2008/05/20 - PL. ÚS 12/07: TRAVEL DOCUMENT FROM A CRIMINALLY PROSECUTED PERSON

HEADNOTES

In the present matter the contested provision of the Act on Travel Documents did not provide (nor does the now valid provision of the Act provide) the administrative body deciding on the revocation of a travel document at the request of a body acting in criminal proceedings any opportunity at all for discretion in the third condition, because if the statutory grounds were met – a request from the body acting in criminal proceedings that was conducting criminal prosecution for an intentional crime against the person in question – the administrative body had no room at all for discretion as to the necessity or proportionality of that measure, and had to revoke the travel document. From a constitutional law viewpoint it is not key (although it is also not insignificant – see par. 33. below), whether the authority to weigh the unavoidability or necessity of using a means that restricts an individual's fundamental right or freedom in the interest or protecting another constitutionally protected value is entrusted to one or another public body (a passport administration body or a body acting in criminal proceedings); the decisive thing is that its decision cannot be removed from effective judicial review. The contested decision [sic] of the Act on Travel Documents did not provide any discretion to the administrative body, which, as a result, considerably limited the possibility of its review by an administrative court. In other words, the administrative court could not question the decision of the passport administration body in the part where it refused to consider objections that did not fall under the contested statutory provision, because if the passport administration body had acted otherwise, it would have been in conflict with that norm. Thus, the Constitutional Court concludes that, in the contested provision, the legislature restricted the right of a travel document holder to seek protection of his rights before a court or other body in such a manner that it completely ruled out the constitutionally guaranteed evaluation by a court of the interference in rights in terms of the unavoidability or necessity of restricting freedom of movement.

In brief, the Constitutional Court does not deny that the refusal to issue or revocation of a travel document specified by law and supported by a justified public interest (legitimate aim) can be an unavoidable (necessary) measure; however, a decision about such a measure cannot be removed from true judicial protection and replaced by merely illusory judicial protection.

It is not the Constitutional Court's job to describe for the legislature in detail what kind of legal regulation it is to adopt regarding the present issue. However, before adopting it, it will be up to the legislature to weigh, thoroughly and consistently, whether it is acceptable for administrative offices and administrative courts to decide on the issuance or revocation of a travel document. By its consequences this is an institution for securing a person; the decision to use it would be better made by the public authorities conducting the proceedings in which that means of securing a person is to be used. Review of such a decision by a court in the same proceeding carries several undoubted advantages. They are not just the ability to act when necessary and greater knowledge of the reasons why the relevant public body considered it necessary to take this step, but primarily – and this also includes a possible constitutional

law aspect – removing undesirable combining blending of various trials conducted by various bodies. The Senate also pointed to this in its brief concerning the petition. Therefore, declaring the contested provision of the Act on Travel Documents unconstitutional, the Constitutional Court does not, under any circumstances, intend to agree with the opinion that wide discretion for an administrative office, supplemented by judicial review with full jurisdiction by the administrative courts, is the route that the legislature should or must take.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The plenum of the Constitutional Court, consisting of the Chairman, Pavel Rychetský, and Judges Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická decided on 20 May 2008 on a petition from the Supreme Administrative Court asking it to declare unconstitutional § 23 let. b) of Act no. 329/1999 Coll., on Travel Documents and Amending Act no. 283/1991 Coll., on the Police of the Czech Republic, as amended by Act no. 217/2002 Coll. and by Act no. 320/2002 Coll., with the participation of 1) the Chamber of Deputies of the Parliament of the CR, and 2) the Senate of the Parliament of the CR, as parties to the proceeding, with the consent of the parties to the proceeding without a hearing, as follows:

The provision of § 23 let. b) of Act no. 329/1999 Coll., on Travel Documents and Amending Act no. 283/1991 Coll., on the Police of the Czech Republic, as amended by Act no. 217/2002 Coll. and by Act no. 320/2002 Coll., was inconsistent with Art. 2 par. 2, Art. 4 par. 1, Art. 14 par. 1 and Art. 36 par. 2 of the Charter of Fundamental Rights and Freedoms and Art. 2 of Protocol no. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

REASONING

1. On 25 June 2007 the Constitutional Court received a petition from the Supreme Administrative Court asking it to declare unconstitutional § 23 let. b) of Act no. 329/1999 Coll., on Travel Documents and Amending Act no. 283/1991 Coll., on the Police of the Czech Republic, as amended by Act no. 217/2002 Coll. and by Act no. 320/2002 Coll. (the "Act on Travel Documents, in the version in effect until 31 December 2004"). The petitioner did so after, in proceedings on a cassation complaint from Jan Charvát (the "complainant"), conducted as file no. 2 As 52/2004, it concluded that the contested provision, which is to be applied in resolving the matter, is inconsistent with Art. 14 par. 2 and 3 and Art. 36 par. 2 of the Charter of Fundamental Rights and Freedoms (the "Charter") and that this inconsistency cannot be overcome by a constitutional interpretation.

I.
Circumstances of the Case

2. In the matter in question, the Municipal Office of Slaný, by decision of 25 March 2003 ref. no. CP 02/03, granted the application of the police counsel of the Police Presidium of the Czech Republic, Office of Criminal Police and Investigation, Department of Economic Crimes, Prague 9, and revoked passports no. 330 33 205 and no. 330 33 206 from the complainant, who was being criminally prosecuted for attempted curtailment of taxes, fees, and similar mandatory dues under § 8 par. 1, § 148 par. 1, 4 of the Criminal Code and for the crime of participation in a criminal conspiracy under § 163a par. 1 of the Criminal Code. In its decision of 22 April 2003 ref. no. Vnitř. 3055/03, the Regional Office of the Central Czech Region denied the complainant's appeal and confirmed the decision of the first-level administrative body. The administrative bodies did not accept the complainant's defense that criminal prosecution of him was unjustified and revoking the passports was self-serving, and referred to § 23 of the Act on Travel Documents, in the version then in effect, which contained an exhaustive list of grounds which, if met, require the administrative body in administrative proceedings to revoke a travel document – in the case of let. b) of that provision, if it receives an application from a body acting in criminal proceedings to revoke a travel document from a citizen who is being prosecuted for an intentional crime. In its decision of 5 May 2004 ref. no. 7 Ca 138/2003-30, the Municipal Court in Prague denied the complainant's complaint for lack of grounds, with reference to administrative bodies being bound by the legal framework in which an administrative bodies does not have an opportunity for discretion, and must revoke the travel document; evidence is presented only as to whether an application to revoke a travel document was filed, whether it was filed by a body acting in criminal proceedings, and whether that body is prosecuting the citizen whose travel document is to be revoked for an intentional crime. Presentation of evidence on other matters is not legally relevant, and therefore it considered unimportant the complainant's subjective attitude regarding travel abroad, or an objection that there were no grounds to impose custody on the grounds of § 67 let. a) of the Criminal Code. In the cassation complaint the complainant objected that the administrative court's decision was illegal, and pointed to the fact that the administrative bodies did not conduct any presentation of evidence on the need to revoke his travel document, nor did they take into consideration the position of the District Court for Prague-East, which did not grant the application from the body acting in criminal proceedings to take the complainant into custody. If there had been proper presentation of evidence the administrative body would have had to find that revoking travel documents more than half a year after beginning criminal prosecution was unjustified, because the complainant, whose business involves frequent trips abroad, was repeatedly outside the Czech Republic, which he informed the police counsel about, and the police counsel did not forbid him to travel; likewise, he was not "blocked" from crossing the border. The complainant described as incorrect the administrative bodies' application and interpretation of the abovementioned provision of the Act on Travel Documents.

