2009/11/19 - PL. ÚS 10/07: SERVICE RELATIONSHIP

HEADNOTES

In earlier case decisions, the Constitutional Court concluded that Article 95 para. 2 of the Constitution of the Czech Republic implies that the Constitutional Court's obligation is to review the constitutionality of the contested provision of an act, even when such a provision has already been annulled (altered), this under the condition that the addressee of the reason claimed for unconstitutionality is a public power, i.e. not a subject of private law, and under the condition that the contested provision of the act is to be applied by an ordinary court in solving a case which has yet to be closed. In the case under consideration, these conditions have been met.
The lump sum death benefit as a welfare benefit is a part of the right to adequate material security in the case of the loss of a provider, protected by Article 30 para. 1 of the Charter.

In accordance with Article 4 para. 2 of the Charter, limitations may be placed upon fundamental rights and basic freedoms only by law and under the conditions prescribed in the Charter. In this, the essence and significance of these rights and freedoms must be preserved (Art. 4 para. 4 of the Charter). A legal arrangement which excludes a judicial review of a decision by a service body on claims of a social nature is not compatible with the condition of preservation of fundamental rights and basic freedoms.

Even when in the field of economic, social and cultural rights, as well as the rights of minorities, it is the state which has been afforded the opportunity of preferential treatment for certain groups of society which is otherwise intricately stratified in terms of social, cultural, professional or other status, while the legislature materialises, through adopting legal norms, their concepts of admissible limitations of factual inequalities within society, there is an increasingly conspicuous effort to guarantee members of security corps the same standard of protection of their procedural rights as belongs to other government employees, and to provide them with the possibility of attaining protection of their fundamental rights pursuant to Article 1, Article 36 para. 1 and para. 2, and Article 37 para. 3 of the Charter of Fundamental Rights and Basic Freedoms with an independent and impartial court. The contested provisions of § 139 para. 1, clause a) of Act No. 154/1994 Coll. on the Security Information Service, in the wording prior to the amendment adopted via Act No. 362/2003 Coll., when the same did not allow the reviewing powers of a court in cases of claims made in accordance with § 124 of Act No. 154/1994 Coll., did not honour such a standard.

The Constitutional Court is aware of specific features of decision making on service affairs relating to members of intelligence services. Information which comes to light in the course of such decision making relates to the field of security risks and interests of the state, which may be reflected in the restriction of warranties of some standard procedural safeguards of a fair trial, such as the public nature of a hearing. The Constitutional Court, in Judgment

file No. II. ÚS 377/04, emphasised that "also in this form of proceedings, it is the task of the legislature to make possible, in a statutory form, implementation of reasonable safeguards for protection by a court, be it, according to the nature of the matter, … for special and differentiated protection".

From the viewpoint of protection of fundamental rights and basic freedoms, public interest in not publishing such specific facts cannot constitute a complete resignation to protection of fundamental human rights and basic freedoms, in particular the judicial review of administrative decisions.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

On 19 November 2009, the Constitutional Court Plenum, composed of Pavel Rychetský, the Chairman, and Justices Stanislav Balík, František Duchoň, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil (Justice Rapporteur) and Jiří Nykodým, adjudicated on a petition by the Supreme Administrative Court for declaration of the unconstitutionality of the provisions of § 139 para. 1 of Act No. 154/1994 Coll. on the Security Information Service, as amended by later regulations, with participation by the Chamber of Deputies of the Parliament of the Czech Republic as a party to the proceedings, as follows:

The provisions of § 139 para. 1 of Act No. 154/1994 Coll. on the Security Information Service, in the wording prior to the amendment adopted via Act No. 362/2003 Coll., when the same did not allow the reviewing powers of a court in cases of claims made in accordance with § 124 of Act No. 154/1994 Coll., were in conflict with Article 1, Article 36 para. 1 and para. 2, Article 37 para. 3 of the Charter of Fundamental Rights and Basic Freedoms, and with Article 6 para. 1 of the Convention on the Protection of Human Rights and Fundamental Freedoms.

