

2007/10/16 - PL. ÚS 53/04: EQUALITY OF RIGHTS

HEADNOTES

The Constitutional Court first considered the question of whether the contested § 32 of the Pension Insurance Act, as amended, is inconsistent with Art. 52 of the Constitution. It began with the consideration that the expert literature gives the Collection of Laws an informational function, consisting of the fact that the Collection of Laws serves as the official source for legal regulations (see. K.Klíma and collective of authors, *Komentáře k Ústavě a Listině* [Commentary on the Constitution and the Charter], Pilsen, Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2005, p. 281). Although Act no. 155/1995 Coll., on Pension Insurance, was - as mentioned above - amended fifteen times while it was in effect, and since 1995 the complete wording has not been promulgated in the Collection of Laws after any of the amendments, the Constitutional Court found that § 32 of the Pension Insurance Act, amended only by Act no. 425/2003 Coll. was still sufficiently easily understandable for a generally familiarity with the law, as a rule guiding the conduct of those for whom it is intended.

Equality is a relative category, which requires the removal of unjustified differences. Therefore, the principle of equal rights under Art. 1 of the Charter of Fundamental Rights and Freedoms, must be understood such that legal distinctions in the approach to certain rights may not be an expression or arbitrariness; however, it does not give rise to the conclusion that everyone must be granted every right.

A particular legal framework that gives an advantage to one group or category of persons compared to another, cannot, in and of itself, be said to violate the principle of equality. The legislature has some room for discretion about whether to implement such preferential treatment. It must see to it that the preferential approach is based on objective and reasonable grounds (a legitimate legislative aim), and that there is a proportional relationship between that aim and the means used to achieve it (legal advantages).

The Constitutional Court does not share the opinion that the contested provision is inconsistent with Art. 1 and Art. 3 par. 1 of the Charter in relation to Art. 30 par. 1 of the Charter, cited by the petitioner, and that annulling § 32 of the Pension Insurance Act would implement equality between the sexes in relation to the right to material security in old age. If the contested provision were annulled, a certain advantage for women/mothers would be removed, without, as part of the “equalization,” men/fathers acquiring the same advantages as women/mothers have. The Constitutional Court functions only as a negative legislature, and its intervention regarding the contested provision would thus only violate the principle of protection citizens’ confidence in the law, or perhaps interfere in legal certainty, or legitimate expectation. In this context, the Constitutional Court states that in this case a conflict between the positive law and justice has not arisen.

**CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT**

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court, composed of Stanislav Balík (judge rapporteur), František Duchoň, Vlasta Formánková, Vojen Güttler, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jan Musil, Jiří Nykodým, Pavel Rychetský, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická, ruled in the matter of a petition from the Supreme Administrative Court, represented by JUDr. Miluše Došková, seeking the annulment of § 32 of Act no. 155/1995 Coll., on Pension Insurance, as amended by later regulations, with the participation of the Chamber of Deputies and the Senate of the Parliament of the CR, as parties to the proceedings, and the Regional Court in Hradec Králové, represented by JUDr. Marcela Sedmíková and the Supreme Administrative Court, represented by JUDr. Jaroslav Vlašín, as secondary parties to the proceedings, as follows:

The petition is denied.

REASONING

I.

Description of the Matter and Recapitulation of the Petition

1. On 25 October 2004, the Constitutional Court received a petition from the Supreme Administrative Court, represented by JUDr. Miluše Došková (the “petitioner”), under § 64 par. 3 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations (the “Act on the Constitutional Court”), seeking the annulment of § 32 of Act no. 155/1995 Coll., on Pension Insurance, as amended by later regulations (“the Pension Insurance Act”).
2. The petition was submitted in connection with the petitioner’s decision-making regarding a cassation complaint by plaintiff Emil Pastrňák against the defendant Czech Social Security Administration, against a decision by the Regional Court in Ostrava of 13 November 2003, ref. no 21 Cad 79/2003-18, which denied the complaint against a decision by the Czech Social Security Administration of 24 April 2003, no. 480 928 418, denying the plaintiff’s application for a retirement pension due to failure to meet the conditions of § 31 and § 32 par. 3 of the Pension Insurance Act. The petitioner is conducting the matter as file no. 2 Ads 2/2004.
3. The petitioner believes that § 32 of the Pension Insurance Act, that is, the setting of different retirement ages, according to the number of children raised, only for women, 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 (the “Charter”).
4. Responding to the plaintiff’s arguments, the petitioner suspended proceedings in the matter and submitted to the Constitutional Court a petition to annul the provision in question. It took the position that § 32 of the Pension Insurance Act, which is being applied in the matter, is inconsistent with the constitutional order

of the Czech Republic, insofar as it sets the retirement age according to the number of children raised only for women. It concluded that the contested provision is so mandatory that it does not permit the discrimination against men raising children as single parents to be overcome even through a constitutional interpretation. The petitioner pointed to the Constitutional Court judgment of 21 January 2003, file no. Pl. ÚS 15/02 (publ. in the Collection of Laws as no. 40/2003 Coll.), and its essential grounds, concerning equal rights. The petitioner pointed out that in Czech law the retirement age has traditionally been set differently for women and men, and it is further differentiated for women according to the number of children raised. In the petitioner's opinion, reasonable grounds for justifying the difference in the conditions and appropriate amount of security in old age cannot be found if only a certain group of persons receives an advantage in meeting special conditions and another group that meets the same conditions is denied the advantage. Thus, even though there are no substantive grounds for it, related to the different sexes, the law defines differently, based on the sex of the person caring for a child, the right of that person to receive a retirement pension, and sets unequal conditions for men and women when setting the retirement age in connection with caring for children. Finally, the petitioner pointed to the advantageous position of women under Art. 29 of the Charter, and to Art. 32 par. 4 of the Charter in connection with caring for children as part of the rights of both parents.