II.
Petitioner's Arguments

3. The Supreme Administrative Court suspended proceedings in the matter and submitted to the Constitutional Court a petition to declare the cited provision unconstitutional, because in its opinion the fact that an administrative body is bound by the submitted application without expressly being given any opportunity whatsoever for discretion regarding the grounds, proportionality, and necessity for such serious interference as revocation of travel documents, and thus restriction of freedom of movement, is inconsistent with the constitutional order of the Czech Republic. The petitioner acknowledged that the application to revoke a travel document and the measure taken is to serve to secure the purpose of criminal prosecution and that the body acting in criminal prosecution can best evaluate the need for such a restriction in relation to a particular crime and a particular person. However, if the administrative body that makes a substantive decision is denied the opportunity to evaluate the police body's deliberations, review evidence on the conditions for revoking a travel document (other than verifying the existence of statutory grounds for filing the application), weight the arguments of the party to the proceeding, and on that basis reach its own conclusion (which may differ from the application), an unacceptable situation results, because no phase of that proceedings leaves room for protecting the rights of the party to the proceedings, because that framework considerably limits judicial review to mere evaluation of the existence of an application and of criminal proceedings. Thus, the administrative body and administrative court can only review whether one of the relatively widely defined, only loosely corresponding with Art. 14 par. 3 of the Charter, grounds under § 23 of the Act on Travel Documents exists; if it does, the administrative body must always revoke the travel document or refuse to issue it, without being able to consider whether such interference in the particular citizen's rights is unavoidable for the protection of the rights of third parties. Only the applying party would perform that evaluation, but informally, without any sort of procedure or guarantees of review, which is a procedure that can hardly be considered to be a fair trial under Art. 6 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"); moreover, this situation does not ensure effective judicial review of a decision by a public administration body on a fundamental right under Art. 36 par. 2 of the Charter.

4. The Supreme Administrative Court also considered whether the provision in question can be interpreted in a constitutional manner, and concluded that it cannot. This comes into consideration only where a particular provision of a legal regulation permits various interpretations, where one is in accordance with constitutional norms, and others are inconsistent with them. In this case, the interpretation of the contested provision would have had to be that the administrative body is required, in addition to the conditions expressly provided by statute, whether, in a particular case, the conditions fro limiting a fundamental right enshrined in Art. 14 of the Charter were met, i.e., it would have to ensure a fair trial that met the fundamental principles of administrative proceedings, determine the facts of the matter, and address these facts in the grounds for its decision. However, that interpretation would be in direct conflict with the

statutory text. The impossibility of that interpretation is also supported by the explanatory report to the Act on Travel Documents (Chamber of Deputies publication 272), from which it is clear that the legislature's intent was to rule out discretionary authority for an administrative body. The Supreme Administrative Court added that it is aware that the Constitutional Court considered this issue in its resolution of 26 March 2003 file no. I.ÚS 52/03, where it denied a constitutional complaint filed in a similar case, on the grounds that the provision transferred discretion from the administrative body to bodies acting in criminal proceedings. The petitioner commented that the deliberation conducted by a body acting in criminal proceedings, i.e. deliberation about whether to file an application to revoke a travel document, is completely exempt from judicial review; the application is not a decision by an administrative body, nor is there an action by an administrative body that is reviewable under § 82 et seq. of the Administrative Procedure Code.

III.
Briefs from the Parties to the Proceeding

5. The Chamber of Deputies of the Parliament of the Czech Republic in its brief on the petition, of 14 August 2007, signed by the Chairman Ing. Miloslav Vlček, recapitulated the petition's key arguments and disagreed with them. The Chairman of the Chamber of Deputies stated that the wording of the contested provision was conceived so that, in accordance with Art. 14 par. 3 of the Charter, freedom of movement and residence would be limited in the exhaustively listed grounds, and the consideration as to whether the limitation was necessary was left to the body that applies the revocation of (or refusal to issue) a passport, which, in the case of the contested provision, is the body acting in criminal proceedings. The logical result of that regulation was ruling out the discretionary authority of the administrative body that decides on the action. The resulting limitation of the rights of parties to administrative proceedings was, in accordance with Art. 14 par. 3 of the Charter, considered to be unavoidable in order to maintain public order.

6. The Chamber of Deputies stated that it discussed the Act in its 3rd term of office, and during discussion in the Committee for Public Administration, Regional Development and the Environment, and in the second reading, no amending proposal to § 23 was submitted. The bill was approved on 21 October 1999 and passed to the Senate of the Parliament of the CR. The senate discussed the bill, and on 12 November 1999 it returned it to the Chamber of Deputies with amending proposals that did not affect § 23; the Chamber of Deputies voted on the Senate's version on 30 November 1999, and approved it by the required majority of all deputies. The President of the Republic signed the Act on 14 December 1999, and on 27 December 1999 it was promulgated in the Collection of Laws as no. 329/1999 Coll. The Act was thus adopted in the prescribed manner, and the Chairman of the Chamber of Deputies stated that the legislative assembly acted in the belief that the adopted Act is consistent with the Constitution, the constitutional order, and the legal order of the Czech Republic. The Chamber of Deputies left the decision on whether the contested provision is constitutional to the Constitutional Court.

7. The Senate of the Parliament of the Czech Republic, in its brief on the petition, of 31 July 2007, signed by the Chairman of the Senate, MUDr. Přemysl Sobotka, stated that the Act was discussed in committees, and at their recommendation it was approved, with amending proposals, on 12 November 1999 by a significant majority; out of 62 Senators present, 56 voted in favor of the bill, and 6 abstained from voting. The adopted amending proposals were not directed at the contested provision, but during discussion in the committee the representatives of the proponent of the bill were criticized because the government did not take the opportunity to change the previous construction of the legal regulation under which an administrative body decides to revoke a travel document upon the application of various state bodies on grounds listed materially non-organically in the Act on Travel Documents. It was stated in the committees that the grounds for non-issuance or revocation of a travel document should be written in those legal regulations in which that instrument would be connected to regulation of relationships for which its purpose intends it (which it serves). The authority to decide on non-issuance or revocation of a travel document should belong to the state bodies whose jurisdiction is defined for these relationships by law, because such a legal framework also creates a regime of appropriate guarantees that a matter will be properly substantively handled, including the standard rights of a party to a proceeding and the possibility of subsequent review. For example, the Civil Procedure Code could regulate a court's authority to decide to confiscate a travel document in cases of an order to execute a court decision due to failure to meet financial obligations, the Criminal Procedure Code could address the authority of bodies acting in criminal proceedings to confiscate a travel document within the framework for securing persons and things when prosecuting a citizen for a particular crime, etc. A decision by a body acting in criminal proceedings could be contested by a complaint under the rules of a criminal trial, similarly as with, e.g., custody, or other actions to secure a person or thing. However, the Criminal Procedure Code does not establish the authority of bodies acting in criminal proceedings regarding making an application to a passport issuing administrative body.

