

#### HEADNOTES

It can generally be stated that persons who are active in the public, that is, politicians, public officials, media stars, etc., must bear a greater degree of public criticism than other citizens. There is a dual basis for this principle. On the one hand, it encourages the public discussion of public affairs and the free formation of opinions. So as to allow for the greatest possible plenitude of discussion of public affairs, it should be regulated by state authority solely to the extent absolutely indispensable (compare Art. 17 par. 4 of the Charter of Fundamental Rights and Basic Freedoms). In addition, the state accepts that its authoritative interference with the freedom of expression, for the purpose of protecting the good name of other citizens, should be subsidiary, that is, employed only in the case that such harm cannot be cured by some other means. Such harm can be cured by means other than interference by the state, for example, by making use of permissible opportunities to oppose controversial and misleading opinions. Thus, it is often possible to minimize the damaging consequences of controversial statements by means that are more effective than a judicial proceeding.

#### JUDGMENT

On this day a Panel of the Constitutional Court, composed of its Chairwoman Ivana Janů, judge František Duchoň and Vojen Güttler in the matter of the constitutional complaint of the complainant, J. R., represented by JUDr. P.Z., an attorney, against the 25 July 2002 judgment of the High Court in Prague, no. 1 Co 106/2002 - 69, and the 24 April 2003 judgment of the Supreme Court of the Czech Republic, no. 28 Cdo 2194/2002 - 89, with the participation of the secondary party, H.V., represented by Mgr. V. C., an attorney, decided as follows:

I. The 25 July 2002 judgment of the High Court in Prague, no. 1 Co 106/2002 - 69, and the 24 April 2003 judgment of the Supreme Court of the Czech Republic, no. 28 Cdo 2194/2002 - 89, resulted in a violation of the complainant's fundamental rights and basic freedoms flowing from Art. 17 par. 2 of the Charter of Fundamental Rights and Basic Freedoms and from Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

II. Therefore, the 25 July 2002 judgment of the High Court in Prague, no. 1 Co 106/2002 - 69, and the 24 April 2003 judgment of the Supreme Court of the Czech Republic, no. 28 Cdo 2194/2002 - 89, are quashed.

#### REASONING

In his constitutional complaint, which was timely submitted and formally correct, the complainant sought the quashing of the above-indicated judgments of the High Court in Prague (hereinafter "High Court") and the Supreme Court of the Czech Republic. He stated in the constitutional complaint that, in an interview for the daily newspaper, *Lidové noviny*, he expressed an opinion which is based on the fact that in the 70's and 80's of the previous century, the field of popular music was restricted politically (and he employed for this purpose, and with a certain degree of exaggeration, the term "mafia"). He further expressed the view that H.V. also took advantage of these contacts from the former period. In this sense he was alerting the public to the fact that in the media field there is a considerable degree of continuity of personnel from the pre-1990 period, which otherwise followed from the evidence before the ordinary courts. The complainant criticizes the manner in which the ordinary courts proceeded in that they did not assess all, rather only some, of the admitted evidence and thereby infringed his right to fair process. Moreover, it is not clear from the reasoning of the ordinary courts' decisions why an apology should be printed also in *MF Dnes*, a daily newspaper which was in no way connected with this dispute. In the complainant's view, this case involves a conflict between two rights and freedoms, namely the right to the protection of personhood, on the one hand, and the freedom of expression on the other. Ordinary court jurisprudence up till now concerns itself rather with the protection of personhood, whilst issues concerning the freedom of express are much less frequently considered. From a historical perspective that is in no way surprising. Also during the period of the Communist regime, the courts often applied the provisions on the protection of personhood, but naturally there could be no mention of some sort of protection of the freedom of expression. The ordinary courts thus violated his right to the freedom of expression. The complainant drew attention to the divergent jurisprudence of the Supreme Court of the Czech Republic in relation to other persons and made reference to the dispute, heard as no. 30 Cdo 79/2001, with the former Prime Minister M.Z. This divergence constitutes an infringement of the principle of equality before the law.

