

2006/04/26 - PL. ÚS 37/04: DISCRIMINATION

HEADNOTES

One can not conclude from interpretation of § 133a par. 2 of the CPC that it is enough for a person who felt racially discriminated against when purchasing services to simply claim that discriminatory conduct occurred. That person must, in court proceedings, not only claim, but also prove, that he was not treated in the usual, non-disadvantaging manner. If he does not prove this claim, he can not succeed in the proceedings. He must also claim that the disadvantaging treatment was motivated by discrimination on the basis of racial or ethnic origin. Of course, he does not have to prove that motivation; it is assumed in the event of proof of different treatment, but is rebuttable, if the contrary is proved (through evidence). In any case, the requirement that the plaintiff must prove that he was discriminated against precisely and exclusively because of his racial (ethnic) origin, and not for other reasons, is quite obviously impossible to meet, because proving the defendant's motivation (impetus) is ruled out by the nature of the matter.

Therefore, the petitioner's opinion will not stand - the opinion being that in proceedings cited in the contested provision of the Civil Procedure Code "the plaintiff is given an advantage, because it does not have to prove what is alleged to have happened and why it is being complained of, whereas the defendant is disadvantaged, because it is supposed to prove something that did not happen." In reality the burden of proof does not lie only and exclusively on the defendant. The plaintiff also bears a burden of claiming and a burden of proof. If the plaintiff successfully bears these burdens, which the court must decide in the individual case, it is then up to the defendant to prove his claim that discrimination on racial (ethnic) grounds did not occur. For the foregoing reasons the Constitutional Court concluded that § 133a par. 2 of the CPC is a proportionate means for achieving the aim pursued, or that - if it is applied in the abovementioned constitutional manner - a fair balance between the requirements of the public interest of society and the requirements of protection of individual fundamental rights will be preserved.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court of the Czech Republic, composed of its Chairman Pavel Rychetský, judge Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kurka, Dagmar Lastovecká, Jiří Mucha, Miloslav Výborný, Eliška Wagnerová a Michaela Židlická decided on 26 April 2006 on a petition from the Regional Court in Ústí nad Labem seeking the annulment of § 133a par. 2 of Act no. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, with the participation of the Chamber of Deputies of the Parliament of the CR and the Senate of the Parliament of the CR, as follows:

The petition to annul § 133a par. 2 of Act no. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, is denied.

REASONING

I.

1. The Regional Court in Ústí nad Labem, in proceedings on protection of personality under § 11 of the Civil Code, conducted under file no. 34 C 22/2002, is adjudicating a dispute between the plaintiffs M. B., L. Č., D. D. and R. K., all residing in Ústí nad Labem, and the defendants J. H. and P. D., doing business in Ústí nad Labem, pursuant to a complaint delivered to the Regional Court on 13 March 2002.

2. The substance of the dispute is that on 26 November 2001 at about 11:15 a.m., the plaintiffs, citizens of Roma nationality, visited the defendants' restaurant in Ústí nad Labem. According to the plaintiff's claim, none of the waitstaff paid attention to them for a long time, and therefore the second plaintiff asked a passing waitress whether they would be served. The waitress answered that they would not be, because the restaurant was a private club, and for service it was necessary to present a club card, which only regular guests have and which costs CZK 300. After the plaintiffs expressed interest in buying a card, they were told that they could have one beer and leave. However, the plaintiffs said that they wanted to eat, in response to which they were told that the restaurant was not serving food. Immediately after that, three non-Roma persons entered

the restaurant, and were served without any questions or demands to present a club card. The plaintiffs see this attitude by the wait staff as racial discrimination, belittling their dignity. Therefore, they filed a complaint with the Regional Court in Ústí nad Labem, seeking protection of personality and an imposition of an obligation on the defendants to send them a letter of apology and pay compensation of non-property damages in the amount of CZK 80,000, i.e. CZK 20,000 to each of the plaintiffs, and to pay the costs of the proceedings.

3. The Regional Court in Ústí nad Labem, by decision of 3 July 2004, ref. no. 34 C 22/2002-63, suspended the proceedings on the grounds that § 133a par. 2 of the CPC, which is to be applied in addressing the matter, is inconsistent with the constitutional order [Art. 95 par. 2 of the Constitution of the CR, § 64 par. 3 of Act no. 182/1993 Coll., on the Constitutional Court, as amended (the “Act on the Constitutional Court”)] and filed a petition with the Constitutional Court to annul it.

4. In the petition, the Regional Court stated that so far in the proceedings it has questioned the plaintiffs (with the exception of L. Č., who submitted an excuse for absence), both defendants, their employee E. M., and a defense witness, J. L. The plaintiffs maintained their claim that they had been racially discriminated against, as Roma. The defendants and their employee denied that they disadvantaged anyone, at any time, for any reason, compared to other customers; however, they both stated that they could not prove this statement in any way, because they do not document the service of individual restaurant guests in any way. The witness L. declared that, although he is a Roma, he, at the same time and in the same place as the plaintiffs, did not feel discriminated against. The Regional Court also stated that despite the claims which tend, uncertainly, to testify for the other side, the plaintiffs maintained their complaint, and asked that a decision be made in their favor with the application of § 133a par. 2 of the CPC, because their belief that they had been racially discriminated against in the provision of services had not been refuted in the proceedings, and should therefore be taken as proven.

5. The Regional Court in Ústí nad Labem, in very concise constitutional law arguments, stated the belief that § 133a par. 2 of the Civil Procedure Code violates the principle of procedural equality of participants in court proceedings, and is therefore inconsistent with Article 96 par. 1 of the Constitution of the Czech Republic (the “Constitution”), under which “all parties to a proceeding have equal rights before the court.” The shift of the burden of proof - compared to the standard order - from the plaintiffs to the defendants, the complaining side has an unjust advantage because it does not have to prove what is alleged to have happened and why it is being complained against, whereas the defending side has an unjust disadvantage, because it is supposed to prove what did not happen, although it could not have expect the need for such proof in advance. It follows from the logic of the matter that whereas the first proof is relatively easily possible, the second proof is difficult, and possibly - as in the present matter - even completely impossible.

