



Up-383/11-26
18 September 2013

DECISION

At a session held on 18 September 2013 in proceedings to decide upon the constitutional complaint of A. B., C., represented by Olivera Gomboc, attorney in Ljubljana, the Constitutional Court

decided as follows:

1. Supreme Court Judgement No. I Ips 200/2010, dated 13 January 2011, Higher Court in Ljubljana Judgement No. II Kp 707/2009, dated 8 April 2010, and Local Court in Ljubljana Judgement No. II K 99/2007, dated 20 February 2009, are abrogated.

2. On the basis of point 1 of Article 358 of the Criminal Procedure Act (Official Gazette RS No. 32/12 – official consolidated text and 47/13), the complainant is acquitted of the substance of the summary charge of the District State Prosecutor's Office in Ljubljana, No. Kt (O) 4395/05, filed on 20 March 2007, amended on 28 November 2008 and 13 January 2009, that he committed the criminal offence of the abduction of a minor according to the first paragraph of Article 200 of the Criminal Code (Official Gazette RS No. 95/04 – official consolidated text) by "unlawfully abducting a minor from a parent to whom the minor has been entrusted, detaining the minor, and preventing the minor from being with a person who has rights in respect of the minor, by – on 7 September 2005 in the afternoon, after Č. D. brought the complainant's son F. G., born on X. X. X, to E. Street in Ljubljana, without the permission of the son's mother H. I. J., who was granted custody thereof by final Judgement of the District Court in Ljubljana No. P 2600/2003-IV, dated 24 May 2004, in conjunction with Judgement and Order of the Higher Court in Ljubljana No. IV Cp 38/2004, dated 21 October 2004 – taking the minor with him to his residence at No. X, E. Street in Ljubljana and detaining him there contrary to the mentioned judicial decisions until 22 May 2006, as he did not hand the minor over to his mother during the mentioned period of time in spite of Execution Order of the Local Court in Ljubljana No. In 2005/01241-3, dated 3 October 2005, and Order of the Higher Court in Ljubljana No. IV Cp 786/2006, dated 22 March 2006; and on 8 September 2005 by also demanding that the representatives of the child's school not allow the child to leave with his mother; therefore, in the described manner he prevented the mother as an entitled person from being with him."

3. The costs of the criminal proceedings referred to in the previous point are to be charged to the budget.

REASONING

A.

1. By a final judgement issued by the Local Court in Ljubljana, the complainant was found guilty of committing the criminal offence of abducting a minor in accordance with the first paragraph of Article 200 of the Criminal Code (hereinafter referred to as the CC). He was sentenced to three months' imprisonment, suspended for two years. The complainant allegedly committed the criminal offence by unlawfully abducting a minor from his parent to whom the minor had been entrusted, detaining the minor, and preventing the minor from being with a person who has rights in respect of the minor. He allegedly committed the criminal offence from 7 September 2005 to 22 May 2006.

2. The Supreme Court confirmed the assessment of the lower courts that the complainant's conduct was unlawful and further pointed out that, as regards the criminal offence under the first paragraph of Article 200 of the CC, the [mentioned] unlawfulness is a special statutory element of such criminal offence and, therefore, when examining its existence, it is necessary to examine the legal basis that was violated by the perpetrator's conduct. The same as the lower courts, it considered that such legal basis was the final Judgement of the District Court in Ljubljana, No. P 2600/2003-IV, dated 24 May 2004, by which the mother was granted custody of the minor. Considering that the complainant was aware of this Judgement and that he was aware of the legal recourse with regard to changing the Judgement, the Supreme Court assessed that by conduct contrary to the mentioned Judgement the complainant clearly manifested unlawful conduct and thus fulfilled the statutory element of the mentioned criminal offence. Furthermore, it assessed that the subsequent judicial decisions (the Temporary Injunction dated 22 May 2006 and the Judgement of the District Court in Ljubljana dated 17 December 2008, by which the complainant was granted custody of the minor) could no longer influence the fact of unlawful conduct *ex tunc*. The Supreme Court also dismissed the allegations of the complainant's defence counsel that there was no unlawful conduct in the material sense since the complainant had pursued the child's interests, which had allegedly been threatened in this case. It adopted the position that it is precisely for the purpose of protecting the child's interests that the legal manner of regulating the relationships between parents and children in the event of divorces and especially in the event of disagreements between parents on such issues is provided for. It was precisely in order to protect the child's interests that by a judgement it was allegedly decided that the mother was granted custody of the minor. As long as such a judgement is in force, in the opinion of the Supreme Court, it is necessary to assess any conduct contrary thereto as conduct contrary to the child's interests and thus also materially unlawful. The Supreme Court dismissed as unfounded also the allegations of the complainant's defence counsel that the complainant's conduct entailed conduct amounting to a minor offence under Article 14 of the CC. It assessed that the complainant's conduct needs to be considered as a whole. As such, it was allegedly extremely uncompromising and persisted despite the Execution Order on the basis of which the mother sought to legally regain custody of the minor.

3. The complainant alleges the violation of the first paragraph of Article 28 (the principle of legality in criminal law), Article 54 (the rights and duties of parents), and Article 56 of the Constitution (the rights of children). He states that when assessing whether he acted unlawfully and thus satisfied all the elements of the alleged criminal offence, the courts formalistically reasoned only from the finding that he had not respected the judicial decision by which the mother had been granted custody of the minor. The complainant deems that when examining the existence of unlawfulness as an element of the alleged criminal offence, the court did not consider Article 54 of the Constitution as he acted exclusively in the interests of his child, which should allegedly exclude unlawfulness in the substantive sense. He claims that he had a reasonable expectation that the criminal court would consider justified reasons – reasons benefitting the child, due to which he resolutely opposed going back to his mother. Therefore, the complainant considers it unacceptable that none of the courts that decided in the criminal proceedings had taken into account the fact that the child had run away from his mother and that he had tried to exercise his constitutional right with a clear and resolute expression of his will. The complainant deems that by weighing which of the values should be granted judicial protection – respect for a final judicial decision or the protection of the rights or interests of a child as a constitutional category – the courts should give priority to the protection of the rights or interests of the child because they were threatened.

