2001/06/27 - PL. ÚS 16/99: ADMINISTRATIVE JUDICIARY

HEADNOTE

The current regulation of the administrative judiciary shows serious constitutional law deficiencies. Primarily, certain activities of the public administration, like its potential inactivity, are not under the review of the judicial power at all. Further, not everyone whose rights may be affected by an administrative decision has the right to turn to the courts. Even if he does have that right, he is not a party to a fully fair trial under Art. 6 par. 1 of the Convention, although that should be the case in a number of matters. An issued court decision is then final and (with the exception of a constitutional complaint) non-reversible, which leads to inconsistent case law, as well as to an unequal position for the administrative body, i.e. to a situation in conflict with the requirements of a state governed by the rule of law. The finality of certain decisions (stopping proceedings) can then even lead to a denial of justice. Finally, the exercise of the administrative judiciary is organized in a manner which ignores the fact that Art. 91 of the Constitution1) states that the Supreme Administrative Court is part of the court system.

The Plenum of the Constitutional Court decided in the matter of joined petitions for the annulment of certain provisions of part five "The Administrative Judiciary" of Act no. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, or for annulment of this entire part of the Act, which was filed by M. C., represented by attorney, R. P., , represented by attorney and Panel IV of the Constitutional Court, with the participation of the Parliament of the Czech Republic and the additional participation of D. S., represented by attorney, and the private elementary school Acorn's & John's school, s.r.o., represented by attorney , as follows:

Part five "The Administrative Judiciary" (§ 244-250s) of Act no. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations,2) is annulled as of 31 December 2002.

REASONING

During 1999-2001 the Plenum of the Constitutional Court received several petitions to pronounce unconstitutional specifically identified provisions of part five of Act no. 99/1963 Coll. the Civil Procedure Code (the "CPCP), on the Administrative Judiciary. The first is the petition filed by M. C. together with a constitutional complaint for the annulment of § 250d par. 33) and § 250j par. 44) of the CPC. The essence of this petition is the objection of unconstitutionality of a concept which does not admit any appeal at all against decisions issued in the administrative judiciary, even in those cases where the issued decision is not a decision in the matter itself, but, for example, the proceedings are stopped for alleged defects in the petition, failure to pay court fees, etc., without it being possible, unlike the rules applied in ordinary civil proceedings, to correct evidently erroneous or hasty court decisions. This is also related to the fact that these decisions, whose consequences in

reality mean a denial of the right to judicial protection, are not decided by a panel but the chairman of the panel. The petitioner's attorney amended and supplemented this petition during the public oral sessions of the Plenum of the Constitutional Court on 27 June 2000 and by a written submission of 5 September 2000. He stated above all that after his petition was filed Act no. 30/2000 Coll. amended the Civil Procedure Code, including the originally contested § 250d par. 33). This Act will not go into effect until 1 January 2001, but it clearly makes this part of the petition unnecessary, although it is documentation of the fact that the legislature was evidently aware of the shortcomings of this provision. However, in view of the fact that the cited, relatively extensive amendment of the CPC did not affect the basic shortcomings in the entire system of the administrative judiciary, he simultaneously proposed that the Constitutional Court consider annulling the entire part five of the CPC. He then stated, concerning this change of the petition, that the legislature must be aware of the shortcomings which the current regulation of the administrative judiciary contains, and that it is therefore surprising that in more than seven years it was unable to get to the implementation of the Constitution of the Czech Republic (the "Constitution") and establish the Supreme Administrative Court which it envisages, where it was able to get to creating the institution of the Public Ombudsman, which the Constitution does not contain. He stated that he is not calling for multi-level proceedings, but for implementation of a mechanism which would make it possible to correct evident errors by the administrative courts and, in particular, permit the unification of the jurisprudence of these courts, as in a number of cases regional courts have decided the same matter completely differently. Thus, the situation today is such that evident mistakes can be corrected only by the Constitutional Court, which is undoubtedly not its job. The petition also stated that merely deleting or annulling only § 250j par. 4 of the CPC 4) (which was his original petition) can not, in and of itself, create a sensible system. Therefore, he is convinced that it is necessary to force the legislature to finally concern itself with this problem, and that, in his opinion, can be achieved only by annulling the entire part five of the CPC.