6. In the petitioner's opinion, the possible argument that even the standard order which places the burden of proof on the plaintiff does not guarantee complete equality of the parties, and will not stand, because that standard order reflects the different procedural situation of both of the adversaries in the proceedings: the plaintiff is the "master of the process" and can always - after considering his own possible evidentiary weakness - quite easily terminate it; in contrast, the defendant does not have that opportunity. Thus, it is just for this procedural weakness of the defendant to be compensated for by removal of the burden of proof.

7. Therefore, for these reasons the Regional Court believes that the contested § 133a par. 2 of the CPC violates the defendants' right to a fair trial, which is immanently contained not only in the Czech constitutional order, but also in the legal order of the European Union, e.g. in Art. 6 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention").

8. In conclusion, the Regional Court in Ústí nad Labem proposed that the Constitutional Court in its judgment annul § 133a par. 2 of the Civil Procedure Code.

9. On 23 August 2004 the Constitutional Court received a petition from M. B., L. Č. and D. D., plaintiffs in the proceedings conducted before the Regional Court in Ústí nad Labem as file no. 34 C 22/2002, in which they asked the Constitutional Court to consider whether they could be considered secondary parties in the proceedings on the petition from the Regional Court in Ústí nad Labem to annul § 133a of the CPC, or whether that status could be granted to them by resolution under § 28 par. 3 of Act no. 182/1993 Coll., on the Constitutional Court, as amended (the "Act on the Constitutional Court").

II.

II.a

10. The Chamber of Deputies of the Parliament of the Czech Republic, represented by its Chairman, PhDr. L. Z., in a statement of 27 August 2004, said that § 133a was inserted into the Civil Procedure Code primarily in response to the Czech Republic's obligation arising from EC Council Directive no. 97/80/EC of 15 December 1997, on the burden of proof in cases of sex discrimination. Subsequently § 133a was expended by Act no. 151/2002 Coll., which reflected in it the requirements of two other European directives, i.e. Council Directive no. 2000/43/EC of 29 June 2000, implementing the principle of equal treatment of persons regardless of racial or ethnic origin, and Council Directive no. 2000/78/EC of 27 November 2000, establishing the general framework for equal treatment in employment and professions.

11. Under Directive no. 2000/43/EC the member states of the European Union were required to ensure in their legal systems that in cases when persons consider themselves

wronged in that they were directly or indirectly discriminated against because the principle of equal treatment has not been applied to them, the burden of proof is borne by the defendant. The aim of this directive is to make it the defendant's obligation to prove that there has been no breach of the principle of equal treatment.

12. The Chamber of Deputies did not agree with the petitioner's opinion that reflecting the obligation arising for the Czech Republic from Directive no. 2000/43/EC into the Civil Procedure Code violated Art. 96 par. 1 of the Constitution, which governs the equality of the parties in proceedings before a court. In every civil trial one of the parties has the burden of proof, and this obligation does not violate the equal standing of parties in proceedings before the court. In setting the burden of proof, the contested provision is based primarily on protecting the parties who believe that their rights were injured because of unequal treatment. The equality of the parties to proceedings is given, among other things, primarily by the independence of the court. The parties to proceedings, in respect of whom the court fulfills its role, must be mutually non-subordinate, i.e. they must have equal standing in the proceeding. This equal standing is not violated by the obligation of a burden of proof.

13. The contested provision does not take away the defendants' right to a fair trial. As part of the principles of a fair trial before a court in this case too (i.e. in the procedure under § 133a par. 2 of the CPC) the parties are able to seek their rights before an independent and impartial court. In that procedure, every party to the proceedings is given personal access to the court, has an opportunity to participate in questioning and have the matter discussed in his presence and to respond to the evidence presented. Annuling § 133a par. 2 of the CPC would clearly violate the Czech Republic's obligations arising from membership in the European Union and the related obligations arising from EU directives.

14. Act no. 151/2002 Coll., which Amends Certain Acts in Connection with the Enactment of the Administrative Procedure Code, was approved after a properly conducted norm-creating process; it was signed by the appropriate constitutional bodies and published in the Collection of Laws.

15. In conclusion, the Chamber of Deputies expressed the opinion that the legislative assembly, at the time when it passed Act no. 151/2002 Coll., acted in the belief that the passed Act was consistent with the Constitution, the constitutional order, the legal order of the Czech Republic, and relevant European directives by which the Czech Republic is bound. It is up to the Constitutional Court, in connection with the submitted petition to annul § 133a par. 2 of Act no. 151/2002 Coll., which amends certain Acts in connection with the enactment of the Administrative Procedure Act, to evaluate the constitutionality of that Act and issue the appropriate judgment.

II.b

16. The Senate of the Parliament of the Czech Republic, represented by its then-chairman, Doc. JUDr. P. P., in a statement of 2 September 2004, stated that the contested § 133a par. 2 of the CPC was included in an “accompanying” act (Act no. 151/2002 Coll.), in the course of the legislative process in the Chamber of Deputies, as material which, although it was not related to the administrative judiciary, nonetheless, from the point of view of the Czech Republic’s accession to the European Union, was extremely necessary.

17. As regards the merits of the matter, the Senate stated that the right of everyone to equality before a statute, or before the law (and protection from discrimination) is a general fundamental right recognized both by the European Union and at the level of individual member states (including the Czech Republic).

18. The category of equality enshrined in Art. 1 of the Charter of Fundamental Rights and Freedoms (the “Charter”) is one of the fundamental human rights that are, by their nature, social values constituting the value system of society (Constitutional Court judgment published as no. 168/1995 Coll.). As such, it is developed in further provisions for individual areas and situation. At the constitutional level this includes, for example - this is relevant to the adjudicated case - the equality of rights in court proceedings (Art. 37 par. 3 of the Charter in connection with Art. 96 par. 1 of the Constitution); at the sub-constitutional level, for example § 18 of the CPC, which projects the principle of equal rights in court proceedings into “ordinary law.”

19. In light of the foregoing, § 133a of the CPC is supposed to help person who feel they have been discriminated against to effectively exercise their right to equal treatment, so that the court is supposed to consider the facts about the asserted discrimination based on racial or ethnic origin as proven, unless the contrary comes out in the proceedings. The second paragraph of § 133a of the CPC applies to the provision of health and social care, access to education and professional training, access to public tenders, membership in employee or employer organization, and membership in professional and interest-based associations and to the sale of goods in stores or the provision of services. We can add to this that the scope of things regulated by the incriminated paragraph 2 is, together with the deviation in the basis of discrimination, a factor which differentiates it from paragraph 1 of the same provision (paragraph 1 assumes not only discrimination on the basis of racial or ethnic origin, but also on the basis of sex, religion, faith, world view, health disability, age or sexual orientation). However, the instrument of legal protection is the same in both cases.

