THE CZECH REPUBLIC

ADDITIONAL OBSERVATIONS OF THE GOVERNMENT ON THE ADMISSIBILITY AND MERITS OF THE APPLICATIONS

Jan VOMOČIL v. THE CZECH REPUBLIC
(No. 38817/04)

Art 38, a.s. v. THE CZECH REPUBLIC
(No. 1458/07)

PRAGUE

30 JUNE 2009

1. In its letter of 14 May 2009 the European Court of Human Rights (hereinafter "the Court") invited the Government of the Czech Republic (hereinafter "the Government") to submit their additional observations on the admissibility and merits of the applications submitted to the Court by Mr Jan Vomočil (hereinafter "the Applicant Vomočil") and Art 38, a.s. (hereinafter "the Applicant Company") against the Czech Republic and registered under Nos. 38817/04 and 1458/07.

The Observations should answer the following questions:

1. Has there been an effective remedy whereby the applicants and other landlords in the similar situation could claim before courts of ordinary jurisdiction increases in rent retrospectively? Has there been any temporal or other limitation in that regard?
2. If such a remedy has been in place, does it provide the applicants and other landlords in the similar situation with any reasonable chances to establish facts occurred in distant past and necessary for substantiating their claims? How does the relevant law take into consideration the lapse of time during which the applicants and landlords in the similar situation were not allowed to raise their claims to recover their financial losses? In particular, are ordinary courts obliged to establish relevant facts necessary for deciding their cases, such as relevant levels of rents in given locations? Or, is the burden of proof in the cases carried exclusively by the claiming landlords?
3. Given the persisting discrepancies between the respective case law of the Constitutional Court on the one hand and certain ordinary courts on the other, could the claims of the applicants and other landlords in the similar situation be dealt with in the proceedings complying with the principle of reasonable length?

2. In their Observations – in accordance with paragraph 14(b)(i) of Practice direction on written pleadings issued by the President of the Court in accordance with Rule 32 of the Rules of Court – the Government shall limit their Observations to answering the questions asked only. In principle, unless it is necessary with regard to the asked questions or the development of proceedings before the Court on the submitted applications, at present the Government are not expressing their opinion on the common observations of the Applicant Vomočil, the Applicant Company and *Občanské sdružení majitelů domů, bytů a dalších nemovitostí v České republice* [the Civic Association of the Owners of Houses, Flats and Other Immovables in the Czech Republic] (hereinafter "the Intervening Association") of 28 April 2008 (hereinafter "the Applicants' common observations") and the individual observations of the Applicant Vomočil and the Applicant Company of that day and of 17 April 2008, respectively, and on all of the applicants' other submissions that were sent to the Government by the Court in the meantime for information only.

The Government expect that if at least one of the applications now under consideration is declared to be admissible, they will be given an opportunity to

express their opinion on the above observations within their supplementary observations submitted under Rule 59 § 1 of the Rules of Court.

PROCEDURE

I. ON PROCEEDINGS ON SELECTED APPLICATIONS

3. The Government took note of the fact notified to them in the Court's letter dated 29 April 2008 that the consideration of application No. 11179/06, submitted by Mr Oskar Morawetz against the Czech Republic, had been adjourned *sine die*. Before the proceedings on this application are resumed, the Government do not consider it necessary to express their opinion on its admissibility and merits.

4. The Government also took note of the fact that in the Court's decision of 25 March 2008 application No. 11163/06, which had been submitted to the Court by Mr Vladislav Hlaváček and Mr Václav Hlaváček (hereinafter "the Applicants Hlaváčeks") against the Czech Republic, had been struck out of the list of cases on the grounds of the fact that the applicants had not insisted on a further examination of their application.

The Government fully respect the Applicants Hlaváčeks' will not to insist on the consideration of their application and it is not their role to assess their decision in any way. However, in this place they have to resolutely protest to the accusation that they have exerted any pressure on the Applicants Hlaváčeks or any other applicants, either directly or through media. At the same time the Government are taking the liberty of expressing their doubts that the Applicants Hlaváčeks' decision is a consequence of media's alleged pressure after quotations (generally inaccurate, torn out of context, and therefore misleading) from the Government's proposed observations on the admissibility and merits of the applications of 31 December 2007 (hereinafter "the Government's initial observations") appeared in the media (pp. 10 and 11 of the Applicants' common observations).[1]

In general, the Government are not aware of any media campaign in the Czech Republic against the applicants – either against those whose applications were selected as pilot cases or against any other applicant – if, however, the applicants do not take free public presentation of various (and often contradicting) opinions on socially a very significant and sensitive issue, which the issue of regulation of tenement housing, and housing in general, undoubtedly is, as a cam-

[1] In this connection the Government would refer to the fact that the draft observations were sent for commentaries on 12 November 1997 and the first article reporting on the content of the observations appeared in the media on 28 November 1997 (article by T. Fránek at the *aktualne.cz* website, which is referred to in footnote 4 in the Applicants' common observations). However, the Applicants Hlaváčeks' letter in which they withdrew their application and in which they mentioned the alleged "*media campaign conducted against the applicants in [the Czech Republic]*" is dated 15 October 2007.

paign. Such society-wide discussion is under way in the Czech Republic and the Government cannot prevent it.

5. In this connection the Government consider it to be desirable to also protest against the applicants' assertion that the Government's method of defence lacks dignity, and for which the Government allegedly use "*in addition to threats in the form of more-than-likely managed information leaks [...] also the phrasing of [its] observations itself, which does not provide a legal assessment of the case but is actually a personal attack on the Applicants and their legal representation – whereby the latter is especially absurd from the legal perspective*." "*The Applicants, their legal representatives and the Intervening Party*" further assert the following: "A *'battle down to the last man', without taking the actual situation into consideration, is after all typical for the Czech Republic's Government, as the Government denies any fault on its part and is not willing to make good, even in a situation that obviously involves the longstanding and systemic disregard of human rights and the Convention, which are inherent in the legal relationships in the Czech Republic*." (p. 13 of the Applicants' common observations). The Government consider these diatribes to be entirely absurd; nevertheless, they believe that they cannot ignore them without a brief commentary.

In the first place, the Government again deny any managed information leaks and they do not understand at all how a leak of several fragmented quotations from the text of their observations, then being prepared, on the admissibility and merits of the applications to the media could do them any good more than one month before the set deadline for sending the observations to the Court.

The Government are also not aware that the phrasing of their observations detracted from the applicants' and their counsels' human dignity. If it perhaps is not the case of the Government's observations on these applications, but on other applications (as mentioned on page 13 and 14 of the Applicants' common observations), it is not clear to the Government why the Applicant Vomočil's legal counsel and the Intervening Association refer to that as late as now.

Finally, as regards the criticism about their battle *"down to the last man, without taking the actual situation into consideration"* the Government would like to mention some statistics concerning applications submitted against the Czech Republic and communicated to them by the Court (information as at 30 June 2009):

- out of a total of 445 cases finally disposed of as of this date, in 131 cases the Czech Republic has been found to have violated at least one right or freedom guaranteed by the Convention, which the applicants have claimed; in just satisfaction, the Czech Republic was obligated to pay them a total of EUR 1,092,114;
- in 200 cases, following the Government's observations, the Court has declared the applications to be inadmissible in its decisions or in its judgments has found that the Convention has not been violated;

– in 79 cases, the Government concluded a friendly settlement with the applicants, and under those settlements they have paid them EUR 984,865.

