2003/06/03 - II. ÚS 405/02: PENSION INSURANCE

HEADNOTES

In this case § 61 of Act no. 155/1995 Coll., on Pension Insurance, by referring to an international agreement, imposes a different manner of calculating the amount of an early pension, depending on the criterion of the location of a citizen's employer's registered address. If a Czech citizen (with permanent residence in the CR) was employed in the Slovak Republic at that time, in terms of pension insurance this is considered "employment abroad," which has negative consequences for his pension entitlements in the Czech pension insurance system.

The Constitutional Court considers differentiation between citizens of the Czech Republic, which is based on a fiction that employment in the Slovak Republic of the then joint Czechoslovak state is "employment abroad," to be discriminatory, as it is not supported by "objective" and "reasonable" grounds.

The CR's international obligations vis-à-vis the SR, whose effects are also aimed into the past an into the legal situations of their citizens, which were created and developed inside Czechoslovakia and the Czechoslovak legal order, must respect certain constitutional bounds.

The complainant met the condition of a minimum number of years of insurance required by § 31 para. 1 of Act no. 155/1995 Coll. in the time when the joint Czechoslovak state existed. The Constitutional Court believes that application of an international agreement on the basis of § 61 of that Act can not lead to retroactively denying him fulfillment of that condition. This is inconsistent with the principle of legal certainty and the foreseeability of law, which form the very basis of the concept of a state governed by the rule of law. The concept of a state governed by the rule of law must be understood not in isolation, but in connection to the constitutional requirement of respect for the rights and freedoms of the human being and the citizen, as is stated in Art. 1 para. 1 of the Constitution. This constitutional requirement of respect for rights and freedoms must also be preserved when applying an international agreement, all the more so because international law itself honors the principle that "ratification of international agreements does not affect more advantageous rights, protection and conditions provided and guaranteed by domestic legislation" (see Constitutional Court judgment of 24 May 1995, published under no. 164/1995 Coll.).

The Constitutional Court is not authorized to evaluate the constitutionality of an already ratified international agreement. On the other hand it is required to be guided by Article 88 para. 2 of the Constitution, under which the judges of the Constitutional Court are bound in their decision making only by the constitutional order and the statute under par 1. The Agreement between the CR and the SR on Social Security is not an agreement which could be considered a component of the constitutional order (see Constitutional Court judgment of 25 June 2002, published under no. 403/2002 Coll.). It is also not an agreement under Art. 10 of the Charter, in the version before the "Euro-amendment." As its preamble clearly indicates, its purpose was not to secure the fundamental rights and freedoms of citizens. The parties were guided by

"the desire to regulate their relationships in the area of social security." Therefore, the Constitutional Court can not accept as constitutional an application of one of its provisions which would result in a situation which is not in accordance with the Charter or the Constitution as parts of the constitutional order.

CZECH REPUBLIC
CONSTITUTINAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

A Panel of the Constitutional Court decided, in the matter of the petitioner J.H., on a constitutional complaint against a verdict of the High Court in Olomouc of 21 March 2002, ref. no. 2 Cao 249/2001-27, with the participation of the High Court in Olomouc as a party to the proceedings and the Czech Social Security Administration, Prague 5, as a subsidiary part to the proceedings, as follows:

The verdict of the High Court in Olomouc of 21 March 2002, ref. no. 2 Cao 249/2001-27, is annulled.

REASONING

In a timely filed constitutional complaint, which reached the Constitutional Court on 20 June 2002 and otherwise met the conditions prescribed by Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations (the "Act on the Constitutional Court"), the complainant contested the verdict of the High Court in Olomouc cited in the heading. He claims that the High Court's decision did not respect the principle of observing obligations arising from accepted international agreements, denied the complainant the right to material security in old age in an amount corresponding to the length of the insured period, and the level of income and taxes and insurance premiums deducted from it, and thereby violated Article 1 of the Charter of Fundamental Rights and Freedoms (the "Charter"), which guarantees citizens' equal rights. He petitioned the Constitutional Court to annul the contested verdict.

