2007/02/20 - II. ÚS 568/06: PROTECTION OF FAMILY LIFE

HEADNOTES

As stated above, in the constitutional complaint the petitioner claimed violation of Art. 32 par. 1 of the Charter, under which parenthood and the family are protected by the law, and which guarantees special protection to children and juveniles. This provision essentially represents an institutional guarantee, and thus binds the legislature to specifically protect the institutions of parenthood and the family. This provision can not be considered one that contains a fundamental right. This follows anyway from the fact that this provision is subject to a statutory limitation; under Art. 41 of the Charter it can be claimed only within the confines of the laws implementing it. In addition, systematically this provision is included in the category of social rights, which are considered more a component of constitutional soft law (cf. e.g. judgment file no. IV. US 8/05, in The Constitutional Court of the CR: Collection of Decisions, vol. 37, judgment no. 112, p. 453; or file no. IV. US 113/05, not yet published, electronic version available at www.judikatura.cz), in contrast to classic fundamental rights (so-called core rights).

Both Art. 10 par. 2 of the Charter, and Art. 8 of the Convention speak generally about protection of family life, or respect for family life, without, however, defining in legal terms what they mean by the term "family life." Therefore, when interpreting these provisions, it is necessary to start with the fact that the family is, in the first place, a biological connection, and then a social institution, which is only subsequently defined by a legal framework. Therefore, when interpreting these concepts, we must take into account the biological connection, and then also the social reality of the family and family life, which, of course, in the last century has undergone fundamental changes.

The family is a social group of related persons, among whom there are close ties – blood, psychosocial, emotional, economical, etc. Thus although at the level of social reality the concept of family is very changeable (as stated above, the social reality of the family has undergone successive transformations, and through them the traditional European concept of the family has disintegrated more and more noticeably, and legal regulation of the family and family life is necessarily also subject to these transformations), nevertheless it can not be overlooked that the basis of family ties is traditionally precisely the biological bond of a blood relationship between family members.

Therefore, on the one hand we can not rule out the fact that legal protection as a family can also be enjoyed by a social group of persons living outside the institution of marriage, or a group of persons not related by blood, among whom there are nonetheless the abovementioned emotional and other ties (persons living together as mates, partners living together with a child that was born to one of the parents from another relationship, etc.). And that scope of the concept of family life also arises from the case law of the European Court of Human Rights.

On the other hand, that concept of family and family life also assumes the importance of blood ties between family members. In Kroon and others v. the Netherlands the ECHR gave priority to the biological tie between the father of a child living in a de facto bond with the mother and that child, and denying the paternity of the mother's husband, over the legal situation and the legal construct of the family: ""respect' for 'family life' requires that biological and social reality prevail over a legal presumption …" (Kroon and others v. the Netherlands, par. 40).

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

A Panel of the Constitutional Court, consisting of chairwoman Dagmar Lastovecká and judges Jiří Nykodým and Eliška Wagnerová (judge rapporteur) decided on 20 February 2007 in the matter of a constitutional complaint from K. F., represented by JUDr. L. R., attorney, against a decision by the Regional Court in Pilsen of 15 June 2006, file no. 10 Co 283/2006, and against other interference by a public authority, consisting of delays in a proceeding conducted before the District Court in Domažlice, file no. P 195/2003, with the participation of the Regional Court in Pilsen and the District Court in Domažlice as parties to the proceedings, and Václav Waldmann, residing at 345 06 Úsilov 6, represented by Mgr. Vojtěch Fořt, attorney, with his registered address in Domažlice, Nadporučíka O. Bartošky 15, as a secondary party to the proceeding, as follows:

I. The decision by the Regional Court in Pilsen of 15 June 2006, file no. 10 Co 283/2006, violated the petitioner's fundamental right to protection from interference in family life, or the right to respect for family life, guaranteed by Art. 10 par. 2 of the Charter of Fundamental Rights and Freedoms and Art. 8 of the Convention on the Protection of Human Rights and Fundamental Freedoms.
II. Therefore, that decision is annulled.
III. The rest of the constitutional complaint is denied.

REASONING

I.

In her timely and duly filed constitutional complaint the petitioner contested the abovementioned decision by the general court and proposed that the Constitutional Court find that there were unjustified delays in the proceeding before the District Court in Domažlice.

As the petitioner stated in the constitutional complaint, the decision of the District Court in Pilsen-City of 14 March 2006, ref. no. 99 P 315/2005-605, appointed the petitioner as guardian of the minor Lucie Waldmannová (now Fainová), and provided that, as guardian, she would raise the minor, represent her, and manager her property instead of her parents. The decision also determined that the secondary party was to have visitation rights with the minor every even numbered week from Friday at 10:00 a.m. until Monday at 10:00 a.m. and every odd numbered week on Tuesday and Thursday from 2:00 p.m. until 6:00 p.m.

In the contested decision, the Regional Court in Pilsen changed the trial court's decision and set a different visitation period, every even week from Friday at 10:00 a.m. until Sunday at 6:00 p.m. and every even week from Thursday at 10:00 a.m. until Friday at 6:00 p.m.