In other words, in 45% of the cases finally disposed of to date the Government's alleged battle *"down to the last man, without taking the actual situation into consideration"* has led the Court to the conclusion that the Convention has not been violated or that it is necessary to declare the application to be inadmissible. The same approach taken by the Government has further been manifest in the fact that in 18% of the cases they have concluded a friendly settlement, with the total amount that has been paid *ex gratia* in this way is comparable with the total amount that the Government has been obligated to pay in 29% of all the cases finally disposed of to date.

In the Government's opinion, these numbers are, *per se*, sufficiently eloquent and they clearly illustrate the Government's entirely balanced approach to the defence of the Czech Republic in proceedings before the Court.

II. ON THE "PILOT-JUDGMENT" PROCEDURE

6. The Government would note that out of the four applications originally selected by the Court as "pilot", on the basis of which the whole issue of regulation of tenancy relationships in the Czech Republic is to be considered, the Court continues to examine only two (see §§ 3 and 4 above). In the Government's opinion, this fact *per se* does not prevent the application of the "pilot-judgment" procedure.

7. Nevertheless, in this connection the Government consider it to be necessary to express their opinion on the doubts about the selection of the pilot cases raised by the applicants and the Intervening Association. In their common observations, the applicants welcome the fact that the "pilot-judgment" procedure was selected for the purpose of examining the applications, but at the same time they contest the selection of the pilot cases in various respects and instead of the selected applications they propose other ones (pp. 6 to 9 of the observations).

8. First of all, the applicants believe that for their case to be considered as a pilot case, their consent is necessary.

The Government do not share this opinion of the applicants. Eventually, the necessity to obtain an applicant's consent to the consideration of his case as a pilot case may mean that the use of the "pilot-judgment" procedure could be entirely frustrated if none of the applicants were willing to provide his consent.

On the other hand, it is evident that the "pilot" applicant can feel certain responsibility for the destiny of the other applications concerning the same issue, and he may not be willing or able to bear this burden. However, in the Government's opinion the primary criterion should not be the applicant's willingness to express his opinion also on issues related to the existence or non-existence of a

specific systemic situation of a violation of the Convention, but it should be his ability to do so.

9. The applicants further assert that their own cases are not appropriate to be considered as pilot cases,[2] and offer to the Court three other applicants whose cases should be examined as pilot cases.

In the first place, the Government do not consider it conceivable for the individual parties – whether the applicants, the Government or even a third party – to propose to the Court any specific cases that should be considered as pilot cases. In the Government's opinion, the role of the parties should have been (or should be) to express their opinion, in particular, on whether the selected cases are indeed sufficiently representative in the sense that on their basis a decision can be made on whether or not there is a certain systemic situation of a violation of the Convention. If this is not the case, the parties should clearly specify the reasons that lead them to such a conclusion and that should make it evident *in abstracto*, what characteristics the selected case(s) should have to make it/them capable of being considered to be pilot(s). It would then be only up to the Court to select, where necessary, some other pilot cases on the basis of the above information and after critical assessment thereof.

In their initial observations the Government noted that at that stage of the proceedings the Court (and the Government too) did not have sufficient information to enable it to reliably establish the appropriateness of the selected cases as pilot cases. At the same time the Government invited the applicants, through the Court, to supply the Court with at least basic information on their cases, from which it would be possible to gain a basic overview of the applicants' structure, which would, in turn, make it possible to assess the "representative" nature of the selected cases. Although there is not question that it must be easy for the Intervening Association to provide the Court with information at least on the cases of its members (who, *nota bene*, apparently make up more than four fifths of all the applicants who have resorted to the Court with their applications concerning the regulation of tenancy relationships in the Czech Republic), no such information is

[2] Nevertheless, the Government is not entirely in the clear as to the reasons for this conclusion.
As regards the fact that the selected applicants are allegedly not representative from the point of view of the acquisition of ownership, then the applicants themselves contest the relevance of this criterion (p. 7 of the Applicants' common observations). Even if they acknowledged its relevance, however, it would only mean that in their opinion some other (not represented in the initial selection of pilot applications) types of the acquisition of ownership should also be selected and not necessarily that the selected cases should be replaced with other cases.
The applicants also do not specify in any way why the selected cases are inappropriate with regard to the criterion of "types of units present in the building". In fact, they themselves also deny the relevance of this criterion (p. 8 of the Applicants' common observations).
Finally, as regards the classification of the applicants by whether or not they have used domestic remedies, the Government consider the selection of the pilot cases to be fairly representative, because only the Applicant Vomočil used, in a certain way, at least one remedy, while other applicants remained "legally passive" (*cf.* §§ 322 to 329 of the Government's initial observations). However, the legally passive attitude in relation to the existing domestic remedies is entirely predominant among the applicants.

contained in the Applicants' common observations, with the exception of some vague and unsupported information on the structure of the group of the applicants from the point of view of their acquisition of ownership (pp. 7 and 8 of the Applicants' common observations).

10. The Government regard it as symptomatic that, again, the applicants do not provide even the basic specific information on the offered pilot cases, with the exception of their assurances that they have acquired their ownership in various ways (however, they do not mention those ways at all) and that they have exhausted virtually all domestic remedies.[3]

11. From all of the Applicants' written submissions to date their unwillingness, and it remains a question whether or not this is a self-serving unwillingness, to inform the Court about the specific circumstances of their cases is clearly evident, as is their sometimes even tenacious effort to attack the Government, for various reasons, for the fact that they are doing their best to make up for this lack of information.[4]

THE FACTS

I. CIRCUMSTANCES OF THE CASES

12. The Government are not aware of any new factual circumstances concerning the cases under consideration.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. REGULATION OF TENANCY RELATIONSHIPS

13. Since there has been certain development in the regulation of tenancy relationships at both the legislative level and the courts' case law level, particularly the Constitutional Court's case law, since the submission of the Government's initial observations the Government consider it to be appropriate to briefly inform the Court about those changes.

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[3] The applicants have not even submitted to the Court the consent of the "pilot" applicants proposed by them as cases that would be considered as pilots, although in their opinion it is precisely such consent which should be a prerequisite for the use of the "pilot-judgment" procedure.

[4] A typical example of this approach is the effort to contest the Government's right to *"view and have free access to all the materials and actions that, for example, Johny Vomočil led with his tenants"*, because in the applicants' opinion these documents are not directly linked to the application (p. 10 of the Applicants' common observations). The Government can hardly imagine that the facts concerning proceedings on the domestic remedy against a violation of the right that constitutes the subject matter of this application could be reasonably regarded as irrelevant for the decision on the admissibility and merits of the application.