The petition of R. P., filed on 4 October 1999 together with a constitutional complaint, asks that the Constitutional Court issue a judgment annulling the word "legality" (or phrases in which forms of this concept appear) in specifically identified provisions of part five of the CPC (these are the word "legality" in § 244 par. 1 and 2, in § 245 par. 1 the word "legality" and "the legality of a previously made administrative"). He also proposes annulling the entire § 245 par. 2,5) in § 247 par. 1 annulling the words "the legality of this", in § 249 par. 2 the words "in which the plaintiff sees the illegality of the administrative body's decision," in § 250i par. 1 13) the word "legality", in § 250i par. 3 the words "the legality of the contested" and finally proposes annulling the entire § 250j par. 1.6)

In the petitioner's opinion, judicial review of an administrative decision, restricted only to reviewing its legality, is fundamental interference in the right to a fair trial. The court is required to review the matter comprehensively (i.e. including the substantive aspect), as is required of it primarily by Art. 6 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"). The provisions which he contests do not permit a court to review the substantive and factual aspects of a decision contested by a complaint, which is a situation that is in conflict not only with the cited provision of the Convention, but also with the case law of the European Court of Human Rights (the

"ECHR"). In this regard the petitioner points, in particular, to the decision in the matter of Albert et Le Compte (10 February 1983, A 58, § 29), in which the court stated that a decision by an administrative body must be subject to subsequent review either by another body which meets the requirements of Art. 6 par. 1 of the Convention or by a court which has "full jurisdiction." The ECHR decided analogously in the matter of Ozturk (21 February 1984, A 73, § 67) and decided in the same vein in other matters as well.

The petitioner also points out that in any case the Constitutional Court of the Czech Republic also, in its judgment of 27 November 1996 file no. Pl. ÚS 28/95 (no. 1/1997 Coll.), stated the opinion that our legal order does not evidently and clearly establish a right for full review of an administrative decision by an independent and unbiased tribunal which would meet the requirements of Art. 6 par. 1 of the Convention, i.e. a tribunal which would make findings not only on questions of the legality of the administrative decision, but also concerning the factual state of affairs (i.e. with "full jurisdiction"). In the same judgment the Constitutional Court also points to the Resolution "On the Protection of the Individual in Relation to the Acts of Administrative Authorities" approved on 28 September 1977 by the Committee of Ministers of the Council of Europe, specifically to principle I point 1, under which "In response to each administrative act which could affect the rights, freedoms and interests of a party to the proceedings, the party is to have an opportunity to state an opinion on the actual state of the matter and the evidence." In conclusion the petitioner points out that the ECHR stated its opinion on Czechoslovak (and thus de facto the current Czech legislation in the field of the administrative judiciary) in its decision in the matter of Lauko vs the Slovak Republic of 2 September 1998.

Finally, another petitioner in this matter is Panel IV of the Constitutional Court, which in two cases interrupted proceedings on a constitutional complaint under § 78 par. 2 of Act no. 182/1993 Coll., on the Constitutional Court, and initiated the opening of proceedings to evaluate the constitutionality of two provisions of part five of the CPC, which, in its opinion, go beyond constitutional bounds.

The first of these cases is connected to the complaint of Marie Melezínková, who joined to her constitutional complaint a petition to annul § 139 let. c) of Act no. 50/1976 Coll., on Zoning Planning and the Building Code (the Building Code), as amended by later regulations, under which only a neighbour whose plot of land had a common border with a builder could be consider a party to building proceedings. The Constitutional Court granted this petition in separate proceedings under file no. Pl. ÚS 19/99 and annulled the contested provision of the Building Code by its judgment of 22 March 2000, no. 96/2000 Coll., as of the day of promulgation in the Collection of Laws.

However, in the opinion of Panel IV, the grounds for excluding the petitioner from the opportunity to file an administrative complaint included, in addition to the cited Building Code provision, § 250 par. 2 7) of the CPC, which ties the authorization to file a complaint to the condition of being a party to the administrative proceedings. This provision seems to the panel to be in conflict with article 36 par. 2 of the Charter of Fundamental Rights and Freedoms (the "Charter"),8) for the following reasons:

The definition of the circle of parties to administrative proceedings is given by Act no. 71/1967 Coll., on Administrative Proceedings (the Administrative Procedure Code) in § 14. In par. 1 of that section the general definition of a party to administrative proceedings

states that it is someone whose rights, legally protected interests or obligations are to be addressed in the proceedings, or someone whose rights, legally protected interests or obligations can be directly affected by the decision. A party to the proceedings is also someone who claims that he can be directly affected in his rights, legally protected interests or obligations by the decision, until such time as the contrary is proved. The circle of parties to proceedings thus defined undoubtedly fits with Art. 36 par. 2 of the Charter.8) Under § 14 par. 2 of the Administrative Procedure Code a party to the proceedings is also someone who is given that status by a special regulation. However, there are several special regulations in the field of administrative law in which the concept of a party to the proceedings is approached specifically and is often defined more narrowly than would correspond to the general definition in § 14 par. 1) of the Administrative Procedure Code. (We can cite as examples – in addition to the cases already adjudicated by the Constitutional Court, concerning certain kinds of buildings proceedings – § 17 par. 3 of Act no. 44/1988 Coll., on Protection and Exploitation of Mineral Wealth (the Mining Act), as amended by later regulations, where only the petitioner is a party to the proceedings to establish a protected mineral deposit territory, or § 9 par. 8 of Act no. 229/1991 Coll., on Regulation of Ownership of Land and Other Agricultural Property, as amended by later regulations, the so-called Land Act, which considers only the entitled party, the obligated person and the land fund to be parties to the proceedings, but not, for example, persons for whose benefit rights corresponding to an easement exist).

