

2014/06/11 - I. ÚS 4503/12: Sentence of Expulsion

09-10-2014

**Sentence of Expulsion for an Indefinite Period of Time
I.ÚS 4503/12 of 11 June 2014**

**CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT**

IN THE NAME OF THE REPUBLIC

STATEMENT

The Constitutional Court has decided outside an oral hearing and without the parties to the proceedings being present, through the panel composed of its presiding judge Kateřina Šimáčková (judge-rapporteur), Ivana Janů, and Ludvík David, judges, in the case of the constitutional complaint filed by the complainant, V. N., a national of the Ukraine, at that time serving a prison sentence at the Bělušice Prison, represented by JUDr. Eduard Bruna, Ph.D., lawyer, based at Sokolovská 24, Prague 8 - Karlín, against the resolution of the Supreme Court, of 5 September 2012, ref. No. 7 Tdo 846/2012-62, the judgment of the High Court in Prague, of 20 October 2011, file No. 2 To 77/2011, and the judgment of the Municipal Court in Prague, of 16 May 2011, file No. 2 T 2/2011, with the participation of the Supreme Court, High Court in Prague, and the Municipal Court in Prague, as follows:

I. The statement of the judgment of the Municipal Court in Prague, of 16 May 2011, file No. 2 T 2/2011, through which the complainant was sentenced to expulsion from the Czech Republic for an indefinite period of time pursuant to Section 80 (1) of the Criminal Code, has violated the complainant's fundamental right guaranteed by Article 36 (1) and Article 39 of the Charter of Fundamental Rights and Freedoms.

II. Therefore, the judgment of the Municipal Court in Prague, of 16 May 2011, file No. 2 T 2/2011, is annulled as for the statement of the sentence of expulsion imposed upon the complainant.

III. The statement II of the judgment of the High Court in Prague of 20 October 2011, file No. 2 To 77/2011, and the resolution of the Supreme Court of 5 September 2012, ref. No. 7 Tdo 846/2012-62, has violated the complainant's fundamental right guaranteed by Article 36 (1) and Article 39 of the Charter of Fundamental Rights and Freedoms.

IV. Therefore, the statement II of the judgment of the High Court in Prague, of 20 October 2011, file No. 2 To 77/2011 and the resolution of the Supreme Court, of 5 September 2012, file No. 7 Tdo 846/2012-62, concerning the complainant, is annulled.

V. The remainder of the constitutional complaint is rejected.

REASONING

I. Constitutional complaint and the comments by the parties to the proceedings

1. Through his constitutional complaint which meets all the requirements of Act No. 182/1993 Coll., on the Constitutional Court, as amended (hereinafter referred to as the “Act on the Constitutional Court”), the complainant, with reference to the violation of its constitutionally guaranteed rights, seeks the annulment of the decisions of ordinary courts in his criminal case. Specifically, his constitutional complaint, as arising from its content, is directed against the resolution of the Supreme Court, of 5 September 2012, file No. 7 Tdo 846/2012-62, the judgment of the High Court in Prague, of 20 October 2011, file No. 2 To 77/2011, and the judgment of the Municipal Court in Prague, of 16 May 2011, file No. 2 T 2/2011.

2. Based on the contested judgment of the Municipal Court in Prague, file No. 2 T 2/2011, the complainant was convicted of a particularly serious crime of robbery pursuant to Section 173 (1) (2) (c) of Act No. 40/2009 Coll., the Criminal Code, the offence of illegal entry into dwelling pursuant to Section 178 (1) (2) of the Criminal Code, and the offence of forgery and alteration of a public document pursuant to Section 348 (1) of the Criminal Code. For the offences mentioned above, he has been sentenced to an aggregate term of imprisonment of 6 years and 6 months, while the sentence of expulsion from the territory of the Czech Republic for an indefinite period of time and the sentence of forfeiture pursuant to Section 70 (1) (a) of the Criminal Code have been imposed on him. The complainant’s appeal was dismissed by the contested judgment of the High Court in Prague, file No. 2 To 77/2011; his subsequent appeal on point of law was then rejected by the contested resolution of the Supreme Court, file No. 7 Tdo 846/2012.

3. In his constitutional complaint, the complainant claims that the contested decisions have violated fundamental constitutional principles and his constitutionally guaranteed rights, namely the right to a fair trial under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the “Convention”), the right to an effective remedy by pursuant to Article 13 of the Convention, and the right to a fair trial under Article (36) 1 of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the “Charter”).

4. The complainant sees the violation of his constitutionally guaranteed rights especially in the fact that the contested decisions of the ordinary courts are burdened by an extreme inconsistency between the evidence produced and the findings of fact made. In the given case, the evidence

produced did not suggest that the complainant had committed an act which he was blamed for; in addition, the statement of guilt may be supported by the indirect evidence only if that evidence forms a unified chain. The judgment of the Municipal Court in Prague rested entirely on insufficient findings of fact and the Municipal Court thus violated the criminal law principle of search and interfered with the complainant's right to a fair trial. The complainant then later in his constitutional complaint specifies its reservations to particular evidence against him and points to their lack of probative force to achieve the findings of fact which were made by the ordinary courts in the contested decisions.

5. The complainant also contests in his case the imposition of a sentence of expulsion from the territory of the Czech Republic for an indefinite period of time according to Section 80 (1) of the Criminal Code. According to the complainant, there were not met the statutory conditions for the imposition of such sentence and the sentence imposed is inadequate. The sentence of expulsion constitutes a serious interference with the freedom of movement and residence as guaranteed by Article 14 of the Charter also for non-nationals who are in some way tied to the territory of the Czech Republic where they lived most of their lives. Further, determining a sentence for an indefinite period of time violates Article 8 of the Convention, which guarantees the right to respect the private and family life. The complainant also refers to the judgment of the Constitutional Court, of 21 April 1999, file No. ÚS 178/98, according to which it is not possible to impose a sentence of expulsion for an indefinite period of time, i.e. forever, without the prior examination of the possibility of correction of the accused, since such sentence is conceptually linked to the offender whose correction is not possible. The complainant has lived in the Czech Republic for about 15 years; he has lived with his partner in their common household for 12 years and they continue maintaining their contact even during the imprisonment. He has no ties with the Ukraine, of which he is a national, and has not been there for about 10 years. In the Czech Republic, he has a criminal record dated 2001, for the criminal offence of obstructing the enforcement of an official decision with the sentence of expulsion for a period of two years. In that event, according to the complainant, the reasoning of the sentence containing one sentence with reference to the interest of the protection of health and property of nationals of the Czech Republic cannot stand.

6. Also the parties to the proceedings commented on the constitutional complaint at the request of the Constitutional Court.

7. In its comment, the Supreme Court stated that the complainant raises only factual objections identical to the objections already raised in the appeal proceedings and in the appeal on point of law proceedings. The Supreme Court is bound by the findings of fact of lower courts and it may only intervene in the factual basis of the contested decisions in exceptional cases where it finds an extreme inconsistency between the findings of facts of the court and the evidence produced, while it did not find any such extreme inconsistency in the criminal case of the complainant. The Supreme Court did not comment on the issue of the sentence of expulsion for an indefinite period of time because it did not deal with it in the appeal on point of law proceedings.

