



Up-679/12-17  
16 October 2014

## DECISION

At a session held on 16 October 2014, in proceedings to decide upon the constitutional complaint of Janko Pibernik and Slavka Pibernik, both from Krško, Mojca Pibernik and Jan Pibernik, both from Brežice, and Kana Pibernik, Ljubljana, all represented by Bojan Klakočar, attorney in Krško, the Constitutional Court

decided as follows:

**Judgment of the Supreme Court No. II Ips 435/2010, dated 5 April 2012, Judgment of the Higher Court in Ljubljana No. II Cp 3775/2009, dated 12 May 2010, and Judgment of the District Court in Ljubljana No. P 3614/2007-III, dated 18 June 2009, are abrogated in the part in which the claims of Janko Pibernik, Slavka Pibernik, Mojca Pibernik, and Kana Pibernik were dismissed. In this part, the case is remanded to the District Court in Ljubljana for new adjudication.**

## REASONING

### A

1. The challenged judgments were issued in a civil procedure in which the complainants (the parents of the deceased Samo Pibernik, his partner Mojca Pibernik, and their two children) demanded the payment of compensation for non-pecuniary damage that occurred due to the death of Samo Pibernik that was allegedly caused by the unlawful conduct of police officers in a police

action on 3 April 2000. The court of first instance required the defendant (the Republic of Slovenia) to pay complainant Mojca Pibernik (the third applicant in the lawsuit) compensation for non-pecuniary damage in the amount of EUR 1,000 with statutory default interest, and dismissed the compensation claims of the other complainants (the plaintiffs in the lawsuit). Both the complainants and the defendant filed appeals against the judgment of the first instance. The Higher Court dismissed all the appeals and upheld the judgment of the court of first instance. The Higher Court determined that Article 26 of the Constitution and Article 172 of the Obligations Act (Official Gazette SFRY, Nos. 29/78, 39/85, and 57/89 – hereinafter referred to as the OA), which was in force at the time when the damaging incident occurred, is the basis for the liability of the state for damages. The challenged decision is based on the assessment that the complainants failed to prove the unlawfulness of the conduct of the police in the procedure against the deceased Samo Pibernik, therefore their claims for the payment of compensation for [having suffered] psychological damage due to the death of a relative (Article 201 of the OA) and compensation for lost alimony and support (Article 194 of the OA) are not substantiated. Following from the finding that Samo Pibernik died of an acute asthma attack triggered by the physical and emotional strain during the arrest, the courts proceeded by focusing, in particular, on the assessment of the question of whether police officers acted lawfully in their action and in conformity with the police authorisations and instructions on the use of measures involving the use of force that were applicable at the time. According to the positions of both the court of first instance and the Higher Court, the police officers did not act unlawfully in the circumstances of the concrete case. The courts established that on that day police officers were charged with executing the Order of the investigating judge on duty, No. I Kpd 381/2000, dated 3 April 2000, by which a house search was ordered due to the suspicion that criminal offences related to drug trafficking had been committed. With respect to the findings in the evidentiary proceedings, the deceased resisted the orders of the police officers, therefore, in the assessment of the courts, the police officers applied measures involving the use of force appropriately. The first and second instance courts also concurred with regard to the assessment that it is not possible to criticise the police officers for not enabling the deceased to receive timely and appropriate medical help (i.e. that they were or should have been acquainted with the medical situation of the deceased and the possibility that he could suffocate due to an acute asthma attack), and that with regard thereto it is not possible to allege inadequate diligence when planning the action. Both courts concurred that a causal link between such conduct and the

death of Samo Pibernik does not exist even if with regard thereto it were proven that the conduct of the police officers was inappropriate.