REASONING

I. Recapitulation of the petition

1. In a petition delivered to the Constitutional Court on 25 May 2007, the Supreme Administrative Court demanded that the Constitutional Court decide that the provisions of § 139 para. 1 of Act No. 154/1994 Coll. on the Security Information Service (hereinafter referred to only as the "Act on the Security Information Service"), in the wording effective until 31 December 2006, i.e. prior to the amendment adopted via Act No. 362/2003 Coll., are in conflict with Art. 1, Art. 36 and Art. 37 para. 3 of the Charter, that is with the constitutional order of the Czech Republic.

The provisions contested by the petition read as follows:

“The court shall not review a decision by a service body with the exception of a decision on the following:
a) discharge from the service relationship in accordance with § 40 para. 1, clause c) or clause d);
b) compensation for loss if the sum required exceeds CZK 5,000.00”.

2. The petitioner stated that they filed said petition in connection with their decision-making activities in the case administered by the Supreme Administrative Court under file No. 5 As 65/2006. In the same, Bc. E. R., the complainant, contests, through a cassational complaint on the merits, a resolution by the Municipal Court in Prague dated 30 May 2006, ref. No. 8 Ca 57/2006-27, whereby her action was dismissed, such an action being against a decision of the Director of the Security Information Service, dated 10 January 2006, ref. No. 29-7/2005-BIS-1, whereby her appeal against the decision of the Director of the Security Information Service dated 7 November 2005, ref. No. 11-31/2005-BIS-1, on awarding lump sum death benefit, was rejected as overdue. The Municipal Court in Prague dismissed the action by resolution as inadmissible, as the same was filed against a decision which is excluded from judicial review in accordance with the provisions of § 139 para. 1 of the Act on the Security Information Service.

3. The Supreme Administrative Court, which was to decide on the cassational complaint on the merits, during the preliminary hearing of the case concluded that the provisions of § 139 para. 1 of the Act on the Security Information Service, which had already been applied and will have to be applied again in the given case, cannot be interpreted in a constitutionally conforming way since the same are in conflict with the constitutional order of the Czech Republic. Therefore, the Supreme Administrative Court suspended the proceedings and, pursuant to the provisions of Art. 95 para. 2 of the Constitution of the Czech Republic, proposed that the Constitutional Court declare the unconstitutionality of § 139 para. 1 of the Act on the Security Information Service, in the wording preceding the amendment adopted via Act No. 362/2003 Coll. The Supreme Administrative Court specified that the legal opinion of the Constitutional Court would be binding upon them in further proceedings.

4. In support of their opinion, and with reference to a “procedurally similar situation”, the petitioner refers to a Judgment of the Constitutional Court dated 10 January 2001, file No. Pl. ÚS 33/2000 (published in Collection of Judgments and Rulings of the Constitutional Court, Volume 21, p. 29 et seq.), in which the Constitutional Court also adjudicated on a petition by an ordinary court that contested the statutory provisions which had already been amended, at the time of decision making by the Constitutional Court.

5. Beyond the scope of the petition, the petitioner refers to the wording of the provisions of § 67 para. 1 of 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”), which is, with respect to derogation of legal regulations within norm control proceedings, based on ex nunc not ex tunc effects. This rule, in their opinion, cannot be perceived mechanically, since in such a case, the essence of normative regulation could be omitted.

6. In connection with prohibition of the retroactive effect of legal regulations, a direct consequence of which is an obligation on the part of all bodies applying law to employ legal regulations in the form in which they were valid at the time when the decisive legal facts actually occurred, the petitioner emphasises that even when a legal regulation may be, or is, at the time of decision making of the Constitutional Court, changed or even annulled without being superseded, the same must henceforth be applied to previous legal relationships which originated at the time of the validity and effectiveness of such a regulation. The petitioner highlighted that should the Constitutional Court refuse to deal with their petition for the very reason of subsequent derogation of the contested legal regulation, the Constitutional Court by such a course of action would trigger a situation in which the fundamental rights and basic freedoms of the parties to the proceedings would be violated. The possible protection of constitutional rights of the parties to the proceedings, which would be provided by the Constitutional Court only as late as following a decision by the ordinary courts, appears to the petitioner to be "ineffective" and "unsystematic", as it is always necessary to proceed from the contents of Article 4 of the Constitution of the Czech Republic, which guarantees judicial protection of fundamental rights and basic freedoms. For this reason the petitioner insists that the Constitutional Court, in its decision making, does not neglect to pursue the interest of the entire structure of ordinary courts in the proper functioning of all partial elements of such a system.

