



**REPUBLIKA SLOVENIJA  
USTAVNO SODIŠČE**

Case No.: Up-2155/08-10  
Date: 1 October 2009

**D E C I S I O N**

At a session held on 1 October 2009 in proceedings to decide upon the constitutional complaint of A. B. and C. Č., both from D., represented by Gozdana Petrič and Tatjana Kotar, lawyers in Novo mesto, the Constitutional Court

d e c i d e d a s f o l l o w s :

**The first paragraph of the operative provisions of Ljubljana Higher Court Judgment No. I Cp 5101/2007, dated 28 May 2008, and items I and II of the operative provisions of Novo mesto Local Court Judgment No. P 25/2006, dated 29 May 2007, are abrogated. The case is remanded to Novo mesto Local Court for new adjudication.**

**R e a s o n i n g**

A.

1. The court of first instance dismissed the complainants' claim against a municipal utility company to pay compensation for non-pecuniary damage due to an interference with the right to reverence for the deceased, which is one of the personality rights. The Higher Court dismissed their appeal and upheld the position of the court of first instance that merely by moving an urn niche [i.e. grave] by 20 cm when such had to be opened because of the funeral of the complainants' father, their right to dignified preservation of the memory of their deceased parents by means of visitations to their grave had not been interfered with.

2. The complainants claim that by its conduct the defendant violated their memory of the personality of their deceased parents (i.e. their reverence), which is allegedly protected within the framework of Articles 34 and 35 of the Constitution. Their

feelings of reverence were allegedly hurt by the defendant, as the defendant without their knowledge and against their deceased father's will moved the urn grave of their parents by 20 cm in order to arrange the cemetery. They state that the right to reverence most of all ensures the conviction that the deceased are resting in peace, the conviction that the inviolability of their mortal remains and their grave are being respected, and the conviction that their passing is being respected. A grave is therefore not merely a place where one can be physically proximate to the deceased, but most of all a place of spiritual contact, therefore any such conduct which interferes with the individual's inner life in such a manner so as to cause anger, fear, sadness, feelings of powerlessness, feelings of inferiority, in short, if one's spiritual balance is disrupted, entails a violation of the right to reverence. The complainants cite judicial decisions in which the courts have allegedly already answered the question of what is deemed to be an interference with a grave or with the right to reverence. Convinced that such an interference in fact took place, the complainants further state that the courts should have established whether there existed a reason which eliminated the obligation to refrain from the interference with their personality rights, specifically, with the right to reverence, which could be either the equal rights of others or that it is in the public interest. The complainants furthermore allege the violation of constitutional procedural guarantees (Articles 22, 23, and 25 of the Constitution). They are of the opinion that they were not guaranteed the right to judicial protection or to a full dialogue in terms of content with a court, neither in the first nor in the second instance. The courts allegedly did not answer any of the relevant allegations the complainants stated in their claim and in the appeal; furthermore, they allegedly did not substantiate their legal standpoints. The complainants also allege that the courts departed from the case-law.

3. The panel of the Constitutional Court accepted the constitutional complaint for consideration by Order No. Up-2155/08, dated 22 May 2009. Pursuant to the first paragraph of Article 56 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA), the Constitutional Court notified the Higher Court of the acceptance of the constitutional complaint for consideration. On the basis of the second paragraph of Article 56 of the CCA, the Constitutional Court sent the constitutional complaint to the opposing party in the civil proceedings for a reply. The opposing party did not reply to the constitutional complaint.

#### B.

4. The complainants allege that the defendant hurt their feelings of reverence by moving the urn grave of their parents without their knowledge and consent, and even despite the explicit opposition of the complainants' father, who is now deceased.[1] They allege that the court which adopted the standpoint that thereby their right to dignified preservation of the memory of their deceased parents by visitations to their grave was not interfered with, did not comprehensively review the alleged interference with the constitutionally protected personality right and that it did not at all consider, in terms of content, the very essence of the human right, in spite of the extensive arguments contained in the appeal. The content of their allegations entail a violation of Article 35 of the Constitution, therefore, the Constitutional Court carried out a review within this framework.