2. The Supreme Court partially granted the revision filed by the complainants and in the part in which they refer to the fourth complainant (i.e. the minor son of the deceased) abrogated the judgments of the courts of the first and second instance, and in such scope remanded the case to the court of first instance for new adjudication. In the assessment of the Supreme Court, the court of first instance rejected, without substantiation, the taking of evidence by hearing the minor Jan Pibernik, because at the time of the damaging incident he was still a child (although he was an eyewitness to the relevant incident in the apartment). The court of first instance refused to hear him, arguing that due to the fact that the son was [only] a little more than 5 years old when the incident happened, it would constitute an inappropriate piece of evidence. According to the Supreme Court, also a child can be examined as a party as it has been scientifically established that also very small children have the same sensory capacities as adults. In the action, the hearing of the son as a party was proposed due to the fact that he was present during the key moments when the police officers carried out the actions due to which the defendant could be liable for damages. In the assessment of the Supreme Court, the defendant justifiably requested the taking of evidence by hearing the minor son of the deceased as a party to proceedings and this does not entail an inappropriate piece of evidence that the court could refuse to take in advance. The Supreme Court dismissed the revision allegations of the other complainants. It concurred with the substantive law assessment of the lower courts that the arrest procedure involving Samo Pibernik did not entail inadmissible conduct and that the reaction of the police officers to the asthmatic attack did not entail negligent conduct. Therefore, also in the assessment of the Supreme Court, not all the prerequisites for the liability of the defendant for damages are fulfilled.

3. The complainants allege violations of the rights determined by Article 14, the fourth paragraph of Article 15, and Articles 22, 23, and 26 of the Constitution. First of all, they stress that they were the distinctly weaker party in the dispute against the state. They refer to Decision of the Constitutional Court No. Up-555/03, Up-827/04, dated 6 July 2006 (Official Gazette RS, No. 78/06, and OdlUS XV, 92), by which it was established that the right of complainants Mojca Pibernik and Janko Pibernik to effective protection of the rights determined by the fourth paragraph of Article 15 of the Constitution and in relation to Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR) was violated. According to the allegations

of the complainants, this Decision of the Constitutional Court was not implemented in the concrete civil proceedings for damages. They reproach the [respective] court for having carried out the civil proceedings in a discriminatory manner. According to the complainants' allegations, although the court was acquainted with the mentioned Decision of the Constitutional Court, it did not carry out the proceedings in such a manner so as to determine the state of the facts and to establish the liability of the defendant. The complainants find the fact that the court rejected the taking of virtually all evidence that they proposed to be particularly unacceptable. On the other hand, the court took all the evidence proposed by the defendant. The complainants stress that the challenged decision was adopted without them being heard as parties to proceedings (with the exception of the minor Jan Pibernik, with regard to whom the Supreme Court remanded the case to the court of first instance for new adjudication). They are convinced that this entails a violation of the principle of parties' right to be heard as determined by the Civil Procedure Act (Official Gazette RS, No. 73/07 – official consolidated text and 45/08 – hereinafter referred to as the CPA) and, at the same time, also a violation of the right to make a statement (Article 22 of the Constitution). That the proceedings were carried out in a discriminatory manner was allegedly also evident when other evidence proposed by the complainants in order to establish the liability of the defendant were rejected (especially the motion for examining the expert witness Dr. Miroslav Žaberl, expert on questions regarding the exercise of police authorisations). The complainants are convinced that the civil trial court did not assess with sufficient expertise the testimonies of the police officers who participated in the action at issue. They find the position of the court that the police officers were not obliged to comply with the provisions of the Criminal Procedure Act (Official Gazette RS, No. 63/94, 70/94 – rect., 72/98, and 6/99 – hereinafter referred to as the CrPA) on house searches to be unacceptable, because in fact they were not yet carrying out such a search, but only "created the conditions for carrying out a house search." Allegedly, the court uncritically followed the allegations of the defendant, who justified the intrusion of police officers by the necessity of the house search. The complainants allege that the Supreme Court unjustifiably overlooked infringements of essential procedural requirements of the provisions of the CPA, which at the same time also entailed a violation of human rights and fundamental freedoms. The court allegedly completely overlooked their allegations regarding the violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Official Gazette RS, No. 24/93, MP, No. 7/93 – hereinafter referred to as the Convention against Torture). This allegedly happened precisely because the proposed evidence was not taken (i.e. due to the refusal to hear the

