2006/06/06 - PL. ÚS 42/04: MAN CARING FOR CHILD

HEADNOTES

The merits of the matter - as summarized in detail above – lie in the legal regulation under which, for purposes of pension insurance, a man is considered to be a person caring for a child aged up to four years only if he filed an application for insurance benefits no later than two years after ending the care for the child.

Fundamental rights or freedoms can quite exceptionally be limited in the event of their conflict with a public good (public interest); however, in that regard the essential consideration is the maxim under which a fundamental right or freedom can be limited only in the event of an exceptionally strong and duly justified public interest, and the essence and significance of the limited fundamental right must be carefully preserved. Thus, the first condition is balancing the conflicting fundamental right and the public interest (a so-called "false" conflict – unlike a conflict between two fundamental rights); the second is the already emphasized need to preserve the essence and significance of the limited fundamental right or freedom (Art. 4 par. 4 of the Charter). Balancing, then, as usual, consists of the following criteria: the first is the criterion of suitability, that is, an answer to the question whether the institution limiting a certain fundamental right permits the accomplishment of the aim pursued; another is the criterion of necessity, consisting of comparing the legislative means which limits the fundamental right or freedom with other measures which permit the accomplishment of the same aim, but do not affect fundamental rights and freedoms. In terms of these conditions for observance of the principle of proportionality a reviewed statutory provision which markedly violates a fundamental rights arising from the constitutional principle of equality can not stand; even if the main aim it pursues is the effective management of public funds, it does not fulfill the cited condition of necessity, which consists of comparing a legislative means which limits a fundamental right with other possible measures which permit achieving the same aim without interfering in the constitutionally protected principle of equality between the sexes. Elimination of arbitrariness then lies, as repeatedly emphasized above, particularly in the fact that no privilege or discrimination can be applied outside reasonable and objective criteria. In this matter, however, that is not the case, for the reasons already stated.

The consequences in this situation are – in connection with Art. 1 a Art. 3 par. 1 of the Charter of Fundamental Rights and Freedoms – discrimination, in particular in relation to the right to proportionate material security in old age under Art. 30 par. 1 of the Charter. The contested provision evidently violates these articles, because selected subjects are discriminated against, without sufficient grounds, in comparison to other subjects who find themselves in a completely identical legal position. The Constitutional Court therefore considers that the contested provision – taken comprehensively - creates an unjustified inequality among subjects participating in pension insurance, established by accepting the institution of filing a mandatory application for participation in insurance for a man, by a deadline of two years after ending the care for a child. In this regard, the Constitutional Court found no reason

capable of explaining the unequal approach to subjects who find themselves in the same situation as described in detail above.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court, composed of Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Vladimír Kůrka, Dagmar Lastovecká, Jan Musil, Jiří Mucha, Jiří Nykodým, Miloslav Výborný, Pavel Rychetský, Eliška Wagnerová a Michaela Židlická decided on a petition from the petitioner, the Supreme Administrative Court, under Art. 95 par. 2 of the Constitution of the CR, seeking the annulment of § 5 par. 3, second and third sentences, of Act no. 155/1995 Coll., Pension Insurance, as amended by later regulations, and of § 6 par. 4 let. a), point 11 of Act no. 582/1991 Coll., on Organization and Implementation of Social Security, as amended by later regulations, in the part expressed by the words "care by a man for a child aged up to four years, care for a child aged up to 18 years, if the child has long term health disabilities requiring special care" and" and by the words "these children and," as follows:

The provisions of § 5 par. 3 second and third sentences of Act no. 155/1995 Coll., On Pension Insurance, as amended by later regulations and § 6 par. 4 let. a), point 11 of Act no. 582/1991 Coll., on Organization and Implementation of Social Security, as amended by later regulations, in the parts expressed by the words "care by a man for a child aged up to four years, care for a child aged up to 18 years, if the child has long term health disabilities requiring special care" and" and by the words "these children and," are annulled as of 1 July 2007.

REASONING

I.

1. The petitioner, in accordance with Art. 95 par. 2 of the Constitution of the CR, by its petition sought the annulment of § 5 par. 3, second and third sentences, of Act no. 155/1995 Coll., on Pension Insurance, as amended by later regulations ("Act no. 155/1995 Coll." or the "Pension Insurance Act") and § 6 par. 4 let. a), point 11 of Act no. 582/1991 Coll., on Organization and Implementation of Social Security, as amended by later regulations ("Act no. 582/1991 Coll." of the "Act on Organization and Implementation of Social Security) in the parts expressed by the words care by a man for a child aged up to four years, care for a child aged up to 18 years, if the child has long term health disabilities requiring special care" and" and by the words "these children and."