Thus, in some cases persons whose rights or obligations were clearly addressed, or whose rights could be affected by a decision of the state administration body, do not have active standing to file an administrative complaint. It cannot be ruled out that these could be fundamental rights (Compared to the abovementioned examples of special regulations, this could be, in particular, the right of ownership). The provision of § 250 par. 2 of the CPC 7) thus creates inequality, and in the opinion of the panel not only is in conflict with Art. 36 par. 2 of the Charter,8) but also does not meet the requirements arising from Art. 6 par. 1 of the Convention, i.e. the requirement that everyone whose civil rights or obligations are at issue must be guaranteed the right of access to the courts.

Finally, Panel IV of the Constitutional Court, in connection with the decision about the constitutional complaint of S. D.l, interrupted proceedings and submitted to the Plenum of the Constitutional Court for review the constitutionality of § 250a of the CPC,9) which provides that the obligatory representative before an administrative court can only be an attorney (or notary, under the amendment of the CPC made by Act no. 30/2000 Coll.). In the Panel ’s opinion, in a situation where a considerable part of the administrative courts’ agenda consists of tax matters and where Act no. 523/1992 Coll., on Tax Advisors and the Chamber of Tax Advisors of the Czech Republic provides in § 6 that tax advisors are authorized and required to protect the rights and justified interests of their client and, in doing so, to fully use all legal means for the protection of his rights, there is a situation of apparent lack of accordance between legal regulations of the same legal force, which should undoubtedly not exist in a state governed by the rule of law. If the CPC removes an administrative complaint from the means available to tax advisors to protect the rights of their client, the Panel is of the opinion that such a restriction lacks reasonable grounds, and is basically a restriction of the right to freely conduct business under Art. 26 par. 1 of the Charter.10) Even though, under par. 2 10) of that Article the law may set conditions and restrictions for the conduct of certain professions or activities, in setting such

restrictions the principles set by Art. 4 par. 3 and 4 of the Charter 11) must be respected. Moreover, if the legislature wanted to remove the right to act before a court from the powers of tax advisors, it should have done so expressly in Act no. 523/1992 Coll. Panel IV thus sees the unconstitutionality of § 250a of the CPC 9) in the legislature's omitting to include tax advisors in the list of persons entitled to represent someone before the administrative courts (of course, only in the scope of authorization under special regulations, as the amendment of the CPC provided for notaries). If it did not do so, this provisions has signs of arbitrary will, when a particular group is removed from the group of persons undoubtedly qualified to provide legal assistance under Art. 37 par. 2 of the Charter 12) and, as a result of that removal, the subject of its business activity provided by another law is restricted. For completeness, the Panel emphasizes that the same applies to patent representatives (Act no. 237/1991 Coll. on Patent Representatives, as amended by later regulations).

On 10 October 2000 the Plenum of the Constitutional Court decided that all the cited petitions would be joined for joint proceedings and would subsequently be conducted under the single file no. Pl. ÚS 16/99.

After joining the matters the Constitutional Court received, together with a constitutional complaint, a petition from the private elementary school Acorn's & John's school, s.r.o., with its registered office in Přerov, for the annulment of § 250d par. 33 of the CPC. By decision file no. Pl. ÚS 4/01 of 2 February 2001 the Constitutional Court denied this petition on the grounds of a pending suit and stated that the petitioner had the right to take part in the proceedings in the matter Pl. ÚS 16/99 as a secondary party. The Constitutional Court decided analogously by decision file no. Pl. ÚS 7/01 of 21 February 2001 on the petition from D. S. for the annulment of § 250i par. 1 of the CPC. 13.

The statement of the Chamber of Deputies of the Parliament of the Czech Republic states that Art. 36 par. 2 of the Charter 8) expressly provides that the institution of judicial review of an administrative decision is based on the review of legality, i.e. that the court reviews only the legal evaluation of the matter. This principle of the Charter is then made concrete in the relevant provisions of the CPC. The Chamber of Deputies therefore does not share the opinion on the unconstitutionality of those provisions of the CPC which restrict the activity of the court to review of the legality of the decision by a public administration body. Concerning the petition of Panel IV of the Constitutional Court for the annulment of § 250 par. 2 of the CPC 7) the Chamber of Deputies stated that Article 36 par. 2 of the Charter 8) permits the law to exclude certain decisions from review and simultaneously provides that these may not concern fundamental rights and freedoms. In accordance with this treatment the CPC excludes some administrative decisions from review. If § 250 par. 2 of the CPC 7) is evaluated in relation to Art. 36 par. 2 of the Charter,8) one cannot conclude that it is unconstitutional, as it unambiguously states that everyone who claims that he was a party to administrative proceedings, or was not but should have been, and was deprived of his rights by a decision by an administrative body, may file a complaint. The purpose of review of administrative decisions is not for the CPC to expand the circle of parties in administrative proceedings which have already taken place, because judicial review of administration can not be general. In the opinion of the Chamber of Deputies, the court does not decide directly about a certain right, but the

subject of the proceedings is the administrative act, which it reviews only from a legal point of view, i.e. in terms of its compliance with the law.