5. The right of the relatives of a deceased person to express reverence is protected within the framework of their personality rights, more precisely within the framework of the personality right to one's mental integrity.[2] Personality rights and an individual's privacy are protected by Article 35 of the Constitution. Reverence[3] is respect for and the memory of the personality of the deceased, which individuals cherish in accordance with their convictions. As a personality right to one's mental integrity, it is part of the individual's privacy. Within this framework, personal feelings and one's inner spiritual life are protected. An interference with individuals' mental integrity occurs especially if their feelings and views are violated in such a manner that these interferences with individuals' inner spiritual life cause anger, fear, sadness, and feelings of inferiority. The memory of a deceased person can be impaired if, for instance, the inviolability of their mortal remains is violated, if their honour or reputation are offended, if their pictures, letters, or voice are published, or if facts from their personal and family life are disseminated. The purpose of the right to reverence is also the posthumous protection of the personality of the deceased, their dignity, and the wish that the decisions they took during their lifetime will be respected also after their death.[4] If in such instances also the mental integrity of the persons who were the closest to the deceased is hurt, they may act against such interference not only in the interest of the deceased, but also in their own interest.[5] The condition for such is that it is an interference with their own personal good or that their own interests regarding their mental integrity are damaged.[6]

6. The Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, IT, No. 7/94 – hereinafter referred to as the Convention) ensures in the first paragraph of Article 8 the right to respect for private and family life. The European Court of Human Rights (hereinafter referred to as the ECHR) can establish a violation of Article 8 of the Convention if a state does not respond with enough sensitivity to individuals who have lost a close relative.[7] The ECHR underlines that certain events in the life of a family must be given particularly careful protection. The death of a close relative and the ensuing mourning must lead the authorities to take the necessary measures to ensure that the private and family lives of the persons concerned are respected.[8] The ECHR established a violation of Article 8 of the Convention in a case in which the competent authorities refused to allow the then detained applicant to leave detention to attend the funerals of his parents;[9] in a case in which for seven months the authorities did not return the body of a girl who had died in hospital to her parents due to the inquiry;[10] and in a case in which the competent authorities, without notifying the parents of a stillborn baby, took the baby's body in an inappropriate vehicle to the cemetery and buried the baby in a communal grave.[11] On the other hand, the ECHR did not establish a violation of Article 8 of the Convention in a case in which Swedish authorities refused to allow the applicant to transfer the urn containing her husband's ashes from one place to another when she moved to a different part of Sweden.[12] In weighing the applicant's right to establish who his father was by means of a DNA analysis of a sample of his deceased father and the right of relatives to the inviolability of the deceased's body and the right to respect for the dead, the ECHR tipped the scales in favour of the right to establish one's fatherhood.[13]

7. The Slovenian courts deemed the conduct of a municipal utility company to be an interference with the plaintiffs' personality rights and mental integrity, one part of

which is also the feeling of reverence of the relatives towards the deceased, namely, that when digging up a neighbouring grave the company removed a marble slab from the grave leased by the plaintiffs without the prior notification or consent of the relatives thereof and temporarily piled a large amount of soil on it.[14] The court has also recognised the interference with the right to reverence in the conduct of a locality which, despite the opposition of the relatives, stated the names and other personal data of the deceased on the memorial plaque.[15] The courts drew attention to feelings of reverence also in cases in which the subject of dispute was exhumation and the transfer of mortal remains and underlined the purpose of the Act on Cemetery and Funeral Services and on Arranging Cemeteries. In accordance with this act, cemetery and funeral services and within this framework the handling of the mortal remains of a deceased person shall be carried out in a manner such that the honour of the deceased and their dignity are guaranteed.[16] Relatives were not, however, recognised the right to reverence in a case in which they wished to prohibit the publication of photographs and the release of a movie about the deceased, a drug addict, who had allowed such publication when she was still alive. The court underlined the significance of the posthumous protection of the deceased and their dignity, and at the same time also drew attention to honouring the decisions they made when they were still alive and that the strictly personal interests of relatives cannot be protected within the framework of their right to reverence for the deceased, inasmuch as they are contrary to the interests of the deceased.[17]