8. Apart from the description of the discussion of the issue in the committees, the Senate also addressed some related circumstances, and presented aspects that the Constitutional Court might take into account when considering whether the contested provision was constitutional. It pointed out that the legal framework for non-issuance or revocation of travel documents on grounds arising from various areas of regulation of social relationships has its historical origins. In the beginnings of passport law, the aim was primarily an instrument for politically motivated restriction on travel out of the country, which corresponded to its being established in police law, and decision making within the arbitrary will of the state; with the development of other publicly legitimate needs for restricting travel out of the country other grounds were simply added to this legislative base. The Senate attached an overview of the existing framework of passport regulations in statute from 1928, 1948 and 1965, where especially the last two emphasized passport restrictions on the grounds of state security, and made absolute the state's arbitrary will in deciding to deny someone a passport. The Senate emphasized that it was only the Act on Travel Documents from 1991 (no. 216/1991 Coll.) that was substantially different from its predecessors. It respected the constitutionally established assumption that a citizen has the right to freely leave

the territory of the state, and narrowed the cases where it was possible to refuse to issue a travel document to cases that were legally defined. Political grounds for denying the right to travel out of the country became a thing of the past, although the legislative construction of the Act on Travel Documents was preserved. Because the form was preserved, it is still the passport administration body that decides to deny a travel document, rather than the bodies in whose jurisdiction the need to restrict a citizen's travel arises in order to prevent the marring of important decisions in the public interest. The Senate stated that the valid Act on Travel Documents, no. 329/1999 Coll., also accentuates the poor organization of the regulations, because it newly declares that a passport administration body's decision making in a matter of denying a travel document is bound by the "application" from the materially appropriate judicial bodies. Thus, with an absurd detour, the legal framework follows a model where it is unthinkable that a passport administrative body decides, even if only formally, on an "application" (but in fact a decision) of a court [in the case of let. a) of the cited provision – note by the Constitutional Court].

9. The Senate conditionally agreed with the petitioner that the former § 23 let. b) of the Act on Travel Documents, or the currently valid (virtually identical in content) § 23 let. c), makes impossible the material review of cases of non-issuance or revocation of travel documents, and in a certain respect this limits the right of the affected person to judicial protection from interference in their right to travel freely out of the state, which is one of the fundamental rights and freedoms. The true essence of non-issuance or revocation of a travel document is to prevent cases where criminal prosecution is hindered or marred, a function that organically belongs to the purpose of criminal proceedings. The means and intensity of the legally recognized defense of a prosecuted person should legislatively correspond to this essence. According to the Senate, this problem could be solved, for example, in the manner that was indicated in the debate in Senate committees, i.e. a entrusting consideration of the need to limit freedom of movement and residence (traveling out of the country) for reasons of public order and protection of the rights of others under Art. 14 par. 3 of the Charter to bodies acting in criminal proceedings. In the future, the form of a possible act to secure a person or thing that limited traveling out of the country could also be considered, because the condition that a citizen must hold a travel document in order to travel out of the country is becoming irrelevant, at least for trips to European Union member states.

10. The Senate pointed out that in this matter it already stated its position on the petitioner's petition under file no. Pl.ÚS 48/05, in which the petitioner sought the annulment of the now valid § 23 let. c) of the Act on Travel Documents, as amended by Act no. 559/2004 Coll. The substantive change of § 23 let. b) of the cited Act valid until 31 December 2004 was only that the condition for non-issuance or revocation of a travel document was not to be criminal prosecution for any intentional crime, but for a crime for which a prison sentence of at least three years can be imposed. In the conclusion of its brief, the Senate stated that it discussed the bill of the Act on Travel Documents within its constitutionally specified competence and in a constitutionally specified manner, and acted on the bill with the majority believing that the bill was consistent with the constitutional order of the Czech Republic and the state's international obligations. It left the

decision on whether the contested provision is constitutional to the Constitutional Court.

IV.
Waiver of Hearing

11. Under § 44 par. 2 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations (the "Act on the Constitutional Court"), the Constitutional Court may, with the consent of the parties, waive a hearing, if it cannot be expected to further clarify the matter. In view of the fact that both the petitioner, in its petition, and the parties to the proceedings, in the brief from the Chairman of the Chamber of Deputies of the Parliament of the Czech Republic and the Chairman of the Senate of the Parliament of the Czech Republic agreed to waive a hearing, and in view of the fact that the Constitutional Court believed that a hearing could not be expected to further clarify the matter, a hearing in the matter was waived.

V.
Text of the Contested Legal Regulation

12. The provision of § 23 of the Act on Travel Documents in the version valid and in effect until 31 December 2004, and within it let. b) applied at the time the relevant public bodies made their decisions, reads:
Issuance of a travel document shall be denied, or an issued travel document shall be revoked, at the request
a) of a court, to/from a citizen against whom the execution of a court decision has been ordered for failure to meet support obligations or financial obligations,
b) of a body acting in criminal proceedings, to/from a citizen who is being prosecuted for an intentional crime, or
c) of a body that is executing a decision or arranging its execution under a special legal regulation, to/from a citizen who did not serve a prison sentence for an intentional crime, if the sentence was not waived or the statute of limitations has not run on serving the sentence.