The complainant thus proposed that the 25 July 2002 judgment of the High Court in Prague, no. 1 Co 106/2002 - 69, and the 24 April 2003 judgment of the Supreme Court of the Czech Republic, no. 28 Cdo 2194/2002 - 89, be quashed. They are decisions in a dispute on the protection of personhood, heard before the Municipal Court in Prague (hereinafter "Municipal Court") under file no. 32 C 10/2001, on the basis of the action filed by H. V. (hereinafter "secondary party") against the defendant-complainant. In its judgment, which is contested in the constitutional complaint, the High Court modified the Municipal Court's 14 January 2002 judgment rejecting the claim, no. 32 C 10/2001 - 35, and ordered the complainant, first, to send the plaintiff a personal letter of apology and, second, at his own expense, to have an apology published in the dailies *Lidové Noviny* and *Mladá Fronta Dnes*, in all cases the apology was to be worded as it is in the statement of that judgment. The complainant's extraordinary appeal against this High Court judgment was rejected on the merits by the Supreme Court of the Czech Republic in its 24 April 2003 judgment, no. 28 Cdo 2194/2002 - 89.

In conformity with § 42 paras. 3, 4 of Act No. 182/1993 Coll., on the Constitutional Court, as subsequently amended (hereinafter "Act on the Constitutional Court"), the Constitutional Court sought the views of the parties to the proceeding and requested from the Municipal Court in Prague its file no. 32 C 10/2001.

In its pleading, the High Court in Prague referred to its judgment in full.

The Supreme Court of the Czech Republic stated that its judgment was based on published case-law and that it did not find anything incorrect in the decision of the High Court in Prague contested in the extraordinary appeal. The Supreme Court stated that it based its decision on published case-law and found no error in the decision of the High Court in Prague contested in the extraordinary appeal.

The secondary party stated that the complainant's thinking on what he meant by the term, "Mafioso" is irrelevant. The ordinary court decisions in no way threaten the freedom of expression, as the complainant seems to indicate, because the courts impose a sanction only in cases where the freedom of expression has been abused. Moreover, the manner in which the complainant carried out his obligation to publish an apology in the daily press was highly peculiar because, in addition to the text required by the court, he also published his own attitude, including the basic theses of the constitutional complaint itself. She therefore proposes that the constitutional complaint be dismissed as manifestly unfounded.

As was ascertained from file no. 32 C 10/2001 of the Municipal Court in Prague, on 9 1 2001 the secondary party, in that case as the plaintiff, filed against the complainant an action for the protection of personhood, in which she sought, in the action's three prayers for relief, that the obligation be placed on the defendant: 1. to desist in his unsubstantiated media attacks against the plaintiff, which both tied her with unidentified Mafioso, and would otherwise create the impression that in 1977 she signed the Anti-Charter [trans. note: The Anti-Charter was a document which the Communist regime pressed upon public figures to sign to show their unqualified support for that regime, and to reject the document to which it refers, Charter 77, signed by the most active dissidents in the country]; 2. within three days of the judgment coming into effect, to send the plaintiff a letter containing an apology (formulated as proposed in the complaint) for the complainant's statements published on 6 October 2000 in an interview for Lidové noviny within the context of the article "Girl's War - Are Czech Singers still even Singers? Aren't they just Painted Faces on Record Covers?", as well as for the statements in his submissions, on 16 and 23 October 2000, to the readers section of Lidové noviny; and 3. to publish at his own expense in the dailies, Lidové noviny and MF Dnes, an apology (formulated as proposed by the plaintiff), related to the defendant's statements made in Lidové noviny on 6, 16, and 23 October 2000, as these submissions were capable of tarnishing her reputation among the wider public.

The complainant proposed that that action be rejected on the merits because in the mentioned articles, he merely quotes from an 11 February 1977 ČTK [Czech Press Office] report and from articles of the same date in the former Rudé právo [trans. note, the former Communist Party daily newspaper] and Mladá fronta, which make clear that the secondary party's name was listed among the signatories of the "Anti-Charter". As regards his statement that H. V. did not lose "contact with the Mafioso who, in the seventies and eighties, pushed her onto radio, television, and LPs", and that she is therefore now celebrating a "come back", the complainant is of the view that he has the right to express his view on the whole cultural scene. By this expression, he allegedly did not intend anything other than that "unfortunately the existing practice in this field is that, without contacts, even the very best singers will not get into the limelight".