5. On 18 January 2005 the Constitutional Court issued a decision, file no. Pl. ÚS 67/04, denying the petition from the Regional Court in Hradec Králové, represented by JUDr. Marcela Sedmíková, delivered to the Constitutional Court on 1 December 2004, seeking annulment of § 32 of the Pension Insurance Act, because the petition was barred by the obstacle of a *lis pendens*. In view of the fact that the petition was filed by an authorized petitioner under § 64 par. 3 of the Act on the Constitutional Court, the authorized petitioner has the right under § 35 par. 2 in fine of the Act on the Constitutional Court to take part in proceedings on the previously filed petition as a secondary part in the matter Pl. ÚS 53/04.

6. On 27 January 2005 the Constitutional Court issued a decision, file no. Pl. ÚS 72/04, which denied the petition of the Supreme Administrative Court, represented by JUDr. Jaroslav Vlašín, delivered to the Constitutional Court on 13 December 2004, seeking the annulment of § 32 of the Pension Insurance Act, because the petition was barred by the obstacle of a *lis pendens*. As the petition was filed by an authorized petitioner under § 64 par. 3 of the Act on the Constitutional Court, the authorized petitioner has the right under § 35 par. 2 in fine of the Act on the Constitutional Court to take part in proceedings on the previously filed petition as a secondary part in the matter Pl. ÚS 53/04.

II.

Recapitulation of the Substantive Parts of the Statements from the Parties

7. Pursuant to § 42 par. 4 a § 69 of the Act on the Constitutional Court sent the petition in question, seeking the annulment of § 32 of the Pension Insurance Act, to the Chamber of Deputies and the Senate of the Parliament of the Czech Republic.

8. In its statement of 25 April 2006, the Chamber of Deputies of the Parliament of the CR pointed to the typology of retirement ages in the Pension Insurance Act and to the fact that the general retirement age for women is further differentiated according to the number of children raised. It emphasized, that the possibility of providing advantages in pension insurance to persons who raised children, e.g. by lowering the retirement age, is part of international standards, e.g. Council Directive no. 79/7/EHS of 19 December 1978, on the progressive implementation of the principle of equal treatment for men and women in matters of social security. The Chamber also pointed to Art. 18 of the Convention on the Rights of the Child and Art. 5 of the Convention on the Elimination of All Forms of Discrimination against Women. In the Chamber's opinion, in preparing pension reform it will evidently be appropriate to stop seeing the raising of a child as a matter reserved exclusively for women, and to expand it to men. The status and roles of men and women in society are changing, and it is unquestionably necessary to react to that. However, § 32 of the Pension Insurance Act should not be changed immediately, but at the earliest after 2012, when the progressive raising of the retirement age is to end. In the conclusion of its statement the Chamber stated that the legislative assembly acted in the belief that the enacted statute is consistent with the Constitution, the constitutional order, and the legal order of the Czech Republic. It is up to the Constitutional Court to evaluate "the constitutionality of the statute and issue the appropriate decision."

9. The Senate of the Parliament of the Czech Republic, in its statement of 28 April 2006, stated that Act no. 155/1995 Coll., on Pension Insurance, was passed by the Chamber of Deputies on 30 June 1995, to go into effect on 1 January 1996, i.e. at a time before the Senate was created. The contested provision of § 32 in the current text was introduced by an amendment made by Act no. 425/2003 Coll., which amends Act no. 155/1995 Coll., on Pension Insurance, as amended by later regulations, Act no. 589/1992 Coll., on Social Security Premiums and Contributions to State Employment Policy, as amended by later regulations, Act no. 582/1991 Coll., on the Organization and Administration of Social Security, as amended by later regulations, and Act no. 48/1997 Coll., on Public Health Insurance and Amending and Supplementing Certain Related Acts, as amended by later regulations. The substance of the amendments was savings measures; one of the changes was to raise the age for retirement pensions from 62 to 63, keeping a lower retirement age for women, according to the number of children raised. The extensive discussion also mentioned the amending proposals to the government bill that were passed by the Chamber of Deputies. One of them was an amending proposal concerning keeping the reduced retirement age for women according to the number of children raised, whereas the government bill contained a framework which would have progressively (by 2005) introduced a uniform retirement age for men and women, with the number of children raised no longer being taken into account when setting the retirement age for women. The explanatory report to the bill stated that a uniform retirement age for men and women corresponded to the fundamental EU law on equality of the sexes, and that the heretofore different retirement ages for men and women in some states were tolerated as an exception for historical reasons. The Senate pointed out that the framework differentiating the retirement age for women according to the number of children raised was introduced by Act no. 101/1964 Coll., on Social Security, with effect as of 1 January 1965; this framework was basically justified on the grounds that "it