7. The petitioner is aware of the fact that the Constitutional Court, when applying the provisions of § 67 of the Act on the Constitutional Court, within an "abstract norm control" [pursuant to § 64 para. 1, clauses a) and b) of the Act on the Constitutional Court], discontinues such proceedings if the contested provisions of the act lose validity. However, the petitioner emphasised that the other type of norm control – a concrete norm control [§ 64 para. 1, clauses c) and e), para. 3 of the Act on the Constitutional Court] – is based on a completely different concept, the meaning of which is to eliminate the unconstitutional application of a contested section of a legal regulation in a specific case.

8. In relation to the merits of the matter, the petitioner reasons by referring to the impossibility of judicial protection of the fundamental rights of the complainant, since in accordance with the contested provisions, a judicial review of decisions of the Director of the Security Information Service is not allowed, which in their opinion represents a flagrant violation of the fundamental rights of the complainant pursuant to Article 36 para. 1 and para. 2 of the Charter, i.e. affecting the fundamental procedural right to have, under realistic conditions, access to a court and to seek therewith protection for one's rights, including the right to a fair trial. From the viewpoint of constitutional protection in the field of administrative law, the petitioner refers to the second sentence of paragraph 2 of Article 36 of the Charter, which does not permit any possibility of eliminating from judicial review such cases in which a body of public power has come into conflict with any fundamental rights or basic freedoms. Exclusion from judicial review is possible in the case of decision making by a body of public administration on subjective public rights, but not in decision making by a body of public power on fundamental rights or basic freedoms guaranteed by the Charter. In this case, the issue involves a social right being affected – a fundamental right regulated in Article 30 para. 1 of the Charter – wherein the right of citizens to adequate

material security in the case of the loss of their provider is established. Following termination of the service relationship, certain benefits are disbursed to members of the Security Information Service, such as an ex-service pension, pay off, and, if the service relationship is terminated by death, survivors are paid lump sum death benefit. In the given case, the lump sum death benefit is a special form of security for the survivors in the case of the loss of their provider.

9. If such a decision relating to a fundamental social right was excluded from judicial review in accordance with the wording of the above-quoted provisions in the wording effective until 31 December 2006, such an arrangement was not, according to the petitioner, in harmony with the right to a fair trial, and thus not in line with Article 36 of the Charter.

10. The petitioner expressed doubts concerning the realistic possibility of objectively independent and impartial decision making by the Director of the Security Information Service if the principles of a fair trial are to be adhered to, this under the situation when the Director of the Security Information Service, in accordance with the provisions of § 135 para. 1 of the Act on the Security Information Service, decides on a remedy exercised by a party to the proceedings against a decision of the Director of the Security Information Service.

11. The reasons that led the petitioner to the conclusion on the unconstitutionality of the provisions of § 139 para. 1 of the Act on the Security Information Service, in the wording effective until 31 December 2006, were employed earlier in argumentation relating to the decision of the Constitutional Court Plenum dated 26 April 2005, file No. Pl. ÚS 11/04, on a petition for annulment of the provisions of § 77k para. 6 of Act No. 148/1998 Coll. on Protection of Classified Information (published in Collection of Judgments and Rulings of the Constitutional Court of the Czech Republic, Volume 37, under No. 89, p. 207, or in Collection of Laws under No. 220/2005).

12. Even though the petitioner admits that attaining safeguards specified under the provisions of Article 36 para. 2 of the Charter does not mean an unconditional review of a decision merely by a court (but is also possible by another tribunal), it is necessary to insist that the same must be an independent body, the members of which are and may objectively be independent and impartial in their decision making. Besides, the Constitutional Court has previously dealt with this issue, for example, in a Judgment dated 23 November 1999, file No. Pl. ÚS 28/98, published under No. 2/2000 Coll., or in a Judgment dated 17 January 2001, file No. 9/2000, published under No. 52/2001 Coll.).

