision of legal services (§ 25 paragraph 1 of the Act on the Legal Profession), and which they necessarily need for the proper practice of the legal profession. Clearly, these circumstances necessarily restrain the complainant in his activities and ability to discharge his obligations in the provision of legal aid, this beyond the scope of fulfilling the purpose of the criminal proceedings (§ 1 paragraph 1 of the Criminal Procedure Code). Therefore, as a consequence, the above-specified course of action taken by the Municipal Court in Prague also represents an infringement of the complainant's right to engage in commercial and economic activity under Article 26 paragraph 1 of the Charter. The point is that this right includes also the obligation on the part of the bodies involved in criminal proceedings to respect the attorney at law's obligation to maintain confidentiality, serving to protect the clients of the attorney at law, and thus the confidentiality of the attorney at law as a precondition for the practice of the legal profession, the same forming the attorney at law's business.

For the reasons specified above, the Constitutional Court grants the constitutional complaint and in accordance with the provisions of § 82 paragraph 1, paragraph 2 clause a), and paragraph 3 clause b) of the Act on the Constitutional Court declares that:

I.) the Constitutional Court enjoins the Municipal Court in Prague from continuing to violate the constitutionally guaranteed rights of the complainant guaranteed by Article 36 paragraph 1, Article 26 paragraph 1, and Article 11 paragraph 1 of the Charter of Fundamental Rights and Basic Freedoms;
II.) the Constitutional Court orders the Municipal Court in Prague to cease inhibiting the Czech Bar Association from returning to the complainant the deposited documents seized during searches held on 18 June 2008 and specified in detail in records on conducting the searches dated 18 June 2008, ČTS: OKFK-182/TČ-2008-18 and ČTS: OKFK-182/TČ-2008-18-B.

Note: Decisions of the Constitutional Court cannot be appealed.