The Petitioner believes that the steps taken by the general courts, and the contested decision itself, violated her constitutionally guaranteed fundamental rights, as well as the fundamental rights of the minor, specifically the fundamental right guaranteed by Art. 32 par. 1 of the Charter of Fundamental Rights and Freedoms (the "Charter"), under which the family is under the protection of the law and which guarantees special protection to children and juveniles, and the fundamental right to have a matter handled without unnecessary delay guaranteed by Art. 38 par. 2 of the Charter.

In the constitutional complaint the petitioner first described the circumstances of the entire case. The minor Lucie Waldmannová (now Fainová) was born on 2 December 2002 to Miroslava Waldmannová, whose marriage with her husband Václav Waldmann was already going through crisis, and who had an extra-marital relationship with Martin Faina, the petitioner's son. On 11 December 2003 there was a tragic traffic accident in which the minor's mother and her friend Martin Faina died.

Because at the time of the minor's mother's death her marriage with Václav Waldmann had not been dissolved, and he was legally considered to be the minor's father, after the death of her mother, a preliminary order entrusted the minor Lucie to the care of Václav Waldmann, as her legal representative. Because the petitioner had doubts about Václav Waldmann's paternity, at her instigation the Supreme State Prosecutor's Office filed a complaint to deny paternity. During that proceeding it was proved that Václav Waldmann is not the minor Lucie's biological father. A proceeding to determine paternity was subsequently begun, which determined that Lucie's biological father is Martin Faina, the petitioner's deceased son.

The Petitioner believes that the entire matter concerning her petition to have Lucie entrusted to her care took a disproportionately long time to process, despite the fact that this was an urgent matter, as Lucie was entrusted to the care of Václav Waldmann during that entire time, only on the basis of a preliminary order. In particular, the decision-making at the District Court in Domažlice involved delays, and although during the proceeding the petitioner filed requests to order hearings, to issue a final decision, and a complaint about delays in the proceeding, these delays were never explained to the petitioner. Only after the entire matter

was transferred to the District Court in Pilsen-City, after almost two years, was a decision made in the matter to appoint the petitioner as guardian and entrust the minor to her care. Therefore, the Petitioner believes that the delays in the proceeding before the District Court in Domažlice violated her fundamental right guaranteed by Art. 38 par. 2 of the Charter, as stated above.

As regards the decision by the Regional Court in Pilsen, the petitioner objected that she considers the provision of visitation between the minor and the secondary party Václav Waldmann to be unjustified, because he is a completely unrelated person to the minor, he is currently being prosecuted for extensive property crimes, the court expert did not consider his child-rearing methods to be suitable, and, not least, at the time the constitutional complaint was filed the minor had health problems in the genital area, evidently due to possible sexual abuse of the minor by the secondary party. In view of this, at the same time as she filed the constitutional petition, the petitioner filed an application to forbid him from having contact with the minor.

These circumstances lead the petitioner to conclude that in this case the court should never have ordered visitation between the minor and the secondary party. It also can not be overlooked that the visitation granted is extensive, because it is virtually joint custody, which is wider than is usual with most fathers. In this regard, the Petitioner also pointed to the fact that the Act on the Family regulates only the contact of a minor child with parents, grandparents, and siblings. The Act does not at all address the provision of visitation with a third party. Although the commentary on the Act on the Family does not strictly rule out such visitation , it is necessary in each particular case to consider primarily the rights and interests of the minor child, in particular the child's proper, peaceful, adequate and balanced development.

According to the petitioner, it is evident that the contested decision, which provided visitation with a third party, is completely inconsistent with the minor's interests, as the aim of the proceeding was supposed to be to calm the relationships, and to bring order into Lucie's life, and place her in a certain, particular, stable, and motivating environment, which, also according to an expert's assessment, the petitioner's home is. Instead, the minor is exposed to constant changes of environment; according to the petitioner moving her from place to place and delivering her to a stranger is quite certainly inconsistent with Art. 32 par. 1 of the Charter and with the principles of child protection, but also inconsistent with the purpose and content of the Convention on the Rights of the Child, based on which the general courts justified their decision.

In view of this, the petitioner proposed that the Constitutional Court annul the contested decision and find that there were delays in the proceeding before the District Court in Domažlice.

Upon a request from the Constitutional Court, the Regional Court in Pilsen, and the District Court in Domažlice, as parties to the proceeding, and Václav Waldmann, as a secondary party to the proceedings, filed responses to the constitutional complaint. The Constitutional Court then also asked for a statement from the Municipal Office in Domažlice, which had been the court-appointed guardian in the

prior proceeding, but the Constitutional Court did not receive its statement by the deadline.

In its response, the Regional Court in Pilsen referred to the reasoning in its decision, and added that the trial court decision was changed only for practical reasons. The change did not change the extent of visitation that had been set by the trial court, only improved the timing. Basically, the appeals court thus agreed with the decision by the first level court, which had already provided for the contact between the minor and Václav Waldmann. The general courts based this primarily on the expert assessment. The expert recommended the visitation in view of the minor's interests, and the relatively extensive visitation with an unrelated person was accepted in view of the unusual situation in the matter. On the legal side the appeals court based its decision on the Convention on the Rights of the Child.

