

2009/09/15 - PL. ÚS 18/07: WITHDRAWAL OF TRAVEL DOCUMENT FROM A CRIMINALLY PROSECUTED PERSON II

HEADNOTES

When assessing the constitutionality of the contested provisions, the Constitutional Court in particular found that the essence of the case is virtually identical to that dealt with in a Judgment of the Constitutional Court dated 20 May 2008 under file No. Pl. ÚS 12/07. The Constitutional Court, in the above-specified Judgment, declared that the provisions of § 23 clause b) of Act No. 329/1999 Coll. on Travel Documents and on Alteration to Act No. 283/1991 Coll. on the Police of the Czech Republic, in the wording of Act No. 217/2002 Coll. and of Act No. 320/2002 Coll., were in contravention of Art. 2 para. 2, Art. 4 para. 1, Art. 14 para. 1, and Art. 36 para. 2 of the Charter of Fundamental Rights and Basic Freedoms, and Art. 2 of Protocol No. 4 to the Convention on the Protection of Human Rights and Fundamental Freedoms. The modification consisting (since the effectiveness of Act No. 559/2004 Coll.) of the possibility of withdrawing a travel document or denying the issue of a travel document only provided that criminal prosecution is administered against a citizen for a criminal act for which a sentence of imprisonment for at least 3 years may be imposed, is not of such a nature as would establish constitutional conformity of the provisions under consideration.

The purpose of the contested provisions is withdrawal or denial of issue of a travel document, with the objective of a person prosecuted for a particularly qualified (serious) criminal act becoming unable to evade criminal prosecution, aggravate the same or completely avoid the same. It is clear that the proportionality of this measure from the viewpoint of its inevitability or indispensability may be assessed only on the basis of the condition and development of criminal prosecution of the person affected by such a measure and that such evaluation pertains to a body involved in criminal proceedings. The Criminal Procedure Code, however, does not provide a person prosecuted with a procedural instrument through which they could have the proportionality of the proposed measure reviewed effectively, since a request by the body involved in criminal proceedings concerning withdrawal of a travel document from the prosecuted person is decided upon in proceedings other than criminal proceedings.

The essential reasons for the Judgment of the Constitutional Court dated 20 May 2008, file No. Pl. ÚS 12/07, express a binding legal opinion whereby also the Constitutional Court itself is now bound (Art. 89 para. 2 of the Constitution).

Therefore, the Constitutional Court (now) wishes merely to add and repeatedly remark, to the conclusions expressed above and contained in Judgment file No. Pl. ÚS 12/07 quoted above, that one of the basic conceptual preconditions for a constitutionally guaranteed right to a fair trial (Art. 36 et seq. of the Charter of Fundamental Rights and Basic Freedoms) is decision making by independent and impartial courts in accordance with specific principles established in relevant

procedural regulations; however, these regulations must, in their individual provisions, realistically allow such a trial and not distinguish unfoundedly between individual subjects whose fundamental rights are comparable. Such procedure, even though it is perhaps permitted by common interpretation of the relevant statutory provisions, leads to a direct infringement of constitutionally guaranteed fundamental rights or freedoms of the affected holders of a public subjective right, and for the most part also to violation of the same; the crucial principles of a modern democratic law-based and constitutional state (Art. 1 para. 1 of the Constitution), which is understood and defined as a “material law-based state”, bound by supreme constitutional principles and values, do not allow any such eventualities. In addition, the essence of legal certainty as one of the attributes of a law-based state - containing also protection of trust in law - in particular comprises the matter that everyone may rely on the fact that the state provides them with effective protection of their rights and assists them in implementing their subjective right.

The Constitutional Court believes that it is not its task to indicate in detail to the legislature which legal arrangement the latter should adopt with respect to the issues under examination. Prior to adoption of the same, however, it will be up to the legislature to consistently and thoroughly weigh up whether it is really acceptable that denial of issue or withdrawal of a travel document be decided on by administrative authorities and administrative courts, and whether this issue actually falls within their powers at all. In terms of their consequences, this is actually a securing institute; a decision on the necessity of using the same should be made by such bodies of public power that administer proceedings in which such a securing measure is to be used, i.e. bodies involved in criminal proceedings. Review of such a decision by a court in the same proceedings (that is in criminal proceedings) entails also a number of incontestable advantages. These include not only efficiency and greater knowledge of reasons for which the relevant body of public power deems it indispensable to employ such a securing measure, but also, and in particular, removal of undesirable overlap of various proceedings administered by various bodies, these being bodies involved in criminal proceedings and administrative bodies and administrative courts. In any case, this was pointed out by the Senate in their statement in the above-quoted case Pl. ÚS 12/07.

**CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT**

IN THE NAME OF THE CZECH REPUBLIC

The Constitutional Court Plenum, composed of Stanislav Balík, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým and Pavel Rychetský, adjudicated upon a petition filed by the petitioner, the Regional Court of Hradec Králové, under Art. 95 para. 2 of the Constitution of the Czech Republic, for annulment of the provisions of § 23 clause c) of Act No. 329/1999 Coll. on Travel Documents and on Alteration to Act No. 283/1991 Coll. on the Police of the Czech Republic, in the wording effective from 1 January 2005, as follows: The provisions of § 23 clause c) of Act No. 329/1999 Coll. on Travel Documents and on Alteration to Act No. 283/1991 Coll. on the Police of the Czech Republic, as amended by later regulations, shall be annulled as of 31 December 2010.

REASONING

I.

1. Through their petition, the petitioner claimed, in accordance with Art. 95 para. 2 of the Constitution of the Czech Republic, that the Constitutional Court annul the provisions of § 23 clause c) of Act No. 329/1999 Coll. on Travel Documents and on Alteration to Act No. 283/1991 Coll. on the Police of the Czech Republic, in the wording effective from 1 January 2005.

2. Within the reasoning for their petition, the petitioner included that by a decision of the Regional Authority of Hradec Králové Region (hereinafter referred to only as the “appellate body”), dated 30 June 2005, file No. 10687A/Z/2005, an appeal by Ing. M. H. against the decision of the City Hall of Hradec Králové (the body of the first level), dated 10 March 2005, file No. OS3/DV/2005, on denial of issue of a passport pursuant to the provisions of § 23 clause c) of Act No. 329/1999 Coll., had been dismissed. The above-specified person filed an action against the decision of the appellate administrative body in accordance with Section Three, Chapter 11, Volume 1 of Act No. 150/2002 Coll., the Code of Administrative Justice. Within the scope of preparations for the proceedings, the Regional Court ascertained from administrative files, in particular from the decision of the body of the first level as well as the appellate body, that issue of a passport on the basis of an application by the plaintiff for the issue of a travel document, dated 31 January 2005, was denied without evidence proposed by the plaintiff being analysed, with reference to the provisions of § 23 clause c) of the above-defined Act, and to the fact that an administrative body is not entitled to examine the reasonableness of the application when it is proven that the plaintiff is being prosecuted for committing the criminal act of fraud in the form of aiding and abetting, that is for an intentional criminal act for which a sentence of imprisonment for up to 12 years may be imposed. The administrative body does not have the possibility of separately assessing the reason for denial of the passport, and it is merely up to

the bodies involved in criminal proceedings to evaluate whether the denial of issue of a travel document is inevitable. The petitioner added that the plaintiff, in para. V and para. VI of the action (Art. 4 and Art. 5 of the judicial record), specified objections in detail for which the plaintiff considers the provisions of § 23 clause c) of the Act as being in contradiction with the constitutional order. Their repeated specification in the petition was thus considered by the Regional Court to be useless duplicity and, since they share the doubts raised by the plaintiff, the Court referred to the arguments specified by the plaintiff and proposed that the contested provisions be annulled.

3. The Constitutional Court requested that the petitioner amend their petition with proper argumentation in relation to constitutional law; this also so that the consolidated petition (without reference to the contents of the judicial record) may be sent to both chambers of the Parliament of the Czech Republic for their respective statements.