20. Historical analysis of § 133a par. 2 of the CPC shows that, when approving it, the legislature was guided primarily by the intent to harmonize Czech law with European Community law. The “European norm-creator,” on the basis that creating the same starting conditions can not be satisfactorily achieved in certain things and situations at the national level, bound member states to pass the necessary measures so that, if a particular

person feels injured by the failure to observe the principle of equal treatment and presents to a court or other appropriate body facts testifying that there has been direct or indirect discrimination, it was up to the defendant to prove that the principle of equal treatment has not been violated (the norm in question has the heading “Burden of Proof”).

21. Although it is obvious from these circumstances that the choice of legislative means was considerably limiting, nevertheless the legislature concluded that the formulation of the contested provision, based on the assumption that the asserted facts were true, unless the proceedings shows otherwise, is a legal construction which in no way violates the principle of evidence on which civil procedural law is based. In this case the legal presumption does not in any way limit the parties to the dispute in submitting claims or presenting evidence, but merely permits the court to decide in the matter in the event of “evidentiary weakness” on the side of the defendant, or if there is a dearth of evidence.

22. In addition to the dominant, formally legislative aspect of the reasons for passing § 133a par. 2 of the CPC, we can add to the statement on the material, social side of the matter. In its decision-making, the Senate did not doubt the validity of the reasons that led the European legislature to define the material application of the relevant norm, and therefore it did not have serious problems with the national norm applying to a circle of cases identical to the relevant European directives.

23. We can say that in the abovementioned dimensions § 133a par. 2 of the CPC is consistent with the constitutional principle of equal rights for parties in court proceedings, because it does not violate the principles of “equal weapons” (a fair trial) by providing more advantages to one of the parties. One could even argue that this provision helps implement the principle of “material” equality where otherwise, due to the objective impossibility of proving one’s claims, “formal” equality would be unjustifiably suppressed.

24. In a matter of claimed discrimination the factual situation is determined in the standard manner. No party is limited either in the claims it submits or in proposing evidence. The provision of § 133a par. 2 of the CPC only conditionally (i.e. unless the contrary is proved in any way in the proceedings) ascribes truthfulness to the plaintiff’s claims of unequal treatment, and thus removes the burden of proof from him. Of course, this fact does not deny the defendant the opportunity to prove the untruthfulness of that claim with the help of evidence showing equal treatment. The defendant thus proves what his conduct was, not that he refrained from impermissible conduct. In any case, that is not even possible, given the nature of the matter. Therefore, on this point we can not agree with the petitioner that the defendant is supposed to prove “something that did not happen.”

25. The contested provision, placed in the part of the law entitled “Evaluation of Evidence,” is a norm that does not in any way instruct the judge in a blanket manner to identify the cases as discriminatory under § 133a par. 2 of the CPC and give up on evaluating each case on the particulars and the entire context. On the contrary, it assumes

that there will be an “additional” criterion for evaluation, and thus places increased demands on the judge in evaluating a case of unequal treatment. This provision must be interpreted in such a way that, in order to even be able to subsume the case under § 133a par. 2 of the CPC, the judge must first reach a conclusion that the facts really do indicate discrimination (see chap. II Art. 8 par. 1 of Council Directive no. 2000/43/EC; and likewise, Council Directive no. 2000/78/EC and Council Directive no. 97/80/EC). If this is not so, § 133a par. 2 of the CPC can not be applied at all.

26. The Senate does not believe that the “shift of the burden of proof” described by the petitioner creates conflict with the constitutional principle of a fair trial, but believes that by imposing greater responsibility on the defendant in determining the facts leads (in matters defined both in § 133a par. 2, and, also, in § 133a paragraph 1 of the CPC) to more thorough observance of the maxim of fair handling of the matter, as required by Article 6 par. 1 of the Convention.

27. It is evident from the petition that the petitioner finds unconstitutionality primarily in the consequence of “shift of the burden of proof,” not in the circle of things to which the norm applies. The Senate adds that if the Constitutional Court finds the petitioner’s arguments for annulling § 133a par. 2 of the CPC justified, then paragraph 1 of that section suffers from the same deficit.

28. For completeness, above the framework of the position statement on § 133a par. 2 of the CPC, it can be stated that, as regards the burden of proof, the anti-discrimination legislation now being prepared by the government also does not expect any changes to the status quo.

29. The same approach to the present issue is also taken by other European Union member states (e.g., France, Ireland, Sweden, Portugal, Poland, Hungary), whose legislature and case law are in line with the described trend (see, e.g. Equality and non-discrimination, Annual report 2004, European Commission, p. 20).

30. In conclusion, the Chairman of the Senate stated that he was sending his position statement with the provision that it is fully up to the Constitutional Court to evaluate the constitutionality of the petition to annul the contested provisions.

II.c

31. The Regional Court in Ústí nad Labem did not respond to the position statements of the Chamber of Deputies and the Senate, which the Constitutional Court sent to it by letter on 20 September 2004.

II.d

32. The Ministry of Justice, in response to the Constitutional Court's request, in its position statement on the petition to annul § 133a par. 2 of the CPC, repeated the petitioner's arguments and stated the reasons for the inclusion of the provision in the legal order of the Czech Republic, which consisted of the need to transpose Article 8 par. 1 and 2 of Council Directive 2000/43/EC of 29 June 2000, which introduces the principle of equal treatment of persons regardless of their race or ethnic origin into the national legal order. The obvious aim of this legal framework is to provide protection to the weaker party in a dispute, which is undoubtedly a person against whom expressions of racial or ethnic discrimination were alleged. In accordance with Art. 8 par. 2 of the cited directive, which provides the possibility of setting lighter conditions for shifting the burden of proof to the defendant, the legislature decided to implement a more benevolent wording and permitted the plaintiff in a discrimination dispute to only "claim the facts," not "present facts indicating direct or indirect discrimination," as provided by Art. 8 par. 1 of the directive. It is necessary to realize that this violation of the principle that the plaintiff bears the burden of proof is done in this case as a result of transposing the Directive, i.e. a regulation passed by the European Community in accordance with the Treaty Establishing the European Communities. Under Art. 249 par. 3 of the EC Treaty is a legal act that is binding on every state to which it is intended, as regards the result that is to be achieved. The choice of forms and means for meeting the aim set by the directive is left to the state's domestic bodies. In this case, the suitable means for implementing the directive was considered to be a statute - the Civil Procedure Code.