As regards the petitioner's claim concerning sexual abuse of the minor, the appeals court stated that the petitioner had never indicated – nor had there been any other evidence to indicated – sexual abuse. This claim is raised for the first time in the constitutional complaint.

In his response, the secondary party stated that he considers the constitutional complaint to be obviously unjustified, and, moreover, that it contains a number of imprecise statements, untruths, and radically subjective "truths" from the petitioner, who presented them that way during the entire proceedings before the general courts. For example, it is not true that the minor was entrusted to the secondary party on the basis of a preliminary order, because until September 2004 she was entrusted to him by law, as his daughter. After his paternity of the minor was denied and a legal vacuum arose, the petitioner misused it by refusing to return the minor to him during a visit. Based on that behavior by the petitioner, in October 2004 the secondary party applied for a preliminary order to entrust the minor to his care. Based on that preliminary order, the secondary party had the minor in his care until the decision making the petitioner the guardian. The paternity of the deceased Martin Faina was not determined until the decision of 25 November 2005.

The secondary party also stated that he does not consider the dispute to be a battle with the petitioner, but sees it as a situation where the two parties are not able to agree, and therefore it is necessary for the court to decide. In contrast, according to the secondary party, the petitioner is promoting only her own interests in this dispute, without taking into account the results of the evidence and expert investigation. That is why the petitioner did not accept the psychological examination by the expert, PhDr. Prunner, which indicated that all the parties have irreplaceable and significant importance in the minor's life.

The petitioner, and especially her former husband, have behaved very dishonorably, even aggressively, during the entire dispute, and are capable of using any means to achieve their own interests. They have so far filed or instigated the filing of four criminal notices against the secondary party (for abuse and neglect of an entrusted person, for unauthorized conduct of business and manipulation with an inheritance, for sexual abuse) – but these accusations have not been proved.

Although all the accusations were false, and filed only in order to achieve the interests of the petitioner's family, the secondary party never took any counter-measures, in order not to provoke further aggression from the petitioner's family. On the contrary, the secondary party, even when he was legally considered the minor's father and had her in his care, permitted the petitioner and her family regular contact (at that time this was voluntary, because such contact had not been ordered by any court).

The development in the situation during July and August 2006 is described in the complaints concerning visitation filed by the secondary party, because the petitioner decided not to respect the contested court decision. It is also evident from these complaints why and how the minor had the health problems described, and the entire situation as regards the secondary party's contact with the minor is also described.

On 30 October 2006, the Constitutional Court received an addendum from the panel chairwoman of the Regional Court in Pilsen, that included a report from the police commission of the Police of the CR, Criminal Police and Investigation Service, which indicates that in the matter of suspicion of criminal sexual abuse, the minor Lucie had been questioned, and that no grounds arose to begin criminal prosecution.

The Constitutional Court also requested for review the file from the District Court Pilsen-City, file no. 99 P 315/2005, which also includes the previous file material maintained by the District Court in Domažlice as file no. P 195/2003.

The Constitutional Court determined the following relevant facts from the file.

The petitioner first filed a petition to have the minor Lucie entrusted to her care, together with a petition to issue a preliminary order on 17 December 2003, i.e. shortly after the tragic death of her son, Martin Faina, and the Lucie's mother, Miroslava Waldmannová (p. 14). She justified her petition on the grounds that Lucie had been living together with her deceased mother and the petitioner's son in the petitioner's household for about 9 months before the tragic event; in contrast, the secondary party (then the registered father of the minor) showed no interest in the minor during that time, and his attitude changed only after Miroslava Waldmannová's death, when he took the minor away from the petitioner's household.

The District Court in Domažlice denied the petition to issue a preliminary order, entrusting the minor the petitioner's care, by resolution of 22 December 2003. On 5 March 2004 the District Court in Domažlice issued a decision in which it ordered the petitioner to have contact with the minor at specified times (p. 44). The Regional Court in Pilsen annulled that decision by resolution of the of 29 April 2004, on the grounds that the verdict did not correspond to the petitioner's petition, which asked for the minor to be entrusted to her care (verdict ultra petitum) (p. 77).
In the new proceedings before the trial court the petitioner submitted an expert medical / molecular genetics opinion, which indicated that Lucie's biological

father is, 99.999997% probability, the petitioner's son.

After that the District Court in Domažlice again ruled in the matter, by a decision of 6 August 2004 (p. 122), which denied the petitioner's petition. The trial court relied on the evidence presented, from which it concluded that the secondary party, as the minor's legal father, took excellent care of her, and, although his biological paternity had been disputed by the petitioner, he had thus far acted as if caring for his own child. The trial court added that it was also necessary to consider the actions of Lucie's deceased mother, who, before her death, did not file a petition to deny paternity by the six-month deadline. The court took into account that the Supreme State Prosecutor's Office filed a complaint to deny paternity, which, however, has no effect on the decision-making in this matter, even after paternity is actually denied. The trial court also stated that the secondary party voluntarily allowed the petitioner to have regular visits with the minor every week.
On 23 August 2004, the District Court in Domažlice issued a verdict in file no. 5 C 144/2004, which denied the secondary party's paternity of the minor; the decision went into legal effect on 30 September 2004 (filed at p. 146 – 147).