The Municipal Court took detailed evidence relating in particular to the relations in Czechoslovak cultural scene, and popular music in particular, in the 70's and 80's of the last century. In its 14 January 2002 judgment on the merits, no. 32 C 10/2001 - 35, it then rejected the claim in its entirety. It did not find the first prayer for relief to be well-founded because "the plaintiff chose the route of the media to reproduce her views," to which the complainant "repeatedly reacted", and such an exchange may not be judicially prohibited. As regards the requested relief of a letter of apology, the Municipal Court found that, while the complainant's statement on contacts "with Mafioso" constituted an unjustified encroachment upon the secondary party's personal sphere. Linking her with the mafia, when is generally understood to mean "an international criminal syndicate", connected with "brutal violence, threats, abductions, etc.", constituted a disproportionate criticism. The court concluded that, in terms of its factual findings, the proposed wording of the apology did not correspond to the ascertained unjustified encroachment, nor did it correspond to the wording of the complainant's statement. As concerns the dispute regarding her alleged signing of the Anti-Charter, the Municipal Court observed that it is not evident why and for what reason the two parties are engaging in a dispute as to whether or not she signed the "Anti-Charter". It concluded that, at the end of the day, it is a matter of taste as to which arguments music critics use in their music critics.

In its 25 July 2002 judgment, no. 1 Co 106/2002 - 69, the High Court in Prague decided on the plaintiff's appeal against the Municipal Court's judgment. It modified the Municipal Court's judgment to the extent that it placed upon the defendant the obligation, within three days of its judgment coming into effect, to send the plaintiff a personal letter containing an apology worded as follows: "Dear Mrs. H.V., in my interview for Lidové noviny, printed in the synoptic material on 6 October 2000, I said of you, among other things: 'she evidently succeeded in not losing contact with the Mafioso who, in the seventies and eighties pushed her onto radio, television, and LPs. She is now celebrating a come back in Poland, and even with G. in Carnegie Hall.' For this attack upon your reputation I, therefore, apologize. J. R."

The complainant was further ordered, at his own expense and within 15 days of the judgment becoming final, to have printed in the daily newspapers, Lidové noviny and MF Dnes, an apology reading: In my interview for Lidové noviny, printed on 6 October 2000 in an interview for Lidové noviny in the article entitled "Girl's War - Are Czech Singers still even Singers? Aren't they just Painted Faces on Record Covers?" I said of Mrs. H. V., among other things, that . . . she evidently succeeded in not losing contact with the Mafioso who, in the seventies and eighties pushed her onto radio, television, and LPs. She is now celebrating a come back in Poland, and even with G. in Carnegie Hall. I therefore apologize to Mrs. H. V. for this attack upon her reputation. J. R."

The High Court rejected on the merits the proposal in the action that the wording of the apology also contain the text: "My speculation about your not losing contact with the Mafioso was deceptive and was not appropriate to your professional and social contacts", as well as the proposal that the word "good" be used in this context.

As concerns the complainant's statement about "contacts with Mafioso", the appellate court concluded that these are "factual assertions" and that associating someone with the mafia, that is, members of an organization that is generally conceived of as criminal, acting beyond the confines of law, calls into doubt the honor and dignity of such person. In the

given case the association of the plaintiff, a pop singer, and the mafia is made in connection with her professional success, thus especially her professional honor is cast into doubt. In adjudging the meaning of the word, "mafia", what the complainant meant by it is not decisive, since he would himself have had to analyze it in the article, which he did not do. The complainant did not prove the truth of his assertions, that in the seventies and eighties the plaintiff had contacts with the mafia, which she managed not to lose, and due to this she is enjoying a come-back. The appellate court did not agree with the complainant's objection that the plaintiff, who is a pop singer and thus a person of public interest, must put up with lesser restrictions on the criticism of her, since, in the appellate court's view, even persons of public interest are not obliged to tolerate untrue factual assertions, as was the case in this matter.

The appellate court devoted some attention to the relationship between Art. 10 and Art. 17 of the Charter, which rights are, in its view, in principle equal. With reference to judgment no. I. US 156/99, which the complainant employed in his argument, the appellate court inferred that, in weighing the priority of one right over the other, the circumstances of the specific matter must always be taken into consideration. The appellate court stated "[p]recisely the circumstances of the matter at issue argue in favor of the priority of the plaintiff's right to the protection of personhood, for to make public information about the plaintiff, the truth of which was not proven in the proceeding, is an abuse of the right to the freedom of expression."

The complainant submitted an extraordinary appeal against the appellate court decision. He called attention to the fact that his statements regarding the secondary party have a figurative meaning. According to him "it is simply not possible to believe that, when reading the survey at issue, a reader who reached the word 'Mafioso' did not understand this word in the way it was meant by the appellant (now complainant). No reasonably thinking reader could, in view of the context of the statement, actually think that the complainant was accusing the plaintiff of contacts with a classical criminal organization, a mafia of the Italian or American type." The complainant emphasized he had not stated that the plaintiff's professional success could be attributed solely to the mentioned contacts she had with "Mafioso". In the complainant's view, the factual finding to the effect that the plaintiff's professional reputation was harmed finds no support in the evidence taken.