13. Finally, the petitioner remarks that the administrative judiciary most often (as is the case in the matter under consideration) adjudicates disputes between executive branches of the state and parties of private law, which demands a sufficiency of effective safeguards to maintain the independence and impartiality of decision making, without concurrent links towards the executive power. These criteria are satisfied in the case of judges; it is not so in the enforcement of the right to procedural defence of the appellant against the decision of the Director of the Security Information Service, which the petitioner finds to be in conflict with Article 1, Article 36, and with Article 37 para. 3 of the Charter.

II. Recapitulation of the prior proceedings

14. From the appended file by the Supreme Administrative Court administered under file No. 5 As 65/2006 (to which a file from the Municipal Court in Prague, file No. 8 Ca 57/2006 was annexed) it was ascertained that Bc. E. R. (who held the procedural position of a plaintiff in the previous proceedings) demanded, by an action filed against the Security Information Service, the annulment of a decision of the Director of the Security Information Service dated 10 January 2006, ref. No. 29-7/2005-BIS-1, whereby an appeal by the complainant was rejected against the decision of the Director of the Security Information Service dated 7 November 2005 on awarding lump sum death benefit, subsequent to the death of her husband, at the amount of CZK 112,491 (in accordance with the provisions of § 124 of the Act on the Security Information Service), which was awarded to (and apportioned between) her and her two minor children. The plaintiff did not agree with this distribution of the awarded sum, as in her opinion, the lump sum death benefit at the given amount should have been awarded to each of the survivors and not apportioned.

15. The plaintiff stated that she had confirmed receipt of the decision of the Director of the Security Information Service dated 7 November 2005 with her signature as late as 7 December 2005, even though she had been earlier familiarised with the wording of the same. She submitted a remedy on 22 November 2005 to be delivered by post, which was, in her opinion, within the statutory term.

16. By a decision of the Director of the Security Information Service dated 10 January 2006, ref. No. 29-7/2005-BIS-1, the appeal by the plaintiff (delivered to the Director of the Security Information Service on 28 November 2005) was rejected on the grounds of "expiry of the period for appeal".

17. As is specified in the reasoning for the above rejection, the plaintiff received the decision of the Director of the Security Information Service, dated 7 November 2005, ref. No. 11-31/2005-BIS-1, as early as 8 November 2005 and signed for the receipt of such. Therefore, the fifteen-day term for filing an appeal commenced on 9 November 2005 and ended on 23 November 2005. When the appeal was delivered to the Director of the Security Information Service on 28 November 2005, it was delivered only following the statutory period for appeal.

18. The Municipal Court in Prague, by a resolution dated 30 May 2006, ref. No. 8 Ca 57/2006-27, dismissed the action (verdict I). The reason for such a dismissal was the fact that the given case involved neither a decision of the service body on discharge from a service relationship in accordance with § 40 para. 1, clause c) or clause d) of the Act on the Security Information Service, nor a decision on compensation for loss with the sum exceeding CZK 5,000.00. Since reviewing other decisions of a service body is not possible (§ 139 para. 1 of the Act on the Security Information Service), and the action was brought against a decision which is excluded from a judicial review, the Municipal Court in Prague found the action to be inadmissible [§ 68 clause e) and § 46 para. 1, clause d) of the Code of Administrative Justice].

19. The plaintiff contested such a negative resolution by the Municipal Court in Prague with a cassational complaint on the merits, filed for the reason specified in the provisions of § 103 para. 1, clause e) of the Code of Administrative Justice.

III. Statement by the party to the proceedings

20. In its statement concerning the petition, signed by Ing. Miloslav Vlček, the Chairperson, the Chamber of Deputies of the Parliament of the Czech Republic stated that the contested provisions of § 139 para. 1 of the Act on the Security Information Service were, in an unaltered form, part of this Act until the annulment of the same by Act No. 362/2003 Coll. with effectiveness as of 1 January 2007. The Act on the Security Information Service (Print of the Chamber of Deputies No. 1015) was approved at the 21st session of the Chamber of Deputies on 7 July 1994, and on 27 July 1994 it was promulgated in the Collection of Laws as Item 49 under No. 154/1994 Coll.