(i) Act No. 107/2006

14. On 11 June 2008 the Ministry for Regional Development issued, on the basis of Act No. 107/2006, on unilateral rent increase (see §§ 159 to 161 of the Government's initial observations for more details), a notice (published as No. 214/2008 in the Collection of Laws), in which, *inter alia*, the maximum level of rent to which the landlord can increase the rent with effect from 1 January 2009 was determined.

On 25 June 2009 the Ministry for Regional Development issued a notice (published as No. 180/2009 in the Collection of Laws), in which the maximum level of rent for the period after 1 January 2010 – and in chosen locations (see § 15 below) also after 1 January 2011 and 1 January 2012 – was determined.

For an easy calculation of the unilateral rent increase 'rent calculators' will again be available on the website of the Ministry for Regional Development (*www.mmr.cz*).

15. On 15 May 2009 an amendment to Act No. 107/2006 was passed (Act No. 150/2009), and in consequence of this amendment the period during which the 'target rent' is to be reached (see §§ 159 to 161 and 464 to 466 of the Government's initial observations for details) was extended to 2012 (as against the originally expected year 2010). This amendment concerns flats in the city of Prague, in municipalities in Central Bohemia with a population of more than 9,999 as at 1 January 2009, and in the cities of České Budějovice, Plzeň, Karlovy Vary, Liberec, Hradec Králové, Pardubice, Jihlava, Brno, Olomouc, and Zlín.

The reason for this distribution of the last stage of the deregulation over three years was the fact that in the above locations too high levels would be reached due to increases in the prices of flats from which the target rent is calculated,

16. The Government submit to the Court for its information as Enclosure 1 specific up-to-date information on the development of rents for model flats (see Tables 10a to 10d and 11 in the Government's initial observations).

In this connection, the Government would then only draw attention to the fact that if according to the applicants' calculations, on which the Government do not further comment at the moment, the regulated rent should reach in 2010 the level of the simple replacement costs allegedly "only" in 30 out of a total of 6,248 municipalities in the Czech Republic (pp. 31 and 32 of the Applicants' common observations), this would also mean that such level would be reached in an overwhelming majority of flats with regulated rent, because these are generally located in those 30 municipalities (this concerns, in particular, Prague and other big cities); on the other hand, in an overwhelming majority of municipalities there are no flats with regulated rent at all.

(ii) The Civil Code

17. On 16 April 2009 the Government laid before the Chamber of Deputies of the Parliament of the Czech Republic, a Bill amending the Civil Code and other related laws (see Enclosure 2).

The amendment concerns, in particular, special provisions on renting flats (Sections 685 to 716 of the Civil Code). In addition to a number of rather minor changes in some of the provisions, the amendment brings the following material changes (additions are marked bold, repealed parts are struck through) in provisions governing the rent and passage of tenancy in the case of the tenant's death:

"Section 696

(1) The rent at the moment of conclusion of the lease contract or change in the rent during the tenancy relationship shall be arranged for in an agreement between the landlord and the tenant, unless this Act or a separate regulation stipulate otherwise.

(2) If the rent is not agreed and if the rent does not correspond to the usual level of rent in the place and time in question, then the court shall decide, upon the landlord's or the tenant's motion, to change the rent to the usual level of rent in the place and time in question. The change in rent can be granted as from the day of the filing of the motion with the court.

(3) The court can also decide pursuant to subsection 2 in cases of tenancy agreed in perpetuity, where the rent was agreed and where the circumstances have changed so materially that the change has brought about a gross disproportion in the parties' rights and obligations. The petitioner must prove that he could not reasonably anticipate or influence the change.

(4) Provisions of subsections 2 and 3 shall not apply to the determination of rent in flats in housing cooperatives.

~~(2)~~**(5)** The method of calculating the amount of service charges for the use of the flat and the method of their payment shall be stipulated by a separate regulation."

"Section 706

(1) ~~If the tenant dies and where the flat is not in spouses' joint tenancy, then the tenant's children, parents, siblings, son-in-law and daughter-in-law shall become its tenants (joint tenants), if they prove that they lived in a common household with him/her on the day of his/her death and if they do not have their own flat.~~

~~(2) Also the tenant's grandchildren and persons taking care of the common household of the deceased tenant or persons dependent on him/her as regards their upbringing shall become tenants (joint tenants), if they prove that they had lived with him/her in the common household continuously for at least three years prior to his/her death and if they do not have their own flat. In case of the tenant's grandchildren, the court may decide for reasons worthy of special consideration that they could become the tenants, even if their stay in the common household with the tenant had not lasted for three years. In case of persons whom the flat tenant housed after the conclusion of the lease contract the first sentence shall apply to them only if the tenant and the landlord concluded a written agreement on that; this shall not apply in case of the tenant's grandchildren.~~

~~(3) If the tenant of a flat in a housing cooperative dies and where the flat is not in spouses' joint tenancy, upon the death of the tenant his/her membership of the housing cooperative and the flat tenancy shall pass to the heir to whom the membership share has passed.~~

(1) If the tenant dies and where the flat is not in joint tenancy, the rights and obligations relating to the tenancy shall pass to the person who lived with the tenant in a common household as at the day of the tenant's death and who does not have his/her own flat. If this person is someone else than the tenant's spouse, partner, parent, sibling, son-in-law, daughter-in-law or child, then the rights and obligations relating to the tenancy shall only pass to that person if the landlord had consented to his/her living in the flat. Such consent shall be in writing.

(2) After the passage of the tenancy under subsection 1 the tenancy shall end no later than within two years from the moment of passage. The first sentence shall not apply if the person to whom the tenancy has passed was at least 75 years old at the moment of the passage of the tenancy. The first sentence shall also not apply if the person to whom the tenancy has passed has not reached the age of 18 at the moment of the passage of the tenancy; in that case the tenancy shall end no later than on the day on which this person reaches the age of 20, unless the landlord and the tenant agree otherwise.

(3) If multiple persons satisfy the conditions for the passage of tenancy the rights and obligations relating to the tenancy shall pass to all of them jointly and severally. If, however, the tenant's child is among these persons this child shall have priority for the rights and obligations relating to the tenancy to pass to him/her.

(4) Each of the persons satisfying the conditions for the passage of tenancy can declare, within one month from the tenant's death, that he/she does not wish to carry on with the tenancy; his/her tenancy shall end on the day of the notification.

(5) If the tenant of a flat in a housing cooperative dies and where the flat is not in spouses' joint tenancy, upon the death of the tenant his/her membership of the housing cooperative and the tenancy of the flat shall pass to the heir to whom the membership share has passed."

In the explanatory report on those provisions the following is noted, *inter alia*:

"On [...] Section 696(2), (3) and (4)

After the end of the effect of Part One of Act No. 107/2006, on unilateral rent increase, the landlord and also the tenant will be allowed to request rent at the level usual in the place. That means that the rent can be increased, but also decreased. If the contracting parties fail to reach agreement on the rent the court shall decide on the amount of the rent.

The court will be allowed to decide in the same way also in cases where the rent was agreed on, but the change in the circumstances is so material that it has brought about a gross disproportion in the parties'

rights and obligations. The petitioner must prove that he could not reasonably anticipate or influence the change (the usual clause of *rebus sic stantibus*).

