

# 2008/12/09 - PL. ÚS 26/07: ADMINISTRATIVE EXPULSION OF ALIEN

## HEADNOTES

According to Art. 36 para. 2 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter the “Charter”), the review of decisions relating to fundamental rights and basic freedoms in accordance with the Charter may not be excluded from court jurisdiction. This right is formulated in a general manner and not limited to citizens of the Czech Republic. If then a decision on administrative expulsion is capable of infringing a fundamental right or basic freedom of an alien, the provision of the Act excluding a judicial review of such a decision no longer stands.

Even though the subjective, constitutionally guaranteed right of aliens to reside in the territory of the Czech Republic does not exist, rights which might be aggrieved by expulsion are undoubtedly guaranteed to aliens by the Charter. In relation to this, the Charter in no way discriminates between whether an alien resides in the territory of the Czech Republic with due authorisation or not. Even a decision on administrative expulsion of an alien, one who resides in the territory of the Czech Republic without due authorisation, may infringe a number of their fundamental rights, such as the right to life, the right not to be subjected to torture or to other degrading treatment or punishment, the right to respect for private and family life, etc. The provisions of the Act on the Residence of Aliens, which under this circumstance exclude a judicial review of decisions on administrative expulsion, are consequently in conflict with Art. 36 para. 2 of the Charter.

## CZECH REPUBLIC CONSTITUTIONAL COURT JUDGMENT

### IN THE NAME OF THE CZECH REPUBLIC

The Constitutional Court Plenum, composed of Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Pavel Rychetský (Justice Rapporteur), Miloslav Výborný, Eliška Wagnerová, and Michaela Židlická, adjudicated the matter of a petition filed by the Supreme Administrative Court, represented by JUDr. Petr Příhoda, President of a Chamber of the Supreme Administrative Court, concerning the annulment of the provisions of § 171 para. 1 clause c) of 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 Act No. 161/2006 Coll., with participation by the Chamber of Deputies and the Senate of the Parliament of the Czech Republic, as follows:

The provisions of § 171 para. 1 clause c) of 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 Act No. 161/2006 Coll., shall be annulled as of the date this Judgment is published in the Collection of Laws.

## REASONING

### I.

#### Recapitulation of the petition

1. By a petition filed in accordance with Art. 95 para. 2 of the Constitution of the Czech Republic (hereinafter the “Constitution”) and § 64 para. 3 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations, the Supreme Administrative Court (hereinafter also the “petitioner”) claimed that a Judgment be passed whereby the provisions of § 171 para. 1 clause c) (hereinafter also the “contested provisions”) of 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 Act No. 161/2006 Coll. (hereinafter only “Act on the Residence of Aliens”), be annulled. By the contested provisions, decisions on administrative expulsion are excluded from a judicial review, if, prior to the start of proceedings on the expulsion, the alien stayed in the territory or in the transit area of an international airport in an unauthorised manner. The petitioner believes that the contested provisions are in conflict with Art. 36 para. 2 and Art. 10 para. 2 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter only the “Charter”).

2. The petition states that the Supreme Administrative Court administers proceedings on a cassational complaint on the merits, file No. 8 As 42/2006, in which the complainants, Nguyen Xuan Thuy and Do Adamová, claim that the resolution of the Municipal Court in Prague, file No. 8 Ca 339/2005-29 dated 18 May 2006, be annulled. The contested resolution dismissed their action against a decision made by the relevant bodies on administrative expulsion of the former complainant from temporary residence in the territory of the Czech Republic, as specified by § 119 para. 1 clause a) item 3, clause b) item 1, clause c) items 2, 3 of Act No. 326/1999 Coll.

3. The administrative expulsion was imposed as a result of a residence check effected by the Alien Police on 22 June 2005. During this check, Nguyen Xuan Thuy submitted a forged travel document featuring another name. Following ascertainment of his true identity, the relevant bodies also found out that administrative expulsion from temporary residence in the territory of the Czech Republic had been imposed on him earlier, with a term of validity from 26 January 2001 to 26 January 2004. Nguyen Xuan Thuy stated that he was living in a shared household with his common-law wife Do Adamová, a citizen of the Czech Republic, and that it was his intention to conclude marriage and have children with her, and expulsion would represent an infringement of his private and family life. The administrative body, in reasoning their decision, stated that they took into account all identified acts which the alien had committed in the territory of the Czech Republic, the impact on his private life, and security of the Czech Republic and the European Union, as well as protection against unlawful migration. They concluded

that imposition of administrative expulsion would not constitute an inadequate infringement of the private life of the alien, since, however he has a common-law wife here, he had known in the past that he resided in the territory of the Czech Republic in contravention of the law, and had not properly solved said situation himself. Upon an appeal by the complainants, the appellate administrative body reviewed the decision on administrative expulsion, after which the relevant sections of the verdict of the contested decision remained unchanged.