For its discussion and decision in the matter, the Constitutional Court requested the file of the Regional Court in Brno, file no. 41 Ca 201/2000, from which it determined the following:

The Czech Social Security Administration in Prague (the "subsidiary party") by its decision of 22 November 1999, with effect as of 1 July 1999, assigned the complainant a partial early old age pension of CZK 494 per month (with effect as of 1 August 1999 it increased it to CZK 514 per month), on the grounds that the amount of the pension corresponds to the period insured in the Czech Republic from 1 August 1995 to 30 June 1999. The complainant then applied for an increase in the pension, asking that his period of employment in the joint state until 31 December 1992 also be included. On 26 October 2000 the subsidiary party rejected his application on the grounds that periods of employment until 31 December 1992 are, under the Agreement on Social Security concluded between the CR and the SR under no. 228/93 Coll. (the "Agreement"), Slovak periods. The complainant filed an appeal against this decision. The Regional Court in Brno, by a verdict of 6 June 2001, ref. no. 41 Ca 201/2000-15, confirmed the contested decision. It based its legal opinion on the determination that the complainant worked from 16 October 1962 to 31 July 1995 for an employer whose registered address was in the territory of the Slovak Republic. Thus, it considered this period to be a period insured abroad. It concluded that the subsidiary party proceeded correctly in setting the level of pension, when it applied Article 11 of the Agreement and § 31 of the Act on Pension Insurance. It pointed out that if the Agreement did not exist, the complainant could not be assigned an early old age pension at all, as he would not have met the required insured period in the Czech Republic, and Act no. 100/1988 Coll., which is in effect in the Slovak Republic, does not recognize an early old age pension.

The complainant appealed against the decision of the Regional Court in Brno. He referred to the conclusions of the Supreme Court of the CR reached in proceedings under file no. 30 Cdo 120/98 and stated that if the Agreement did not exist, the subsidiary party would consider the Czechoslovak employment period as its own. He pointed to the fact that the Slovak side can not address the question of whose the "Czechoslovak period" is, as it does not recognize early old age pensions. He pointed out that the court did not apply in its decision the principle "not to damage, by the existence of the Agreement, a citizen who is a permanent resident of a state, under the legal regulations of which his entitlement would be more advantageous without the Agreement."

The High Court in Olomouc confirmed the contested decision in its verdict of 21 March 2002, ref. no. 2 Cao 249/2001-27. It stated that the subsidiary party, in calculating the complainant's early old age pension, proceeded in accordance with the Act on Pension Insurance and the Agreement. It found no defects in its procedure when calculating the partial early old age pension. In the opinion of the appeals court, the complainant's other request can not be granted. The High Court pointed out that after the division of the CSFR the complainant's employment period from 16 October 1962 to 31 July 1995 must be considered a period of employment abroad, as it was performed in the territory of the Slovak Republic. The period until 31 December 1992 can not be separated from this period as a Czechoslovak period, as this is not possible under either the Act on Pension Insurance or the Agreement. Under the Act on Pension Insurance it would be possible to include as the complainant's insured period for calculating the pension amount only the time from 2 April 1959 to 31 December 1959, from 1 January 1960 to 15 October 1962, and from 1 August 1995 to 30 June 1999, i.e. a total of 10 years and 214 days. The court concluded that if only domestic regulations are applied, the complainant would have no entitlement to an early old age pension, as he would not meet the condition of the necessary insured

period, i.e. a period of at least 25 years. According to the appeals court, the Supreme Court verdict file no. 30 Cdo 120/98 can not be applied to this case. The beginning assumption for the procedure contained in this verdict was the fact that the applicant, unlike the complainant, met the required insured period in the territory of the Czech Republic. The High Court reached the final conclusion that the subsidiary party's decision denying the complainant's application for a change in the amount of the partial early old age pension due to lack of fulfillment of the conditions of § 56 of the Act on Pension Insurance, with the application of Art. 11 and 20 of the Agreement, is a "lawful decision."