In its 24 April 2003 judgment, no. 28 Cdo 2194/2002 - 89, the Supreme Court of the Czech Republic rejected the complainant's appeal on the merits. It referred in its reasoning to, among other things, a decision published as no. 15/1996 in the Collection of Judicial Decisions and Positions, in which the Supreme Court of the Czech Republic adopted the unambiguous proposition of law that the mere publication of false information, touching upon the personality of a natural person, generally constitutes an unjustified encroachment upon that person's right to the protection of her personhood, justifying the requirement of just satisfaction pursuant to § 13 par. 1 of the Civil Code (hereinafter "CivC"). According to the Supreme Court of the Czech Republic, in principle every untrue assertion or accusation is an unjustified encroachment that impinges upon the rights of natural persons protected in the sense of § 11 of the Civil Code (with reference to the jurisprudence published in Anthology III - The Supreme Court of the Czech Republic, SEVT, Prague, 1980, pp. 172 and 193). In order to successfully assert the right to the protection of personhood, it is sufficient to find that the encroachment was, objectively considered, capable of disrupting or threatening the right protected by § 11 CivC. It is not required that such encroachment resulted in consequences (with reference to the constant jurisprudence). The Supreme Court of the Czech Republic concluded that the extraordinary appeal was not well-founded as "the defendant published a statement that encroached upon the plaintiff's right to the protection of her personal rights, but it was not proven in the proceeding that the defendant's verbal statement corresponded to the facts and that it was true."

On the basis of the final court order for the carrying out of the decision the complainant apologized to H. V., both in his letter of 30 May 2003 and on the pages of the 23 June 2003 editions of Lidové noviny and MF Dnes.

It was ascertained from the appendix attached to the file that, on 6 October 2000, an article entitled "Girl's War - Are Czech Singers still even Singers? Aren't they just Painted Faces on Record Covers?" was published on pp. 10-14 of the Lidové noviny Friday supplement. The article dealt extensively with the relations in Czech pop music; in particular, it noted that Czech pop music "is ruled" by eight female singers who do not allow any other aspirants to compete with them. In this connection, the introduction posed, among others, questions about the principles upon which the world of Czech female singers functions, why "do the same ladies always remain at the top", to what extent does their popularity depend upon their presentation in the media, etc. In addition to those of other personalities, the article also extensively cited the views of the complainant, who already in the introduction was presented as "from among the most critical of critics". The complainant there stated, among other things, that he considered the world of Czech female pop-music as a "strange community which is closed off and refuses to let in anyone else from the world of Czech music". According to another of the complainant's statements "it's as if in Czech show business there is in place an opposition agreement. [trans. note - This is in reference to an agreement (in effect for the years 1998-2002) between the two largest political parties, which was commonly understood as an effort to squeeze smaller political parties out of the political scene] No new talent can establish itself there. . . . Behind everything is the stable which supports the singers. And the mentioned young ladies or women are popular, even though nobody actually knows why" (p. 11 of the mentioned Lidové noviny supplement). The complainant then gave his views altogether on eight of the most popular Czech female singers, among others, of L. B. he said, "I must praise the manner in which she managed to free herself from the tight clutches of various cads who were taking advantage of her at the time when 'Disobedient Tennis Shoes' was playing on the radio"; about I. B. he said, among other things, "[s]he is a singer with good technical skills but, had it not been for Š., I cannot imagine how she would have established herself"; about H. V., "We can view her in several ways - also as on a person who like other men and women of pop-music was entangled with the former regime. Except she evidently succeeded in not losing contact with the Mafioso who, in the seventies and eighties pushed her onto radio, television, and LPs. She is now celebrating a come back in Poland, and even with G. in Carnegie Hall. To sing in a very moving way for the suspected buddy of Š., the Czech-American, J. . . ." (this is the statement that became the subject of the court dispute and is also the subject of this constitutional complaint); about D. R., "Marvelous, advantaged girl

from Slovakia who was supported by the Štáidlian mafia, pardon, the selfless ones 'ringing out normalization bliss' " (quotation marks in the original).

In addition to the complainant, also one of the analyzed performers, the singer L. M., assessed what is happening behind the scenes in pop-music in the same way: "The world of show business is really very tough. The harms, lashes and intrigues, calling into doubt your results, the blurring of the facts of the matter, the superficial evaluations . . . All this occurs behind the scenes. It is a contest among record companies, a battle over how of them can manage to magnify their project or thwart someone else's project. It is brutal and perverse."

