

Pl. US 37/04 - decided 26 April 2006

(...)

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

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

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

"Article 6

Right to a fair trial

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

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

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

60. The right to a fair hearing can not be separated from the general requirement of equality and non-discrimination. In this context, however, the meaning of equality is one that applies to the equality of parties in proceedings before a court, found in various opposed procedural positions, usually called "equal weapons." In the constitutional order of the Czech Republic this principle is contained in Art. 96 par. 1 of the Constitution, under which "all parties to a proceeding have equal rights before the court," or Art. 37 par. 3 of the Charter, under which "all parties to such proceedings are equal." Such equality is not literally stated in the Convention, but the case law of the European Court could not but derive it from the requirement of fairness. A trial is a dispute that is played out through adversarial discussion, in which the parties to the dispute must have "equal weapons," i.e. the same opportunity to speak and defend "their" truth. In practical life there will usually not be absolute, mathematical equality; it is a relative concept, especially in the sense that it can not completely erase the difference in the procedural and especially factual position of the parties, arising from their different abilities. This unequal position can be compensated to a certain degree by additional guarantees for the weaker party, so-called favor defensionis, which is manifested by, e.g. regulation of the burden of proof (see, e.g. B. Repik, *Evropska umluva o lidskych pravech a trestni pravo* [The European Convention for the Protection of Human Rights and Criminal Law], Orac, 2002, p. 144 et seq., similarly also B. Repik, *Ludske prava v sudnom konani* [Human Rights in Court Proceedings], MANZ Bratislava, 1999, p. 155 et seq.). In the decision in the matter *De Haes and Gijssels v. Belgium* (1997), (in par. 55 of the reasoning), the European Court again confirmed that the principle of equal weapons - an element of

the wider concept of a fair trial - requires that each side be given a reasonable opportunity to defend its position under conditions which do not place it at a substantial disadvantage in relation to its opponent. It also stated a similar opinion in the matter *Ankerl v. Switzerland* (1996), (in par. 38 of the reasoning of the decision).

61. The Constitutional Court has also considered the equality of parties to proceedings in a number of its decisions. For example, in the matter file no. IV. US 13/98 (Collection of Decisions of the Constitutional Court, Volume 12, judgment no. 98) it stated that "the principle of equality of the parties is a key principle of a fair trial. It is enshrined in Art. 37 par. 3 of the Charter and in Art. 96 par. 1 of the Constitution of the Czech Republic and is also reflected in a number of provisions in procedural regulations. The Civil Procedure Code expressly provides the equality of parties to proceedings in § 18, from which a court has an obligation to ensure the parties the same, i.e. equally effective opportunities to exercise their rights." Under the judgment in the matter file no. Pl. US 15/01 (Collection of Decisions of the Constitutional Court, Volume 24, judgment no. 164) "The constitutional principles forming one of the components of the fundamental right to a fair trial include the principle of "equal weapons," or the principle of equal opportunities (i.e. the principle of equality of all parties to proceedings) under Art. 37 par. 3 of the Charter, Art. 96 par. 1 of the Constitution and Art. 6 par. 1 of the Convention. The principle of "equal weapons" (Art. 6 par. 1 of the Convention) has been distinctively reflected in the existing case law of the European Court of Human Rights. In that context it can be described, in particular, by saying that in the Court's opinion its foundation is the idea of equality, wherefore it is comparable to the principle of the ban on discrimination under Art. 14 of the Convention."

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

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

64. Thus, at the constitutional law level the principle of equal weapons in a civil trial, contained in the right to a fair trial, generally also includes equality of the burdens which are laid on the parties to the proceedings (and which must not be disproportionate), and that in the contrary case the proceedings as a whole can not be considered fair. This general principle of equality of the parties must then also be reflected in the legal regulation of presentation of evidence at the statutory level.

65. The statutory regulation of an adversarial civil trial is governed by the principle to hear, under which it is fundamentally a matter for the parties to the proceedings to make claims of fact and propose proof of them. The burden of proof lies in a party's procedural responsibility to see to it that the facts he claims will be proved in the trial. Thus, in an ordinary civil adversarial trial each party bears the burden of proof for those facts that he himself asserts. The general regulation of presentation of evidence in § 120 of the CPC, where, under paragraph one "the parties are required to identify evidence to prove their claims," clearly specifies that the initiative for gathering evidence fundamentally lies on the parties. Thus, a party has the obligation (burden) of assertion and obligation (burden) of proof. The burden of proof is an institution of procedural law which affects the party in

whose interest it is for a certain fact, decisive under substantive law and asserted by the party, to be proved in the trial, so that the court recognizes it as true (cf. Bures, Drapal, Krcmar, Mazanec, Obcansky soudni rad - Komentar, 6.vydani [The Civil Procedure Code - Commentary, 6th ed.], p. 450 et seq.).

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

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

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

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

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

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

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

71. As regards the legitimacy of the aims pursued by § 133a par. 2 of the CPC (and likewise the non-contested § 133a par. 1 of the CPC), it is obvious (and also correctly stated in the position statements of the Chamber of Deputies and the Senate), that the cited provision became part of the Civil Procedure Code in connection with the obligation of the Czech Republic, as a member state of the European Union, to reflect in its legal order the obligations arising from the relevant European directives. The constitutional dimension of this obligation is framed by Art. 1 par. 2 of the Constitution, under which "the Czech Republic observes the obligations which arise for it from international law." The reasons themselves for passing so-called anti-discriminatory directives are similarly expressed, especially in their preambles. Primarily they are concerned with effective promotion of the principle of equal treatment, which is understood to be the non-existence of any direct or indirect discrimination on the basis of sex, race, ethnic origin, and other reasons specified in

the directives. In fact this is the result of several years of development in the European Union, which is, as provided by Article 6 of the Treaty on the European Union, established on the principles of freedom, democracy, respect for human rights and fundamental freedoms, as well as on the principles of a law-based state, principles which are common to the member states; the European Union recognizes as general legal principles of the Community the fundamental rights as they are guaranteed by the Convention and as they follow from the constitutional traditions common to the member states. The cited anti-discrimination directives have a common point of departure, under which persons who have been subject to discrimination, should have effective means for legal protection. Therefore, domestic legal frameworks are to ensure, among other things, special regulation of the burden of proof. It is supposed to be based on the principle that if a person who feels injured by non-observance of the principle of equal treatment proves to the court facts which indicate that there was direct or indirect discrimination, the burden of proof shifts to the opponent, who is required to prove that there was no violation of the principle of equal treatment (see, e.g., Art. 8 par. 1 of Council Directive 2000/43/EC). The Constitutional Court accepts that, if the Convention is to be primarily and above all a system for protecting human rights, it is essential to take into account the changing conditions in the states parties, and to respond to any newly arising consent, as regards standards that are to be achieved and that are, in this case, expressed especially in the preamble and normative provisions of individual anti-discrimination directives. For that reason the Constitutional Court respects the expression of the will of member states of the European Union expressed in the cited directives, and states that the contested § 133a par. 2 of the CPC does pursue a legitimate aim.

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

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

racial (ethnic) origin, and not for other reasons, is quite obviously impossible to meet, because proving the defendant's motivation (impetus) is ruled out by the nature of the matter.

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

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

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

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

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