In view of this, the Regional Court in Pilsen, by resolution of 22 October 2004 annulled the trial court's previous verdict in the matter of the petitioner's petition to have the minor entrusted to her care, because, according to the appeals court, the denial of paternity created a completely new situation, both procedural (ending the participation of Václav Waldmann in the proceeding), and factual, because as soon as the denial of paternity took effect, the minor was without a legal representative (pp. 151-152).

On 15 September 2004, even before the decision denying paternity went into legal effect, the petitioner filed a petition asking the court to appoint her the minor's guardian (p. 142), and on 4 October 2004 both the petitioner and the secondary party filed petitions seeking to have the minor entrusted to their care (pp. 154-157).

On 5 October 2004, the District Court in Domažlice issued a resolution denying the petitioner's petition to have the minor preliminarily entrusted to her care, and decided that the minor was to be preliminarily entrusted to the care of the secondary party. The general court drew on the fact that at that time neither the petitioner nor the secondary party had any legal relationship to the minor, because paternity had been denied, but at the same it had not been determined that the petitioner's deceased son was the minor's father. In view of the fact that the actual relationships of both parties to the minor were equally intensive, the court inclined toward maintaining the status quo and leaving the minor in the care of the secondary party.

On 8 October 2004, the petitioner again filed a petition to be named guardian, together with the petition to issue a preliminary order, to which the District Court in Domažlice responded on the same day by issuing a resolution denying the petition for a preliminary order on the grounds that, by the nature of the matter, this would be a permanent order, not an interim one.

In a filing of 20 October 2004, the petitioner raised the objection that the judges of the District Court in Domažlice were biased (pp. 196-198) and on 16 December 2004 she filed a new petition seeking a preliminary order entrusting the minor to her care (p. 232). On 14 February 2005 the Regional Court in Pilsen, in separate resolutions, confirmed the preliminary order entrusting the minor to the care of the secondary party, the denial of the petitioner's request for a preliminary order appointing her as guardian, and decided on the objection of bias by not removing one of the judges of the District Court in Domažlice from decision-making (p. 254 – 258). The petitioner then, by addendum of 9 March 2005, withdrew the claim of bias against the deciding judge in the District Court in Domažlice (p. 270).

However, on 24 May 2005, the deciding judge declared herself biased due to the negative relationship with the petitioner that had been created during the proceedings. In her declaration, the judge referred to the conduct of the petitioner and her former husband, who, she said, subjected her to public pressure through a petition, media coverage of the case, and repeated complaints. The Regional Court in Pilsen then decided, by resolution of 15 June 2005, to remove the deciding judge, and assigned the matter to the District Court in Pilsen-City.

On 1 June 2005, the petitioner filed a new petition seeking a preliminary order entrusting the minor to her care (p. 306), which was decided by the District Court in Pilsen-City by resolution of 4 July 2005, which denied the petition. It stated that, legally speaking, both parties were in the same position, because paternity had not been determined yet, and in order to maintain a stable environment for the child he therefore considered it most appropriate to leave the child in the care of the secondary party.

On 12 August 2005, the minor's guardian filed a complaint to determine paternity with the City Office of Domažlice (p. 405). This act by the guardian was approved by the District Court Pilsen-City, with legal effect, on 13 September 2005, and the determination of paternity was made by verdict of the District Court in Domažlice of 25 November 2005, file no. 5 C 173/2005 (p. 526 – 527), which went into legal effect on 16 December 2005.

The file also contains a psychologist's expert assessment, prepared on 15 January 2005, that concludes that all the persons involved have a role in the life and emotional life of the minor; the expert proposes that the minor's contact with all these persons be maintained. The expert also stated that he was aware that the minor was influenced by "implants" on the part of the petitioner and her former husband, aimed at destroying the minor's relationship to the secondary party. However, according to the expert, it is necessary to maintain contact with the secondary party, so that a feedback effect, could occur for the minor on the basis of her own experiences, which would correct the effect of these implants. (p. 76 of the assessment, p. 512).

After a hearing on 14 March 2006, the District Court in Pilsen-City issued a verdict entrusting the minor to the care of the petitioner, i.e. the petitioner was appointed the minor's guardian; the court ordered that the secondary party have visitation with the minor every even-numbered week from Friday at 10:00 a.m. until Monday at 10:00 a.m. and every odd-numbered week on Tuesday and

Thursday from 2:00 p.m. to 6:00 p.m. The trial court justified this decision by taking into account primarily the recommendation from the expert, who said that it was in the minor's interests to ensure contact with all the involved persons. As the expert assessment identified the petitioner as the most suitable authority figure to raise the child, the minor was entrusted to her care and contact with the secondary party was ordered. The trial court acknowledged that the Act on the Family expressly governs only ordering contact with siblings or grandparents, but, if it is in the minor's interest, according to the trial court the relevant provisions must be interpreted more broadly.

