2009/12/01 - PL. ÚS 17/09: ADMINISTRATIVE ACTION CONCERNING INTERNATIONAL PROTECTION - LENGTH OF TERM

HEADNOTES

A term of the action as such cannot be unconstitutional. It is for the legislature to consider whether and which term they establish for the exercise of rights. Not even the length of the term of the action alone can be principally a reason for annulment of the same. The conclusion of its (un)constitutionality may be reached only after the assessment of other contextually working circumstances. The Constitutional Court, when assessing the seven-day term for filing an administrative action against a decision of the Ministry of the Interior on an application for granting international protection regarding cases when such an application has been rejected as manifestly unjustified, has examined whether the same does not unacceptably favour any group of applicants for international protection, whether the same was not established by the legislature in an arbitrary manner, and whether the same is not inadequate.

From the viewpoint of conditions for the possibility of making use of judicial protection, applicants are divided into two categories. With respect to the general requirement of principally equal access to constitutional guarantees, it is therefore necessary to deal with the issue of necessity and justifiability of such differentiation. The purpose of such a term is to eliminate cases which "manifestly are not of an asylum-related nature". They burden the system, and expeditiousness is, with respect to such cases, an important aspect. However, the Constitutional Court sees no immediate link between these arguments and the length of the term of the action. The aspect of expeditiousness is surely important and was reflected in asylum law, amongst other points, by shortening the general two-month term of the action to a period of 15 days.

The plaintiff is obliged, as early as in the action and at the latest during the course of the term of the action, to define the scope to which they contest the administrative decision, and at least in a basic manner delineate reasons in which they perceive the unlawfulness of the decision. An action in the administrative judiciary must contain a point of the action within the term for filing the same. If it is not so, such filing is a mere announcement of an intention to turn to an administrative court with an action, which, however, has no relevant effect, even upon an extensive interpretation of the term "point of the action". From the very beginning, demands are thus placed on the quality of the argumentation of the plaintiff. Taking into account the fact referred to by the petitioner, i.e. that the plaintiff is, as an applicant for asylum, in a specific situation when they are usually not familiar with the local conditions and legal order, do not know the language, have no background or contacts here, and depend on external help, such a formal requirement by the rules of procedure is not an easy one to fulfil. When this is complemented by a seven-day term, factually necessarily shortened by at least two more non-working

days of the weekend, within which the applicant-plaintiff must manage all this, then they are subjected to inappropriate pressure.

The Constitutional Court is aware of a possible objection that by annulling the contested provisions, the term of the action in the case of manifestly unjustified applications will be prolonged from seven to fifteen days (§ 32 para. 1 of the Asylum Act), but a combination of social factors in applicants for asylum, and principles governing the administrative judiciary will continue to have such effect that a number of applicants will not effectively receive a judicial review on the merits. For surely it will still happen that applicants will file blanket actions at the very end of the term of the action, and thus the room for possibly amending the necessary requisites will remain minimal. Nevertheless, the availability of a judicial review of the decision for these applicants, when respecting the principle of vigilantibus iura, will be greater. Without thus declaring that the fifteen-day term alone is a sufficient one (this would be beyond the scope of the subject of the proceedings defined by the petition), the Constitutional Court states that proper initiation of a judicial review is more realistic for persons holding the position of an applicant for asylum in the course of this (fifteen-day) term.

The provisions of the Asylum Act under consideration, by restricting the right on the part of the applicant to claim with a court protection of their rights by establishing an inadequately short term for filing an action, in essence render the proclaimed judicial protection a mere illusion (similarly in Judgment file No. Pl. ÚS 12/07, promulgated under No. 355/2008 Coll.). Such provisions are therefore in conflict with Article 36 para. 2 of the Charter of Fundamental Rights and Basic Freedoms, according to which a person who claims that their rights were curtailed by a decision of a public administrative authority may turn to a court for review of the legality of that decision, unless the law provides otherwise; however, judicial review of decisions affecting the fundamental rights and basic freedoms listed in the Charter may not be removed from the jurisdiction of courts; and with Article 13 of the Convention on the Protection of Human Rights and Fundamental Freedoms, guaranteeing the right to an effective remedy before a national authority to anyone who has been affected in relation to the right acknowledged by the Convention.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

On 1 December 2009, the Constitutional Court Plenum, composed of Pavel Rychetský, the President of the Constitutional Court, and Justices Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jan Musil, Jiří Nykodým, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická, adjudicated on a petition by the Supreme Administrative Court for annulment of the provisions of § 32 para. 2, clause a) of Act No. 325/1999 Coll. on Asylum and on Alteration to Act No. 283/1991 Coll. on the Police of the Czech Republic, as amended by later regulations, (the Asylum Act), as amended by later regulations; with participation by the Chamber of Deputies of the Parliament of the Czech Republic and the Senate of the Parliament of the Czech Republic as parties to the proceedings; as follows:

The provisions of § 32 para. 2, clause a) of Act No. 325/1999 Coll. on Asylum and on Alteration to Act No. 283/1991 Coll. on the Police of the Czech Republic, as amended by later regulations, (the Asylum Act), as amended by later regulations, shall be annulled as of the date this Judgment is published in the Collection of Laws.

REASONING

I.
Definition of the case, argumentation of the petitioner

1. On 1 July 2009, the Constitutional Court received a petition for annulment of a part of Act No. 325/1999 Coll. on Asylum and on Alteration to Act No. 283/1991 Coll. on the Police of the Czech Republic, as amended by later regulations, (the Asylum Act), as amended by later regulations, (hereinafter referred to only as the "Asylum Act"), specifically § 32 para. 2, clause a), establishing a seven-day term for filing an administrative action against a decision of the Ministry of the Interior on an application for granting international protection regarding cases when such an application has been rejected as manifestly unfounded.