complainants, the rejection of the expert opinions of permanent court-appointed medical experts Dr. Dolšek and Dr. Čakar, the rejection of the opinion of pulmonologist Dr. Skralovnik, and the refusal to take evidence by appointing an expert pulmonologist). In such context, the complainants underline that during the direct examination of the court-appointed expert Dr. Turel it became apparent that the appointed expert is not a pulmonologist, but an internist who referred to his individual experience in the field of the treatment of pulmonary patients. According to the complainants, the appropriate specialisation and expertise of the appointed expert were thus not ensured. Such conduct of the court is particularly unacceptable for the complainants due to the fact that the court rejected other motions for evidence that, in the opinion of the complainants, were essential for establishing the liability of the defendant. In such context, the complainants also draw attention to the unacceptable application of Article 213 of the CPA (when the court negatively assessed in advance the quality of a certain evidentiary means). What was at issue in the disputed police action was, according to the complainants, a violation of human rights and fundamental freedoms (determined by Articles 17, 18, 19, and 21 of the Constitution). The complainants are convinced that the defendant itself caused the dangerous conduct of the police officers, therefore it must be liable for damages resulting from the tragic outcome. The state carried out the action as planned, but in the opinion of the complainants it was poorly planned. Numerous circumstances regarding the incident allegedly demonstrate that what was at issue was not an action carried out with negligence (severe violence by police officers that lasted for a prolonged period of time, numerous bodily injuries, loss of blood, the refusal to provide [medical] assistance in time). The complainants are convinced that the force was applied contrary to the principles of necessity and proportionality (i.e. the application of the mildest measures involving the use of force) and respect for the personality and dignity of the deceased. In order to assess the liability of the defendant, it would also be necessary, according to the complainants, to take into consideration the appropriate provisions of the ECHR and the Convention against Torture (which explicitly determines that the state shall ensure to victims of torture an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible; in the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation). With regard to the above, the complainants propose that the challenged judgments be abrogated and the case remanded to the court of first instance for new adjudication.

4. By Order No. Up-679/12, dated 2 April 2013, the Constitutional Court accepted the constitutional complaint for consideration. The Constitutional

Court rejected the constitutional complaint of Jan Pibernik against the Order of the Supreme Court (by which that court abrogated the judgments of the lower courts with regard to the decision regarding his claim and in such scope remanded the case to the court of first instance for new adjudication) due to the non-exhaustion of legal remedies. In the new proceedings, the court will namely decide anew on the substantiation of his claim, and after the exhaustion of all legal remedies the mentioned complainant will also be able to file a constitutional complaint.

5. In conformity with the first paragraph of Article 56 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text and 109/12 – hereinafter referred to as the CCA), the Constitutional Court notified the Supreme Court that it had accepted the constitutional complaint for consideration. In conformity with the second paragraph of the mentioned Article of the CCA, the Constitutional Court sent the constitutional complaint for a reply to the opposing party from the civil procedure, who did not reply thereto.

## **B**

6. The complainants claim that the challenged decision of the courts is based on standpoints regarding the liability of the state for damages that are unacceptable from the viewpoint of the right to compensation for damage determined by Article 26 of the Constitution. They are opposed to the substantive law assessment of the courts that in the police action that was carried out in order for Samo Pibernik to be arrested the police officers did not act in an inadmissible manner. According to the allegations of the complainants, in the mentioned action there was police violence, and already during the civil proceedings they also referred to the provisions of the ECHR and the Convention against Torture. Also unacceptable for the complainants is the assessment of the courts that the reaction of the police officers to the asthmatic attack of the deceased did not entail insufficiently diligent conduct and that therefore the conduct of the police officers was not unlawful, which is one of the prerequisites for the liability of the state for damages. The complainants stress that during the civil procedure they also referred to Decision of the Constitutional Court No. Up-555/03, Up-827/04, by which it was established that the right of the first complainant (the father of the deceased) and the third complainant (the partner of the deceased) to the effective protection of rights determined by the fourth paragraph of Article 15 of the Constitution in connection to Article 13 of the ECHR was violated

because the state did not carry out an independent investigation of the circumstances of the incident (the death of Samo Pibernik). According to the complainants, this Decision of the Constitutional Court was not implemented in the civil proceedings for damages at issue.