8. In its comment, the High Court in Prague referred to the reasons contained in the judgment of 20 October 2011, file No. 2 To 77/2011. The Municipal Court pointed out in its comment that the complainant's objections regarding the factual findings had been dealt with by the High Court in Prague, that had found these findings correct and kept them unchanged. As regards the matter of the sentence of expulsion for an indefinite period of time, the Municipal Court stated that it had been imposed upon the complainant entirely in accordance with the law, since the sentence of expulsion was imposed by the court based on the severity of the criminal offence committed and the fact that the complainant was sentenced to expulsion in 2001 as well. The Municipal Court considers the correction of the complainant as highly unlikely.

9. The complainant responded to the comment by the ordinary courts as parties to the proceedings by his reply thoroughly elaborating upon in particular the matter of imposing the sentence of expulsion for an indefinite period of time in his case. He reiterated that he considered the sentence of expulsion as inadequate and also directly in conflict with Section 80 of the Criminal Code. He claimed that the Municipal Court failed to explain the basic facts necessary to conclude that in this case it is possible to impose a sentence of expulsion. The decisions of ordinary courts are according to the complainant non-conforming with the constitutional rights to the freedom of movement and residence (Article 14 of the Charter) and private and family life (Article 8 of the Convention). The complainant reiterated that he had lived in the Czech Republic for about 15 years; he has lived with his partner in their common household for 12 years and they continue maintaining their contact even during the imprisonment. He has no ties with the Ukraine, which was also found by the Ministry of Justice when it did not hand over the complainant to imprisonment in the Ukraine for the lack of social ties assisting his re-socialisation. As to the objection of the Municipal Court that his partner is of a foreign nationality, the complainant stated that at the time of the rendering of the contested judgment his partner was granted a permanent stay in the Czech Republic and, at the present, she is a Czech national. The complainant has in the Czech Republic also his mother and aunt who is also a national of the Czech Republic. He lives with his partner in a relationship similar to the marital union, which should be regarded as the basis for family life (here, the complainant refers to the judgment rendered by the ECtHR in the case of *Abdulaziz, Cabales, and Balkandali versus the United Kingdom*, of 28 May 1985, No. 9214/80; 9473/81; 9474/81). The partners have even tried to marry but for administrative reasons it has not yet occurred (the complainant was not able to obtain the relevant certificate of his civil status from the Ukraine in person as he was in prison in the Czech Republic at that time). Further, in his reply, the complainant contested the opinion of the Municipal Court that considered his correction as highly unlikely, while the complainant pointed out that in his home state he has no criminal record and in the Czech Republic he has only one criminal record of 2001 for committing a criminal offence of obstructing the enforcement of an official decision. The complainant also raised the issue of the purpose of sentence, while concluded that for the purpose of general prevention it is not possible to apply inadequately severe repression as it would result in an unlawful exemplary punishment. While the emphasis placed in the case by the Municipal Court on that it is a criminal offence committed by a foreigner should be considered as such disproportionate distortion of the balance between prevention and repression, violating in consequence Article 36 (1) and Article (37) 3 of the Charter.

II. Previous course of the proceedings

10. To assess the constitutional complaint and contested decisions, the Constitutional Court also requested the file from the Municipal Court in Prague, file No. 2 T 2/2011, from which it has found the following.

11. Based on the contested judgment of the Municipal Court in Prague, of 16 May 2011, file No. 2 T 2/2011, the complainant was convicted of a particularly serious crime of robbery pursuant to Section 173 (1) (2) (c) of the Criminal Code, the offence of illegal entry into dwelling pursuant to Section 178 (1) (2) of the Criminal Code, and the offence of forgery and alteration of a public document pursuant to Section 348 (1) of the Criminal Code. For the offences mentioned above, he has been sentenced under Section 173 (2) of the Criminal Code, while Section 43 (1) of the Criminal Code was applied, to an aggregate term of imprisonment of 6 years and 6 months, for which enforcement he was placed in the high security prison. Further, the sentence of expulsion from the territory of the Czech Republic for an indefinite period of time pursuant to Section 80 (1) of the Criminal Code and the sentence of forfeiture pursuant to Section 70 (1) (a) of the Criminal Code have been imposed on him. At the same time, pursuant to Section 228 (1) of Act No. 141/1961 Coll., the Criminal Procedure Code, the obligation to indemnify the injured for damage has been imposed on the complainant. The reasoning of the judgment of the Municipal Court, among other things, implies that the sentence of expulsion for an indefinite period of time has been imposed because “it is not in the interest of protection of health and property of nationals of the Czech Republic that persons committing serious criminal offences and also with false documents stay in its territory”.

12. The complainant has filed an appeal against the judgment of the Municipal Court, contesting both the statement of guilt, partially, and the statement of sentence and damages. Through its judgment, of 20 October 2011, file No. 2 77/2011, the High Court in Prague dismissed the complainant’s appeal as unfounded, because the High Court found no grounds which could in the complainant’s case lead to a decision different than that rendered by the court of first instance.

13. The judgment of the High Court was contested by the complainant through his appeal on point of law rejected by the resolution of the Supreme Court, of 5 September 2012, file No. 7 Tdo 846/2012-62. The complainant’s appeal on point of law was based on the grounds pursuant to Section 265b (1) (g) al) of the Criminal Procedure Code; according to the Supreme Court, however, the content of the complainant’s objections under the appeal on point of law did not fulfil the mentioned grounds, as a result of which the Supreme Court decided in accordance with Section 265i (1) (b) of the Criminal Procedure Code.

III. Assessment of the constitutional complaint

14. After considering the arguments contained in the constitutional complaint, all the comments from the parties to the proceedings, and the content of the contested decisions and the requested file of the Municipal Court, the Constitutional Court has concluded that the constitutional complaint is partly justified.

15. By way of introduction, the Constitutional Court notes that pursuant to Article 83 of the Constitution of the Czech Republic it is the judicial body protecting the Constitution and it is not part of the system of ordinary courts and its role is not to make the instance review of their

decisions. If the constitutional complaint is directed against the court decision rendered in judicial proceedings is therefore not significant in itself if the factual inaccuracy of the decision is claimed. The powers of the Constitutional Court are established solely for the purpose of review of decisions in terms of compliance with constitutional principles, i.e. whether the proceedings violated the rights and freedoms of a party to the proceedings protected by constitutional provisions, whether the proceedings were conducted in accordance with constitutional principles, and whether the proceedings can be considered as fair on the whole.

16. The complainant raised in his constitutional complaint two groups of objections – one is related to shortcomings in the evidence before the Municipal Court, or an extreme inconsistency between the evidence produced and the findings of fact made in the complainant’s case; the other group of objections were directed against the imposed sentence of expulsion for an indefinite period of time. The Constitutional Court concluded that only the matter of sentence of expulsion for an indefinite period of time imposed upon the complainant establishes the legitimacy of the constitutional complaint and, therefore, will be further assessed in the first place.