2. The petitioner stated that they administered, under file No. 1 Azs 72/2008, proceedings on a cassational complaint on the merits filed by a Ukrainian citizen, aimed against a resolution of the Regional Court in Prague, whereby this citizen's action against a decision of the Ministry of the Interior on rejection of an application for granting international protection as manifestly unjustified was dismissed. The decision of the Ministry was delivered to the cassational complainant on 3 March 2008. On 5 March 2008, this Ukrainian citizen contested the same with an action, in which this citizen specified, amongst other points, that he was not able to properly draw it up himself and, therefore, asked for a representative to be appointed for the judicial proceedings, who would amend his

filing. The Regional Court fulfilled this request and by a resolution dated 1 April 2008 appointed a representative for the complainant; the Court then asked both to properly amend the action within a term of 5 days from the delivery of the request, and notified them of the consequences of failing to comply with the request. This resolution was delivered to the representative of the complainant on 3 April 2008. On 10 April 2008, the action was amended. On 23 April 2008, the Regional Court dismissed the action, stating that the established term of five days had expired on 8 April 2008. In a subsequent cassational complaint on the merits, the complainant claimed that, with said request being delivered to his representative on Thursday 3 April 2008, the five-day term ended on Tuesday 8 April 2008. With respect to the fact that the appointed representative could neither meet the complainant in person during such a short period of time, nor know the contents of the file, the term established by the court for amendment of the action was unfeasible.

3. Since the Supreme Administrative Court concluded that § 32 para. 2, clause a) cannot be interpreted in a constitutionally conforming manner in such a way that the complainant is not deprived of his right to judicial protection, the Supreme Administrative Court turned to the Constitutional Court with a petition for annulment of such provisions.

4. Even though the Asylum Act does not contain a jurisdictional exclusion whereby it would exclude from judicial review a decision on rejection of an application for granting international protection for the same being manifestly unfounded, the above provisions, with respect to the very short term available for filing an action, according to the Supreme Administrative Court, make judicial protection of unsuccessful applicants ineffective. The fundamental right guaranteed by Art. 36 para. 2 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter referred to also as the “Charter”) is then conferred merely as an illusion. The term in itself does not necessarily appear constitutionally nonconforming, but its constitutionality must be evaluated within the process of application of the same, in context with consequential norms, as well as social factors into which it is embedded.

5. The Supreme Administrative Court points out that the administrative judiciary, under the competence of which the judicial review of applications for granting international protection takes place, is governed by a dispositive principle and one of concentrated proceedings. This means, inter alia, that the plaintiff may extend the action to cover until then uncontested verdicts of the decision, or extend the action with additional points of the same, only during the term for filing an action (§ 71 para. 2 of the Code of Administrative Justice). Default of time may not be waived (§ 72 para. 4 of the Code of Administrative Justice). The existence of such a strictly conceived concentration of proceedings is, under the administrative judiciary, compensated for by a general two-month term for filing an action against a decision of an administrative body. The plaintiff also, as is standard, passed through administrative proceedings of two instances and contests a decision of an appellate administrative body. The Asylum Act, however, interferes in the system so conceived with a special arrangement establishing administrative proceedings of one instance regarding an application for international protection, and determines considerably shorter terms for filing actions against decisions in such matters. It is

the very combination of such a short term and the general rules of the administrative judiciary which leads, as a final consequence, to the restriction of the right to judicial protection.

6. The Supreme Administrative Court further refers to the position in which the majority of applicants find themselves. The applicants are usually persons who have no or minimal knowledge of the Czech language and the Czech cultural and legal environment. If an application from one such person is rejected as manifestly unjustified, the Ministry of the Interior issues a decision within 30 days from the commencement of the proceedings. Following delivery of the same, the applicants have only 7 days to file an action. In such a short period of time it is very difficult to develop an action in a qualified manner. Moreover, the applicants usually have to rely on assistance from non-governmental organisations or legal representatives appointed ex officio. In any case, the appointed representative has only as many days to extend the action as are left from the statutory seven-day term which commences upon delivery of the administrative decision. In the specific case now being considered by the Supreme Administrative Court, this was only 5 days, of which three were working days; in other cases, it can be even fewer. In relation to this it is necessary to take into account the time necessary to contact the applicant, and possibly to obtain an interpreter, to study the case and prepare argumentation. The consequences in practice are such that the applicants, in many cases, do not manage to file a proper action within the prescribed term, and even if they do, the lack of time for developing the same necessitates its inferior quality.

7. Taking into consideration the strictly conceived principle of concentrated proceedings mentioned above, the situation cannot be rectified through interpretation according to which the court has the possibility or even the obligation to determine a longer term for extension of the action. However benevolent the interpretation of the term “a point of the action” in its case law is, the existence of the same cannot be derived, for example, from blanket actions which, in the very case of unsuccessful applicants for international protection, are not exceptional.

8. The Supreme Administrative Court further states that the existing disputable seven-day term was incorporated into the Asylum Act by an amendment effective from 1 January 2003. The motive for the establishment of a restrictive arrangement, as is implied from the explanatory report, was the acceleration of asylum proceedings in cases when an applicant clearly does not fulfil the conditions, as well as financial and security reasons; the Supreme Administrative Court believes that another reason consisted of the need to respond to a considerable increase in the number of applicants for international protection at the turn of the century, which has caused apprehension over congestion experienced by the given bodies. In any case, in its opinion, the procedure cannot be accelerated at the expense of procedural rights of the parties. In addition, curtailment of the term is not based on a reason of special interest, as is the case, for example, regarding the judicial review of election-related cases. Surely, curtailment cannot be justified by financial aspects; also, applicants can not be generally seen as a threat to security. In addition, since 2001, there has been a constant decrease in the number of applicants, with the present situation being

comparable to that of the early 1990s. The Supreme Administrative Court is of the opinion that the asylum procedure may be made more effective also through other means; as an example they suggest the practice adopted in some countries which solved the requirement for the existence of remedies through the existence of special quasi-judicial tribunals composed of experts in the issue of immigration. However, since the Czech legislature has elected a method of review of such decisions under the competence of the Code of Administrative Justice, in which the espousal of rights and interests is, to a large degree, dependent on the activity of the party at the moment of filing the action, then the legislature cannot at the same time deprive such a party of the possibility to advocate their rights effectively due to the legislature having established such a short term of the action.