The court also stated that it is aware of the risk of heightened conflict in the relationship between the petitioner and the secondary party, as occurred during the proceeding. Based on the expert assessment, the court even considered it proven that, on the part of the minor's grandfather, this goes as far as hatred of the secondary party. According to the court, the petitioner's testimony indicates that if visitation is ordered between the minor and the secondary party, she does not intend to accept such interference. In the reasoning of its decision, the trial court called on the parties to thoroughly respect the visitation order, not take steps to limit visits, and not involve the minor in their negative relationships.

In the contested decision the Regional Court in Pilsen partly confirmed the trial court's verdict and partly – as regards ordering visits with the secondary party – changed it, of course, without reducing or expanding the total time of contact. In its reasoning the court stated that, although § 27 of the Act on the Family does not govern contact with persons not listed there (i.e. apart from parents, siblings and grandparents), the court relied on the Convention on the Rights of the Child. Under Art. 3 par. 1 and 2 of the Convention the interests of the child must be the primary criterion in any activity concerning children. The parties undertake to ensure for a child such protection and care as is necessary for its well-being, and will take into account the rights and obligations of the child's parents, legal representatives, or other individuals legally responsible for the child.

The Regional Court thus added that it considered contact with the secondary party to be a measure that protects the minor's interests. It took into account again the conclusion of the expert assessment, that it is necessary to ensure contact in order for the minor to have an opportunity to create her own "feedback" effect, to correct the effect of the "implants" from the petitioner and her former husband, which are aimed at destroying the minor's relationship with the secondary party. According to the appeals court, the minor is an adaptable child and is used to her alternating environments.

From the file, the Constitutional Court familiarized itself with the course of the visitation between the minor and the secondary party, as it took place from the time the contested decision went into effect. At p. 660 et seq. is the secondary party's complaint of 28 July 2006 against the conduct of the petitioner, alleged to prevent him from the visitation he was ordered to have with the minor. On 31 July 2006, the petitioner filed a petition seeking a preliminary order, in which she proposes banning the secondary party's visitation with the minor, on the grounds of suspicion that he is sexually abusing her (p. 663 – 6665). Another complaint by the secondary party is filed at p. 676. On 7 August 2006, the District Court in Pilsen-

City denied the petitioner's petition on the grounds that she did not prove the allegations concerning suspicious of sexual abuse. On 15 August 2006, the secondary party filed a petition for execution of the decision (p. 685).

On 6 September 2006, the City Office in Domažlice, as the appropriate body for social-legal protection of children, filed a petition seeking a preliminary order forbidding the secondary party's visitation with the minor. The grounds for the petition were that it had guided the parties to conclude an agreement in the matter of visitation, but no agreement had been concluded, and, on the contrary, both sides had verbally attacked each other. According to the City Office agreement between the parties is not possible, and that situation endangers the minor's healthy development (p. 695-699).

On 20 February 2007, a hearing took place before the Constitutional Court, attended only by the petitioner and her legal representative. At the hearing, the petitioner submitted a protocol on a hearing before the District Court in Pilsen-City on 30 January 2007. The secondary party's testimony before that court was said to indicate that he showed no interest in visitation with the minor since the filing of a criminal notice for the crime of sexual abuse. The petitioner responded to the Constitutional Court's questions that the denial of paternity had not taken place when the minor's mother was alive because the secondary party threatened her, and yet at that time, when the minor lived with her mother and the petitioner's son, he did not pay child support for her. The secondary party last had visitation with the minor on 3 June 2006.

II.

After stating that the constitutional complaint is permissible (§ 75 par. 1, a contrario Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, the "Act on the Constitutional Court"), was filed on time (§ 72 par. 3 of the Act on the Constitutional Court), and meets the other requirements specified by law [§ 30 par. 1, § 72 par. 1 let. a) of the Act on the Constitutional Court], the Constitutional Court reviewed it on the merits, and concluded that it is justified, although the Constitutional Court found that there was violation of a different fundamental right than the petitioner stated in the constitutional complaint.

III.

A)

As stated above, in the constitutional complaint the petitioner claimed violation of Art. 32 par. 1 of the Charter, under which parenthood and the family are protected by the law, and which guarantees special protection to children and juveniles. This provision essentially represents an institutional guarantee, and thus binds the legislature to specifically protect the institutions of parenthood and the family. This provision can not be considered one that contains a fundamental right. This follows anyway from the fact that this provision is subject to a statutory limitation;

under Art. 41 of the Charter it can be claimed only within the confines of the laws implementing it. In addition, systematically this provision is included in the category of social rights, which are considered more a component of constitutional soft law (cf. e.g. judgment file no. IV. US 8/05, in The Constitutional Court of the CR: Collection of Decisions, vol. 37, judgment no. 112, p. 453; or file no. IV. US 113/05, not yet published, electronic version available at www.judikatura.cz), in contrast to classic fundamental rights (so-called core rights).