2. In the petition to open proceedings the petitioner stated that in the matter of the plaintiff M. H. against the defendant, the Czech Social Security Administration, a decision of the District Social Security Administration in Děčín, dated 28 June 2001, ref. no. POD 20/2001/DZ/Če, ruled that, in the period from 1 April 1996 to 8 February 1998, the plaintiff could not be considered to be a person caring for a child under § 5 par. 1 let. r) of Act no. 155/1995 Coll., as amended. The decision was based on the grounds that the plaintiff filed an application for insurance benefits and simultaneously the petition to open proceedings on the time and extent of care by a man for a child aged up to four years after the two-year deadline provided by law had expired, and therefore he could not be considered a person specified in § 5 par. 1 let. r) of Act no. 155/1995 Coll. The defendant denied the plaintiff's appeal by decision of 14 August 2001, ref. no. DP/2220/01, and confirmed the decision contested by the appeal, the decision of the District Social Security Administration of 28 June 2001. The defendant based its decision on the grounds that under § 5 par. 3 of Act no. 155/1995 Coll. a man is considered to be a person specified in paragraph 1 let. r) only if he filed an application for insurance benefits no later than two years after ending care for a child. The plaintiff filed a petition to open proceedings at the appropriate district social security office on 21 June 2001, i.e. after the end of the statutory deadline. In the reasoning of the decision the defendant also stated – as regards the plaintiff's appeal objection, that he interrupted entrepreneurial activity because of caring for a child – that it admitted as evidence the plaintiff's file as a self-employed person, maintained by the first-level administrative body, and determined that the plaintiff had periodically terminated his entrepreneurial activities without stating a reason since 1994. The plaintiff filed an appeal against the defendant's decision with the Regional Court in Ústí nad Labem, in which he objected, among other things, that he had not been properly instructed by the employees of the District Social Security Administration, whose expertise he trusted, how he was supposed to proceed in the matter, and that he filed the application for insurance benefits late as result of the inadequate instructions. However, the Regional Court in Ústí nad Labem confirmed the defendant's decision by its decision of 18 October 2001, file no. 15 Ca 338/01. The court did not consider the necessity of meeting this administrative condition to be discriminatory; according to the court the substantial thing was that the plaintiff did not meet the condition for being included in the group of insured persons, and not the reasons for which it happened. The plaintiff filed an appeal against the decision of the Regional Court in Ústí nad Labem, but the High Court in Prague, by its decision of 6 February 2002, confirmed the contested decision. The court stated, among other things, that the provisions of the statute which imposed the duty in question on the plaintiff was quite clear, and the statute did not provide any exceptions to it.

3. The plaintiff filed an appeal on a point of law ("dovolání") against this decision, claiming that the decision was based on incorrect legal assessment of the matter. As in the previous appeal ("opravný prostředek"), in this appeal too he objected that § 5 of Act no. 155/1995 Coll. discriminates against men, because women are not restricted by any deadline. He considers this provision to be inconsistent with Art. 1 of the Charter of Fundamental Rights and Freedoms; in his opinion, even if that inconsistency did not exist, there would still be an inequality in rights between men and women in this case, because the appropriate bodies do not have an express duty to inform regarding this issue, and men, who still tend to be

exception in cases of caring for a child, can not learn about this deadline.

4. The Supreme Court – in view of a change in the legal regulation – transferred the appeal on a point of law, under § 129 par. 4 of Act no. 150/2002 Coll., the Administrative Procedure Code (the "APC"), to the Supreme Administrative Court (the petitioner) to complete the proceedings pursuant to the provisions of part three chapter three division one of the Act, that is, to complete the proceedings pursuant to the provisions regulating proceedings on a cassation complaint.

5. In reviewing the matter, the Supreme Administrative Court was of the opinion that § 5 par. 3, second and third sentences, of Act no. 155/1995 Coll., on Pension Insurance, as amended by later regulations, as well as § 6 par. 4 let. a) point 11 of Act no. 582/1991 Coll., on Organization and Implementation of Social Security, as amended by later regulations, which must be applied in the matter, are inconsistent with the constitutional order of the Czech Republic, insofar as it provides that a man is considered to be a person caring for a child aged up to four years, or for a child aged up to 18 years, if the child has long term serious health disabilities requiring special care, only if he filed an application for insurance benefits no later than two years after ending the care for the child "and the man proves the period of the care for the child through a decision by the District Social Security Administration on the period and scope of that care issued in administrative proceedings opened upon his application." Under § 5 par. 1 let. r) of Act no. 155/1995 Coll. on Pension Insurance (the "Pension Insurance Act"), as amended by later regulations, the category of persons who, upon fulfilling the conditions specified by this Act, draw pension insurance benefits, includes persons caring for a child aged up to four years, or a child aged up to 18 years, if the child has long-term serious health disabilities requiring special care. under § 5 par. 3 of the Act a person specified in paragraph 1 let. r) means a child's parent, a person to whom the child was entrusted in foster care by a court decision, or to whom a child was entrusted by decision of the appropriate body, and the husband (wife) of a child's parent, if the child was entrusted to the other spouse for upbringing by court decision or if the other parent has died or is unknown. Under the second sentence of that paragraph, a man is considered to be a person specified in § 5 par. 1 let. r), only if he filed an application for insurance benefits no later than two years after ending the care for the child; if he did not file the application by that deadline, he can not be considered to be a person specified in paragraph 1 let. r). Under the third sentence of that paragraph, sentence two applies analogously to a person who cares for a child aged up to 18 years, if the child has long-term serious health disabilities requiring special care. Act no. 582/1991 Coll., on Organization and Implementation of Social Security, as amended by later regulations, in § 6 par. 4 let. a) point 11 entrusts the District Social Security Administration with, among other things, deciding on the period and extend of care by a man for a child aged up to four years and care for a child aged up to 18 years, if the child has long-term serious health disabilities requiring special care, where the period of care for these children is after 31 December 1995. Under § 85 par. 2 of that Act, the periods of care specified in § 6 par. 4 let. a) point 11 are proved by a decision by the District Social Security Administration on the period and extent of the care. The application to open proceedings is filed on a pre-printed form, and the petition can be filed no earlier than after ending the care or during the period of care in connection filing an application for a pension, but not before filing an application

to draw pension insurance benefits under § 5 par. 3 second sentence and par. 4 of the Act on Pension Insurance, but no later than two years after ending the care.