II.
Opinions of the parties to the proceedings and the Ministry of the Interior

9. In their statement concerning the contents of the petition, the Chamber of Deputies of the Parliament of the Czech Republic specified that the term under examination had been incorporated into the Asylum Act by an amendment submitted by the Government, in the belief that the bill is fully compatible with international commitments, in particular with the Convention relating to the Status of Refugees from 1951 (editorial comment: promulgated under No. 208/1993 Coll.). Also, the rapporteur introduced the relevant Print by saying that the proposed arrangement is in harmony with EU law. The matter was dealt with by the Committee on Defence and Security which adopted a number of amendments, however, the term under consideration was not contested. The Act was then properly approved and promulgated. The Chamber of Deputies dealt with said term again in connection with addressing the government bill of an act whereby some acts are altered in connection with adopting the Administrative Procedure Code. It was stated that said Print, which introduced the new wording of § 32 of the Asylum Act, is in line with the Resolution on Minimum Guarantees for Asylum Procedures, and honours requirements of ratified and promulgated international treaties on human rights and fundamental freedoms, by which the Czech Republic is bound pursuant to Art. 10 of the Constitution. The Committee on Constitutional and Legal Affairs adopted a comprehensive amendment, into which, however, they did not incorporate the new wording of § 32 of the Asylum Act. This non-adopted part of the amendment to the Asylum Act was thereafter submitted in the original wording within the scope of the amendment proposed by the Deputies regarding another act, and was so adopted and promulgated. The legislative assembly has acted in the conviction that the acts adopted are in harmony with the constitutional order. They leave it to the Constitutional Court to assess the constitutionality of the arrangement.

10. The Senate of the Parliament of the Czech Republic is of the same conviction, which is that said part of the Asylum Act is in harmony with the constitutional order as well as international commitments. In their statement on the contents of the petition they specify that the objective of the amendment to the Asylum Act, the same amendment as is mentioned several times above, was to tighten conditions for granting asylum in terms of a more effective elimination of cases of

misuse of such a right. Procedural instruments (in addition to other items) were thus to be adjusted in such a way that they correspond to the varied conduct of applicants and lead to an expeditious settlement of cases. According to the sponsor, this more effective attitude was also necessitated by a steep rise in the number of applications (as many as 8,788 cases in 2000; during 2001 as many as 20,000 cases were indicated). Also for this reason, the number of causes for "manifest unfoundedness" was expanded, the term for administrative decision was shortened (from ninety to thirty days), and the remedial process was reduced by omitting the possibility of filing a remonstrance. After passing the bill of the amendment to the Senate, the Senate's Committees dealt with the same. Some of them recommended returning the bill of the act with proposed amendments aimed at mitigating some unnecessarily severe conditions of the Asylum Act, however, none of these proposals applied directly to the term now under consideration. Likewise, the Senate has left the final decision to the Constitutional Court.

11. With respect to the subject of the petition, the Constitutional Court considered it practical to request a statement on the contents of the petition additionally from the Ministry of the Interior, which exercises authority in the given field of state administration.

12. The Minister of the Interior responded with a detailed explication. First of all, the Ministry holds the opinion, ever since the actual establishment of the contested provisions into the legal order of the Czech Republic, that the same are in harmony with the constitutional order, and does not identify itself with the argument of the petitioner that the same cannot be interpreted in a constitutionally conforming manner. The case on which the examined petition by the Supreme Administrative Court was based is not the first to deal with the issue of terms according to the Asylum Act; the petitioner has only adopted a different view of the given matter now. So, for example, in decision file No. 2 Azs 117/2004, dated 26 October 2004, the Supreme Administrative Court stated that already a dismissal by the Regional Court of a filing was incorrect if such a court did not take into consideration an amendment to such a filing made after the specified term. The point is that such a term is a judicial one, and thus it is not possible to automatically infer, from ineffectual expiry of the same, an obligation not to take into account a subsequent amendment. Similarly, in decision file No. 9 Azs 1/2009, dated 12 February 2009, the Supreme Administrative Court found that the procedure by the Regional Court which dismissed a filing for defects therein without taking into consideration that the term for remedying the same was unrealistic with respect to the specific obstacles regarding the petitioner, constituted a denial of justice. The case law thus, according to the Ministry, has found a constitutionally conforming solution, even without the need to interfere in the contested provisions. It is then impossible to infer from the given petition why the petitioner had to deviate from this solution.

13. In relation to the right to judicial protection, the Ministry believes it appropriate to accentuate as a basic premise the fact that the contested provisions of the Asylum Act do not disallow a judicial review by an independent court of said decisions in the case of international protection and that the Asylum Act even confers the effects of deferral to the majority of actions filed.

14. With reference to the conclusion of the Constitutional Court presented in Judgment file No. IV. ÚS 553/06, dated 30 January 2007 (N 17/44 SbNU 217) and opinions held by legal theory, the Ministry denies the opinion expressed in the petition, according to which decision making on applications for granting international protection represents that relating to fundamental rights and basic freedoms.

15. The Ministry denies that the seven-day term means an illusoriness of the right to judicial protection. This term does not apply to all actions in cases of international protection, but only to those when expeditiousness of the proceedings aims to eliminate cases which manifestly are not of an asylum-related nature. These are cases which are not related to international protection, and which only abuse asylum instruments for other purposes, in particular legalisation of stay, which purpose, however, is served by mechanisms regulated in Act No. 326/1999 Coll. on the Residence of Aliens in the Territory of the Czech Republic and on Alterations to Some Acts. Therefore, they merely burden the system and the short term allocated is thus appropriate. A similar arrangement resulting from varied lengths of terms for individual asylum procedures is common in other EU countries as well, for example, Germany, France, Great Britain, Belgium and so on; in some countries, the given term is even shorter. Otherwise, the length of the term fits the context of specially determined terms in alien law; with respect to this, the Ministry refers to resolution file No. I. ÚS 609/01, dated 5 March 2002 (not published in the Collection of Judgments and Rulings), in which the Constitutional Court dealt with the constitutionality of a shortened thirty-day term for filing an administrative action against a decision pursuant to Act No. 326/1999 Coll. Similarly the Supreme Administrative Court, in decision file No. 5 As 7/2009, dated 16 April 2009, stated that statutory ten-day term for filing an action against a decision by an administrative body on expulsion of an alien, even though it is considerably shorter than the general term, does not aggravate in an excessive way the alien's exercise of their right to a judicial review of such a decision, since terms are compensated for by providing the action with the effects of deferral. In addition, determination of a shorter term pursues a legitimate objective in the form of limiting the residence of an expelled person merely to a necessary period of time. It is, therefore, not in conflict with Art. 36 para. 2 of the Charter or Art. 1 of Protocol No. 7 to the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter also referred to as the "Convention"). As for argumentation of the petitioner with the effects of the principle of concentrated proceedings on the status of the plaintiff, the Ministry refers to the fact that the solution consists, pursuant to the conclusions of Judgment of the Constitutional Court file No. IV. ÚS 2170/08, dated 12 May 2009, of an extensive interpretation of the term "point of the action". In addition, the concept of the principle of concentrated proceedings, as it is presented in the petition by the Supreme Administrative Court, i.e. that the legal representative may be permitted only as many days for amending the action as are left from the seven-day term for filing the same, is, according to the Ministry, overly restrictive. Furthermore, the Ministry does not concur with the opinion that at present, when the numbers of applicants are on the decrease, the arrangement under consideration is unnecessary. The given legislative alteration was not motivated by a sharp rise in agenda, but by an effort to make proceedings more effective and to eliminate cases in which the asylum system is only abused.

