Up-1177/12
Up-89/14
28 May 2015

DECISION

At a session held on 28 May 2015 in proceedings to decide upon the constitutional complaints of Luka Vraneš, Ljubljana, represented by Bojana Potočan, attorney in Ljubljana, the Constitutional Court

decided as follows:

1. Supreme Court Judgment No. II Ips 11/2008, dated 10 September 2012, is abrogated and the case is remanded to the Supreme Court for new adjudication.

2. Supreme Court Order No. II DoR 269/2013, dated 21 November 2013, Ljubljana Higher Court Judgment and Order No. II Cp 800/2013, dated 12 June 2013, and Ljubljana District Court Judgment No. P 3103/2007-III, dated 11 January 2013, are abrogated. The case is remanded to the Ljubljana District Court for new adjudication.

REASONING

A

1. By an action in civil proceedings filed on 10 October 2000, the complainant requested that the defendant (the Republic of Slovenia) pay compensation for non-pecuniary and pecuniary damage incurred due to his removal from the register of permanent residents and transfer into the register of foreigners. He was removed [from the register] after the decision of the Ministry of the Interior (hereinafter referred to as the MI), dated 2 August 1994, was served on him, by which his request to be granted Slovene citizenship was rejected, as granting him citizenship would allegedly

constitute a threat to public order and the security of the state. The complainant initiated proceedings for the judicial review of administrative acts against this decision of the MI; however, by Judgment No. U 1312/94-9, dated 6 February 1997, the Supreme Court dismissed his action. The complainant succeeded in his efforts to have the mentioned decisions abrogated when the Constitutional Court adopted Decision No. Up-187/97, dated 4 November 1999 (OdlUS VIII, 299), and in the repeated proceedings he was granted [Slovene] citizenship (by a decision of the MI dated 1 June 2000). Since he had to wait almost nine years to obtain a correct decision regarding his citizenship, in the subsequent action for damages he also claimed a violation of the right to a trial within a reasonable time. He alleged that he sustained pecuniary damage totalling SIT 7,885,529.70 (due to lost income from 24 March 1995 to 10 October 2000; due to having lost the right to an [ownership transformation] certificate; and due to the costs of administrative and judicial procedures). He assessed that his non-pecuniary damage amounts in total to SIT 16,835,897.00 (as a result of the psychological damage he suffered due to the defamation of his good name and reputation and as a result of the psychological damage he suffered due to the infringement of his personality rights). The court of first instance partly granted the claim for damages. It assessed that the defendant had acted unlawfully. It explained that the rejection of the application for citizenship had not been reasoned by citing specific conduct of the complainant that would substantiate the conclusion that he poses a threat to the security of the state; therefore, the decision of the MI was arbitrary, as was the Supreme Court decision upholding this decision, which did not take into account the then-established case law of the Constitutional Court. The court of first instance also stated that the complainant's right to a trial without undue delay was violated as well, as the procedure for granting him citizenship took an unreasonably long time. The court of first instance also established that the complainant's monetary claim had become partially time-barred. Due to the objection of the monetary claim being time-barred, it dismissed the claims for compensation for pecuniary damage stemming from the costs of procedures and the certificate, and partially also those stemming from lost income (until 10 October 1997). However, the court of first instance granted the complainant the remaining part of the claim for compensation for pecuniary damage (i.e. income lost from 10 October 1997 until the filing of the action in the amount of SIT 4,329,226.40). Due to the fact that the claim regarding the compensation for non-pecuniary damage for defamation (which happened as early as in 1996, when an official cut his identity card in half in front of everyone present and when he and his wife had to prove the existence of their marriage with two witnesses when he wanted to register

her as the new owner of a vehicle) was time-barred, the court of first instance dismissed this claim as well. The court of first instance otherwise awarded compensation for the infringement of personality rights in the amount of SIT 5,000,000.00, but dismissed the remaining part of the claim that exceeded this amount. The total compensation awarded by the court of first instance to the complainant thus amounted to SIT 9,329,226.40.

2. Both parties filed appeals against the first instance judgment. The Higher Court partially granted the appeals of both parties to proceedings. It abrogated the judgment of first instance in the dismissed part regarding pecuniary damage (for income lost before 10 October 1997, for the certificate, and the costs [of the procedures]) and in the successful part regarding income lost in 2000 (amounting to SIT 1,122,392.04), whereas in the part referring to the decision on non-pecuniary damage (in both the dismissed part and in the successful part) and the remaining part of the awarded amount for pecuniary damage (income lost from 10 October 1997 until the end of 1999), it upheld the judgment. The Higher Court concurred with the position of the court of first instance that the defendant had acted unlawfully (i.e. that the application had been rejected arbitrarily and that the procedure had been unreasonably long) and that the claim for compensation for damage that arose before 10 October 1995 became time-barred (due to the absolute limitation period having expired), as did the claim for compensation for non-pecuniary damage due to defamation. On the other hand, the Higher Court adopted a different position with regard to the time-barring of the claim for compensation for the remaining damage. It assessed that the course of the relative limitation period must be assessed with regard to the circumstances of the concrete case, and accepted the allegation in the appeal that in the concrete case the complainant had only been informed who the perpetrator was when the decision of the MI of 1 June 2000 on the granting of citizenship was issued, as only then was his assumption confirmed that the previous two decisions on the rejection of his application had been substantively incorrect. Since the procedure was concluded when the last decision of the MI was issued, the complainant was only then able to find out how long the procedure had lasted.