The article is then concluded with the following observation: "It may be necessary to stand music critics on their head - and the world of Czech female singers will continue to be a world that is impervious and indestructible. The one thing that can be wished is that the tabloids endeavor to 'make' a star whom we can not only look at but also listen to" (quotation marks in the original).

On 14 October 2000 Lidové noviny published in its weekend supplement an extensive interview with the secondary party entitled "Was I Supposed to Emigrate?" and the subtitle "H. V. - 35 Years at the Top". According to the secondary party's own pleading in her lawsuit, the interview was conceived as a response to the complainant's views appearing in Lidové noviny on 6 October 2000. The interview was published on two large pages of the newspaper format. In the interview, she reacted to the complainant's statement on "contacts with Mafioso" as follows: "And that second invective was from the pen of Mr. R, wasn't it? If he writes about me scurrilously that I was the regime's female singer, then he must have been its scribbler, as in the same period he wrote his articles and for that took money from the regime. I don't care in the least what Mr. R. wrote. I think that the results of my work speak for me quite adequately, as does its reception by real and serious critics, both here and abroad. . . . And these political attacks are just feeble fabrication and slander. And as you know, you can't effectively fight against a person's slander. My friends and colleagues in the business know very well about my political positions." In that interview the secondary party rebuffed the assertion that in 1977 she perhaps signed the "Anti-Charter".

The complainant's reaction to the mentioned interview was published on 16 October 2000 in the next following edition of Lidové noviny, in the column "" with the title, "Ohh, that Memory of H!" In a brief contribution the complainant cited the 11 February 1977 edition of Rudé právo as evidence of the fact that the secondary party is mentioned as one of the signers of the "Anti-Charter". Her reaction to the complainant's contribution was published in Lidové noviny on 16 October 2000 with the title, "I am not a Liar". In it she emphasized that she had never signed the "Anti-Charter" as she was on a tour abroad at the time. In the following issue of Lidové noviny (on 23 October 2000), the complainant gave his response in a brief contribution entitled "Another Attempt by H", in which he rejected H. V.'s arguments.

With reference to its constant jurisprudence, the Constitutional Court is obliged in considering and deciding upon each constitutional complaint, first and foremost, to respect the fact that it is not empowered to intervene in the judicial work of ordinary courts as it is not the summit of that court system (Art. 91 of the Czech Constitution) and, therefore, may not arrogate to itself the right of review over their decision-making. The condition for respecting this principle, however, is observance of the condition that, in their decision-making, courts proceed in accordance with the constitutional order.

As this condition was not respected in the instant case, the constitutional complaint is well-founded.

According to Art. 10 par. 1 of the Charter, everyone has the right to demand that his human dignity, personal honor, and good reputation be respected, and that his name be protected. According to Art. 17 par. 1 of the Charter, the freedom of expression is guaranteed. According to the second paragraph of that Article, everyone has the right to express his views in speech, in writing, in the press, in pictures, or in another form. Both Article 10 and Article 17 of the Charter express basic constitutional values in the legal order of the Czech Republic, a democratic law-based state. The constitutionally guaranteed right to express one's views is restricted in content by the rights of others, in particular the rights laid down in Art. 10 of the Charter. The conflict of both rights plays out on the sub-constitutional plane, for example, in the application of § 11 and following of the Civil Code, as was the case also in this matter. In applying such statutory provisions, a judge must always bear in mind the constitutional dimension of the application of a statute which expresses the accommodation of those constitutional rights. As the Constitutional Court has repeatedly brought to their attention, one of the functions of the Czech Constitution, more especially so the provisions concerning fundamental rights and basic freedoms, is its "radiation" throughout the entire legal order. The spirit of the Czech Constitution consists not only in laying down the fundamental rights and basic freedoms, as well as the institutional mechanism and process of formation of legitimate decisions by the state (or public authorities), not only in the directly binding nature of the Czech Constitution and in its status as a direct source of law, but also in the necessity for state bodies, or public authorities, to interpret and apply law from the perspective of the protection of fundamental rights and freedoms. In individual cases that entails the obligation of courts to interpret particular statutory provisions in the first place from the perspective of the purpose and spirit of the constitutionally guaranteed fundamental rights and basic freedoms (compare, for example, Judgment No. III. US 139/98, Czech Constitutional Court: Collection of Judgment and Rulings, vol. 12, p. 97).