VI.
Petitioner's Active Standing and Evaluation of Conditions for the Proceeding

13. The petitioner already turned to the Constitutional Court in the same legal matter in October 2005, when it filed a petition to annul § 23 let. c) of the Act on Travel Documents as amended by Act no. 559/2004 Coll. (footnote no.1). The Constitutional Court denied the petition under § 43 par. 1 let. c) a par. 2 let. b) of the Act on the Constitutional Court, by resolution of 25 April 2007 file no. Pl.ÚS 48/05, because the petitioner proposed annulling a provision that could not be applied in resolving the matter [before it]. The Constitutional Court pointed to the fact that Act no. 559/2004 Coll. annulled the original § 23 and replaced it with a new provision, so § 23 let. c) of the Act on Travel Documents as amended by the cited amendment, effective as of 1 January 2005 could not have been applied in

the petitioner's matter, because at the time that the public authorities were making their decisions, it was not a valid and effective component of the legal order. Nothing about this conclusion was changed by the petitioner's claim that after amendment of the Act on Travel Documents the text of the previous § 23 let. b) was contained in let. c). The Constitutional Court pointed out the need to distinguish a situation where a statutory provision is not changed from a situation where a contested provision was annulled and replaced by a new provision (or legal regulation), even if their wording is identical, because the normative existence (validity) of a legal regulation is formed by unity of the norm-creator's will and its expression (publication of the expression), and therefore, two legal regulations identical in content, one following the other in time, do not necessarily have normative identity (identity of validity) [cf. resolution file no. Pl.ÚS 20/99, Coll. of Decisions vol. 22, p. 349 (351), judgment file no. Pl.ÚS 15/01, promulgated as no. 424/2001 Coll., Coll. of Decisions vol. 24, p. 201 (223)]. Moreover, both provisions, although they agree that issuance of a travel document shall be denied or an issued travel document shall be revoked at the request of a body acting in criminal proceedings, demonstrate a material difference in the fact that, under the previous version of § 23 let. b), this happens vis-à-vis a citizen who is being prosecuted for an intentional crime, whereas under the present version of § 23 let. c) this affects a citizen who is being prosecuted for a crime (including one of negligence) for which a prison sentence of at least three years can be imposed.

14. With the present petition the petitioner met the conditions in Art. 95 par. 2 of the Constitution, because it seeks a declaration of unconstitutionality of § 23 let. b) of the Act on Travel Documents, in the version valid and in effect until 31 December 2004, which was applied in the matter in question, and in the proceedings on the cassation complaint the petitioner will review whether it was applied correctly.

15. Under § 67 par. 1 of the Act on the Constitutional Court there are grounds to to stop proceedings if a statute, another legal regulation, or the individual provisions that are proposed to be annulled cease to be valid before the proceedings before the Constitutional Court end, but as the Constitutional Court already stated in its judgment of 6 February 2007 file no. Pl.ÚS 38/06 (available at http://nalus.usoud.cz), under the legal opinion in judgment file no. Pl. ÚS 33/2000 (Coll. of Decisions, vol. 21, p. 29), which is also referred to in the reasoning of judgment file no. Pl. ÚS 42/03 (no. 280/2006 Coll., Coll. of Decisions, vol. 40, p. 703), if a judge of a general court concludes that a statute which is to be applied in resolving a matter – i.e., not only valid at that time, but also no longer valid but still applicable – is inconsistent with a constitutional law, it is required to sumit the matter to the Constitutional Court. The Constitutional Court considers a refusal to provide help to the general court by its decision on the constitutionality or unconstitutionality of an applicable statue to create an unsolvable situation of an artificial legal vacuum; it would then classify a decision by the general court itself on the unconstitutionality of the applied provisions as a procedure in conflict with the Constitution, inconsistent with the principle of a concentrated constitutional judiciary. In judgment file no. Pl.ÚS 38/06 the Constitutional Court considered the question of whether a procedure under Art. 95 par. 2 of the Constitution, which opens room for evaluating previous legal actions (or legal events) by a later, but constitutional legal framework, showing signs of true retroactivity, is consistent

with the principle of a law-based state (Art. 1 par. 1 of the Constitution); it distinguished cases of vertical and horizontal application of fundamental rights and formulated a conclusion that true retroactivity, in a case of a declaration that an already annulled statue was unconstitutional and evaluation of previous factual actions by a constitutional legal framework with effects ex tunc on the part of the public authorities does not establish violation of the principle of protecting citizens' confidence in the law, or interference in legal certainty or acquired rights. Thus, under Art. 95 par. 2 of the Constitution, the Constitutional Court is required to review on the merits whether the contested provision is constitutional, even though it was already annulled, provided that the addressee of the claimed grounds for unconstitutionality is the public authorities. That is so in the present matter, and therefore, in the context of the cited legal opinions stated in the abovementioned judgments, the conditions for reviewing the submitted petition on the merits have been met. In view of § 35 par. 1 of the Act on the Constitutional Court, the Constitutional Court's previous resolution, file no. Pl.ÚS 48/05, does not create the obstacle of rei iudicatae.

VII.
Case Law of the Constitutional Court on the Revocation of a Travel Document of a Citizen of the Czech Republic

16. Until the adoption of Act no. 329/1999 Coll., § 17 let. b) of Act no. 216/1991 Coll. of the Act on Travel Documents, was in effect, under which the issuance of a travel document could be denied to, or an issued travel document could be revoked from, a citizen who was being criminally prosecuted. The legal framework at that time did not provide any other criteria or conditions that had to be met in order to establish the discretionary authority of administrative bodies, and in terms of the law it was sufficient if the administrative body verified in a relevant manner that a particular person was being criminally prosecuted, for example, through information from the investigator who led the prosecution. The Constitutional Court rejected constitutional complaints contesting the decisions of administrative courts as obviously groundless, on the grounds that the purpose of criminal prosecution fully corresponded to permissible limitation of freedom of movement under Art. 14 par. 3 of the Charter, and this was procedure within the bounds of a constitutional exception. In its resolution of 7 September 1999, file no. II.ÚS 95/98 (not published, available at http://nalus.usoud.cz), it stated that it is necessary to review whether application of the relevant provision of the Act on Travel Documents does not lead to disproportionate interference in an individual's fundamental rights and freedoms, because the regulation itself did not rule it out a priori; it described disproportionate interference as arbitrariness, which, however, cannot be found where more burdensome interference is possible, i.e. limitation of personal freedom instead of limitation of freedom of movement that is only temporary and outside the territory of the republic. Regarding the scope of an administrative court's review activity, the Constitutional Court stated that the court "could not review the grounds for criminal prosecution, and thus the very basis for interference in freedom of movement."

17. After the adoption of Act no. 329/1999 Coll., the Constitutional Court proceeded similarly in reviewing decision based on application of the provision

contested by the petition; it described the Act on Travel Documents as a statute that implements limitations on the freedom of movement provided in Art. 14 par. 3 of the Charter and which gives bodies acting in criminal proceedings an opportunity to ask for limitation of the freedom of movement of a person being prosecuted for an intentional crime by the revocation of his travel document. In the matter file no. I.ÚS 52/03, mentioned by the petitioner, where, at the request of the state prosecutor a travel document was revoked from a criminally prosecuted person a year and a half after notice of the indictment, and the person claimed that he never evaded criminal prosecution or marred the investigation, the Constitutional Court had no doubt that only bodies acting in criminal proceedings can, on the basis of the situation and development of the prosecution of a particular person, weigh whether it is necessary to limit the persons freedom of movement in this manner (resolution of 26 June 2003, not published, available at http://nalus.usoud.cz).