6. In the petitioner's opinion, it follows from the foregoing that the Pension Insurance Act distinguishes between and sets different conditions for a parent or another person (placed on the same level in § 5 par. 3 first sentence) for drawing pension insurance benefits, based on caring for a child aged up to four years, care for a child aged up to 18 years, if the child has long term health disabilities requiring special care, depending on whether the person is a man or a woman. For a woman (the child's mother or another women – a person specified in § 5 par. 3 first sentence) the mere caring for the child (if it does not overlap with another, more advantageous form of insurance benefits) suffices for the period of care for a child, as an alternative insurance period, to be added to the total insurance period for an entitlement to a pension and the percentage level of the pension. For a man to draw pension benefits, the Pension Insurance Act imposes an additional condition, that he must file an application for insurance benefits by the deadline set by law, and must also, by the deadline set by law, file a petition to open proceedings, in which the administrative body will rule on the period and extend of his care for the child. If he misses the deadline set by the Act, then, even though he cared for the child, that care does not form a basis for insurance benefits, and the period of that care is not included in the total period for an entitlement to a pension and the percentage level of the pension. Thus, although there are no substantive grounds tied to a difference in sex, purely based on a difference in the sex of the person caring for a child, establishes the right for that person's pension insurance benefits in a different manner and sets unequal conditions for men and women for pension insurance benefits in connection with care for minor children. For these reasons, the Supreme Administrative Court believes that conditioning a man's pension insurance benefits on filing an application for pension insurance benefits by a statutory deadline and filing a petition to open proceedings in which the administrative body will rule on the period and extend of his care for a child, is inconsistent with the constitutional order, specifically with Art. 1, Art. 3 par. 1 and Art. 30 par. 1 of the Charter of Fundamental Rights and Freedoms, because it establishes, based on the sex of a person caring for a child, an inequality between men and women in their right to appropriate material security in old age, or during a period of inability to work.

II.

7. The Constitutional Court, in accordance with § 42 par. 3, 4 and § 69 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, sent the petition to the Chamber of Deputies and the Senate of the Parliament of the Czech Republic for their positions, and also requested a written position statement from the Ministry of Labor and Social Affairs (§ 48 par. 1, 2 of the Act). These bodies sent in their opinions on the constitutional complaint.
…

III.

13. The provisions of the Pension Insurance Act and the Act on Organization and Implementation of Social Security which the petitioner contests and requests to be annulled read as follows:

14. § 5 par. 3 of the Pension Insurance Act – A person specified in paragraph 1 let. r) means a child's parent, a person to whom the child was entrusted in foster care by a court decision, or to whom a child was entrusted by decision of the appropriate body, and the husband (wife) of a child's parent, if the child was entrusted to the other spouse for upbringing by court decision or if the other parent has died or is unknown; parent here also means one who adopts a child. A man is considered to be a person specified in paragraph in paragraph 1 let. r), only if he filed an application for insurance benefits no later than two years after ending care for the child; if he did not file this application by that deadline, he can not be considered a person specified in paragraph 1 let. r). Sentence two also applies analogously to a person who cares for a child aged up to 18 years, if the child has long-term serious health disabilities requiring special care. [Note: § 5 par. 1 let. r) of the Act reads: Persons entitled to insurance benefits, upon fulfilling conditions specified in this Act, are persons caring for a child aged up to four years or for a child aged up to 18 years, if the child has long-term serious health disabilities requiring special care.]

15. § 6 par. 4 let. a) point 11 of the Act on Organization and Implementation of Social Security – The District Social Security Administrations shall rule on the period and extend of care by a man for a child aged up to four years, care for a child aged up to 18 years, if the child has long-term serious health disabilities requiring special care, and care by a person who personally cares for a mostly or completely helpless person, or a partially helpless person over 80 ears of age, in cases whether the period of care for these children and helpless persons is after 31 December 1995.

IV.

16. The Constitutional Court first, in accordance with § 68 par. 2 of the Act on the Constitutional Court, reviewed whether the Act whose provisions are claimed to be unconstitutional by the petitioners, was passed and promulgated within the bounds of constitutionally provided jurisdiction and in a constitutionally prescribed manner.

17. From the statements of the Chamber of Deputies and the Senate of the Parliament of the CR, as well as from relevant parliamentary publications and voting records, the Constitutional Court determined that the Chamber of Deputies approved the draft of the Pension Insurance Act at its 32nd session on 30 June 1995, i.e. before the establishment of the Senate. The Act was signed by the constitutional officials and on 4 August 1995 it was promulgated in the Collection of Laws, in part 41, as number 155/1995 Coll. Thus, the Pension Insurance Act was passed in a constitutionally prescribed manner and within the bounds of

constitutionally provided jurisdiction, with observance of the rules provided in Article 39 par. 1 and 2 of the Constitution. Act no. 134/1997 Coll., amending the contested provisions of the Pension Insurance Act (the third sentence was inserted) was also properly passed, as the draft of the Act was approved by the Chamber of Deputies on 23 May 1997 and by the Senate on 11 June 1997. The Act was signed by the appropriate constitutional officials, and promulgated in the Collection of Laws, in part 48, as number 134/1997, on 26 June 1997. (The Act on Pension Insurance, no. 155/1995 Coll. was amended by a number of other statutes, but these amendments did not affect the contested provision.)

18. As regards the contested provision of the Act on Organization and Implementation of Social Security, no. 582/1991 Coll., the Constitutional Court states that as regards statutes issued before the Constitution of the Czech Republic went into effect, the Constitutional Court is authorized to review only the consistency of their content with the current constitutional order, but not the constitutionality of the process of their creation and the observance of norm-creating authority. In terms of formal review of constitutionality the Constitutional Court therefore reviewed only the amendments of the Act which affected the contested provisions; these are primarily Act no. 160/1995 Coll., which Amends and Supplements Certain Acts in Connection with Passing the Act on Pension Insurance. In this regard it determined that the Act was duly approved on 30 June 1995 in the 32nd session of the Chamber of Deputies, was signed by the appropriate constitutional officials, and on 8 August 1995 was promulgated in the Collection of Laws, in part 42, as number 160/95. This Act too was thus passed in a constitutionally prescribed manner and within the bounds of constitutionally provided jurisdiction.

19. Another amendment which supplemented the contested provisions of Act no. 582/1991 Coll., on Organization and Implementation of Social Security, was implemented by Act no. 424/2003 Coll., which Amends Act no. 582/1991 Coll., on Organization and Implementation of Social Security, as Amended by Later Regulations and Certain Other Acts. The Constitutional Court verified that this Act was duly approved on 26 September 2003 in the 20th session of the Chamber of Deputies and on 6 November 2003 in the 11th session of the Senate of the Parliament of the Czech Republic. It was signed by the constitutional officials and on 12 December 2003 was promulgated in the Collection of Laws, in part 139, as number 424/2003. The Constitutional Court thus states that this Act too was passed in a constitutionally prescribed manner and within the bounds of constitutionally provided jurisdiction.