A. Alleged unconstitutionality of a sentence of expulsion for an indefinite period of time

17. As to the alleged unconstitutionality of the imposed sentence of expulsion, the Constitutional Court notes in the first place that, due to its task of protecting the constitutionality, it respects the jurisdiction of the ordinary courts to impose sentences for criminal offences, which has been entrusted to them pursuant to Article 90 of the Constitution, or Article 40 (1) of the Charter. The Constitutional Court is then entitled to intervene in the jurisdiction of ordinary courts only if the sentence imposed departs from the constitutional interpretative principles of the constitutional order of the Czech Republic. While exercising their power to impose penalties, the ordinary courts are obliged to fulfil, inter alia, the constitutional principle of *nullum crimen et nulla poena sine lege* (no crime and no punishment without the law), expressed explicitly in Article 39 of the Charter: “Only the law may designate which acts constitute a criminal offence and what penalties, or other detriments to rights or property, may be imposed for committing them.”

18. At the legal level, the sentencing is then mainly regulated by the Criminal Code, which, in its Chapter Five, also contains guidelines for the imposition of criminal sanctions and penalties particularly, concerning, among other things, the determination of the type and term of the sentence:

“Section 37 General provisions for the imposition of criminal sanctions

(1) Criminal sanctions may only be imposed on the basis of the criminal law.

(2) Any cruel and inadequate criminal sanctions may not be imposed on the offender. The enforcement of criminal sanctions must not degrade the human dignity.

Section 38 Adequacy of criminal sanctions

- (1) Criminal sanctions must be imposed with regard to the nature and seriousness of the criminal offence and the circumstances of the offender.
- (2) Where there is sufficient to impose a criminal sanction which affects the offender to a lesser extent, a more severe criminal sanction must not be imposed on the offender.
- (3) While imposing criminal sanctions, the legitimate interests of those harmed by the criminal offence must also be taken into account.

Section 39 Determination of the type and term of sentence

- (1) While determining the type of sentence and its term, the court shall take into account the nature and seriousness of the criminal offence committed, the personal, family, property, and other circumstances of the offender and his/her previous way of life and the possibility of his/her correction; it shall also take into account the offender's conduct after the crime, especially his/her efforts to compensate damage or remove other harmful consequences of the crime and, if designated as the cooperating accused, also how important his/her contribution was to clarifying the crime committed by members of an organised group, in conjunction with an organised group or in favour of an organised criminal group. It shall also take into account the effects and consequences on the future life of the offender that can be expected from the sentence.

...”

19. The sentence of expulsion is then specifically regulated in Section 80 of the Criminal Code:

“Section 80 Expulsion

- (1) The court may impose on an offender who is not a national of the Czech Republic the sentence of expulsion from the territory of the Czech Republic, as a separate sentence or a sentence in addition to another, if required by the security of people or property, or any other public interest; as a separate sentence, a sentence of expulsion may be imposed if with respect to the nature and severity of the criminal offence and the person and circumstances of the offender the imposition of another sentence is not necessary.
- (2) With regard to the nature and severity of the criminal offence committed, the possibility of correction and the circumstances of the offender, and the degree of threat to the security of people, property or other public interest, the court may impose a sentence of expulsion for one to ten years and/or for an indefinite period of time.

...”

Further, Section 80 (3), the circumstances under which the sentence of expulsion cannot be imposed are listed.

20. Here, it is worth reminding that the imposition (enforcement) of the sentence of expulsion constitutes a major interference in the freedom of movement and residence of an individual in the Czech Republic, as guaranteed by Article 14 of the Charter. Should such interference be constitutionally conforming and legitimate, it is necessary while imposing the respective sentence to examine properly and take into account other specific criteria and circumstances of each case. These criteria were summarised by the European Court of Human Rights (the “ECtHR”) in

the judgment of the Grand Chamber in the case Üner versus the Netherlands of 18 October 2006, No. 46410/99. In addition to the most important criteria of the nature and severity of the offence, the court pointed to the following criteria (Sections 57 and 58 of the judgment):

- The length of the complainant's stay in the country from which he is to be excluded;
- A period which has elapsed since the commission of the criminal offence and the complainant's conduct during that period;
- Nationality of the persons concerned;
- The complainant's family situation, such as the duration of the marriage and other factors indicative of the reality of couple's family life;
- Whether the spouse knew about the criminal offence at the time when entering into the marriage;
- Whether children were born during the marriage and possibly their age; and
- The seriousness of the difficulties which the spouse would probably face in the country where the complainant is to be expelled.

Further, the ECtHR explicitly expressed two other criteria:

- The highest interest and welfare of children, especially the seriousness of difficulties that any of the complainant's children could face in the country to which the complainant is to be expelled; and
- The strength of the social, cultural, and family ties with the host country and the destination country (where the complainant is to be expelled).

21. As it results from the above-mentioned, in particular the principle of independence of the judiciary and the principle of subsidiarity of intervention by the Constitutional Court, when assessing the complainant's objections against the imposition of the sentence of expulsion for an indefinite period of time, the Constitutional Court will focus only on the issue of whether the imposition of the sentence has affected the constitutional rights of the complainant. The Constitutional Court also considered whether the objection against the imposition of inadequate (non-proportional) sentence is permissible, if the complainant did not raise it in his appeal on point of law. Pursuant to the Criminal Procedure Code (Section 265b (1)), as far as the sentence is concerned, the only express ground of appeal on point of law is that the kind of sentence that the law does not permit or that a sentence outside the penal rate stipulated in the Criminal Code for the criminal offence which the accused has been found guilty of (letter h) has been imposed on the accused. The complainant did not apply his arguments against the inadequacy of sentence before the Supreme Court, because this argument does not fall explicitly under any statutory reason for an appeal on point of law. The Constitutional Court notes that the complainant had lodged an appeal on point of law and a constitutional complaint before the issue of opinion of the Constitutional Court Pl. ÚS – st. 38/14 of 4 March 2014 (No. 40/2014 Coll.), conditioning the permissibility of a constitutional complaint on the lodging of an appeal on point of law in the criminal court proceedings. The Constitutional Court therefore concluded that the failure to lodge a complainant against an inadequate sentence in the proceedings concerning the appeal on point of law shall not be considered to the detriment of the complainant as in its cited opinion it expressed a binding opinion on the impermissibility of a constitutional complaint due to failure to use the appeal on point of law in the criminal court proceedings only after the lodging of the assessed constitutional complaint by the complainant and, therefore, the assessed complaint is permissible.

22. Before the Constitutional Court proceeds to examine the issue of the constitutionality of the sentence of expulsion for an indefinite period of time, it considers appropriate to mention briefly also the fundamental bases for sentencing in a democratic rule of law.