4. Subsequently, Nguyen Xuan Thuy and Do Adamová brought an action to the Municipal Court in Prague, which denied the same with reference to § 171 clause c) of the Act on the Residence of Aliens. In the reasoning for their decision they stated that, on the basis of the effected administrative proceedings and criminal proceedings, it had been proven that Nguyen Xuan Thuy, prior to the commencement of the proceedings on expulsion, resided in the territory of the Czech Republic on the basis of forged documents, that is without due authorisation, and a review by a court is excluded in the given case.

5. When dealing with the cassational complaint on the merits, the Supreme Administrative Court concluded that the contested provisions of the Act on the Residence of Aliens are in conflict with the above-specified provisions of the Charter, and consequently filed a petition to the Constitutional Court concerning annulment of the same.

6. The petitioner states that “in accordance with the provisions of Art. 36 para. 2 of the Charter, a person who claims that their rights were curtailed by a decision of a body of public power may turn to a court for review of the legality of that decision, unless a law provides otherwise. Judicial review of decisions affecting the fundamental rights and basic freedoms listed in the Charter may not be removed from the jurisdiction of courts.” The petitioner refers to Art. 14 para. 1 of the Charter according to which the liberty of movement and the freedom of the choice of residence in the territory of the Czech Republic are guaranteed, and points out that an alien may be, in accordance with the fifth paragraph of the same Article, expelled only in cases determined by law. The Supreme Administrative Court also quotes Art. 10 para. 2 of the Charter, establishing the right to be protected from any unauthorised intrusion into private and family life.

7. The petitioner distinguishes previous case law of the Constitutional Court, specifically Resolution file No. III. ÚS 219/04 dated 23 June 2004 (U 39/33 SbNU 591), where the Constitutional Court, according to the petitioner, “made a statement, in connection with a review of an entitlement to be granted a visa, that a subjective, constitutionally guaranteed right of aliens to reside in the territory of the Czech Republic does not exist, since it is for a sovereign state to decide under which (non-discriminatory) conditions it allows residence of aliens in its territory. In accordance with the explicit wording of the Act, there is no inherent legal entitlement to be granted a visa.” The Constitutional Court thus, according to the petitioner, “concluded that the issue of granting a visa is left to the administrative discretion of the relevant administrative bodies.”

8. However, according to the petitioner, in the case of administrative expulsion on the basis of the contested provisions, the situation is different: “Administrative

expulsion as an administrative sanction is not an issue of administrative discretion; this instrument is applied when conditions for its imposition are fulfilled. The Act on the Residence of Aliens, Section X, contains an exhaustive enumeration of cases under which an alien may be expelled. The Act endeavours to mitigate any potentially adverse consequences of administrative expulsion by means of the provisions of § 122, which define conditions for eliminating the severity of administrative expulsion. The existing legal regulation disabling a judicial review of such administrative decisions creates, within the framework of the state administration, a possibility for non-transparent decision-making to take place, with all the effects resulting from the same concerning the quality of administrative decisions and, in extreme cases, may lead to corruption. There is no objective and impartial mechanism (in the case of state administration bodies, an appellate review of individual administrative acts) whereby it would be verified whether, in the given case, reasons for expulsion determined by law (Art. 14 para. 5 of the Charter) are truly fulfilled. Unlawful administrative expulsion may represent a significant and difficult to rectify infringement of private and family life guaranteed by Art. 10 para. 2 of the Charter, or the right to engage in commercial and economic activity (Art. 26 para. 1 of the Charter).”

9. In order to support their arguments, the petitioner refers to conclusions expressed by the Supreme Court concerning the possibility of imposing a sentence of expulsion. In a judgment dated 3 September 1997, file No. 2 Tzn 60/97 (No. 13/1998 of Collection of Criminal Law Decisions) they stated that “the sentence of expulsion may be imposed only ‘in cases in which the same is not made impossible by personal circumstances of the defendant, in particular their family relations and bonds to a locality in the Czech Republic where they have lived a considerable part of their lives. Only in such a way it is possible to ensure that the punishment imposed is not an inadequate infringement of their lives (...). Only such a decision is then also in harmony with Art. 8 of the Convention on the Protection of Human Rights and Fundamental Freedoms (...).’” In the petitioner’s opinion, criminal acts represent, from the viewpoint of level of risk posed to society, such a category of unlawful acts which are “considerably more dangerous for society than administrative offences.” The more so, according to the petitioner, it is necessary to conclude that the same must apply to the range of imposition of administrative expulsion, especially in light of the fact that the impacts of the sentence of expulsion and administrative expulsion on the private life of an individual are similar. According to the petitioner “the right to a family life, or potential considerable infringement of the same [...] should also be taken into account in cases of imposition of administrative expulsion. In the instance of alleged infringements of fundamental rights, the law must allow for judicial review of administrative decisions.”