16. According to the Ministry, by annulling the contested provisions, the difference between rejecting a petition as manifestly unjustified and between typical proceedings would be removed, which is undesirable and in conflict with the meaning and purpose of the legal arrangement. It would also be in contravention of the present trend in European law, to which the present arrangement of the asylum procedures corresponds. Therefore, the Ministry recommends rejecting the petition.

III.
Wording of the contested provisions

17. The provisions of § 32 para. 2, clause a) of the Asylum Act read as follows: "Within 7 days of the serving of the decision, an action may be filed against the decision on the application for granting international protection which rejects the application as manifestly unfounded".

IV.
Conditions for the active standing of the petitioner; the constitutional conformity of the legislative process

18. The petition was filed by the Supreme Administrative Court in connection with the proceedings taking place at the same Court, and the procedural provision of the Asylum Act proposed for annulment is one of the provisions the same Court must apply. The Supreme Administrative Court's active standing is thus supported by the provisions of § 64 para. 3 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations (hereinafter referred to only as the "Act on the Constitutional Court").

19. The Constitutional Court, pursuant to the provisions of § 68 para. 2 of the Act on the Constitutional Court, dealt with the manner of adoption and publication of Act No. 2/2002 Coll. whereby the Asylum Act and Some Other Acts are Altered, whereby the contested provisions were inserted into the Asylum Act. The statements by both parties, as well as relevant web pages (www.psp.cz), imply that the Chamber of Deputies of the Parliament of the Czech Republic discussed the bill as Print No. 921. The first reading took place on 16 May 2001, the second on 19 September 2001 and the third on 21 September 2001, when the bill of the act was approved and advanced to the Senate. The Senate returned the same during its 10th session on 25 October 2001 (Resolution No. 189), to the Lower House with some proposed amendments, when of the 66 Senators present, 60 voted for such a return, 3 voted against it and 3 abstained from voting. On 27 November 2001, at their 43rd session, the Chamber of Deputies discussed the bill again and approved the same in the wording approved by the Senate (Resolution No. 1866); of the 168 members present, 110 voted for and 53 voted against the bill. The President of the Republic signed the act on 14 December 2001, and on 7 January 2002, the Act was properly promulgated in the Collection of Laws.

20. The Constitutional Court stated that the Act under consideration was adopted through a constitutionally conforming legislative procedure.

V.
The actual review

21. The Constitutional Court has evaluated the petition and for the reasons specified below concluded that there is a reason to annul the contested provisions of the Asylum Act.

22. First of all it is necessary to point out that the Constitutional Court is a body responsible for the protection of constitutionality (Art. 83 of the Constitution of the Czech Republic). In proceedings on annulment of acts and other legal regulations, the Constitutional Court holds the position of a "negative legislature", and its task is to evaluate the constitutionality of contested legal regulations or specified parts thereof, and possibly to evaluate whether or not it is possible to interpret and apply the contested regulations in a constitutionally conforming manner. The Constitutional Court in this is not entitled to evaluate the suitability, practicality or doctrinal purity of a legal norm, since such powers always pertain solely to the legislature.

23. Therefore, as was implied from the narrative section of the reasoning, the Constitutional Court is facing a task of assessing whether the seven-day term of the action still provides the plaintiff with a realistic opportunity to have the decision on rejecting the application for granting international protection as manifestly groundless examined by an administrative court, or whether the length of the term for initiation of proceedings actually turns the right to a judicial review merely into an empty gesture.

24. In its case law, the Constitutional Court has dealt with the issues of terms and their connections with constitutional guarantees several times.

25. So, for example, in Judgment file No. Pl. ÚS 33/97, dated 17 December 1997 (N 163/9 SbNU 399; 30/1998 Coll.), the Constitutional Court stated, concerning the concept of a term at a general level, the following: "The purpose of the legal institute of a term is to reduce entropy (equivocality) in exercising rights or powers, to limit in terms of time the condition of uncertainty in legal relationships (which plays a particularly important role from the viewpoint of evidence in cases of disputes), to accelerate the processes of decision making with the aim of realistic achievement of intended objectives. These reasons resulted in the establishment of terms as far back as thousands of years ago."

26. The scope of the constitutional review of statutory provisions establishing terms was then defined by the Constitutional Court in Judgment file No. Pl. ÚS 46/2000, dated 6 June 2001 (N 84/22 SbNU 205; 279/2001 Coll.), where the Court stated: "The mission of the Constitutional Court consists of the control of constitutionality. Within this scope, the Court may only annul unconstitutional regulations, or parts of the same, however, it is not the Court's task to rectify consequences which have occurred through the petitioner failing to exercise their

rights within the determined term. Annulment of terms violates principles of a law-based state, since the same considerably interferes in the principle of legal certainty, which is one of the basic elements of current democratic legal systems. The term alone cannot be unconstitutional. However, it may appear to be such with respect to the given specific circumstances."