4. In an amendment to said petition, the petitioner stated that the reasons for which they consider the contested provisions to be inconsistent with the constitutional order principally agree with the reasons for which the Constitutional Court found unconstitutional the provisions of § 23 clause b) of Act No. 329/1999 Coll. on Travel Documents and on Alteration to Act No. 283/1991 Coll. on the Police of the Czech Republic in the wording effective until 31 December 2004. Such a finding was pronounced by the Constitutional Court in their Judgment dated 20 May 2008, file No. Pl. ÚS 12/07. In this, the Regional Court as the petitioner referred in particular to the fact that the contested provisions of the Act on Travel Documents do not provide the administrative body in charge of deciding on withdrawal of a travel document or on denial of issue of a travel document upon request by a body involved in criminal proceedings with any possibility of discretion within the scope of the condition that an infringement of rights must be, in a democratic society, inevitable or indispensable. That is, if the statutory reason is met - a request by a body involved in criminal proceedings, if criminal prosecution is administered against a citizen for a criminal act for which a sentence of imprisonment for at least 3 years may be imposed - the administrative body has no leeway whatsoever for administrative discretion on the indispensability or proportionality of such a measure, and must withdraw a travel document or deny issue of the same, which, as a consequence, also considerably restricts the possibility of review by an administrative court. The above-quoted provisions thus restrict the right of the holder of a travel document or an applicant for such a travel document to claim protection for their rights before a court or another body in such a way that a constitutionally guaranteed evaluation of infringement of their rights from the viewpoint of the inevitability or indispensability of restriction of liberty of movement is not made impossible. According to the petitioner, the contested provisions thus do not make possible for the ordinary courts to comply with their obligations related to protection of fundamental rights or freedoms of an individual if they review requests from a body involved in criminal proceedings for withdrawal of a travel document from or for denial of issue of travel document to a person against whom criminal proceedings are administered for a criminal act for which a sentence of imprisonment for at least 3 years may be imposed; this represents non-compliance with the principles established in Art. 2 para. 2 and Art. 4 para. 1 of the Charter. Thus the given individual is denied their right to effective

judicial protection in accordance with Art. 36 para. 2 of the Charter, which, in eventual consequence, leads to violation of Art. 14 para. 1 and Art. 2 of Protocol No. 4 to the Convention on the Protection of Human Rights and Fundamental Freedoms. For such a reason, the Regional Court proceeded pursuant to § 95 para. 2 of the Constitution of the Czech Republic.

II.

5. The Constitutional Court requested that the Chamber of Deputies of the Parliament of the Czech Republic and the Senate of the Parliament of the Czech Republic provide their respective statements concerning the petition.

6. The statement from the Chamber of Deputies of the Parliament of the Czech Republic says that the contested provisions were contained in Print No. 605 of the 4th election term - a governmental bill of an act whereby alterations are made to Act No. 328/1999 Coll. on Identity Cards, as amended by later regulations, Act No. 329/1999 Coll. on Travel Documents and on Alteration to Act No. 283/1991 Coll. on the Police of the Czech Republic as amended by later regulations (the Act on Travel Documents), as amended by later regulations, Act No. 200/1990 Coll. on Minor Transgressions, as amended by later regulations, Act No. 153/1994 Coll. on Intelligence Services of the Czech Republic, as amended by later regulations, and Act No. 326/1999 Coll. on the Residence of Aliens in the Territory of the Czech Republic and on Alterations to Some Acts, as amended by later regulations. In the Explanatory Report, the Government explicitly stated that the amendment to the Act being submitted is in compliance with the constitutional order of the Czech Republic, in particular that the same fully complies with the Charter of Fundamental Rights and Basic Freedoms, where the right to liberty of movement and freedom of choice of residence is established. Furthermore, the entire bill of the amendment is in accordance with the law of the European Community and international treaties by which the Czech Republic is bound, which regulate the legal relationships in question as well as those related to the same. The first reading of this Print took place on 7 April 2004. The bill of the act was assigned for discussion by the Committee on Public Administration, Regional Development and the Environment. The Committee on Public Administration, Regional Development and the Environment dealt with Print No. 605 on 14 April 2004 during their 33rd session, and no amendment was proposed regarding the bill of the amendment to Act No. 329/1999 Coll. The second reading of Print 605 took place on 16 June 2004 and no amendment was proposed regarding the contested provisions. The third reading took place on 30 June 2004. The Chamber of Deputies approved the bill of the act, as of the 185 members present, 171 members voted for the bill of the act and 2 members voted against it. The approved bill of the act was submitted to the Senate on 15 July 2004. The Senate returned the bill of the act to the Chamber of Deputies together with proposed amendments, which, however, did not apply to the Act on Travel Documents. The Chamber of Deputies voted on the act returned by the Senate on 24 September 2004. Of the 194 members present, 96 members voted for the bill of the act in the wording of the proposed amendments submitted by the Senate, whilst 38 members voted against it. The bill was not approved since the prescribed quorum was 98 votes. Thereafter, the Chamber of Deputies approved the bill of the act in the wording in which the same had been submitted

to the Senate, when of the 194 members present, 130 members voted for it and 14 members voted against it. The Act containing the contested provisions was signed by the President of the Republic on 18 October 2004. The amendment to the Act was approved by the necessary majority of members of the Chamber of Deputies, was signed by the relevant constitutional representatives and properly promulgated in the Collection of Laws on 9 November 2004 under number 559/2004 Coll.