3. Both parties to proceedings filed revisions against the judgment of the second instance. The Supreme Court partially granted the revision of the complainant, but rejected it with respect to the decision on the costs. The Supreme Court partially granted the revision of the defendant and partially modified the Higher Court Judgment, namely point 3 of the operative provisions, such that it granted the appeal of the defendant also with regard

to the successful part of the judgment of the court of first instance in so far as it had not been abrogated, and also in this part dismissed the claim. The Supreme Court based its decision on the position that the injured party's knowledge of two circumstances is important with regard to the onset of the course of the relative limitation period regarding claims for damages: knowledge of the damage and knowledge of the perpetrator (the first paragraph of Article 376 of the Obligations Act, Official Gazette SFRY, Nos. 29/78, 39/85, and 57/89 – hereinafter referred to as the OA). Knowing the perpetrator does not entail knowing that he or she is liable or what the basis for his or her liability is, but refers to the person [as such] who caused damage. The position of the Supreme Court was that in the concrete case the legislation on the basis of which the removal of the complainant from the register of permanent residents was carried out and which the Constitutional Court established was inconsistent with the Constitution (the Aliens Act, Official Gazette RS, No. 1/91-I, etc. – hereinafter referred to as the AA, and the Act Regulating the Legal Status of Citizens of Former Yugoslavia Living in the Republic of Slovenia, Official Gazette RS, No. 76/10 – official consolidated text – hereinafter referred to as the ARLSCFY) did not prohibit such claims or otherwise insurmountably interfere with the complainant's right to judicially request the fulfilment of the obligation (Article 383 of the OA). The complainant should have filed the action before the limitation period expired, and in the proceedings the (in)appropriateness of the statutory regulation then in force and its (in)consistency with the Constitution would then also be assessed, if necessary.

4. The court of first instance had to decide anew on the part of the defendant's claim for damages that was abrogated by the mentioned Higher Court Judgment and remanded to the court of first instance for new adjudication. In the new trial it decided on the claim for compensation for pecuniary damage represented by the income lost in 2000, the value of the certificate that the citizens of the Republic of Slovenia received on the basis of the Ownership Transformation of Companies Act (Official Gazette RS, Nos. 55/92, 7/93, 31/93, and 1/96), and the costs of the administrative and judicial procedures incurred from 1994 to 1997. The court of first instance dismissed the claim in its entirety and decided that the complainant must reimburse the assessed costs of the defendant. It deemed that the claim made in the action dated 10 October 2000 was time-barred. The complainant filed an appeal against this judgment of the court of first instance. The Higher Court granted the appeal and abrogated the challenged judgment of the court of first instance in the part relating to the costs, and in this part remanded it to the court of first instance for new

adjudication. In the remaining part, which it did not abrogate, it dismissed the appeal and upheld the judgment of the court of first instance. It adopted the position that the complainant's efforts to prove, in appellate proceedings, that the decision on the rejection of his application for citizenship was arbitrary, falls within the scope of efforts to limit damage and cannot have an influence on the assessment of the onset of the course of the limitation period. The alleged damage is a consequence of the rejection of the application for citizenship and the removal of the complainant from the register of permanent residents, which was a consequence thereof. This was the decisive circumstance for the assessment of when the limitation period began with regard to claiming compensation for the alleged damage. The complainant filed a motion for a revision of the Higher Court Judgment, which the Supreme Court rejected. In doing so, it referred to its position adopted in Judgment No. II Ips 11/2008, in accordance with which, with regard to claims for damages, the injured party's knowledge of two circumstances is crucial for [determining] the onset of the course of the relative limitation period: the damage and the perpetrator (the first paragraph of Article 376 of the OA). Knowing the perpetrator does not entail knowing that he or she is liable or what the basis for his or her liability is; it entails knowing [the identity of] the person who caused the damage. Since in the proceedings at issue also the courts of the first and second instance adopted such a position, the Supreme Court assessed that the complainant did not demonstrate the existence of the conditions for granting a revision.

5. The complainant alleges the violation of the rights determined by Articles 14, 18, 21, 22, 26, 34, 43, and 49 of the Constitution. He is opposed to the position and the reasons stated by the Supreme Court regarding the claim for damages being time-barred. He draws attention to the fact that it took the Supreme Court an unreasonably long time (no less than five years) to decide on the motion of the parties for a revision, with regard to which, according to the complainant, the reason for such lengthy revision proceedings was that the Supreme Court waited for the European Court of Human Rights (hereinafter referred to as the ECtHR) to decide in the case *Kurić and others v. Slovenia* (judgment dated 26 June 2012). The complainant is indeed of the opinion that his position is substantially different than that of the [so-called] erased persons, but it is true that he suffered consequences similar to what they did. He explains that starting in 1976 he lived in various towns in Slovenia, namely as an officer of the Yugoslav People's Army, until 1990, when he was transferred to Samobor, Croatia. On 12 November 1991 he applied for Slovene citizenship, in conformity with Article 40 of the Citizenship of the Republic of Slovenia Act (Official Gazette

RS, Nos. 1/91-I, 30/91-I, 38/92, and 13/94 – hereinafter referred to as the CRSA). Although he fulfilled all the statutory conditions, his application was rejected because granting him Slovene citizenship allegedly posed a threat to the security, defence, and public order of the state. Subsequently, in the repeated procedure, after he had received Decision of the Constitutional Court No. Up-187/97, by which the Supreme Court Judgment and the decision of the MI were annulled, the complainant was granted Slovene citizenship by a decision of the MI, dated 1 June 2000. By an action filed on 10 October 2000, the complainant claimed compensation from the state and was awarded (and also already received) compensation for non-pecuniary damage and compensation for lost income. By the challenged Judgment, No. II Ips 11/2008, dated 10 September 2012, the Supreme Court modified the Higher Court decision and dismissed the complainant's claim for damages in its entirety because it was time-barred. The complainant is firmly opposed to the position of the Supreme Court that the limitation period started already in 1994, when his application for citizenship was rejected with finality. Such a position of the Supreme Court allegedly places him in a position completely without rights and denies his constitutionally guaranteed right to compensation for damage. The complainant once again draws attention to the fact that his position should not be equated with the position of the so-called erased persons, because the latter justifiably expect, on the basis of the [above-mentioned] decision of the ECtHR, the adoption of a systemic solution in order to remedy the injustices that happened to them. The complainant, on the other hand, claimed damages from the state due to arbitrary decision-making in the procedure for acquiring citizenship, and his claim has already been decided on with finality. He is convinced that the position of the Higher Court adopted in Judgment No. II Cp 1428/2007 is correct. According to the Higher Court, the onset of the relative limitation period determined by the first paragraph of Article 376 of the OA must be assessed with regard to the circumstances of the concrete case. The complainant learned of the perpetrator of the damage only from the decision of the MI, dated 1 June 2000, i.e. this was when the prerequisites that enabled him to file a claim for damages were fulfilled. When the decision of the MI was issued on 1 June 2000 the complainant also learned of the damage incurred, however he had been subjected to violations of human rights and fundamental freedoms ever since 1994, when the decision rejecting his application for Slovene citizenship became final (this decision was, in fact, later abrogated). Due to the fact that the complainant could not have known, until the decision of the MI was issued on 1 June 2000, how long the situation in which his human rights and fundamental freedoms were violated would last, he also could not have known what the scope of the