18. Thus, we can summarize that in its previous decision making on this issue the Constitutional Court indicated the limits within which limitation of an individual's freedom of movement must be measured. It left open the question of effective review of a decision by a body acting in criminal proceedings for purposes of verifying whether an adopted measure rules out arbitrariness in a case where it exceeds the positive aspects, e.g. the public interest in these measures. However, in this regard it must be remembered that the subject matter of constitutional law review was decisions of administrative panels of general courts, deciding according to Part Five of the Civil Procedure Code, in the version in effect until 31 December 2002, i.e. with the existence of a legal framework which then displayed serious constitutional law defects, to which the Constitutional Court responded on a fundamental level in judgment file no. Pl.ÚS 16/99 (č. 276/2001 Coll., Coll. of Decisions, vol. 22, p. 329).

VIII.
Constitutional Limits on Freedom of Movement

19. Freedom of movement is one of the fundamental human rights, and under Art. 4 of the Constitution it is under the protection of the judicial branch. Under Art. 14 of the Charter

1) The liberty of movement and the freedom of the choice of residence is guaranteed.
2) Everyone who is legitimately staying within the territory of the Czech and Slovak Federal Republic has the right freely to leave it.
3) These freedoms may be limited by law if such is unavoidable for the security of the state, the maintenance of public order, the protection of the rights and freedoms of others or, in demarcated areas, for the purpose of protecting nature.
4) Every citizen is free to enter the territory of the Czech and Slovak Federal Republic. No citizen may be forced to leave his homeland.
5) An alien may be expelled only in cases specified by the law.

Under Article 2 of Protocol no. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("Protocol no. 4" or the "Protocol")

1) Everyone lawfully within the territory of a State shall, within that territory, have

the right to liberty of movement and freedom to choose his residence.
2) Everyone shall be free to leave any country, including his own.
3) No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4) The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

20. Rights arising from the freedom of movement (Art. 14 of the Charter) can be asserted directly (Art. 41 par. 1 of the Charter a contrario), not through statutes that would implement these rights. However, constitutional guarantees are not unlimited, and the freedom of movement is limited by constitutional bounds. Generally these limitations can be summarized to the effect that they must be specified by statute, for reasons provided in an exhaustive list in par. 3 of Article 14 of the Charter, "if it is unavoidable." Protocol no. 4 to the Convention guarantees freedom of movement for the citizens of the relevant state and for foreigners in different ways (cf. "everyone who is lawfully within"), and sets the limitations for cases specified in par. 3 of the Protocol by the condition "necessary in a democratic society." The Charter and the Protocol do not set any other limits, and therefore freedom of movement must be understood as a right that includes not only the right to move freely and settle anywhere in the territory of the Czech Republic, but also the right to freely travel to another country and to return.

21. As regards citizens of the Czech Republic, the constitutional framework permits their freedom of movement to be limited by intervention by the public authorities. In order for that intervention to be considered constitutionally permissible, it must meet three conditions:
- it must be provided by law,
- it must have a legitimate aim,
- it must be unavoidable, or necessary, in a democratic society.

VIII.1)
Evaluation whether the Limitation is Consistent with the Law, and whether It Is Justified by the Public Interest

22. Under § 2 and 3 of the Act on Travel Documents, valid at the time decisive for the complainant, a citizen of the Czech Republic could leave its territory only at a border crossing with a valid travel document (passport), which could be revoked by a decision of public bodies in cases provided in § 23; under let. b) the purpose of revoking a travel document was to ensure that a citizen who was being criminally prosecuted for an intentional crime would be available in the interests of the proper conduct of the criminal proceeding. Limitation of the movement of the Czech Republic on trips abroad was defined by law, and thus the contested provision meets the first condition.

23. The second condition is that the intervention must have a legitimate aim. These aims are defined in the Charter and the Convention by "soft concepts" – state security, national security, public order, public safety, avoiding criminality, protection of health or morals, protection of the rights and freedoms of others, and protection of the environment. Some of these concepts are defined by law; some of them, although frequently used, e.g. the term "public order," are not defined unambiguously in the legal order, and therefore they are interpreted by the case law of the courts, or by decisions of other public bodies. From a constitutional law viewpoint, it is not important whether these concepts are given content by the legislature or interpreted by case law; the important thing is that they may not be further expanded. The contested provision would make it possible to limit an individual's freedom of movement outside the territory of the Czech Republic as a result of his being prosecuted for an intentional crime. Criminal proceedings leading to the appropriate discovery of crimes and just punishment of their perpetrators (§ 1 par. 1 of the Criminal Code) for purposes of protecting the interests of society, the constitutional establishment of the Czech Republic, and the rights and legitimate interests of natural and legal persons (§ 1 of the Criminal Code) are a generally legitimate public interest. Thus, revocation of a travel document on the basis of the contested provision of the Act on Travel Documents, which permits limiting an individual's freedom of movement in the interest of one of these legitimate aims, meets the second condition.

VIII.2)
Evaluation of the Unavoidability or Necessity of Limitation

24. The third condition provides that interference in rights must be unavoidable, or necessary, in a democratic society. These terms are also not defined in detail in the Charter or the Convention; however, it is obvious that they involve a certain urgent social need, whose specific application represents room for discretion and justification by the legislature. If it is not provided by law, the characteristic features of this need can be derived from case law.

25. In connection with evaluating the necessity of interference by a public body into the rights and freedoms of an individual, the Constitutional Court ruled that "if the constitutional order of the Czech Republic permits interference in protection of rights, that happens only, and exclusively in the interest of protecting the democratic society, or in the interest of constitutionally guaranteed fundamental rights and freedoms of others; this includes primarily a necessity arising from the general interest in protecting society from crime, and in discovering and punishing such crimes. Permissible interference by the state power into a fundamental rights or freedom of a person is only such interference as is necessary in that sense. In order not to exceed the bounds of necessity, there must be a system of appropriate and sufficient guarantees, consisting of the appropriate legal regulations and effective review of observance of them." (cf. judgment file no. II.ÚS 502/2000, published in Coll. of Decisions, vol. 21, p. 83). Likewise, the case law of the European Court of Human Rights indicates that when evaluating interference that leads to violation of an individual's freedom of movement, within the principles provided by Art. 2 of Protocol no. 4, the Court pays attention to, e.g. the result of investigation, or the development of a particular case, and in that

context evaluates whether the interference was proportionate in relation to the intended aim [cf. e.g., the case of Baumann v. France, Application no. 33592/96, the case of Iletmis v. Turkey, Application no. 29871/96, http://www.echr.coe.int, the case of Luordo v. Italy, Application no. 32190/96, Soudní judikatura, Přehled rozsudků ESLP [Case Law, Review of Decisions of the ECHR], no. 6/2003, p. 317 (324) et seq.].