4. The complainant points out that he immediately wanted to achieve legal regulation of the disputed relationship with the expectation that in order to protect the child's interests the civil court would decide quickly on his motion for a temporary injunction filed on 8 September 2005. The civil court only issued an order on the proposed temporary injunction on 22 May 2006 and a judgement only on 17 December 2008; in accordance with both, he was granted custody of his son. If the court had decided quickly, the disputed relationship between the parents regarding the child would have been regulated quickly in a legal manner, in accordance with the guarantees determined by Article 22 and the first paragraph of Article 23 of the Constitution. Thus, the basis for the court's assessment that the complainant's conduct was unlawful would also have formally ceased to exist. The legal manner of regulating the relationship between parents and children in the event of a divorce or disagreement between the parents, which in the opinion of the Supreme Court is allegedly in itself in the child's interests, in the case at issue allegedly proves to be just the opposite. According to the complainant, the situation in which the criminal court convicted him precisely of the criminal offence of abducting a minor, after the finality of the civil judgement by which the complainant was granted custody of the child, is intolerable from the legal point of view.

5. The complainant points out that the criminal judgement, despite imposing a suspended sentence, has caused him severe mental suffering and thus entails a heavy burden for him. In the circumstances of the case at issue, he considers the allegation that he committed the mentioned criminal offence unacceptable. Despite the existence of a judgement and the requirement to execute it, in his opinion it is difficult to force a child who is capable of reasonably stating his or her will to return against his or her will to the person whom he or she should be with according to the existing legal basis regarding such custody.

6. By Order No. Up-383/11, dated 28 June 2012, the Constitutional Court panel accepted the constitutional complaint for consideration. The Supreme Court was notified thereof.

B. – I.

7. According to the second paragraph of Article 38.a of the Constitutional Court Act (Official Gazette RS No. 64/07 – official consolidated text and 109/12 – hereinafter referred to as the CCA), in order to protect the privacy of a participant in proceedings, upon the motion of such participant or on its own, the Constitutional Court may decide that the personal data of a participant in proceedings or the personal data of other individuals not be stated in the decision of the Constitutional Court. The Constitutional Court did not decide to conceal the identity because on the basis of the first paragraph of Article 60 of the CCA the Court itself decided whether the charges against the complainant were justified. As the mandate determined by the second paragraph of Article 38.a of the CCA allows even complete concealment of the identity of an individual, and thus allows also less than that, the Constitutional Court decided to anonymise the personal data when such decision is published because the information from the proceedings, from which the public was excluded, is evident from both the constitutional complaint and judicial decisions, and because there are circumstances that interfere with the privacy of the complainant, his former wife, and also their children.

8. In cases where the challenged final criminal judgement by which a suspended sentence had been imposed was expunged from the criminal record at the time of deciding upon the constitutional complaint, the Constitutional Court has hitherto rejected the constitutional complaint on the grounds that the complainant does not have a legal interest in a decision thereon (see Order of the Constitutional Court No. Up-94/02, dated 21 October 2004, OdiUS XIII, 88). Namely, by expunging the judgement, the legal consequences of the conviction allegedly cease to exist, i.e. the person is deemed to have never been convicted. It follows from the information sent by the Ministry of Justice upon the request of the Constitutional Court that in the complainant's case the anticipated date of the end of the probationary period is 23 April 2012. According to the relevant statutory provisions, it can therefore be concluded that the final criminal judgement had been expunged, although the Ministry of Justice did not explicitly notify the Constitutional Court thereof. Since the complainant explicitly draws attention to the fact that also the suspended sentence entails a heavy burden for him and has caused him mental suffering, the Constitutional Court reconsidered its position in Order No. Up-94/02 and decided to change it due to constitutional reasons. Namely, the possible success of the constitutional complaint would entail that by a final judgement of conviction human rights and fundamental freedoms would be violated, which in a new trial might lead to a judgement of acquittal. Such person would be unjustly convicted. This is a sufficient reason for legal interest in the decision on the constitutional complaint, as Article 30 of the Constitution guarantees a wrongly convicted person the right to rehabilitation, compensation, and other rights provided by law. Moral rehabilitation, constitutionally recognized also as a human right, therefore entails a sufficient reason for changing this position. Namely, the mentioned right is also enjoyed by people regarding whom a judgement of conviction has been expunged from the criminal record. Therefore, the procedural conditions for deciding are fulfilled also in the case at issue.

B. – II.

9. In proceedings to decide upon the constitutional complaint, the Constitutional Court inspected the following case files: No. II K 99/2007 of the Local Court in Ljubljana; No. P 2600/2003-IV (No. P 3558/2004-IV, No. P 1510/2009-IV) of the District Court in Ljubljana; and No. In 2005/01241 of the Local Court in Ljubljana. The inspected case files reveal the actual circumstances of the cases decided on, i.e. *inter alia* on the custody of the complainant's minor son, on the execution of the final judgement on the custody of the child which was granted to his former wife, and on the complainant's criminal liability. The subjects of decision-making in this constitutional complaint are only the judgements issued in the criminal case against the complainant. However, in the final judgement of conviction the time the criminal offence was committed is defined as the period from 7 September 2005, when the complainant allegedly abducted the minor from his mother, to 22 May 2006, when by a temporary injunction the District Court in Ljubljana granted the complainant custody of his minor son. Regarding such, the complainant claims that he requested that the court issue the

mentioned decision already on 8 September 2005 and that on the one hand the courts did not proceed quickly, and on the other they found the complainant criminally liable for the unlawful detainment of a minor. In addition, the Supreme Court alleges that the complainant was uncompromising when committing the criminal offence, which allegedly persisted despite the execution order. Therefore, the Constitutional Court also inspected the civil and execution case files on the basis of which the decisions were issued which were also referred to in the challenged judgements.