7. The Chamber of Deputies concluded that the legislative assembly acted in confidence that the acts adopted were in accordance with the Constitution and the Czech legal order, and that it is up to the Constitutional Court to assess the constitutionality of such acts and make a decision in connection with the petition by the Regional Court of Hradec Králové for annulment of the provisions of § 23 clause c) of Act No. 329/1999 Coll. on Travel Documents, in the wording effective from 1 January 2005 (note: the Chamber of Deputies - unlike the Senate - did not submit their statement on the procedure of adopting the original text of Act No. 329/1999 Coll.).

8. The Senate of the Parliament of the Czech Republic included in their statement that the provisions of Act No. 329/1999 Coll. on Travel Documents contested by the petition are the result of legislative activities completed with promulgation of the above-quoted Act on 27 December 1999. The bill of the act in question was submitted to the Senate by the Chamber of Deputies on 26 October 1999. The Senate discussed the bill of the act submitted (Senate Print No. 109) in the prescribed way in their committees and thereafter during the Senate's 11th session in the 2nd term of office on 12 November 1999. By Senate Resolution No. 185, dated 12 November 1999, the Senate, upon recommendation by all three committees to which the bill was assigned, returned the act in question to the Chamber of Deputies with some proposed amendments. The Resolution was adopted by a considerable majority, as of the 60 Senators present, 56 members voted for the proposal, nobody was against it, and 4 Senators abstained from voting. The proposed amendments adopted by the Senate did not concern the given provisions of § 23 on the denial of issue or withdrawal of a travel document; however, when dealing with this bill of the act in the Senate committees, it was explicitly pointed out (within the debate) to the representatives of the Government as its proponent that the Government had not used the submission of the new act as an opportunity for altering the then valid legal arrangement, in accordance with which the withdrawal of a travel document is decided on by a passport administrative body upon request by various state bodies, for reasons which are (unsystematically in terms of factual organisation) listed also in the Act on Travel Documents. The Senate committees stated that reasons for non-issue or withdrawal of a travel document should be contained in the procedural legal regulations in which this instrument would proceed from the arrangement of relationships for which it is determined in terms of its purpose. The authority to make a decision on non-issue or withdrawal of a travel document should be vested in state bodies, the competence of which is defined by law for such relationships, since within the scope of such a legal arrangement, a system has been established for relevant safeguards for proper deliberation of the case, including the standard rights of parties to the proceedings and the possibility of subsequent judicial review. However, the resolution of the Senate committees did not recommend that the Senate adopt amendments within the meaning of the above-stated comments,

as it was declared that such a solution is rather exacting and, therefore, should be prepared by the Government as a coherent solution and within a complete legislative process.

9. The Senate continued by adding that the provisions contested by the petition had been amended only once, by Act No. 559/2004 Coll. However, this amendment did not change the factual core of this arrangement. Alteration to the provisions of § 23 clause b) valid until 31 December 2004, consisted merely of the fact that the non-issue or withdrawal of a travel document should not be thereafter preconditioned by criminal prosecution for an intentional criminal act, but for a criminal act for which a sentence of imprisonment for at least three years may be imposed. By inserting a new clause - b) - in § 23, the formal designation of the provisions in question moved from the previous “b)” to the present “c)”. The above-outlined amendment was submitted to the Senate by the Chamber of Deputies on 14 July 2004. The Senate dealt with the submitted bill of the act (Senate Print No. 392), in the prescribed manner, in their committees and thereafter, during the 17th session of the 4th term of office on 22 July 2004, upon recommendation by the Senate committees, returned to the Chamber of Deputies the given amendment to the act with proposed amendments, via Senate Resolution No. 493, dated 22 July 2004. The Resolution was unanimously adopted in voting No. 32, as of the 57 Senators present, 57 voted for the proposal. From the above it is clear that the Senate formed a quorum and the given Resolution was adopted by the necessary number of votes. The proposed amendments adopted by the Senate, however, were not aimed at the given provision on denial of issue or withdrawal of a travel document; additionally, the discussions of the committees and the plenum of the chamber did not touch upon the contested provisions. In the case of amendments, the interest of the legislature usually rests on the provisions to which the alteration bears an essential effect, which, however, according to the Senate, was not the case of the change in the given provisions. The Senate specified that they had dealt with the given bill of the act, the majority expressing the conviction that the same is in accordance with the constitutional order of the Czech Republic and international commitments; the Senate leaves it to the Constitutional Court to assess the constitutionality of the provisions contested by the petition.