27. The conclusions above then served as the basis for the Constitutional Court's Judgment file No. Pl. ÚS 6/05, dated 13 December 2005 (N 226/39 SbNU 389; 531/2005 Coll.). Therein the Court again stated that "a deadline, prima facie, without anything further, does not and can not demonstrate elements of unconstitutionality" and that "the unconstitutionality of a term may be stated only in a dialogue with specific circumstances of the matter being evaluated". The Constitutional Court declared, taking into account its hitherto case law, that these specific circumstances, i.e. viewpoints for contextual evaluation of the constitutionality of a term, are as follows:
"1. disproportionality of the deadline in relation to the time-limited possibility for exercising a constitutionally guaranteed right (claim), or to the defined time period for limitation of a subjective right". Here, the Constitutional Court referred to Judgment file no. Pl. US 5/03, dated 9 July 2003 (N 109/30 SbNU 499; 211/2003 Coll.), annulling the provisions of § 3 and § 6 of Act No. 290/2002 Coll., which represented a disproportionate restriction of property rights, violation of Art. 11 para. 1 in connection with Art. 4 para. 4 of the Charter of Fundamental Rights and Basic Freedoms (in the given context, the Court considered constitutionally conforming such a legal arrangement which would establish such a restriction only to a completely essential scope of time, which can be understood merely as a minimum period of time, clearly prima facie a "transitional" one, but not a period of ten years);
"2. arbitrariness by the legislature when setting the deadline (establishing or cancelling it)." Pursuant to this viewpoint of assessment of constitutionality of the term, the Court proceeded in case file No. Pl. ÚS 2/02 – Judgment dated 9 March 2004 (N 35/32 SbNU 331; 278/2004 Coll.), in which it found unconstitutional the annulment of provisions of § 879c to § 879e of the Civil Code implemented by Act No. 229/2001 Coll., whereby the legislature interfered in the legitimate expectation of a precisely defined circle of entities just one day before the expiration of the term in which property rights would have been acquired, as a result of which entities that acted in confidence in the conditions previously set by the state were, just one day before the expiration of the term mentioned above, confronted with the arbitrary steps taken by the state;
"3. the constitutionally unacceptable inequality of two groups of subjects which results from the annulment of a certain statutory condition for exercising a right due to unconstitutionality, where this annulment does not, without anything further, create an opportunity to exercise rights for the affected group because of the expiration of deadlines as a result of derogation". Here, reference was made to Judgment file No. Pl. ÚS 3/94, dated 12 July 1994 (N 38/1 SbNU 279; 164/1994 Coll.), and Judgment file No. Pl. ÚS 24/97, dated 3 June 1998 (N 62/11 SbNU 111; 153/1998 Coll.), whereby, by annulling the provisions setting the commencement of the term for exercising a restitution claim, an opportunity was created to exercise the same also for those persons entitled who, as a result of the condition of permanent residence, could not successfully exercise their claims by the original deadlines.

28. On the basis of these propositions, declared in the past and applicable even today, the Constitutional Court therefore states that the contested term of the action as such cannot be unconstitutional. It is for the legislature to consider whether and which term they establish for the exercise of rights. Besides, this is in fact not questioned, since the petitioner views the unconstitutionality of the term exclusively in the length of the same; that is in the fact that the same is too short. However, not even the length of the term of the action alone can be principally a reason for annulment of the same. The conclusion of its (un)constitutionality may be reached only after the assessment of other contextually working circumstances. In this sense, the petitioner refers to the principles governing the administrative judiciary, these being the dispositive principle and the principle of concentrated proceedings, which, in connection with a short term, considerably hinder the applicant for international protection in the possibility of implementing a judicial review, and in some cases even preclude the same. A specific situation in life in which the majority of applicants for international protection find themselves is also impossible to omit.

29. The Constitutional Court has carefully considered these reservations when assessing the term from the viewpoints specified above; that is whether the same does not unacceptably favour any group of applicants for international protection, whether the same was not established by the legislature in an arbitrary manner, and whether the same is not inadequate.

30. It remains to be added that the issue of constitutionality of a special term of the action was dealt with by the Constitutional Court earlier in resolution file No. I. ÚS 609/01 (available at http://nalus.usoud.cz/). In this resolution, the Court decided on a constitutional complaint related to a petition for annulling the provisions of § 172 para. 1 of Act No. 326/1999 Coll. on the Residence of Aliens in the Territory of the Czech Republic and on Alterations to Some Acts, according to which “An action against an administrative decision must be filed within 30 days from delivery of the decision of the administrative body of the last instance or from the date of notification of another decision of an administrative body, unless hereinafter specified otherwise. Failure to comply with the term cannot be condoned.” The complainant stated that, as a result of this arrangement, foreigners are discriminated against as for their right to judicial protection, since the established term of 30 days for filing an action is – just with respect to the fact that foreigners often unfamiliar with the Czech language are involved – inadequately short. The Constitutional Court dismissed the petition as manifestly unfounded, stating that the contested provisions are not in contradiction with any of the constitutional principles. In the reasoning, the Court stated that “from the viewpoint of constitutional law, it is principally up to the legislature whether and in which fields of administrative-law regulation they determine, by a special act, a term for filing an administrative action; that is a term different from the general term of two months from the delivery of a decision of an administrative body of the last instance, which is established in the provisions of § 250b para. 1, first sentence, of the Civil Procedure Code. The establishment of the special term alone (different from the general arrangement according to the above-quoted provisions of the Civil Procedure Code) – which can be seen in the form of a thirty-day term, for example, in the provisions of § 17 para. 6 of Act No. 526/1990 Coll. on Prices,

or in the provisions of § 16 para. 4 of Act No. 498/1990 Coll. on Refugees, as amended by later regulations – cannot be considered to contravene constitutional principls, as, from the viewpoint of constitutional law, only whether or not this special term for filing an administrative action respects the constitutionally guaranteed fundamental rights of the persons concerned must be considered determining. The Constitutional Court believes that a different (thirty-day) term established by a special act does not prevent the exercise of the fundamental right to judicial protection in accordance with the provisions of Art. 36 of the Charter. Solely the general term for filing an administrative action cannot be guaranteed even from the viewpoint of constitutional law, since this would constitute a disownment of the right of the state to regulation of a special term by a special Act No. 326/1999, which, in terms of the subject of legal arrangement (and personal effect), relates to (the stay of) aliens in the territory of the Czech Republic. Besides, the complainants in their constitutional complaint associate the discrimination claimed against aliens – in relation to their right to judicial protection – with an alleged inadequately short thirty-day term for filing an administrative action by persons who are often unfamiliar with the Czech language. The Constitutional Court, however, believes that by establishing a special thirty-day term for filing an administrative action, public power does not fail to preserve the constitutionally guaranteed fundamental right of an alien to judicial protection, since such a term does not disturb or alter the above fundamental right, and does not make it inaccessible to aliens. To the contrary, from the viewpoint of constitutional law, public power creates, for the exercise of this fundamental right in relation to all natural persons (affected by this act), equal conditions without discrimination. The Constitutional Court, therefore, concludes that the provisions of § 172 para. 1 on a term for filing an administrative action are manifestly constitutionally conforming and there is no reason for annulling the same." A proposition according to which it is not possible to infer a constitutional guarantee for a general term for filing an administrative action, and according to which the only determinant is whether the special term respects constitutionally guaranteed fundamental rights, is automatically applicable also to the petition now being evaluated. However, in other points, the Constitutional Court responded, by the resolution specified above, to specific interrelations of special provisions of the Act on the Residence of Aliens; first of all, the resolution considered the thirty-day term, now the constitutionality of a term of seven days, i.e. a considerably shorter one, is being reviewed. In addition, proceedings under the Act on the Residence of Aliens are not strictly administered in one instance only, as is the case with asylum administrative proceedings, which makes it possible to assess the tightening of conditions of access to an administrative court, as compared to the standard arrangement, to a certain extent in a more benevolent way.