21. Act No. 362/2003 Coll. on Alteration of Acts Relating to the Adoption of the Act on a Service Relationship of Members of Security Corps (Print of the Chamber of Deputies No. 257), was approved on 2 July 2003 at the 18th session of the Chamber of Deputies, and was promulgated in the Collection of Laws on 31 October 2003 under No. 362/2003 Coll. and became effective on 1 January 2007 (the provisions of Art. II of Act No. 530/2005 Coll.). Both acts, these being the Act on the Security Information Service and Act No. 362/2003 Coll., were properly adopted, signed and promulgated. The legislature proceeded from the conviction that the adopted statutory legal arrangement was in accordance with the constitutional order of the Czech Republic, even though the contested provisions of the Act on the Security Information Service were subsequently annulled by the legislature.

22. The Chamber of Deputies does not concur with the legal interpretation of Article 95 para. 2 of the Constitution of the Czech Republic, contained in particular in Judgment of the Constitutional Court file No. Pl. ÚS 33/2000 (one which was also inclined to by the Supreme Administrative Court). Through this interpretation, the Constitutional Court allegedly “inferred jurisdiction not included in Art. 87 of the Constitution of the Czech Republic”, while such a legal interpretation allegedly does not take into account the intention of the legislature, which placed the above-quoted Article of the Constitution in a specific constitutional context further elaborated by the Act on the Constitutional Court.

23. In the next section of the statement, arguments of the petitioner are criticised whereby the petitioner tried to support their opinion on the necessity and unsubstitutability of the role of the Constitutional Court in assessing the petition for declaration of the unconstitutionality of specific provisions of an act. The party to the proceedings claims that even when the legislature adopts a legal arrangement which proves to be “ineffective”, it is (only) up to the legislature to evaluate the effectiveness of the legal arrangement and thereafter possibly replace the same with another, a more comprehensive legal arrangement.

24. Allegedly, however, the ordinary courts are not at all entitled to not apply, on the basis of their own decisions, the statutory arrangement, even though the same appears to be ineffective. The point is that it is not up to an (ordinary) court to assess, in accordance with its own internal conviction, as to "what is and what is not in accordance with the constitutional order". The argument specified by the petitioner is, in this connection, reduced to a construct of an inferred direct application of Article 95 para. 2 of the Constitution; that is to "entitlement of the ordinary courts to a consultation with the Constitutional Court". If the legislature did not provide such jurisdiction to the Constitutional Court, there is no statutory possibility available entitling the ordinary courts to appeal to the same.

25. The party to the proceedings compares the legal situation occurring in the case under consideration with a similar one dealt with in a Judgment of the Constitutional Court, file No. Pl. ÚS 33/2000, and infers that the ordinary court should have first examined whether or not it was possible to interpret the provisions questioned in a constitutionally conforming manner, and possibly whether application of the same in the case under consideration is essential and proper. The party to the proceedings reproaches the petitioner for their having chosen an intricate course of action, when they have elected, out of all possible interpretations of 'ordinary law', the one which forces them to apply already invalid provisions of the Act on the Security Information Service concerning the exclusion of a judicial review, and then claim there is a conflict between the contested provision and the constitutional order of the Czech Republic and initiate review of such provisions by the Constitutional Court with a sole objection – to not apply the contested provisions in the case being settled by the same court. The petitioner allegedly did not sufficiently take into account the fact that the contested provisions were not valid at the time of examining the same and that the new legal arrangement contained in Act No. 362/2003 Coll., effective since 1 January 2007, does not disallow a judicial review in similar cases any more.

26. Even when the party to the proceedings proceeds from the valid legal arrangement which determines that the court, when reviewing a decision of an administrative body, proceeds from the factual and legal conditions which existed at the time of decision making by the administrative body, the party believes that, following annulment of the hitherto legal arrangement, the court responsible for decision making should no longer be bound by the same, provided that "employment of the same is not imposed by the interim provisions of the new legal arrangement". Within the scope of these deliberations, the party to the proceedings declares the conviction that it is not evident which values of a law-based state or which fundamental rights and basic freedoms would be violated by the petitioner, if the petitioner, with regard to the new legal arrangement, had admitted a judicial review of the decision of the administrative body, which, in accordance with the hitherto legal arrangement, was not feasible.