III.

10. The Constitutional Court, in accordance with § 68 para. 2 of the Act on the Constitutional Court, firstly examined whether the Act, the unconstitutionality of the provisions of which was claimed by the petitioner, was adopted and issued within the confines of powers determined by the Constitution and in a constitutionally prescribed manner. The Court discovered (from statements by the Chamber of Deputies of the Parliament of the Czech Republic and the Senate of the Parliament of the Czech Republic, as well as from delivered prints of the Chamber of Deputies, stenographic records, relevant resolutions and data on the course of voting by both Chambers) that both the original Act and the amendment to the same modifying the contested provisions (Act No. 559/2004 Coll.) were adopted and issued in a manner prescribed by the Constitution and within the confines of powers determined by the Constitution, when the quorums determined in Art. 39 para. 1 and para. 2 of the Constitution of the Czech Republic were complied with.

The above-specified amendment to Act No. 329/1999 Coll. was signed by the relevant constitutional representatives and promulgated in the Collection of Laws under No. 559/2004 Coll.

IV.

11. The provisions of § 23 of the Act on Travel Documents in the wording of Act No. 559/2004 Coll., effective from 1 January 2005, read as follows (the section contested by the petition is underlined):

Issue of a travel document to a citizen shall be denied or an issued travel document shall be withdrawn upon request by:

- a) a court, if an execution of judicial decision is ordered against a citizen;
- b) a court distress officer authorised by a court to administer a distraint, if there is an obvious danger that a citizen would circumvent the distraint by travelling abroad;
- c) a body involved in criminal proceedings, if criminal prosecution is administered against a citizen for a criminal act for which a sentence of imprisonment for at least 3 years may be imposed; or
- d) a body which executes a decision or arranges for the same in accordance with a special legal regulation, when the citizen failed to serve the sentence of imprisonment; this shall not apply if the citizen's sentence was remitted or when such sentence is not served due to limitation.

V.

12. The Constitutional Court concluded that the petition is justified.

13. When assessing the constitutionality of the contested provisions, the Constitutional Court in particular found that the essence of the case is virtually identical to that dealt with in a Judgment of the Constitutional Court dated 20 May 2008 under file No. Pl. ÚS 12/07. The Constitutional Court, in the above-specified Judgment, declared that the provisions of § 23 clause b) of Act No. 329/1999 Coll. on Travel Documents and on Alteration to Act No. 283/1991 Coll. on the Police of the Czech Republic, in the wording of Act No. 217/2002 Coll. and of Act No. 320/2002 Coll., were in contravention of Art. 2 para. 2, Art. 4 para. 1, Art. 14 para. 1, and Art. 36 para. 2 of the Charter of Fundamental Rights and Basic Freedoms, and Art. 2 of Protocol No. 4 to the Convention on the Protection of Human Rights and Fundamental Freedoms. The provisions of § 23 clause b) of the Act on Travel Documents in the wording valid and effective until 31 December 2004 specified that “issue of a travel document shall be denied to or an issued travel document shall be withdrawn from a citizen against whom criminal prosecution is administered for an intentional criminal act, upon request by a body involved in criminal proceedings”. The modification consisting (since the effectiveness of Act No. 559/2004 Coll.) of the possibility of withdrawing a travel document or denying the issue of a travel document only provided that criminal prosecution is administered against a citizen for a criminal act for which a sentence of imprisonment for at least 3 years may be imposed, is not of such a nature as would

establish constitutional conformity of the provisions under consideration.