The importance in individual cases of rights and freedoms that are in opposition is found in the specific circumstances of the matter, the hierarchy of societal values and the constitutional foundations of the legal order. As legal doctrine points out, "the problem of relative preferences is not - and frequently even cannot or should not be - resolved by the route of legislation in valid law, so that they tend to be resolved in further developing the law by the route of interpretation when they are applied" (Boguszak, J., On the Theory of Law Creation (values, norms, and legal principles), in The Law Faculty of Charles University, 1348-1998, Jubilee Festschrift, Prague 1998, p. 168). In the case of a conflict between the freedom of expression and the right to the protection of personhood, that is, of fundamental rights which are of the same legal force, first and foremost it will always be up to the ordinary courts to resolve, taking into consideration the circumstance of each individual case to carefully weigh whether one right has not unjustly been accorded priority over the

other right (compare, for ex., judgment no. IV. US 154/97, Constitutional Court of the Czech Republic: Collection of Judgments and Rulings, Vol. 10, p. 112).

The Constitutional Court may not intervene into the decision of an ordinary court merely due to the fact that it would itself measure the constitutional values and fundamental rights differently and would thus reach a different conclusion. However, the Constitutional Court shall intervene and protect fundamental rights to the extent that the ordinary courts committed error in assessing the significance of the fundamental right or basic freedom. As a general matter, the more serious the ordinary court's encroachment upon a certain right, the more thoroughgoing must be the Constitutional Court's review of the ordinary court's decision (compare, the analogous jurisprudence of the Federal Constitutional Court, published as BVerfGE 42, 143 [pp. 148-149]).

The Constitutional Court is of the view that the ordinary court did not take sufficiently into account the constitutional law nature of this matter. In its decision, the Supreme Court of the Czech Republic gave no consideration to the constitutional aspect of this matter. The High Court, the appellate court in this matter, dealt with it in a single brief paragraph in which it reached the conclusion, without any arguments whatsoever, that the freedom of expression was not violated in this matter. The ordinary courts thereby accorded unjustified priority to one basic right over another, while their encroachment upon the complainant's freedom of expression, as will be explained below, must be evaluated as very serious and as a threat to public discussion on events behind the scenes in popular music, which is a matter of public interest.

The ordinary courts considered the complainant's statement, to the effect that H.B. "evidently succeeded in not losing contact with the mafia, which in the 70's and 80's pushed her onto radio, television, and LPs", as an assertion of fact. According to the ordinary courts, since the complainant was unable to demonstrate the truth of this "fact", he could not prevail in this dispute. As follows from the long-term jurisprudence of the European Court for Human Rights, a value judgment and an assertion of fact differ in a fundamental way. Whereas the existence of a fact can be proven, the truthfulness of a value judgment is not demonstrable, because a value judgment does not describe a fact, rather it more or less freely interprets it (this point was analyzed in detail, for example, in the case of *Lingens v. Austria* (1986), par. 46). While the assertion of certain false facts can, without more, even be generally prohibited, the articulation of value judgments, even controversial ones, in principle enjoys constitutional protection (compare, for ex., BVerfGE 90, 241, on the one hand, and BVerfGE 90, 1, on the other).

In view of the fact that it cannot be fulfilled, the requirement to prove the truthfulness of a value judgment is, in and of itself, a violation of the freedom of expression. That does not mean that value judgments are entirely incontestable in the context of a proceeding on the protection of personhood. Where some statement constitutes a value judgment, the appropriateness of the interference with the rights of personhood can depend upon whether there exists a sufficient factual basis for the contested statement, since even a value judgment can be excessive, if it lacks any factual basis whatsoever [compare the decisions of the European Court of Human Rights in the matter, *De Haes a Gijssels v. Belgium* (1997) and *Oberschlick v. Austria* (No. 2) (1997)].