33. The Ministry can not agree with the petitioner's opinion that the choice of the cited means suppressed the rights of parties in a trial to equal rights before the court, as it claims with reference to Art. 96 par. 1 of the Constitution, and violated the principle of equal standing of parties to a trial, as enshrined in Art. 37 par. 3 of the Charter. The evidentiary obligation is based primarily on protection of parties who believe that their rights were violated because of unequal treatment.

34. Although the abovementioned directive was issued in 2000, the Czech Republic is bound by it, under Art. 2 of the Accession Treaty as of 1 May 2004, when it became a member state of the European Union. If the Czech Republic did not observe the cited directive, i.e. did not pass the necessary measures to insure its transposition into domestic law, it would, under the Treaty Establishing the European Communities, be liable for this error, as a result of which a complaint could be filed by the Commission at the European Court of Justice, and subsequently a fine or penalties could be imposed.

35. In the Ministry's opinion it can not agree with the petitioner's claim that § 133a par. 2 of the CPC is inconsistent with Art. 96 par. 1 of the Constitution, under which "All parties to a proceeding have equal rights before the court." This principle of equality of the parties is also explicitly stated in the Charter in Art. 37 par. 3 ("All parties to such proceedings are equal"). The principle of equality of the parties is also emphasized in § 18 of the CPC, which enshrines the equal position of parties in civil court proceedings.

Equality before the law and before the court are contained in a single concept. It means the equal position of both parties in the application of substantive and procedural regulation before any court as regards any natural or legal person. The principle of equality of the parties is manifested by creating equal procedural conditions and procedural positions of the subjects whose rights and obligations a court is deciding about. It rules out giving a particular group of parties or individuals an exception position connected with recognizing special rights, or, on the contrary, obligations. The very fact that it is usually up to the plaintiff to prove the claims presented in the complaint does not mean that the plaintiff does not have the same rights as the opposing party, which does not have that obligation. Likewise, it can not be considered a violation of equal standing of parties to a proceedings if in some justifiable cases “unlike in the standard order,” as the petitioner states, the burden of proof is shifted. Such a procedure is in no way exceptional, and many states use it not only in the cases cited in the abovementioned directive (see, e.g., complaints against property obtained from illegal sources applied in Anglo-Saxon law). Thorough application of the principle of equality of the parties is also ensured by the independence of judges, rules on excluding biased court persons, but also by the existence of a single judicial system, which ensures each citizen and legal entity the opportunity to have his matter heard publicly by the appropriate court, organized and active on the basis of general constitutional principles.

36. The Ministry also stated that it could not agree that the contested legal regulation denies the defendants’ right to a fair trial. The provision of § 133a par. 2 of the CPC (but analogously also § 133a par. 1 of the CPC) in no way affects the primary principle of free evaluation of evidence explicitly stated in § 132 of the CPC, under which the court evaluates evidence in its discretion, each piece individually and all pieces of evidence in relation to each other. When evaluating the facts of the matter during the evidentiary process, the court is not bound in evaluating the level of trustworthiness, or evidentiary strength of individual pieces of evidence; and thus also in the case of the claimed facts being presumed to be “proved” under § 133a par. 2 of the CPC (but also analogously § 133a par. 1 of the CPC) it is fully up to the court’s discretion what evidentiary strength in connection and in comparison with the other evidence presented it ascribes to these “proved” claimed facts. At the same time, the contrary may be proved in the proceedings, in the situation under § 120 par. 3 of the CPC, i.e. by a procedure where the court may, in an adversarial proceeding, also admit evidence other than that presented by a party.

37. In conclusion the Ministry of Justice stated that in view of the foregoing it believes that neither the cited directive nor § 133a par. 2 of the CPC are inconsistent with the rights of the parties provided by the constitutional order of the Czech Republic, but that they emphasize the fundamental right of discriminated (weaker) subjects to a fair trial, as is guaranteed both by the Charter (Art. 36 par. 1), and by Article 6 par. 1 of the Convention, and are therefore constitutional. It is up to the Constitutional Court, in connection with the filed petition to annul § 133a par. 2 of the CPC, to evaluate the constitutionality of these provisions and issue an appropriate decision.

38. The European Roma Rights Center based in Budapest (the “European Center”) informed the Constitutional Court on 16 December 2004 that it had been informed about the proceedings being conducted before the Plenum of the Constitutional Court concerning the petition to annul § 133a par. 2 of the CPC as being unconstitutional. In that connection it submitted to the Constitutional Court an amicus brief, in which it emphasized, among other things, that a condition for shifting the burden of proof to the defendant is that the plaintiff prove prima facie discrimination, and only after that does the defendant have an obligation to prove that he did not violate the principle of equal treatment (see also par. 21 of the Preamble to Council Directive 2000/43/EC). Experience shows that effective and true observance of property law provisions guaranteeing non-discrimination are secured when the burden of proof is also shared by the defendant, who must prove that his conduct was objectively justified. It pointed to the decision of the UN Human Rights Committee in the matter *Mukong v. Cameroon*, Communiqué no. 458/1991 (1994), under which the burden of proof can not rest only with the plaintiff, especially considering that the parties do not always have equal access to the evidence and that frequently the defendant alone has access to the relevant information.

39. Shifting the burden of proof from the plaintiff to the defendant after the case was classified as prima facie discrimination makes it easier for the plaintiff to decide to file a complaint.

40. When it is possible to classify a case as prima facie discrimination depends on the circumstances of each case; however, it is obvious that in applying this evidentiary principle it is sufficient for the plaintiff to provide arguments, i.e. “facts indicating that there was direct or indirect discrimination.” The evidentiary standard presently required, “beyond reasonable doubt” is applied more in criminal proceedings.

41. The European Center pointed to the decision of the European Court of Human Rights (the “European Court”) in the matter *Nachova and others v. Bulgaria* (2004), in which the European Court stated that the burden of proof must be shifted to the defendant in matters concerning discrimination under Art. 14 of the Convention, and stated that this approach is consistent with developments in Europe.