10. The petitioner also refers to the case law of the European Court of Human Rights. In a judgment of the European Court of Human Rights in the case of *Berrehab v. the Netherlands* No. 10730/84 dated 21 June 1988, the Court, in the opinion of the petitioner, admitted that the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter only the “Convention”) does not prohibit contracting states from regulating the entry and residence of aliens in the country, however, the restricting measures adopted should be proportional in relationship to the pursued objective. According to the petitioner’s interpretation,

the Court has thus “assessed the legitimacy of the pursued objective and significance of the infringement of the right of the complainant to the protection of his family life. In the given case, the Court concluded that non-extension of the residence visa and expulsion of the complainant would result in a serious infringement of his family life.” At the same time, the petitioner states that they are aware of “the case law [of the European Court of Human Rights] in which the Court stated that Art. 6 of the Convention [see, for example, judgment of the European Court of Human Rights in the case of *Maaouia v. France* No. 39652/98 dated 5 October 2000] does not apply to a ban on residence in the territory of a member country, since Art. 1 of Protocol No. 7 to the Convention contains specific safeguards in proceedings on the expulsion of aliens; and member countries of the Convention have clearly expressed, through this Article, their will to remove these proceedings from the field of application of Art. 6 para. 1 of the Convention (clauses 36, 37 of the above-quoted decision). Other safeguards (according to the Explanatory Report to Protocol No. 7) in place to protect aliens in the territory of member countries who are threatened by administrative expulsion, include Art. 3 of the Convention (prohibition of inhuman or degrading treatment), and Art. 8 of the Convention (protection of private and family life), both in connection with Art. 13 of the Convention (right to an effective remedy against violation of the rights and freedoms guaranteed by the Convention).” According to the petitioner, “Art. 13 of the Convention [...] is also subsequently reflected by Art. 36 para. 2 of the Charter, however, this principle has not been consistently reflected in the Act on the Residence of Aliens in the Territory of the Czech Republic.”

## II.

### Course of the proceedings and recapitulation of the statements of the parties to the proceedings

11. In accordance with § 69 of the Act on the Constitutional Court, upon a request by the Constitutional Court, the Chamber of Deputies of the Parliament of the Czech Republic, through its Chairperson, Ing. Miloslav Vlček, submitted a statement. Also the Senate of the Parliament of the Czech Republic, through its President, MUDr. Přemysl Sobotka, submitted a statement.

12. In its statement, the Chamber of Deputies firstly summarised the course of dealing with the contested provisions. They pointed out the wording of the explanatory report, which had commented on the proposed phrasing of § 171 of the Act on the Residence of Aliens, that the same “excludes from a possible judicial review such decisions not infringing fundamental rights and basic freedoms.” The Chamber of Deputies, at the conclusion of its statement, stated that “the legislative assembly acted in confidence that the adopted act is in harmony with the Constitution, constitutional order, and legal order”, and leaves it to “the Constitutional Court to assess the constitutionality of the Act in connection with the submitted petition, and issue an appropriate decision.”

13. The Senate, referring to the above-quoted section of the explanatory report on the bill of the Act, stated that “the bill was undoubtedly grounded on the traditional postulate of the sovereignty of a state in terms of allowing or disallowing aliens within its territory. Illegal residence of an alien then, in such



respect, seemed to be incapable of enjoying protection resulting from the freedom of choice of residence (by illegal residence, the alien effectively abandons such protection).” According to the Senate, this legal regulation is not in conflict with procedural safeguards relating to the expulsion of aliens, which are specified in Art. 1 of Protocol No. 7 to the European Convention, which determines the right to a judicial review only in the case of expulsion from residence permitted by the receiving country. The provisions of § 119a para. 2 of the Act on the Residence of Aliens then, according to the Senate, represent “legal safeguards” of adherence to Art. 10 of the Charter and Art. 8 of the European Convention (regulating the right to respect for private and family life), when the same determine that a decision on administrative expulsion may not be passed should the same result in an inadequate intrusion into the private or family life of an alien. The Senate remarked that exclusion of a judicial review, in spite of numerous amendments to the Act on the Residence of Aliens, remained unchanged.

14. The Senate also wished to emphasise a judgment by the Supreme Administrative Court, dated 29 September 2006, file No. 4 Azs 419/2005-65 (published in the Collection of Decisions of the Supreme Administrative Court under No. 1009/07), wherein, according to the Senate, the Supreme Administrative Court considered exclusion of a judicial review to be admissible, however, they repeatedly remarked that should any doubts arise, this exclusion must be interpreted in a restrictive manner, i.e. in favour of a judicial review.

