



Številka: Up-695/11
Datum: 10 January 2013

DECISION

At a session held on 10 January 2013 in proceedings to decide upon the constitutional complaint of the company Infohip, d. o. o., Kranj, represented by mag. Miha Šipec, attorney in Ljubljana, the Constitutional Court

decided as follows:

Supreme Court Judgment No. III Ips 123/2009, dated 29 March 2011, is abrogated and the case remanded to the Supreme Court for new adjudication.

REASONING

A.

1. In 1995 the complainant purchased real property (a worker's home) in a bankruptcy procedure and in 1996 and 1997 she filed 115 actions for eviction against the tenants of individual rooms. These actions for eviction were finally decided on six and a half years after the actions for eviction were filed, namely by Judgment of the Higher Court in Ljubljana No. I Cp 2056/2002, dated 7 May 2003. Due to the pecuniary damage incurred because she could not use the real property, the complainant filed a lawsuit against the Republic of Slovenia in which she claimed compensation for damage. By a default judgment, the court of first instance ordered the defendant to pay compensation for pecuniary damage in the amount of EUR 3,303,739.50. The court held that the complainant incurred damage due to a violation of the right to a trial without undue delay, that she could not dispose of her real property free of occupants and personal property from 1 January 1998, and that too slow consideration of concrete legal procedures (115 actions for eviction) entails unlawful conduct according to Article 26 of the Constitution. The Higher Court abrogated in part the judgment of the court of first instance and changed it in part such that it dismissed EUR 1,847,976.92 of the claim.

2. The decision on the dismissal of the claim was confirmed by the Supreme Court, which dismissed the complainant's revision appeal. This decision was based on the standpoint that the allegations in the claim do not substantiate unlawful conduct and thus do not substantiate the liability for damage determined by Article 26 of the Constitution. Regarding such, the Supreme Court differentiated between the liability of the state for damage due to the backlog of cases conditioned by the system and liability for damage caused by the unlawful conduct of one of its authorities within the performance of its function. According to the standpoint of the Supreme Court, failure to consider a court case without undue delay that is conditioned by the system can substantiate sanctions against the state due to a violation of the right to a trial without undue delay (Article 23 of the Constitution); however, this in itself does not substantiate the unlawful conduct determined by Article 26 of the Constitution and thus it does not substantiate the liability of the state for damage on this basis. The backlog of cases conditioned by the system allegedly refers to such omissions with regard to an undefined circle of people (to the community as such); however, the unlawful conduct and thus the liability for damage determined by Article 26 of the Constitution are allegedly substantiated by the violation of duties towards a person or circle of people defined or definable in advance.

3. The complainant only challenges the decision of the Supreme Court and alleges violations of Articles 2 and 14, the fourth paragraph of Article 15, and Articles 22, 23, 26, 33, 67, and 74 of the Constitution. The complainant deems that it does not follow from Article 26 of the Constitution that the liability of the state for damage can be limited only to those cases of unlawful conduct of a person or an authority which can be defined, and that such would entail that damage caused by unlawful conduct conditioned by the system can not in any instance be claimed on the basis of Article 26 of the Constitution. This allegedly entails that regarding a large part of the unlawful conduct of the state, compensation can allegedly not be claimed for damage determined by Article 26 of the Constitution. The complainant also deems that regarding the liability of the state for damage determined by Article 26 of the Constitution it is not possible to proceed from the general rules of the law of damages. Even if the liability of the state for damages determined by Article 26 of the Constitution was limited by the general rules of the law of damages, the standpoints of the Supreme Court would allegedly entail a violation of Article 26 of the Constitution, as this right would allegedly be completely undermined. The complainant deems that the decision of the Supreme Court is also arbitrary as it does not consider Decision of the Constitutional Court No. Up-2965/08, dated 13 May 2010 (Official Gazette RS, No. 45/10), and the established case law (Judgment of the Supreme Court No. II Ips 274/2003, dated 25 November 2004, Judgment and Order of the Supreme Court No. II Ips 342/2004, dated 14. April 2005), from which it allegedly follows that the liability of the state for damage exists also in the event of errors by the state conditioned by the system. Demand for the concretisation of the inadmissible conduct and omissions of a specific judge allegedly entails the imposition of an excessive burden, in particular if it is taken into consideration that the