V.

20. After this determination, the Constitutional Court turned to evaluating the content of the contested statutory provisions in terms of their consistency with the constitutional order of the Czech Republic.

21. The essence of the matter is the question whether the abovementioned provisions of the Pension Insurance Act and the related provisions of the Act on Organization and Implementation of Social Security are capable of violating the

principle of equality in rights, generally stated in Article 1 of the Charter of Fundamental Rights and Freedoms, under which people are free, have equal dignity, and enjoy equality of rights, and further specified in Article 3 of the Charter (paragraph 1), under which the fundamental rights and basic freedoms are guaranteed to all, without regard to, among other things, gender, or other status. We must also take into consideration Art. 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, under which the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground, including sex. Likewise, Article 26 of the International Covenant on Civil and Political Rights provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, or birth.

22. After reviewing the matter, the Constitutional Court concluded that the petition must be granted, and the contested statutory provisions annulled.

23. The Constitutional Court is led to that conclusion by the following reasons.

24. 1) The equality of all human beings as subjects of fundamental rights and freedoms is contained in basically all documents protecting human rights. This involves, among other things, the practical recognition and acceptance of the value of every human being as such, regardless of his abilities, knowledge, or "usefulness" or benefit for the whole; from a legal philosophy perspective, this is an expression of an ancient truth – although violated countless times in history – that a person can never be arbitrarily treated merely as a means serving the interests of others. We can state that a free individual's equality in dignity and rights is a basic foundation stone of our constitutional order, and is reflected in the entire Charter of Fundamental Rights and Freedoms.

25. The Constitutional Court has already, in a number of its decisions (for a summary of them, see, e.g. judgment file no. Pl. ÚS 33/96, Collection of Decisions of the Constitutional Court of the CR, Volume 8, Judgment no. 67, pp. 163, 170 et seq.) analyzed in more detail the content of the constitutional principle of equality. Thus, it is necessary to repeat, in particular, that it agreed with the understanding of equality as already expressed by the Constitutional Court of the CSFR in its judgment of 8 October 1992, file no. Pl. ÚS 22/92 (published as no. 11, Collection of Decisions of the Constitutional Court of the CSFR), under which "it is up to the state to decide, in the interest of securing its functions, that it will provide fewer advantages to one group than to another. Even here, however, it may not proceed completely arbitrarily … If the law determines the success of one group and at the same time sets disproportionate obligations on another, this may take place only with reference to the public good." The Constitutional Court of the CSFR thus rejected an absolute conception of the principle of equality, and understood equality as a relative category, which requires, in particular, the removal of unjustified differences and elimination of arbitrariness. It thus shifted the content of the equality principle into the area of constitutional acceptability of viewpoints for differentiating subjects and rights. Thus, legal differentiation in the

approach to certain rights may not be a manifestation of arbitrariness, but it does not categorically mean that any right has to be recognized for everyone. In any case, Article 1 of the Charter of Fundamental Rights and Freedoms can not be interpreted in isolation from the other general articles, 2 to 4 of the Charter; on the contrary, they must be understood as a single whole. It is evident from these general provisions that the constitutional framers did not conceive even the fundamental protected values named in Article 3 of the Charter as absolute. In the matter file no. Pl. ÚS 4/95 (Collection of Decisions of the Constitutional Court of the CR, Volume 3, Judgment no. 29, pp. 209 et seq.) the Constitutional Court stated, among other things, that inequality in social relations, if it is to affect fundamental human rights, must reach an intensity which casts doubt, at least in a certain regard, on the very essence of equality. This usually happens if the violation of equality is also connected to violation of another fundamental right.

26. As the Constitutional Court also stated in judgment file no. Pl. ÚS 15/02 (Collection of Decisions of the Constitutional Court of the CR, Volume 29, Judgment no. 11, pp. 79, 87 et seq.) the constitutional principle of equal rights belongs to those fundamental human rights which constitute the value system of modern democratic societies. The principle of equality is a legal philosophical postulate which is guaranteed on the level of positive law by a ban on discrimination. Equality is not an unchanging category, as it undergoes development which leaves significant marks on its content, particularly in the area of political and social rights. International documents on human rights and many decisions by international supervisory bodies are also based on the idea that not every unequal treatment of various subjects can be classified as violation of the principle of equality, that is, as illegal discrimination against one group of subjects compared to others. A number of conditions must be met in order for this principle to be violated: various subjects who are in the same or a comparable situation are treated in a different manner, without any objective or reasonable grounds for applying a different procedure. Here we can add that in its settled case law the European Court of Human Rights analogously states that different treatment of persons in analogous or comparable situations is discriminatory if there is no objective and reasonable justification, i.e. if it is not for a legitimate aim, or if the means used are not proportionate to that aim. Likewise, in applying Art. 26 of the Covenant, the UN Committee for Human Rights has repeatedly expressed the opinion that eliminating arbitrariness lies in not permitting discrimination outside reasonable and objective criteria. International documents and court decisions often distinguish formal equality (i.e. equal treatment of formally equal subjects in formally equal cases) and substantive equality (i.e. formally unequal treatment of subjects who are in fact unequal, which is intended to compensate for this factual inequality and thus help create actual equality between them). The latter case is often called “positive” discrimination, if it introduces advantageous treatment of subjects who are in fact at a marked disadvantage compared to others (preferential treatment). Thus, the means of preferential treatment are not fundamentally inconsistent with the legal principles of equality and a ban on discrimination, if they are applied with a view to removing factual discrimination between these subjects. The legislature has some discretion in considering whether to enshrine such preferential treatment in the legal order. In doing so, it must take care to see to it that the preferential approach is based on objective and reasonable grounds (a legitimate legislative aim) and that there is a proportionate

relationship between that aim and the means used to achieve it (legal advantages). In the area of civil and political rights and freedoms, which is immanently characterized by the state's obligation to refrain from interfering in them, there is generally only minimal room for preferential treatment of certain subjects. In contrast, in the area of economic, social, cultural and minority rights, where the state, on the contrary, has an obligation to intervene – as the intervention is supposed to remove blatant aspects of inequality between various groups in a society of complicated social, cultural, professional or other levels – the legislature logically has at its disposal much greater discretion to effectuate its concept of the permissible bounds for inequality in fact in the society (cf. Pl. ÚS 15/02).