Concerning the restriction of tax advisors from acting before the courts, the Chamber of Deputies considers it to be in accordance with Art. 26 par. 2 of the Charter.10) It states that although it is true that Act no. 523/1992 Coll. speaks of the provision of legal assistance in the field of taxes, deductions, fees and other similar payments, as well as in matters related to taxes, the term "legal assistance" used here is not the same as the term "legal assistance" which is governed by Art. 37 par. 2 of the Charter. 12) The Chamber of Deputies considers persons authorized to provide legal assistance under this Article, in civil court proceedings, to be only attorneys and notaries. In view of the fact that part five of the CPC, on the administrative courts, regulates specific proceedings, where an administrative act is reviewed only in legal terms and the court does not concern itself with evaluating the factual state of affairs, the Chamber of Deputies does not consider a tax advisor, particularly in view of his insufficient legal education, to be a person who could represent someone in these proceedings. The Chamber of Deputies also states, as a supporting argument, the fact that the qualifying exams for tax advisors can also be taken by a person who has only completed secondary education. For these reasons, it does not consider the treatment of obligatory representation in § 250a of the CPC 9) to be unconstitutional.

The Chamber of Deputies also pointed to the last extensive amendment of the CPC, discussed and approved by the Chamber of Deputies and the Senate, which responds not only to necessary changes in the judiciary but also tries to remove problematic provisions which often caused interpretation problems in court practice.

The Senate of the Parliament of the Czech Republic made a statement only on the issue of obligatory representation by an attorney when it stated that the purpose of § 250a of the CPC, 9) which was inserted in the law by an amendment at the end of 1991, was the legislature's attempt to ensure that complaints for review of decisions by administrative bodies would be filed by a qualified person and to prevent a possible avalanche of lay filings against administrative acts, since overall these are legally complicated cases, for the evaluation of which a legal education is necessary. It was apparently also intended that the regulation of obligatory representation in the administrative courts not differ from the similar institution in appeal proceedings and in proceedings on a complaint due to confusion. The conclusion of the Senate's statement says that although it is not ruled out in principle for the contested provision to be expanded so as to permit tax advisors to appear before the courts in matters concerning tax issues, this would to a great extent negate the legislature's attempt to achieve qualified legal representation before the courts. Annulment of the contested provision could lead to an increase in non-qualified petitions and an increased burden on the general courts.

Concerning the other petitions the Senate only stated that it did not take part in the creation of the contested provisions. These provisions were inserted into the CPC by Federal Assembly Act no. 519/1991 Coll., which Amends and Supplements the Civil Procedure Code and the Notarial Code.

In its position statements on the individual petitions, the Ministry of Justice stated that Art. 36 par. 4 of the Charter assumes statutory delimitation of the conditions and details

under which one can exercise the right for court review of the legality of decisions by public administration bodies. The CPC does so in part five, where it delineates procedural conditions for exercising rights for judicial review. Insofar as this procedural regulation provides, in the interests of the court's ability to act and decide, the requirements for the particulars of a complaint, if it establishes the court's right to require removal of defects in the complaint (if such defects prevent handling the substance of the matter) and if it provides that, if the court's requests to remove defects in the complaint are not respected, the court shall stop the proceedings without making a substantive decision on the complaint, such a legal regulation cannot be seen as disproportionate restriction of the right to judicial review under Art. 36 par. 2 of the Charter.8) The situation is similar in other cases in which the Code, in § 250d par. 3,3) permits a court to stop proceedings. If the Code did not contain this provision, an unsolvable situation would arise; how should the court proceed, for example, in a case where a complaint was filed late, by an unauthorized person, or in a case where the plaintiff withdrew the complaint, etc.

The Ministry of Justice also stated that it is beyond any doubt that an appeal against a court decision is an important tool, through which erroneous court decisions can be corrected and thus judicial decision-making can be unified. Therefore one of the aims of reform steps in the administrative judiciary is to establish an appeal, as, even if multi-level judicial decision-making does not arise directly from the Constitution, it is necessary for a procedural regulation to permit correction of individual erroneous decisions and unity of decision-making within the administrative judiciary itself, and for correction of erroneous decisions thus not to be transferred to the Constitutional Court through the institution of a constitutional complaint. However, a statutory change can not be tied only to § 250j par. 4 of the CPC,4) because, with the exception of proceedings in matters provided in § 250s par. 2 of the CPC, 14) part four of the CPC on appeals cannot be used in matters of the administrative judiciary.