With regard to this, the Constitutional Court considered the question whether the contested general court decision is capable of interfering with a different constitutionally guaranteed fundamental right that is, without any doubts, considered a "traditional" fundamental right. As the contested decision ordered visitation between the minor child and the secondary party, and thus created an obligation for the petitioner to deliver the minor, Lucie, to the secondary part for specified time intervals and thus for that period tolerate a restriction, consisting of the impossibility of living with her minor granddaughter, the Constitutional Court concluded that the affected fundamental right in this case is the petitioner's right to protection of family life, which is guaranteed by Art. 10 par. 2 of the Charter and Art. 8 of the Convention on the Protection of Human Rights and Fundamental Freedoms (the "Convention").

B)

Both Art. 10 par. 2 of the Charter, and Art. 8 of the Convention speak generally about protection of family life, or respect for family life, without, however, defining in legal terms what they mean by the term "family life." Therefore, when interpreting these provisions, it is necessary to start with the fact that the family is, in the first place, a biological connection, and then a social institution, which is only subsequently defined by a legal framework. Therefore, when interpreting these concepts, we must take into account the biological connection, and then also the social reality of the family and family life, which, of course, in the last century has undergone fundamental changes from an extended family (parents, their married sons, and their wives and children) to the so-called nuclear family (the marriage of a man and wife, and children; cf, e.g. Možný, I.: Sociologie rodiny [The Sociology of the Family]. SLON, Prague 1999, pp. 27-28, 47-50), which, of course, is itself being eroded in recent times (cf. e.g. Možný, I.: Sociologie rodiny[The Sociology of the Family]. Chapter: Konec rodiny? [The End of the Family?] SLON, Prague 1999, pp. 199-219).

The family is a social group of related persons, among whom there are close ties – blood, psychosocial, emotional, economical, etc. Thus although at the level of social reality the concept of family is very changeable (as stated above, the social reality of the family has undergone successive transformations, and through them the traditional European concept of the family has disintegrated more and more noticeably, and legal regulation of the family and family life is necessarily also subject to these transformations), nevertheless it can not be overlooked that the basis of family ties is traditionally precisely the biological bond of a blood relationship between family members (on the family as an institutional form to ensure reproduction of the species, see Možný, I.: Sociologie rodiny [Sociology of

the Family]. SLON, Prague 1999, pp. 99 and 115).

Therefore, on the one hand we can not rule out the fact that legal protection as a family can also be enjoyed by a social group of persons living outside the institution of marriage, or a group of persons not related by blood, among whom there are nonetheless the abovementioned emotional and other ties (persons living together as mates, partners living together with a child that was born to one of the parents from another relationship, etc.). And that scope of the concept of family life also arises from the case law of the European Court of Human Rights, under which, for example, "the notion of 'family life' … is not confined solely to marriage-based relationships and may encompass other de facto 'family ties' where parties are living together outside marriage." According to the ECHR, as a rule, "living together may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto 'family ties'" (judgment in the case of Kroon and Others v. the Netherlands, par. 30). On the other hand, that concept of family and family life also assumes the importance of blood ties between family members. In Kroon and others v. the Netherlands the ECHR gave priority to the biological tie between the father of a child living in a de facto bond with the mother and that child, and denying the paternity of the mother's husband, over the legal situation and the legal construct of the family: ""respect' for 'family life' requires that biological and social reality prevail over a legal presumption …" (Kroon and others v. the Netherlands, par. 40).

Therefore, when there is a conflict between the interests of persons with blood ties, between whom social ties forming the typical features of a family also demonstrably exist, and the interest of unrelated persons, between whom and the child there were also formed in the past, as a result of long-term co-habitation, the abovementioned emotional, social, and other ties, which would otherwise form the features of de facto family ties, it is necessary – if there is no other compelling reason – to provide protection to those family ties which, besides emotional and social ties, also have the blood relationship.

Yet, according to the ECHR decision, it follows from the obligation to respect family life that, as soon as the existence of a family relationship is proved, the state must fundamentally act in a manner so that this relationship can develop, and must take measures that will enable parent and child to be reunited (e.g. the verdict in the case Kutzner v. Germany, par. 61).
In the decision Bronda v. Italy the ECHR stated that relationships between children and their grandparents, with whom they have lived for a certain time can be given the same protection as the relationship between a parent and child: "The Court recalls that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8. That principle applies, too, in cases like the present one in which the Court is concerned with the relations between a child and its grandparents, with whom it had lived for a time." (judgment in Bronda v. Italy, par. 51).

C)

The presently adjudicated matter concerns a situation where the general courts decided on entrusting the minor to care, or guardianship and on ordering contact of the minor with a third, unrelated person. On one side there is the petitioner, who is in the de facto (biological), and – after determination of paternity – also legal position of the minor's grandparent; on the other side there is the interest of the secondary party, who had the minor entrusted to his care for a certain period, first as her legal representative, and then based on the preliminary court order.