31. The term from the viewpoint of the individual groups of asylum seekers.

32. The subject of the Asylum Act also includes the arrangement of proceedings on granting international protection in the form of asylum or subsidiary protection, and proceedings on withdrawal of asylum or subsidiary protection [§ 1 clause b) of the Asylum Act]. Asylum proceedings are administrative proceedings, in which the Ministry of the Interior is in charge of taking the decision. Should the Ministry, in their decision making, discover that reasons for granting asylum have been fulfilled, they will grant international protection in the form of asylum or

subsidiary protection (§ 28 para. 1). In the contrary case, i.e. when the Ministry finds no reason for granting either form of international protection, the Ministry will reject the application (§ 28 para. 2). Negative decisions may be divided into two categories. Firstly, these are cases when the complainant does specify reasons for which asylum is granted, but in the given case such reasons are not identified and confirmed. Alternatively, the Ministry may reject an application as manifestly unjustified, this in cases exhaustively enumerated in § 16 of the Asylum Act. These are cases when the applicant endeavours to circumvent or abuse the right of asylum for the purpose of legalisation of stay in the territory of the Republic, or for other reasons. In relation to a qualitatively completely different nature of reasons for rejecting the application, different lengths for the terms for filing an administrative action are also determined. Generally, this term is 15 days, however, when an application is rejected as manifestly unjustified, an action may be only filed within a term of 7 days from the date of delivery of the decision; the same system applies to cases when the decision making covered an application filed in facilities for detention of aliens or when proceedings were discontinued for the reason of inadmissibility of the application for granting international protection.

33. From the viewpoint of conditions for the possibility of making use of judicial protection, applicants are thus divided into two categories. With respect to the general requirement of principally equal access to constitutional guarantees, it is necessary to deal with the issue of necessity and justifiability of such differentiation. According to the statement provided by the Ministry, the purpose of such a term is to eliminate cases which “manifestly are not of an asylum-related nature”. They burden the system, and expeditiousness is, with respect to such cases, an important aspect. However, the Constitutional Court sees no immediate link between these arguments and the length of the term of the action. The aspect of expeditiousness is important and was reflected in asylum law, amongst other points, by shortening the general two-month term of the action to a period of 15 days. The category of manifestly unjustified applications is surely qualitatively different from other applications, and some procedural peculiarities, such as a closed range of reasons for which it is possible to decide on such an application in such a manner, and shortening the term for the issue of an administrative decision to a period of 30 days from the date of commencement of the proceedings on granting international protection, are thus justifiable. A closed enumeration of reasons then leads to lesser demands for presenting evidence for and reasoning of the decision. These are acceptable consequences of the above-specified categorisation of applications, which in principle accelerate and facilitate proceedings in cases lacking an asylum-related nature; this is also a manifestation of elimination of such cases. However, if the very conclusion that the asylum-related nature is truly lacking in a given case is to be subjected to a judicial review, mere access to a court only to such a group of applicants cannot be restricted through further shortening the term of the action.

34. The Ministry in its explication specifies that using various lengths of terms for “standard asylum procedures” and accelerated proceedings is very common also in other member countries of the EU, and even shorter terms can be found. In relation to this, the Constitutional Court states that they left aside the comparative argument of foreign legal arrangements, since, as was declared,

evaluating the constitutionality of the term is a contextual evaluation. Other legal rules are of crucial significance, such ones influencing submission of the case to a court, i.e. actually how the term is reflected in the circumstances in the Czech Republic, where administrative proceedings in asylum-related cases are based on one instance, and the administrative judiciary is governed by the dispositive principle and the principle of concentrated proceedings, which places specific demands on the action. As an example in this connection, it is possible to include relevant sections of the arrangement of asylum proceedings and the subsequent judicial review in the Federal Republic of Germany (see an article by Petr Lavický and Sylva Šiškeová: Nad novou úpravou řízení o kasační stížnosti v azylových věcech /On the new arrangement of proceedings on a cassational complaint on the merits in asylum-related cases/, Právní rozhledy /Legal Review/ 19/2005). There, the given matter is regulated by the Act on Asylum Proceedings (Asylverfahrensgesetz, BGBI. I 1992, 1126). The proceedings are based on a single instance and are administered before the Federal Office for Migration and Refugees. Its decisions may be contested by an action filed with an administrative court. The term of the action amounts to two weeks from the delivery of the decision, and facts may be declared and evidence proposed within a period of one month; the court is not obliged to analyse evidence and take into consideration statements made following the expiry of such a term, but this only under the condition that admission of the same would cause procrastination in proceedings, the delay was not properly excused, and the party was instructed on the implications of failing to comply with the term.