23. The state that respects with a full sense of responsibility the freedom of each human being cannot restrict it (or the freedom of movement and residence) arbitrarily without justifying its actions properly. In the criminal law, such rationale and reasoning constitute the purposes of sentencing. As opposed to Act No. 140/1961 Coll., the Criminal Code, effective until 31 December 2009, the currently valid and effective Criminal Code does not contain an explicit expression of the purpose of criminal sanctions (Section 23 of the Criminal Code stipulated that the purpose of sentence is to protect the society against criminal offenders, to prevent the convicted from committing further crimes, and to make the convicted lead an orderly life, and thus to have an educational influence on other members of the society). According to the explanatory memorandum concerning the Criminal Code, the definition of the purposes of sentencing is left to the criminal law theory and the former provisions of the Criminal Code are replaced by projecting the general principles of sentencing into the individual provisions of the Criminal Code relating to criminal sanctions. The purpose of sentencing then results not only from those general principles as well as from the overall concept of the Criminal Code, and in particular from the various provisions governing the imposition of criminal sanctions.

24. The criminal law theory distinguishes and describes a number of purposes of criminal sanctions, especially the retributive purpose leading to the imposition of deserved punishment (just deserts), as well as consequentialist purposes focusing on the consequences of a sentence, such as deterrence, that is individual and general prevention; rehabilitation of the offender, that is his or her education and correction; incapacitation of the offender, that is preventing him or her from committing further criminal offences; restoration, that is the restoration and correction of damaged relationships between the offender and the victim and the whole society (cf. the concept of restorative justice); or reparation to the victim [cf. Ashworth, A., von Hirsch, A., Roberts, J. (eds). *Principled Sentencing: Readings on Theory and Policy*. Oxford: Hart Publishing, 2009]. In modern systems of criminal justice, these purposes are usually combined with each other, or the sentencing takes into account both the need for a just punishment in response to the anti-social behaviour, such as the need to ensure the security of people and property against dangerous offenders, the attainment of the re-education of offender (if possible), as well as the redress after the crime. However, different purposes may be in conflict with each other in sentencing in a particular case, while this conflict can be solved for example by declaring the primary purpose, which must always be fulfilled, and the supporting or secondary purposes, whose achievement is appropriate, but not necessary under all the circumstances and in the full extent.

25. As mentioned above, the Czech legislature while adopting the Criminal Code intentionally [and contrary to the recommendation of the Committee of Ministers of the Council of Europe No. R (92) 17 concerning the consistency in sentencing] refrained from its task to express the purpose(s) of sentencing, or also outline a hierarchy among these purposes, as well as specify whether for certain categories of criminal offences it is desirable to monitor a specific purpose of sentence primarily. In such situation, it is therefore necessary to find justification for infringements of the fundamental rights and freedoms of individuals in the exercise of criminal justice through the interpretation of principles of and guidelines for sentencing. It can be inferred from the statutory need to respect the principle of proportionality (Section 38 (1) of the Criminal Code) and the requirement for the subsidiarity of a more severe criminal sanction (the principle of *ultima ratio*, Section 38 (2) of the Criminal Code) in sentencing that one of the purposes of a sentence appropriate to the nature

and severity of the committed crime is the just punishment of the offender (*punitur quia peccatum est* – punishment is to be inflicted, because a crime has been committed). The new concept of sentencing, which is reflected in the Criminal Code especially in the formulation of the principle of *ultima ratio*, the accentuation of alternative sentences, and the projection of the principles of sentencing both into the provisions on sentencing in general and into the provisions concerning individual sentences in particular, allows more efficient achievement of also the consequentialist purposes of sentencing – to protect the society effectively, to prevent criminal offences, to compensate victims (cf. Section 38 (3) of the Criminal Code), etc. The principle of proportionality serves as protection against the purely purposeful implementation of criminal repression, such as social isolation (incapacitation) for an indefinite period of time of persons who do not conform to the society or cause fear or condemning reactions within the society due to their non-conformist (and delinquent) way of life (outside the cases where it is absolutely unavoidable, for example with the people suffering from such severe problems that their free movement constitutes a high risk of damage to their life or health or the life and health of other people).

26. It can be summarised that if the legislature does not specify its criminal policy in terms of the purposes of sentencing in a detailed manner, then any sentence imposed (whether a separate sentence or more sentences at the same time) must strictly observe and respect the principles of proportionality and *ultima ratio* [subsidiarity of (more severe) criminal repression], even in the event that the court has found in a particular situation that any of consequentialist purposes – for example, deterring prospective offenders, integration of the convicted into the therapeutic program for the purpose of remedy (rehabilitation), etc. – would require for the convicted person a more severe sentence or a sentence restricting his or her fundamental rights and freedoms to a greater extent. The current legislation, as it has been explained above, does not allow imposing exemplary sentences within the meaning of a disproportionate increase in penal repression (even within the legal limits of sentences), in individual or in general terms, that is the imposition of such sanctions that would prioritise preventive, educational, prohibitory, and other similar purposes to the purpose of sentence in the form of just punishment for the committed act. In other words, the principle of proportionality is not limited only to the term of punishment between the lower and upper limits of sentence, but also binds the ordinary courts to maintain the principle of imposing similar sentences in similar cases and different sentences in different cases within that range. A departure from the principle of proportionality in monitoring other purposes and objectives – typically by imposing exemplary sentences or increasing repression against foreigners – distorts in essence the principles of equality before the law and the right to a fair trial and affects the sense of justice within the society.

27. The sentence of expulsion by its legal definition (see Item 19 of the judgment) serves primarily the purpose of prohibition which is by nature absolute, in the sense that the convicted is completely and physically prevented from being present in the Czech Republic, i.e. in the territory of the jurisdiction of Czech criminal justice, as a result of which the offender loses any opportunity to commit any criminal offence against persons, property or other public interests of the Czech society, or in the territory of the Czech Republic. In practice, it is therefore a very effective prevention tool. When considering the purpose of the sentence of expulsion, as well as any other type of punishment, it is not possible to ignore the purpose of just deserts, adequate in relation to the nature and seriousness of the offence; in other words, it is not possible to consider only the security interests of society but it is also necessary to weigh up whether the offender – seen in the first place as a “human being” and not a “foreigner” (as this kind of sentence can only be

imposed on other nationals) – really deserves such sentence and such term of sentence with regard to the criminal offence committed.