Also the inclusion of a definition of "usual rent" was considered. However, it was then noted that it would be sufficient to use the existing legislation by analogy – Act No. 151/1997 on property valuation and on changes to certain laws. More specifically, Section 2 of the above cited Act indicates that the level of rent usual in a place is a rent for which it would be possible to rent a flat in the particular place, condition, and time. Exceptional circumstances on the market, the landlord's and tenant's personal situation or special popularity may not be reflected in the usual level of rent.

It is explicitly stipulated that the opportunity to claim usual rent does not apply to flats in housing cooperatives."

"On [...] Section 706

To strengthen the landlord's opportunities to dispose of the flat. The tenancy shall automatically pass to the specified closest relatives who lived with the tenant in a common household as at the day of his/her death. The tenancy shall only pass to other persons who lived with the tenant in a common household as at the day of his/her death if the landlord has given his/her consent in writing to their living in the flat. The condition that the person to whom the tenancy is to pass does not have his/her own flat has to be satisfied in all cases. At the same time the Act provides for the duration of the tenancy, which will be limited to two years after the passage of the tenancy, unless the landlord and tenant agree otherwise. In contrast to the proposal contained in the code and the present wording, the list of entitled persons has been pared and does not include the tenant's grandchildren. The reason is because this group is the most misused for illicit trade in flats and it artificially protracts the regulation of rents. Since the objective of the presented proposal is to remove regulated flats, this restriction, which is intended to help the process of deregulation and introduction of market mechanisms, has been chosen. There is nothing to prevent the re-inclusion of grandchildren in a new code.

The purpose of 'the social clause' is to protect, after the passage of tenancy, persons who have reached the age of 75 or, on the other hand, have not reached the age of 18 years. In these cases the limit on the duration of the tenancy to two years would not apply.

In the case of multiple persons who have become entitled by virtue of the passage [of tenancy], they shall become joint tenants. If the tenant's child is among the entitled persons only this child (children) shall become the tenant(s).

An opportunity for the entitled person to 'reject' the passage of tenancy has also been provided for."

(iii) The Constitutional Court's case law

18. On 28 April 2009 the Constitutional Court's plenum adopted an opinion (File Ref. Pl. ÚS-st 27/09; published in the Collection of Laws on 18 May 2009 under No. 136/2009), the ruling of which reads as follows (the whole text of the opinion, including the substantiation, forms Enclosure 3 to the Government's present Additional Observations):

> "I Ordinary courts can decide on rent increase for the period from the bringing of the action to 31 December 2006. They cannot increase the rent for the period prior to the bringing of the action because this is prevented by the nature of the decision with constitutive effects; rent increase for the period from 1 January 2007 cannot be granted because since that date unilateral rent increase has been allowed under Section 3(2) of Act No. 107/2006 on unilateral rent increase and a change to Act No. 40/1964, the Civil Code, as amended.
>
> II Ordinary courts are obligated to examine actions brought by landlords (flat owners) against the State for compensation for the damage [based on Act No. 82/1998, on liability for damage caused in the exercise of public authority by a decision or incorrect official procedure and amending the Czech National Council's Act No. 358/1992 on notaries public and their activities (the Notary Code)] that they have allegedly suffered in consequence of long lasting unconstitutional failure to act by the Parliament, consisting in failure to adopt a separate legal regulation defining the cases in which the landlord is entitled to unilaterally increase the rent and payment for the service charges for the use of the flat and to modify other terms and conditions of the lease contract (the Constitutional Court's Finding of 28 February 2006 under File Ref. Pl. ÚS 20/05), from the point of view of their right to compensation for an imposed restriction of their ownership right under Article 11 § 4 of the Charter of Fundamental Rights and Freedoms and in that sense to provide the parties to the proceedings with procedural room for expressing their opinion on the above change of legal assessment. The claim against the State for compensation for the imposed restriction of the ownership right under Article 11 § 4 of the Charter of Fundamental Rights and Freedoms is subsidiary to the landlord's claim for rent increase on the tenant only for the period beginning on the day of bringing the action. For the period prior to that day, the landlord can lodge a claim for compensation for the imposed restriction of ownership right against the State directly."

19. The Constitutional Court has already applied the opinion of the plenum for example in its Finding File Ref. I. ÚS 2220/08 of 10 June 2009 (see Enclosure 4), whereby it quashed the ordinary courts' decisions rejecting the applicant's action against the Czech Republic for compensation for damage allegedly caused to him in the form of loss due to rent regulation (see also Finding File Ref. II. ÚS 481/05 and Finding File Ref. II. ÚS 884/08 of the same date).

B. OTHER RELEVANT LEGISLATION

(i) The Rules of Civil Procedure (Act No. 99/1963)

20. Selected provisions relating to deliberations and evidence in civil proceedings have the following wording (as in force until 30 June 2009):

"Section 118

(1) Having opened the hearing, the presiding judge shall invite the claimant (petitioner) to present his/her action (motion to initiate proceedings), or to convey its content, and he shall invite the defendant (other parties to the proceedings) to present or convey the content of their written pleadings submitted in the case; the presiding judge shall read or convey content of submissions of absent parties. The presiding judge shall invite the defendant (another party) who has not yet submitted his written pleading to express his opinion on the matter. If necessary, the presiding judge shall also invite a party to supplement his/her assertions and to propose evidence in support of such assertions.

(2) Having carried out the acts under subsection 1, the presiding judge shall communicate the outcomes of the preparations for the hearing and on the basis of the outcomes of the proceedings until then he shall note which of the legally significant assertions of facts made by the parties can be regarded as identical, which legally significant assertions of fact remain in dispute and which of the proposed pieces of evidence proposed so far will be adduced, or which pieces of evidence the court will adduce even when the parties have not proposed them.

[...]

Section 118a

(1) Should it turn out during the hearing that a party has not given account of all relevant facts or has not given a complete account of them, the presiding judge shall invite this party to supplement his/her assertions and he shall also advise him of the subject matter to be covered by the supplementing assertions and what the consequences of failure to comply would be.

(2) If the presiding judge believes that the case can be legally assessed differently from the party's legal opinion, he shall invite the party to supplement the account of the relevant facts to the necessary extent; he shall proceed similarly as under subsection 1.

(3) If the presiding judge finds during the hearing that a party has not yet proposed the evidence necessary to prove all of his/her contentious assertions, he shall invite the party to designate such evidence without any undue delay and shall advise the party of the consequences of failure to comply.

[...]

Obligation of evidence

Section 120

(1) The parties are obligated to designate evidence to prove their claims. The court shall decide which of the proposed pieces of evidence will be adduced.

(2) In cases in which proceedings can be initiated without a motion, as well as in proceedings on a permission to enter into marriage, in proceedings on the determination and denial of parenthood, in proceedings on the determination whether the consent of the child's parents is necessary for adoption, in adoption proceedings, in proceedings on the appointment of an arbitrator or presiding arbitrator, in proceedings on asset to eviction from a rented flat, in proceedings on the lawfulness of the detention of a foreigner and on his release, and in proceedings on certain questions of companies, cooperatives and other juristic persons (Section 200e), the court shall also adduce other evidence required to establish the facts of the case in addition to the evidence proposed by the parties.