expresses the different life situation of mothers who, in addition to fulfilling their work obligations, also fulfilled obligations in taking care of children.” The government proposal from 2003, aimed at progressively introducing a uniform retirement age for men and women, where the solution was to be that the number of children raised would not be taken into account for either men or women, which was to be achieved progressively by 2025, corresponds in time with the Slovak solution provided by the Slovak Act no. 461/2003 Coll., leading to unifying the retirement ages for men and women by 2015. In 1998 the government, in resolution no. 236, passed the document Government Priorities and Procedures in Promoting Equality between Men and Women, on the basis of which, every year, it discusses the Summary Report on the Fulfillment of Government Priorities and Procedures in Promoting Equality between Men and Women. The report for 2003 identified the difference between men and women in the age requirement in the basic system for entitlement to old-age pensions as a problem related to the care for children in the area of basic pension insurance. However, [it said] this inequality should not be addressed by granting a more advantageous entitlement to men, but rather by taking away entitlements from women. The report for 2004 stated that, in terms of EU norms, it appeared that the regulations on pension insurance (in particular, Act no. 155/1995 Coll., as amended by later regulations) do not contain provisions that give rise to unequal standing of men and women. Article 7 of Council Directive 79/7/EHS removes from its jurisdiction the setting of retirement age for provision of old-age and veterans’ pensions, and its possible consequences for benefit payments and the advantageous of the system of old-age pensions provided to persons who raised children. That means that the different retirement ages for men and women, and its possible consequences, continue to be permissible in the pension system. Finally, the report for 2005 stated that, at the government level, the current framework of different retirement ages for men and women in connection with care for children was seen as unequal standing, or a framework that is discriminatory toward men. Nonetheless, opinions began to appear that pointed toward the unequal position of men and women in terms of the different retirement ages, for example, in the Report on the State of Human Rights for 2004, the Czech Helsinki Committee stated that “a distinctive inequality is the higher age for entitlement to an old-age pension for men who cared for a child than for women who cared for a child.” In February 2006 the Czech Republic Government Council for Human Rights, in the Initiative of the CR Government Council for Human Rights on the Discrimination against Men Caring for Children, stated, among other things, that “the present legal regulation of the statutory retirement age discriminates against men by setting different retirement ages for men and women, and by setting the retirement age according to the number of children raised. Yet, at present it disadvantages women in the labor market as a result of the fact that the statutory retirement age in practice artificially shortens the career track of women who are mothers, which supports the prevailing stereotype that it is primarily a woman who is supposed to take care of children. Motherhood should not automatically be either a reason for ‘advantages,’ nor mean a disadvantage on the labor market, because belonging to the female sex does not automatically make one qualified to be a parent and belonging to the male sex does not make one analogously disqualified.” According to this document, addressing sex discrimination is a “relatively radical intervention in the existing framework,” and, as pension system reform is unavoidable, addressing this problem should be part of the pension insurance reform being prepared.” The Ombudsman’s report on

activities for the first quarter of 2006 stated that the old legal regulation derived from the traditional concept of the family is basically discriminatory, “even though the draft anti-discrimination law does not consider the different retirement age to be discrimination.[”] The Senate of the Parliament of the CR concludes that “opinions about the constitutionality or unconstitutionality of the legal framework providing different ages for men and women for entitlement to an old-age pension are quite varied.” It concludes that “it is surely not an expression of arbitrariness by the legislature, but more a question of maintaining the previous framework, passed during a particular historical period, because changing it, in view of present-day conditions, is relatively complicated socially and politically. Thus, insofar as an opinion is stated that the legal framework of different retirement ages for men and women is unconstitutional, as a framework that is discriminatory toward men, and that resolving this problem should be part of the reform of pension insurance, the question remains in how many years the present framework could or should be changed. It is up to the Constitutional Court to evaluate the constitutionality of the contested § 32 of Act no. 155/1995 Coll., on Social Security, as amended, and decide the matter, and in the event it grants the petition, to decide as of what date the cited provision is annulled. However, in this regard we can state that it is difficult to expect that it would be possible (socially tolerably and economically or politically acceptable) to resolve this issue in such a way that the discrimination against men would be eliminated “in one stroke” as of a particular date.

III.

Recapitulation of the Essential Parts of the Statements Requested by the Constitutional Court

10. The Constitutional Court, pursuant to § 48 par. 2 of the Act on the Constitutional Court, also requested statements from the Ministry of Labor and Social Affairs and the Czech Social Security Administration.

11. The Ministry of Labor and Social Affairs (the “Ministry”), in its statement of 26 April 2006, addressed the issue of the importance of the retirement age in pension insurance, briefly described the development of the current legal framework, gave its opinion on the relationship of the current legal framework to EU/EC norms, described, from a comparative law perspective, the essential information concerning foreign legal frameworks, and presented an analysis of the possibilities for unifying the different retirement ages in the Czech Republic. The Ministry especially pointed to the fact that retirement ages in the Czech Republic are differentiated, and not only by sex. It emphasized the fact that the retirement age is a key institution in the Pension Insurance Act, without which the Act would basically be inapplicable. As part of a historical survey, the Ministry pointed out that different retirement ages for men and women were first introduced in the Czech Republic by Act no. 55/1956 Coll., on Social Security, with effect as of 1 January 1957. The explanatory report to that Act emphasized the “special status and physical constitution of women.” In 1956, only about half of the retirement systems then existing in the world gave women a lower age than men for entitlement to an old-age pension, regardless of the number of children raised. It was not until Act no. 101/1964 Coll., on Social Security, most of whose provisions

went into effect on 1 July 1964, that the age limit for women for entitlement to an old-age pension was further differentiated, according to the number of children raised. According to the explanatory report to that Act, “this different retirement age expresses the different life situation of mothers, who, in addition to fulfilling their work obligations, also fulfilled obligations in the family when caring for children.” The Ministry emphasized that the different retirement ages for men and women meant a change that arose historically in a particular social context, because the opinion at that time was that concurrent employment and care for children placed greater demands on a woman than on a man, and society reached a consensus to compensate that status, or task, of women, with an earlier retirement. The Ministry relies on statistical data from the year 2004 to document the fact that in the Czech Republic there are still considerable differences in the socio-economic status of men and women. The Pension Insurance Act, which went into effect on 1 January 1996, introduced progressive increases in the existing retirement ages, more markedly in the case of women. The reason for these differentiated increases was implementation of the aim to progressively align the retirement ages for men and women. The process of aligning the retirement ages for men and women is a long-term matter, analogous to how the differentiation was implemented, that also being the result of historical developments. The government draft of the amendment of the Pension Insurance Act of 2003 contained a legal framework that consisted of further continuation of the differentiated increases in retirement ages, with the aim of unifying them at 63, regardless of the number of children raised, which was to be reached in 2025. With the passage of an amending proposal from the Chamber of Deputies, the increases in retirement age continue with the differentiation, so far with the goal being a different age for men and childless women on the one hand, and for women who raised children on the other. Discussion continues, not about whether to progressively align the retirement ages for men and women, with the aim of unifying them, but about the speed of the alignment. The decision to progressively unify the retirement ages is consistent with foreign trends in countries whose situation is similar to that of the Czech Republic; only in Slovakia is the number of children raised temporarily a further criterion for setting lower retirement ages for women, analogously to the Czech Republic, which also results from the history from the creation of a joint state until the division of the CSFR. To a certain extent children raised are also taken into account in Slovenia. The Ministry pointed to the fact that the Ombudsman, as indicated from his summary report on activities in 2005, did not receive any applications concerning this issue, and did not work with the issue, and also pointed to the fact that proceedings concerning the Council Directive of 19 December 1978 (7917/EEC) were stopped, which means that it is not necessary to implement a special transposition process for this directive, and the Czech legal framework is not inconsistent with it. The Council Directive of 20 December 1996 (96/97/ES), which amends Directive 86/378/ES, on the implementation of the principles of equal treatment for men and women in occupational social security schemes, does not permit different retirement ages for men and women in such systems, but it is not relevant to the Pension Insurance Act, which governs basic state pension insurance, and therefore the European Commission does not require the Czech Republic to unify the retirement age for men and women for entitlement to an old-age pension out of the basic pension insurance. In its comparative-law overview, the Ministry points to a trend of “raising the lower retirement ages of women.” The same retirement for men and