The issue whether the complainant's statement concerning H. V.'s contacts "with the Mafioso who, in the seventies and eighties pushed her onto the media", was an assertion of fact or a value judgment cannot be established solely on the basis of one isolated sentence, as the ordinary court have done. The Constitutional Court has ascertained from the above-mentioned appendices to the Municipal Court's file that the article, "Girl's War - Are Czech Singers still even Singers? Aren't they just Painted Faces on Record Covers?", extensively and critically dealt with the relation in Czech pop-music, especially various behind-the-scenes influences and pressures of the most diverse music managers and recording companies. At another point, the complainant says that he considers the world of Czech female pop-music as a "strange community which is closed off and refuses to let in anyone else from the world of Czech music": "Behind everything is the stable which supports the singers. And the mentioned young ladies or women are popular, even though nobody actually knows why" (p. 11 of the mentioned *Lidové noviny* supplement of 6 October 2000). He also speaks to the circumstance that important personages of Czechoslovak pop-music even today influence the Czech media scene. In this sense the Constitutional Court concurs with the complainant that in no case can an average reader, who reads the mentioned word in the overall context of the article, understand the complainant's critique of the secondary party such that she is, as a singer, in contact with members of the mafia, that is "an international crime syndicate" connected, in the words of the Municipal Court in Prague, with "brutal violence, threats, abductions, etc." In the overall context of the article, the complainant's statements are not assertions of fact, but value judgments. To the extent that the ordinary courts required that such value judgment be proven, they proceeded unconstitutionally and violated both Art. 17 par. 2 of the Charter and Art. 10 of the Convention.

In order for a value judgment not to overstep the limits that are constitutionally protected, it is generally required that it have a certain foundation. In evaluating the foundation of a value judgment, it is necessary to take into consideration the entire article, and not just the one or two sentences at issue as the ordinary courts have done, as well as the overall societal context in which a certain statement is made [compare the decision of the European Court of Human Rights in the *Feldek v. Slovakia* (2001), par. 86, interpreting the value-laden adjective, "fascist"].

It is evident from the article that it was conceived as a critical contribution and that the complainant, as a music critic, was sought out as "from among the most critical of critics", which is stated at the very beginning of the article. The complainant makes a very negative evaluation of the producers from the period of the Communist regime, for ex., where he says of L. B. that she was "in the clutches of various cads who were taking advantage of her at the time when 'Disobedient Tennis Shoes' was playing on the radio" (that is, at the end of the 1980's), or of I. B. that her success in becoming established is attributed, in particular, to the influence of "Š". The term, "mafia", is not employed solely in relation to H. V., but also in relation to D. R. who, according to the complainant "was supported by the Š mafia, pardon, the selfless ones 'ringing out normalization bliss'." In this statement appearing on p. 12 of the cited article, the complainant even indicates what he means by the terms, "mafia" or "Mafioso". In the Constitutional Court's view there is no doubt that the complainant had a definite foundation for the use of the terms, "mafia" or "Mafioso", for a expressive, polemical, and controversial evaluation of what

went on behind the scenes in popular music; a certain foundation was also afforded him by the statements of one of the singers in the cited article ("The world of show business is really very tough. The harms, lashes and intrigues, calling into doubt your results, the blurring of the facts of the matter, the superficial evaluations . . . All this occurs behind the scenes. It is a contest among record companies, a battle over how of them can manage to magnify their project or thwart someone else's project. It is brutal and perverse."). Moreover, the complainant's value judgment rested upon information that was generally known to the wider public (for ex., the comeback of producers who had significant influence on popular music prior to 1990).

It is true that publicly disseminated opinions should, in principle, not overstep the line of the rules of decency generally recognized in democratic society, otherwise they would lose their character as proper judgments or commentary and, as such, could fall outside the bounds of constitutional protection (compare judgment no. III. US 359/96, Czech Constitutional Court: Collection of Judgment and Rulings, vol. 8, p. 367). The Constitutional Court concurs with the jurisprudence of the European Court of Human Rights according to which the freedom of expression represents one of the most important foundations of democratic society and one of the main conditions of the advancement and development of each individual. As such the freedom of expression relates not only to "information" or "ideas" that are favorably received or considered as innocuous or insignificant, but even those which injure, shock, or disturb: such is required for pluralism, tolerance, and a spirit of openness, without which there would be no democratic society. Compare, for example, the decision, *Fuentes Bobo v. Spain* (2000). It is a foundational principle of contemporary Euro-Atlantic society that also exaggerated and excessive opinions, and even opinions which are insulting to some, if they are presented in a public or political debate, are constitutionally protected opinions [compare the decisions of the Federal Constitutional Court, BVerfGE 61, 1 and BVerfGE 90, 1, or the decision of the Supreme Court of the United States in *New York Times C. v. Sullivan*, 376 U.S. 254 (1964)]. The Constitutional Court has repeatedly expressed the view that, due to the significance of the freedom of expression under Art. 17 par. 1 of the Charter, each opinion, viewpoint, or criticism is in principle permissible (compare judgment no. II. US 357/96, Czech Constitutional Court: Collection of Judgments and Rulings, vol. 9, p. 355), and that any limitation placed upon the freedom of expression is thus an exception which must be restrictively interpreted and which can be justified solely by qualifying circumstances.