26. The purpose of the contested provision was to revoke or refuse to issue a travel document, so that the person being prosecuted for an intentional crime could not avoid prosecution, hinder it, or completely evade it. Thus, it is evident that the proportionality of that measure in terms of its unavoidability, or necessity, can be determined only on the basis of the situation and development of the criminal prosecution of the person affected by the provision, and that this evaluation rests with the body acting in criminal proceedings. However, the Criminal Code does not provide the prosecuted person a procedural means of obtaining effective review of the proportionality of the proposed measure, because the request from the body acting in criminal proceedings to revoke the travel document of the prosecuted person is decided in a proceeding other than the criminal proceeding.

27. Thus, the Constitutional Court reviewed primarily the question of whether a norm establishing the scope of facts for which the freedom of movement of a travel document holder is inconsistent with the constitutional order, specifically with Art. 36 par. 1 of the Charter, under which, “Everyone may assert, through the legally prescribed procedure, his rights before an independent and impartial court or, in specified cases, before another body.” The significance and purpose of this provision is to set an obligation for the state to protect everyone’s rights, because in a law-based state there cannot exist a situation in which the bearer of a right could not seek protection of the right (before a court or other body). Generally, the state is here in order to protect its citizens (but also persons staying in its territory) and to provide them guarantees that their rights will be protected. As the Constitutional Court explained in its judgment of 29 January 2008, file no. Pl.ÚS 72/06 (http://nalus.usoud.cz), paragraph 4 Art. 36 of the Charter (to which par. 1 Art. 36 of the Charter basically refers in the phrase “prescribed procedure”) refers to a law that provides “conditions and detailed provisions” in relation to all the foregoing paragraphs of Art. 36 of the Charter; nonetheless, such a law, issued on the basis of constitutional authorization, is bound by Art. 36 of the Charter, and cannot deviate from its content. The significance and purpose of an “ordinary’ statute under Art. 36 par. 4 of the Charter is only to set the conditions and details of implementation of the rights (already) established by the constitutional framers in Art. 36 of the Charter, that is, conditions and details of a purely procedural nature. If, under Art. 36 par. 1 of the Charter, everyone has the right to seek protection of his rights before a court or other body, and the conditions and rules for implementation of that right are provided by law, then that law, issued on the basis of constitutional authorization, cannot completely negate the entitlement of everyone to seek protection of his rights before a court or other body, and thus, even if in only certain cases, deny a constitutionally guaranteed fundamental right. Article 36 par. 1 of the Charter constitutionally guarantees everyone the right to seek protection of his right before a court or other body in all cases where it has been violated (there is no constitutional restriction). In other words, no person can be completely barred by law from the opportunity to seek protection of his right,

even if in only a certain case, because that person's right under Art. 36 par. 1 of the Charter would be annulled. An opposite interpretation would also indicate that the establishment of everyone's right to turn to judicial and other protective bodies for protection of one's rights created by the constitutional framers – endowed with the highest legal force – would basically become meaningless, because it could be annulled by the will of only the legislature in one or another situation.

28. In the present matter the contested provision of the Act on Travel Documents did not provide (nor does the now valid provision of the Act provide) the administrative body deciding on the revocation of a travel document at the request of a body acting in criminal proceedings any opportunity at all for discretion in the third condition, because if the statutory grounds were met – a request from the body acting in criminal proceedings that was conducting criminal prosecution for an intentional crime against the person in question – the administrative body had no room at all for discretion as to the necessity or proportionality of that measure, and had to revoke the travel document. From a constitutional law viewpoint it is not key (although it is also not insignificant – see par. 33. below), whether the authority to weigh the unavoidability or necessity of using a means that restricts an individual's fundamental right or freedom in the interest or protecting another constitutionally protected value is entrusted to one or another public body (a passport administration body or a body acting in criminal proceedings); the decisive thing is that its decision cannot be removed from effective judicial review. The contested decision [sic] of the Act on Travel Documents did not provide any discretion to the administrative body, which, as a result, considerably limited the possibility of its review by an administrative court. In other words, the administrative court could not question the decision of the passport administration body in the part where it refused to consider objections that did not fall under the contested statutory provision, because if the passport administration body had acted otherwise, it would have been in conflict with that norm. Thus, the Constitutional Court concludes that, in the contested provision, the legislature restricted the right of a travel document holder to seek protection of his rights before a court or other body in such a manner that it completely ruled out the constitutionally guaranteed evaluation by a court of the interference in rights in terms of the unavoidability or necessity of restricting freedom of movement.

29. In brief, the Constitutional Court does not deny that the refusal to issue or revocation of a travel document specified by law and supported by a justified public interest (legitimate aim) can be an unavoidable (necessary) measure; however, a decision about such a measure cannot be removed from true judicial protection and replaced by merely illusory judicial protection.

30. In the abovementioned judgment Pl.ÚS 72/06, the Constitutional Court also addressed exceptions from the principle of general judicial reviewability of administrative decision, because, under Art. 36 par. 2 of the Charter: Unless a law provides otherwise, a person who claims that his rights were curtailed by a decision of a public administrative authority may turn to a court for review of the legality of that decision. However, judicial review of decisions affecting the fundamental rights and basic freedoms listed in this Charter may not be removed from the jurisdiction of courts." The Constitutional Court pointed to the fact that, although

in the second sentence of Art. 36 par. 2 of the Charter the constitutional framers delegate to the legislature the permission of exceptions from the review of administrative decisions by a court, that constitutional authorization is limited in the fact that decisions concerning the fundamental rights and freedoms guaranteed by the Charter may not be removed from judicial review. Here the constitutional framers evidently reflected the different relevance of the fundamental rights and freedoms and "ordinary" rights and freedoms; because of the different nature, the more important rights logically deserve greater protection.

31. In the present matter the decision to revoke a travel document affects the fundamental to freedom of movement; therefore, the legal exception to the rule is not permitted. The conclusions stated regarding Art. 36 par. 1 and 4 of the Charter apply equally to Art. 36 par. 2 of the Charter, i.e. a law setting "conditions and rules" under Art. 36 par. 4 of the Charter cannot deviate from the content of Art. 36 par. 2 of the Charter. Thus, if everyone has, under Art. 36 par. 2 of the Charter, the right to judicial review of decisions by public administration bodies affecting the fundamental rights and freedoms, and the conditions and rules for implementation of that right are set by law, then such a law, issued on the basis of constitutional authorization, cannot completely rule out that entitlement of every person, even if only to a certain extent. Article 36 par. 2 of the Charter does not permit the law and restrictions in content of the right to judicial review of decisions affecting the fundamental rights and freedoms. The contested provision does not rule out subjecting a decision by the passport administration authority to revoke a travel document to judicial review, but the review is limited as regards the decision of the passport administration body, and does not include review of the actions (request) of the body acting in criminal proceedings.