42. After shifting the burden of proof, it is up to the defendant to present evidence to refute the claim of prima facie discrimination. According to the European Court of Justice, the defendant must prove that the different treatment “meet a necessary aim” and was “suitable and requisite for attaining that aim” (the matter *Ingrid Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH & Co. KG*, /1989/, ECR 2743). The question of shifting the burden of proof in matters of discrimination based on sex is also considered in the decision of the Labour Appeals Tribunal of Great Britain of 3 April 2003 in the matter *Barton v. Investec Henderson Crosthwaite Securities Ltd.*, which emphasized the increased

importance of the defendant defending his conduct in matters of discrimination.

43. The European Center pointed to other decisions of the European Court of Justice on preliminary issues (the matter 170/84 Bilka-Kaufhaus GmbH /1986/ ECR 1607, the matter 109/88, Danfoss /1989/, ECR 3220), from which one can conclude that the plaintiff is primarily required to prove a case of prima facie different treatment on the basis of a forbidden reason; otherwise, the plaintiff lost the case. If the plaintiff proves this, it is up to the defendant to provide objective reasons for such different treatment (e.g. achieving a justified aim or implementing appropriate measures for achieving such an aim).

44. In conclusion the European Center stated that the principle of shifting the burden of proof is the result of more than twenty years of development and liberalization which has occurred since the first EU directives concerning questions of sex passed in mid 1970s. Its purpose is to create a balance that will permit the courts to gather all relevant evidence from the parties before deciding whether discrimination occurred. Shifting the burden of proof helps the plaintiff achieve a situation where the defendant has an obligation to justify his conduct. As a result, it binds both parties to base their position on the most convincing arguments.

III.

45. The provision of § 133a of the CPC, including paragraph 2, which is proposed to be annulled, reads:

“§ 133a

(1) The facts asserted about the claim that the party was directly or indirectly discriminated against on the basis of his sex, racial or ethnic origin, religion, faith, world view, health disability, age or sexual orientation shall be considered by the court to be proven in labor matters, unless the contrary is found in the proceedings.
(2) The facts asserted about the claim that the party was directly or indirectly discriminated against on the basis of his racial or ethnic origin shall be considered by the court to be proven in matters concerning provision of health and social care, access to education and vocational training, access to public tenders, membership in employee or employer organizations and membership in professional and interest-based associations and concerning the sale of goods in stores or the provision of services, unless the contrary is found in the proceedings.”

IV.

46. When reviewing the conditions for the proceedings, the Constitutional Court found that application of the contested § 133a par. 2 of the CPC is unavoidable for the Regional Court to decide in the matter. Thus, it is a provision that is to be used in resolving the matter under Art. 95 par. 2 of the Constitution, and thus the condition specified in Art. 95 par. 2 of the Constitution has been met.

47. Regarding the request from M. B., L. Č. and D. D., to be granted secondary party status, or for a decision that they have that status in the proceedings, the Constitutional Court states that in proceedings to annul a statute and other legal regulations the Act on the Constitutional Court, by which the Constitutional Court is bound under Art. 88 of the Constitution of the Czech Republic, does not recognize secondary party status, with the exception of cases arising as a result of procedures under § 35 par. 2 of that Act.

V.

48. The provision of § 133a par. 2 was inserted into the Civil Procedure Code by a statute of 21 March 2002, Act no. 151/2002 Coll., which Amends Certain Acts in Connection with the Enactment of the Administrative Procedure Code. The Act went into effect on 1 January 2003 and was published in part 61/2002 Of the Collection of Laws of the CR, which was distributed on 17 April 2002.

49. From the electronic library of the Chamber of Deputies of the Parliament of the Czech Republic the Constitutional Court determined that the draft Act was submitted to the Chamber of Deputies as a government draft on 1 October 2001 and distributed to the deputies as publication 1081/0. The draft was passed at the 46th session of the Chamber of Deputies on 15 February 2002 by resolution no. 2106, when, out of 159 deputies present, 149 voted in favor, with a quorum of 80.

50. From the electronic library of the Senate of the Parliament of the Czech Republic the Constitutional Court determined that the draft Act was distributed to the senators as Senate publication no. 224. At the 15th session of the Senate, in the third term of office, on 21 March 2002, the Senate passed resolution no. 327, in which it expressed its will not to consider the draft Act. out of the 43 senators present, 38 were in favor, and 1 against, with a quorum of 22.

51. On 26 March 2002 the Act was delivered to the president for signature. The president signed the Act on 28 March 2002.

52. Therefore, the Constitutional Court, under § 68 par. 2 of the Act on the Constitutional Court, found that Act no. 151/2002 Coll., which Amends Certain Acts in Connection with the Enactment of the Administrative Procedure Code, was passed and issued within the bounds of legislative jurisdiction of the Parliament of the CR set by the Constitution of the Czech Republic and in a constitutionally prescribed manner.

VI.

53. The Constitutional Court concluded that the petition to annul § 133a par. 2 of the CPC is not justified, and therefore denied the petition for the following reasons.

54. In proceedings to annul statutes or their individual provisions under Art. 87 par. 1 let. a) of the Constitution, the Constitutional Court evaluates the content of the statute in terms of its consistency with the constitutional order. In this regard the Constitutional Court points out that as the last domestic instance for constitutional law classification, it does not consider itself bound by the classification that the petitioner applies to the matter in the reasoning of the petition. Under the principle *iura novit curia* it can also consider the petition from the point of view of provisions that the petitioner or the parties did not cite. A petition or complaint is characterized by the facts it criticizes, or by its subject matter, which it claims to be unconstitutional, and not by mere legal reasoning. Of course, one can not conclude from this that detailed constitutional law arguments are not supposed to be a regular component of a petition. In this case the Constitutional Court is of the opinion that the petition from the Regional Court does not contain such detailed arguments.

55. The essence of the petition is the claim that § 133a par. 2 of the CPC is unconstitutional because in the matters listed therein it shifts the burden of proof to the defendant, thereby discriminating against it. This is claimed to violate constitutionally enshrined fundamental rights, in particular the right to a fair trial under Art. 6 par. 1 of the Convention and the corresponding rights enshrined in Chapter Five of the Charter, the principle of equality of the parties in court proceedings under Art. 37 par. 3 of the Charter, Art. 96 par. 1 of the Constitution and Art. 14 par. 1 of the International Covenant on Civil and Political Rights, no. 120/1976 Coll. (the “Covenant”), and the ban on discrimination under Art. 14 of the Convention.