The complainant contested the decision of the High Court in Olomouc in the adjudicated constitutional complaint. In it he points to the advantages and disadvantages of the criterion set in the Agreement for determining which of the states parties will bear the expenses for pensions during the period of the joint state, as being the location where the employer had its registered address as of the day the federation was divided. He understands the fact that his entitlement was evaluated under Slovak regulations. However, he does not agree that he should bear the negative consequences, i.e. that after 40 years of work in his own country he should be left with a pension in the amount of about two thirds of the pension which his fellow citizens receive for the same period and the same income. He points out that the citizens of both republics were assured that dividing the federation would not affect their entitlements. After 1993 the Ministry of Labor and Social Affairs also passed a measure to even out the pension level to the level of pensions given under Czech regulations. However, since mid-1998 it has been gradually ceasing to implement it. The complainant points to other social international agreements which respect the fundamental principle of not damaging the citizen through such an agreement. However, in his opinion, the providers of pension insurance here ignore this principle. He believes that the creators of the Agreement also did not intend to not resolve the negative situation of many retirees on the Czech side, although on the other hand they did not expect the possibility that the economic situation in the two newly-created countries would not develop the same way. He states that if the Agreement had not been concluded, he would be entitled to an early old age pension under Czech regulations, for 37 years worked in Czechoslovakia, and for 3 years of insurance in the Czech Republic after 1992. Only the period of insurance in the Slovak Republic after 1992 would not be included in calculating the amount of the pension. The reality is such that after 40 years of employment in his own country he received a pension of CZK 514. Thus, the existence of the Agreement became for the complainant, who always had permanent residence in the territory of the Czech Republic, a disaster which, he claims, is unparalleled in the practice of international agreements in the area of social security. He points to the extraordinary measures of the Ministry of Labor and Social Affairs on removing harshness and to a number of examples from actual practice where, especially in recent years, the decision making of the allocation commission, which evaluates individual applications for balancing contributions as a way of removing harshness, is discriminatory. The government ombudsman also pointed this out in his summary report on his activities in 2001. However, the complainant is not entitled to a balancing contribution. He also is not entitled to an early old age pension from the Slovak side, as such a pension does not exist in Slovakia. He was given only a partial pension. According to the complainant, this situation could be corrected by allocating him a "temporary early pension" until the time when he becomes entitled to an old age pension under Slovak regulations.

The complainant points to the contested decision of the High Court in Olomouc, under which the complainant is not entitled to an early pension either under the Agreement or under domestic regulations. He believes that this conclusion is inconsistent with not only the purpose of concluding bilateral social agreements (to not deprive a citizen of an entitlement only because he worked in the other contracting state), but also the citizen's right to rely on future security in old age, if for a number of years he met the conditions required by his own state. According to the complainant, the High Court also did not respect the principle of the Agreement concerning division of expenses and related to the time of the joint state. It handled the complainant's objection, pointing to the legal opinion of the Supreme Court stated in decision file no. 30 Cdo 120/98, by retroactively dividing employment until 1992 into periods in the territories of the Czech Republic and of the Slovak Republic which, however, the Supreme Court did not do in the cited verdict. Without any support whatsoever, the court evaluated the complainant's case using a different criterion than is contained in the Agreement itself. The complainant is convinced that the practice which the High Court in Olomouc confirmed in the contested verdict also violates the principles of the multilateral ILO convention no. 102 concerning Minimum Standards of Social Security (published under no. 461/1991 Coll.) and the European Social Security Code. He believes that payment of the full Czech early old age pension until such time as he becomes entitled to a "normal" Slovak old age pension would not be inconsistent with the aim of Article 20 of the Agreement. He points to a number of examples in practice and states that an international social agreement can not annul or amend the laws of a state party. The incorrect interpretation applied by the High Court would mean that a state party ceases to fulfill its obligations vis-à-vis its citizens, arising from its own laws, or permits some of its citizens to receive worse security than others. In contrast, the previous practice respected the legal opinion of the Supreme Court of the CSR, stated in decision file no. Cpj 232/73, under which the fact that the Czechoslovak state concluded an agreement on social insurance with another state may not, under any circumstances, be to the detriment of a Czechoslovak citizen's pension entitlements. Such an agreement can bring benefits for the citizen, but may not reduce his lawful entitlements under Czechoslovak regulations. This principle is also used in the case law of the Constitutional Court, which stated, in judgment file no. Pl. ÚS 31/94, that "ratification of international agreements does not affect the more advantageous rights, protection and conditions provided and guaranteed by domestic legislation." The complainant points to differing judicial practice in addressing these issues, where some courts respect the abovementioned legal opinion of the Supreme Court (e.g. decisions by the High Court in Prague, file no. 12 Cao 12/96, the Regional Court in Ostrava, file no. 21 Ca 280/99, the Regional Court in Brno, file no. 22 Ca 68/99, 22 Ca 69/99, and the Supreme Court in Brno, file no. 30 Cdo 120/98), but other courts do not. The contested verdict of the High Court in Olomouc can be included in the second category. Yet, with regard to the gravity of this issue, in view of the legal certainty of citizens, court decisions should be foreseeable and practices should be uniform.