7. In conformity with the established constitutional case law, a violation of the right determined by Article 26 of the Constitution is expressed when a court bases its decision on a certain legal standpoint that would be unacceptable from the viewpoint of that right.[1] For such reason, the Constitutional Court must assess the standpoints that the courts adopted in relation to Article 26 of the Constitution in the challenged judgments. The central question that arises is the question regarding unlawfulness as one of the prerequisites of the liability of the state for damages. In the case at issue, this question is tightly intertwined with the content of the right to life (Article 17 of the Constitution) and the positive and negative obligations of the state with regard to the protection of this human right.

8. Article 17 of the Constitution determines that human life is inviolable. By the right to life one of the supreme constitutional goods is protected in free and democratic societies, i.e. human life[2]. By this human right, the physical existence of a human as the prerequisite for his intellectual existence, personal freedom, and acting in general is protected.[3] A human's right to life is an essential and the underlying element of human dignity as hierarchically the highest constitutional value that represents the value starting point of all human rights.[4] As such, the Constitution guarantees it as an absolute right, therefore it cannot be limited even on the basis of the third paragraph of Article 15 of the Constitution. In conformity with the established constitutional case law, there exist negative and positive obligations of the state in relation to the protection of human rights and fundamental freedoms. The negative obligations entail that the state must refrain from interferences with human rights and fundamental freedoms, especially interferences with the right to life (Article 17 of the Constitution) and the right to the prohibition of torture (Article 18 of the Constitution). The positive obligations, however, oblige the state and its individual branches of power (the judicial, legislative, and executive powers) to actively protect human rights and fundamental freedoms, whereby possibilities for their as effective as possible exercise shall be created. In such context, it is clear that the positive duties of the state escalate in conformity with the importance of the affected constitutionally protected value. Since human rights that protect the life, health, security, physical and mental integrity and dignity of individuals are the fundamental values of a democratic society, the state must protect them in a particularly active manner and it must create possibilities for their maximally effective exercise.[5]

9. The right to life is first and foremost a defensive right of individuals that prohibits authoritative and intentional interferences of the state with human life as a constitutionally protected good.[6] In the event of the death of a person due to the use of force by the repressive authorities of the state (e.g. the Police or the military), the state must ensure an effective and independent official investigation of the circumstances of the death. Thereby, the procedural aspect of the right to life is protected. Within the framework of procedures initiated due to an event that leads to the death or injury of an individual, the state must credibly and plausibly justify the occurrence of such consequences. The state carries the burden of proof in demonstrating that in the circumstances of a concrete event it acted in conformity with the statutorily determined competences and authorisations, and in particular also in conformity with the positive obligation to protect the inviolability of life and the physical integrity of the persons involved. Within [the framework of] its positive duties, the state must namely, by its active conduct (which includes diligent planning and supervision of the measures taken when force is used), prevent the occurrence of fatal consequences for individuals.

10. Furthermore, from the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR) it follows that the right to life (Article 2 of the ECHR)[7] is, together with Article 3 of the ECHR (the prohibition of torture),[8] one of the most fundamental values in a democratic society that connect the Member States of the Council of Europe. The objective or purpose of Article 2 of the ECHR as an instrument for protecting the individual from the state arbitrarily depriving him or her of his or her life requires that this Article be in such respect interpreted narrowly and applied in a manner that enables effective and practical supervisory measures.[9] From the wording of Article 2 of the ECHR taken as a whole, it follows that the right to life applies not only to intentional killing, but also to situations where the use of force is allowed and where such use of force ends with the deprivation of life, although unintentionally. Any use of force must be "absolutely necessary" to achieve one or more purposes determined by subparagraphs (a) through (c).[10] From Article 2 of the ECHR there follows the requirement that the force applied must be strictly proportionate to the achievement of admissible objectives.[11] With regard to the importance of Article 2 of the ECHR in a democratic society, the justifiability of an interference with the right to life must be assessed in accordance with the most detailed and strict criteria. In such framework, the ECtHR assesses whether the death of a person was caused intentionally by the use of force, and in doing so it takes into consideration not only that the action was caused by the representatives of the state who in fact control the force, but also other circumstances, such as the planning and supervision of measures taken involving the use of force. According to the ECtHR, when