damage was. According to the complainant, the position of the Supreme Court regarding the [claim being] time-barred is not only substantively erroneous, but it also does not take into consideration the circumstances of the concrete case and excessively protects the state in relation to the citizen. The complainant stresses that immediately after he learned, i.e. proved, that the rejection of his application for citizenship was unlawful, he filed a claim for damages by which he claimed from the state compensation for the damage he had sustained. He underlines that he did not hesitate for a moment when invoking his rights, whereas the state, on the other hand, took almost nine years to decide whether to grant him citizenship, which were followed by another 12-year procedure for the payment of compensation. The complainant is convinced that his claim for damages did not become time-barred also with regard to the positions adopted in the ECtHR Judgment in *Kurić and others v. Slovenia*.

6. By Panel Order No. Up-1177/12, Up-89/14, dated 15 April 2014, the Constitutional Court decided that the constitutional complaints be accepted for consideration. In conformity with the first paragraph of Article 56 of the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text and 109/12 – hereinafter referred to as the CCA), it notified the Supreme Court thereof. In conformity with the second paragraph of Article 56 of the CCA, it sent the constitutional complaints to the opposing party in the civil proceedings, i.e. to the Republic of Slovenia, to reply thereto; the opposing party replied by a submission dated 8 May 2014. It stated that “it has no comments regarding the Panel Order of the Constitutional Court.” Otherwise, the defendant in the civil proceedings is of the opinion that since the Act Regulating Compensation for Damage Sustained as a Result of Removal from the Register of Permanent Residents (Official Gazette RS, No. 99/13 – hereinafter referred to as the ARCDSRRR) entered into force, the complainant no longer has a legal interest to file his two constitutional complaints. It explained that the administrative procedure for granting citizenship was demanding and lengthy, with regard to which the complainant was granted citizenship on 1 June 2000. The opposing party dismissed the allegation that the civil proceedings for damages were lengthy and stated that the complainant had already been paid compensation on the basis of the judicial decision, which had become final (i.e. Ljubljana Higher Court Judgment No. II Cp 800/2013 in relation to Ljubljana District Court Judgment No. P 3103/2007-III, dated 11 January 2013), and that despite the Supreme Court Judgment, by which his claim for damages was dismissed, he did not reimburse the sum paid. Furthermore, the awarded compensation was allegedly higher than

envisaged by the ARCDSRRR. This is another reason why the defendant is of the opinion that the constitutional complaint is unfounded.

7. The reply of the defendant in the lawsuit was sent to the complainant, who responded thereto by a submission dated 30 May 2014. He dismissed the allegations of the defendant that he has no legal interest. He maintained that his position is essentially different from the position of the erased persons, as he claimed compensation for damage due to arbitrary decision-making in the procedure for acquiring citizenship, and his claim has already been decided on with finality. Also in other respects the complainant is convinced that the position of the Supreme Court that the claim is time-barred is incorrect, which allegedly follows from the Judgment of the Grand Chamber of the ECtHR in *Kurić and others v. Slovenia.* The act regulating the question of the compensation to which the erased persons are entitled was only adopted after the complainant's claim had already been decided on with finality, therefore it cannot have an influence on his legal interest. With regard to the alleged violation of Article 18 of the Constitution, the complainant explains that he did not allege physical torture; however, with respect to all that has been said, he was certainly subjected to psychological torture, as he was unable to leave the state (even to attend his mother's funeral and the funerals of other relatives), he was without a permanent residence, without work, without the right to vote, he was not socially insured; in fact, he could not benefit from the fundamental human rights and citizenship rights ensured by the Constitution and the legal order of the Republic of Slovenia. The complainant also opposes the allegation of the defendant that the administrative procedure was so demanding that it justified the nine years of uncertainty in which he lived. The complainant labels as inappropriate the connection made by the defendant between the complainant's allegations regarding the length of procedures and the fact that the compensation has already been paid to the complainant. This fact allegedly does not affect the proceedings before the Constitutional Court. The complainant is convinced that the judgments of the courts of first and second instance were just and also legally correct; however, he disagrees with the Supreme Court decision and thus challenges it by the constitutional complaint.

B – I

8. With regard to the doubt as to the legal interest of the complainant that the defendant in the lawsuit expressed in its submission dated 8 May 2014,

it must be underlined that a favourable Constitutional Court decision would mean, for the complainant, an improvement in his legal position. In accordance with the transitional statutory provision (the first paragraph of Article 28 of the ARCDSRRR), the judicial proceedings for compensation for damage sustained as a result of removal from the register of permanent residents that were initiated before the same Act entered into force and which have not yet been decided on finally shall be concluded in conformity with the provisions of the Act (i.e. in conformity with the provisions of the ARCDSRRR). In the event of the abrogation of the challenged judgments and the case being remanded to the court of first instance for new adjudication, the court should take into account, when again assessing the complainant's claims for damages, the second paragraph of Article 11 of the ARCDSRRR, which determines that in proceedings initiated in accordance with this Act, the provisions regarding the time-barring of claims for damages from the act regulating obligation relations do not apply. Since the challenged judgments refer to the [above-mentioned] position regarding the time-barring of claims for damages, the legal position of the complainant would improve in this respect were the constitutional complaint to be granted. Therefore, the Constitutional Court deems that the procedural prerequisite of legal interest is fulfilled.

B – II

9. One of the main allegations of the complainant is that the Supreme Court Judgment No. II Ips 11/2008 (which is challenged by the first constitutional complaint) is based on positions that are not acceptable from the viewpoint of the right to compensation determined by Article 26 of the Constitution. The complainant is firmly opposed to the position of the Supreme Court that his claims for damages are time-barred, in particular the position that the limitation period began already in 1994 when his application for citizenship was rejected and the relevant decision became final.[1] Such position of the Supreme Court allegedly placed the complainant in a position completely without rights and denied him the constitutionally guaranteed right to compensation for damage. In his opinion, the correct position is that of the Higher Court (adopted in Judgment No. II Cp 1428/2007), in accordance with which the course of the relative limitation period determined by the first paragraph of Article 376 of the OA must be assessed with respect to the circumstances of the individual case and that in the case at issue the complainant learned of the perpetrator of the damage only from the Decision

of the MI dated 1 June 2000, meaning that only then were the prerequisites that enabled him to claim compensation for damage fulfilled.