28. In general, the sentence of expulsion may be imposed subject to the conditions set out in Section 80 of the Criminal Code (the accused person is not a Czech national, the imposition of such sentence is in the public interest, and there is no legal reason not to impose the sentence) for each criminal offence listed in a special chapter of the Criminal Code. However, with regard to the need to respect the principle of adequacy of sentence and when imposing the sentence of expulsion of a certain term, it is necessary to take into account also the type severity of individual criminal offences, which is expressed in the Czech Criminal Code by the lengths of the terms of imprisonment. Various terms of sentence depending on the relative seriousness of criminal offences are then based on the principle of ordinal (relative) proportionality. According to the principle of cardinal (absolute) proportionality, it is determined on the other hand how long term of sentence may be imposed for a criminal offence with respect to its severity. Pursuant to Section 80 (2) of the Criminal Code, when determining the term of sentence of expulsion, the court must take into account the nature and seriousness of the criminal offence. The Criminal Code applies the term of one to ten years or an indefinite period of time to all the offences and does not specify any other limits according to the seriousness of criminal offences in the special chapter. However, this does not mean that the relative seriousness of the punished criminal offence does not have any importance in preserving the principle of adequacy in the case of the sentence of expulsion. Being aware of the principle of proportionality in its two dimensions – the ordinal and cardinal – the requirement of Section 80 (2) of the Criminal Code must be interpreted so that the court must take into account not only the nature and seriousness of the particular offence committed (for example, robbery is a particularly serious crime and, therefore, the most severe sentence of expulsion for an indefinite period of time is imposed) but also the relative seriousness of the criminal offence under consideration compared to less and more serious offences of the same type (for example, any robbery during which “only” a threat of imminent violence is used is less serious than murder and robbery), so that – with regard to the principle of *ultima ratio* – only the most serious crimes are punished in the most severe manner.

29. Pursuant to Article 39 of the Charter “only the law may designate which act constitutes a criminal offence and what penalties, or other detriments to rights or property, may be imposed for committing such offence.” The law then clearly postulates the obligation to impose criminal sanctions in an adequate manner as because pursuant to Section 38 (1) of the Criminal Code a criminal sanction must be imposed with regard to the nature and gravity of the criminal offence and the circumstances of the offender. Also the doctrine concludes that the adequacy of criminal sanctions, i.e. the proportionality between the interest in protecting the society against the criminal offender and the interference with the fundamental rights of the offender caused by the imposition of criminal sanctions, has the constitutional nature (see Šámal, P. a kol.: Trestní řád. Komentář. 7th issue. Prague: C. H. Beck, 2013, page 504).

30. The insufficiently reasoned and insufficiently justified decision to award the most severe term of sentence is then a violation of the statutory obligation to impose adequate criminal sanctions, and in more serious cases it may constitute a violation of the constitutional requirement for the legality of sentence and interference in the constitutional order *nulla poena sine lege*.

31. As the Constitutional Court stated in its case-law “the principles of fair punishment and equality of citizens before the law within the rule of law are complied with best if the regular cases of standard crimes are prosecuted within the normal sentencing guidelines provided for in the special chapter of the Criminal Code. Through the sentencing guidelines, the legislature expresses a type degree of social dangerousness of a certain type of criminal offence and provides the law enforcement authorities with a solid framework within which they are to determine a specific sentence with regard to all the circumstances of the case. This way of the legislative determination of term of sentence best complies with the principle of *nullum crimen, nulla poena sine lege*, as expressed in Article 39 of the Charter, and the principle that no one shall be prosecuted or deprived of one’s freedom except on such grounds and in the manner prescribed by the law (Article 8 (2) of the Charter). Sentencing based on the regular terms of sentence best complies with the principle of equality of citizens before the law (Article 1 of the Charter) and the principle of foreseeability of court decisions.” (judgment, file No. III. ÚS 747/06, of 4 April 2007, N 62/45 of the Collection of Judgments of the Constitutional Court 53).

32. The Constitutional Court therefore concludes that the sentence of expulsion may be imposed for a term of one year to ten years or for an indefinite period of time. When imposing a sentence in a certain case, the ordinary court must consider – bearing the principle of *ultima ratio* in mind – four basic criteria: Firstly, the proportionality of sentence with regard to the nature and seriousness of the criminal offence, as well as with respect to the relative seriousness of the criminal offence within the classification of criminal offences in the special chapter of the Criminal Code; secondly, individual prognosis or possibility of the correction of the offender; thirdly, the circumstances of the offender, that is the strength of his or her social, cultural, and family ties in the host country and in the country which he or she is to be expelled to, as well as the interests and welfare of the children of the offender; and fourthly, the prognosis of danger to the safety of people, property, or other general interests. If this consideration by the court is not properly carried out and justified, it constitutes a breach of Article 39 of the Charter, prohibiting the imposition of sentences in other than a lawful manner.

33. The Constitutional Court has already dealt with the issue of the necessity and adequacy of a sentence of expulsion for an indefinite period of time in terms of the right to respect for private and family life (Article 8 of the Convention), in its judgment, file No. II. ÚS 178/98 of 21 April 1999 (N 57/14 of the Collection of Judgments of the Constitutional Court 27). In the case under consideration, the ordinary court imposed on the accused a sentence of expulsion for an indefinite period of time on the basis of formal assumptions – the accused was not a national of the Czech Republic, he was not granted the status of refugee or asylum, and he has never been granted a long-term or permanent residence; namely, within the aggregate sentence for the criminal offence of theft under Section 247 (1) (a) and (b) of the then effective Criminal Code, the criminal offence of robbery under Section 234 (1) of the Criminal Code, and an attempted offence of unauthorised use of another’s property under Section 249 (1) of the Criminal Code, while the criminal offence of robbery was a particularly serious criminal offence that was even committed in complicity and while making a gross act of violence resulting in an injury and incapacity to work of the victim. The Constitutional Court then stated in its compliant judgment that: “Although the prevention of crime by expulsion is a legitimate and, therefore, permissible objective essential in any democratic society, the requirement for adequacy is not fulfilled where the maximum sentence, i.e. the sentence

of expulsion for an indefinite period of time, without a time limitation, in other words, forever, has been imposed, without the possibility of the correction of the offender having been examined as required by Section 57 of the Criminal Code. The Constitutional Court deems that the maximum sentence of expulsion, i.e. forever, is conceptually related to such offender where the correction is not possible. Given that the decision contested by the constitutional complaint and the proceedings preceding it did not deal with the possibility of the correction of the complainant, it is ultimately a decision issued in violation of the law, specifically Section 57 of the Criminal Code.”

34. While imposing a sentence of expulsion for an indefinite period of time, the ordinary court must examine not only the prognosis of the correction of the offender which is conceptually near impossibility, or a very high degree of improbability of correction, but must also take into account in a qualified manner the security risk of the stay of the offender in the territory of the Czech Republic, i.e. find that not even the maximum of ten years of residence outside the Czech Republic diminishes the fear that after the expiry of the specified period and a possible return to the territory of the Czech Republic the offender could again endanger the social interests by his or her criminal offences. The sentence of expulsion for an indefinite period of time may be conceptually imposed only in the most serious cases where it is not possible to expect reasonably that the convicted person will cease to be a security threat to the Czech Republic after several years. The decision to impose a sentence of expulsion for an indefinite period of time, the reasoning of which lack the considerations mentioned above, or contain only a formalistic reference to social interests, without considering duly the adequacy of the imposed sentence to all the relevant circumstances of the case and considering the principle of *ultima ratio* when imposing and determining the sentence, violates the convicted person’s constitutional rights to a fair trial guaranteed by Article 36 (1) of the Charter and to the predictability, proportionality, and legality of a sentence as guaranteed by Article 39.