10. It is, *inter alia*, evident from case file No. P 2600/2003 (No. P 3558/2004, No. P 1510/2009) of the District Court in Ljubljana in a civil case concerning divorce and deciding on granting parents custody of their minor children, that by final Judgement No. P 2600/2003-IV, dated 24 May 2004, the complainant and his former wife divorced and that the mother was granted custody of the minor children. Furthermore, it follows from the [relevant] case file (No. P 2903/2005-IV, which is joined with case file No. P 3558/2004) that the complainant brought an action on 8 September 2005 for the issuance of a new decision on the custody of his son and motioned for a injunction temporarily granting him custody of the child. By Order No. P 3558/2005, dated 22 May 2006, the Court decided to temporarily grant the complainant custody of his minor son. Furthermore, by Judgements of the District Court in Ljubljana No. P 3558/2004, dated 17 December 2008, and No. P 1510/2009, dated 17 February 2010, the court *inter alia* decided that the minor's mother was to be stripped of custody and the complainant was to be granted such.

11. It *inter alia* follows from case file No. In 2005/01241 of the Local Court in Ljubljana, in relation to an execution case, that the complainant's former wife filed a motion for execution due to the transfer of her minor son on 9 September 2005 and that by Order No. In 2005/01241-3, dated 3 October 2005, the court allowed execution due to the transfer of the child and in the event of failure to comply with such an obligation imposed a fine on the complainant amounting to SIT 1,000,000.00 at that time. By Order No. 2874 In 1241/2005, dated 2 March 2012, the court dismissed the execution proceedings and by Order No. 2874 In 1241/2005, dated 12 October 2012, it dismissed the proceedings to decide upon the proposal for the imposition of a fine.

12. It *inter alia* follows from case file No. II K 99/2007 of the Local Court in Ljubljana, relating to a criminal case in which the challenged judgements were issued, that:

- on 7 September 2005 the complainant's former wife notified the police station that the complainant did not want to return their minor son whom she had been granted custody of following their divorce;
- on 7 September 2005 the president of the K. Society., a person whom the complainant's minor son trusts, and the minor son gathered at the Social Work Centre in order to ask the minor son whether he wished to live with his father, which allegedly followed also from his written statement, of which the police station was allegedly also notified already the same day;
- on 8 September 2005, the competent employees of the Social Work Centre, the representatives of the police, the president of the K. Society., the complainant, and his former wife gathered at the elementary school in order to clarify the situation; after a discussion, in which the minor son insisted on going home with his father, with whom he wanted to live, the child's wish was followed in accordance with the instructions of the state prosecutor that the child's wishes were to be respected, if consensus was not possible, in order to avoid even greater traumatising of the child;
- on 24 April 2006, the District State Prosecutor's Office in Ljubljana filed a motion for the execution of investigative acts with regard to the complainant and on 20 March 2007 a summary charge due to the reasonable suspicion of him having committed the criminal offences of the abduction of a minor in accordance with the first paragraph of Article 200 of the CC[1], and the neglect and maltreatment of a minor in accordance with the first paragraph of Article 201 of the CC;
- by the Judgement of the Higher Court in Ljubljana dated 8 April 2010, in conjunction with the Judgement of the Local Court in Ljubljana dated 20 February 2009, the complainant was convicted of a criminal offence in accordance with the first paragraph of Article 200 of the CC;

– by the Judgement of the Supreme Court dated 13 January 2011, the request for the protection of legality against the Judgement referred to in the previous indent was dismissed.

B. – III.

13. The complainant *inter alia* claims that the challenged judgements violate his rights under Articles 54 and 56 of the Constitution, because the court did not weigh between the two [relevant] values, i.e. respect for a final judgement and the child's interests, which are constitutionally protected, and did not give priority to the latter. The first paragraph of Article 54 of the Constitution determines that parents have the right and duty to maintain, educate, and raise their children; this right may be revoked or restricted only for such reasons as are provided by law in order to protect the child's interests. Furthermore, the first paragraph of Article 56 of the Constitution determines that children enjoy special protection and care, and that they enjoy human rights and fundamental freedoms in accordance with their age and maturity. Therefore, the Constitutional Court assessed the positions of the courts in the challenged judgements in terms of their compliance with the first paragraph of Article 54 and the first paragraph of Article 56 of the Constitution.

14. On the basis of the mentioned constitutional provisions, it is parents who are primarily entitled and obliged to take care of their children. Such entitlement and obligation of parents entails, from the perspective of the position of children, the right of children to be taken care of and raised by their parents. Thereby children are guaranteed special protection, which is also a reflection of the right to respect for one's family life.[2] This refers to the mutual intertwinement of parental care and children's rights. The position of these provisions in the chapter on human rights and fundamental freedoms itself speaks for the fact that the state must generally not interfere with the mentioned relationship between parents and children. For the effective guarantee of the mutual connection between parents and children, the state must adopt measures that will enable the actual establishment and protection of these relationships.[3] In accordance with the mentioned duty of the state, the first sentence of the first paragraph of Article 56 of the Constitution should be interpreted in conjunction with the principle of the child's best interests,[4] which must be considered also by the courts when deciding on relationships between parents and children.

15. Parents must exercise the rights and duties referred to in the first paragraph of Article 54 of the Constitution in the interests of their children.[5] It is assumed that parents, aware of their responsibilities towards their children, are willing and able to act in the interests of their children.[6] Since the rights of parents towards a child are equal (the first paragraph of Article 54 in conjunction with the second paragraph of Article 14 of the Constitution), parents should in general care for a child together, even if they live separately.[7] The European Court of Human Rights (hereinafter referred to as the ECtHR) also considers that the child's best interests must be the main guidance when interpreting Article 8 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) as regards the exercise of parental care and the maintenance of contacts between parents and children,[8] and that the child's interests may, depending on their nature and seriousness, override the interests of the parents.[9] The child's interests are allegedly composed of two aspects. On the one hand, the child's interests allegedly require that the child's ties with his or her family be maintained, except in cases when the family has proved to be particularly inappropriate, while on the other hand it is clearly in the child's interest to ensure his or her development in a sound environment, and under Article 8 of the ECHR a parent cannot be entitled to take such measures as would harm the child's health and development.[10]