10. In two cases the Constitutional Court has already assessed decisions of civil courts related to the liability of the state for removal from the register of permanent residents. By Order No. Up-1176/09, dated 5 July 2011, a Constitutional Court panel decided that the constitutional complaint filed against the decision of the courts to dismiss claims for damages by which the complainant claimed, from the Republic of Slovenia, the payment of compensation for pecuniary damage resulting from the fact that from the time he was removed from the register of permanent residents he had been unable to work, and due to the fact that his application for citizenship had been unjustifiably rejected, and [the payment of compensation] for non-pecuniary damage consisting of the psychological damage he suffered due to the lengthy procedure and lengthy unemployment, when he had no means of subsistence. The Constitutional Court adopted a similar decision in case No. Up-108/11. A Constitutional Court panel decided, by Order No. Up-108/11, dated 26 September 2011, that the constitutional complaint by which the complainant challenged the decision of the courts to dismiss his claims for compensation for pecuniary and non-pecuniary damage caused by his removal from the register of permanent residents would not be accepted for consideration. In both of the mentioned cases the Constitutional Court considered the allegations of the complainants in particular from the viewpoint of the constitutional procedural guarantees ensured by Article 22 of the Constitution (i.e. from the viewpoint of the requirement of a reasoned judicial decision and the prohibition of arbitrary decision-making by the courts).

11. In the mentioned cases, the Constitutional Court did not consider the positions of the court from the viewpoint of the right to compensation for damage guaranteed by Article 26 of the Constitution. However, the allegations of the complainant in the case at issue do require an assessment from the viewpoint of the mentioned human right. In conformity with the established constitutional case law, there is a violation of the right determined by Article 26 of the Constitution when a court bases its decision on a certain legal position that from the viewpoint of this right would be unacceptable.[2] Therefore, the Constitutional Court must verify whether the challenged decision is based on positions that are not acceptable from the viewpoint of the right to compensation for damage determined by Article 26 of the Constitution.

12. In conformity with the first paragraph of Article 26 of the Constitution, everyone has the right to compensation for damage caused through unlawful actions in connection with the performance of any function or other activity by a person or authority performing such function or activity within a state or local community authority or as a bearer of public authority. From this human right there follows, primarily, the general prohibition of exercising authority in an unlawful manner, regardless of which branch of power caused the damage.[3] The essence of the right to compensation for damage is to ensure compensatory protection from unlawful actions by the state power. In conformity with the first paragraph of Article 26 of the Constitution, the basis of this liability is (1) an unlawful action of a state authority, a local community authority, or a bearer of public authority, with regard to which what is at issue is (2) an action when exercising such authority or in connection with the exercise thereof, a consequence of which is (3) damage.

13. There is an established position in the constitutional case law that the forms of unlawful conduct by the state include its liability for omissions that refer to a certain defined or definable person, as well as liability for systemic deficiencies that can be attributed to the state or its apparatus as such (this is stated in Decision of the Constitutional Court No. Up-695/11). An interpretation in accordance with which the state would only be liable for those forms of unlawful conduct that can be attributed to a certain person or authority in connection with the performance of any function or other activity within a state or local community authority or as a bearer of public authority would namely be unacceptable from the viewpoint of the first paragraph of Article 26 of the Constitution. This would namely mean that the state would not be liable for unlawful conduct that cannot be attributed to a certain person or a certain authority, but [can only be attributed] to the state or its apparatus as such, and also not in cases where there is no individualised relation between the bearer of authority and the affected individual.[4]

14. When assessing the content and the scope of the right guaranteed by Article 26 of the Constitution, one must take into account that the liability of the state for damage caused by state authorities, employees, and officials when exercising authority entails a specific form of liability. The specificity of this right follows from a particular position of the state vis-à-vis entities (citizens, legal entities, and also other persons situated on its territory). The state enters such legal relation vertically, i.e. when exercising authority or in connection with the exercise thereof, with regard to which it is bound by the constitutional prohibition of unlawful authoritative conduct.[5] By instituting

the liability of the state for damage, affected individuals are protected against the occurrence of damage resulting from the authoritative conduct of [state] authorities.[6] The state is liable for damage caused when exercising the function of authority or in relation to its exercise, i.e. for *ex iure imperii* conduct.[7] With regard to the above, it is evident that in order to assess the liability of the state for damage, the classic rules of vicarious civil liability for damage do not suffice; when assessing individual prerequisites of the liability of the state, the mentioned specificities that originate from the authoritative nature of the functioning of its authorities must be taken into consideration (this is stated in Decision of the Constitutional Court No. Up-679/12, dated 16 October 2014, Official Gazette RS, No. 81/14). Even if a court applies, when assessing [the liability of the state], certain rules of the general law of obligations, it must apply them in a manner adapted to the characteristics of liability for damage under public law.

15. In a number of decisions the Constitutional Court has adopted a position on the violations of the human rights and fundamental freedoms of persons removed from the register of permanent residents when the legislation enabling independence was adopted.[8] It follows from these decisions that erased persons as citizens of the former Socialist Federal Republic of Yugoslavia (hereinafter referred to as the SFRY) were treated unequally compared to other foreigners who had lived in Slovenia before its independence and whose permanent residence permits remained valid in conformity with Article 82 of the AA. In order to remedy the established unconstitutionalities, in 2010 the legislature adopted the Act Amending the Act Regulating the Legal Status of Citizens of Former Yugoslavia Living in the Republic of Slovenia (Official Gazette RS, No. 50/10 – ARLSCFY-B). By this Act, the legislature strived to allow erased persons to obtain a legal status by obtaining a permanent residence permit under milder conditions than those set forth by the AA, and also to enable the issuance of special decisions by which their legal status would be recognised *ex tunc*. As the Constitutional Court established by Decision No. U-II-1/10, dated 10 June 2010 (Official Gazette RS, No. 50/10, and OdlUS XIX, 11), by [adopting] a special regulation regarding the issuance of permanent residence permits and by *ex tunc* recognition of actual residence, the legislature provided moral satisfaction as a special form of remedying the consequences of the violations of human rights that occurred due to removal from the register of permanent residence. In such a manner it accomplished the task imposed on it by the fourth paragraph of Article 15 of the Constitution. The Constitutional Court already at that time warned that the question of the liability of the state for damage determined by Article 26 of the Constitution

could be raised in cases when damage was caused to individuals due to their removal from the register of permanent residence because they were deprived of the rights that are conditional upon permanent residence in the Republic of Slovenia.