35. Such infringement of the subjective fundamental right as guaranteed by Article 36 (1) of the Charter occurred in the present case of the complainant. The ordinary courts made a mistake while imposing on the complainant a sentence of expulsion for an indefinite period of time. In the first place, the reasoning of their decisions, the judgment of the Municipal Court in particular, are totally devoid of the assessment of the above-mentioned basic criteria for imposing and determining the term of the sentence of expulsion (see Items 28 and 30 of this judgment) in the case of the complainant. Yet, even if the reasons for imposing the sentence of expulsion given in the reasoning of the judgment of the Municipal Court stand in the context of the whole case, they cannot obviously stand in the event of a sentence for an indefinite period of time. The formalistic justification of the indefinite term of the complainant’s sentence pointing out that “it is not in the interest of protection of health and property of nationals of the Czech Republic that persons committing serious criminal activities and also with false documents stay in its territory” does not allow the Constitutional Court to examine whether the imposition of the respective sentence on the complainant respected the principle of proportionality and the principle of *ultima ratio*, that is whether, taking into account whether the criminal offence, the person of the offender, and his circumstances, it was not sufficient to impose a less severe criminal sanction, i.e. a sentence of expulsion for a period of one to ten years. The sentence of expulsion for an indefinite period of time clearly represents within the Criminal Code the most severe sentence of this kind, reserved for the most serious cases of criminal offences, as elaborated above.

36. Under these circumstances, the Constitutional Court has concluded that without dealing with the legality and adequacy of the sentence of expulsion in this case in a more detailed manner it must state that the most severe term of sentence which the law allows, that is the sentence of expulsion for an indefinite period of time, without a proper assessment with regard to the statutory conditions as set out in Section 80 of the Criminal Code, as they were explained and specified above, and in particular without any convincing reason why the ordinary courts chose such term of imprisonment with respect to all the circumstances of the case and the circumstances of the offender, cannot stand from the constitutional point of view. For this reason, the contested decisions of the ordinary courts are inconsistent with the complainant's constitutionally guaranteed right to a fair trial under Art 36 (1) of the Charter, as well as the principle of *nulla poena sine lege* as expressed in Article 39 of the Charter.

37. For the sake of completeness, the Constitutional Court then also states that the conclusions reached cannot be altered by additional arguments contained in the comment by the Municipal Court. Neither a formal reference to the seriousness of the criminal offence committed or a reference to the previous conviction of 2001 nor the opinion of the Court that the possibility of the correction of the complainant is highly improbable (again, without further explanation) explain why a sentence of expulsion for one to ten years is not sufficient to achieve the purposes of the sentence but it is necessary to resort to the sentence of expulsion for an indefinite period of time which is the most severe for the complainant. As mentioned above, the sentence for such term should be reserved for the most dangerous offenders of the most serious criminal offences, whose free movement constitutes a particularly high danger to the life, health, property, and other general values existing within the society; however, neither the reasoning of the judgment nor the comment of the Municipal Court shows convincingly that these circumstances are fulfilled in the complainant's case. Finally, the Constitutional Court points out as for the arguments of the Municipal Court that not even the possible facts that the complainant's partner is a foreign national (but with the permit for permanent residence in the Czech Republic) prevents the complainant from living a family life in the Czech Republic or exercising his right to such life, as protected by Article 8 of the Convention.

B. Alleged deficiencies in the evidence

38. In addition to the objections relating to the imposed sentence of expulsion, the complainant also raised in its constitutional complaint objections against shortcomings in evidence, or an extreme inconsistency between the evidence produced and the findings of fact which affected the proceedings before the ordinary courts (Municipal Court).

39. As for this group of complaints, the Constitutional Court specifically notes that in accordance with the constitutional principle of judicial independence (Articles 81 and 82 of the Constitution) the task of the ordinary courts is to assess the completeness, credibility, and truthfulness of the evidence within the meaning of Section 2 (5) and (6) of the Criminal Procedure Code;

the Constitutional Court can only assess the compliance of the procedure of the production of evidence contested by the complainant, or evaluation of the evidence, with the constitutional principles of fair trial.

40. The constitutional principle of presumption of innocence (Article 40 (2) of the Charter) is reflected in the Czech criminal procedure in the obligation of the law enforcement authorities to prove the guilt of the accused beyond a reasonable doubt (cf. Section 2 (5) of the Criminal Procedure Code). Where there is any reasonable doubt, it must be interpreted in favour of the accused (the principle of *in dubio pro reo*, cf. for example, the judgments, file No. I. ÚS 3094/08, I. ÚS 910/07, I. ÚS 49/06, and I. ÚS 429/03). The procedure of the production of evidence, including the evaluation of evidence, however, with regard to the principle of judicial independence, falls under the competence of the ordinary courts, not of the Constitutional Court. The Constitutional Court has repeatedly emphasised, in accordance with the principle mentioned above which also implies the principle of the free evaluation of evidence (Section 2 (6) of the Criminal Procedure Code), that it is the ordinary court that decides which facts are relevant for the production of evidence and which of the evidence proposed (or not proposed) will be produced by that court, or whether and to what extent it seems necessary to provide the further evidence, which facts are considered established, and which do not have to be proved [see for example the judgment, file No. I. ÚS 564/08, of 22 May 2012 (N 110/65 of the Collection of Judgments of the Constitutional Court 491)]. In principle, the Constitutional Court may not interfere in the evaluation of the content of the evidence produced and is not entitled to verify the findings of fact and thus replace effectively the trial court [cf. the judgment, file No. III. ÚS 23/93, of 1 February 1994 (N 5/1 of the Collection of Judgments of the Constitutional Court 41), or the recent judgment, file No. III. ÚS 1250/12, of 13 November 2012]. It is primarily the task of the trial court to assess the credibility of the evidence as in accordance with the principle of oral proceedings and immediacy it has the best prerequisites for such assessment after the completion of the trial. In terms of constitutional review, it is important whether the evidence which the contested decision is based on forms a coherent unit and whether the reasoning of the contested decision does not show signs of obvious arbitrariness.

41. However, the Constitutional Court did not find any such defects in the contested decisions, in particular the judgment of the Municipal Court.

42. In the present case, the Municipal Court as a trial court heard the complainant as the defendant, read the testimonies of the co-defendant from the pre-trial proceedings pursuant to Section 207 (2) of the Criminal Procedure Code, heard the witnesses and produced the documentary evidence, including expert opinions in the field of forensic science, traceology, dactyloscopy, genetics, and technical examination of documents, as well as the methods of odour identification, and evaluated them subsequently, as described in the reasoning of its judgment.

43. The Constitutional Court has found that the trial court made its conclusion on the guilt of the complainant and sufficiently and logically justified it on the basis of evidence produced in the trial conducted in accordance with the requirement of adversary proceedings, where

the evidence conclusively showed that a criminal offence had been committed and that the criminal offence had been committed by the complainant, which was subsequently confirmed by the appellate court and the court deciding on the appeal on point of law. The Constitutional Court thus did not find that the decision of the trial court suffered from any extreme inconsistency between the evidence produced and the findings of fact made, or that the subsequently drawn legal conclusions and assessment of the case did not correspond to such evidence or findings. From a constitutional point of view, the conclusion of the complainant's guilt stands.