From the point of view of de lege ferenda the Ministry of Justice also stated that, as far as legislative intentions in the area of administrative judiciary are concerned, it is aware that the current legal regulations are not satisfactory and needs to be replaced by new regulations, which would meet both the requirements of the Convention and of the constitutional order of the Czech Republic, as well as the fact that it must be a regulation which is functional, interconnected with reform of public administration and recodification of administrative proceedings, and at the same time also manageable in terms of the costs to the state budget which such a project will require. The current legal regulation reflects the time of its creation, when it was necessary to establish the administrative judiciary as an institution as quickly as possible, and therefore it was necessary to use the existing court system and take the possibilities of burdening it as a starting point. In establishing the administrative judiciary the consequences which arise for this branch of the judiciary from the Convention, particularly Art. 6 par. 1, were evidently not fully anticipated. The difficulties in finding an optimal and simultaneously manageable solution of commitments arising from this provision were the main reason for postponing the establishment of the Supreme Administrative Court, as the administrative judiciary required a comprehensive solution. The current treatment creates an interconnected whole, and intervention in individual provisions without change related provisions would make this treatment unusable.

The Ministry of Justice also cited the inconsistency between Art. 36 par. 2 of the Charter 8) and Art. 6 par. 1 of the Convention. It points out that the ECHR did not provide an abstract definition of the term "civil rights and obligations," and therefore it is necessary to rely on the individual decisions of this court, under which this term is to include a wide circle of things which are still seen as public law matters in this country. The case law of this court tends to a constantly wider application of Art. 6 par. 1 of the Convention.

Concerning § 250 par. 2 of the CPC,7) the Ministry of Justice has no doubts about the constitutionality of this regulation in relation to decisions issued in administrative proceedings in which the circle of parties to the proceedings is governed by the definition under § 14 par. 1 of the Administrative Procedure Code. However, it is evident that many proceedings which are conducted under the Administrative Procedure Code have a circle of parties which is restricted, in contrast to § 14 of the Administrative Procedure Code, so that not all persons whose rights and obligations are affected or whose rights are concerned in the proceedings are parties to the proceedings before the administrative body and can defend their rights there, and it is impossible not to see that in this cases the legal treatment establishes inequality. In the opinion of the Ministry of Justice, however, correction of this situation should be ensured more by amendment of specific administrative law regulations which exclude persons whose rights are affected from participation in a certain type of administrative proceedings.

Concerning the issue of mandatory representation by an attorney, the Ministry of Justice takes as its starting point the opinion that insufficient familiarity with the area of procedural law could be to the detriment of the person who seeks judicial review through a complaint or an appeal. Therefore, the qualification prerequisites provided by Act no. 523/1992 Coll. for performance of the activities of a tax advisor appear to the Ministry of Justice to be insufficient for the area of the administrative judiciary. At a general level, in the event that the Constitutional Court should conclude that the evaluated provisions of the CPC are unconstitutional, the Ministry of Justice then pointed to the need to allow sufficient time to implement the necessary legislative changes, insofar as possible comprehensively, as part of reform of the administrative judiciary.

In response to the question of the chairman of the Constitutional Court of 7 June 2001, asking what is the present state of legislative work on reform of the administrative judiciary, the minister of justice stated that reform of the administrative judiciary is an exceptionally demanding legislative project, not only in terms of the draft law itself, but primarily in terms of finding optimal substantive solutions, as it will fundamentally affect both the rights of persons who can appeal for judicial protection and the activities of public administration bodies. Therefore, in 2000 the Ministry of Justice prepared an "Initial Thesis for the Preparation of a Concept of the Administrative Judiciary and Possible Variations of its Organizational Structure." In July last year the government submitted this document to both houses of Parliament and after the Chamber of Deputies, by resolution of 24 January 2001, recommended to the government a variation which would receive majority support, it was possible to begin work on preparation of a draft law. A commission was formed, composed of prominent experts in legal theory and practice, and the constitutional law committees of both houses of Parliament were asked to work with it. At the present time working drafts of legislative outlines are being discussed, and the minister expects that the drafts will be submitted to the government for discussion in

August of this year. It is expected that the new legal regulation of the administrative judiciary will go into effect on 1 January 2003.

After weighing the foregoing arguments and positions, the Constitutional Court reached the conclusion that it is necessary to annul part five of the CPC. It was guided by the following considerations.

It is undisputed that the method of renewing the administrative judiciary by amendment of the CPC in 1991 was understood, at the time, as a temporary solution, with the awareness that it was necessary to perform a complete recodification of proceedings and create a sensible system of administrative courts. In view of the fact that, in a short time, obligations arising from the Convention (no. 209/1992 Coll.) were accepted without reservation, and that the Convention places substantially wider demands on the area of judicial review of the activities of public administration, this temporary arrangement became even more problematic in many points.