16. In the case *Kurić and others v. Slovenia,* the Grand Chamber of the ECtHR decided that the recognition of violations of human rights and the issuance of permanent residence permits to erased persons are not sufficient measures to remedy the injustices [that occurred] on the national level. Taking into account the long period during which the complainants suffered because they were in jeopardy and in legal uncertainty, and with respect to the gravity of the consequences that the removal caused them, the Grand Chamber of the ECtHR adopted the position that such recognition of a violation of human rights and the issuance of permanent residence permits to the complainants are not appropriate and sufficient measures to remedy the injustices [that occurred] on the national level. The ECtHR established that the complainants were not awarded appropriate monetary compensation for the years when they were vulnerable and exposed to legal uncertainty. With regard to the possibility that they would claim and be awarded compensation on the national level, the ECtHR established that none of the erased persons received satisfaction for the damage sustained in the form of a final and binding judgment, although several proceedings were pending. The State Attorney's Office also did not grant any of the complainants' claims for compensation. The ECtHR deemed that their chances of receiving compensation in the Republic of Slovenia were too remote to possibly influence the assessment of that concrete case. It assessed that the facts of that case unveiled the deficiencies of the Slovene legal order, a consequence of which is that the entire group of erased persons was still denied the right to compensation due to violations of their fundamental rights.[9]

17. The positions of the ECtHR regarding the application of the rules on time-barring are also important for the assessment of the case at issue. These rules determine that due to the expiration of a time limit, the creditor loses the right to judicial protection of his or her rights.[10] The creditor must namely not be passive and must promptly [request] protection of his or her rights; however, on the other hand, in a certain moment it is necessary to ensure that the legal relation is regulated definitively. The ECtHR has emphasised in a number of judgments that the existence of limitation periods is by itself not incompatible with the European Convention on Human Rights (hereinafter referred to as the ECHR). The institute of time-

barring namely pursues multiple legitimate aims: primarily, it is intended to ensure legal certainty and to determine a time limit for judicial invocation of claims, which serves to protect the creditor against the invocation of time-barred claims. In addition, the limitation period prevents the court from adopting decisions on events that occurred in the too distant past and with regard to which there no longer exist sufficient and reliable evidence. However, the task of the court is to establish, in each individual case, whether the application of rules on time-barring, taking into account the nature of the limitation period, is compatible with the requirements under the ECHR.[11] Too rigid application of limitation periods, where the court does not take into account the circumstances of the concrete case, can namely entail an inadmissible interference with the right of access to the court, if it renders the application of an available legal remedy disproportionally difficult for the party or if it prevents the party from applying it. The application of limitation periods and preclusive time limits must not be such as to prevent the effective protection of rights.[12] Otherwise, such can result in an interference with the party's right of access to the court, which is not proportionate to the purpose of ensuring legal certainty and the just conduct of proceedings.[13]

B – III

Decision on the first constitutional complaint

18. The Constitutional Court must assess, by taking into consideration the constitutional dimension and the aspect of the ECHR regarding the dilemma at issue, whether the (restrictive) interpretation and application of rules on time-barring by which the Supreme Court reasoned the decision on the rejection of the complainant's claims for damages entail an excessive interference with the right guaranteed by Article 26 of the Constitution.[14] Such consideration follows from the supposition that the court's decision-making on the liability of the state for damage for *ex iure imperii* conduct requires an appropriate adaptation of the classic civil law institutes (i.e., in the case at issue, rules regarding time-barring) to the particularities that follow from the public law nature of the liability of the state for damage. The purpose of the Constitution is not to merely formally and theoretically recognise human rights; it is namely a constitutional requirement that the possibility of the effective and actual exercise of human rights be ensured.[15] Therefore, the key question for assessing the case at issue is whether due to the position of the Supreme Court regarding the time-barring

it was made disproportionally difficult for the complainant to effectively invoke, in an action for damages, the right to compensation for damage due to the alleged unlawful action of the state. The assessment regarding the acceptability of the position regarding time-barring in the case at issue depends, to a significant extent, on the question of whether the Supreme Court appropriately assessed the specific circumstances that erased persons and, among them, also the complainant were in, i.e. by taking into consideration the positions of the Constitutional Court regarding the specific position of erased persons and the positions expressed in the Judgment of the Grand Chamber of the ECtHR in the *Kurić and others v. Slovenia* case.

19. At the beginning of its reasoning, the Supreme Court correctly stated that damage caused by the state and its authorities while exercising authority does not give rise to classic liability, but to a special type of liability that exists as the protection everyone enjoys from potential damage caused by the state by its unlawful actions, and that the liability of the state in such cases falls within public law. However, the remainder of the reasoning of the challenged judgment does not reflect that the Supreme Court adapted the assessment of the case at issue to the public law nature of the liability of the state, in particular also considering the special position of erased persons such as follows from the decisions of the Constitutional Court and the ECtHR. The Supreme Court proceeded from the position that the injured party's knowledge of two circumstances is important with regard to the course of the relative limitation period regarding claims for damages: knowledge of damage and of the perpetrator (the first paragraph of Article 376 of the OA). Knowledge of the perpetrator includes knowledge of the conduct of this person in the real world, but not also a legal assessment (i.e. of the unlawfulness) of the perpetrator's conduct. It is therefore the plaintiff who carries the risk that the assessment that the perceived damaging conduct of the defendant is unlawful will [perhaps not] be made promptly. Therefore, in the opinion of the Supreme Court, the decision of the MI dated 1 June 2000 is not relevant for the time-barring in the case at issue. According to the Supreme Court, the final rejection of the complainant's application for citizenship of the Republic of Slovenia in 1994 and his removal from the register of permanent residents that occurred at that time were the legally relevant grounds for awarding non-pecuniary damages for the infringement of personality rights. In the assessment of the Supreme Court, the complainant has suffered psychological damage ever since, because he could not be employed and could not buy the apartment [he had been residing in], because he did not have health and social insurance,

because he had no right to vote, and because he lived in very difficult material conditions, people ignored him, and he was humiliated, all of which was reflected in his psyche. The Supreme Court thus concurred with the court of first instance that the complainant had known for more than three years before filing the action who the perpetrator of the damage was and he was certainly aware of the damage while it was happening. According to the Supreme Court, the position of the Higher Court is erroneous, namely that the three-year limitation period could only start when the decision of the MI on granting citizenship, dated 1 June 2000, was adopted and that only then was the complainant's assumption confirmed that there were no reasons for refusing to grant him citizenship, i.e. that the previous decision on that matter was substantively erroneous, while at the same time he also discovered how long the procedure had lasted.