44. Therefore, the constitutional complaint in the part in which it was not directed against the decision on the sentence of expulsion for an indefinite period of time but against the statement of the complainant's guilt has been found to be manifestly unfounded within the meaning of Section 43 (2) (a) of the Act on the Constitutional Court.

IV. Conclusion

45. Based on all of the above-mentioned reasons, the Constitutional Court had no choice but to annul the decisions of the Municipal Court in Prague, the Prague High Court, and the Supreme Court contested by the constitutional complaint, as indicated in the statements II. and IV. of this judgment, because the decision to impose the sentence of expulsion for an indefinite period of time on the complainant violated his fundamental right guaranteed by Article (36) (1) and Article 39 of the Charter [Section 82 (2) and (3) (a) of the Act on the Constitutional Court]. The remaining part of the constitutional complaint was rejected as a manifestly unfounded petition [Section 43 (2) (a) of the Act on the Constitutional Court].

46. Annuling the decisions mentioned in the statement of this judgment creates the space for the procedure of ordinary courts under Sections 314h to 314k of the Criminal Procedure Code. With regard to the binding legal conclusions given in this judgment (Article 89 (2) of the Constitution), the trial court shall be required to decide again on the sentence of expulsion. In its decision-making, it must not only fulfil the requirements for the quality of reasoning of the decision imposing the sentence but also consider the above-mentioned criteria of imposition and determination of the sentence of expulsion (see especially Items 28 and 30 of this judgment) and apply them properly to the complainant's case with regard to all the relevant facts and arguments raised by him.

Appeal: No appeal is permissible against the judgment of the Constitutional Court.

In Brno on 11 June 2014

Kateřina Šimáčková, m.p.

Presiding Judge

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A dissenting opinion of judge Ivana Janů

1. Pursuant to Section 22 of the Act on the Constitutional Court, I disagree with the statement of the judgment of the Constitutional Court, file No. I. ÚS 4503/12, and I am writing a dissenting opinion.

I. Impermissibility of the objections raised

2. I have to mention that the Constitutional Court before proceeding to the assessment of the merits of the constitutional complaint should examine whether there are conditions for the consideration of the constitutional complaint. Due to the principle of subsidiarity which is applied in the proceedings before the Constitutional Court, those conditions include the requirement for the previous exhaustion of all procedural remedies available under the law to the complainant in order to protect his rights. This requirement has consistently been interpreted by the Constitutional Court in a substantive sense, that means it is not sufficient if the complainant merely exercises a procedural remedy to protect his rights, but it is also necessary to raise an objection against the relevant misconduct therein. In this respect, it is possible to refer to the extensive and constant case-law of the Constitutional Court, represented by a number of resolutions (see e.g. file No. II. ÚS 362/01, I. ÚS 736/08, I. ÚS 1729/08, IV. ÚS 589/2000, I. ÚS 1608/12, I. ÚS 1439/13, and I. ÚS 2409/13), as well as several judgments (see e.g. file No. III. ÚS 161/01, I. ÚS 3113/13).

3. The mentioned requirement, that is the principle of subsidiarity, is a reflection of the task and the role of the Constitutional Court in the legal order of the state. The protection of constitutionality is not and by definition cannot be a task of only the Constitutional Court but it is a task of all public authorities. On the contrary, the Constitutional Court represents in the given regard *ultima ratio*, an institutional mechanism which is to be used if and only if the use of other means of the rule of law is not an option.

4. The exhaustion of remedies in terms of their content is to be *conditio sine qua non* for the successful raising of the constitutional complaint. The constitutional complaint is not reducible to the means through which the complainant obtains another opportunity to defend his rights as a result of his own failure (failure to act consisting in the absence of assertion) in the regular proceedings before public authorities which are asked to protect his rights and whose competence such assessment falls under. By accepting the objections formulated as late as in the proceedings concerning the constitutional complaint, the Constitutional Court would gradually become another level of the system of courts at which the complainants would basically catching up with what they neglected in the previous proceedings due to their own fault. However, such concept of activities is clearly not within the competence of the Constitutional Court – the authority in charge of the protection of constitutionality. On the contrary, it would be an utterly harmful trend which would lead to a shift of the centre of gravity of proceedings and evidence from the ordinary courts to the Constitutional Court. Despite that the proceedings before the Constitutional Court apparently do not apply the principle of oral proceedings, public proceedings, and other similar principles to such an extent as before the ordinary courts. The possibility of applying in the constitutional complaint entirely new, previously not raised objections would certainly be undesirable also in terms of the need to concentrate proceedings in a certain way and, therefore, prevent delays.

5. For these reasons, if the Constitutional Court retracts the hitherto applied requirement for not only the formal but also the material exhaustion of remedies, in my opinion it would ultimately did not contribute to the protection of the constitutionally guaranteed rights of the complainants, but just the opposite. Moreover, it is questionable whether such change in approach would not require referring the case to the Plenum of the Constitutional Court in accordance with Section 23 of the Act on the Constitutional Court.

6. In the present case, there is no dispute about that the complainant raised the objections concerning the imposed sentence of expulsion before the ordinary courts neither in the appellate proceedings nor in the proceedings concerning the appeal on point of law, while focusing solely on the conclusion of guilt. That was quite appropriately noted in its comment on the constitutional complaint by the Supreme Court and the complainant himself admits that in his subsequent reply, while he even expresses in the sense that he is aware that, for this reason, the respective objections may be evaluated by the Constitutional Court as impermissible.

7. In the situation where the complainant raised its objections before the ordinary courts neither in the appellate proceedings nor in the proceedings concerning the appeal on point of law, I hold that the Constitutional Court should not have dealt with them at all, but should have considered them due to the material failure to use remedies as impermissible and the constitutional complaint should have been rejected.

8. The above-mentioned conclusion cannot be changed even by the majority's reference to that the complainant lodged an appeal on point of law and a constitutional complaint before the issue of opinion of the Constitutional Court, of 4 March 2014, No. 40/2014 Coll., conditioning the permissibility of a constitutional complaint on the lodging of an appeal on point of law in the criminal court proceedings, even in the cases where the objections raised do not fall under any reason for an appeal on point of law regulated by the Criminal Procedure Code. Even if we disregard the proceedings concerning the appeal on point of law, this does not affect the conclusion that the respective objections could and should have been applied by the complainant in the appellate proceedings, which did not happen.

II. Unfounded nature of the objections raised

9. It is obvious from the above-mentioned that I could not support the statement of the judgment. For the sake of completeness, however, I want to give my opinion also of the merits of the case as for which I cannot agree with the majority either.