35. On the issue of arbitrariness of the legislature when establishing the term.

36. The arrangement of a judicial review of asylum decisions is continual. According to Act No. 498/1990 Coll. on Refugees, effective since 1 January 1991, proceedings on granting the status of a refugee were administered by the Ministry of the Interior; remonstrance was originally allowed against the Ministry's decision in all cases, and after 31 December 1993, merely in cases of specified types of decisions. The Act allowed the filing of a petition for review of a decision by a court, but merely with respect to decisions of the Minister of the Interior issued in proceedings on the remonstrance. On 1 January 2000, the present Asylum Act became effective. The proceedings on granting asylum according to this regulation were originally of two instances in cases of decisions on not granting asylum and decisions on rejecting a petition for the commencement of proceedings on granting asylum as manifestly unjustified, when the Act allowed a remonstrance to be filed. In the case that the remonstrance was admitted, which is statistically true in the majority of cases, filing an administrative action was admissible only against a decision on such a remonstrance; however, filing an action was, unlike in the earlier legal arrangement, no longer dependent on the verdict of the decision, and all decisions could be contested by an action. The action filed was associated with the effects of deferral. By adopting Act No. 2/2002 Coll., the possibility of review of decisions of the Ministry of the Interior in remonstrance proceedings was completely removed, with effectiveness from 1 February 2002. Applicants continued to turn to the court not with an action, but with a remedy against a decision of an administrative body, when such a decision was not yet legally effective. The term for filing a remedy was, compared to the general one, shortened to 15 days from the date of delivery of the decision and, in exhaustively

defined cases, e.g. in the case of rejection of an application for granting asylum as manifestly unjustified, to 7 days. Starting from 1 January 2003, when Act No. 217/2002 Coll. became effective, the legislature returned to the model of reviewing a legally effective decision of the Ministry by a court on the basis of an action.

37. Conditions for a judicial review, including terms for filing an action (petition), have changed over time, but gradually, without any sudden leaps or shifts into extreme positions, for example, from a wide review according to general rules to complete elimination of the same. Through the now contested provisions, the legislature did not interfere in the system of reviewing asylum-related decisions in any principal and unexpected way, and did not subvert a well-proven and established pattern. The legislature reasoned by the need for expeditiousness and effectiveness of the asylum procedure, referred to the practice (not specified or explained in any detail) of legal arrangements for asylum in the countries of the European Union. It is not possible to say that the term under consideration was established in the Asylum Act through a procedure showing signs of arbitrariness on the part of the legislature. The arrangement is not unintelligible or internally inconsistent, and the legislature did not proceed in an unpredictable manner. Undoubtedly, by establishing a shorter term of the action for the given group of applicants, for the reason of making the asylum procedure more effective and expeditious, the legislature did not aim primarily at their factual elimination from the range of those who may find protection of their rights with a court. Complications in the application of such an arrangement were revealed as late as in practice (here meaning the information from the petitioner that there is an increasing number of cases such as that which has led them to submit the petition under consideration; that is cases when the applicant, within the term, manages only to announce their intention to file an action, however, does not manage to add any reasons).

38. Adequacy of the term.

39. The term for filing an action established by the contested provisions is a statutory term, the length of which cannot be altered by the court. Neither can failure to comply with such a term be waived, since such a procedure is forbidden by the Code of Administrative Justice (§ 72 para. 4). Unfavourable consequences of failing to comply with the term for filing the action, therefore, cannot be averted in any way. On the other hand, relatively great demands are placed on the person developing the action; in addition to the general requisites of a filing (§ 37 para. 2 and para. 3 of the Code of Administrative Justice), i.e. in particular specifying the subject of the action, who is filing the action, against whom such an action is directed and what is thereby proposed, signature and date, the same must also include particular requisites (§ 71 para. 1 of the Code of Administrative Justice), which is designation of the contested decision and the date of delivery or other announcement of the same to the plaintiff, designation of the persons taking part in the proceedings, if such persons are known to the plaintiff, identification of verdicts of the decision which the plaintiff contests, points of the action from which it must be clear for which reasons – factual and legal – the plaintiff deems the contested verdicts of the decision to be unlawful or null, which evidence the plaintiff proposes to be presented to prove their statements, and finally the

proposed verdict of the judgment. The plaintiff may extend the action to include verdicts of the decision which have not been contested until then or extend the action with additional points only within the term for filing the action (§ 71 para. 2, third sentence of the Code of Administrative Justice). The proceedings are thus governed by a strictly conceived principle of concentration. The Constitutional Court commented on principles governing the administrative judiciary (even though this was at the time prior to the adoption of the Code of Administrative Justice) in Judgment file No. Pl. ÚS 12/99, dated 27 June 2000 (N 98/18 SbNU 355; 232/2000 Coll.). The Constitutional Court stated that "… any provision which, by formalising proceedings in the administrative judiciary, de facto determines limits for access to the court; that is limits of one of the fundamental constitutional rights – the right to judicial protection. All such provisions … must, therefore, be interpreted in line with Art. 4 para. 4 of the Charter, i.e. in the application of such provisions to preserve the essence and meaning of the fundamental rights and basic freedoms.… The Constitutional Court thus evaluates the contested provisions as those interpretable within the constitutional limits, did not find the 'dispositive principle', or principle of concentrated proceedings in the administrative judiciary, established therein to be unconstitutional, since, even though the Court may be criticised for departing from the principle of material truth, it cannot be omitted that the same firstly and beyond doubt helps to fulfil the constitutional right to have one's case considered and decided within a reasonable term, or without unnecessary delay (Art. 6 para. 1 the Convention on the Protection of Human Rights and Fundamental Freedoms, Art. 38 para. 2 of the Charter)." The Constitutional Court dwells on this conclusion even at present. Therefore, the problem cannot be solved by breaking the principle of concentration.

40. The plaintiff is obliged, as early as in the action and at the latest during the course of the term of the action, to define the scope to which they contest the administrative decision, and at least in a basic manner delineate reasons in which they perceive the unlawfulness of the decision. With respect to plaintiffs, no practical problems may be principally expected with defining the scope of such contesting, but the situation is different with respect to formulating reasons for the action. This means defining factual and legal reasons for which the plaintiff deems the decision to be unlawful and null. The first difficulty is the very interpretation of this condition, as is proven by Judgment file No. IV. ÚS 2170/08 (available at http://nalus.usoud.cz/), in which the Constitutional Court pointed out the differences in interpretation of the term "point of the action" in decisions of the individual chambers of the Supreme Administrative Court. In any case, accord is found in the fact that an action in the administrative judiciary must contain a point of the action within the term for filing the same. If it is not so, such filing is a mere announcement of an intention to turn to an administrative court with an action, which, however, has no relevant effect, even upon an extensive interpretation of the term "point of the action". From the very beginning, demands are thus placed on the quality of the argumentation of the plaintiff. Taking into account the fact referred to by the petitioner, i.e. that the plaintiff is, as an applicant for asylum, in a specific situation when they are usually not familiar with the local conditions and legal order, do not know the language, have no background or contacts here, and depend on external help, such a formal requirement by the rules of procedure is not an easy one to fulfil. When this is complemented by a seven-day term, factually necessarily shortened by at least two

more non-working days of the weekend, within which the applicant-plaintiff must manage all this, then they are subjected to inappropriate pressure. It is then quite understandable that the plaintiff responds to such a short term by filing a blanket action for the purpose of meeting the statutory term, this being associated with an expectation of a request to amend their argumentation.