To this situation was added the fact that the Constitution expressly included a Supreme Administrative Court in the system of courts, without postponing the establishment of this court in its transitional and final provisions, or assigning specific tasks to specific bodies, as well as deadlines for implementing the constitutional state of affairs. Thus, the constitutional order assumes a supreme body in the administrative court system, while the law governing this branch of the judiciary (part five of the CPC) is constructed completely differently, as it creates three independent levels of decision-making, and this decision-making is, with the exception of pension matters, final.

The present system also does not provide judicial protection from illegal procedures or intervention by the public administration which do not have the character and form of an administrative decision (in particular direct intervention or interference, issuing certifications, often with significant legal consequences, etc.), there is no means for judicial protection from the inactivity of an administrative office, the administrative courts cannot directly decide on the validity of actions of the public administration (e.g. about whether an act is null or whether the validity of a decision which recognizes a right or imposes an obligation ceased to exist – e.g. by the passage of time etc.). In these cases as well the Constitutional Court often fills in.

A separate problem exists in the so-called administrative punishment, where, although the Constitutional Court, by judgment of 17 January 2001, file no. Pl ÚS 9/2000 (no. 52/2001 Coll.) on the annulment of § 83 par. 1 of Act no. 200/1990 Coll. on Minor Offences, as amended by later regulations, which excluded from judicial review decisions which penalized the least serious minor offences, moved matters somewhat forward, nonetheless this area is not in accordance with the Convention, as “accusations of a crime” under Art. 6 par. 1, under the case law of the ECHR, include in practice proceedings on all sanctions imposed by administrative offices on natural persons for a minor offence or other administrative delict as well as on sanctions imposed in disciplinary or censure proceedings (on state employees, soldiers, police officers), or imposed in analogous proceedings on members of chambers with mandatory membership. The court must then be endowed with the power to evaluate not only the legality of the sanction, but also its reasonableness.

These cited reservations, together with the fact that our administrative courts have their decision-making process regulated in a manner under part five of the CPC, permit us to state that the current administrative judiciary in the Czech Republic, as far as process and jurisdiction are concerned, generally corresponds to the Constitution and the Charter, but does not correspond to Art. 6 par. 1 of the Convention, as the Convention clearly requires that a court or similar body decide on the law (that is, on the matter itself, and not only the legality of the foregoing administrative act). Thus, in our system, a court can only remove an illegal decision, but not one which is substantively defective. In other words, at this time the administrative discretion of a dependent body cannot be replaced by independent judicial consideration. If this is so in matters of "civil rights and obligations" and administrative punishment under the Convention, this situation is unconstitutional, though it will stand in other matters.

The foregoing analysis of the present situation indicates that we can agree with those petitioners who state that the Civil Procedure Code, by the fact that it regulates the administrative judiciary in part five, contents itself, without regard to the specific nature of a matter, with mere review of legality and in its provisions more closely regulates only this review, is in conflict with Art. 6 par. 1 of the Convention, and thus generally also with the constitutional order of the Czech Republic. In the opinion of the Constitutional Court, this deficiency cannot be solved otherwise than by a fundamental change in the concept of the administrative judiciary, in which it will be a matter for the legislature, taking into account the wealth of case law of the ECHR, to ensure full judicial control in all areas which this case law considers, under Art. 6 par. 1 of the Convention, to be "civil rights or obligations" or which are classified under the term "any criminal complaint".

Concerning the problem of the constitutionality of the procedural regulations, which restricts the administrative judiciary in most cases to one level, it must be stated that the Constitution and the Charter do not guarantee a multi-level judiciary as a fundamental right. Such a right also can not be drawn from international treaties. Art. 2 of Protocol no. 7 to the Convention ensures the right to at least one appeal before a court of a higher level only in more serious criminal matters. The same right in criminal proceedings is provided to a convicted person by Art. 14 of the International Convention on Civil and Political Rights (no. 120/1976 Coll.). On the other hand, however, there can be no dispute about the fact that the requirement to form a mechanism for unifying case law (if only through the form of a cassation complaint or other extraordinary means of appeal) arises from the requirements placed on a state which defines itself as a state governed by the rule of law. The consequences of the non-existence of such a mechanism then also lead to insufficient pressure on the cultivation of public administration as a whole and to the feelings of bodies of that administration, often justified, that they are exposed to judicial review which lacks a unifying function. In addition, the absence of any means of unifying the case of law of the administrative courts leads to the situation where the Constitutional Court finds itself in the role of the "unifying body," in conflict with its position. This situation creates a fundamental inequality between legal entities and natural persons, on one side, and administrative authorities, as the state has no means to defend itself against the sometimes diametrically opposed decision-making of the administrative courts. In other words, the executive has no opportunity to call for evaluation of administrative case law by the supreme body of the judicial power if it believes that it is in conflict with the law.