16. In proceedings regarding the relationships between parents and children, parents must have enough possibilities to express their views and interests, so that their statements are taken into consideration by the competent authority, and to apply available legal remedies.[11] Nevertheless, regarding such, parents have to bear in mind that a child is a person who should be respected as such also within the family circle, and therefore his or her will should

be considered in accordance with his or her age and maturity. In such proceedings the child should be treated as a subject, which in particular entails that children who, in accordance with their age and maturity, are capable of understanding the circumstances and independently expressing their will thereon, should be enabled to do so, as well. Their will should be respected, as long as it is consistent with the principle of the child's best interests.[12] The right to express themselves with regard to the question of which of the parents who are getting divorced they wish to live with is provided by Article 22 of the Constitution in conjunction with the first paragraph of Article 56 of the Constitution to children who are sufficiently old and mature to exercise such right.[13] Such right is based on respect for their personal dignity (Article 34 of the Constitution). The above-mentioned is particularly true in cases when the children are, in accordance with their age and maturity, already capable of understanding their situation due to their parents' divorce,[14] and are, therefore, particularly vulnerable, of which both the parents themselves and the competent state authorities should be aware, when the latter are called upon to decide if the parents do not agree on the custody of the child. The child's right to personal dignity thus corresponds to the duty of responsible parents to ensure respect for these rights of their children; therefore, in the first paragraph of Article 54 the Constitution speaks of both the rights of parents towards their children, as well as their duties. Thus, all the above-mentioned rights are a concretisation of the principle of the child's best interests.

17. The above-mentioned should primarily be taken into account when deciding in the relevant proceedings on granting custody of minors to divorced former spouses. Nevertheless, the human rights of parents and children and in this framework also the principle of the child's best interests should also be respected in criminal proceedings initiated due to a criminal offence, the purpose of which is precisely to ensure, on the one hand, respect for the duties of parents, and on the other the children's rights. Therefore, the principle of the child's best interests referred to in the first paragraph of Article 56 of the Constitution, which corresponds to the parents' duty, even if they are divorced, to ensure the safety and education of their children so as to ensure the full and harmonious development of their personality (the first paragraph of Article 54 of the Constitution), is a constitutional value protected by the legislature also by the incrimination of conduct contrary to the mentioned principle.

18. It is assumed until proven otherwise that a final judicial decision by which custody of minor children is granted to divorced former spouses is based on respect for the principle of the child's best interests. Therefore, it is necessary to confirm the positions of the courts [at issue] that parents should respect such final judicial decisions and that in changed circumstances they have adequate legal remedies to enforce their right referred to in the first paragraph of Article 54 of the Constitution and especially in order to protect the child's right referred to in the first paragraph of Article 56 of the Constitution, which is the mirror image of parents' duties.

19. Respect for final judicial decisions is a generally important constitutional value and *inter alia* also one of the fundamental postulates of a state governed by the rule of law (Article 2 of the Constitution). As follows from the established constitutional case-law, it is also an integral part of the right to effective judicial protection referred to in the first paragraph of Article 23 of the Constitution.[15] Its essence is to strengthen the legal relationship to the benefit of trust in the law, which is one of the principles of the rule of law.[16] In particular, the stability of legal relationships is aimed at protecting the holders of rights and obligations in such relationships by binding all participants with regard to the content of the decision (*res iudicata ius facit inter partes*), because the final decision is considered right and true (*res iudicata pro veritate accipitur*).[17] This leads to a prohibition on interfering in an already adjudicated matter (*ne bis in idem*).[18] Therefore, the institution of finality is essential as an instrument of legal certainty, which is also one of the principles of the rule of law. Final judicial decisions must be respected by all, first and foremost by state authorities. Therefore, not even the court itself should interfere in the content of a final judicial decision. Legal relationships regulated by a final decision of a state authority can be annulled, abrogated, or amended only in such cases and by such procedures as are provided by law (Article 158 of the Constitution). Respect for final judicial decisions is thus already in itself a constitutional value, moreover, when it comes to

respect for court decisions regarding the question of which of the divorced parents should be granted custody of their child, respect for a final judicial decision on such question also presupposes that it was decided in accordance with the child's best interests.

20. However, it should also be taken into account that it is precisely in the field of child custody that the finality of judicial decisions cannot be an absolute value. Not only changed circumstances on the side of one parent or both of them, but especially the development of the child's capabilities to express him- or herself, in accordance with his or her age and maturity, on issues that are crucial for his or her upbringing, i.e. respect for his or her personal dignity, can lead to the conclusion that in the exceptional circumstances of an individual case recognition of the absoluteness of a final court decision might be in contradiction with the principle of the child's best interests. Therefore, also according to the position of the ECtHR, even in cases when the Hague Convention is applicable, a child's return cannot be ordered automatically or mechanically, but the child's best interests from a personal development perspective depends on a variety of individual circumstances, in particular his or her age and level of maturity, the presence or absence of his or her parents, the environment, and experience. Therefore, the child's best interests must be evaluated in each individual case.[19] The ECtHR is of the view that what is inherent in the concept of the child's best interests is the right of a minor to not be removed from one of his or her parents and retained by the other who considers (rightly or wrongly) that he or she has equal or greater rights in respect of the minor.[20] Referring to its already well-established case-law[21], the ECtHR points out that when examining whether the competent state authorities have taken all the necessary steps to facilitate the enforcement of the contact arrangements, it must strike a balance between the various interests involved: the interests of the child and the parent with whom the child lives, the interests of the other parent, and the general interest in ensuring respect for the rule of law.[22] When determining whether there has been a violation of Article 8 of the ECHR, the ECtHR also takes the child's age and behaviour into account.[23] When assessing whether the domestic courts failed to strike a fair balance between the best interests and wishes of the child and the rights of the parent with whom the child does not live, the ECtHR also points out that the approach of domestic courts that consider that it is of greatest relevance to custody and access issues to establish the psychological situation of the child and take his or her wishes into consideration cannot be open to criticism.[24] Also in its recent decisions the ECtHR points out that in cases concerning the enforcement of decisions in the sphere of family law, what is decisive is whether the state authorities have taken all the necessary steps to facilitate the execution, as far as reasonably can be expected in the special circumstances of each case (they must in particular bear in mind the child's interests) and that coercive measures against children are not desirable in this sensitive area.[25]