what is at issue is the use of force by the Police, it is difficult to distinguish between the negative and positive obligations of the state on the basis of the ECHR. In such instances, the ECtHR assesses whether the police action was planned with a sufficient degree of diligence and whether it was supervised by the competent authorities, all with a view to maximally reducing the possibility of a fatal outcome. It also assesses whether all precautionary measures were taken when choosing the means and methods with regard to the safety of the action carried out.[12] The requirement of [there being] an investigation and the indisputable problems that accompany the combatting of criminality cannot justify a limitation of the protection that is ensured with regard to the right to life and the right to one's physical integrity. In such respect, the ECtHR stresses that also when combatting terrorism and organised crime, the ECHR absolutely prohibits torture and inhuman or degrading treatment, as well as the deprivation of life, regardless of the victim's conduct. If during the process of arresting a person or while a person is under police supervision consequences occur that are fatal for his or her life (or physical integrity), reasonable doubt arises with regard to the conformity of the conduct from the viewpoint of the above-mentioned standards that impose on the state not only negative, but also positive obligations with regard to the protection of the right to life (or the right to the protection of one's physical integrity). For such reason, the state must present credible and plausible arguments on the basis of which it can explain or justify the type of force that it applied during the police operation.[13]

11. When the state does not act in accordance with the obligations that follow from Article 17 of the Constitution and Article 2 of the ECHR, the question of its liability for damages determined by Article 26 of the Constitution inevitably arises. 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, first and foremost, the general prohibition of exercising power in an unlawful manner, namely regardless of through which branch of power the damage is caused.[14] By establishing the liability of the state for damages, affected individuals are protected in the event damage occurs due to the authoritative actions of authorities.[15] The basis of such responsibility is (1) the unlawful conduct of a state authority, local community authority, or bearer of public authority (2) when exercising power or in relation to such being exercised, a consequence of which is (3) the occurrence of damage.[16] The complex relationship between the state as the power and individuals, within the framework of which also falls the liability of the state for damages, is

essentially a public law relationship (a vertical legal relationship). When exercising power, or with regard to its exercise, the state enters such legal relationship vertically and is, with regard to such, bound by the constitutional prohibition of unlawful authoritative conduct.[17] The liability of the state for damage caused when exercising the function of authority, or with regard to its exercise, establishes the responsibility of the state for *ex iure imperii* conduct.[18] What is at issue is a specific form of liability that originates from the special position of the state vis-à-vis persons and entities (citizens and legal entities, as well as other persons on its territory). With regard to such, it is evident that in order to assess the liability of the state for damages, the classical rules of vicarious civil liability for damages do not suffice; when assessing individual prerequisites as regards the responsibility of the state, specificities that originate from the authoritative nature of the functioning of its authorities, officials, and employees must be taken into consideration.[19]

12. In light of the mentioned starting points, also the content of the legal standard of unlawfulness is different than it is in classical civil law relationships regarding damages (where unlawfulness entails the violation of a right or a legally protected interest).[20] With regard to so-called public law unlawfulness, the question regarding the due action by the state as the entity of authority arises, i.e. how a state authority or another bearer of public authority should act in an individual case and what the concrete and objectively necessary diligence of the authority is when performing the function of authority.[21] The foundation of the liability of the state for damages thus lies in the obligations of the state and its authorities that are particularly emphasised when human rights that protect the fundamental values of democratic society (such as the right determined by Article 17 of the Constitution) are at issue: the state is not only obliged to refrain from taking measures by which it would interfere in an inadmissible manner with the protected interests of individuals or their human rights, but it also must protect these interests and rights by its active conduct or measures.