15. In sections two and three of their statement, the Senate recapitulated the course of the legislative process and stated that the bill of the Act, as modified by amendments proposed by the Senate, was adopted by the Senate “within the confines of powers determined by the Constitution and in a constitutionally approved manner [...], the majority expressing the conviction that [...] it is in harmony with the constitutional order of the Czech Republic and the international commitments of the country.” According to the Senate, it is for the Constitutional Court to assess the constitutionality of the contested provisions by the petition and make a decision.

### III.

Recapitulation of statements of other entities in accordance with § 49 of the Act on the Constitutional Court

16. In accordance with § 49 para. 1 of the Act on the Constitutional Court, the Constitutional Court addressed the Minister of the Interior, the Minister of Justice, and the Public Defender of Rights and provided them with the opportunity to make statements concerning the petition.

17. The Minister of the Interior considered the petition to be unjustified, and consequently recommended the same to be dismissed in accordance with the provisions of § 70 para. 2 of the Act on the Constitutional Court. The Minister stated that the Act on the Residence of Aliens allows a judicial review in cases when the alien resides in the territory of the Czech Republic with due authorisation. With respect to aliens who reside in the territory of the Czech Republic without due authorisation (and who are thus affected by the contested

provisions), the Minister of the Interior stated that in the knowledge of the Ministry, these aliens are “generally aware of their unlawful conduct and their problematic standing. Establishment of family relations, be it by concluding marriages or affirming paternity to a minor, in a situation which is uncertain and mostly left unresolved by the alien, cannot [in the Minister of the Interior’s opinion] be a circumstance decisive for making a decision on administrative expulsion.” The Minister stated that “the Ministry is well aware, on the basis of its official operations, that in many cases marriages are concluded and paternity affirmed purely expediently with the purpose of obtaining a residency permit or legalising residence in the territory of the Czech Republic, which would otherwise apparently not be achieved.”

18. Furthermore, the Minister of the Interior referred to Resolution of the Constitutional Court file No. III. ÚS 219/04 (quoted above under clause 7 of this Judgment). According to the Minister, within this resolution the Constitutional Court “stated that a subjective, constitutionally guaranteed right of aliens to reside in the territory of the Czech Republic does not exist, since it is for a sovereign state to decide under which conditions it allows residence of aliens in its territory.” According to the Minister of the Interior, the Constitutional Court “in the past made an unambiguous statement that [the Charter] provides protection only to such rights which the given party is guaranteed by the legal order.”

19. According to the Minister of the Interior, a similar idea is also conveyed by the judgment of the Supreme Administrative Court dated 29 September 2006, file No. 4 Azs 419/2005-65 (quoted above under clause 14 of this Judgment). The Minister in his statement extensively quoted some sections of this decision:

[The Supreme Administrative Court] starts from the point that the judicial review of a decision of an administrative body on the issues of decision making on public subjective rights of both natural persons and legal entities is, as is determined by the valid legal regulation of administrative judiciary, determined in particular by Act No. 150/2002 Coll., the Administrative Procedure Code, one of the fundamental and regular safeguards of lawfulness of the execution of public administration, through which Art. 36 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter the “Charter”) is brought into effect. According to this Article, a person who claims that their rights were curtailed by a decision of a public administration body may (unless a law provides otherwise) turn to a court for review of the legality of that decision. However, a judicial review of decisions affecting the fundamental rights and basic freedoms listed in the Charter may not be removed from the jurisdiction of the courts.

As is implied from the case law of the European Court of Human Rights [for example in the case of *Maaouia v. France*, quoted above under clause 10 of this Judgment], the international protection of fundamental human rights and basic freedoms, of which the Charter is a national reflection, does not construe the right of an alien to reside in a certain territory as a fundamental human right, and thus the absence of a judicial review of expulsion from the territory of a state does not represent a lack in the standard of protection that should be enjoyed by fundamental rights and basic freedoms. The European Court of Human Rights inferred that the expulsion of an alien from the territory of a state is not covered

by Art. 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms relating to the right to a fair trial (“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”), but that the basic procedural safeguards are governed by Art. 1 of Protocol No. 7 to the Convention [“An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: a) to submit reasons against his expulsion; b) to have his case reviewed; and c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.”].

However the principles of a modern democratic state negate any acts of arbitrariness shown by state bodies, states are, within the scope of international protection of human rights and freedoms, granted the right to control the entry and residence of aliens in their territories, with the option of expelling an alien if such an expulsion is in accordance with the law, if legitimate objectives are pursued, and if it is necessary in a democratic country [see, for example, judgment of the European Court of Human Rights in the case of *Dalia v. France* No. 26102/95 dated 19 February 1998]. However, a difference is made between aliens, depending on whether the state approved (be it only implicitly) their residence in its territory or whether they reside in the given territory without such approval. This is also proven by the minimum procedural rules alone determined by Art. 1 of Protocol No. 7 to the Convention, which apply only to “an alien lawfully resident in the territory of a State...”.