(3) If proceedings referred to in subsection 2 are not involved the court can adduce evidence other than that proposed by the parties in cases where the need to adduce it in order to establish the facts of the case has emerged during the proceedings. If the parties do not designate the evidence necessary to prove their claims the court shall base its establishment of the facts of the case on the evidence that has been adduced.

[...]"

21. With effect from 1 July 2009 the first sentence of Section 120(3) shall have the following new wording:

"If proceedings referred to in subsection 2 are not involved the court can adduce evidence other than proposed by the parties in cases where such evidence is needed to establish the facts of the case and it follows from the content of the file."

(ii) Act No. 6/2002, on courts and judges

22. Section 174a(1) of the Act, as amended by Act No. 7/2009 (with effect from 1 July 2009) reads as follows:

"If a party or a person who is a party to the proceedings believes that there are delays in the proceedings, he/she can file a motion with the court, requesting the court to determine a time limit for the making of a procedural act in the case of which this person believes there are delays in proceedings (hereinafter 'motion to determine a time limit'). The motion to determine a time limit for the making of a procedural act shall not be conditional on filing a complaint under Section 164."

THE LAW

I. ON THE FIRST AND SECOND QUESTION POSED BY THE COURT

23. The Court asks the Government whether there has been an effective remedy whereby the applicants and other landlords in the similar situation could claim before courts of ordinary jurisdiction increases in rent retrospectively, and whether there has been any temporal or other limitation in that regard.

The Court further asks, if such a remedy has been in place, whether it provides the applicants and other landlords in the similar situation with any reasonable chances to establish facts occurred in distant past and necessary for substantiating their claims, and how does the relevant law take into consideration the lapse of time during which the applicants and landlords in the similar situation were not allowed to raise their claims to recover their financial losses. In this connection the Court is interested to know, in particular, whether ordinary courts are obliged to establish relevant facts necessary for deciding their cases, such as relevant levels of rents in given locations, or whether the burden of proof in the cases is carried exclusively by the claiming landlords.

(i) On the existence of an effective remedy

24. In their initial observations the Government advised the Court of the fact that the selected applicants had and have at their disposal effective remedies against the violation of rights and freedoms guaranteed by the Convention which they claim in the proceedings before the Court, these remedies being in particular an action against the tenant for rent increase and an action for damages against the State (see §§ 265 *et seq*.).

In the meantime, there has been a gradual clarification of, in particular, the Constitutional Court's case law on these two remedies; this development led to the adoption of the opinion of the Constitutional Court's plenum on 28 April 2009, whose conclusions are *in extenso* repeated above (§ 18).

25. In this connection the Government have to dismiss the assumption on which the Court's first question is apparently based and according to which precisely an action for rent increase should perhaps be thought to be *the* effective remedy that the Czech Republic was or is obliged to make available to the applicants under Article 13 of the Convention for the purpose of remedying the violations of the Convention pleaded by them. This action can be such an effective remedy (see §§ 26 to 28 below), but at the same time other remedies, or their combinations (see, *mutatis mutandis, Hartman v. the Czech Republic*, No. 53341/99, judgment of 10 July 2003, § 81), can be such effective remedies.

a) Claim for rent increase

26. In the opinion of its plenum of April 2009, the Constitutional Court has confirmed its existing case law which indicates that the applicants and other landlords in the similar situation can claim, using action against the tenant, rent in-

crease with effect from the day of bringing the action (point I of the ruling of the opinion; *cf*. also the summary of the relevant Constitutional Court's Findings contained in points 4 to 6 of the substantiation of the opinion).

27. In the case of the Applicant Vomočil, who was the only one of the selected applicants who had brought such action, the *dies a quo* is therefore theoretically 14 July 2003 (see § 17 of the Government's initial observations).

28. Since the Constitutional Court has deduced the ordinary courts' obligation to decide on such actions from the non-existence of a regulation that would have allowed the landlords to unilaterally increase the rent and the existence of which had been envisaged in Section 696(1) of the Civil Code, as in force prior to 30 March 2006 (see §§ 270 to 275 of the Government's initial observations for details), and since from 1 January 2007 the landlords could again unilaterally increase the rent under the newly passed Act No. 107/2006 (see §§ 159 *et seq*. of the Government's initial observations for details), the Constitutional Court has explicitly limited the ordinary courts' obligation to decide on actions for rent increase by the date 31 December 2006.

Apparently, from the above it implicitly follows that the second boundary is 20 March 2003 in this case, because on the day before that day the Constitutional Court repealed the last regulation which regulated rent (see §§ 143 to 148 and 222 of the Government's initial observations for details).

b) Claim for compensation against the State

29. In addition to an action for rent increase against the tenant, the landlords also have at their disposal an action for damages against the State. In the Constitutional Court's opinion, such actions, which the landlords have already brought before courts in a number of cases, should be examined as claims for compensation for a restriction imposed on the ownership right under Article 11 § 4 of the Charter of Fundamental Rights and Freedoms (promulgated in the resolution of the presidium of the Czech National Council as No. 2/1993 in the Collection of Laws; hereinafter "the Charter") (point II of the ruling in the opinion of the Constitutional Court's plenum of April 2009).

30. At the same time, the Constitutional Court has not rigidly restricted the period of time for which the landlords could theoretically claim such compensation. It only noted that raising a claim against the State for the period covered by the action against the tenant for rent increase is tied to non-satisfaction of the claim raised against the tenant.

31. It is therefore necessary to base considerations on the fact that in the opinion of the Constitutional Court's plenum, Article 11 § 4 of the Charter cannot be interpreted to mean that compensation is to be granted for each restriction of the ownership right, but only for certain qualified cases of restriction (point 16 of the substantiation of the Constitutional Court's opinion). The Constitutional Court did not consider it necessary to exhaustively define the required characteristics of

such a qualified restriction of the ownership right, but deduced in general that such characteristics can be the following:

- restriction of the ownership right which goes over and beyond the obligations that the law in general provides for all entities having an ownership right while observing the principle of equality (point 17 of the substantiation of the Constitutional Court's opinion);
- the intensity of the restriction of the ownership right, which can be expressed by a number of factors, particularly by the question of the extent of the restriction itself and the duration of such restriction, i.e. whether it is a temporary or permanent restriction (point 18 of the substantiation of the Constitutional Court's opinion).

The time boundaries of the claim for compensation for the restriction of the ownership right will therefore follow from the answer to the question of what was the period of time within which the restriction of the ownership right in the case of a specific applicant had the characteristics of a qualified restriction of the ownership right, for which compensation under Article 11 § 4 of the Charter shall be due.

32. It should not be ignored that the Constitutional Court's argumentation is purely abstract. In connection with its Findings of 2000 and 2002, whereby it repealed the then existing rent regulating legislation for its being unconstitutional (see §§ 186 and 187 of the Government's initial observations for details), the Constitutional Court's plenum in point 18 of its opinion mentions the "*possible* violation of the ownership right of a number of landlords" and a restriction of "the constitutionally guaranteed ownership right of *some* landlords".