20. The courts could also have taken the circumstances of the complainant – due to the fact that he was removed from the register of permanent residents – as a basis for suspending the course of the period of limitation (Article 383 of the OA and Article 360 of the Code of Obligations, Official Gazette RS, No. 97/07 – official consolidated text – hereinafter referred to as the CO).[16] The term insurmountable obstacles concerns a legal standard that has to be filled in by the court in every concrete case. It denotes obstacles that actually prevent the creditor from judicially requesting the fulfilment of the obligation.[17] Already the described course of decision-making with regard to obtaining citizenship in the concrete case reflects the obstacles that the complainant was faced with when the authorities in power decided on his case. In addition to these circumstances, which are specific to the complainant's case, also the broader context has to be taken into consideration, in particular the fact that despite the decisions of the Constitutional Court, the state (via the executive and legislative branches of power) delayed, for a number of years, the remedying of the consequences of the violations of human rights that erased persons were victims of.[18] It also follows from the Judgment of the Grand Chamber of the ECtHR in *Kurić and others v. Slovenia* that the existing legal regulation denied erased persons access to [obtaining] compensation for violations of their fundamental human rights. In such circumstances, the possibility of erased persons filing claims for damages against the state was merely hypothetical, i.e. without any real chance of success.

21. The Supreme Court rejected the possibility of applying the institute of time-barring by substantiating that the existing legislation (i.e. the AA and the ARLSCFY) did not prohibit filing claims for damages, nor did it otherwise

insurmountably interfere with the complainant's right to judicially request the fulfilment of the obligation (Article 383 of the OA). According to the position of the Supreme Court, not even the legislation on which the removal of the complainant from the register of permanent residents was based, and which the Constitutional Court established was inconsistent with the Constitution, allows a different interpretation of time-barring. The Supreme Court concluded its assessment with the finding that there does not (yet) exist a legal basis that in the circumstances of the case at issue would allow the complainant to succeed despite the defendant's objection to the time-barring. However, such reasoning of the Supreme Court is not acceptable from the viewpoint of the constitutional duty of a court, in the event it considers the statutory provision that it has to apply in a concrete case to be unconstitutional, to stay the proceedings and initiate proceedings before the Constitutional Court (Article 156 of the Constitution), whereas otherwise it must (within the limits of the methods of interpretation that are established in the legal field) find a constitutionally consistent interpretation of the statutory norm.[19] Also from the Judgment of the ECtHR in *Kurić and others v. Slovenia* there followed the duty of the court to interpret the statutory regulation on which the decision was based in a manner that is not contrary to the reasons the ECtHR adopted in that judgment. If the Supreme Court assessed that within the framework of the statutory regulation in force no interpretation was possible that would be consistent with the requirements under the Constitution and the ECHR, it should have stayed the proceedings and initiated proceedings for a review of the constitutionality of the statutory regulation before the Constitutional Court (Article 156 of the Constitution), which it did not do.

22. According to the Supreme Court, "it is not correct to look for an impediment against time-barring in the fact that the administrative decision on the rejection of the plaintiff's application for citizenship was valid at the time, as before it was annulled there was no impediment to the plaintiff's claim for damages." Allegedly, already in the proceedings for the judicial review of administrative acts initiated against the mentioned administrative decision the complainant had the possibility to claim compensation for damage caused by the execution of the challenged act (Article 11, the second paragraph of Article 27, and the fourth paragraph of Article 42 of the Act Regulating Proceedings for the Judicial Review of Administrative Acts, Official Gazette SFRY, No. 4/77, etc.). Such position presupposes that already when he was invoking his primary legal protection (i.e. during the administrative procedure in which he strove to obtain citizenship), the complainant should also have filed claims for damages against the state.

However, it is not realistic to expect that an individual requesting that the state grant him [a certain] legal status (e.g. a citizenship) would at the same time claim compensatory protection against the state.[20] Such position only represents a hypothetical possibility for the complainant to claim compensatory protection against the state, which is not compatible with the requirements of the Constitutional Court and the ECtHR regarding effective and actual exercise of human rights.

23. With regard to the above, the position of the Supreme Court regarding the time-barring of claims for damages turns out to be unacceptable already from the viewpoint of the general requirement that, with respect to the circumstances of the individual case, the court must apply the rules regarding limitation periods in such a manner that the filing of claims available to a party is not rendered disproportionally difficult or even prevented [altogether]. In the case at issue, the Supreme Court imposed, by its rigid interpretation of the rules regarding time-barring, a disproportionate burden on the complainant with regard to the invocation of the right to compensation for damage guaranteed by Article 26 of the Constitution. The Supreme Court had certain leeway for interpretation of the statutory regulation that served as the basis for deciding, within the framework of which it could have enabled the complainant effective invocation of compensatory protection against the state. With regard to the special circumstances that accompanied the removal of persons from the register of permanent residents, and the fact that the state postponed the matter for a number of years before definitively regulating their position, the position of the Supreme Court regarding the time-barring of the complainant's claims for damages is not acceptable.

24. The Constitutional Court assesses that by its interpretation of the rules regarding time-barring, the Supreme Court rendered it disproportionally difficult for the complainant to effectively invoke the right to compensation for damage against the state (Article 26 of the Constitution), namely damage caused by his removal from the register of permanent residents, or [even] prevented him from doing so. For such reason, the Constitutional Court abrogated the challenged judgment and remanded the case to the Supreme Court for new adjudication (point 1 of the operative provisions). When deciding anew, the Supreme Court will have to take into consideration the reasons stated in this Decision, in particular also the fact that the case at issue concerns public law liability for damage that requires an adapted application of the criteria for assessing the liability of the defendant for

damage, in particular due to the special circumstances which erased persons were in, including the complainant.