14. The Constitutional Court is thus reduced to repeating that the liberty of movement guaranteed by Art. 14 of the Charter belongs to fundamental human rights and, in accordance with Art. 4 of the Constitution, such liberty is under the protection of judicial power. Those rights resulting from the liberty of movement may be claimed directly, immediately, not only through statutes that would implement such provisions. However, constitutional safeguards are not unbounded; liberty of movement is limited by constitutional confines. Such restrictions may be generally described as such which must be determined by law for reasons exhaustively specified under para. 3 of Article 14 of the Charter, and this in cases “if such is unavoidable”. The Convention on the Protection of Human Rights and Fundamental Freedoms in Protocol No. 4 guarantees liberty of movement to citizens of the given state and aliens in different ways (cf. “everyone lawfully within the territory”), and restriction of the same is determined only in cases specified under para. 3 of the Protocol “as necessary in a democratic society”. Neither the Charter nor the Protocol determines any other limit; that is why liberty of movement must be understood as a right which includes not only the right to freely move and settle in any place within the territory of the Czech Republic, but also the right to freely travel abroad and return.

15. As already specified by the Constitutional Court in Judgment file No. Pl. ÚS 12/07, the constitutional arrangement, in relation to the citizens of the Czech Republic, permits that exercise of their liberty of movement be restricted by an intervention of public power. For this intervention to be considered constitutionally acceptable, it must be determined by law, must strive for a legitimate objective and must be inevitable or indispensable in a democratic society. Legitimate objectives are defined in the Charter and the Convention by way of “fuzzy concepts” such as state security, national security, ordre public, public safety, prevention of crime, protection of health or morals, protection of the rights and freedoms of others, and protection of nature. Some of these terms are defined by law, some of them, even though they are frequently used, such as the term “ordre public”, are not unambiguously defined by the legal order, and that is why they are interpreted by court case law or decisions of other bodies of public power. From the viewpoint of constitutional law it is irrelevant whether such terms are specified by the legislature or interpreted by case law; what is decisive is that they must not be further expanded. By the provisions contested, it is possible to restrict the liberty of movement of an individual outside the territory of the Czech Republic due to criminal prosecution of the same for a criminal act for which - *de lege lata* - a sentence of imprisonment for at least 3 years may be imposed. Criminal proceedings leading to proper investigation of criminal acts and fair punishment of their perpetrators (§ 1 para. 1 of the Criminal Procedure Code) for the purposes of protecting the interests of society, the constitutional system of the Czech Republic and the rights and justified interests of natural persons and legal entities (§ 1 of the Criminal Code) generally represent a legitimate public interest. However, as for the further condition that intervention in these rights must be inevitable or indispensable in a democratic society, the Constitutional Court stated that despite these terms not being defined in closer detail in the Charter or the Convention, it is clear that they contain a certain pressing social need, the specification of which represents capacity for free discretion and justification by the legislature. Unless

the same are determined by law, the distinctive traits of such a need may be inferred from case law.

16. In relation to this, the Constitutional Court, in connection with evaluating the indispensability of infringement by a body of public power of the rights and freedoms of an individual, adjudicated that: “if the constitutional order of the Czech Republic admits breaching the protection of rights, it is done solely and exclusively in the interest of protecting a democratic society, and possibly for the sake of constitutionally guaranteed fundamental rights and basic freedoms of others; in particular this includes such indispensability arisen out of general interest in protecting society against criminal acts and in such acts being identified and punished. Thus only such infringement by state power of the fundamental right or freedom of a man is admissible, as is indispensable within the meaning above. In order to make sure that the bounds of indispensability are not broken, there must be a system in place of adequate and sufficient safeguards consisting of adequate legal regulations and effective control of compliance with the same.” (cf. Judgment file No. II. ÚS 502/2000, published in the Collection of Judgments and Rulings, vol. 21, p. 83). Also, from the case law of the European Court of Human Rights, it is implied that in assessing infringement leading to a violation of liberty of movement of an individual, the European Court of Human Rights, within the principles determined by Art. 2 of Protocol No. 4, takes into account, for example, the results of examination or development of a specific case, and in connection to such, the Court weighs up whether the infringement was proportional in relation to the intended objective [cf. for example the case of *Baumann v. France*, Application No. 33592/96, the case of *Iletmis v. Turkey*, Application No. 29871/96, the case of *Luordo v. Italy*, Application No. 32190/96, Court Case Law, Overview of Judgments of the ECHR, No. 6/2003, p. 317 (324) et seq.].

17. The purpose of the contested provisions is withdrawal or denial of issue of a travel document, with the objective of a person prosecuted for a particularly qualified (serious) criminal act becoming unable to evade criminal prosecution, aggravate the same or completely avoid the same. It is clear that the proportionality of this measure from the viewpoint of its inevitability or indispensability may be assessed only on the basis of the condition and development of criminal prosecution of the person affected by such a measure and that such evaluation pertains to a body involved in criminal proceedings. The Criminal Procedure Code, however, does not provide a person prosecuted with a procedural instrument through which they could have the proportionality of the proposed measure reviewed effectively, since a request by the body involved in criminal proceedings concerning withdrawal of a travel document from the prosecuted person is decided upon in proceedings other than criminal proceedings.