In the contested decision, the Regional Court in Pilsen decided to entrust the minor to the petitioner, and ordered that she should have contact with the secondary party. It justified these steps, as regards factual findings, with the conclusion of the expert assessment, according to which it is in the minor's interest to maintain the widest possible contact with all the involved persons, and as regards a legal basis, with reference to Art. 3 of the Convention on the rights of the child, under which the interests of the child are the primary criterion for any activity concerning children. It is evident from the reasoning in the court's decision, that it was aware of the proven hostile relationship between the petitioner and the secondary party, and in its decision it called on all the parties to cooperate in raising the minor.

As stated above, in terms of protection of family life, the relationships of grandparents and their grandchildren enjoy comparable protection to that of the relationships between parents and children, if the child has lived with the grandparents for a certain time. This applies all the more so if the child is, as a result of a tragic event, without its parents, and has only grandparents as the closest relatives with whom the minor child shared a common household while the parents were still alive, as happened in this case.

Between the petitioner and the minor, Lucie, all the abovementioned ties exist, that, in their aggregate, create the quality of family life (at the very least biological and legal ties consisting of a direct blood line, emotional and other psycho-social ties), and after the court decision determining the paternity of the petitioner's son, that de facto situation was also confirmed as regards the minor's legal status.

In contrast, the relationship between the secondary party and Lucie can at present be based only on emotional ties that were formed during the time when they lived together when he was the minor's "registered" father. Here the Constitutional Court in no way intends to reduce the quality of these relationships, which can reach the same level and intensity as if the minor had been the secondary party's own child. Nevertheless, we can not overlook the fact that a blood tie is absent in their relationship, nor is there a legal tie, and thus the secondary party is an unrelated person to the minor.

It is quite natural that where the child's family, created by biological ties, exists, its members are willing to have the child in their care and raise it, even have an emotional tie to the child that has arisen over many years, and the child has fitted into the other social ties in that family, that alternative must outweigh the upbringing and care that a third, unrelated person would provide for the child,

even if that person also has an emotional and social tie to the child. As mentioned above, as soon as the existence of a family tie is proved, the state must basically behave so that this relationship can develop, and must take appropriate measures to unite the biological family with the child (e.g. the judgment in Kutzner v. Germany, par. 61). Thus, the state has an obligation to provide particular protection to that relationship, including protection from interference by third parties. All the more so, the state may not, through legal instruments, create a situation that would weaken the quality, or integrity of family life and interfere with the relationships in that family.

The Constitutional Court believes that this is precisely what happened through the actions of the Regional Court in Pilsen, insofar as it ordered the regular visitation between the minor and the secondary party.

In the Constitutional Court's opinion such interference in the petitioner's family life can not be justified on the basis of an isolated interest of the minor, as the general court did in the contested decision. Generally, we can agree that the interest of the child is the priority criterion in providing protection to the family life of family members; nonetheless, when taking that interest into account one can not ignore the rights of parents, or legal representatives (Art. 3 par. 1, 2 of the Convention on the Rights of the Child). The Constitutional Court believes that in this case the general courts did not take into consideration all relevant facts influencing a balanced evaluation of the relationship about which they decided.

The Constitutional Court considers it incorrect if the general court considered the interest of the child to be proven merely by adopting the conclusions of the expert, according to whom it would be appropriate to ensure contact with all the involved persons, and if the court did not pay the same attention to the existing conflict-ridden situation between the petitioner's family and the secondary party. Both these facts create factors that need to be examined in terms of meeting the interest of the child. It is necessary to weigh whether it is really in the interest of the minor to maintain contact with the secondary party if that is done at the price of heightened conflicts between the petitioner's family and the secondary party, of which the minor child remains a witness, and basically a victim. Moreover, the courts completely failed to take into account and evaluate the petitioner's rights to exercise her "parenting" rights without interruption, without interference from the state.

Based on the facts evident from the court files, the Constitutional Court believes that even before the court made its decision, the conflicts were quite intense, and the petitioner herself stated during a hearing that she would resist allowing the minor to have contact with the secondary party. If the conflict situations culminated immediately after the general court decisions went into effect, in the Constitutional Court's opinion it would be as a result of the incorrect evaluation of these facts by the general court.

In this regard we can refer to the decision of the Grand Chamber of the ECHR in Sahin v. Germany, where the court evaluated, in terms of the right to family life, a situation where a legal and biological father's contact with his child was restricted on the grounds of serious disputes between the parents, which were transferred to

the child, and there was a danger that the contact could endanger the child's development. In that decision the Grand Chamber of the ECHR accepted, that denying contact on the grounds of existing tension which the child witnesses is not violation of the right to family life. The Constitutional Court emphasizes that that case involved the child's contact with the actual father, not with a third, unrelated person, as in the present case.

The Constitutional Court adds that it is the function of the courts to provide impartial protection to the subjective rights of the parties to a proceeding (Art. 90 of the Constitution of the CR), not to educate them to live better. The courts are obligated to base their decisions on the facts determined, and not to attempt, through their decisions, to create a situation that the court would consider suitable for the personal life of the persons involved.