20. According to the Minister of the Interior, it may be assumed that the contested provisions are not in conflict with Art. 10 para. 2 of the Charter (the right to be protected from any unauthorised intrusion into private and family life), Art. 14 of the Charter (the liberty of movement and the freedom of choice of residence), Art. 26 para. 1 of the Charter (the right to free choice of profession), and Art. 36 para. 2 of the Charter (the right to judicial and other legal protection).

21. The Minister of the Interior further believes that it is necessary to address the harmony of the contested provisions with Art. 13 of the Convention (the right to an effective remedy against violation of the rights and freedoms guaranteed by the Convention). According to the Minister, the case of *Maaouia v. France* (quoted above under clause 10 of this Judgment) stated that Art. 6 of the Convention, on the right to a fair trial, does not apply to issues of asylum and immigration; however, these issues are covered by Art. 13 of the Convention. This “may be used only in connection with another right or freedom guaranteed by the Convention, in other words, this is not an autonomous provision. The case law of the Court defined certain requirements for the quality of the review which must be fulfilled in order to satisfy the conditions of Art. 13. Similarly, the conditions may also be applied to the functioning of the basic procedural safeguards regulated in Art. 1 of Protocol No. 7 to the Convention.” The Minister of the Interior believes that “according to [the European Court of Human Rights], an effective remedy must make it possible for the relevant body to deal with the merits of the case and to be able to ensure effective rectification. According to the Court, Art. 13 [of the Convention] does not specify to which kind of remedy this relates, and does not require that the decision



making body be a court of justice. Nevertheless, powers and procedural safeguards available to the given body are relevant in terms of whether the same are effective remedies.” According to the Minister, the European Court of Human Rights in many cases “accepted various non-judiciary bodies as being in line with the requirements of Art. 13.” The Minister stated that the European Court of Human Rights “accentuated the powers of a body to provide an effective remedy over the formal nature of the body,” and (without referring to a specific decision of the European Court of Human Rights) specified the basic parameters which the given body should possess. These include: 1. independence of the body which allegedly committed the given violation; 2. possibility of the alien to pronounce their arguments in a similar manner as if standing before a court of justice; 3. the decision making body must issue binding decisions; and 4. the alien is able to effectively utilise a victory won in their case. Absence of any of these parameters may be, in the Minister’s opinion, replaced with a system of remedies.

22. The following part of the statement from the Minister of the Interior claims that the Czech legal regulation adheres to the above-defined requirements, and thus it provides an effective system of remedies as specified by the requirements of the European Court of Human Rights. According to the Minister of the Interior, decisions on administrative expulsion are issued, “generally speaking, by an Alien Police department”, “[the decision] is handed over to the alien in the presence of an interpreter, provided that the alien does not understand Czech, and it contains a notification on the possibility of filing an appeal against the given decision to the Directorate of the Alien and Border Police Service [via] the body which passed the given decision. Within their appeal, the alien has the chance to express all their arguments and objections.” The Directorate of the Alien and Border Police Service may dismiss the appeal, or may annul the given decision. In the latter case, the Directorate either returns the case to be re-heard by the body which issued the given decision (and such a body is then bound by the legal opinion of the Directorate) or they annul the given decision without taking any other measures. In such an instance, the alien’s record in the registry of undesirable persons is deleted and the originally issued decision has no effect on possible further legalisation of residence in the Czech Republic. Even should the case be returned to a new hearing, it is assessed anew, and the alien has again the possibility of appealing to the Directorate of the Alien and Border Police Service. According to the Minister of the Interior, the alien may also use other institutes of the Administrative Procedure Code - reopening the trial or review proceedings. Such proceedings are placed under the powers of the Ministry of the Interior, which is a superior administrative body over the Directorate of the Alien and Border Police Service.

23. On the contrary, the Public Defender of Rights supported the petition for annulment of the contested provisions. First of all, the Public Defender of Rights believes that the contested provisions are in conflict with Art. 36 para. 2 of the Charter.

24. Furthermore, the Public Defender of Rights states that “even when Art. 8 [of the Convention] contains no absolute right of any category of aliens not to be expelled, the case law of the European Court of Human Rights proves that a decision to expel an alien from a country in which close members of the alien’s

family life may represent, in addition to an infringement of Art. 3, a violation of the alien's right to respect for their private and family life" as specified [by the quoted provisions of the Convention]." The Public Defender of Rights refers to the following judgments of the European Court of Human Rights: in the case of *Moustaquim v. Belgium*, No. 12313/86, dated 18 February 1991; in the case of *Beldjoudi v. France*, No. 12083/86, dated 26 March 1992; in the case of *Boultif v. Switzerland*, No. 54273/00, dated 2 August 2001; in the case of *Amrollahi v. Denmark*, No. 56811/00, dated 11 July 2002; in the case of *Yilmaz v. Germany*, 52853/99, dated 17 March 2003; and in the case of *Keles v. Germany*, No. 32231/02, dated 27 October 2005.