13. From Decision of the Constitutional Court No. Up-555/03, Up-827/04, there follow important starting points for the courts deciding in the civil dispute at issue with regard to the assessment of the liability of the defendant for damages. In that Decision, the Constitutional Court accentuated the procedural aspect of the obligation of the state with regard to the protection of the right to life. With regard to the fact that during the action of the repressive authorities of the state a person died, the state should, in conformity with the fourth paragraph of Article 15 of the Constitution in relation to Article 13 of the ECHR, carry out an independent investigation of the circumstances of the incident and enable the relatives of the deceased (the complainants) effective

access to such investigation. The state did not carry out such an investigation within the framework of the criminal procedure, nor did it carry out any other investigation that would fulfil the mentioned criteria.[22] In such context, it must be emphasised that in order for the procedural obligation of the state with regard to the protection of the right to life to be fulfilled, it is not necessary that such investigation be ensured within the framework of the criminal procedure. In fact, the state cannot satisfy this obligation by mere proceedings for damages; however, if such proceedings are initiated, the relatives of the deceased must have the possibility in adversarial proceedings (as an independent investigation was not carried out) to impartially and objectively investigate and determine the circumstances of the death and the possible liability of the state for the death of the individual when he or she was under the physical supervision of its repressive authorities. In such proceedings for damages, it is the state that must dispel any doubt with regard to [the question of whether] the conduct of its authorities was in conformity with the fundamental constitutional requirements and the requirements of the Convention. If the state does not succeed in credibly and plausibly substantiating its allegations regarding its lawful and sufficiently diligent conduct (the planning and supervision over the carrying out of the action) in the circumstances of an individual case, in particular also that it has done everything in its power to prevent the occurrence of consequences fatal to persons, this suffices to conclude that there was unlawfulness as one of the fundamental conditions for the liability of the state for damages.[23]

14. The assessment of the courts in the challenged judgments is not in conformity with the mentioned constitutional requirements. The challenged decision imposes on the complainants the burden of taking a position and proving the unlawfulness of the conduct of the police in the police procedure against the deceased Samo Pibernik. Both the court of first instance and the Higher Court adopted the position that Decision of the Constitutional Court No. Up-555/03, Up-827/04 cannot influence the assessment with regard to whether the prerequisites for the liability of the defendant for damages are fulfilled. Such standpoint of the courts is fundamentally unacceptable from the viewpoint of the right protected by Article 26 of the Constitution. The assessment of the courts thereby negates the importance of the constitutionally imposed procedural duty of the state to ensure an independent, objective, and effective investigation of the circumstances of the death, which extends to the interpretation of the term unlawfulness from Article 26 of the Constitution. The reason for this is that such interpretation does not take into consideration that doubt as to the constitutional conformity of the conduct of authorities with regard to the protection of the right to life was not eliminated, therefore in a dispute regarding damages one must proceed from

the presumption that the death occurred due to the unlawful conduct of the authorities. Consequently, the court should impose on the state the burden to plausibly substantiate that it acted lawfully when carrying out the police action, that the use of force was proportionate, and that it implemented, to the highest possible degree, measures by which it was to prevent any foreseeable risk as regards the life and health of the persons investigated.

15. The courts limited their assessment only to the question of whether in the action the police officers acted lawfully and in conformity with the police authorisations in force at that time and whether there existed a lawful basis for their actions. According to the findings of the courts, the police officers had such a legal basis in the Order of the investigating judge on duty, No. I Kpd 381/2000, dated 3 April 2000, which was issued on the basis of Articles 215 through 218 of the CrPA in force at the time. However, in the circumstances of the case at issue, the mere existence of a court order for a house search is not a sufficient reason to conclude that the conduct of the police officers was in conformity with the constitutional requirements and the requirements of the Convention with regard to the protection of the right to life. Moreover, the reference of the courts to the Instructions on the Use of Measures Involving the Use of Force (Official Gazette SRS, No. 25/81) as the [legal] basis for the use of force and the finding that the police officers used measures involving the use of force justifiably, because the deceased did not obey their orders, but tried to escape from the hallway into an apartment protected by a security door, also do not suffice. In the assessment it is necessary to proceed from the nature of a house search, which in itself is not an invasive measure and does not, as a general rule, represent a risk for the life or health of the investigated person. The task of the police when carrying out a house search is limited only to preventing the obstruction of the investigation. Therefore, the defendant (i.e. the state) had to prove that the force used when performing the mentioned investigative act was limited to the least degree necessary. The centre of gravity of the assessment of the courts should be in establishing whether during the performance of the investigative measure ordered the police officers did everything [in their power] to protect the life and health of the person investigated and to prevent the risk to such person. The reasoning of the challenged judgments does not contain concrete findings or an assessment of the circumstances of the performance of the mentioned investigative act on the basis of which it would be possible to conclude that the police officers acted in conformity with the principle of applying the least force necessary and that they prepared and supervised the action diligently enough in order to exclude any foreseeable risk for the life and health of individuals.