18. The Constitutional Court thus - repeatedly - considered in particular the issue whether the norm limiting the scope of circumstances under which liberty of movement of a holder of a travel document may be restricted is in contradiction with the constitutional order, specifically with Art. 36 para. 1 of the Charter, pursuant to which it is true that everyone may assert, through the legally prescribed procedure, their rights before an independent and impartial court or, in specified cases, before another body. The meaning and purpose of this provision is to determine the obligation of the state to provide protection of the right for

everyone, as a situation in which a holder of a right could not attain its protection (before a court or another body) cannot exist in a law-based state. It is generally true that a democratic state exists for the very reason that it protects its citizens (but also persons staying in its territory) and provides them with safeguards that their rights will be protected. As the Constitutional Court explained in a Judgment dated 29 January 2008, file No. Pl. ÚS 72/06, paragraph 4 of Art. 36 of the Charter (which is basically referred to by para. 1 of Art. 36 of the Charter with its text “through the legally prescribed procedure”) does refer to the act which regulates “conditions therefor and detailed provisions” in relation to all preceding paragraphs of Art. 36 of the Charter; such an act, issued on the basis of constitutional authorisation, is, however, limited by the provisions of Art. 36 of the Charter, and thus cannot deviate from the contents thereof. The meaning and purpose of an “ordinary” act pursuant to Art. 36 para. 4 of the Charter are only to determine the conditions and detailed provisions for implementing rights (already) established, as per their contents, by the constitutional framer in Art. 36 of the Charter, i.e. the conditions and detailed provisions of merely a procedural nature. If, pursuant to Art. 36 para. 1 of the Charter, everyone has the right to assert protection of their rights before a court or another body, while the conditions for and rules of implementation of such a right are determined by law, then such a law, that is an act issued on the basis of constitutional authorisation, cannot completely negate the claim on the part of “everyone” to assert protection of their rights before a court or another body in any given situation, and thus abandon a constitutionally guaranteed fundamental right, albeit only in certain cases. By Article 36 para. 1 of the Charter, everyone is constitutionally guaranteed the possibility of asserting protection of their rights before a court or another body in all situations when such a right is violated (there is no constitutional restriction here). No person may be completely excluded by law from the possibility of asserting protection of their right - be it only in a certain case - by their right pursuant to Art. 36 para. 1 of the Charter being annulled. A contrary interpretation would also signify that the establishment by the constitutional framer - endowed by superior legal power - of the right of everyone to turn to judicial and other bodies for protection of their rights would basically lose sense, as it could be, for any given situation, eliminated by the will solely of the (mere) legislature.

19. In the above-specified Judgment, the Constitutional Court inferred that the contested provisions of the Act on Travel Documents do not provide the administrative body in charge of deciding on withdrawal of a travel document, upon request by a body involved in criminal proceedings, with any possibility of discretion within the scope of the condition of the inevitability or indispensability of such infringement in a democratic society, since if the statutory reason - a request by a body involved in criminal proceedings which administered a criminal prosecution against the person in question for the given criminal act - is established, the administrative body has no room whatsoever for administrative discretion on the indispensability or proportionality of such a measure, and must withdraw the travel document. The Court added that - from the viewpoint of constitutional law - it is not essential whether the power is vested in this or that body of public power (a passport administrative body or a body involved in criminal proceedings) to weigh up the inevitability or indispensability of using the means through which fundamental rights or freedoms of an individual are restricted in the interest of protecting other constitutionally protected values; what is decisive is

that their decision must not be removed from effective judicial control. The contested provisions of the Act on Travel Documents, however, do not provide the administrative body with any possibility of discretion, which as a consequence considerably limits the possibilities of their review by an administrative court. The entitlement to deny the issue of a travel document or to withdraw a travel document, determined by law and justified by due public interest (legitimate objective), may be, in a specific case, an inevitable (indispensable) measure; however, the decision on such a measure cannot be removed from true judicial protection and subjected to judicial protection which is merely illusory.