27. Thus, from the perspective of the abovementioned fundamental principles and previously reached conclusions of the Constitutional Court, it was necessary to evaluate in this case whether the legal framework, consisting of the contested provisions of the Pension Insurance Act and the Act on Organization and Implementation of Social Security, is not an expression of arbitrariness, and also whether there was a legitimate attempt at – in a way justified – preferential approach, and not an unconstitutional differentiation between the affected subjects (men and women) which is not based on objective and reasonable grounds and viewpoints. One of the essential signs of a democratic law-based state is the principle of proportionality, which assumes, in particular, that measures which limit fundamental rights and freedoms may not have negative effects which exceed the accomplishments represented by the public interest in these measures.

28. The merits of the matter - as summarized in detail above – lie in the legal regulation under which, for purposes of pension insurance, a man is considered to be a person caring for a child aged up to four years only if he filed an application for insurance benefits no later than two years after ending the care for the child. It must be stated – in agreement with the opinion of the Senate of the Parliament of the CR and with the position of the Ministry of Labor and Social Affairs – that, as regards a person caring for a child aged up to 18 years, if the child has long term serious health disabilities requiring special care, the cited condition also applies to a woman (§ 5 par. 3, third sentence) so in that regard no inequality between the sexes can occur (but see pp. 19). However, the Pension Insurance Act does not impose any administrative condition on women – in contrast to men – for participation on pension insurance on the grounds of caring for a child aged up to four, and here an evident inequality undoubtedly occurs. The Constitutional Court therefore concentrated on reviewing the constitutionality of the legal framework consisting of the second sentence of § 5 par. 3 of Act no. 155/1995 Coll., on Pension Insurance.

29. a) According to the statement from the Ministry of Labor and Social Affairs, during preparation of the draft amendment to the Pension Insurance Act this requirement (the condition for men) was key in the search for suitable instruments to prevent allocation of one and the same period to more than one insured party, in particular for reasons of protecting the public interest, because effective management of financial resources allocated for payment of pensions in the amount prescribed by legal regulations must also be considered a public interest. The Constitutional Court therefore posed the question whether this aim can be considered sufficiently legitimate, and in particular, whether it is implemented in a

manner which is proportional to that aim. Although it is evident that effective management of public funds is certainly in the public interest and that the solution applied by the legislature could even be ascribed – especially in practical terms – a certain relevance, it can not be overlooked that this was done at the price of establishing a marked inequality between the sexes and at the price of discriminating against men who care for a child aged up to four. Arguments based on statistical data (contained in the position statement from the Ministry of Labor and Social Affairs), demonstrating that with men these are quite exceptional cases in comparison with the number of women caring for children and that setting the administrative condition only for men (allegedly) requires fulfillment of a "certain cooperation" from a negligible number from that group of people (less than one per thousand), can not stand from a constitutional law viewpoint. On the contrary – taken purely logically – the ministry is inconsistent with itself to a certain degree, because if the number of men is so negligible, then the potential misuse of public funds would surely also not reach such an extent that the cited steps by the legislature would be at all justified, not to mention the fact that here this fraction from the group of insured persons is somehow subject to the possibility of basically unfair treatment. In contrast, however, even if the consequences of this provision affected, or could affect, only a small group or persons, it would be unacceptable from a constitutional viewpoint. As regards the objection in the statement from the Chamber of Deputies, that a woman is relieved of this obligation on the grounds of "such an exception being practical," because from the "model developing in our environment" filing applications for participation in pension insurance by a woman in these cases has acquired the characteristics of a mere formality, we must say that in a law-based state significant interference in fundamental rights or freedoms and violation of the principle of equality between the sexes can not be justified basically by their practicality in terms of the interests and simpler procedures of state bodies. Fundamental rights or freedoms can quite exceptionally be limited in the event of their conflict with a public good (public interest); however, in that regard the essential consideration is the maxim under which a fundamental right or freedom can be limited only in the event of an exceptionally strong and duly justified public interest, and the essence and significance of the limited fundamental right must be carefully preserved. Thus, the first condition is balancing the conflicting fundamental right and the public interest (a so-called "false" conflict – unlike a conflict between two fundamental rights); the second is the already emphasized need to preserve the essence and significance of the limited fundamental right or freedom (Art. 4 par. 4 of the Charter). Balancing, then, as usual, consists of the following criteria: the first is the criterion of suitability, that is, an answer to the question whether the institution limiting a certain fundamental right permits the accomplishment of the aim pursued; another is the criterion of necessity, consisting of comparing the legislative means which limits the fundamental right or freedom with other measures which permit the accomplishment of the same aim, but do not affect fundamental rights and freedoms. (Note: This judgment does not discuss other criteria in more detail, as this would be superfluous.) In terms of these conditions for observance of the principle of proportionality a reviewed statutory provision which markedly violates a fundamental rights arising from the constitutional principle of equality can not stand; even if the main aim it pursues is the effective management of public funds, it does not fulfill the cited condition of necessity, which consists of comparing a legislative means which limits a fundamental right with other possible measures

which permit achieving the same aim without interfering in the constitutionally protected principle of equality between the sexes. Elimination of arbitrariness then lies, as repeatedly emphasized above, particularly in the fact that no privilege or discrimination can be applied outside reasonable and objective criteria. In this matter, however, that is not the case, for the reasons already stated.