27. The party to the proceedings considers the petition by the petitioner for declaration of the unconstitutionality of the provisions of § 139 para. 1 of the Act on the Security Information Service to be inadmissible.

IV. Dispensation of an oral hearing

28. According to the provisions of § 44 paragraph 2 of the Act on the Constitutional Court, the Constitutional Court may, upon consent by the parties, dispense with an oral hearing if further clarification of the matter cannot be expected from said hearing. With respect to the fact that the petitioner in their petition and the Chairperson of the Chamber of Deputies of the Parliament of the Czech Republic both expressed consent for dispensation of an oral hearing, and, with respect to the fact that the Constitutional Court deemed that further clarification of the matter cannot be expected from such a hearing, the same was dispensed with in respect of the given case.

V. Control of the constitutionality of a legal norm which is invalid but still applicable

29. The Constitutional Court has first dealt with evaluating whether it is competent, in terms of merits, to hear the petition filed, since the petitioner did not demand annulment of the contested statutory provisions, but only declaration of the unconstitutionality of the same. Such a proposed verdict of the petition was influenced by the fact that Act No. 362/2003 Coll. on Alteration of Acts Relating to the Adoption of the Act on a Service Relationship of Members of Security Corps (hereinafter referred to only as "Act No. 362/2003 Coll."), which altered not only the Act on the Security Information Service, but also a whole number of other legal regulations, became valid on 31 October 2003 and effective on 1 January 2007.

30. Act No. 362/2003 Coll. annulled the provisions of § 139 para. 1 of the Act on the Security Information Service (cf. Section four, Art. IV, clause 3) which were contested by the petition. These issues are now regulated by another act, Act No. 361/2003 Coll. on a Service Relationship of Members of Security Corps (hereinafter referred to only as "Act No. 361/2003 Coll."), whose provisions of § 196 para. 1 allow review by a court of all decisions which were issued within the proceedings in accordance with such an act. According to the statement of the petitioner, the contested provisions of § 139 para. 1 of the Act on the Security Information Service were applied within the proceedings before the Municipal Court in Prague in the wording prior to the amendment; meaning that – within the proceedings on the filed cassational complaint on the merits – application of the contested provisions will also have to be reviewed, which was the crucial reason why the petitioner, in accordance with the provisions of § 95 para. 2 of the Constitution of the Czech Republic, turned to the Constitutional Court.

31. In earlier case decisions, the Constitutional Court concluded that Article 95 para. 2 of the Constitution of the Czech Republic implies that the Constitutional Court's obligation is to review the constitutionality of the contested provision of an act, even when such a provision has already been annulled (altered), this under the condition that the addressee of the reason claimed for unconstitutionality is a public power, i.e. not a subject of private law, and under the condition that the contested provision of the act is to be applied by an ordinary court in solving a case which has yet to be closed. Such legal opinion has previously been declared, for example, in a Judgment dated 10 January 2001, file No. Pl. ÚS 33/2000 (published in Collection of Judgments and Rulings of the Constitutional Court, Volume 21,

Judgment No. 5, promulgated under No. 78/2001 Coll.), as well as in other judgments (for example, Judgment dated 29 January 2008, file No. Pl. ÚS 72/06, promulgated under No. 291/2008 Coll., Judgment dated 6 February 2007, file No. Pl. ÚS 38/06, promulgated under No. 84/2007).

32. In the case under consideration, these conditions have been met.

33. In the case under consideration, it is necessary to answer the question whether the contested provisions were, in the case administered by the Municipal Court in Prague under file No. 8 Ca 57/2006, truly applied to the scope the review of which is proposed, and if it was not so, even though reference is made to the same in the reasoning of the resolution by the Municipal Court in Prague dated 30 May 2006, ref. No. 8 Ca 57/2006-27, whether and to what extent this fact must be granted relevance in just the proceedings on norm control before the Constitutional Court.