Apart from the above-stated arguments, the ordinary courts must also be reproached for not giving sufficient consideration to the status of the secondary party. It can generally be stated that persons who are active in the public, politicians, public officials, media stars etc., must bear a greater degree of criticism than other citizens. The jurisprudence of the European Court of Human Rights is also built upon this principle [in greater detail, for example, in the matter of *Lingens v. Austria* (1986)], just as is the jurisprudence of the Supreme Court of the United States - compare, for example, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). There is a dual basis for this principle. On the one hand, it encourages the public discussion of public affairs and the free formation of opinions. So as to allow for the greatest possible plenitude of discussion of public affairs, it should be regulated by state authority solely to the extent absolutely indispensable (compare Art. 17 par. 4 of the Charter). In addition, the state accepts that its authoritative interference with the freedom of expression, for the purpose of protecting the good name of other citizens, should be subsidiary, that is, employed only in the case that such harm cannot be cured by some other means. Such harm can be cured by means other than interference by the state, for example, by use of permissible possibilities to oppose controversial and misleading opinions. Thus, it is often possible to minimize the damaging consequences of controversial statements by far more effective than by means of a judicial proceeding. For persons active in public life, whether they are politicians or publicly known persons, it is generally the case that they enjoy much easier access to the media and thus have far greater possibilities to refute information which they themselves consider to be fabricated. For this reason as well, the judicial protection of the good name of such publicly active persons is realized to a lesser degree than the protection of the good name of anyone else, who has a far smaller spectrum of opportunities to enter into public discussion than persons who are publicly active.

These theoretical premises are fully applicable in this case. A discussion of what goes on behind the scenes in Czech popular music is a discussion on public affairs. It is typically political issues which qualify as public affairs, but so do issues connected with societal, cultural, sports, and other themes. For this reason, state authority can regulate the discussion of these issues only in exceptional cases and only to a degree that is indispensably necessary.

It is beyond doubt that, as the secondary party is a pop singer, she is a person active in public life. As such she has substantially easier access to the media than does any "ordinary" citizen. As the secondary party otherwise herself admits in her 4 January 2001 complaint, the two-page interview, printed in *Lidové Noviny* on 14 October 2000, was conceived (in her words) as a "commensurate response" to the complainant's statements contained in the article, "Girls War". In this sense it is not for the courts to intervene in the public discussion between the complainant and the secondary party, as public discussion is the very best means for the formation of opinion and the search for answers to questions of the type which this matter concerns. In similar matters, a judicial decision will seldom be purposeful; on the contrary, as a rule it will represent an unconstitutional restriction of the freedom of expression.

The Constitutional Court concludes that the ordinary courts acted unconstitutionally, due to the fact that they interpreted the significance of the word, "mafia", as an assertion of fact, corresponding to the alleged participation of the secondary party - singer in organized crime, as they demanded, in conflict with Art. 17 par. 2 of the Charter and Art. 10 of the Convention, that a value judgment be proved, which in essence is not possible. Moreover, the ordinary courts acted entirely arbitrarily by failing to take into consideration other meanings of the words, "mafia" and "Mafioso", the meanings which the complainant proposed to them which bear no connection to a criminal organization founded on murders and abductions, rather criticizing a society founded on connections and non-transparent relations. With respect to the context of the whole affair as well as of the significance of the complainant's statements, these other and broader meanings of the words, "mafia" and "Mafioso", appear far more probable than meaning to which the ordinary court judgments attributed to

them, which is entirely improbable and does not at all seem to fit in the context of the article. The Constitutional Court cannot fail to take into account the fact that the secondary party, as a pop singer, is a person known to the public who must bear a greater degree of criticism than citizens who are not in the public eye; moreover, on her own she has sufficient opportunities to present through the media her disagreement with the complainant's view. It is up to the readers, and not the court, to judge for themselves whether or not the complainant's assessment of the situation in Czech popular music is reasonable and persuasive.

In view of the other above-stated arguments, by this judgment the Constitutional Court has, pursuant to § 82 par. 3 lit. a) Act No. 182/1993 Coll., on the Constitutional Court, granted the constitutional complaint and quashed the designated ordinary court decisions due to their conflict with Art. 17 par. 2 of the Charter of Fundamental Rights and Basic Freedoms and Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Notice: A Constitutional Court judgment may not be appealed.

Brno 15 March 2005