The complainant further points to Act no. 100/1932 Coll., on the domestic applicability of international agreements on social insurance. He states that the Agreement and domestic law apply side by side. However, in his opinion the rule on priority application of the Agreement does not mean that it has higher legal force, but indicates the order of application.

Thus, the complainant is convinced that he should be allocated an "interim" old age pension under Act no. 155/1995 Coll., on Pension Insurance, for the period from 1 July 1999 to 2 April 2001, i.e. for the entire time of employment in the joint state and the period of insurance obtained in the Czech Republic after 1992, until such time as he becomes entitled to an old age pension under Slovak regulations. The decision of the High Court in Olomouc did not respect the fundamental principles of a state governed by the rule of law and denied the complainant his right to material security in old age in an amount corresponding to the length of the insured period, the level of income, and the taxes and insurance premiums deducted from it. It thereby violated Article 1 of the Charter on the equal rights of citizens.

The Constitutional Court, under § 32 of the Act on the Constitutional Court, called on the party to the proceedings, the High Court in Olomouc, and the subsidiary party to the proceedings, the Czech Social Security Administration in Prague, to submit statements on the adjudicated constitutional complaint.

The constitutional complaint is justified.

The Constitutional Court has emphasized many times in the past that it is fundamentally not authorized to intervene in the decision making activity of the general courts, as it is not the top of that system (cf. Art. 81, Art. 90 of the Constitution). If the courts proceed in accordance with Chapter Five of the Charter, it cannot assume the right of review over their activity (Art. 83 of the Constitution). On the other hand, however, it is authorized to evaluate whether proceedings as a whole were fair and whether they violated the complainant's fundamental rights or freedoms guaranteed by the Charter or the Constitution. In the past the Constitutional Court has repeatedly acknowledged that the interpretation and application of legal regulations by the general courts can be, in some cases, so extreme, that they diverge from the bounds of Chapter Five of the Charter and thus interfere with a constitutionally guaranteed right. In that case it is within the powers of the Constitutional Court to annul the contested decision (cf., e.g., II. ÚS 433/98, or II. ÚS 474/2000).