34. As results from the description of the given proceedings before the ordinary court, it is clear that the subject of the proceedings on the merits of the case consisted of lump sum death benefit granted to the survivors of a member of the Security Information Service, which is, with respect to the legal arrangement specified in Chapter Eight of the Act on the Security Information Service in the wording effective until 31 December 2006, one of the claims relating to the termination of an service relationship [§ 124 in relation to the provisions of § 38 clause e) of the quoted Act].

35. Therefore, the Constitutional Court concluded that the Supreme Administrative Court is a justified petitioner and thus conditions for their active standing in the proceedings on a norm control in relationship to the provisions of § 139 para. 1 of the Act on the Security Information Service have been fulfilled.

VI. Evaluation of the constitutionality of the contested statutory provisions in terms of their contents

36. Furthermore, the Constitutional Court proceeded to evaluate, in terms of contents, (a part of) the contested statutory provisions from the viewpoint of their harmony with the constitutional order of the Czech Republic, while the Constitutional Court took into account that the proposed verdict of the petition contested not the entire provisions of § 139 of the Act on the Security Information Service, but only paragraph 1 of the same, which regulates an exception to the rule that the court does not review decisions of a service body.

37. Exceptions to the rule of not reviewing the decisions of a service body apparently apply to the field of claims related to the termination of a service relationship of a member of the Security Information Service upon discharge from the same (§ 38 and § 40 of the Act on the Security Information Service); in connection with termination of the service relationship of a member of the Security Information Service, claims originate to a disbursement of some benefits, such as pay off (§ 116), salary settlement (§ 117), and service benefits (§ 119); if the service relationship of a member of the Security Information Service ends through the death of such a person, survivors are paid lump sum death benefit (§ 124).

38. The Constitutional Court has dealt with the issue of service benefits and ex-service pensions in its decisions on a number of occasions (for example, Judgment of the Constitutional Court dated 28 February 1996, file No. Pl. ÚS 9/95, resolution file No. II. ÚS 164/01, III. ÚS 209/01, and Judgment dated 9 October 2003, file No. IV. ÚS 150/01, all available at http://nalus.usoud.cz).

39. In Judgment file No. Pl. ÚS 9/95, the Constitutional Court inclined towards the opinion of the Ministry of Labour and Social Affairs and stated that "in the legal order of the Czech Republic, these benefits are framed as a certain form of financial compensation for work carried out under aggravated conditions and certain personal limitations resulting from the nature of the work in the armed forces of the state (or security corps). They form a part of those benefits of a social nature related to the termination of a service relationship of members of such corps".

40. In this sense, lump sum death benefit may be indisputably seen as a social benefit. The lump sum death benefit is a part of the right to adequate material security in the case of the loss of a provider, protected by Article 30 para. 1 of the Charter.

41. In accordance with Article 4 para. 2 of the Charter, limitations may be placed upon fundamental rights and basic freedoms only by law and under the conditions prescribed in the Charter. In this, the essence and significance of these rights and freedoms must be preserved (Art. 4 para. 4 of the Charter). A legal arrangement which excludes a judicial review of a decision by a service body on claims of a social nature is not compatible with the condition of preservation of fundamental rights and basic freedoms.

42. By an amendment to the Act on the Security Information Service, adopted via Act No. 362/2003 Coll. with effectiveness from 1 January 2007, the provisions of § 22 to 146a, including footnotes Nos. 8) to 28) and 30), were annulled, that is including the contested provisions of § 139 para. 1 of the Act on the Security Information Service. It is thus apparent that the legislature, having been aware of the unequal position of members of security corps compared to other government employees, made it possible through the new legal arrangement to review by a court all legally effective decisions of service bodies issued in proceedings in accordance with the above act.