30. In evaluating the criterion of necessity (as part of the proportionality test) the Constitutional Court also considered that the state and its bodies evidently also have other opportunities to timely determine or obtain – using existing databases – relevant information for the given issue (for example, the appropriate bodies, state or public, must know to whom they are paying a parental contribution, or who is drawing parental leave), without having to require the cooperation of the entitled subject (a man) beyond a level tolerable for the substance of the matter, and thereby affecting his freedom and, as a consequence, discriminating against him or violating the constitutional principle of equality in that regard. In any case, in a wider sense this is related to the effort to remove unnecessary bureaucratic burdens, that is, to efficiently use and connect the information that, for example, various bodies (state and public) have already obtained or could have obtained in connection with their activities.

31. The consequences in this situation are – in connection with Art. 1 and Art. 3 par. 1 of the Charter of Fundamental Rights and Freedoms – discrimination, in particular in relation to the right to proportionate material security in old age under Art. 30 par. 1 of the Charter. The contested provision evidently violates these articles, because selected subjects are discriminated against, without sufficient grounds, in comparison to other subjects who find themselves in a completely identical legal position. The Constitutional Court therefore considers that the contested provision – taken comprehensively – creates an unjustified inequality among subjects participating in pension insurance, established by accepting the institution of filing a mandatory application for participation in insurance for a man, by a deadline of two years after ending the care for a child. In this regard, the Constitutional Court found no reason capable of explaining the unequal approach to subjects who find themselves in the same situation as described in detail above.

32. For completeness, we can add that arguments based on the alleged consequences of annulling the contested regulation or possible practical complications, as is contained in the position statement from the Ministry of Labor and Social Affairs, will not stand. Here the Constitutional Court considers that – in its opinion – burdening both men and women, in future, by imposing an obligation to file an application for participation in insurance is not the only alternative to the legislative solution this question (in relation to the annulled framework). However, it is not the task of the Constitutional Court, as a judicial body for protection of constitutionality, to give the legislature detailed instructions on how it is supposed to address, at the level of simple law, all situations which come into consideration; its obligation is only to evaluate whether the contested provisions of the legal regulation will stand in terms of constitutionality or not.

33. For this reason the opinion contained in the statement from the Senate of the Parliament of the CR is irrelevant, the opinion that missing the foreclosure

deadline can be addressed in certain cases, as part of eliminating the harshness of the law; this might have a place in proceedings on a constitutional complaint, but not in proceedings on consistency of legal regulations with the constitutional order. This is all the more true if the Constitutional Court find an unconstitutionality in the contested provision which can not be interpreted in a constitutional manner. The fact that the legal order may contain a mechanism which sometimes permits the unconstitutional consequences of such a provision to be mitigated or eliminated of course changes nothing about the unconstitutionality of that statutory provision itself; it is the then duty of the Constitutional Court, as a guarantor of constitutionality in a law-based state, to respond accordingly – i.e. by derogation of the provision.

34. Therefore, we can only conclude that the legislature, by passing the contested provision, did not observe the duty to take an equal approach to subjects of law, and created different groups, one of which, from a constitutional perspective, it discriminated against without justification. Thus, the principle of proportionality between the aims of a statute and the chosen means was violated. Although the postulate of equality – as stated above – does not give rise to a requirement for general equality among all, it does give rise to a requirement that the law not provide advantages or impose disadvantage on one group over another without justification. In the present matter it is undisputed that the contested provision does not observe the requirement to provide the same rights under the same conditions – ruling out unjustified differences – because the legislature, without constitutionally acceptable grounds, disadvantaged those subjects who, even though they in fact cared for a child, can easily find themselves in a situation where – although they fulfill the legal conditions in other respects – they will not participate in insurance, unlike subjects who find themselves in the same situation. Thus, in the Constitutional Court's opinion, the contested provision established differences which can not be adequately justified in a constitutionally qualified manner.

35. It only remains to add that, in view of the categorical formulation of the second sentence of § 5 par. 3 of the Pension Insurance Act, in this regard there was no room here for an interpretation of the contested provision which would consistent with the constitution so as to make it possible not to annul the contested regulation.

36. b) As regards § 5 par. 3, third sentence, of the Pension Insurance Act, the Constitutional Court does state – at a different place (pp. 17, point 28) – that, in the case of a person caring for a child aged up to 18 years, if the child has long term health disabilities requiring special care, the condition in the second sentence also applies to a woman, so that there is no inequality between the sexes here. However, it can not be overlooked that if only the second sentence of § 5 par. 3 of Act no. 155/1995 Coll., on Pension Insurance were annulled, the third sentence, which refers to the second, would lose its meaning. Therefore the Constitutional Court granted the petition by annulling both the second sentence, and the contested third sentence of the provision in question.

37. 2) As regards the contested provision of § 6 par. 4 let. a) point 11 of Act no. 582/1991 Coll., on Organization and Implementation of Social Security, as amended

by later regulations, in the parts expressed by the words “care by a man for a child aged up to four years, care for a child aged up to 18 years, if the child has long term health disabilities requiring special care” and” and by the words “these children and,” the Constitutional Court concluded that the petition to annul them must be granted on analogous grounds as were stated in the foregoing paragraph. This is evidently a provision which is so connected to the annulled provisions of the Pension Insurance Act (and it was for those reasons that the petitioner proposed their annulment), that it is logically inseparable from the annulled provisions of the Pension Insurance Act and is closely related to it. In this regard, however, the Constitutional Court points out that the entire situation requires a systematic approach by the legislature, and a comprehensive solution of the issue, which may include amendment or deletion of other provisions of statutes, coming under consideration in a wider sense, which regulate the reviewed matter.