56. Thus, the present case concerns application of the procedural principle of equality and non-discrimination in the decision making of the general courts in civil matters. International law protection is primarily enshrined in the Covenant, which provides in Art. 14 par. 1, among other things, that “All persons shall be equal before the courts.”

57. The right to a fair trial is guaranteed primarily by Article 6 of the Convention, which is directly titled as such in the text as revised by Protocol no. 11, and whose relevant provision for the “civil” branch reads:

“Article 6

Right to a fair trial

1. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law which shall decide on his civil rights and obligations ...”

58. As regards the actual content of this fundamental right, it is obvious from its wording that this is a structured right, which includes several independent subjective fundamental rights, formulated both specification (e.g. a public and speed trial, or an independent and impartial court), and generally (namely, “entitled to a fair hearing”).

59. The right to a fair hearing, as a component of the right to a fair trial, is thus an uncertain, open, and precisely undefined concept. Its content includes not only all other guarantees expressly named in Art. 6 par. 1 of the Convention, but in particular also those that are not named in it, but which the European Court, in particular, in its longtime decision making activity derived and gradually defined from the general requirement of a fair trial. Thus, in relation to (not only) admission of evidence principles were defined which, though not expressly stated in the Convention, and an inseparable part of the concept of a fair trial. They are primarily the principle of equal weapons and adversarial proceedings.

60. The right to a fair hearing can not be separated from the general requirement of equality and non-discrimination. In this context, however, the meaning of equality is one that applies to the equality of parties in proceedings before a court, found in various opposed procedural positions, usually called “equal weapons.” In the constitutional order of the Czech Republic this principle is contained in Art. 96 par. 1 of the Constitution, under which “all parties to a proceeding have equal rights before the court,” or Art. 37 par. 3 of the Charter, under which “all parties to such proceedings are equal.” Such equality is not literally stated in the Convention, but the case law of the European Court could not but derive it from the requirement of fairness. A trial is a dispute that is played out through adversarial discussion, in which the parties to the dispute must have “equal weapons,” i.e. the same opportunity to speak and defend “their” truth. In practical life there will usually not be absolute, mathematical equality; it is a relative concept, especially in the sense that it can not completely erase the difference in the procedural and especially factual position of the parties, arising from their different abilities. This unequal position can be compensated to a certain degree by additional guarantees for the weaker party, so-called favor defensionis, which is manifested by, e.g. regulation of the burden of proof (see, e.g. B. Repík, *Evropská úmluva o lidských právech a trestní právo* [The European Convention for the Protection of Human Rights and Criminal Law], Orac, 2002, p. 144 et seq., similarly also B. Repík, *Ľudské práva v súdnom konaní* [Human Rights in Court Proceedings], MANZ Bratislava, 1999, p. 155 et seq.). In the decision in the matter *De Haes and Gijssels v. Belgium* (1997), (in par. 55 of the reasoning), the European Court again confirmed that the principle of equal weapons - an element of the wider concept of a fair trial - requires that each side be given a reasonable opportunity to defend its position under conditions which do not place it at a substantial disadvantage in relation to its opponent. It also stated a similar opinion in the matter *Ankerl v. Switzerland* (1996), (in par. 38 of the reasoning of the decision).

61. The Constitutional Court has also considered the equality of parties to proceedings in a number of its decisions. For example, in the matter file no. IV. ÚS 13/98 (Collection of Decisions of the Constitutional Court, Volume 12, judgment no. 98) it stated that “the

principle of equality of the parties is a key principle of a fair trial. It is enshrined in Art. 37 par. 3 of the Charter and in Art. 96 par. 1 of the Constitution of the Czech Republic and is also reflected in a number of provisions in procedural regulations. The Civil Procedure Code expressly provides the equality of parties to proceedings in § 18, from which a court has an obligation to ensure the parties the same, i.e. equally effective opportunities to exercise their rights.” Under the judgment in the matter file no. Pl. ÚS 15/01 (Collection of Decisions of the Constitutional Court, Volume 24, judgment no. 164) “The constitutional principles forming one of the components of the fundamental right to a fair trial include the principle of “equal weapons,” or the principle of equal opportunities (i.e. the principle of equality of all parties to proceedings) under Art. 37 par. 3 of the Charter , Art. 96 par. 1 of the Constitution and Art. 6 par. 1 of the Convention. The principle of “equal weapons” (Art. 6 par. 1 of the Convention) has been distinctively reflected in the existing case law of the European Court of Human Rights. In that context it can be described, in particular, by saying that in the Court’s opinion its foundation is the idea of equality, wherefore it is comparable to the principle of the ban on discrimination under Art. 14 of the Convention.”

62. Unlike the principle of equality of parties in proceedings before a court, at the constitutional law level the question of who in a civil trial is to bear the burden of proof is not expressly regulated. The European Court has said regarding this issue, e.g. in the matter *Blücher v. Czech Republic* (2005) and similarly in the matter *Tiemann v. France and Germany* (2000), that “Article 6 par. 1 of the Convention does not set any rules for the permissibility or evidentiary value of evidence of the burden of proof, which are questions that are basically subject to domestic law.”

63. Thus, the Convention and the Charter guarantee a fair trial, but do not regulate presentation of evidence as such, although this is a substantial, if not the most important part of a trial. Of course, this does not mean that presentation of evidence is somehow “apart” from the constitutional law level and regulation of it is exclusively the province of statutes. The fundamental principles of a fair trial, namely the principles of equal weapons and its adversarial nature, governing the entire trial, necessarily also apply to presentation of evidence. For example, in the matter file no. IV. ÚS 167/96 (Collection of Decisions of the Constitutional Court, Volume 6, judgment no. 93) the Constitutional Court stated that “it is aware of the importance of the institution of the burden of proof, because it permits the court to decide even in a case where it is not possible to completely clarify the factual situation. However, this institution too is subject to a certain procedural law framework, as it is defined primarily by the principles of an impartial and fair trial, arising from Article 90 of the Constitution of the CR , as well as from Article 36 par. 1 of the Charter. That means, among other things, that the court can not impose the burden of proof on one of the parties without anything further and in a one-sided manner, but only in the context of all relevant circumstances of the case.”