43. Even when in the field of economic, social and cultural rights, as well as the rights of minorities, it is the state which has been afforded the opportunity of preferential treatment for certain groups of society which is otherwise intricately stratified in terms of social, cultural, professional or other status, while the legislature materialises, through adopting legal norms, their concepts of admissible limitations of factual inequalities within society, there is an increasingly conspicuous effort to guarantee members of security corps the same standard of protection of their procedural rights as belongs to other government employees, and to provide them with the possibility of attaining protection of their fundamental rights pursuant to Art. 1, Art. 36 para. 1 and para. 2, and Art. 37 para. 3 of the Charter with an independent and impartial court. In the contested

provisions of § 139 para. 1, clause a) of the Act on the Security Information Service, such a standard was not honoured. The new legal arrangement expressed the conviction of the legislature that there are no relevant reasons for further continuance of a different approach in this field of legal arrangement.

44. Besides, the Constitutional Court, already in a Judgment dated 9 October 2003, file No. IV. ÚS 150/01, in which they dealt with the issue of service benefits and their influence on the legal sphere of the complainant, expressed its opinion that if the hitherto (that is as of 31 December 2006) legal arrangement does not permit all decisions of administrative bodies concerning civil rights and obligations to be subject to review by a court or another independent body in such a way as is conceived by Art. 6 para. 1 of the Convention, such a course of action may be considered an undesirable excess.

45. The Constitutional Court has dealt with the issue whether the judicial exclusion of review of a decision of a functional body in the matter of a claim to lump sum death benefit, in accordance with § 124 of the Act on the Security Information Service (with exceptions specified in the contested provisions of § 139 para. 1 of the Act on the Security Information Service), ensured independence and impartiality of decision making to the parties to the proceedings, and thus also fairness of proceedings administered in accordance with the Act on the Security Information Service; the Constitutional Court reached the conclusion that it was not so. The executive body which represents its interests in the area of a service relation not only issued a first instance decision, but also made a decision at the second instance on a remedy against said decision. In a situation when there was not any review by an independent and impartial body, the decision depended on the will of one institution, which, just by the nature of the matter, cannot be considered independent or impartial. It is clear that such an arrangement contravenes the generally acknowledged meaning and purpose of Art. 36 para. 2 of the Charter, as well as Art. 6 para. 1 of the Convention on the Protection of Human Rights and Fundamental Freedoms, and Art. 4 of the Constitution of the Czech Republic, which determines that fundamental rights and basic freedoms are under the protection of judicial power.

46. The Constitutional Court is aware of specific features of decision making on service affairs relating to members of intelligence services. Information which comes to light in the course of such decision making relates to the field of security risks and interests of the state, which may be reflected in the restriction of warranties of some standard procedural safeguards of a proper and thus also fair trial, such as the public nature of a hearing. A similar situation was assessed by the Constitutional Court in a Judgment dated 6 September 2007, file No. II. ÚS 377/04, in relation to dealing with a constitutional complaint contesting the decision making in cases of classified information, and it was emphasised that “also in this form of proceedings, it is the task of the legislature to make possible, in a statutory form, implementation of reasonable safeguards for protection by a court, be it, according to the nature of the matter, … for special and differentiated protection”. From the viewpoint of protection of fundamental rights and basic freedoms, public interest in not publishing such specific facts cannot constitute a complete resignation to protection of fundamental human rights and basic freedoms, in particular the judicial review of administrative decisions.

47. The Constitutional Court, for the reason specified above, concluded that the provisions of § 139 para. 1 of Act No. 154/1994 Coll. on the Security Information Service, in the wording prior to the amendment made by Act No. 362/2003 Coll. on Alteration of Acts Relating to the Adoption of the Act on a Service Relationship of Members of Security Corps, as amended by later regulations, are in conflict with Art. 1, Art. 36, Art. 37 para. 3 of the Charter, Art. 6 para. 1 of the Convention, and therefore, in accordance with Art. 95 para. 2 of the Constitution, the Constitutional Court granted the petition of the Supreme Administrative Court.

48. With respect to Art. 89 para. 2 of the Constitution of the Czech Republic, bodies of public power are obliged to reflect the consequences of established unconstitutionality in their decision-making practice, i.e. not to apply the above-quoted provisions in dealing with specific cases.

Note: Decisions of the Constitutional Court cannot be appealed.

In Brno on 19 November 2009

Pavel Rychetský
President of the Constitutional Court