38. For the reasons stated above, the Constitutional Court granted a proportional delay in executability of this judgment, as this is the only way to permit the legislature to implement a new, constitutionally consistent regulation of this issue.

39. The Constitutional Court, with the consent of the parties, omitted oral proceedings, because further clarification of the matter could not be expected from them.

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

Brno, 6 June 2006

Dissenting opinion
of judge Vladimír Kůrka

I consider the opposite solution to be more persuasive; the contested provisions of the Pension Insurance Act do not lack a rational basis.

At the level of sub-constitutional law, this involves a system of proving conditions which establish participation in insurance, and it is true that this is set more strictly for men than women – in the case of a parent caring for a child under four years of age. However, the fact that participation in insurance must be documented (by a man) can not be considered discriminatory; the situation thus appears to be, that women can demonstrate this participation more simply, and they are given a certain advantage in relation to men.

At the constitutional law level, the question then is whether this advantage from different treatment under the legal framework in effect is reasonably justifiably, if it pursues a legitimate aim and if it meets the condition of suitability, or preserving the essence and significance of rights.

In contrast to the conclusions in the judgment, I lean toward a positive answer, and I consider the reasons submitted by the Ministry of Labor and Social Affairs to

be satisfactory.

It is not objectively possible for “inequality” between men and women to be achieved by applying the existing system for women also to men caring for a child up to for years of age, because their legal positions are in conflict (only one of them can participate in insurance). Thus, implementing formal equality will only bring the result that women will be deprived of the advantages of simple demonstration of their participation in insurance, yet the position of men here can not become more advantageous; there are strong practical reasons for a framework analogous to the cancelled one, under the current second sentence of § 5 par. 3 of the Pension Insurance Act to become (for elimination of “inequality”) universal (for men and women) in future.

Brno, 6 June 2006

Dissenting opinion
of judge Jan Musil

I disagree with the verdict and the reasoning of judgment file no. Pl. ÚS 42/05, and, pursuant to § 14 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, I assert a dissenting opinion to it. I have the following reasons for this dissenting opinion:

1. The existing legal situation is not discrimination against men, but rather the giving of an advantage to women for which legitimate reasons exist (this is a case of “positive” discrimination).

It is necessary in each case to decide clearly in some way which parent is to have the period of caring for a child allocated to the period of pension insurance as a substitute period, because there are two parents, and the care for a child can be allocated to only one of them (§ 14 par. 2 of Act no. 155/1995 Coll., on Pension Insurance, as amended by later regulations). Yet both must demonstrate the entitlement – a woman, when she retires (through a birth certificate and an affidavit that she did in fact care for the child), a man through his statement that he cared for the child. The only relevant difference between men and women lies in the fact that a man must make his claim for time allocation within two years after ending care for the child; the difference between men and women is thus only in the time when they exercise the claim for time allocation. I do not consider this to be discrimination against men, because there are reasonable and acceptable reasons for this differentiation regarding the time for exercising the claim.

2. One rational reason for simplifying the procedure for exercising a claim by women is undoubtedly first of all the undeniable fact that in the overwhelming majority of case it is women who care for very young children; the current legal framework contains a simple mechanism for the contrary situation, when a man cares for a child, to be easily and objectively determined.

An understandable and rationally acceptable reason for differentiating the time for exercising a claim for allocation of the period of care for a child between a man and a woman, under the current legal framework, is the fact that in most cases the child's mother retires before the father, so for that reason too the question of the father's period of insurance must be resolved before that same period is allocated for the mother. After several decades there can be difficulties of proof, and therefore it is required that a man's participation in insurance be reviewed as son as possible after ending care for a child.

3. The current legal framework only forces a man, in his own interest (i.e. for allocation of a substitute period allocable to pension insurance), to perform very simple steps by the deadline in order to exercise his claim (file an application for participation in pension insurance, file a petition to open proceedings to prove the period and scope of care for a child). The minimal cooperation required from the application is usual in the exercising of all social benefit payments or other advantages, and will fully stand up to the light of the principle "let everyone be vigilant about his own rights" (vigilantibus iura).

4. If it were objected that a man may not learn of the statutory expiration period for exercising the claim, we can point to the familiar principle "ignorance of the law is no excuse" (ignorantia iuris non excusat). Similar requirements to exercise a claim in a timely manner are well-known with a number of legal institutions, and do not raise any fundamental objections. We also can not overlook the opportunity that the law provides to correct, in individual cases, the negative consequences of missing the deadline, through the institution of eliminating harshness (§ 4 par. 3 of Act no. 582/1991 Coll.).

5. Quite undoubtedly, the social security bodies which decide on the entitlement and amount of a pension claim protect an important public interest, because the consequences of their decision-making are reflected in the management of public funds, from which insurance benefits are paid. These bodies are required to prevent unjustified benefits from being provided, including duplicate allocation of a substitute period for purposes of participation in pension insurance on the grounds of caring for a child. Fulfilling this duty requires that the facts used for making a decision are objectively determined, including verifying which parent actually cared for a child.

Requiring minimal cooperation from persons who seek to obtain social benefits can not, in my opinion, be considered and "unnecessary bureaucratic burden," as stated in point 30 of the reasoning of the Constitutional Court's decision. I also find no reason to conclude that the requirement of cooperation from the entitled subject (man) means in this case that the legislature "affects the area of his freedom and as a result discriminates against him," as is claimed in the reasoning .

6. Nor do I agree with the thought expressed in point 30 of the reasoning, that a man's cooperation in exercising a claim is not necessary because "the state and its bodies evidently also have other opportunities to timely determine or obtain – using existing databases – relevant information for the given issue." It is claimed that data about the payment of parental contributions or drawing parental leave could serve as a source for this information. This thought is only hypothetical ("evidently

have"), and it may be doubted whether information from these various sources is fully compatible, because the conditions for exercising these various social claims need not necessarily be identical. The Constitutional Court did not consider any evidence concerning the compatibility of these data.