Concerning the petition of Panel IV for annulment of § 250 par. 2 of the CPC,7) under the present legal regulation it is evident that conditioning active standing to file an administrative complaint on previous participation in administrative proceedings can, in some cases, lead to a situation where the right to file a complaint – i.e. the right to access to the court – does not apply to entities whose rights or obligations were evidently concerned, or whose rights could be affected by a decision of the public administration body (and it cannot be ruled out that this could be a fundamental right, e.g. the right of ownership). This leads to persons whose rights are affected by an administrative decision being in unequal positions. This situation is in conflict with Art. 36 par. 2 of the Charter 8) and with the requirements arising from Art. 6 par. 1 of the Convention, as it does not meet the requirement that everyone whose civil rights or obligations are concerned, must be guaranteed the right of access to the courts. This unconstitutional situation can undoubtedly be resolved in the manner which the Ministry of Justice proposes in its statement, i.e. by changing those provisions of administrative law regulations which exclude from participation in administrative proceedings persons whose rights could be affected by an administrative decision. Such a solution would certainly be effective, and thus also desirable, as the opportunity to defend one's rights should be provided to all affected persons in the administrative proceedings themselves. It must be stated, and positively evaluated, that in this regard the legislature itself has already corrected some special regulations (e.g. it expanded the definition of participants in proceedings on building bans or protected areas in the Building Code). The Constitutional Court also acted in this spirit, in its judgment of 22 March 2000, file no. Pl. ÚS 19/99 (no. 96/2000 Coll.), in which it annulled the definition of the term "neighbour" in § 139 let. c) of the Building Code, as well as in its judgment of 22 March 2000, file no. Pl. ÚS 2/99 (no. 95/2000 Coll.), which annulled § 78 par. 1 of the same Code, determining participants in final occupancy proceedings.

This problem could be solved by immediate derogation or the part of the first sentence of § 250 par. 2 of the CPC,7) expressed in the words "as a party to administrative proceedings", as well as annulment of the second sentence of that paragraph, which is in any case redundant, as the fact of whether someone is a party to administrative proceedings does not depend on whether the administrative office treats him as such. Moreover, this provision seems to ignore the basic condition of proceedings, consisting of the necessity for the contested decision to have gone into effect. On the other hand, however, the Constitutional Court was aware that even restricting participation to the plaintiff and the defendant (§ 250 par. 1 of the CPC 15)) is a step backwards compared to the regulation under the First Republic, which is also admitted by the official commentary to the CPC, as it speaks about the fact that this provisions evokes doubts from a constitutional viewpoint and de lege ferenda will require effective correction. It is clear that it should be a matter of general interest for the administrative court to not only concern itself with the plaintiff's objections but to see to it that all person who were somehow involved in the matter receive the opportunity to defend their rights before a court.

Finally, concerning the reservations of Panel IV about the constitutionality of § 250a of the CPC, 9) it must be stated that mandatory representation, whether by an attorney or other specialists (tax advisors, auditors, patent representatives, etc.), is not usual before the first level courts in Europe. However, despite this unusual situation and factual strictness in the Czech legal system, the current concept cannot be criticized for being in conflict with the constitutional order. An argument against the possible objection of restricting access to the courts is the attempt to ensure equality of the parties in proceedings before the administrative court, i.e. that the plaintiff not be at a disadvantage against the defendant administrative body, which is usually represented by a qualified state official. Mandatory legal representation should generally serve to effect the principle of equal weapons, as an element of a fair trial. It will be a matter for the legislature, in the new codification, to evaluate the necessity of required legal representation generally, as well as whether legal assistance, or the right to such assistance, provided in Art. 37 par. 2 of the Charter,12) can be ensured only by persons with a university level legal education. In this regard the Constitutional Court also points out that in the case of mandatory legal representation it is necessary to ensure, better than has heretofore been done, the availability of such representation for socially disadvantaged persons.

The Constitutional Court closes and summarizes that the present regulation of the administrative judiciary demonstrates serious constitutional law deficiencies. Primarily, certain activities of the public administration, just like its possible inactivity, are not under the review of the judicial power at all. Further, not everyone whose rights can be affected by an administrative decision has the right to turn to a court. If he does have that right, he is not a party in a fully fair trial under Art. 6 par. 1 of the Convention, although in a number of cases that should be so. The issued court decision is final and (with the exception of a constitutional complaint) non-reversible, which leads to non-unified case law as well as to an unequal position for the administrative office, i.e. to a situation in conflict with the requirements of a state based on the rule of law. The finality of some decisions (stopping proceedings) can also lead to a denial of justice. Finally, performance of the administrative judiciary is organized in a manner which ignores the fact that the Constitution, in Art. 91, provides for the Supreme Administrative Court as a component of the court system.