10. In principle, it is possible to agree with the conclusions of the judgment in general, but one cannot ignore the fact that they fail to address the facts of the case to a great extent or completely. For example, in Item 20 of the judgment, the majority mentions the criteria for the imposition of a sentence of expulsion, from which the reader of this decision could get the feeling at first glance that these criteria may be in favour of the complainant. At the same time, if we apply them to the present case, we will find in fact that apart from the criteria of the length of stay in the country from which the complainant is to be expelled (and even about this criterion there is a certain question mark – see below) no other criterion is in his favour apparently. Likewise, one can certainly agree with the fact that the legal order does not allow imposing exemplary sentences within the meaning of disproportionate increase in the criminal repression, but it is not clear why the judgment actually deals with it when the facts of the case do not raise any suspicion that the sentence imposed in the case has an exemplary character. It can even be said that the application of the legal background emphasised in the judgment tends to confirm the accuracy of the imposition of the respective sentence in the present case. For example, if the judgment refers to the type and relative severity of the criminal offence committed (Item 27) or the proportionality of sentence in relation to the severity (Item 31), then in the situation where the severity is very high in the complainant's case, the imposition of the given sentence seems to be fully appropriate in the light of these criteria.

11. It should be pointed out that the complainant was convicted of a particularly serious crime, which is the most serious category of criminal offences in the Czech legal order, with the upper limit of the term of sentence being twelve years. Along with another offender, the offender carried out the robbery while being masked by a hood based on a tip from a third party that money is in the property. It was a premeditated and planned criminal offence. During the robbery, the complainant was unfazed by meeting a housekeeper in the house, but proceeded to violence, threatened her with a gun, tried to tie her, and then locked her in the toilet and continued in the robbery. The caused damage was in excess of one million Czech crowns. Thus, it was obviously a very serious unlawful act of purely criminal nature.

12. As for the criteria pointed out in Item 20 of the judgment, it is necessary to mention that the complainant's personal relationship to the Czech Republic is only partial. At the time of committing the offence, he had already stayed here (if the data given by him is true) for 11 years, that is almost a third of his life, but the question is to what extent the length of stay which was illegal and which frustrated the ban ordered can be included in that period. In addition, it must be emphasised that he has no wife or children here, while the issue of children as is also mentioned by the text of the judgment is considered an essential criterion. The complainant is apparently devoted to activities of questionable character more than to creating family ties, as it was found in this case that he lived under a false identity, commonly impersonated another person, and held a number of stolen and forged documents with his photos in various names (he was also convicted in the proceedings of the offence of forgery and alteration of a public document). It should also be noted that the complainant does not mention in the statement of its ties to the Czech Republic any permanent job or that he would have a legal source of income here.

13. It cannot be taken into account that the complainant is currently charged with other criminal offences against property on a larger scale and of illegal possession of arms, but it is certainly relevant that he was already sentenced and that he has already been expelled in the past (for

2 years). I think it is quite logical that if the earlier expulsion for a shorter period was not sufficient, it is now adequate to consider a more severe option. If the previous less severe sentences failed to correct the complainant, no wonder that the ordinary courts were sceptical about the possibility of the correction of the complainant, and such scepticism should not be identified as unjustified, as the majority does.

14. It is also possible to refer to the relevant commentary (Šámal, Pavel a kol.: Trestní zákoník. Komentář; 2nd issue, Prague, C. H. Beck, 2012, Section 80) that mentions the facts such as problems with the law in the past, the previously imposed sentence of expulsion, and the deliberate altering of personal data by the offender as the cases where the imposition of a sentence of expulsion is especially applicable.

15. I must also consider as rather manipulative the part of the judgment dealing with that (Item 26) the offender is to be seen in the first place as a human being, and not as a foreigner, as if these concepts were in some contrast, which is not the case. A foreigner is no less a human being than a native and will not be rid of any part of his or her humanity even if he is eventually expelled. He or she will simply be a convicted person whom a certain sentence has been imposed on for the criminal offence which he or she has been found guilty of.

16. I must also oppose the message of the judgment in the respect in which it deals with the sentence of expulsion for an indefinite period of time as the most severe sentence. This is only the most severe variant of the sentence of expulsion but certainly not the most severe sentence at all, because such would only be an unsuspended term of imprisonment. On the contrary, the expulsion should be generally regarded as a considerably less severe manner of punishment than imprisonment, when the expelled person may freely live his or her life and find his or her happiness in his or her mother country or in other states where his or her stay was not denied. The expulsion of persons who seemed to have created links of dubious character rather than family background might be more than a burdensome punishment rather an opportunity (although it is still the question of whether they will use it) to break with the past and begin a different and more honest life.

17. There is no doubt that the state – the judiciary has an obligation to protect the security of its citizens, their property, life and health or other public interests and to impose on the foreigners staying in its territory and committing crimes sentences for the criminal offences committed by them. It is an obligation and the role of the state to respond to the criminal offences committed in its territory, to punish the crimes, and prevent their recurrence. One of the possible and appropriate instruments which are available to the Czech Republic in this respect in accordance with the law is in the case of foreigners the sentence of expulsion, including expulsion for an indefinite period of time.

18. In the present case, the ordinary courts carried out only a brief general analysis of the relevant criteria for the imposition of sentence; however, based on the fact that the defence did not raise its objections before the ordinary courts in this respect and did not require from them a detailed justification, a brief reasoning will stand in the constitutional point of view. In a situation where in the light of the above analysed criteria and circumstances it appears that there were material reasons for the imposition of a sentence of expulsion for an indefinite period of time and that even the imposition of the sentence was entirely appropriate, I see no reason why the Constitutional Court should comply with the complaints of the complainant, even if we put aside the impermissibility of the complaints raised by him.

III. Conclusion

19. Given the above, I am convinced that the complainant's objections against the sentence imposed should not have been reviewed by the Constitutional Court at all because they were not permissible due to failure to use all remedies available. And if they are examined, they should have been found manifestly unfounded.

20. I see no reason why the state would have to suffer the stay of foreign nationals committing criminal offences in its territory. Especially in the case of severe or recurring criminal offences, the expulsion for an indefinite period of time may be fully appropriate. It must be admitted that even as for criminal offender there may be factors indicating the appropriateness of the imposition of such sentence where the expulsion is excluded. However, in the present case, I do not find any such essential combination of reasons in favour of the complainant. The majority decided to disregard the principle of subsidiarity and proceeded in an activist manner to the review of the adequacy of the scope of the reasoning of the statement of the sentence and to its annulment, although in this respect not all remedies were used and the sentence imposed does not seem to be inappropriate in the light of the facts of the case. I had no choice but to express my dissent from the judgment through this dissenting opinion.

21. Further, in addition to my dissenting opinion, I have to express my reservation about the fact that that interveners, that is the competent prosecution offices, have not been asked to comment in the proceedings before the Constitutional Court, although it is the duty of the judge-rapporteur to send them immediately the petition for comment, as set out in the Act on the Constitutional Court (see Section 76 (2), Section 32, and Section 42 (4)) and confirmed by the established practice. Therefore, I am forced to conclude that the proceedings before the Constitutional Court have not taken place entirely in accordance with the law.