25. According to the Public Defender of Rights, protection against unauthorised intrusion into private and family life is additionally provided by Art. 10 para. 2 of the Charter. If the right to this protection is actually one of the fundamental rights and basic freedoms, then, according to the Public Defender of Rights, a decision on expulsion must not be excluded from a judicial review, irrespective of whether the alien resides in the territory of the Czech Republic with or without due authorisation. The same argumentation may also be used, according to the Public Defender of Rights, for Art. 3 and Art. 8 of the Convention, in connection with Art. 13, and "with respect to the absolute nature [of the formerly named right], the lack of a judicial review with respect to the contested violation may be even more serious." The Public Defender of Rights stated that "on the basis of examining the entire range of suggestions directed at this issue [they do not consider], with respect to the nature of the right threatened by expulsion, the standard appellate proceedings to the superior administrative body (the Directorate of the Alien and Border Police Service) to be an effective remedy as specified by Art. 13 of the Convention," and they remark that "in relation to Art. 3 [of the Convention], this deficiency is even more remarkable." In spite of some changes in legal regulation, the Public Defender of Rights does not consider as suitable "the present mechanism for protecting the alien being expelled, based upon their previous unauthorised residence, with respect to possible infringement of the right for protection of their private and family life. He [lacks] a safeguard in the very form of a judicial review". The Public Defender of Rights "henceforth [considers], in individual cases on the part of administrative bodies, the application and knowledge of case law [of the European Court of Human Rights], and with respect to citizens of the EU and their family members, also of case law of the Court of Justice of the European Communities, to be insufficient."

26. According to the Public Defender of Rights, "the deficit he described does not apply to citizens of the EU and their family members, or family members of citizens of the Czech Republic (§ 15a of the Act on the Residence of Aliens in connection with the provisions of § 171 para. 2 of the same Act)." Nevertheless, even in this case the Public Defender of Rights does not consider "the legal regulation to be incontestable from the viewpoint of *acquis communautaire*, since limitation of the right to a judicial review, which is permitted in certain cases by the provisions of § 171 para. 2, is not in harmony with [Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC,

75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Official Journal L 158, p. 77; Special edition 05/05, p. 46) (see clause 26 of the Introduction and Article 31 of the Directive)].”

27. The Minister of Justice stated that the Act on the Residence of Aliens does not number amongst the functions of the Ministry and, therefore, they only issued a general statement. In this statement they “are inclined towards the arguments specified by the petitioner [...] since they are directed, in addition to other points, at a greater transparency of decision making by state administration bodies, and contribute to the removal of a conflict between the above-specified provisions and [the Charter], and to fulfilment of the rights guaranteed by the Charter.” On the basis of this, the Ministry supports the petition.

#### IV.

##### Wording of the contested provisions of legal regulation

28. The contested provisions of the Act on the Residence of Aliens read as follows:  
Judicial review

§ 171

(1) The following will be excluded from a judicial review:  
[...]

c) decisions on administrative expulsion, if, prior to the start of proceedings on the expulsion,  
the alien stayed in the Territory or in the transit area of an international airport in an unauthorised manner; [...]

#### V.

##### Active standing of the petitioner

29. The petitioner infers their active standing for filing the petition under assessment from Art. 95 para. 2 of the Constitution. According to this provision, if a court of justice concludes that an act which is to be used when dealing with a case is in conflict with the constitutional order, such a court shall submit the case to the Constitutional Court. The right of the court is specified in closer detail in § 64 para. 3 of the Act on the Constitutional Court as a right to file a petition proposing the annulment of a statute or individual provisions thereof. That means the active standing of a court of justice to file a petition for annulling a statute, or the individual provisions thereof, is derived from the subject of the dispute and its legal definition. In other words, the court may file a petition for annulling only such a statute or individual provisions of the same which are to be applied in the settlement of a dispute administered before a general court. The deliberation on such an application must be justified and derived from the fulfilment of conditions of the proceedings, including due legal standing of the parties, and if a substantive law regulation is concerned, it must be ascertained unambiguously that such a regulation is to be applied [see Judgment file No. Pl. ÚS 50/05, dated 16 October 2007 (2/2008 Coll.), clause 11].