The Charter states in Art. 30 para. 1 that "Citizens have the right to adequate material security in old age and during periods of work incapacity, as well as in the case of the loss of their provider. The subject of this right is a "citizen," although previously valid laws used this concept to mean "resident with permanent residence in the territory of the CR." The adequacy of pension security payments means commensurateness to the earnings of a given "citizen" before the entitlement to a pension arose. The complainant is a citizen of the CR, has permanent residence in the territory of the CR, and was given a partial early old age pension in the amount specified above, which, in his opinion, is much less than he should be entitled to as an ordinary Czech citizen in the pension insurance system (see p. 18 of the constitutional complaint). The Czech Social Security Administration and the general courts calculated the amount of the pension taking into account the wording of the agreement between the CR and the SR on social security of 29 October 1992, which gives as a criterion for calculation of the amount of pension the location of the employer's registered address. In view of the fact that the complainant was employed by an employer with its registered address in Myjava, SR, the agreement refers to Slovak law. Slovak law, of course, does not recognize the institution of an early old age pension. The High Court,

as the appeals court, confirmed the procedure and the decision of the Czech Social Security Administration and the court of the first level, and described them as "lawful."

The provision of § 61 of Act no. 155/1995 Coll., on Pension Insurance, which was applied in this matter, really does require, in the matter of setting the base amounts and percent amounts of a partial pension, applying the international agreement first, so the procedure of the Czech Social Security Administration and the general courts was prima facie lawful.

The Constitutional Court does not agree with the manner in which the High Court understood the concept of lawfulness in its decision. The Constitution of the CR, in Art. 1 para. 1 (before the "Euro-amendment" of Art. 1), at the beginning of the fundamental provisions, states that, "The Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens." Thus, it is evident that the framers of the Constitution did not connect the constitutional existence of the Czech state with a mere formal postulate of a "state governed by the rule of law," but with a state governed by the rule of law whose real effect is respect for the rights and freedoms of man and of citizens.

In this case the law (by referring to an international agreement) imposes a different manner of calculating the amount of an early pension, depending on the criterion of the location of a citizen's employer's registered address. Art. 1 of the Charter provides that people are free, have equal dignity, and enjoy equality of rights. Art. 3 para. 1 of the Charter declares that everyone is guaranteed the enjoyment of her fundamental rights and basic freedoms without regard to differences based on factors cited in the paragraph, or on "other status." Thus, this provision of the Charter provides a ban on discrimination in the enjoyment of any of the rights guaranteed by the Charter. The Constitutional Court thus had to answer the question whether the interpretation and application of the relevant statutory provisions by the Czech Social Security Administration and the general courts, relating to the complainant's exercise of his right to "adequate material security in old age" (Art. 30 para. 1) is a discrimination which is forbidden by Art. 3 para. 1 of the Charter.

Not every differentiation between citizens is of a discriminatory nature. Different treatment of citizens is constitutionally acceptable if it is based on "objective" and "reasonable" grounds. In this case the differentiation is based on whether a citizen of the CR was, during the existence of the Czechoslovak state, employed by an employer with its registered address in the Czech Republic or in the Slovak Republic. If a Czech citizen (with permanent residence in the CR) was employed in the Slovak Republic at that time, in terms of pension insurance this is considered "employment abroad," which has negative consequences for his pension entitlements in the Czech pension insurance system.

The Czech Republic and the Slovak Republic were created as of 1 January 1993 by the division of the joint Czechoslovak state. This joint state was characterized by a uniform pension insurance system, and so, in terms of the law at the time, it was legally irrelevant, which part of the Czechoslovak state a citizen was employed in, or where his employer had its registered address. Czech National Council constitutional Act no. 4/1993 Coll., on Measures Connected with the Dissolution of the Czech and Slovak Federal Republic (Art. 1), implements reception of the CSFR legal order in Czech law, such that constitutional acts, statutes, and other legal regulations of the CSFR which were valid in the territory of the

CR on the day the CSFR ceased to exist remain valid. Thus, the Czech Republic accepted the principle of continuity of the legal order at the constitutional level. The cited constitutional Act of the Czech National Council is part of the constitutional order of the CR under Art. 112 para. 1 of the Constitution. Therefore, a period of employment with an employer whose registered address was in the Slovak part of the Czechoslovak state can not be seen as "employment abroad." In view of the foregoing, the Constitutional Court considers such differentiation between citizens of the Czech Republic, which is based on a fiction that employment (or the registered address of the employer) in the Slovak Republic of the then joint Czechoslovak state is "employment abroad," to be discriminatory, as it is not supported by "objective" and "reasonable" grounds.