25. Since the Constitutional Court abrogated the challenged judgment due to the established violation of the right determined by Article 26 of the Constitution, it did not assess the other alleged violations of human rights and fundamental freedoms.

B – IV

Decision on the second constitutional complaint

26. The judicial decisions challenged in case No. Up-89/14 are based on substantively the same reasons and the same positions regarding the time-barring of the complainant's claim for damages as the Supreme Court Judgment mentioned in point 1 of the operative provisions. In the repeated proceedings, the court decided anew on the claim for compensation for pecuniary damage amounting to EUR 19,523.84. By taking into consideration the positions the Supreme Court adopted in Decision No. II Ips 11/2008 and the fact that the complainant's application for citizenship was rejected with finality by a decision dated 2 August 1994, the Higher Court adopted the position that the claim filed on 10 October 2000 was time-barred. The Higher Court did not accept the complainant's position that the limitation period started when he received, on 1 June 2000, the decision of the MI. In doing so, it referred to the position of the Supreme Court that what is decisive for the onset of the course of the limitation period is the injured party's knowledge of the conduct of the perpetrator in practice and not knowledge of the legal assessment (i.e. of the unlawfulness) of the perpetrator's conduct. It explained that the complainant's efforts to prove, in legal remedy proceedings, the arbitrariness of the decision rejecting his application for citizenship falls within the scope of efforts to limit damage and cannot have an influence on the assessment regarding the onset of the course of the limitation period. By referring to its own positions adopted in Judgment No. II Ips 11/2008, the Supreme Court dismissed the complainant's motion to grant a revision.

27. The judicial decisions challenged by the second constitutional complaint are based on substantively the same positions that the Constitutional Court established entail a disproportionate interference with the complainant's right to compensation determined by Article 26 of the Constitution. Therefore, the

Constitutional Court also abrogated the judicial decisions stated in point 2 of the operative provisions and remanded the case to the court of first instance for new adjudication.

C

28. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 59 of the CCA, composed of: Mag. Miroslav Mozetič, President, and Judges Dr Mitja Deisinger, Dr Etelka Korpič – Horvat, Jasna Pogačar, Dr Jadranka Sovdat, and Jan Zobec. The decision was reached unanimously.

Mag. Miroslav Mozetič
President

[1] On 12 November 1991, the complainant applied, in conformity with Article 40 of the CRSA, for Slovene citizenship. His application was rejected by a decision of the MI, dated 2 August 1994, although he fulfilled all the conditions determined by the first paragraph of Article 40 of the CRSA, because, according to the findings of the administrative authorities at the time, the complainant allegedly posed a threat to the security, defence, and public order of the state. Also the Supreme Court upheld such decision, which then remained in force until Decision of the Constitutional Court No. Up-187/97 was adopted. By a decision of the administrative unit dated 1 June 2000, the complainant was finally granted Slovene citizenship.
[2] *Cf.* Order of the Constitutional Court No. Up-2/04, dated 4 May 2005 (OdlUS XIV, 46) and Decision of the Constitutional Court No. Up-695/11, dated 10 January 2013 (Official Gazette RS, No. 9/13).
[3] *Cf.* J. Zobec, *Odškodninska odgovornost sodnika in odgovornost države zanj* [Liability of a Judge for Damage and the Liability of the State for such Judge], *Pravni letopis 2013* [Legal Chronicle 2013], p. 201.
[4] One such instance was a case in which ensuring a trial without undue delay was not merely a responsibility of the courts, but of all three branches of power, i.e. including the executive, in particular through the organisation of the judicial administration, as well as the legislative administration through the adoption of appropriate legislation. *Cf.* Decision of the Constitutional Court No. Up-695/11, Para. 13. of the reasoning.
[5] This is stated by J. Zobec, *op. cit.*, pp. 185–228.

[6] This is stated by I. Crnić, Odgovornost države za štetu, Pravo u gospodarstvu, Zagreb, 1–2 (1996), p. 117.
[7] *Cf.* R. Pirnat, *Protipravnost ravnanja javnih oblasti kot element odškodninske odgovornosti javnih oblasti oblasti* [The Unlawfulness of the Conduct of Public Authorities as an Element of the Liability of Public Authorities for Damage], an article published in proceedings entitled *Odgovornost države, lokalnih skupnosti in drugih nosilcev javnih pooblastil za ravnanje svojih organov in uslužbencev* [The Liability of the State, Local Communities, and Other Bearers of Public Authority for the Conduct of Their Authorities and Officials], *Zbornik Inštituta za primerjalno pravo* [Proceedings of the Institute for Comparative Law], *III. dnevi civilnega prava* [3rd Civil Law Days], Ljubljana 2005, p. 21.
[8] Firstly, the Constitutional Court established, by Decision No. U-I-284/94, dated 4 February 1999 (Official Gazette RS, No. 14/99, and OdlUS VIII, 22), that the AA was inconsistent with the Constitution, because it did not determine the conditions for obtaining permanent residence permits for the citizens of other republics of the former SFRY who did not opt for citizenship of the Republic of Slovenia or whose applications for citizenship were rejected. By Decision No. U-I-246/02, dated 3 April 2003 (Official Gazette RS, No. 36/03, and OdlUS XII, 24), the Constitutional Court established the unconstitutionality of the ARLSCFY because it did not allow the citizens of other republics of the former SFRY who on 26 February 1992 were removed from the register of permanent residents and who obtained a residence permit in conformity with the ARLSCFY to also obtain a permanent residence permit *ex tunc;* because it did not regulate the position of those persons against whom the measure of the forced removal of an alien from the state was imposed; and because it did not determine the criteria for defining the condition of actual residence [necessary] for obtaining a permanent residence permit. Furthermore, in a number of concrete proceedings in which erased persons endeavoured to obtain the restitution of rights related to their lost permanent residence, the Constitutional Court also decided in favour of the erased persons (see Decisions of the Constitutional Court No. Up-336/98, dated 20 September 2001 (Official Gazette RS, No. 79/01, and OdlUS X, 225); No. Up-333/96, dated 1 July 1999 (OdlUS VIII, 286); No. Up-60/97, dated 15 July 1999 (OdlUS VIII, 292); No. Up-20/97, dated 18 November 1999 (OdlUS VIII, 300); No. Up-152/97, dated 16 December 1999 (OdlUS VIII, 302); and No. Up-211/04, dated 2 March 2006 (Official Gazette RS, No. 28/06, and OdlUS XV, 40)).
[9] The Grand Chamber of the ECtHR based the Judgment in the same case, dated 12 March 2014, on similar positions, by which it further decided on the amount of the compensation for pecuniary damage. In paragraph 18