21. As has already been pointed out, the rights referred to in the first paragraph of Article 54 and the first paragraph of Article 56 of the Constitution, which both require respect for the child's best interests, should be taken into account also in criminal proceedings in which a decision is issued on the possible criminal liability of a parent who does not respect a final judicial decision on granting parents custody of a child or on establishing contacts between the child and the other parent. Therefore, such court deciding in criminal proceedings should on the one hand ensure respect for final judicial decisions, and on the other hand consider the principle of the child's best interests and strike an appropriate balance between the two, precisely in order to implement the above-mentioned human rights. As also noted by the ECtHR, in such proceedings it is necessary to draw special attention to the balance between the public interest, which lies in respect for the final judicial decision, which is assumed to protect the principle of the child's best interests, and the interests of both parents and especially the actual, even newly-emerged, interests of the child, which may in exceptional circumstances prevail. Accordingly, in exceptional circumstances there may be a collision between respect for a final judicial decision and the principle of the child's best interests. In the event of such, the criminal court should, depending on the content of the constitutionally protected values and circumstances of the individual case, assess which constitutionally protected value should be assigned the higher weight. A position of the court that following such assessment would be contrary to the child's best interests entails a violation of the child's

right referred to in the first paragraph of Article 56 of the Constitution. Such right corresponds to the parent's duty determined by the first paragraph of Article 54 of the Constitution to act in accordance with this right in each individual case. Thus, a parent who, in accordance with the circumstances of the individual case, also acted in such manner cannot be assessed as having committed unlawful conduct, the sanctioning of which is precisely the purpose of the criminal offence determined in the first paragraph of Article 200 of the CC.[26] Therefore, in the circumstances of the case at issue, the Constitutional Court assessed the complainant's allegation of a violation of the first paragraph of Article 54 of the Constitution precisely from the mentioned viewpoints.

B. – IV.

22. In the challenged judgements the court of first instance and the court of second instance assigned absolute validity to the final judicial decision by which the mother of the complainant's son was granted custody. Such a position was explicitly confirmed also by the Supreme Court, which emphasized that all conduct contrary to the final judicial decision is contrary to the child's interests and consequently also materially unlawful. Therefore, this allegedly applies without exception also to all conduct which would, in accordance with a careful assessment, later be proven to entail precisely respect for the child's best interests as a human right, which in the circumstances at that time was different from that protected by the final judicial decision. Such views of the courts are, therefore, in and of themselves inconsistent with the right determined in the first paragraph of Article 56 of the Constitution, which may entail a violation of the right determined by the first paragraph of Article 54 of the Constitution in criminal proceedings. By attributing unlawfulness to conduct that cannot be unlawful, if the mentioned rights are being respected, they might consequently also violate the right determined by the first paragraph of Article 28 of the Constitution. In the circumstances of the case at issue, for the reasons set out below, these views also *de facto* entail a violation of the complainant's right referred to in the first paragraph of Article 54 of the Constitution and consequently also a violation of the right referred to in the first paragraph of Article 28 of the Constitution.

23. As follows from the examined case files, during the time period when the complainant is alleged to have committed a criminal offence, an eleven-year old child clearly expressed his own will with regard to whom he would like to live with, and through adults, including ones who have been appointed trusted persons [Slo: *zaupne osebe*] precisely in order to ensure respect for his interests, tried to achieve that he was to live with his father instead of his mother. It follows from the information in the case file that on 7 September 2005 the child resolutely opposed being in his mother's custody any further and that he explicitly demanded that the complainant (his father) not return him to his mother. During the events that took place the next day, i.e. on 8 September 2005, at the school the child attended, also the police did not use coercive measures to execute the final judgement dated 24 May 2004 precisely due to respect for the child's best interests. By his conduct, which includes demanding that the school not release the child to his mother, the complainant in fact expressed his opposition to forcing an eleven-year old child to do something that he allegedly strongly opposed by his own will and allegedly did not want. As regards his age and maturity, the eleven-year old child was capable of expressing his will on the essential circumstances regarding custody, which was also held by the courts. The courts took the view that the complainant should have convinced his son, in a manner understandable to him, to respect the final judgement until a different court decision was issued, which generally can be agreed with. However, it also needs to be considered that such conduct, bearing in mind the expressed persistence of the child, could only be achieved by force. Such coercive measures would formally ensure respect for the final judgement; however, it could have had severe consequences regarding the child's development in the circumstances and with regard to his traumatic experiences and traumatic comprehension of the environment, which was not in favour of respecting his will.

24. In addition, the complainant pursued the legal path to securing the child's rights already the same day, i.e. on 8 September 2005,[27] in order to achieve a change in the final

Judgement of the District Court in Ljubljana, dated 24 May 2004. The fact is that instead of proceeding quickly, the competent court concluded only on 22 May 2006 by Decision No. P 3558/2005 that the complainant was thereby temporarily granted custody of his minor son. Nevertheless, by the final judgement of conviction the complainant allegedly committed a criminal offence from the day the child came to him in the company of a person whom the child trusted, to the day the mentioned temporary injunction was issued. After the issuance of the temporary injunction, the proceedings, which were concluded by a final judgement according to which the complainant was granted custody of his minor son, had lasted quite a few years. It is possible to concur with the complainant that these proceedings, ever since the decision-making regarding [i.e. the filing of] the motion for a temporary injunction, lasted unacceptably long, which was also clearly contrary to the principle of the child's best interests. On the one hand, the complainant was facing an allegation of unlawful conduct – in the Judgement of the Supreme Court he is even alleged to have been uncompromising because he allegedly did not comply with the execution proceedings for the execution of the final judgement – while on the other hand, the competent court decided upon his motion, which should have been decided on especially quickly, only after nearly nine months. All this despite the fact that it is precisely the possibility of the issuance of a temporary injunction that presents an effective means by which the child's best interests should immediately be protected in an individual case. The courts that decided on the complainant's criminal liability were also informed of all these circumstances.