16. With regard to the above, the position of the courts in accordance with which the complainants failed to prove the unlawfulness of the conduct of the police officers is unacceptable from the viewpoint of the right to compensation for damage protected by Article 26 of the Constitution. Therefore, the Constitutional Court abrogated the challenged judgments in the part in which the claims of Janko Pibernik, Slavka Pibernik, Mojca Pibernik, and Kana Pibernik were dismissed and in this part remanded the case to the court of first instance for new adjudication. With regard to the fact that it abrogated the challenged judgments due to a violation of the right determined by Article 26 of the Constitution, the Constitutional Court did not examine the other alleged violations of human rights.

### C

17. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 59 of the CCA, composed of: Dr. Jadranka Sovdat, Vice President, and Judges Dr. Mitja Deisinger, Dr. Dunja Jadek Pensa, Dr. Etelka Korpič – Horvat, Dr. Ernest Petrič, Jasna Pogačar, and Jan Zobec. The decision was reached unanimously.

Dr. Jadranka Sovdat  
Vice President

#### Notes:

[1] Cf. Order of the Constitutional Court No. Up-2/04, dated 4 May 2005 (OdiUS XIV, 46) and Decision of the Constitutional Court No. Up-695/11, dated 10 January 2013 (Official Gazette RS, No. 9/13).

[2] Its supreme importance is also evident from the second paragraph of Article 16 of the Constitution, in accordance with which the right to life is placed among the human rights that cannot be temporarily suspended or restricted even during a war or state of emergency.

[3] Cf. B. Ivanc in: L. Šturm, Ed., *Komentar Ustave Republike Slovenije: dopolnitev komentarja – A* (Commentary on the Constitution of the Republic of Slovenia: Supplement to the Commentary – A), Fakulteta za podiplomske državne in evropske študije (Faculty of Postgraduate National and European Studies), Ljubljana, 2011, p. 207, Para. 1.

[4] *Ibidem*, p. 208, Para. 3. See also Decision of the Constitutional Court No. U-I-109/10, dated 26 September 2011 (Official Gazette RS, No. 78/11, and

OdIUS XIX, 26). [5] Cf. Decisions of the Constitutional Court No. Up-555/03, Up-827/04, Para. 25 of the reasoning, and No. Up-1082/12, dated 29 May 2014 (Official Gazette RS, No. 43/14), Para. 14 of the reasoning.

[6] Cf. B. Ivanc, *op. cit.* p. 216, Para. 18.

[7] Article 2 of the ECHR (right to life) reads as follows:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

[8] Article 3 of the ECHR (prohibition of torture) reads as follows: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[9] Cf. judgments of the ECtHR in *Andronicou and Constantinou v. Cyprus*, dated 9 October 1997, and in *Huohvanainen v. Finland*, dated 13 March 2007.

[10] This means that the necessity of such measure must be assessed more strictly and more diligently than normally during the assessment of whether a measure by the state is "necessary in a democratic society."

[11] Cf. judgment of the ECtHR in *Kelly and Others v. the United Kingdom*, dated 4 May 2001.

[12] Cf. judgments of the ECtHR in *McCann and Others v. the United Kingdom*, dated 27 September 1995; *Andronicou and Constantinou v. Cyprus*; *Ergi v. Turkey*, dated 28 July 1998; *Hugh Jordan v. the United Kingdom*, dated 4 May 2001; *Makaratzis v. Greece*, dated 20 December 2004; and *Finogenov and Others v. Russia*, dated 20 December 2011.