30. The information specified above implies that the contested provisions are

decisive for the success of either party in proceedings before the petitioner. The petitioner thus meets the conditions specified in the previous clause for active standing for filing the given petition to the Constitutional Court.

## VI.

### Constitutional conformity of legislative process

31. In accordance with § 68 para. 2 of the Act on the Constitutional Court, the Constitutional Court, in addition to assessing the compliance of the contested act with constitutional acts, is to find out whether the act was adopted and issued within the confines of powers determined by the Constitution and in a constitutionally prescribed manner.

32. With respect to the fact that the petitioner claimed neither a defect in the legislative process nor a transgression of the powers on the part of the legislature determined by the Constitution, it is not necessary, with respect to the principles of procedural economy, to examine this issue in closer detail; in addition to taking into account the statements submitted by the Chamber of Deputies and the Senate (see clauses 12 and 15 of this Judgment), formal verification of the legislative process is sufficient from a publicly accessible information resource at <http://www.psp.cz>.

33. From this resource, the Constitutional Court ascertained that the bill of the Act, which was subsequently promulgated under No. 326/1999 Coll. (Print of the Chamber of Deputies No. 240, Chamber of Deputies 1998-2002, 3rd election term), was returned to the Chamber of Deputies by the Senate with some proposed amendments, and then approved by resolution No. 605 at the 32nd meeting of the Chamber of Deputies on 30 November 1999 in the wording approved by the Senate, when 172 members were present, of which 171 voted in favour of the bill of the Act, 1 voted against. The Act was signed by the relevant constitutional representatives and promulgated in Item 106 of the Collection of Laws, which was distributed on 23 December 1999 under number 326/1999 Coll.

34. The Constitutional Court states that Act No. 326/1999 Coll. was adopted and issued within the confines of powers determined by the Constitution and in a constitutionally prescribed manner, or, that the Constitutional Court in these proceedings ascertained nothing that would testify for a contrary conclusion.

## VII.

### Evaluation of the Constitutional Court

35. The Constitutional Court firstly examined the compliance of the contested provisions with Art. 36 para. 2 of the Charter, according to which the review of decisions relating to fundamental rights and basic freedoms in accordance with the Charter may not be excluded from court jurisdiction. This right is formulated in a general manner, and not limited to citizens of the Czech Republic. If the Constitutional Court concluded that administrative expulsion is capable of infringing the fundamental rights or basic freedoms of an alien, it would be

necessary to annul the contested provisions which exclude a judicial review of such an expulsion.

36. In their previous case law, the Constitutional Court clearly defined that, in accordance with Art. 36 para 1 of the Charter, since everyone may assert their rights before a court or another body, and the conditions and rules for executing such a right are determined by law, then such law issued on the basis of constitutional authorisation cannot completely negate the claim of each person to assert their rights before a court or another body in any given situation, and thus also deny a constitutionally guaranteed fundamental right, be it merely in certain cases. The provisions of Art. 36 para. 1 of the Charter constitutionally guarantee everyone the possibility of demanding protection for their rights before a court or another body in all cases when such rights are violated (there is no constitutional restriction here). In other words, no person may be completely excluded by law from the possibility of asserting protection for their rights, be it only in certain cases, since their rights according to Art. 36 para. 1 of the Charter would be nullified. A contrary interpretation would also mean that establishment of the right of every person to turn to judicial and other protectional bodies for protection of their rights (effected by the constitutional framer and endowed with supreme legal force) would principally make no sense, since it could be, for any given situation, nullified by the will of mere legislature. The Constitutional Court also referred to the fact that even when the constitutional framer, in the second sentence of Art. 36 para. 2 of the Charter, delegates to legislature allowance for some exemptions from reviewability of administrative decisions by a court, such constitutional authorisation is limited by the fact that exclusion from the reviewing powers of a court must not apply to a decision relating to the fundamental rights and basic freedoms guaranteed by the Charter. In this, the constitutional framer clearly reflected the differing relevance of fundamental rights and basic freedoms and “ordinary” rights and freedoms; more significant rights logically enjoy (on the basis of their distinct nature) a greater protection [Judgment file No. Pl. ÚS 12/07 dated 20 May 2008, clauses 27 and 30, Judgment file No. Pl. ÚS 72/06 dated 29 January 2008 (291/2008 Coll.), clauses 40 and 41, both available at <http://nalus.usoud.cz>].

37. The Constitutional Court emphasises that they in no way doubt their previous conclusions regarding the non-existence of a subjective, constitutionally guaranteed right of aliens to reside in the territory of the Czech Republic. The Constitutional Court continuously confirms that it is for a sovereign state to decide under which (non-discriminatory) conditions it allows residence of aliens in its territory - cf. (in addition to Resolution file No. III ÚS 219/04 quoted above under clause 7 of this Judgment, referred to by both the petitioner /see clause 7 of this Judgment/ and the Minister of the Interior /see clause 18 of this Judgment/) also Resolution file No. I. ÚS 394/06, dated 8 November 2006 (<http://nalus.usoud.cz>), where the Constitutional Court explicitly confirmed this conclusion expressed in the previous resolution; Resolution file No. II. ÚS 59/06 dated 4 May 2006 (<http://nalus.usoud.cz>), and other resolutions.