IX.
Constitutional consequences de lege ferenda

32. Of course, the foregoing indicates that by stating that the reviewed statutory provision is inconsistent with provisions guaranteeing fundamental rights the Constitutional Court's conclusion questions – primarily precisely because of the lack of effective judicial review – the very competence of the relevant administrative office to decide whether to refuse to issue a travel document or to revoke an issued travel document. It is evident that this applies not only in relation to the provision of the Act on Travel Documents affected by the petition, but also in regard to the legal regulation that is valid and in effect today.

33. It is not the Constitutional Court's job to describe for the legislature in detail what kind of legal regulation it is to adopt regarding the present issue. However, before adopting it, it will be up to the legislature to weigh, thoroughly and consistently, whether it is acceptable for administrative offices and administrative courts to decide on the issuance or revocation of a travel document. By its consequences this is an institution for securing a person; the decision to use it would be better made by the public authorities conducting the proceedings in which that means of securing a person is to be used. Review of such a decision by a court in the same proceeding carries several undoubted advantages. They are not just the ability to act when necessary and greater knowledge of the reasons why

the relevant public body considered it necessary to take this step, but primarily – and this also includes a possible constitutional law aspect – removing undesirable combining blending of various trials conducted by various bodies. The Senate also pointed to this in its brief concerning the petition. Therefore, declaring the contested provision of the Act on Travel Documents unconstitutional, the Constitutional Court does not, under any circumstances, intend to agree with the opinion that wide discretion for an administrative office, supplemented by judicial review with full jurisdiction by the administrative courts, is the route that the legislature should or must take.

X.
Conclusion

34. Due to the foregoing, the Constitutional Court concludes that § 23 let. b) of Act no. 329/1999 Coll., on Travel Documents and Amending Act no. 283/1991 Coll., on the Police of the Czech Republic, as amended by Act no. 217/2002 Coll. and Act no. 320/2002 Coll., did not permit the general courts to meet their obligations to protect an individual's fundamental rights and freedoms when reviewing a request from a body acting in criminal proceedings to revoke a travel document from a person whom it was prosecuting for an intentional crime, from the point of view of the third condition, failure to respect the principles enshrined in Art. 2 par. 2 and Art. 4 par. 1 of the Charter. This denied the affected individual the right to effective judicial protection under Art. 36 par. 2 of the Charter, the final consequence of which was violation of Art. 14 par. 1 and Art. 2 of Protocol no 4. Therefore, the Constitutional Court, under Art. 95 par. 2 of the Constitution, granted the petitioner's petition, with the provision that, in view of Art. 89 par. 2 of the Constitution, public bodies are required to reflect the consequences of that unconstitutionality in their decision making, that is, to not apply the cited provision when resolving actual cases.

Instruction: Decisions of the Constitutional Court cannot be appealed.

Brno, 20 May 2008

1. Dissenting Opinion of Judge Vlasta Formánková to the reasoning of the judgment Pl. ÚS 12/07

The dissenting opinion that I am filing under § 14 of the Act on the Constitutional Court is not directed against the judgments' verdict, but intends to add to the legal arguments presented in the judgment's verdict.

I believe that the Constitutional Court should have emphasized in the judgment's reasoning, specifically in Art. IX, that the institution of revoking a passport, or the legal regulation thereof, should be established de lege ferenda in the Criminal Procedure Code, just as in the case of proceedings under Chapter Four, Parts Three to Five of the Criminal Procedure Code (e.g. confiscation of a thing, securing real

estate, freezing funds in an account, a house search, securing and opening correspondence, etc.). The Criminal Procedure Code has its own means for securing a defendant's person and achieving the purpose of criminal prosecution, and bodies acting in criminal proceedings would have the opportunity to weigh at the time, based on the situation and development of the criminal prosecution, whether it is necessary to limit the prosecuted person's freedom of movement and residence by revoking his passport. The statutorily imposed obligation to properly justify every such decision, and simultaneously establishing judicial reviewability of issued decisions would then prevent the circumvention of statutory procedures and would also be a guarantee of such procedure.

2. Dissenting Opinion of Judge Pavel Holländer to the reasoning of the judgment Pl. ÚS 12/07

The significance and purpose of the procedure contained in § 23 let. b) of Act no. 329/1999 Coll., on Travel Documents and Amending Act no. 283/1991 Coll., on the Police of the Czech Republic, as amended by Act no. 217/2002 Coll. a of Act no. 320/2002 Coll., is the statutory establishment of a measure to secure a person in criminal proceedings, i.e. establishment of a provision that is to restrict a person from avoiding criminal proceedings.

I agree with the tenor of the judgment insofar as, in the application of the statutory provision in question, it weighted the need to weigh, on one side, achieving the purpose of the criminal proceeding, and, on the other side, protection of freedom of movement and of residence (Art. 14 par. 1 of the Charter of Fundamental Rights and Freedoms – the "Charter").

Because the institution of refusing to issue or revoking an issued travel document for reasons of securing the purposes of criminal prosecution of a defendant is not enshrined in the Criminal Procedure Code, the statutory provision in question can prima facie be interpreted in two ways:

* The first alternative makes this an indirect amendment of the Criminal Procedure Code, and it would be possible to contest the actions of the police body through a request under § 157a par. 1 of the Criminal Procedure Code. The content of the court's decision making in an administrative court proceedings is only review of whether formal conditions have been met for the administrative bodies to apply a statutory provision, but not evaluation of the proportionality between achieving the purpose of criminal proceedings and protection of the freedom of movement and residence. The defect in this alternative interpretation is the fact that it conflicts with Art. 4 of the Charter, under which the fundamental rights and freedoms are under the protection of the judicial branch, because on the merits, i.e. in the question of meeting the conditions for limiting the freedom of movement and residence of a defendant in view of the justification, and purpose of criminal prosecution, the decision would be made by the state prosecutor's office, and not the court.

* In the second alternative, contained in the judgment, the provision in question is considered, as a whole to be a component of administrative law, which establishes the authority of the administrative courts under § 4 of the Administrative Procedure Code, including review of the proportionality between achieving the purpose of criminal proceedings and protecting the freedom of movement and residence. The defect in this alternative interpretation is that it entrusts decision making on the purposes of criminal proceedings to the administrative courts, which is inconsistent with 13 of the Criminal Procedure Code, § 4 and § 7 par. 1 of the Administrative Procedure Code, as well as with Act no. 6/2002 Coll., on Courts and Judges, as amended by later regulations. The organizational differentiation of the work of the courts in criminal, civil and administrative matters is not only the result of the development of European legal culture in the 19th and 20th centuries, reflecting the presence of elements of the separation of powers within the judicial branch, as well as reasons for professional specialization caused by the fundamental differences in the subject matter. Moreover, this differentiation is also tied to maximum internal consistency and consistency of the law. If the administrative court evaluated, according to the essential grounds of the Constitutional Court's judgment, the relationship between achieving the purposes of criminal proceedings (i.e. also necessarily the sufficient grounds for suspecting the defendant of committing a crime) and protecting the freedom [of movement] and residence of the defendant, it could conclude that there were insufficient grounds for suspicion of committing a crime, and thus also insufficient grounds for refusing to issue or revoking an issued travel document. Let us assume that the state prosecutor's office would subsequently, in an attempt to limit the defendant's ability to avoid criminal prosecution, file a request to take him into custody, which the court would grant, and the (criminal) court would state that there were sufficient grounds for suspicion of committing a crime. The legal system would thus lead to the possibility of making conflicting court decisions, without a procedural possibility for removing the conflict. Therefore, I consider shifting the decision making on the purposes of a criminal proceeding into a different type of proceeding to be inconsistent with the concept of a democratic, law-based state under Art. 1 par. 1 of the Constitution.