64. Thus, at the constitutional law level the principle of equal weapons in a civil trial, contained in the right to a fair trial, generally also includes equality of the burdens which are laid on the parties to the proceedings (and which must not be disproportionate), and

that in the contrary case the proceedings as a whole can not be considered fair. This general principle of equality of the parties must then also be reflected in the legal regulation of presentation of evidence at the statutory level.

65. The statutory regulation of an adversarial civil trial is governed by the principle to hear, under which it is fundamentally a matter for the parties to the proceedings to make claims of fact and propose proof of them. The burden of proof lies in a party's procedural responsibility to see to it that the facts he claims will be proved in the trial. Thus, in an ordinary civil adversarial trial each party bears the burden of proof for those facts that he himself asserts. The general regulation of presentation of evidence in § 120 of the CPC, where, under paragraph one "the parties are required to identify evidence to prove their claims," clearly specifies that the initiative for gathering evidence fundamentally lies on the parties. Thus, a party has the obligation (burden) of assertion and obligation (burden) of proof. The burden of proof is an institution of procedural law which affects the party in whose interest it is for a certain fact, decisive under substantive law and asserted by the party, to be proved in the trial, so that the court recognizes it as true (cf. Bureš, Drápal, Krčmář, Mazanec, *Občanský soudní řád - Komentář*, 6.vydání [The Civil Procedure Code - Commentary, 6th ed.], p. 450 et seq.).

66. The Constitutional Court does not share the Regional Court's claim that the difference in the treatment of the defendant in proceedings under § 133a par. 2 of the CPC, compared to the standard procedural position of the defendant under the general provisions of the Civil Procedure Code on the burden of proof is discriminatory toward the defendant primarily for the following reasons.

67. The Constitutional Court is of the opinion that the specific statutory regulation of presentation of evidence in proceedings under § 133a of the CPC, in which the plaintiff claims that he was directly or indirectly discriminated against (as a rule with the simultaneous claim of violation of rights enshrined in the Civil Code or the Labor Code, and exercising the responsibility arising therefrom), is an exception from the abovementioned general principles of evidence. By its nature this is a rebuttable legal presumption that specifies that proving the opposite is the obligation of the defendant. It obviously differs from the general standards of proof in § 120 of the CPC, because to a certain extent it favors the plaintiff at the expense of the defendant, who seeks nothing before the general courts, but must nevertheless prove something that it did not claim. From this purely formal point of view one can assert that the defendant is, in proceedings where § 133a par. 2 of the CPC is applied, to a certain extent disadvantaged in comparison with the plaintiff. However, shifting the burden of proof to the defendant is not full, or automatic. The person who claims that he is a victim of discrimination must first present to the court facts that sufficiently justify a conclusion that there was possible discrimination, although this is not sufficiently clear from the wording of § 133a par. 2 of the CPC. This conclusion is consistent with the legal opinion of the European Court of Justice (the "ECJ") expressed in the decision of the court of first instance of 16 March 2004 in the case *Afari v. European Central Bank* (T-11/03).

68. Undoubtedly, in proceedings listed in the contested § 133a par. 2 of the CPC (and likewise in labor proceedings - § 133a par. 1 of the CPC) the defendant is treated differently in relation to proof than are defendants in other civil law proceedings, and this difference is an advantage for the plaintiff, and thus obviously a disadvantage for the defendant. Whether this disadvantage can be considered unconstitutional discrimination must be weighed

a) from the viewpoint of an objective and reasonable entitlement, i.e. whether this disadvantage pursues a legitimate aim, and

b) from the viewpoint of a reasonable relationship (proportionality) between the legitimate aim and the means by which that aim is achieved.

69. The Constitutional Court has spoken on the relationship between discrimination and the public interest, e.g. in judgment file no. Pl. ÚS 9/95 (Collection of Decisions of the Constitutional Court, Volume 5, p. 107, published as no. 107/1996 Coll.), in which it stated that “it is up to the state to specify conditions under which it provides an advantage to a particular group of persons, of course, on the assumption that it is doing so in the public interest and for the public good, where the public interest undoubtedly includes promotion of the principles of democracy and human rights.”

70. As stated above, different treatment is discriminatory under Art. 14 of the Convention if it lacks objective and reasonable justification, i.e. a) it does not pursue a legitimate aim and b) there is not a proportional relationship between the means used and the aim pursued.

71. As regards the legitimacy of the aims pursued by § 133a par. 2 of the CPC (and likewise the non-contested § 133a par. 1 of the CPC), it is obvious (and also correctly stated in the position statements of the Chamber of Deputies and the Senate), that the cited provision became part of the Civil Procedure Code in connection with the obligation of the Czech Republic, as a member state of the European Union, to reflect in its legal order the obligations arising from the relevant European directives. The constitutional dimension of this obligation is framed by Art. 1 par. 2 of the Constitution, under which “the Czech Republic observes the obligations which arise for it from international law.” The reasons themselves for passing so-called anti-discriminatory directives are similarly expressed, especially in their preambles. Primarily they are concerned with effective promotion of the principle of equal treatment, which is understood to be the non-existence of any direct or indirect discrimination on the basis of sex, race, ethnic origin, and other reasons specified in the directives. In fact this is the result of several years of development in the European Union, which is, as provided by Article 6 of the Treaty on the European Union, established on the principles of freedom, democracy, respect for human rights and fundamental freedoms, as well as on the principles of a law-based state, principles which are common to the member states; the European Union recognizes as general legal principles of the Community the fundamental rights as they are guaranteed by the Convention and as they follow from the constitutional traditions common to the member states. The cited anti-discrimination directives have a common point of departure, under which persons who have been subject to discrimination, should have effective means for legal protection.

Therefore, domestic legal frameworks are to ensure, among other things, special regulation of the burden of proof. It is supposed to be based on the principle that if a person who feels injured by non-observance of the principle of equal treatment proves to the court facts which indicate that there was direct or indirect discrimination, the burden of proof shifts to the opponent, who is required to prove that there was no violation of the principle of equal treatment (see, e.g., Art. 8 par. 1 of Council Directive 2000/43/EC). The Constitutional Court accepts that, if the Convention is to be primarily and above all a system for protecting human rights, it is essential to take into account the changing conditions in the states parties, and to respond to any newly arising consent, as regards standards that are to be achieved and that are, in this case, expressed especially in the preamble and normative provisions of individual anti-discrimination directives. For that reason the Constitutional Court respects the expression of the will of member states of the European Union expressed in the cited directives, and states that the contested § 133a par. 2 of the CPC does pursue a legitimate aim.