The applicants' opportunity to raise their claims against the tenant and/or the State, and the ordinary courts' obligation to decide on those claims, does not mean *per se* that any claims raised by a specific landlord are entirely, or at least partially, justifiable and that the ordinary courts are obliged to grant them (*cf.* §§ 412 to 414 of the Government's initial observations). The Constitutional Court referred to that again in point 22 of the substantiation of its plenary opinion:

> "The question of whether in the case in question there existed the applicant's specific claim for compensation for an imposed restriction of an ownership right under Article 11 § 4 of the Charter remains to be answered by the ordinary court, which has to consider to what extent his fundamental right to own property was interfered with in consequence of regulated rents, as well as whether in his case the above conditions for the emergence of the right to compensation were satisfied. This is because the unconstitutionality *per se* of legislation on rent regulation did not mean that in each individual case the fundamental right of the landlord (the flat owner) was violated."

(ii) On the burden of proof in proceedings on remedies

33. For reasons specified below, the Government do not believe that documenting the factual circumstances that are necessary to support their claims in

proceedings on the above actions against the tenants or the State would be a serious problem for the applicants or other landlords in the similar situation.

a) On the (im)possibility for landlords to raise their claims for the coverage of financial losses

34. With regard to the above facts mentioned in the answer to the Court's first question, the Government are not aware that there was a period during which the applicants and landlords in the similar situation were prevented from raising their claims for the coverage of financial losses and that should therefore be taken into consideration in some way by the relevant law, as the Court suggests in its second question. The landlords were not prevented in any way from raising their claims against the tenants and the State, and many of them have done so, particularly since 2003 when in the Czech Republic there was no regulation limiting rent in consequence of the Constitutional Court's repealing Findings (see § 224 of the Government's initial observations).

That cannot be changed by the fact that the ordinary courts' case law in the domain in question was evolving and that some courts were originally against the possibility to decide on actions for rent increase against the tenant or on actions for compensation against the State. In both groups of cases, this case law was always reversed by the decisions of the Constitutional Court, which, in principle, granted all constitutional appeals that the landlords filed with it, whether they concerned ordinary courts' decisions in proceedings against the tenant (see § 281 of the Government's initial observations) or against the State (see Findings mentioned in § 19 above).

35. On this occasion the Government consider it appropriate to draw attention again to the fact that the national authorities may provide a higher level of protection of human rights and fundamental freedoms than the Convention does and therefore the Court can consider it to be sufficient to provide a lower level of protection than the one provided by the domestic law (see §§ 334 and 420 of the Government's initial observations). It is also quite significant that while the Charter in its Article 11 § 4 explicitly provides for the right to compensation also in the case of a "mere" imposed restriction of the ownership right in addition to expropriation, in Article 1 of Protocol No. 1 no such right is explicitly provided for.

36. Finally, as regards the financial losses, if any, suffered by the landlords in consequence of rent regulation, the Government have very thoroughly dealt with this issue in their initial observations (see §§ 487 to 538 in particular), in which they concluded that in general it cannot be believed that the burden that rent regulation for certain flats placed on the owners of the houses was unreasonable in the sense that it would not allow them to pay costs for the performance of obligations arising for them due to the ownership of these properties (§ 534 of the Government's initial observations), but the Government cannot, of course, *a priori* assert that it was actually the case of all the landlords (§ 538 of the Government's initial observations). As regards the selected applicants, it is at least debatable whether any financial losses can be considered in the case of the Applicant

Vomočil, whose net annual revenue from the immovable was, according to the expert's findings, CZK 679,644 (see §§ 575 to 577 of the Government's initial observations), or in the case of the Applicant Company, which acquired the immovable in question for a price that significantly reflected rent regulation (see §§ 592 to 595 of the Government's initial observations) and which considers the Government's proposal for the Court to request it to communicate the material circumstances of its case, a proposal which is entirely appropriate and legitimate with regard to the not abstract, but – in principle – very concrete nature of the Court's monitoring of the observance of the Convention (see e.g. *De Becker v. Belgium*, No. 214/56, judgment of 27 March 1962, § 14), to be the Government's attempt "*to fragmentise the opinion by drawing attention to individual cases*" (p. 5 of the Applicant Company's observations of 17 April 2008).

In support of their arguments on the level of regulated rent being sufficient to cover the costs incurred by landlords in performing their statutory obligations related to their ownership of the properties (see §§ 487 *et seq*. of the Government's initial observations), the Government attach, in an enclosure to these Additional Observations, the results of an extensive survey of the level of rent for flats in housing cooperatives (published after the sending of the Government's initial observations), which indicate that the Applicants' claim on the alleged impossibility to cover the costs, if only of ordinary maintenance, not to speak about the costs of repair and technical improvement of the houses, from the revenue from regulated rents is at least very questionable (see Enclosure 5).

b) On the relevant procedural rules concerning burden of proof in general

37. Whether actions against the tenants for rent increase or actions against the State for compensation for an imposed restriction of the ownership right are concerned, in both types of proceedings the courts follow the Rules of Civil Procedure; the relevant provisions of the Rules are quoted above (§§ 20 and 21).

38. The fundamental assumption - as in every civil dispute governed by the accusatorial principle - is that the burden of claim and the burden of proof are borne by the parties to the proceedings. Section 120(1) of the Rules of Civil Procedure, which stipulates that the parties are obligated to designate evidence to prove their claims, corresponds to that.

39. On the other hand, under Section 120(3) of the Rules of Civil Procedure the courts can adduce evidence other than proposed by the parties in cases where the necessity to adduce it in order to establish the facts has emerged during the proceedings (wording in force until 30 June 2009), or in cases where it is necessary to establish the facts and if they arise from the content of the file (wording in force since 1 July 2009).

Other provisions (see Sections 118 and 118a of the Rules of Civil Procedure), to a certain extent, also restrict the application of the accusatorial principle on which civil proceedings are conventionally based, and envisage a larger activity of the court in the interest of the due clarification of all relevant facts.

c) On the application of the general legal regulations on the burden of proof in the proceedings on landlords' claims

40. The Government are not aware of the applicants contesting in any way in their applications or observations the opportunity to document the factual circumstances that are necessary to prove their claims. In their initial observations, the Government drew the attention to a number of cases where the landlords were at least partly successful with their claims (see e.g. the cases mentioned in §§ 205, 206, 209 and 212 of the Government's initial observations), and this alone does not indicate that the landlords, as claimants, lacked evidence. Nor do the Government have any information that the landlords' actions were rejected on the grounds that the claimants failed to prove the facts claimed by them with this shortcoming stemming from the impossibility to prove facts that had occurred in a distant past.

41. In this connection the Government do not entirely understand the reasons that make the Court ask about facts that occurred "in distant past". From the point of view of the Court and its competence *ratione temporis*, in general the most distant relevant date is 18 March 1992, since which the Convention has been binding on the Czech Republic. Moreover, the specific cases that the Government mention, for example, in their initial observations (see §§ 205 to 212) suggest that the landlords raised their claims for the period since 2002. Although the meaning of "distant past" is certainly relative, the Government do not believe that its use is appropriate in this context, in comparison with, for example, proceedings on property restitution where it was often necessary to prove facts that had occurred even more than half a century earlier.