[13] Cf. judgments of the ECtHR in *Rehbock v. Slovenia*, dated 28 November 2000; *Matko v. Slovenia*, dated 2 November 2006; and *Butolen v. Slovenia*, dated 26 April 2012. In all the mentioned cases the Republic of Slovenia was convicted due to a violation of Article 3 of the ECHR because the Government failed to submit credible and plausible arguments by which it could explain or justify the type of force that it applied during the [police] action depriving [the individuals involved of their] liberty. Consequently, the ECtHR established, by taking into consideration the circumstances of each mentioned case, that the force applied was excessive and unjustified.

[14] Cf. J. Zobec, *Odškodninska odgovornost sodnika in odgovornost države zanj* (Liability of a Judge for Damages and the Liability of the State for such

Judge), *Pravni letopis 2013* (Legal Chronicle 2013), p. 201.

[15] This is stated by I. Crnić, *Odgovornost države za štetu, Pravo u gospodarstvu*, Zagreb, 1–2, 1996, p. 117.

[16] The majority standpoint in legal theory and also an established standpoint in the case law places the institute of the liability of the state for damages within the system of civil non-contractual liability for damages and applies for such the general rules of the law of obligations determined by the Code of Obligations, Official Gazette RS, No. 97/07 – official consolidated text – hereinafter referred to as the CO (and, before [it entered into force], the rules determined by the OA), namely the institute of vicarious liability for damages (Articles 147 and 148 of the CO, which regulate the liability of employers and legal entities). For more details, [see] D. Možina, *Odškodninska odgovornost države v sistemu obligacijskega prava* (Liability of the State for Damages Within the System of the Law of Obligations), *Gradivo za dneve civilnega in gospodarskega prava* (Materials for the Civil and Commercial Law Days), Portorož, 2013, p. 56.

[17] This is stated by J. Zobec, *op. cit.*, pp. 185–228.

[18] *Cf.* R. Pirnat, *Protipravnost ravnanja javnih oblasti kot element odškodninske odgovornosti javnih oblasti* (The Unlawfulness of the Conduct of Public Authorities as an Element of the Liability of Public Authorities for Damages), in: *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 (3<sup>rd</sup> Civil Law Days), Ljubljana, 2005, p. 21. From this paper it follows that special rules for liability refer to *ex iure imperii* conduct of public officials and authorities, and not to *ex iure gestionis* conduct. The state, local communities, and bearers of public authority can, of course, as is the case with any other person, be liable in accordance with the general rules of the law of obligations, but only with regard to acts concerning their operations.

[19] *Ibidem*.

[20] J. Zobec, *op. cit.*, p. 202.

[21] In Germany, Austria, and Slovenia, objective diligence with regard to conduct is one of the decisive aspects of the assessment of unlawfulness; in order for unlawfulness to be established, it is required that what is at issue is a violation of specific and objectively necessary diligence. For more details on this subject, see M. Bukovec, *Odškodninska odgovornost države* (The Liability of the State for Damages), doctoral dissertation, Faculty of Law, University of Ljubljana, Ljubljana, 2008, pp. 171–172.

[22] In fact, within the Police Administration of Ljubljana, a commission was

founded whose task was to determine the circumstances of the performance [of the action] and course of the incident at issue; however, the complainants had no influence on whom this commission was composed of. With regard to that, also this investigation of the circumstances of the incident did not fulfil the criteria that the ECtHR established with regard to the right to an effective legal remedy determined by Article 13 of the ECHR.

[23] *Cf.* judgment of the ECtHR in *Shchiborshch and Kuzmina v. Russia*, dated 16 January 2014. In that case, the ECtHR established a violation of the substantive aspect of the right to life, which is protected by Article 2 of the ECHR. In its reasoning, the Court stressed that the police action (the purpose of which was the forced hospitalisation of Shchiborshch) was carried out in an uncontrolled and careless manner and that the measures applied by the police were not in conformity with the standard of caution to be expected from law enforcement officers in a democratic society, in particular not with the principle of minimising to the greatest extent possible any risk to the life and health of Shchiborshch.