41. The Constitutional Court is aware of a possible objection that by annulling the contested provisions, the term of the action in the case of manifestly unjustified applications will be prolonged from seven to fifteen days (§ 32 para. 1 of the Asylum Act), but a combination of social factors in applicants for asylum, and principles governing the administrative judiciary will continue to have such effect that a number of applicants will not effectively receive a judicial review on the merits. For surely it will still happen that applicants will file blanket actions at the very end of the term of the action, and thus the room for possibly amending the necessary requisites will remain minimal. Nevertheless, the availability of a judicial review of the decision for these applicants, when respecting the principle of vigilantibus iura, will be greater. Without thus declaring that the fifteen-day term alone is a sufficient one (this would be beyond the scope of the subject of the proceedings defined by the petition), the Constitutional Court states that proper initiation of a judicial review is more realistic for persons holding the position of an applicant for asylum in the course of this (fifteen-day) term.

42. Furthermore, it is not possible to accept the argument that the shorter term of the action is balanced out by making the action have the effect of deferral. The administrative judiciary has been conceived in such a way that a crucial role is played by just the initial stage of proceedings, when the plaintiff must specify the scope and also define at least the basic focus of the argumentation itself. An applicant who (as a result of the inappropriately short term) did not file a proper action, does not profit from the benefits of the effects of deferral.

43. Another circumstance which had to be taken into consideration when evaluating the proportionality of the term is the fact that an action is, for unsuccessful applicants, the only procedural means of remedy available for consideration. Also for this reason it is necessary to proceed in a conservative manner when constructing formal obstacles for application of the same.

44. Finally, mention must be made regarding the issue of the language problem. An applicants is, in accordance with the provisions of § 22 of the Asylum Act, provided with the assistance of an interpreter, but naturally only in the administrative proceedings; the administrative decision is not translated, the applicant is, through the interpreter, only familiarised with the contents of the same. An administrative action must then be developed in Czech. This is necessarily another complication for their procedural steps and makes them dependent on specialised assistance, which they must obtain.

45. The Constitutional Court had further to consider whether the contested provisions could be interpreted in a constitutionally conforming manner. When the Constitutional Court concluded that the duration of the term under consideration, in combination with the arrangement of review of the decision on rejection of an application for granting international protection as manifestly unjustified, is so

short that the action cannot be considered an effective procedural means of remedy, then the Constitutional Court would not annul the contested provisions only in such a case that the given deficit could be bridged through interpretation. Through such interpretation, the factual prolongation of the term under examination would have to be achieved.

46. Such "prolongation" technically comes into consideration only in such a way that filing an action (this meaning any action, including a blanket one) will represent compliance with the term of the action, and an obligation on the part of the court to request the petitioner to rectify the defects, or amend the filing. In this, the length of the term provided by the court for such a rectification could not be limited to a seven-day period, rather the court would provide an "adequate" term, i.e. such during which, according to the court's opinion and experience, an unsuccessful applicant would be realistically able to respond in a qualified manner. However, the Constitutional Court considers this impermissible and incompatible with the generally acknowledged concept of the principle of concentrated proceedings. Even if such a possibility of factually extending the short term of the action through a judicial request were limited only to asylum-related cases (which is in itself hard to defend and sustain), this would in a material way undermine the very concept of the administrative judiciary. However, this concept cannot be sacrificed in order to mitigate the effects of too short a term on the parties to one form of administrative proceedings. In addition, making the principles of the administrative judiciary unstable would be inadequate to the consequences of annulling the contested provisions.

47. The Ministry in its opinion pointed out the course of action which was chosen by the Supreme Administrative Court in decision file No. 2 Azs 117/2004, dated 26 October 2004; this Court thereby criticised the Regional Court that they, in conflict with § 37 para. 5 of the Code of Administrative Justice, had not taken into consideration the amendment of the party's filing made after the term established by the court but prior to the issue of the decision on the matter, and dismissed the filing. The Constitutional Court does not approve of this. The application of provisions of § 37 para. 5, second sentence of the Code of Administrative Justice determines the consequences of failing to comply with a request for rectification of defects in or amendment to the filing. Even if such an interpretation were adopted that the administrative courts would take into account corrections and amendments to filings received following the term but prior to a decision on such a filing being made, the status of the applicant would remain insecure. Whether or not such filing would be taken into consideration would depend solely on how quickly after the end of duration of the term the court would take their decision.

48. The contested provisions cannot be interpreted in such a way that they would provide the unsuccessful applicant with a warranty of an effective remedy.

49. It thus may be concluded that the provisions of the Asylum Act under consideration, by restricting the right on the part of the applicant to claim with a court protection of their rights by establishing an inadequately short term for filing an action, in essence render the proclaimed judicial protection a mere illusion (similarly in Judgment file No. Pl. ÚS 12/07, promulgated under No. 355/2008 Coll.). Such provisions are therefore in conflict with Article 36 para. 2 of the

Charter of Fundamental Rights and Basic Freedoms, according to which a person who claims that their rights were curtailed by a decision of a public administrative authority may turn to a court for review of the legality of that decision, unless the law provides otherwise; however, judicial review of decisions affecting the fundamental rights and basic freedoms listed in the Charter may not be removed from the jurisdiction of courts; and with Article 13 of the Convention on the Protection of Human Rights and Fundamental Freedoms, guaranteeing the right to an effective remedy before a national authority to anyone who has been affected in relation to the right acknowledged by the Convention.

VI.

50. The reasons specified above have led the Constitutional Court to the conclusion that, pursuant to § 70 para. 1 of the Act on the Constitutional Court, the petition must be granted.

51. Pursuant to § 44 para. 2 of the Act on the Constitutional Court, the Constitutional Court dispensed with an oral hearing, since further clarification of the matter could not be expected from the same, and all parties expressed their approval with such a dispensation.

Notice: Decisions of the Constitutional Court cannot be appealed.