We can presume that it is highly probably that the method of obtaining data for all applicants (men and women) indicated in the judgment would increase the administrative burden and thus also the expense of such a procedure, all at the expense of public budgets for social matters.
One can also object to the process described for reasons relating to protection of personal data. It is generally acknowledged that the combining and comparison of personal data from several different automated information systems, performed by database administrators without the participation of the person concerned, can be a considerable risk for civil rights and freedoms. This is why the law forbids combining personal data which were obtained for differing purposes [cf. § 5 par. 1 let. h) of Act no. 101/2000 Coll., on the Protection of Personal Data as amended by later regulations] and the process described in the judgment would evidently require a change in the current law.

7. We can not rule out the possibility that the derogation stated in the judgment could in future lead to a new legal framework which, paradoxically, will not make men's situation easier, but will worsen the position of women (as indicated in the opinion of the Ministry of Labor and Social Affairs). It is doubtful whether that effect, achieved under the banner of alleged discrimination against men, will bring citizens any benefit in terms of protection of constitutional rights and freedoms.

For all these reasons, I believe that the contested provisions of Act no. 155/1995 Coll., on Pension Insurance, as amended by later regulations and of Act no. 582/1991 Coll., on Organization and Implementation of Social Security, as amended by later regulations, are not inconsistent with the constitutional order of the Czech Republic, and that the petition should have been denied under § 70 par. 2 of the Act on the Constitutional Court.

Brno, 6 June 2006

Dissenting Opinion
of judge Stanislav Balík
I voted against granting the petition. In my opinion the petition should have been denied for the following reasons.

In the past the Constitutional Court has expressed the opinion that "equality is a relative category, which requires the elimination of unjustified differences" (see judgment file no. Pl. ÚS 15/02, in: Collection of Decisions of the Constitutional Court, vol. 29, Judgment no. 11 pp. 79). I conclude that in the contested decisions the differences are justified.

It would certainly be absurd to conclude that the principle mater semper certa est sed pater incertus is discriminatory. I also venture to claim that the roles of a

father and mother in raising and providing for a child can not be fundamentally identical. To the arguments of the Ministry of Labor and Social Affairs on the "traditional model of the Czech family" we can only add as an example that "the first months of a child's life are marked by the mother's influence. Langmeier correctly believes that the quality of harmony in the duo mother-child anticipates the quality of the later interaction within the entire family. Over the course of frequent interactions a firm emotional bond is created between the child and the mother, and later between the child and the father … The child then responds badly to separation from these close persons, in particular the mother." (See. O. Matoušek, Rodina jako instituce a vztahová síť [The Family as Institution and Network of Relationships], Praha, Sociologické nakladatelství, 1993, pp. 61.) I start with the assumption – and according to the statement from the Ministry of Labor and Social Affairs it is statistically document – that usually – although some consider it primly old-fashioned – we can presume that it is more likely the mother who cares for the child, which, under the annulled provisions, it was not necessary to register.

If the care-giving parent is the father, then, in practice, there are two possibilities: that it is by agreement between the parents, and that it is without such agreement (e.g. death of the mother, a court giving custody of the child to the father).

Agreement between the parents assumes previous consideration of all the advantages or disadvantages of the "non-traditional" model. The Constitutional Court has often referred to the principle vigilantibus iura. Before choosing the alternative of the care-giving father, one should necessarily think of nunc est vigilandum. In the case of agreement between the parents, does the father play a solo or are the mutual long-term interests of the trio child-mother-father taken into consideration?

A single father is also not without an entitlement to insurance. It is only necessary to exercise it by the deadline, which is not abnormally short. I assume that while caring for a child, even during the period before the deadline he should have an opportunity to meet an official who observes the principles of persuasiveness, proportionality, cooperation, responsibility, openness and helpfulness (cf. Souhrn hlavních principů dobré správy. [Summary of the Main Principles of Good Administration.] First version, compiled by the ombudsman for the working conference held 22 March 2006 in Brno, in: Principy dobré správy. Sborník příspěvků přednesených na pracovní konferenci [Principles of Good Administration. Collection of Documents Presented at the Working Conference], Brno 2006, pp. 15 – 17) and who – figuratively speaking – from the informal position of a sort of tutoris virorum will remind him of his obligation. Such a reminder should surely also be offered to a father caring for a child upon agreement with the mother. If all these mechanism nonetheless fail, there is still the possibility for individual mitigation of the harshness of the law….

Brno, 6 June 2006

Dissenting Opinion
of Dagmar Lastovecká

I have a dissenting opinion to the judgment of the Plenum of the Constitutional Court in the matter Pl. ÚS 42/04 because I disagree with the conclusion that "the legislature, by passing the contested provision … created different groups, one of which, from a constitutional perspective, it discriminated against without justification."

The reasoning (point 25) cites the case law of the Constitutional Court which rejected an absolute concept of the principle of equality, and equality was understood as a relative category, which requires, in particular, the elimination of unjustified differences and elimination of arbitrariness.

The statutory framework which establishes different conditions for participation in pension insurance was also assessed in the Constitutional Court judgment published as no. 40/2003 Coll., which evaluated the existence of objective and reasonable grounds for applying a different approach (a legitimate aim of the legislature) and whether there is a proportional relationship between that aim and the means used to achieve it (an advantage under the law). The Constitutional Court considered the present matter in the same way.

The legitimate aim for the different approach to men and women in the contested provision is the protection of the public interest, which effective management of funds allocated for paying pensions is considered to be.

My dissenting opinion arises from the opinion that in the present matter there are objective and reasonable grounds for the different approach established in the contested provision, consisting of the continuing traditional model of the family in the Czech Republic – that is, the fact that a man caring for a child aged up to four years is an exceptional situation.

In this situation, where men caring for a child as defined by the contested provision are not excluded from participating in pension insurance, but must merely fulfill an administrative condition – register for participation in pension insurance – I consider this different approach to be justified and proportionate.

Brno, 6 June 2006