For these reasons, the Plenum of the Constitutional Court decided to annul the entire part five of the CPC, as, in its opinion, these deficiencies in constitutionality can not be meaningfully resolved by partial derogations. It does so with the awareness that a number of the provisions in this part and the institutions regulated in it are not unconstitutional and will also be present in the new regulation in one form or another. Likewise, the Constitutional Court is aware of the legislative difficulty of solving the constitutional deficiencies described; on the other hand, however, it is forced to point out that it pointed to the unconstitutionality of problem parts in a number of its panel and plenary decisions, where it pointed out, in particular, that it is not its task to replace the non-existent Supreme Administrative Court, interpret general, particularly administrative law, and provide judicial protection as the only judicial level. Therefore, after weighing all the calls which it made in the past toward the executive and legislative powers, and after taking cognizance of the work in progress on reform of the administrative judiciary, it decided to postpone the enforceability of the annulment verdict until 31 December 2002. The Constitutional Court is convinced of the need for a lengthier vacantia legis for such a

fundamental change, from which it follows that passing new regulations is a task for the present legislative assembly.

Instruction: A decision of the Constitutional Court can not be appealed.

In Brno, 27 June 2001

Pl. US 16/99

Overview of the most important legal regulations

1) Art. 91 of Act no. 1/1993 Coll., the Constitution of the Czech Republic, provides that the court system comprises the Supreme Court, the Supreme Administrative Court, high, regional, and district courts. They may be given a different denomination by statute.

2) The regulations in part V of the Civil Procedure Code, "The Administrative Court System", annulled as of 31 December 2002, is replaced by Act no. 150/2002 Coll., The Administrative Procedure Code, with effect as of 1 January 2003.

3) § 250d par. 3 of Act no. 99/1963 Coll., the Civil Procedure Code, provides that the presiding judge shall stay the proceedings if the complaint was filed late, or if it was filed by an unauthorized person, or if it contests a decision, which cannot be the subject of a review by the court, or if the complainant failed to rectify faults in his complaint, even though the court has ordered their rectification, and these hinder the processing of such complaint in respect of its subject, or if the complaint has been withdrawn [section 550h(2)].

4) § 250j par. 4 of Act no. 99/1963 Coll., the Civil Procedure Code, provides that no legal remedy is admissible against such decision of a court (i.e. decision of the court on a complaint against the decisions of the administrative organs)

5) § 245 par. 2 of Act no. 99/1963 Coll., the Civil Procedure Code, provides that in the case of a decision which an administrative organ issued on the basis of its free consideration as permitted by the law, the court shall only review whether such decision is within the limits and rules stipulated by the law.

6) § 250j par. 1 of Act no. 99/1963 Coll., the Civil Procedure Code, provides that if the court concludes that the contested decision complies with the law, it shall deny the complaint in a judgment.

7) § 250 par. 2 of Act no. 99/1963 Coll., the Civil Procedure Code, provides that the complainant may be an individual or a legal entity averring that he (it), as a party to administrative proceedings, was curtailed in his (its) rights. A complaint may also be lodged by an individual who, or a legal party which, was left out of the administrative proceedings, even though this individual or legal entity should have been a party thereto.

8) Art. 36 par. 2 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides that unless a law provides otherwise, a person who claims that her 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.

9) § 250a of Act no. 99/1963 Coll., the Civil Procedure Code, provides that the complainant must be represented by an advocate or a commercial lawyer, unless he has a legal education himself, or unless the complainant s employee (member) who acts for the complainant at the court has a legal education; this shall not apply to cases in which district courts are competent because of the subject of such cases, or to a review of a decision on sickness insurance or pensions (pension security).

10) Art. 26 par. 1 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides that everybody has the right to the free choice of his profession and to the training for that profession, as well as to engage in commercial and economic activity. Par. 2 of this provision provides that conditions and limitations may be set by law upon the right to engage in certain professions or activities.

11) Art. 4 par. 3 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides that any statutory limitation upon the fundamental rights and basic freedoms must apply in the same way to all cases which meet the specified conditions. Par. 4 of this provision provides that in employing the provisions concerning limitations upon the fundamental rights and basic freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations are not to be misused for purposes other than those for which they were laid down.

12) Art. 37 par. 2 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides that in proceedings before courts, other state bodies, or public administrative authorities, everyone shall have the right to legal assistance from the very beginning of such proceedings.

13) § 250 par. 1 of Act no. 99/1963 Coll., the Civil Procedure Code, provides that when the court reviews the contested decision complied with the law, it shall do so according to the situation at the time when the contested decision was issued; evidence is not examined.

14) § 250s par. 2 of Act no. 99/1963 Coll., the Civil Procedure Code, provides that an appeal may be filed against a decision of the regional court on a matter concerning social security and social insurance, and such appeal shall be decided by the high court under the provisions of Part IV this Code; recourse shall be admissible only under the conditions stipulated in Part IV of this Code.

15) § 250 par. 1 of Act no. 99/1963 Coll., the Civil Procedure Code, provides that the parties to the proceedings are the complainant and the defendant.