The CR concluded the abovementioned agreement on social security with the SR as a newly-created entity under international law. It used the opportunity to exercise its sovereignty by regulating its relationships with the SR. The regulation of these relationships in the future does not create any specific problem of an international law or constitutional law nature. However, much more complicated from that point of view is the circumstance that the bilateral agreement on social security with the SR interferes with legal relationships which arose and continued to exist during the former joint state and during the time when Czechoslovak law, which was subsequently received into Czech law, was valid. The CR's international obligations vis-à-vis the SR, whose effects are also aimed into the past an into the legal situations of their citizens, which were created and developed inside Czechoslovakia and the Czechoslovak legal order, must respect certain constitutional bounds.

The Constitutional Court of the CSFR declared, in its judgment no. 15 of 10 December 1992 (Pl. ÚS 78/92), that "the principles of a state governed by the rule of law, legal certainties which can be derived from the requirement of democratic organization of the state, require that every constitutionally possible case of retroactivity be established expressis verbis in the Constitution, or in a statute, and that cases connected to it be resolved so that the acquired rights are duly protected." The Constitutional Court of the CR also accepts this principle. The complainant met the condition of a minimum number of years of insurance required by § 31 para. 1 of Act no. 155/1995 Coll. in the time when the joint Czechoslovak state existed. The Constitutional Court believes that application of an international agreement on the basis of § 61 of that Act can not lead to retroactively denying him fulfillment of that condition. This is inconsistent with the principle of legal certainty and the foreseeability of law, which form the very basis of the concept of a state governed by the rule of law.

As the Constitutional Court already emphasized above, the concept of a state governed by the rule of law must be understood not in isolation, but in connection to the constitutional requirement of respect for the rights and freedoms of the human being and the citizen, as is stated in Art. 1 para. 1 of the Constitution. This constitutional requirement of respect for rights and freedoms must also be preserved when applying an international agreement, all the more so because international law itself honors the principle that "ratification of international agreements does not affect more advantageous rights, protection and conditions provided and guaranteed by domestic legislation" (see Constitutional Court judgment of 24 May 1995, published under no. 164/1995 Coll.).

The Constitutional Court is not authorized to evaluate the constitutionality of an already ratified international agreement. On the other hand it is required to be guided by Article 88 para. 2 of the Constitution, under which the judges of the Constitutional Court are bound in their decision making only by the constitutional order and the statute under par 1. The Agreement between the CR and the SR on social security is not an agreement which could be considered a component of the constitutional order (see Constitutional Court judgment of 25 June 2002, published under no. 403/2002 Coll.). It is also not an agreement under Art. 10 of the Charter, in the version before the "Euro-amendment." As its preamble clearly indicates, its purpose was not to secure the fundamental rights and freedoms of citizens. The parties were guided by "the desire to regulate their relationships in the area of social security." Therefore, the Constitutional Court can not accept as constitutional an application of one of its provisions which would result in a situation which is not in accordance with the Charter or the Constitution as parts of the constitutional order.

Because the contested decision of the High Court in Olomouc applied the relevant statutory provisions without the requisite regard for the requirements imposed by the constitutional order, it interfered with the complainant's right to judicial protection guaranteed by Art. 36 para. 1 of the Charter. It also violated Art. 3 para. 1 of the Charter, a ban of discrimination, in connection with Art. 30 para. 1 of the Charter.

With regard to the foregoing, the Constitutional Court granted the constitutional complaint and annulled the contested decision of the High Court in Olomouc of 21 March 2002, ref. no. 2 Cao 249/2001-27, under § 82 para. 3 let. a) of the Act on the Constitutional Court.

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

Brno, 3 June 2003