38. Even though the subjective, constitutionally guaranteed right of aliens to reside in the territory of the Czech Republic does not exist, rights which might be aggrieved by expulsion are undoubtedly guaranteed to aliens by the Charter. These include the right to life and prohibition of torture and cruel, inhuman, or degrading



treatment (provisions of Art. 6 and Art. 7 of the Charter), which protects aliens from expulsion to a country in which such rights of the aliens would be endangered, or the right to be protected from any unauthorised intrusion into their private and family life (Art. 10 para. 2), which may prevent expulsion if this right is infringed in an inadequate manner (cf., in this sense, Judgment file No. IV. ÚS 553/06 dated 30 January 2007, available at <http://nalus.usoud.cz>, clauses 30 to 35).

39. In relation to this, the Charter in no way discriminates between whether an alien resides in the territory of the Czech Republic with due authorisation or not, unlike the Convention which provides aliens residing in the territory of a contracting state under due authorisation with procedural safeguards by way of Protocol No. 7 to the Convention, and, in a contrary case, through Art. 13 which guarantees the right to an effective remedy to each person whose rights as guaranteed by the Convention are violated (cf. e.g. judgment *Lupsa v. Romania*, No. 10337/04, dated 8 June 2006, clause 52, and the case law quoted therein). In this respect, the Constitutional Court cannot consider as relevant the arguments submitted by the Minister of the Interior (see clause 17 of this Judgment).

40. This conclusion is also approved by the case law of the European Court of Human Rights, which is referred to by the petitioner, the Minister of the Interior, and the Public Defender of Rights (see clauses 10, 19 and 24 of this Judgment), even though they derive mutually opposing conclusions from the same. The European Court of Human Rights did acknowledge “the Contracting States’ concern to maintain public order, in particular in exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens”, but at the same time they pointed out that “in cases where the relevant decisions would constitute an interference with the rights protected by paragraph 1 of Article 8, they must be shown to be ‘necessary in a democratic society’, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued” (*Moustaquim v. Belgium*, quoted above under clause 24 of this Judgment, clause 43, and related case law of the European Court of Human Rights). Thus the European Court of Human Rights confirmed that the autonomy of the contracting states in making decisions on the expulsion of an alien is limited by the fundamental rights of such aliens, e.g. the right to protection from interference with personal and family life as determined by Art. 8 of the Convention (as was the case in *Moustaquim v. Belgium*), the right to life and prohibition of torture and cruel, inhuman, or degrading treatment or punishment, protected on the basis of Art. 2 and Art. 3 of the Convention, where an expelled alien might possibly be exposed to the same in the country to which they are expelled (see, for example, the judgment of the European Court of Human Rights in the case of *Mamatkulov and Askarov v. Turkey* Nos. 46827/99 and 46951/99 dated 4 February 2005).

41. The fact that the European Court of Human Rights left contracting states with wide autonomy in decision making on the expulsion of an alien and expressly confirmed that the right to access to a court of justice, contained in Art. 6 para. 1 of the Convention, does not apply to making decisions on the expulsion of an alien (see *Maaouia v. France*, quoted above under clause 10 of this Judgment, clauses 34 to 40, or *Mamatkulov and Askarov v. Turkey* quoted in the previous clause of this Judgment, clause 82), plays no role in interpreting Art. 36 para. 2. When

interpreting this provision, it is decisive that there is a possibility a decision on administrative expulsion would infringe the fundamental rights of the alien, and the above-specified case law of the European Court of Human Rights confirms the existence of such an eventuality. There is no reason to decrease the level of procedural protection of fundamental rights guaranteed by the Charter only due to the fact that the Convention regulates the same in another manner, the more so when the Charter guarantees the same absolutely unambiguously, as was specified above in clause 36 of this Judgment (similarly cf. Judgment file No. IV. ÚS 553/06, quoted above in clause 38 of this Judgment, clause 40).

42. For the reasons specified above, the Constitutional Court concluded that the contested provisions of § 171 para. 1 clause c) of Act No. 326/1999 Coll. on the Residence of Aliens in the Territory of the Czech Republic, as amended by Act No. 161/2006 Coll., are in conflict with Art. 36 para. 2 of the Charter, and consequently the Constitutional Court annulled the same as of the date this Judgment is published in the Collection of Laws.

**Note: Decisions of the Constitutional Court cannot be appealed.**