Based on these arguments, I am of the opinion that it is justified to establish the institution of refusing to issue or revoking an issued travel document (or confiscating a travel document) as a measure to secure a person in a criminal proceeding in the criminal procedure code, including establishing the process of judicial review of such a decision taken by a police body (or the state prosecutor's office). The result of my opinion in this decision, in connection with the Constitutional Court's opinion in judgment file no. Pl. ÚS 38/06, concerning proceedings on the review of a norm, would then be that administrative courts would have to stop proceedings due to insufficient authority.

3. Dissenting opinion of judge Dagmar Lastovecká to the reasoning of the judgment Pl. ÚS 12/08

In point 33. of the judgment's reasoning the Constitutional Court states that revoking a travel document under § 23 let. b) of Act no. 329/1999 Coll. is an

institution to secure a person, and also recognizes the constitutional law aspect of undesirable combining of various trials conducted by various bodies (bodies acting in criminal proceedings, administrative offices, administrative courts). However, only within the framework of "constitutional law consequences de lege ferenda" does it leave it up to the legislature to weigh "whether it is acceptable for administrative offices and administrative courts to decide on the issuance or revocation of a travel document."

I believe that this constitutional law aspect should be the grounds for declaring the contested provision of the Act inconsistent with the constitutional order.

4. Dissenting Opinion of Constitutional Court Judge Jan Musil
I agree with the verdict of judgment file no. Pl. ÚS 12/07.

I disagree only with part of the reasoning of this judgment. Under § 14 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, I am filing a dissenting opinion to the reasoning:

I believe that the reason in the judgment's reasoning for annulling § 23 let. b) of Act no. 329/1999 Coll., on Travel Documents, should have been primarily the fact that revocation of a travel document in connection with the conduct of criminal proceedings does not fall within the jurisdiction of administrative bodies at all, and the relevant procedure should not be regulated by an administrative norm.

Deciding on such a measure should be in the exclusive jurisdiction of bodies acting in a criminal proceeding, and the proceeding should be regulated by the Criminal Procedure Code. In the event that such a measure is taken by a body acting in preparatory proceedings, the Criminal Procedure Code should regulate judicial review (implemented by the criminal court judge).

Revocation of a travel document within a criminal proceeding is by its nature a measure to secure a person, comparable to other measures to secure a person or thing under Part Four of the Criminal Procedure Code.

Only bodies acting in criminal proceedings can, on the basis of the gathered evidence, substantive judge how justified the concern is that the accused person could flee abroad and mar the purpose of the ongoing criminal proceeding, and at the same time evaluate whether the interest in effective criminal prosecution in a particular case outweighs the conflicting right of a citizen to freedom of movement under Article 14 of the Charter. If that decision making authority is entrusted to an administrative body (and in judicial review by a court in the administrative courts), these bodies cannot, due to insufficient information, decide with adequate knowledge of the matter. Their decision is exposed to the danger of uncritical dependence on information (usually very fragmentary), provided by bodies acting in criminal proceedings, and review of the legality of the process is completely formal and ineffective.

As an example for a suitable regulation, we can cite the current German regulation for revoking a thing (Beschlagnahme) under § 111c of the German Criminal Procedure Code (StPO) or preliminary revocation of a driver's license under § 111a StPO. That procedural regulation provides suitable guarantees of legality (consent of the judge, means of remedy, etc.), which the present Czech regulation in Act no. 329/1999 Coll., on Travel Documents, does not make possible.

The existing Czech regulation, which leads to chaotic mixing of institutions and measures used in criminal and administrative proceedings, conflicts with the attributes of a law-based state enshrined in the preamble and in Article 1 par. 1 of the Constitution, and jeopardizes the principle of protecting the fundamental rights and the freedom of the judicial branch, enshrined in Article 4 of the Constitution.

5. Dissenting Opinion of Constitutional Court Judge Eliška Wagnerová to the judgment of 20 May 2008, file no. Pl. ÚS 12/07

I disagree with the judgment's reasoning, for the following reasons:
In my opinion, before evaluating the contested provision in terms of the "permissibility" of restriction of the fundamental right to freedom of movement, it was necessary to resolve the question of whether the body that was to apply the contested provision was the competent body. It is not a matter of formal competence, i.e. established by law (here, the contested provision), but a competence that would stand from a constitutionally material concept, i.e. from the point of view of principles arising from the constitutional order as a whole. First of all, I must mention that the purpose of the contested provision must be sought in the criminal proceedings, i.e. in the proceedings that are the sole basis on which guilt and punishment can be decided. The constitutional monopoly on such proceedings, which, of course, are the outcome of the criminal process, is held by the courts (Art. 40 par. 1 of the Charter).

Deciding to revoke (or note issue) a travel document from a defendant is the implementation of one of the criminal law institutions for securing a person, which are supposed to rule out the need for more intrusive interference in the defendant's fundamental rights. In this case it is a means of securing a person that removes the need to limit personal freedom by taking someone into custody, and at the same time it creates conditions for the proper conduct of the criminal trial, the purpose of which is a final decision on guilt and punishment.

It is evident from the foregoing that because of the constitutional monopoly that courts have in deciding on guilt and punishment, in the conception described above, which is reflected in the constitutional principle of separation of powers (Art. 2 par. 1 of the Constitution), we must insist that deciding on this institution for securing a person must remain within the szstem of bodies acting in criminal proceedings, culminating in the form of judicial review, but still within the framework of criminal proceedings.

Insofar as the contested provision entrusted the decision about this institution to secure a person to an administrative body, it established a competence for the body that cannot be constitutionally materially legitimized, or approved. Beyond that framework one can add in support that the administrative body that ruled in the present matter did not have, and could not have, any knowledge of the needs for actions in the criminal proceedings, and therefore was not even capable of weighing the proportionality of its decision.

Because in this case the legislature did not respect the constitutional imperatives arising from Art. 40 par. 1 of the Charter a z Art. 2 par. 1 of the Constitution, as interpreted above, it was necessary to declare that the contested provision is inconsistent with these provisions of the constitutional order, with the consequence that the decision of the administrative body, issued with the application of the contested provision, was a decision ultra vires, that is, a decision issued by a body acting beyond the limits of material constitutionality, and as such it should be annulled and the proceeding stopped.