25. The circumstance that in the situation at issue indicated respect for the requirement to ensure the child's best interests was the clearly and unambiguously expressed will of an eleven-year old child that, in light of the circumstances of the case, he does not want to return to his mother and wants instead to live with his father. It is indeed within the jurisdiction of civil courts to assess in each individual case whether such will is *de facto* in accordance with the child's best interests. In this case, the courts assessed that respect for the child's wish for the complainant to have custody of him is in accordance with the child's best interests. In the criminal proceedings the courts were aware of these facts because the summary charge against the complainant was not submitted before the issuance of the temporary injunction by which he was granted custody of his minor son. When assessing the complainant's unlawful conduct, these circumstances were important, especially given the fact that the complainant is alleged to have committed the criminal offence during a time period when the competent court, in spite of the complainant's repeated motions to expedite the proceedings, did not decide on the proposed temporary injunction. Nevertheless, in criminal proceedings the courts did not pay adequate attention thereto precisely because they *a priori* formalistically took the view that the final judgement of 2004 was absolutely valid and that compliance with the principle of the child's best interests, which was allegedly already established by the final judgement of 2004, cannot lead to any different conclusion.

26. If in the criminal proceedings the courts had considered the clearly expressed will of the minor son, who was, in accordance with his age and maturity, capable of making it clear that he did not want to return to his mother, if they had considered all the specific circumstances that were evident from both the criminal and civil case files, they would have had to conclude that the complainant had acted in the child's best interests, which is also his duty in accordance with the first paragraph of Article 54 of the Constitution, and these interests are also protected thereby. Regarding such, it is not insignificant that the state authorities, despite the fact that they are primarily bound by the obligation to respect final judgements, discontinued the execution of such precisely in order to protect the child's interests. Namely, on 8 September 2005 the police did not use coercive measures to execute the valid final judgement because at that time it assessed that priority should be given to the child's interests. The same conduct cannot, on the one hand, be desirable conduct of the state authorities to respect the child's best interests in the given case, and on the other hand unlawful conduct the complainant is alleged to have committed as an individual. When and as long as there existed a final judicial decision, it equally bound all state authorities as well as all individuals, thus also the child's parents and thus also the complainant. If justified reasons prevented even the authorities competent to execute the final Judgement from doing so, these

also existed as regards the complainant and he was thereby imposed the duty to act in accordance with the first paragraph of Article 54 of the Constitution.

27. In the circumstances of the case at issue, failure to comply with the child's best interests (the first paragraph of Article 56 of the Constitution), in the light of the above-mentioned, led to a violation of the complainant's right referred to in the first paragraph of Article 54 of the Constitution and consequently also to a violation of the right referred to in the first paragraph of Article 28 of the Constitution. Therefore, the Constitutional Court abrogated the challenged judgements (point 1 of the operative provisions). However, the case was not remanded to the court of first instance for new adjudication because, based on the first paragraph of Article 60 of the CCA, the Constitutional Court itself ruled on the charge against the complainant.

B. – V.

28. If the Constitutional Court abrogates challenged judgements, on the basis of the first paragraph of Article 60 of the CCA it may also decide on a disputed right if such is necessary in order to remedy consequences that have already occurred on the basis of an individual act, or if such is required by the nature of the constitutional right or freedom, and if such decision can be reached on the basis of information contained in the case file. On such basis, the Constitutional Court may also itself decide on the justification of the charge brought against the complainant, if the mentioned conditions have been met. The Constitutional Court has hitherto acted in such a manner particularly in cases when it was evident from the reasons for the determination of the violation of a human right by the abrogated judgements that in accordance with precisely this human right it is admissible to adopt precisely the opposite decision from the one adopted by the courts.[28]

29. The Constitutional Court has a sufficient amount of information in the case file in order to decide on the justification of the charge brought against the complainant, and it is bound by the state of the facts established by the competent courts, however, the justification of the charge depends on the question of whether in accordance with an interpretation of the first paragraph of Article 200 of the CC consistent with the Constitution the complainant can be assessed as having committed unlawful conduct in the material sense. If such cannot be attributed to his conduct, conviction due to the alleged criminal offence would entail being convicted for something that is not punishable by law. Therefore, it would entail a violation of the first paragraph of Article 28 of the Constitution. The criminal offence the complainant was charged with was allegedly committed already eight years ago. Remanding the case to the competent court for new adjudication would entail for the complainant the renewed initiation of criminal proceedings after a long period of time. Therefore, all the conditions referred to in the first paragraph of Article 60 of the CCA for a decision on the justification of the charge in this case are fulfilled.[29]

30. At the time when the alleged criminal offence was allegedly committed, the criminal offence of abducting a minor was determined by the first paragraph of Article 200 of the CC. The first paragraph of Article 200 of the CC determined: "Whoever unlawfully abducts a minor from his parent, adoptive parent, guardian, institution, or a person to whom the minor has been entrusted, or whoever detains a minor or prevents him from being with a person who has rights in respect of the minor, or whoever malevolently prevents the implementation of an enforceable judgement referring to a minor, shall be punished by a fine or sentenced to imprisonment for not more than one year." As follows from the mentioned provision, the legislature considered that it is precisely unlawfulness that is a special element of this criminal offence.[30]

31. In cases when a final judicial decision on the question of which parent is granted custody of a child exists, conduct contrary to such decision generally establishes unlawfulness in the sense of the first paragraph of Article 200 of the CC. However, it does not establish it automatically and absolutely because such would in the circumstances of an individual case entail a denial of respect for the principle of the child's best interests (the first paragraph of