women is found, for example, in Denmark, the Netherlands, Germany, Portugal, Spain, Ireland, Canada, Finland, Norway, Iceland, France, and the USA; the process of progressively unifying the different retirement ages is going on in, for example, Belgium, Estonia, Latvia, Hungary, Austria, Great Britain, and Australia; in some countries the differentiation is being preserved even as the retirement age is progressively raised, for example, in Lithuania, Switzerland, Bulgaria and Romania. A proposed retirement age also existed at the end of the 1990s in Poland, Malta, Russia and the Ukraine. A differentiated age according to the number of children raised, but generally not only for mothers, is maintained to some extent in, for example, Slovenia, Latvia, Estonia, and Austria. The Ministry also presented individual alternatives for unifying the retirement age: progressive unification of different retirement ages for men and women regardless of the number of children raised, taking the raising of children into account when setting the retirement age for men as well as women, and a one-time unification of the different retirement ages for men and women, regardless of the number of children raised. Regarding the last alternative, i.e. the simultaneous removal of the unequal status of men and women (in a “jump”), i.e. as of a particular date removing the discrimination based on the number of children raised, the Ministry stated that “this alternative (the “shock” alternative) would be so socially insensitive, and inconsistent with the principle of predictability in law, that it would be socially and politically unacceptable and untenable, and therefore it is not even described in detail.” The approach of lowering the retirement age for men based on raising children would be completely opposite to the approach adopted by all the familiar foreign retirement systems, and would lead to a considerable increase in pension expenditures. The Ministry also pointed to possible practical problems, for example the fact that the retirement age would have to be simultaneously assessed for two (or more) insured persons, “because there is no reliable way of determining which of the parents (in the event of caring for a child in a shared household) provided personal care for a child to a greater extent, and for whom the raising of a child should therefore be recognized for purposes of lowering the retirement age.” If, in the end, raising a child for purposes of lowering the retirement age of a man were recognized only in a case where it could not be allocated to any woman, this would not eliminate unequal treatment, because raising a child would always be allocated to a woman, regardless of whether a man raised the child together with her, but it would be allocated to a man only if he proved that he raised the child alone. The Ministry concludes that the principle of equal treatment for men and women must be implemented in the basic pension insurance progressively, and by taking into account all circumstances, including economic effects; retirement age issues cannot be addressed in isolation. The present legal framework for basic pension insurance, consisting of progressively removing the differences between men and women, is appropriate. A sudden and abrupt change in the legal framework would, on the contrary, be seen negatively by women, as an element of arbitrariness and violation of legal certainty and predictability. In view of the foregoing, the Ministry of Labor and Social Affairs takes the position that the petition to annul § 32 of the Pension Insurance Act must be denied.

12. The Czech Social Security Administration (“CSSA”), in its statement of 17 April 2006, stated that the retirement age, which is set differently for men and women, undoubtedly results from the historical and sociological background to the regulation of social security. Under § 32 of the Pension Insurance Act, the

retirement age for women, derived from the number of children raised, reflects a historical need, and the indisputable, and in its way irreplaceable, role of women in the household (family) in the continental (and particularly central European) context. According to the CSSA, although there have been great social changes at the end of the 20th century, and the equality of men and women in all areas has become one of the key principles of social and social-legal reality, and there are not such marked differences between the roles of men/fathers and women/mothers, the disputed provision can still be defended. Empirical and statistical evidence demonstrates that a woman with children has a reduced opportunity for career advancement and professional growth compared to a man who is a father, and a woman with children is not disadvantaged because she is a woman, but because she has children. The development of a woman's professional career is demonstrably slower than that of a man's, which has in a fundamental effect on the amount of pension benefit payments. The purpose of the disputed norm lies in removing that unjustified difference. The question arises whether, in raising children, as understood by the statutory provision, emphasis is laid on motherhood or parenthood. The physiological aspect of motherhood has a not inconsequential negative effect for a woman, not only in limiting her status in the labor market, but also within her existing employment. Pregnancy, childbirth, and breastfeeding are irreplaceable roles; women cannot be replaced in them by men. Men/fathers do not find themselves in this situation, even in the event that they assume family and parental responsibilities connected with raising a child. In the current social context other parental responsibilities do not have the same effect on their career advancement as in the case of women/mothers. Thus, giving priority to motherhood can be considered just and correct, not establishing discriminatory treatment of the sexes. The retirement ages are progressively gradually being aligned so that for men, as for women who do not have children, they will be 63 years of age after 31 December 2012. The setting of a different retirement age for women and men is not a matter only for the Czech Republic. The CSSA notes that any deliberation about setting a lower retirement age for men in connection with raising children should be supported not only by a serious study of the economic consequences of such a step, but also by other studies of a sociological nature on the position of a women/mother in the labor market, in the household, etc. which should demonstrate the absolutely identical (or only minimally different) and "fungible" position of men and women in all areas of social life. If the entire § 32 of the Pension Insurance Act were annulled, which would be necessary in view of its formulation, then the unexpected non-existence of the provision on the "retirement age" would affect other institutions related to the retirement age, which would evidently be very complicated. The CSSA is of the opinion that the existing situation is not inconsistent with EC law. It points to Art. 7 of Council Directive EHS 79/7 and also to Art. 6 par. 3 of the Agreement on Social Policy, which is attached to Protocol no. 14 of the Treaty on European Union. This article is also fully applicable in connection with Title XI, on Social Policy, of the Treaty establishing the European Community, in the consolidated version from Nice, which enshrines a ban on discrimination, and equal treatment in the area of "pay" for women and men for the same work. This provision does not prevent a member state from keeping or implementing measures that provide special advantages, making it easier for women to perform their professional activities, or that prevent or balance disadvantages in their professional advancement. Thus, the CSSA concludes that the comprehensive framework, consisting of progressively