42. As regards the example of the "relevant level of rent in given locations", illustratively mentioned by the Court in its question, the Government would first of all point out that the courts' decision-making on the landlords' actions cannot be reduced to addressing this issue. This is because no legal regulation or the Constitutional Court's case law indicates that the ordinary courts have to increase the rent to the level of non-regulated rents for flats in the given locations, nor do they indicate that the courts have to award compensation to the landlords equalling the difference between this rent and the regulated rent.

The Constitutional Court has noted, for example in its pivotal Finding Pl. ÚS 20/05 of 28 February 2005, the following (see § 194 of the Government's initial observations for details):

> "The issue at stake is that the ordinary courts, despite the absence of presumed specific regulation, must decide on the rent increase and they must do so depending on the local conditions so that the discrimination mentioned above does not occur. With regard to the fact that in such cases it would concern finding and applying simple law, which does not appertain to the Constitutional Court, as it repeatedly emphasises in its case law, it refrains from offering specific decision making procedures and thus substituting the ordinary courts' function. It would only note that it is necessary to avoid arbitrariness; a decision must be based on rational arguments and thorough assessment of all circumstances of

> the case, the use of common principles and practice of civic life, the work of legal theorists and the courts' established case law that is in conformity with the Constitution."

Similarly, in the plenum's opinion of April 2009 the Constitutional Court point out (point 22 of the substantiation):

> "It should also be emphasised that the amount of the compensation claimed for the imposed restriction of the ownership right under Article 11 § 4 of the Charter need not be identical to the difference between the usual and regulated rents. Therefore the ordinary courts may not reject compensation claims against the State *a priori*, but they have to examine the individual claims while observing the above conclusions. In this sense it is therefore necessary to assess the alleged claim of the landlord (flat owner) as to the law from the point of view of the right to compensation under Article 11 § 4 of the Charter. In this respect, pursuant to Section 118a of the Rules of Civil Procedure the ordinary courts are obligated to provide sufficient procedural room for both parties to the proceedings to be able to express their opinion on a new assessment as to the law and, where necessary, present new evidence or arguments."

43. The ordinary courts' task is therefore to decide, on the basis of the principles formulated in the Constitutional Court's case law, so as to strike a fair balance between the landlords' right to peaceful enjoyment of their possessions and society's interest in the area of housing. The amount of rent in given locations in the case of flats not subject to regulation can therefore be only one of the arguments through which the landlords can support the justification of their claims before the courts.

44. In any case, the Government are convinced that it was not, and is not, difficult to obtain information on rents in the individual locations. In particular, in a number of cases the landlords do not only own flats subject to rent regulation but also flats not subject to this burden, and therefore they themselves must have a very intimate view of the situation on the market in this respect. The Applicant Vomočil can be a specific example of this; in his house, there were also flats not subject to regulation, which the Applicant let (see § 517 of the Government's initial observations).

Furthermore, when criticising the system of regulation of tenancy relationships in the Czech Republic the landlords in general refer exactly to the difference between the regulated rent and rent for flats not subject to regulation, and therefore supporting their claims by specific facts should not be a real problem for them.

Besides that, in the Czech Republic there exist institutions that monitor rents (e.g., the company *Institut regionálních informací, s.r.o.* [The Regional Information Institute], see *www.iri.cz* for details), and it is well known that the landlords (including the Intervening Association) use the data gathered by these institutions when presenting their arguments at the domestic level, and also in proceedings before the Court (see, e.g., p. 31 of the Applicants' common observations).

Finally, also the use of experts' services and submission of their expert opinions is not exceptional.

45. Of course, the general legislation applies here too; under this legislation the courts can, in particular, adduce evidence other than proposed by the parties in cases where the necessity to adduce it in order to establish the facts has emerged in the proceedings or in cases where it is necessary to establish the facts and if it arises from the content of the file (see §§ 37 to 39 above).

Point 22 of the substantiation of the opinion of April 2009 (as well as other decisions – see, e.g., Finding File Ref. IV. ÚS 175/08 of 9 September 2008 and others) shows that in rent regulation matters, the Constitutional Court puts a particular emphasis on the duty of the court to instruct the parties according to Section 118a of the Rules of Civil Procedure.

(iii) Conclusion

46. Referring to the above facts, the Government are convinced that the applicants had at their disposal an effective interconnected system of two domestic remedies against violations of the rights and freedoms guaranteed by the Convention, which they are now claiming in proceedings before the Court.

As the Government already noted in their initial observations (§ 318 *et seq*.), the raised plea of non-exhaustion of all remedies should be rejected by the Court only under the condition that the use of the remedies proclaimed by the Government would clearly lead to an unsuccessful outcome. The Government are convinced that in the case of the above remedies one should definitely not talk about the "existence of an absolute impossibility" of the applicants and other landlords in the similar situation to claim their rights at the domestic level (*cf. Costea and Others v. Romania*, No. 4113/04, decision of 31 March 2009, § 26).

II. ON THE THIRD QUESTION POSED BY THE COURT

47. The Government are also to answer the question of whether given the persisting discrepancies between the respective case law of the Constitutional Court on the one hand and certain ordinary courts on the other, the claims of the applicants and other landlords in the similar situation could be dealt with in proceedings complying with the principle of reasonable length.

(i) On the reasonableness of the length of the proceedings conducted by the selected applicants

48. The Government would note that they do not have any information on any proceedings conducted by any of the selected applicants in respect of rent, with the exception of the Applicant Vomočil.

49. The summary of the factual circumstances of the case contained in the Government's initial observations (§§ 17 to 24) shows that on 14 July 2003 the Applicant Vomočil brought actions before the Brno Municipal Court against six

tenants for the imposition of an obligation to sign an amendment to the lease agreement, on the basis of which the rent would be increased. The proceedings were terminated on 27 June 2007 when the court of first instance discontinued the proceedings, because the claimant had withdrawn the action (at that time it was no longer the applicant but the company JOHNY, s.r.o.).

Therefore the proceedings lasted for less than four years, and during this period courts at two levels of the judiciary considered the case (the court of first instance twice).

50. The length of the proceedings was undoubtedly affected by the fact that the judgment of the court of first instance, which rejected the action, was subsequently quashed by the appellate court, which in the substantiation of its decision pointed to a contradiction between the inferior court's legal opinion and the Constitutional Court's case law.

In this connection the Government would remark first of all that the reversal of one court's decision by a superior court's decision certainly cannot be regarded as an unjustified delay for which the State should be held responsible or which makes the length of the proceedings in question unreasonable in the light of Article 6 § 1 of the Convention. On the contrary, courts' diverging legal opinions can indicate the complexity of the proceedings in question (see, e.g., *Vojáčková v. the Czech Republic*, No. 15741/02, judgment of 4 April 2006, § 25), which is certainly also the case in the proceedings on the Applicant Vomočil's case.