Article 56 of the Constitution), which corresponds on the side of the parents to their duty to act (the first paragraph of Article 54 of the Constitution) in accordance with such principle (paragraphs 20 and 21 of the reasoning of this decision). In order to determine that a parent's conduct is unlawful, it is therefore necessary to carefully consider all the relevant circumstances. Unlawfulness cannot be already assumed on the basis of the existence of a final judicial decision requiring the parent to act in accordance therewith. Changed circumstances on the side of one or both of the parents after the final judicial decision on the custody of the child, as well as the development of the child's capacity to understand the current situation and taking into account his will, as long as such is consistent with the principle of the child's best interests, may, depending on the circumstances of an individual case, exclude unlawfulness in the parent's conduct in the material sense. The same holds in the case at issue when the complainant acted formally in contravention to the enforceable judicial decision, but did everything he could to change it (by bringing an action with a request for a change in the custody of his son and a motion for a temporary injunction on this issue already the same day after the events at the elementary school on 8 September 2005 and immediately the next day after his son came to him and did not want to return to his mother). Thereby, it must be presupposed, according to the nature of the matter, that not only the formation of an action and a motion for a temporary injunction and the lodging of such, but also judicial deciding on the merits thereof, take an appropriate period of time. However, the court must decide on a motion for a temporary injunction as soon as possible. The court's inadmissibly long delay in deciding on the motion for a temporary injunction in the complainant's case was concurrently changed by the charge into the duration of the alleged criminal offence. While the court did not decide for more than eight months on the motion for a temporary injunction by which a change in the custody of the child was requested, the execution proceedings regarding the final judicial decision, which could have been changed by the temporary injunction and which subsequently in fact changed so as to grant the complainant custody of the child, had already been initiated. Nevertheless, it is above all important that the child's best interests in circumstances such as in the case at issue outweigh the importance of respect for a final judicial decision and the execution thereof.

32. The complainant acted as a parent in accordance with his duties towards his child, as respect for the judicial decision, even though he deemed that it needed to be changed, could only be achieved by forcing his son, who was capable, in accordance with his age, of understanding the circumstances in which a decision regarding him was made (this finding follows from Order No. P 3558/2005 and Judgement No. II K 99/2007, dated 20 February 2009), to do something that he in fact strongly opposed. Therefore, it also cannot be alleged that the complainant, despite the threat of a significant fine for [not respecting] the execution of the final judicial decision (Order of the Local Court in Ljubljana No. In 2005/01241-3, dated 3 October 2005), did not force his son to return to his mother. Forcing the child in such circumstances would entail conduct that is not only a violation of the child's personal dignity (Article 34 of the Constitution) at his age and maturity (paragraph 16 of the reasoning of this decision), but also precisely contrary to the child's best interests. Such could further negatively affect the child's psychological development, which due to all the circumstances was already affected, which is also evident from the intensity of the child's reaction to the events on 8 September 2005. Forcing a child, physically or mentally, would result in a conflict with the complainant's duties imposed by the first paragraph of Article 54 of the Constitution. Therefore, the complainant's conduct cannot be held to be unlawful.

33. Final judicial decisions must be respected by everyone, first and foremost by the state authorities. At the events on 8 September 2005, the competent state authorities held that forcing the child to return to his mother would be contrary to respect for the child's best interests. It is not possible to assess that such conduct of the competent authorities was on the one hand correct and in accordance with the principle of the child's best interests, and at the same time declare that the complainant should have ignored the principle of the child's best interests in order to respect the same final judicial decision. Therefore, to reiterate, such conduct of the complainant cannot be held to be unlawful.

34. Given the above, the conduct of the complainant cannot be assessed as having been unlawful. Because unlawfulness is an essential element of the criminal offence referred to in the first paragraph of Article 200 of the CC, the alleged conduct of the complainant does not have all the elements of a criminal offence. The complainant's conviction for such conduct would entail that the complainant was convicted for a criminal offence that at the time when it was committed was not punishable. Therefore, this would entail a violation of the first paragraph of Article 28 of the Constitution. On the basis of point 1 of Article 358 of the Criminal Procedure Act (hereinafter referred to as the CPA), a defendant is acquitted of a charge if the alleged conduct is not punishable. In accordance therewith, the Constitutional Court decided as follows from point 2 of the operative provisions of this decision. Because the Constitutional Court itself decided on the case and acquitted the complainant, it also had to be decided in accordance with the first paragraph of Article 96 of the CPA that the costs of the criminal proceedings are charged to the budget (point 3 of the operative provisions).

C.

35. The Constitutional Court reached this decision on the basis of the first paragraph of Article 59 and the first paragraph of Article 60 of the CCA in conjunction with point 1 of Article 358 and the first paragraph of Article 96 of the CPA, composed of: President Dr. Ernest Petrič and Judges Dr. Mitja Deisinger, Mag. Marta Klampfer, Dr. Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, and Dr. Jadranka Sovdat. Judges Dr. Dunja Jadek Pensa and Jan Zobec were disqualified from deciding in the case. The decision was reached by six votes against one, Judge Klampfer voted against.

Dr. Ernest Petrič
President

End notes:

[1] The first paragraph of Article 200 of the CC determined: "Whoever unlawfully abducts a minor from his parent, adoptive parent, guardian, institution, or a person to whom the minor has been entrusted, or whoever detains a minor or prevents him from being with a person who has rights in respect of the minor, or whoever malevolently prevents the implementation of an enforceable judgement referring to a minor, shall be punished by a fine or sentenced to imprisonment for not more than one year."

[2] Cf. Judgement of the Constitutional Court No. U-I-137/03, dated 26 May 2005 (Official Gazette RS No. 56/05, and OdlUS XIV, 30), paragraph 12 of the reasoning.

[3] Cf. Judgement of the Constitutional Court No. U-I-273/98, dated 1 July 1999 (Official Gazette RS No. 60/99, and OdlUS VIII, 169).

[4] Cf. Judgement of the Constitutional Court No. U-I-116/03, dated 9 February 2006 (Official Gazette RS No. 21/06, and OdlUS XV, 14), paragraph 8 of the reasoning.

[5] Cf. Judgement of the Constitutional Court No. U-I-312/00, dated 23 April 2003 (Official Gazette RS No. 42/03, and OdlUS XII, 39).

[6] Also according to the provisions of the United Nations Convention on the Rights of the Child (Official Gazette SFRY No. 15/90, Act on Notification of Succession concerning Conventions of the United Nations Organization and Conventions Adopted by the International Agency for Atomic Energy, Official Gazette RS No. 35/92, MP, No. 9/92 – hereinafter referred to as the CRC), which is binding on the Republic of Slovenia, the child's interests are the main guidance in all actions concerning children (Article 3), while the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding (Preamble of the CRC).