aligning the retirement ages of men and women, with the aim of reaching the same age (and from that position, the view *e ratione legis*, and, moreover, taking into account generally observing the constitutional principle of special protection for women and mothers), is consistent with the principle of equal treatment. The treatment of women/mothers is based on objective, reasonable grounds, and does not create unjustified (discriminatory) differences between the sexes.

IV.

Text of the Contested Provisions of the Act and their Legislative History

13. The Constitutional Court states that the contested § 32 of the Pension Insurance Act, at the time the petition was filed, and at the present time, reads as follows:

“§ 32

(1) The retirement age is

a) for men, 60 years of age,

b) for women,

1. 53 years of age, if they raised at least five children,

2. 54 years of age, if they raised three or four children,

3. 55 years of age, if they raised two children,

4. 56 years of age, if they raised one child, or

if the insured persons reached that age by 31 December 1995.

(2) For insured persons who reach the age limits provided in paragraph 1 in the period until 31 December 2012, the retirement age is set in the following manner. The following are added to the month in which the insured person reached the specified age: for men, two calendar months, and for women, four calendar months, for each year, or part of a year, from the period after 31 December 1995 to the day the person reaches the age limits specified in paragraph 1; the retirement age is considered to be the age reached in the thus-determined calendar month on the day with the same number as the day of the insured person's birth; if the thus-determined month does not contain a day with that number, the retirement age is the age that is reached on the last day of the thus-determined month.

(3) After 31 December 2012, the retirement age, if the insured persons have not reached retirement age under paragraph 1 or 2, is

a) for men, 63 years of age,

b) for women,

1. 59 years of age, if they raised at least five children,

2. 60 years of age, if they raised three or four children,

3. 61 years of age, if they raised two children,

4. 62 years of age, if they raised one child, or

5. 63 years of age.

(4) The condition of raising a child, for purposes of a woman's entitlement to an old-age pension, is met if a woman personally cares for or cared for a child under the age of majority for at least ten years. However, if a woman took over care of a child after the child reached the age of eight, the condition of raising a child is met if a woman personally cares for or cared for a child under the age of majority for a period of at least five years; however, this does not apply if the woman ceased to

care for the child before the child reached the age of majority.”

14. The Constitutional Court states that § 32 of Act no. 155/1995 Coll. on Pension Security [sic, should be Insurance], read as follows:

“§ 32

(1) The retirement age is

a) for men, 60 years of age,

b) for women

1. 53 years of age, if they raised at least five children,
2. 54 years of age, if they raised three or four children,
3. 55 years of age, if they raised two children,
4. 56 years of age, if they raised one child, or
5. 57 years of age,

if the insured persons reached that age by 31 December 1995.

(2) For insured persons who reach the age limits provided in paragraph 1 in the period from 1 January 1996 through 31 December 2006, the retirement age is set in the following manner. The following are added to the month in which the insured person reached the specified age: for men, two calendar months, and for women, four calendar months, for each year, or part of a year, from the period after 31 December 1995 to the day the person reaches the age limits specified in paragraph 1; the retirement age is considered to be the age reached in the thus-determined calendar month on the day with the same number as the day of the insured person’s birth; if the thus-determined month does not contain a day with that number, the retirement age is the age that is reached on the last day of the thus-determined month.

(3) After 31 December 2006, if the insured persons have not reached retirement age under paragraph 1 or 2, is,

a) for men, 62 years of age,

b) for women

1. 57 years of age, if they raised at least five children,
2. 58 years of age, if they raised three or four children,
3. 59 years of age, if they raised two children,
4. 60 years of age, if they raised one child, or
5. 61 years of age.

(4) The condition of raising a child, for purposes of a woman’s entitlement to an old-age pension, is met if a woman personally cares for or cared for a child under the age of majority for at least ten years. However, if a woman took over care of a child after the child reached the age of eight, the condition of raising a child is met if a woman personally cares for or cared for a child under the age of majority for a period of at least five years; however, this does not apply if the woman ceased to care for the child before the child reached the age of majority.”

15. The Constitutional Court also states that the contested § 32 was not in any way affected by amendments to Act no. 155/1995 Coll., implemented by Acts no. 134/1997 Coll., no. 289/1997 Coll., no. 224/1999 Coll., no. 18/2000 Coll., no. 118/2000 Coll., no. 132/2000 Coll., no. 220/2000 Coll., no. 116/2001 Coll., no. 188/2001 Coll., no. 353/2001 Coll., no. 198/2002 Coll., no. 263/2002 Coll., and no. 264/2002 Coll., and that the contested provision, in the version wording in effect at the time the petition was filed and the version currently in effect, was amended

only by Act no. 425/2003 Coll.