72. It remains to be decided whether the second condition has also been met, that is, whether there is a proportional relationship between the means used and the aim pursued. Although it is not the Constitutional Court's primary task to independently evaluate to what extent, or at what legislative-technical level of quality the legislature succeeded in projecting the obligations arising from Council Directive 2000/43/EC into the Civil Procedure Code, or whether the legislature succeeded in expressing the legitimate aims of the directive in the clear language of the law, it must be stated that at first glance it is obvious that the condition contained in Article 8 par. 1 of the cited directive, according to the unofficial revised wording of which in ISAL (Information System for Approximation of Law) "the member states shall enact, in accordance with their legal systems, the necessary measures so that, as soon as a person feels injured by the failure to observe the principle of equal treatment and submits to the court ... facts indicated that direct or indirect discrimination occurred, it fell to the opponent to prove that the principle of equal treatment had not been violated," that is, a condition that the plaintiff shall present to the court facts indicating that discrimination occurred, is not sufficiently transparently expressed in the existing wording of § 133a of the CPC. For comparison, we can point to the legal regulation of the Slovak Republic, where, under § 11 par. 2 of Act no. 365/2004 Coll., on Equal Treatment and Certain Areas and Protection from Discrimination and Amending and Supplementing Certain Acts (the Anti-Discrimination Act) "the defendant is required to prove that he did not violate the principle of equal treatment, if the plaintiff presents to the court evidence from which one can reasonably conclude that the principle of equal treatment was violated." However, despite these facts, the Constitutional Court is of the opinion that a constitutional interpretation of the contested § 133a par. 2 of the CPC can not lead to a conclusion other than that which arises from the cited directive and from the statements from the Senate and the European Roma Rights Center, i.e., that § 133a par. 2 of the CPC does not have the nature of a rebuttable presumption of responsibility being on the defendant. Thus, application of it requires that, in the first place, the plaintiff himself prove prima facie interference; thus, a mere unsubstantiated claim of alleged discrimination is not sufficient.

73. Thus, in the Constitutional Court's opinion, one can not conclude from interpretation of § 133a par. 2 of the CPC that it is enough for a person who felt racially discriminated against when purchasing services to simply claim that discriminatory conduct occurred. That person must, in court proceedings, not only claim, but also prove, that he was not treated in the usual, non-disadvantaging manner. If he does not prove this claim, he can not succeed in the proceedings. He must also claim that the disadvantaging treatment was motivated by discrimination on the basis of racial or ethnic origin. Of course, he does not have to prove that motivation; it is assumed in the event of proof of different treatment, but is rebuttable, if the contrary is proved (through evidence). In any case, the requirement that the plaintiff must prove that he was discriminated against precisely and exclusively because of his racial (ethnic) origin, and not for other reasons, is quite obviously impossible to meet, because proving the defendant's motivation (impetus) is ruled out by the nature of the matter.

74. This conclusion is consistent with the line of thinking of the ECJ on the interpretation of the previous community directive on non-discrimination, under which if someone "pleads that the principle of equal treatment has been infringed to their detriment and establishes facts from which it may be presumed that there has been direct or indirect discrimination, Community law is to be interpreted as meaning that it shall be for the defendant to prove that there has been no breach of that principle" (see ECJ decision of 10 March 2005 in the matter *Nikoloudi v. OTE*; C-196/02).

75. Therefore, in the Constitutional Court's opinion the petitioner's opinion will not stand - the opinion being that in proceedings cited in the contested provision of the Civil Procedure Code "the plaintiff is given an advantage, because it does not have to prove what is alleged to have happened and why it is being complained of, whereas the defendant is disadvantaged, because it is supposed to prove something that did not happen." In reality the burden of proof does not lie only and exclusively on the defendant. The plaintiff also bears a burden of claiming and a burden of proof. If the plaintiff successfully bears these burdens, which the court must decide in the individual case, it is then up to the defendant to prove his claim that discrimination on racial (ethnic) grounds did not occur. For the foregoing reasons the Constitutional Court concluded that § 133a par. 2 of the CPC is a proportionate means for achieving the aim pursued, or that - if it is applied in the abovementioned constitutional manner - a fair balance between the requirements of the public interest of society and the requirements of protection of individual fundamental rights will be preserved.

76. The Constitutional Court takes this presented opinion despite the position of the Ministry of Justice. The content of that position indicates that the Ministry of Justice has essentially the same opinion as the petitioner: that the "total" burden of proof lies on the defendant, and only on him (even if allegedly provided by the legislature with milder conditions for shifting the burden of proof to the defendant). The Ministry of Justice merely - unlike the petitioner - considers this situation to be constitutional. That is of course not the case; the Constitutional Court notes that the Ministry of Justice apparently overlooked the fact that transposition of the cited directives must range within the

constitutional bounds of a fair trial; the interpretation presented both by the Ministry of Justice and by the petitioner can not be accepted, because it would exceed those bounds.

77. For the abovementioned reasons the Constitutional Court concluded that the existing legal framework can still be interpreted in such a manner that it can be considered consistent with the fundamental right to a fair trial enshrined in Art. 6 par. 1 of the Convention and as not establishing discrimination under Art. 14 of the Convention. Thus, the Constitutional Court did not find grounds to annul the provision, and denied the petition under § 70 par. 2 of the act on the Constitutional Court.

78. Of course, the Constitutional Court considers it undisputed that the formulation of the contested Civil Procedure Code provision requires, especially in terms of the test of proportionality, an interpretation which is virtually a borderline case where one can still, by interpretation of the statutory text, conclude that it is precisely as a result of this interpretation that the contested provision can be considered constitutional. Therefore it would be extremely desirable for the legislature to consider whether it can not conduct the transposition of the cited EC Council directives for the target audience of the relevant procedural norms in a somewhat more clear manner.

Notice: Decisions of the Constitutional Court can not be appealed.

Brno, 26 April 2006