[7] Cf. Judgement of the Constitutional Court No. Up-50/94, dated 22 January 1998 (OdlUS VII, 99).

[8] Thereby, considering the circumstances of the case, it also refers to the Preamble of the Convention on the Civil Aspects of International Child Abduction (Official Gazette RS No. 23/93, MP, No. 6/93 – hereinafter referred to as the Hague Convention), the purpose of which is not to provide for substantive settlement of disputes on issues of parental rights, but the restoration of the previous situation, thus to secure the child's return to the place of his or her habitual residence, however, also taking into account his or her views or objections to being returned (see the second paragraph of Article 13).

[9] Cf. Judgement in the case *Neulinger and Shuruk v. Switzerland*, dated 6 July 2010, paragraph 134 of the reasoning.

[10] Cf. paragraph 136 of the reasoning of the Judgement in the case *Neulinger and Shuruk v. Switzerland*.

[11] Cf. Judgement of the Constitutional Court No. U-I-273/98.

[12] Cf. Article 6 and 7 of the European Convention on the Exercise of Children's Rights (Official Gazette RS No. 86/99, MP, No. 26/99 – ECECR), which is also binding on the Republic of Slovenia.

[13] A child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child has in particular the opportunity to be heard in any judicial and administrative proceedings affecting the child (see Article 12 of the CRC).

[14] Also in cases when separating children from their parents is necessary, the child's interests must be regarded as essential circumstances (cf. Article 9 of the CRC).

[15] Cf. Order of the Constitutional Court No. Up-206/02, dated 24 June 2003 (OdlUS XII, 116).

[16] See T. Jerovšek, P. Kovač in: L. Šturm (ed.), *Komentar Ustave Republike Slovenije, Dopolnitev – A*, [Commentary on the Constitution of the Republic of Slovenia, Supplement – A], Graduate School of Government and European Studies, Ljubljana 2011, p. 1405.

[17] *Ibidem*.

[18] *Ibidem*.

[19] Cf. paragraph 138 of the reasoning of the Judgement in the case *Neulinger and Shuruk v. Switzerland*.

[20] Cf. Judgement in the case *Maumousseau and Washington v. France*, dated 6 December 2007.

[21] Cf. Judgement in the case *Kaleta v. Poland*, dated 16 December 2008, paragraph 53 of the reasoning.

[22] Cf. Judgement in the case *Sbârnea v. Romania*, dated 21 June 2011. In the mentioned case, the complainant (the child's father, who on the basis of a judgement had rights of contact with his daughter) lodged a criminal complaint against the child's mother, alleging that she had not complied with the judgement that defined his contact rights. In December 2003, the public prosecutor decided not to pursue the child's mother criminally, considering that the non-compliance with the final judicial decision could not be imputed to her, but to the child's refusal. The decision of the public prosecutor was abrogated by the domestic court and the case referred back for the investigation to be continued, however, after an extensive investigation, the state prosecutor repeatedly decided not to pursue criminal proceedings because the child's mother did not intend to prevent the complainant from having a personal relationship with his daughter. After the applicant's judicial complaint the domestic court assessed that none of the evidence indicated that the daughter wanted to see the complainant and that her mother was preventing her from doing so. The court's conclusion that the conditions required to attract the criminal liability of the mother had not been met was abrogated and referred back to the investigating authorities, when the daughter precisely explained why she did not want to see her father. The public prosecutor repeatedly terminated criminal proceedings, concluding that the child's mother was not obstructing the execution of the judgement. The Romanian Criminal Code allegedly implied an action from the side of the accused, the mere fact that the mother had failed to inculcate a positive attitude in her daughter towards her father is allegedly not sufficient to assess her conduct as such. Thus, the domestic court upheld such a decision and explained that in this case the child's mother only expressed her disagreement with forcing the child to do something she did not want to do.

[23] The ECtHR held that the applicant's daughter was at that time already of an age when she could not simply be handed over to the father if she refused to join him. The bailiff allegedly took into account the girl's refusal to join her father, however, the court did not find this consideration arbitrary or inappropriate. In the case *Sbârnea v. Romania*, the ECtHR concluded, taking into account all the very difficult circumstances of the case, that the competent authorities had struck a fair balance between the competing interests (see paragraph 138 of the reasoning of the judgement).

[24] Cf. Judgement in the case *Plaza v. Poland*, dated 25 January 2011, paragraph 86 of the reasoning.

[25] Cf. Judgement in the case *Pascal v. Romania*, dated 17 April 2012, paragraphs 70 and 88 of the reasoning. When assessing the alleged violation of Article 8 of the ECHR, the ECtHR did not deny the weight of the reasoning of the criminal court that the mother, whose conduct was allegedly the main reason for the unsuccessful execution of the decision, acted with concern for the best interests of her child. Regarding such, it emphasized that the conduct of the child's mother was such (also) due to the child's rejection of contact with the applicant, which also for the Romanian criminal court was allegedly the main reason for rejecting the applicant's criminal complaint. See paragraph 79 of the reasoning of the judgement in this case.

[26] The CC was in force at the time when the complainant allegedly committed the criminal offence, which in the current Criminal Code (Official Gazette RS No. 50/12 – official consolidated text – KZ-1) is substantively the same criminal offence as determined in the first paragraph of Article 190.

[27] He brought an action seeking custody of both his children and *inter alia* proposed the issuance of a temporary injunction granting temporary custody of his son.

[28] Cf., for example, Judgement of the Constitutional Court No. Up-332/98, dated 18 April 2002 (Official Gazette RS No. 39/02, and OdlUS XI, 117); similar also in Decisions of the Constitutional Court No. Up-50/99, dated 14 December 2000 (Official Gazette RS No. 1/01, and OdlUS IX, 310) and No. Up-406/05, dated 12 April 2007 (Official Gazette RS No. 35/07, and OdlUS XVI, 51).

[29] Having established a violation of the first paragraph of Article 28 of the Constitution, it acted in such a manner also in Decision No. Up-332/98.

[30] See M. Deisinger, *Kazenski zakon s komentarjem – Posebni del*, [Criminal Code with Commentary – Special Part], GV Založba, Ljubljana 2002, p. 320.