of the reasoning of the Judgment dated 12 March 2014, the ECtHR emphasised the importance of Decision of the Constitutional Court No. Up-695/11 for the assessment of the liability of the state for damage in conformity with Article 26 of the Constitution, in particular [the importance of] the position that this Article of the Constitution cannot be interpreted narrowly and that there can exist liability of the state for unlawful conduct that cannot be attributed to an individual or a certain authority that falls within the competence of the state, but to the state itself. According to the Grand Chamber of the ECtHR, that Decision of the Constitutional Court is important for the implementation of the main judgment in that case.

[10] For more detail, see S. Cigoj, *Teorija obligacij, Splošni del obligacijskega prava* [Theory of Obligations, The General Part of the Law of Obligations], Časopisni zavod Uradni list SR Slovenije, Ljubljana 1989, pp. 406 *et seq.*

[11] *Cf.* Judgments of the ECtHR in *Stubbings and Others v. the United Kingdom*, dated 22 October 1996; *Stagno v. Belgium*, dated 7 July 2009; and *Howald Moor and Others v. Switzerland*, dated 11 March 2014.

[12] This is precisely what happened, according to the ECtHR, in the case *Howald Moor and Others v. Switzerland*, in which the Swiss courts decided that the limitation period and the preclusive time limit began already when the plaintiff was exposed to asbestos (the day the damage occurred), regardless of the scientific finding that the illness at issue is, as a general rule, latent for a long period of time, meaning that when the damage arises (the deterioration of health and the related pain and trouble), the limitation period has, as a general rule, already expired. In such circumstances, the court should have taken into consideration, when calculating the limitation period, that the injured party was unable to be aware of his illness sooner and that, consequently, he was not able to file an action. The ECtHR thus established a violation of Article 6 of the ECHR and awarded the applicants (the plaintiff's heirs) damages and the costs of proceedings.

[13] *Cf.* the Judgment of the ECtHR in *Stagno v. Belgium*. In that case, the ECtHR assessed that overly strict application of the rules regarding time-barring by Belgian courts, which had not taken into account the special circumstances of the case, prevented the applicants from using the available legal remedy.

[14] By the positions adopted in the challenged Judgment No. II Ips 11/2008, the Supreme Court set the course of case law with regard to the assessment of claims for damages of erased persons. As can be seen from the IUS-INFO legal database, the Supreme Court regularly refers thereto (e.g. in cases No. II Ips 137/2010, dated 10 September 2012; No. II Ips 1017/2008, dated 10 September 2012; No. II Ips 1202/2008, dated 10 September 2012;

No. II Ips 360/2010, dated 27 September 2012; No. II Ips 635/2009, dated 1 October 2012; No. II Ips 304/2009, dated 18 October 2012; No. II Ips 70/2010, dated 8 November 2012; No. II Ips 99/2011, dated 15 November 2012; No. II Ips 449/2010, dated 7 November 2013; No. II DoR 269/2013, dated 21 November 2013; and No. II Ips 129/2013, dated 19 December 2013).

[15] *Cf.* Decision of the Constitutional Court No. Up-275/97, dated 16 July 1998 (OdlUS VII, 231).

[16] Article 383 of the OA read as follows: “The limitation period shall not run while the creditor is unable to judicially request the fulfilment of the obligation due to insurmountable obstacles.” The same wording is included in Article 360 of the CO.

[17] Among the reasons for the suspension of the period of limitation (*impedimentum praescriptionis*) one can find, in particular, the absolute or relative impossibility to invoke a claim, as well as instances where the invocation of a claim is rendered difficult in practice or is inappropriate due to a special mutual relation between the two parties (a relation of dependence). Such is stated by S. Cigoj, *op. cit.*, pp. 407 and 412.

[18] The unresponsiveness of the competent authorities in power entailed disrespect for the decisions of the Constitutional Court and thus a violation of Article 2 and of the second sentence of the second paragraph of Article 3 of the Constitution, which is what the Constitutional Court has drawn attention to in its annual reports ever since 2003.

[19] This is what the Constitutional Court stated in Decision No. U-I-83/11, Up-938/10, dated 8 November 2012 (Official Gazette RS, No. 95/12), Para. 13 of the reasoning.

[20] In German case law, a rule was formed within the context of the assessment of the liability of the state for damage (which is based on Article 34 of the German Constitution [i.e. *Grundgesetz*], whereby the assessment of such liability in fact leans on the civil law institutes of liability for damage, in particular on Article 839 of the Civil Code – BGB) that in the event an individual invokes his or her primary legal protection (e.g. in proceedings for the judicial review of administrative acts he or she requests that an unlawful legal act be abrogated or annulled), the course of the limitation period is interrupted (*Verjährungsunterbrechung durch Ergreifung des Primärrechtsschutzes*) with regard to possible claims for damages. The provisions regarding time-barring from the BGB were substantially amended when the Act Modernising the Law of Obligations Act (*Gesetz zur Modernisierung des Schuldrechts*, dated 26 November 2001) entered into force on 1 January 2002. Following this statutory amendment, the rules on the suspension of the limitation period (*Hemmung der Verjährung*) are

applicable for the majority of the states of the facts that previously were the basis for an interruption of the course of the limitation period. In such manner, the position from the case law on the interruption of the limitation period due to the invocation of primary legal protection (e.g. filing an action for annulment in proceedings for a judicial review of administrative acts) is still being applied, however, now [such a situation] is deemed to be grounds for a suspension of the course of the limitation period. This is stated by F. Ossenbühl and M. Cornils, Staatshaftungsrecht, 6th Edition, Verlag C. H. Beck, Munich 2013, p. 110. The same is also stated by T. Maunz and G. Dürig (Ed.), Grundgesetz, Kommentar – Art. 34, Verlag C. H. Beck, Munich 2009, p. 117.