16. The Constitutional Court determined from the electronic library of the Parliament of the Czech Republic that the bill of Act no. 155/1995 Coll., on Social Security, was presented to the Parliament by the government on 2 March 1995; the draft was distributed to the deputies as publication no.1574. The bill was passed at the 32nd session of Parliament, on 30 June 1995, by resolution no. 727; of the deputies present, 100 voted in favor, 76 were against, and one abstained.

17. The President signed the Act.

18. Thus, the Constitutional Court stated that Act no. 155/1995 Coll. was passed by the Parliament of the Czech Republic according to constitutional legislative procedure, was signed by the appropriate constitutional authorities, and duly promulgated in the Collection of Laws, going into effect on 1 January 1996.

19. The Constitutional Court determined from the electronic library of the Parliament of the Czech Republic that the draft of Act no. 425/2003 Coll., amending Act no. 155/1995 Coll., on Social Security, as amended by later regulations, Act no. 589/1992 Coll., on Premiums for Social Security and Contributions to State Employment Policy, as amended by later regulations, Act no. 582/1991 Coll., on the Organization and Implementation of Social Security, as amended by later regulations and Act no. 48/1997 Coll., on Public Health Insurance, and amending and supplementing certain related Acts, as amended by later regulations (“Act no. 425/2003 Coll.”), which amended the wording of the contested § 32 of the Pension Insurance Act to the wording in effect at the time the petition was filed and at present, was submitted to the Chamber of Deputies by the government on 8 July 2003. The bill was distributed to the deputies as publication no. 396/0. The bill was passed at the 20th session of the Chamber of Deputies, on 26 September 2003 by resolution no. 664; out of the 196 deputies present, 100 voted in favor.

20. The Constitutional Court determined from the electronic library of the Parliament of the Czech Republic that the Chamber of Deputies forwarded the bill to the Senate on 15 October 2003. The Senate discussed the bill in a plenary session on 6 November 2003, at its 11th session (4th term of office), and it was passed by resolution no. 235, which approved the bill in the wording forwarded by the Chamber of Deputies. Out of 70 senators present, 41 voted in favor.

21. The President signed the bill on 26 November 2003.

22. Thus, the Constitutional Court stated that Act no. 425/2003 Coll., amending the Pension Insurance Act, including the contested § 32 of the Pension Insurance Act, was passed by the Parliament of the Czech Republic according to constitutional legislative procedure, was signed by the appropriate constitutional authorities, and duly promulgated in the Collection of Laws, going into effect on 1 January 2004.

V
Waiver of Hearing

23. In accordance with § 44 par. 2 of the Act on the Constitutional Court, no hearing was held, because it could not be expected to clarify matters further, and all the parties and secondary parties agreed with this step, expressly or impliedly.

VI
Content of Contested Statutory Provisions Consistent with the Constitutional Order

24. The Constitutional Court first considered the question of whether the contested § 32 of the Pension Insurance Act, as amended, is inconsistent with Art. 52 of the Constitution. It began with the consideration that the expert literature gives the Collection of Laws an informational function, consisting of the fact that the Collection of Laws serves as the official source for legal regulations (see. K.Klíma and collective of authors, *Komentáře k Ústavě a Listině* [Commentary on the Constitution and the Charter], Pilsen, Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2005, p. 281). Although Act no. 155/1995 Coll., on Pension Insurance, was - as mentioned above - amended fifteen times while it was in effect, and since 1995 the complete wording has not been promulgated in the Collection of Laws after any of the amendments, the Constitutional Court found that § 32 of the Pension Insurance Act, amended only by Act no. 425/2003 Coll. was still sufficiently easily understandable for a generally familiarity with the law, as a rule guiding the conduct of those for whom it is intended.

25. The petitioner seeks the annulment of the contested provision on the grounds of inconsistency with Art. 1, Art. 3 par. 1 and Art. 30 par. 1 of the Charter, and also points to Art. 29 and Art. 32 par. 4 of the Charter in relation to care for children as part of the rights of both parents. Art. 1 of the Charter reads: All people are free, have equal dignity, and enjoy equality of rights. Their fundamental rights and basic freedoms are inherent, inalienable, non-prescriptible, and not subject to repeal. Art. 3 par. 1 of the Charter reads: (1) Everyone is guaranteed the enjoyment of his fundamental rights and basic freedoms without regard to gender, race, color of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status.

Art. 30 par. 1 of the Charter reads: (1) Citizens have the right to adequate material security in old age and during periods of work incapacity, as well as in the case of the loss of their provider.

26. Analogously to all democratic constitutional Courts, the Constitutional Court of the Czech Republic, in proceedings on review of a norm and in proceedings on constitutional complaints, applies the principle of proportionality.

27. In its judgment of 20 June 2006, file no. Pl. ÚS 38/04 (published in the Collection of Laws as no. 409/2006 Coll.), as in its judgment of 13 August 2002, file no. Pl. ÚS 3/02 (published in the Collection of Laws as no. 405/2002 Coll.), the

Constitutional Court stated, and in its judgment of 27 September 2006, file no. Pl. ÚS 51/06 (published in the Collection of Laws as no. 483/2006 Coll.) reiterated, that “in cases of conflict between the fundamental rights or freedoms and the public interest, or other fundamental rights or freedoms, it is necessary to evaluate the purpose (aim) of that interference in relation to the means used, and [the criterion] for this evaluation is the principle of proportionality (in the wider sense), which can also be called a ban on excessive interference with rights and freedoms.”

28. In its judgment of 21 January 2003, file no. Pl. ÚS 15/02 (published in the Collection of Laws as no. 40/2003 Coll.), the Constitutional Court stated that “equality is a relative category, which requires the removal of unjustified differences. Therefore, the principle of equal rights under Art. 1 of the Charter of Fundamental Rights and Freedoms, must be understood such that legal distinctions in the approach to certain rights may not be an expression or arbitrariness; however, it does not give rise to the conclusion that everyone must be granted every right.