8. Due to the variety of real-life instances, the intensity of experiencing such occurrences, and the individuals' feelings, the substance of the right to reverence, which as a personality right is recognised to the relatives of the deceased, cannot be reduced to a simple mathematical formula. This, as well as the fact that in such cases often extremely delicate issues are touched upon which individuals experience each in their own way, require that courts carefully review in each individual case whether the concrete case falls within the scope of such protection and whether the alleged interference entails a violation of this right considering all the circumstances of the case.[18] This concerns not only the objectively controversial nature, inappropriateness, or offensiveness of an event which allegedly interfered with the individual's right to reverence, but also the individual's perception of, experience of, and his or her subjective attitude towards the event.

9. In the case at issue, the court decided that merely by moving the urn niche by 20 cm without the consent of the complainants when such had to be opened because of the funeral of their father, their right to dignified preservation of the memory of their deceased parents by means of visitations to their grave had not been interfered with regardless of the fact that they were upset, hurt, and furious because of the event. The court of first instance held, and the Higher Court upheld, the standpoint that the violation of the personality right, which would have severely impaired the mental integrity of the complainants, would have taken place if the defendant's conduct had prevented the plaintiffs "from preserving their peaceful memory of their parents at their final resting place with flowers, candles, and other grave adornments, namely by visiting the place where the deceased is interred, which is well-maintained, and where his closest relatives have spiritual contact with him." The courts thus adopted the standpoint that the right to reverence is ensured to individuals already if they are enabled to visit the deceased's grave. Their distress, pain, and fury, which indicate that the event had upset them and that it had provoked a certain emotional reaction

in them, did not seem to be of significance to the courts from the viewpoint of the right to reverence. From the viewpoint of this right, the courts furthermore did not think important the fact that the disputed act was contrary to the explicit wishes of the now deceased father of the complainants. The courts held that the anger and feelings of helplessness of the complainants due to the defendant's conduct, which was contrary to their deceased father's wishes, were not legally recognized damage. The Constitutional Court finds that such substantive definition of the right to reverence is too narrow from the viewpoint of the requirements which derive from Article 35 of the Constitution. As the complainants justifiably point out, a grave is not merely a place of physical proximity to the deceased. The right to reverence is not exhausted already with visitations to the grave, but it ensures relatives most of all the conviction that the deceased are resting in peace, the conviction that the inviolability of their mortal remains and their grave are being respected, the conviction that their passing is being respected, and that their wishes expressed during their life are respected. These convictions could be impaired knowing that the urn niche was moved, regardless of the fact that the complainants could without any interruption visit their parents' grave. This perspective of the right to reverence therefore cannot be overlooked when reviewing [the case at issue], particularly considering the fact that the right to mental integrity primarily concerns precisely the individuals' personal feelings and inner spiritual life.[19]

10. The above-mentioned entails that the interpretation by which the courts substantiated their decision does not take into consideration the requirements which follow from the Constitution with reference to the personality right to reverence. The standpoint that the right to reverence is already ensured to individuals if they can visit the grave of the deceased therefore entails a violation of Article 35 of the Constitution. The Constitutional Court abrogated the challenged judgments in the contested scope and remanded the case for new adjudication. The court will have to decide, after a thorough consideration and by considering all the circumstances of the case, whether the conduct of the defendant entails an interference with the complainants' feelings of reverence and, if the answer is affirmative, if such interference is constitutionally admissible.

11. Due to the fact that the Constitutional Court abrogated the challenged judgments already because of the violation of Article 35 of the Constitution, it did not consider the alleged violations of Articles 22, 23, and 25 of the Constitution.

### C.

12. The Constitutional Court reached this decision on the basis of the first paragraph of Article 59 of the CCA, composed of: Dr Ciril Ribičič, Vice President, and Judges Dr Mitja Deisinger, Mag. Marta Klampfer, Mag. Marija Krisper Kramberger, Mag. Miroslav Mozetič, Dr Ernest Petrič, Jasna Pogačar, and Jan Zobec. The decision was reached unanimously.