defendant was not active and a default judgment was issued. Namely, the complainant cannot know the possible reasons for the inadmissible delays in judicial adjudication, for example, as regards the caseload of the judges, the assignment of cases, the availability of courtrooms, etc. Allegedly, a *probatio diabolica* was required of her. The complainant deems that the allegation that in five years absolutely nothing happened with the court case fully suffices for the establishment of unlawful conduct, while the Supreme Court dismissed the complainant's actions for the acceleration of proceedings merely with the statement that they consist of "over-general allegations on proposed accelerations of proceedings". The complainant also deems that due to the unlawful conduct of the state she is on the verge of insolvency and the real property she could not dispose of due to the unlawful conduct of the state is now subject to execution proceedings.

4. By Order No. Up-695/11, dated 5 June 2012, the Constitutional Court accepted the constitutional complaint for consideration. Pursuant to the first paragraph of Article 56 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA), the Constitutional Court notified the Supreme Court thereof.

5. Pursuant to the second paragraph of Article 56 of the CCA, the Constitutional Court sent the constitutional complaint to the opposing party, who did not reply.

B.

6. The Constitutional Court has addressed the question of judicial protection of the right to a trial without undue delay and to compensation in the case of its violation several times. However, all prior cases involved questions connected with non-pecuniary damage caused by the violation of the mentioned human right. Thus, in Decision No. U-I-65/05, dated 22 November 2005 (Official Gazette RS, No. 92/05 and OdlUS XIV, 72) it established that in the Republic of Slovenia there are no special statutory provisions which would in such case enable an affected person to claim the right to just satisfaction within the meaning of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR). Therefore, it established that the then valid Act on the Judicial Review of Administrative Acts (Official Gazette RS, No. 50/97 and 65/97 – corr., and 70/2000) is inconsistent with the fourth paragraph of Article 15 of the Constitution in conjunction with the first paragraph of Article 23 of the Constitution. The legislature was ordered to adopt appropriate regulation of the judicial protection of the right to a trial without undue delay. The legislature responded to the mentioned decision of the Constitutional Court with the adoption of the Protection of the Right to a Trial without Undue Delay Act (Official Gazette RS, No. 67/12 – official consolidated text – hereinafter referred to as the PRTUDA).[1] PRTUDA first of all ensures parties protection of the right to a trial

without undue delay by so-called legal remedies for acceleration, by which parties may already at the time of the occurrence of an alleged violation effectively influence whether the judicial proceedings proceed without undue delay.[2] If parties are not ensured the right to a trial without undue delay [in practice], the PRTUDA provides them the possibility (if certain requirements are fulfilled)[3] to claim just satisfaction due to a violation thereof in an already concluded judicial procedure, *inter alia* also in the form of financial compensation for non-pecuniary and pecuniary damage.[4] By Decision of the Constitutional Court Nos. U-I-207/08 and Up-2168/08, dated 18 March 2010 (Official Gazette RS, No. 30/10), it established that Article 25 of the PRTUDA, insofar as it does not also regulate the status of other injured parties regarding whom an alleged violation of the right to a trial without undue delay terminated before 1 January 2007, is not in conformity with the fourth paragraph of Article 15 of the Constitution in conjunction with the first paragraph of Article 23 of the Constitution.

7. The complainant deems *inter alia* that by the challenged decision the Supreme Court adopted standpoints regarding the liability of the state for damage that deprived her of compensation for pecuniary damage that she has suffered due to a violation of the right to a trial without undue delay determined by the first paragraph of Article 23 of the Constitution, and which violated her right determined by Article 26 of the Constitution.

8. According to the established constitutional case law, a violation of the right determined by Article 26 of the Constitution exists when the court bases its decision on a legal standpoint that would be unacceptable from the perspective of this right (see Order of the Constitutional Court No. Up-2/04, dated 4 May 2005, OdlUS XIV, 46). Therefore, the Constitutional Court had to review the standpoints that the Supreme Court adopted with regard to Article 26 of the Constitution.