29. International human rights instruments and many decisions of international review bodies are based on the premise that not every unequal treatment of various subjects can be classified as violation of the principle of equality, i.e. as illegal discrimination against one group of subjects in comparison with other subjects. For such violation to occur, several conditions must be met. Various subjects in the same or comparable situation must be treated in a different manner, in the absence of objective and reasonable grounds for applying different procedures.

30. This deliberation leads the Constitutional Court to conclude that a particular legal framework that gives an advantage to one group or category of persons compared to another, cannot, in and of itself, be said to violate the principle of equality. The legislature has some room for discretion about whether to implement such preferential treatment. It must see to it that the preferential approach is based on objective and reasonable grounds (a legitimate legislative aim), and that there is a proportional relationship between that aim and the means used to achieve it (legal advantages).

31. In the area of civil and political rights and freedoms, which is immanently characterized by the obligation of the state to refrain from interfering in them, there is generally only minimal room for preferential (i.e. essentially active) treatment of certain subjects. In contrast, in the area of economic, social, cultural and minority rights, where the state is often obligated to active intervention that is meant to remove conspicuous aspects of inequality between certain groups in a complex, socially, culturally, professionally, or otherwise stratified society, the legislature logically has much more room at its disposal for implementing its concept of the permissible limits of de facto inequality. Therefore, it chooses preferential treatment much more often.”

32. Another of the principles applied in the event of conflict of fundamental rights, or the public good, as principles, as opposed to the case of a conflict of norms of sub-constitutional law, [by which] the Constitutional Court is guided [is] the

directive to optimize, i.e. the postulate to minimize any limitation of a fundamental right or freedom, or the public good. Its content is the maxim that, if one concludes that it is justified to give priority to one over another of two colliding fundamental rights, or public goods, a necessary condition of the final decision is to make use of every opportunity to minimize the interference in one of them. The directive to optimize can be normatively derived from Art. 4 par. 4 of the Charter, under which the fundamental rights and freedoms must be preserved in employing the provisions concerning limitations on the fundamental rights and freedoms, and thus applies analogously in the case of limiting the consequences of a conflict between them (see judgment of the Constitutional Court of 28 January 2004, file no. Pl. ÚS 41/02, published in the Collection of Laws as no. 98/2004 Coll., or the judgment of 27 September 2006, file no. Pl. ÚS 51/06, published in the Collection of Laws as no. 483/2006 Coll.).

33. The Constitutional Court does not share the opinion that the contested provision is inconsistent with Art. 1 and Art. 3 par. 1 of the Charter in relation to Art. 30 par. 1 of the Charter, cited by the petitioner, and that annulling § 32 of the Pension Insurance Act would implement equality between the sexes in relation to the right to material security in old age. If the contested provision were annulled, a certain advantage for women/mothers would be removed, without, as part of the “equalization,” men/fathers acquiring the same advantages as women/mothers have. The Constitutional Court functions only as a negative legislature, and its intervention regarding the contested provision would thus only violate the principle of protection citizens’ confidence in the law, or perhaps interfere in legal certainty, or legitimate expectation. In this context, the Constitutional Court states that in this case a conflict between the positive law and justice has not arisen.

34. The Constitutional Court then evaluated the approach to giving advantages, which was based on objective and reasonable grounds. It took into account historical and sociological grounds, and comparative law. Here it refers to the wealth of arguments arising from the statements of the parties and from those the Court requested, and found that the contested provision comes from the existence of a legitimate aim.

35. The Constitutional Court took into account the fact that § 32 of the Pension Insurance Act is not, as stated above, an exception, from a comparative view of the European Union countries, even though the general trend is toward the future removal of different retirement ages for men and women, as is also being discussed in the Czech Republic.

36. The Constitutional Court also did not find an expression of legislative arbitrariness in passing the current wording of § 32 of the Pension Insurance Act. It concluded that if it annulled the contested provision it would deviate from the principle of minimizing interference, because a solution for the unequal position of men and women in social security insurance cannot be found without a comprehensive and wisely timed adjustment of the entire system of pension insurance that would find socially manageable and economically acceptable standpoints, which need to be implemented as part of a complete reform of the pension system. It must be added, as an obiter dictum, that any elimination of

inequality between men and women in the area of pension insurance should fully reflect the changes in social relationships in society.

37. Finally, the Constitutional Court points out, in relation to the category of equality, that “in the social process these values perform the function of ideal type categories, expressing ultimate aims, which cannot completely overlap with social reality, and which can be achieved only in an approximate manner.” (see the judgment of 7 June 1995, file no. Pl. ÚS 4/95, published in the Collection of Laws as no. 168/1995 Coll.).

38. In view of the fact that the Constitutional Court agreed with the arguments leading to the conclusion that objective and reasonable grounds for applying a differential approach existed, it concluded that § 32 of the Pension Insurance Act is not inconsistent with Art. 1, Art. 3 par. 1 and Art. 30 par. 1 of the Charter of Fundamental Rights and Freedoms, and therefore it denied the petition to annul it (§ 70 par. 2 of Act no. 182/1993 Coll.).

Instruction: Judgments of the Constitutional Court cannot be appealed.

Brno, 16 October 2007

Dissenting Opinion of Judge Vlasta Formánková

This dissenting opinion, which I am filing under § 14 of the Act on the Constitutional Court, dissents both from the verdict of the judgment and from the legal arguments presented in the reasoning of the judgment.

Material security in old age is the consequence of each individual’s life-long activity and his responsible approach to old age. Under the contested § 32 of Act no. 155/1995 Coll., on Pension Insurance, as amended by later regulations (“Act no. 155/1995 Coll.”), the retirement age is different for men and women. For women, the retirement age is differentiated according to the number of children raised, and so they are entitled to old-age pensions earlier.