Dr Ciril Ribičič  
Vice President

Notes:

[1] Article 9 of the Act on Cemetery and Funeral Services and on Arranging Cemeteries (Official Gazette SRS, No. 34/84 and Official Gazette RS, No. 26/90) reads as follows: "Upon the request of the relatives or other natural persons or legal entities who have interest for such, a deceased person may be exhumed and transferred to another cemetery or to another grave in the same cemetery with the prior consent of the grave tenant and with the approval of the municipal administrative body competent for health care. For an exhumation the regulations on the exhumation of a deceased person shall apply."

[2] A. Finžgar, Osebnostne pravice in njihovo varstvo, Splošni del, SAZU, Ljubljana 1985, p. 138; D. Jadek Pensa in: N. Plavšak, M. Juhart, V. Kranjc, A. Polajnar – Pavčnik, P. Grilc (Editor), Obligacijski zakonik s kometarjem, 1. knjiga, GV Založba, Ljubljana 2003, p. 779; Supreme Court Judgment No. II Ips 428/96, dated 26 March 1998: "The individual's right to reverence falls within the framework of the right to one's mental integrity. The individual's mental integrity is a part of his or her privacy." Regarding the theoretical starting-points and questions concerning the protection of the feelings of reverence of relatives, see also B. Novak, O naravi osebnostnih pravic, Podjetje in delo, No. 6-7 (2000), pp. 991-999, and B. Novak, Posmrtno varstvo osebnosti, Zbornik znanstvenih razprav, LX letnik, No. 2 (2000), pp. 107-127.

[3] [Definition] reverence: a great, deep respect; A. Bajec et al. (Editor), Slovar slovenskega knjižnega jezika, DZS, Ljubljana 1998, p. 840.

[4] Ljubljana Higher Court Order No. III Cp 1320/2006, dated 22 March 2006. See also, B. Novak, Posmrtno varstvo osebnosti, *ibidem*, pp. 115 and 125.

[5] A. Finžgar, *ibidem*, pp. 137 and 138.

[6] N. Betetto, Pravna sposobnost fizične osebe ter varstvo človekove osebnosti pred rojstvom in po smrti, Podjetje in delo, No. 6-7 (2003), p. 1742; B. Novak, O naravi osebnostnih pravic, *ibidem*.

[7] D. Gomien, Kratek vodič po Evropski konvenciji o človekovih pravicah, Republika Slovenija, Ministrstvo za pravosodje, Center za izobraževanje v pravosodju, Ljubljana 2009, p. 72.

[8] The ECHR in the Case of Hachette Filipacchi Associates v. France, Judgment dated 14 June 2007.

[9] The ECHR in the Case of Płoski v. Poland, Judgment dated 12 November 2002.

[10] The ECHR in the Case of Pannullo and Forte v. France, Judgment dated 30 October 2001.

[11] The ECHR in the Case of Hadri-Vionnet v. Switzerland, Judgment dated 14 February 2008.

[12] The ECHR in the Case of Elli Poluhas Dödsbo v. Sweden, Judgment dated 17 January 2006.

[13] The ECHR in the Case of Jäggi v. Switzerland, Judgment dated 13 July 2006.

[14] Ljubljana Higher Court Judgment No. I Cp 4340/2007, dated 14 May 2008.

[15] Supreme Court Judgment No. II Ips 428/96, dated 26 March 1998.

[16] Supreme Court Order No. II Ips 384/2006, dated 9 November 2006; Administrative Court Judgment No. U 327/94, dated 12 December 1996; see also Constitutional Court Decision No. U-I-54/99, dated 13 June 2002 (Official Gazette RS, No. 61/02 and OdlUS XI, 137).

[17] Ljubljana Higher Court Order No. III Cp 1320/2006, dated 22 March 2006.

[18] Cf., D. Jadek Pensa, *ibidem*, p. 778.

[19] A. Finžgar, *ibidem*, p. 137; see also paragraph 5 of the statement of reasons of this decision.