In view of all the abovementioned reasons, the Constitutional Court concluded that the contested decision of the Regional Court in Pilsen violated the petitioner's right to protection of family life, or for respect for family life, enjoying constitutional protection under Art. 10 par. 2 of the Charter and Art. 8 of the Convention.

IV.

As regards the part of the constitutional complaint where the petitioner claimed violation of her right to have the matter decided in an appropriate time period and without undue delay, the Constitutional Court concluded that the constitutional complaint is evidently justified.

The Constitutional Court evaluated the steps taken by the District Court in Domažlice by the criteria that arise from the case law of the ECHR, i.e. evaluating the relationship between the objective complexity of the matter, the conduct of the parties, and what was at stake for the parties to the proceeding (see, e.g., the decisions Frydlender v. France, Becker v. Germany, Bořánková v. the Czech Republic.).

In the Constitutional Court's opinion, this guardianship matter, although it is conducted under one file number, can not be taken as one continuous proceeding, because from the moment when the petitioner filed the first petition to have the minor entrusted to her care on 17 December 2003, until the contested decision was issued, the general courts ruled on a number of different petitions. It also can not be overlooked that, during the proceedings, the facts that were relevant for the general courts' decision making changed significantly (the petitioner filed her original petition when the secondary party was the child's registered father and therefore her legal representative, and it was only during the proceeding that his paternity was denied and a subsequent determination of paternity made). Thus, it can be said that as time went on the matter became factually and legally more complicated and objectively became more complex.

On the other hand, it can not be overlooked that the general courts did not at all take into account the expert assessment submitted by the petitioner in 2004

regarding the minor's biological paternity being that of the petitioner's son. They formalistically maintained the legal construction of a legal representative, and did not take reality into account (see the above cited ECHR judgment, Kroon and Others v. the Netherlands). They thus created room for flawed decisions (decision of 6 August 2004).

Likewise, when evaluating the steps taken by the general courts, it can not be overlooked that in this matter their decision making was dependent on the decision making and activity of, not only the general courts, but also other state authorities (the agency for social-legal child protection) in other proceedings. In that context, the actions of the City Office Domažlice is especially remarkable, as it was the minor's guardian, and filed a petition for determination of paternity virtually a year after (12 August 2005) the decision denying paternity went into effect (30 September 2004). In the interim, the minor was subject to a legal vacuum, because there was no person identified as her legal representative, and thus the time of uncertainty, as regards her future environment, was prolonged. Here too, however, it was possible for the court to notify the higher authority of the relevant body was being inactive.

As regards the criterion consisting of the conduct of the parties to the proceedings, it is necessary to consider that, during the proceeding, both the petitioner and the secondary party filed a number of repeated petitions for preliminary orders, and subsequently appeals to the trial court's decisions denying them. Also, the actions of the District Court in Domažlice were undoubtedly affected by the objection of bias that the petitioner applied against several of the trial court judges, and which she withdrew against the deciding judge in the matter after the decision by the Regional Court in Pilsen. Finally, it can not be overlooked that the petitioner did not make use of the procedure under § 174a of Act no. 6/2002 Coll., on Courts, Judges, Lay Judges, and the State Administration of Courts, and Amending Certain Other Acts (the Act on Courts and Judges), as amended by later regulations, and did not ask to have those actions that she believe the court to be late in performing ordered.

The Constitutional Court is aware that the decision making of the general courts in matters concerning the upbringing of minors requires increased demands for speed of the proceedings, whose aim should be to stabilize the situation in relation to the minor child as soon as possible. Otherwise, there is a risk of in fact creating a "vicious circle," where, through the passage of time when the child lives outside the biological (related) family, a new living environment is created for the child, which subsequently complicates measures leading to the protection of the family life of the biological family. This factor undoubtedly played an important role in the general courts' decision making on the merits, because it obviously motivated them to order contact between the minor and the secondary party. However, they did not pay attention to the fact that they themselves took part in that situation, together with the other public authority (the authority for social-legal protection of children). Thereby they were already violating the petitioner's right to family life.

Nevertheless, in view of the complexity of this case, where – as mentioned above – in the course of the proceedings the factual and legal circumstances changed

significantly, as well as the conduct of the parties to the proceedings, whose behavior in no small measure contributed to the length of the proceedings and who did not exercise their rights regarding the speed of the proceeding on time, the Constitutional Court found no violation of the right to have a matter handled without unnecessary delay, guaranteed by Art. 38 par. 2 of the Charter, as the petitioner claimed in the constitutional complaint.

In view of the foregoing, the Constitutional Court granted the constitutional complaint under § 82 par. 2 let. a) of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, in the part aimed against the decision of the Regional Court in Pilsen, and annulled the contested decision under § 82 par. 3 let. a) of that Act; in the part concerning the delays in proceedings before the District Court in Domažlice the Constitutional Court denied the constitutional complaint under § 43 par. 2 let. a) of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, as being evidently unjustified.

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

Brno, 20 February 2007