9. The central standpoint of the challenged judgment is that the liability of the state for damage does not exist as the complainant did not substantiate unlawful conduct, whereas this omission conditioned by the system, i.e. the failure to consider the court case without undue delay, can substantiate a violation of the right to a trial without undue delay determined by the first paragraph of Article 23 of the Constitution; however this does not in itself substantiate the unlawful conduct and thus the liability of the state for damage determined by Article 26 of the Constitution. Namely, the Supreme Court opines that the circumstance of a backlog of cases conditioned by the system entails an omission with regard to a circle of people undefined in advance (to the community as such); however, the unlawful conduct and thus the liability for damage [of the state] determined by Article 26 of the Constitution can be substantiated by a violation of duties towards a person defined or definable in advance (or towards a circle of people defined or definable in advance).

10. Such a standpoint leads to the conclusion that the Supreme Court equated the unlawful conduct of the state with the unlawful conduct of a specific judge, therefore it proceeded from the objective liability of the state for the (culpable) conduct of one of its employees or authorities, instead of reviewing it more broadly, including from the viewpoint of the possible liability of the state due to the backlog of cases conditioned by the system. It did so by delimiting between both forms of liabilities for damage (the backlog of cases conditioned by the system with regard to a circle of people undefined in advance, on one hand, and unlawful conduct towards a person defined or definable in advance, on the other hand) and interpreted Article 26 of the Constitution in such a manner that the liability of the state for the backlog of cases conditioned by the system cannot be based thereon because such only refers to an omission with regard to the community as such and not to an omission with regard to a defined or definable person.

11. The challenged judgment is based on a standpoint which is not consistent with Article 26 of the Constitution and Article 6 of the ECHR. It follows from the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR) that a state is held liable for a violation of the right to a trial without undue delay not only in the event of inappropriate procedural conduct by the court, but also in the event that an unreasonably long trial is a consequence of the objective state of a backlog of cases at the court. The state is also held liable for damage in the event of such as it did not organise the justice system in such a manner that the courts can implement the requirements determined by Article 6 of the ECHR.[5] Furthermore, the first paragraph of Article 16 and the second paragraph of Article 21 of the PRTUDA also determine that the state is to be held objectively liable for damage caused by a violation of this right. Thus, it follows from the challenged judgment that the Supreme Court considered the conduct of the state in a very limited manner, which is not consistent with the Constitution.

12. Article 26 of the Constitution encompasses in the most general manner all forms of unlawful conduct of the state by which the state causes damage to an individual.[6] Therefore, the liability of the state for omissions of the state which refer to a defined or definable person as well as the liability of the state for the backlog of cases conditioned by the system fall within this scope. On one hand, the Constitutional Court adopted the standpoint that just satisfaction due to a violation of the right to a trial within a reasonable time within the meaning of the ECHR does not entail compensation in the classical meaning, according to the criteria of civil liability for material or non-material damage [i.e. pecuniary or non-pecuniary damage], which also applies to compensation according to Article 26 of the Constitution, as it concerns satisfaction whose primary purpose is to provide compensation due to the failure to fulfil the positive duty of the state to ensure a system or organisation of proceedings such that would enable the individual to obtain a court decision within a reasonable time (see Decision of the Constitutional Court No. U-I-65/05). Nevertheless, this does not allow the conclusion that there follows from the

Constitution two different forms of liability of the state for damage which would have a different constitutional legal basis which would not have any mutual relation. As mentioned above, Article 26 of the Constitution encompasses all possible forms of unlawful conduct of the state and is from this point of view so-called *lex generalis*.