20. The essential reasons for the Judgment of the Constitutional Court dated 20 May 2008, file No. Pl. ÚS 12/07, express a binding legal opinion whereby also the Constitutional Court itself is now bound (Art. 89 para. 2 of the Constitution).

21. Therefore, the Constitutional Court (now) wishes merely to add and repeatedly remark, to the conclusions expressed above and contained in Judgment file No. Pl. ÚS 12/07 quoted above, that one of the basic conceptual preconditions for a constitutionally guaranteed right to a fair trial (Art. 36 et seq. of the Charter of Fundamental Rights and Basic Freedoms) is decision making by independent and impartial courts in accordance with specific principles established in relevant procedural regulations; however, these regulations must, in their individual provisions, realistically allow such a trial and not distinguish unfoundedly between individual subjects whose fundamental rights are comparable. Such procedure, even though it is perhaps permitted by common interpretation of the relevant statutory provisions, leads to a direct infringement of constitutionally guaranteed fundamental rights or freedoms of the affected holders of a public subjective right, and for the most part also to violation of the same; the crucial principles of a modern democratic law-based and constitutional state (Art. 1 para. 1 of the Constitution), which is understood and defined as a “material law-based state”, bound by supreme constitutional principles and values, do not allow any such eventualities. In addition, the essence of legal certainty as one of the attributes of a law-based state - containing also protection of trust in law - in particular comprises the matter that everyone may rely on the fact that the state provides them with effective protection of their rights and assists them in implementing their subjective right.

22. The Constitutional Court believes that it is not its task to indicate in detail to the legislature which legal arrangement the latter should adopt with respect to the issues under examination. Prior to adoption of the same, however, it will be up to the legislature to consistently and thoroughly weigh up whether it is really acceptable that denial of issue or withdrawal of a travel document be decided on by administrative authorities and administrative courts, and whether this issue actually falls within their powers at all. In terms of their consequences, this is actually a securing institute; a decision on the necessity of using the same should be made by such bodies of public power that administer proceedings in which such a securing measure is to be used, i.e. bodies involved in criminal proceedings. Review of such a decision by a court in the same proceedings (that is in criminal proceedings) entails also a number of incontestable advantages. These include not only efficiency and greater knowledge of reasons for which the relevant body of public power deems it indispensable to employ such a securing measure, but also,

and in particular, removal of undesirable overlap of various proceedings administered by various bodies, these being bodies involved in criminal proceedings and administrative bodies and administrative courts. In any case, this was pointed out by the Senate in their statement in the above-quoted case Pl. ÚS 12/07. By annulling the contested provisions of the Act on Travel Documents, the Constitutional Court does not intend to affirm the meaning pursuant to which the broad discretionary powers of administrative authority alone, amended with judicial review under full jurisdiction of administrative courts, effectively represents the path the legislature should and must follow.

23. Therefore, the Constitutional Court gathers that the provisions of § 23 clause c) of Act No. 329/1999 Coll. on Travel Documents and on Alteration to Act No. 283/1991 Coll. on the Police of the Czech Republic, in the wording effective from 1 January 2005, do not make it possible for ordinary courts to acquit their obligations relating to the protection of the fundamental rights and freedoms of individuals with respect to reviewing a request by a body involved in criminal proceedings for withdrawal of a travel document from a person against which they administer criminal prosecution for a criminal act for which a sentence of imprisonment for at least 3 years may be imposed; the same is true from the viewpoint of limits of the condition of indispensability or inevitability of such infringement in a democratic society, which represents a violation of principles established in Art. 2 para. 2 and Art. 4 para. 1 of the Charter. Thereby, the individual in question is, at the same time, denied the right to effective judicial protection in accordance with Art. 36 para. 2 of the Charter, which eventually leads to violation of Art. 14 para. 1 and Art. 2 of Protocol No. 4 to the Convention as well.

24. Therefore, the Constitutional Court has completely granted the petition by the petitioner in accordance with Art. 95 para. 2 of the Constitution, and annulled the contested provisions. However, at the same time, the Constitutional Court adequately postponed enforceability of the Judgment in order to make it possible for the legislature to respond to the given circumstances in a constitutionally conformable way.

25. The Constitutional Court has concluded that further clarification of the matter cannot be expected from an oral hearing and therefore the Court, upon approval by the parties, dispensed with the same.

Note: Decisions of the Constitutional Court cannot be appealed.

In Brno on 15 September 2009

Pavel Rychetský
Chairman of the Constitutional Court