The EU member states have not yet unified the retirement age, not only among themselves, but also between groups of men and women. Article 7 of Council Directive 79/7/EHS of 19 December 1978 (the “Directive”) excludes from its area of application the setting of the retirement age and the consequences that may arise for other benefit payments and advantages provided as part of pension insurance to persons who raised children. That means that the different retirement age for men and women is still permissible in the pension system.

Nevertheless, or precisely because of that, it is desirable to equalize the social position of women and men caring for children, by taking this into account when setting the conditions for entitlement to an old-age pension.

I cannot agree with judgment file no. Pl.ÚS 53/04. In my opinion, the contested § 32 of Act no. 155/1995 Coll. establishes an unequal position for women and men in pension insurance, and the claim that annulling the entire § 32 of Act no. 155/1995

Coll. would interfere in other institutions related to the retirement age, cannot stand in light of the fact that the Constitutional Court can delay going into effect of the annulment so that such interference will not occur. I also think that the Constitutional Court should also consider the requirement for meeting the constitutional principle of equality of women and men by removing surviving differences based on gender from the point of view of the conclusions stated in judgment Pl.ÚS 42/04. In this situation - in connection with Art. 1 and Art. 3 par. 1 of the Charter of Fundamental Rights and Freedoms - the consequences involve discrimination, precisely in relation to the right to adequate material security in old age under Art. 30 par. 1 of the Charter. It is evident that different conditions for men and women in the area of pension insurance can exist. However, it is precisely because of this that taking into account the personal care for a child should apply to all the care-providing citizens, regardless of their sex.

In my opinion the contested § 32 of Act no. 155/1995 Coll. establishes impermissible discrimination against men in the right to material security in old age, and is thereby inconsistent with Art. 30 par. 1 in connection with Art. 41 of the Charter of Fundamental Rights and Freedoms.

Brno, 17 October 2007

Dissenting Opinion of Judge Eliška Wagnerová

I disagree with the majority opinion, because I believe that my esteemed colleagues did not fully appreciate the grounds for the unconstitutionality of the contested provision. The actual, unusually sparse reasoning of the judgment, contained only from point 33 to part of point 36, the rest of that point containing a remarkable obiter dictum, is based on tradition, although it does not expressly name it, but, on the contrary, shields itself with, in my opinion, a problematical interpretation of a comparative study provided by the Ministry of Labor and Social Affairs. It is appropriate to point out here that the European Court of Human Rights relatively unambiguously declines to recognize the legitimacy of the disputed family law framework by reference to tradition, and, on the contrary, points to the dynamics in the concept of rights and relationships related to the family (see, e.g. the decision of 22 February 1994, in *Burghartz v. Switzerland*, or the decision of 16 November 2004 in *Ünal Tekeli v. Turkey*).

In my assessment, we cannot conclude from the comparative material provided to us that the contested provision is not an exception in EU countries, as the judgment does (point 35). The judgment refers to the different retirement age for women and men existing in several EU countries, but that difference is not the problem. On the contrary, the problem is that, as compensation for raising children, the retirement age is reduced, according to the number of children raised, by deducting from 1 to 4 years from the basic retirement age, only for women, not for men. As the statement from the Ministry of Labor and Social Affairs indicates, this type of inequality, relevant for the present case, appears only in Slovakia. In other EU states it is possible to subtract years for raising children, but taking facts into account, it is applied to whichever of both parents raised the child and took care of it. It must be emphasized, that the years are subtracted from the

basic retirement age, i.e. one set differently for men and women, and that difference is not disputed, as the judgment attempts to convince us (points 34 and 35).

Unquestionably, as the text of the contested provision clearly indicates, the cited advantage, of subtracting years from the basic retirement age, is tied to the raising of children, i.e. this is not some sort of bonus for giving birth to a child, which, of course, could not be awarded to men. However, insofar as the cited advantage is tied to and conditional on the raising of children, it is simultaneously unambiguously tied to the exercise of parental rights and fundamental rights, in the form of caring for children and raising children, which are guaranteed to both parents by Article 32 par. 4 of the Charter, and therefore they can be limited only by statute, if this is also a measure which is necessary in a democratic society and if the limitation is proportional. One can even conclude, that the reduced retirement age according to the number of children raised, is a clear expression of interpretation of parental rights that can be described as *status positivus*.

Thus, the majority permitted the limitation of the positively interpreted parental right of men, without applying a strict test concerning the possibility of such a limitation, even though there was a suspicion of discrimination against men based on their gender. Generally, differentiation based on sex should always be considered suspect grounds for differentiation (Ovey, C., White R., European Convention on Human Rights, Oxford University Press 2006, cited from B. Čechová, ch. VI., p.167 in *Rovnost a diskriminace [Equality and Discrimination]*, M.Bobek, P.Boučková, Z.Kühn (eds.), C.H.Beck, Praha, 2007), and, as such, should always be subject to especially thorough review (a strict test). The Constitutional Court applied this strict test in the matter Pl. ÚS 42/04, where it also reviewed a provision of the Pension Insurance Act, also differentiating on the basis of sex, and it then concluded that the contested provision had to be annulled. In today's case, the majority has diverged from the opinion expressed in that matter, without explaining why (see the rule that the Constitutional Court is bound by its own case law, and the possibilities for diverging from it, defined in judgment Pl. ÚS 11/02).

In the present matter, there could be room to diverge from the abovementioned judgment, although only in the sense of strengthening the argumentation, precisely in the abovementioned direct connection of the reviewed statutory provision to the parental rights guaranteed by Art. 32 par. 4 of the Charter, which rules out generally and abstractly defined differentiation between both parents. If there is differentiation between parents in practice, then it can only be by an individual act, based on the facts of a particular case - i.e., in this case, according to which of the parents actually provided care for the child and raised it. The manner in which the factual circumstances used to establish a reduction in retirement age would be determined is a matter for the legislature to decide.