13. According to the first paragraph of Article 26 of the Constitution, merely on the basis of linguistic interpretation it could be concluded that the state is liable only for those forms of unlawful conduct which can be attributed to a particular person or to a particular authority in connection with the performance of the function or of any other activity of a state authority, local community authority, or bearer of public authority. However, such narrow interpretation would entail that the state would not be held liable for unlawful conduct that could not be attributed to a particular person or to a particular authority, but only to the state or its apparatus as such,[7] such as in cases where there is no individualised relationship between the bearer of power and the affected individual.[8] Such an instance is also the guarantee of a trial without undue delay, for which not only the court but all three branches of power are responsible, including the executive, especially through the organisation of the judicial administration, and the legislative, through the adoption of appropriate legislation. Such an interpretation of Article 26 of the Constitution is dictated also by the judgments of the ECtHR[9] which were issued against Slovenia due to the violation of the right to a trial without undue delay. Also for this reason in such an instance the unlawful conduct of the state cannot be equated with the unlawful conduct of an individual judge in a specific matter. However, the backlog of cases conditioned by the system does not entail that it is only the community as such that is affected thereby. A well-organized judicial system is otherwise in itself a value which is crucial for a community based on the rule of law. However, due to the non-functioning judicial system it is primarily the individual who is not provided a trial without undue delay who is affected. Namely, it is he who bears the consequences of the backlog of cases conditioned by the system reflected in pecuniary and/or non-pecuniary damage.

14. The position of the Supreme Court in the challenged judgment therefore violates the right to compensation protected by Article 26 of the Constitution. The Constitutional Court abrogated the judgment and remanded the case for new adjudication to the Supreme Court. Since the constitutional complaint was granted for this reason, the Constitutional Court did not review the other alleged violations of human rights and fundamental freedoms alleged by the complainant.

C.

15. The Constitutional Court reached this decision on the basis of the first paragraph of Article 59 of the CCA, composed of: President Dr. Ernest Petrič and Judges Dr. Mitja Deisinger, Mag. Marta Klampfer, Dr. Etelka Korpič – Horvat, Mag. Miroslav

Mozetič, and Jan Zobec. Judge Dr. Dunja Jadek Pensa was disqualified from deciding in the case. The decision was reached unanimously.

Dr. Ernest Petrič
President

Endnotes:

[1] Cf. legislative preparatory materials on the draft PRTUDA, Gazette of the National Assembly, No. 40/06.

[2] Cf. Articles 5 to 14 PRTUDA. The ECtHR has also already adopted the standpoint that these legal remedies are, inasmuch as they apply for first and second instance proceedings, effective. Cf. the Judgment in *Grzinčič v. Slovenia*, dated 3 May 2007.

[3] The first paragraph of Article 15 and the first paragraph of Article 21 PRTUDA.

[4] The second paragraph of Article 15 and the second paragraph of Article 21 PRTUDA.

[5] E.g. the Judgments in *Giancarlo Lombardo v. Italy*, dated 26 November 1992, Para. 23; *Duclos v. France*, dated 17 December 1996, Para. 55; *Süßmann v. Germany*, dated 16 September 1996, Para. 55; and *Pammel v. Germany*, dated 1 July 1997, Para. 68.

[6] The same can be found in M. Cerar, *Pravica do povračila škode (26. člen)* [The Right to Compensation (Article 26)], in: I. Kaučič (editor), *Nova ustavna ureditev Slovenije: Zbornik razprav* [The New Constitutional System of the Republic of Slovenia: Collection of Papers], Gazette of the Republic of Slovenia, Ljubljana 1992, p. 62.

[7] This is the so-called de-personification of the liability of the state for damage, where an individual is confronted by the anonymous state apparatus and the individual, due to the differential functioning and organisation, cannot see who caused him damage. Cf. F. Ossenbühl, *Staatshaftungsrecht*, 4th edition, Verlag C. H. Beck, München 1991, p. 62.

[8] This is especially characteristic of so-called legislative or normative unlawfulness because regulations do not have a precisely defined addressee. Namely, the legislature executes duties for the community as such and not for an individual person or individual group of people. Cf. F. Ossenbühl, *Staatshaftungsrecht*, 4th edition, Verlag C. H. Beck, München 1991, p. 87.

[9] Cf. the Judgment in *Lukenda v. Slovenia*, dated 6 October 2005, and other judgments against Slovenia.