With regard to the circumstances of the case (it concerned joined proceedings on six originally separate actions; during the proceedings the claimant changed), in the Government's opinion the total length of the proceedings cannot be viewed as unreasonable.

51. However, if the Applicant Vomočil believed that the length of the proceedings in his case could not be regarded as reasonable, he had an opportunity to use remedies against a violation of his right to a hearing within a reasonable time, which he had at his disposal in the period in question and which the Government specify below (see §§ 59 to 64).

52. The Government are not aware that the Applicant Company conducted any proceedings claiming a rent increase or compensation for the restriction of its ownership right, nor are they aware that the Applicant Vomočil conducted any other proceedings than the proceedings mentioned above.

(ii) On the reasonableness of the length of the proceedings *in abstracto*

53. The Government would reiterate that they are aware of the Court's effort to find in the proceedings on the selected applications, an answer not only to the question of whether, in these individual cases, rights and freedoms guaranteed under the Convention were violated or not, but also whether the found violations do not disclose some systemic deficiencies in the national law or practice concerning also other persons in the similar situation (see § 226 of the Government's initial observations).

54. However, the possibility of argumentation *in abstracto*, i.e. regardless of the specific circumstances of the individual cases, is certainly limited and the Government drew attention to these limits in relation to the possibility to assess *in abstracto* the proportionality of the interference with the landlords' right to a peaceful enjoyment of possessions caused by regulation of tenancy relationships (see, e.g., § 664 of the Government's initial observations).

55. In the Government's opinion it is even less possible to express a meaningful opinion on the question of whether despite the persisting discrepancies between the Constitutional Court's case law on the one hand and certain ordinary courts' case law on the other, there existed or exists a possibility that actions of landlords in the similar situation as the applicants will be dealt with in proceedings complying with the principle of reasonable length.

56. The Government would further point out that the discrepancies, if any, in the case law need not have been, and need not be, necessarily manifest in all the proceedings that the individual landlords have conducted or conduct at the domestic level.

In this connection the Government would refer to certain proceedings that they have already mentioned in their initial observations. For example, in proceedings conducted before the Tábor District Court (File Ref. 3 C 18/2005), the action for rent increase was partly granted. The proceedings were initiated on 28 January 2005 and ended on 7 July 2006, i.e. in less than a year and a half, and during this period the case was heard at three levels of the judiciary (see § 205 of the Government's initial observations for details).

On 31 January 2007 the Prague 4 District Court (File Ref. 28 C 389/2003) partly granted an action for the determination of rent. The proceedings were initiated on 25 August 2003 and ended on 20 December 2007. Therefore they lasted for four years and almost four months, and during this period the case was heard by courts at three levels of the judiciary (see § 212 of the Government's initial observations – an appeal on a point of law was lodged in the case; a decision on the appeal on a point of law was delivered on the last day under File Ref. 26 Cdo 5036/2007).

In none of the above proceedings were the discrepancies between the ordinary courts' and Constitutional Court's case law manifest in any way.

57. However, not even the lengths of the proceedings in which these discrepancies were reflected – specifically by the superior courts or even the Constitutional Court quashing the courts' originally rejecting decisions – certainly cannot be *a priori* regarded as unreasonable.

An example is the proceedings conducted before the Nymburk District Court under File Ref. 6 C 626/2004, in which, eventually, the landlord's action against the tenant was partly granted when the originally rejecting judgment of the court of first instance was quashed by the appellate court. The proceedings in this case lasted for almost two years, during which the courts of both instances each deliv-

ered two decisions on the merits (see § 209 of the Government's initial observations for details).

Similarly, it is possible to refer to proceedings conducted before the Pardubice District Court (File Ref. 10 C 178/2004), in which the ordinary courts' originally rejecting decisions were quashed by the Constitutional Court. In the subsequent proceedings before the court of first instance the parties to the proceedings reached settlement, under which the defendant accepted the obligation to pay the whole amount claimed by the claimant. The proceedings initiated on 30 September 2003 were thus ended on 9 May 2006, i.e. in two years and approximately eight months, and during this period the case was heard at three levels of the judiciary, including the Constitutional Court (see § 208 of the Government's initial observations for details).

58. The Government believe that in none of the cases cited above can the length of the proceedings be regarded as unreasonable.

(iii) On remedies against violations of the right to a hearing within a reasonable time

59. In any case, the Government are convinced that both the applicants and other landlords in the similar situation have had, and have, at their disposal effective remedies using which they could have, and can, achieve redress of the violation of their right to a hearing within a reasonable time as guaranteed in Article 6 § 1 of the Convention, as, after all, the Government mentioned in their initial observations (§ 283).

60. Therefore, if the Applicant Vomočil believed that proceedings in his case (see §§ 49 to 51 above) lasted for an unreasonably long time, he could have used the compensatory remedy provided for in Act No. 82/1998 on liability for damage caused in the exercise of public authority by a decision or incorrect official procedure, as amended by Act No. 160/2006. The Court has found this remedy to be effective (see *Vokurka v. the Czech Republic*, application No. 40552/02, decision of 16 October 2007, § 65).

Naturally, all other landlords in the similar situation, including the Applicant Company, have had or have the same opportunity.

61. Since 1 July 2004 the Applicant Vomočil and other landlords in the similar situation have also had at their disposal a preventive remedy in the form of a motion for the determination of a time limit for making a procedural act (Section 174a of Act No. 6/2002 on courts and judges).

62. The Government are aware that in the above-cited decision in the *Vokurka* case the Court did not find this remedy effective (§§ 51 to 57), exclusively due to the fact that its use is conditional on an unsuccessful exhaustion of another preventive remedy – complaint filed with an authority responsible for the State's administration of courts (a hierarchy complaint) – which the Court found ineffective in its judgment in the *Hartman* case (cited above, §§ 66 and 82). However, it did not declare a similar system of a preventive remedy introduced in Slovenia

ineffective, which it substantiated in the *Vokurka* decision (§ 56) by noting that the competence of Slovenian authorities "seems to be more elaborate and specific" and that in Slovenia an exhaustion of a preventive remedy is a condition for the use of a compensatory measure. On this occasion the Government consider it to be necessary to challenge the Court's opinion.

Firstly, the Government consider it to be rather surprising (and they dare say that, in a way, also unfair) that the Court as much as considered this issue in the *Vokurka* decision. In fact, in their observations on that application the Government raised the plea of the non-exhaustion of all domestic remedies within the meaning of Article 35 § 1 only when referring to the compensatory remedy under the amended Act No. 82/1998, and not with reference to the new preventive remedy. The applicant Vokurka could not very well exhaust that remedy, because the domestic proceedings the unreasonable length of which he contested before the Court had ended almost two years before the entry into force of the provisions of Section 174a of the Act on courts and judges. Therefore for that case the issue of the effectiveness of this remedy was entirely irrelevant and the Court therefore *de facto* carried out an abstract review of compliance of the domestic law with the Convention, doing so, moreover, on its own initiative. The Court did not indicate to any of the parties that it would deal with this issue.

Secondly, if in the *Hartman* judgment the Court noted on complaints filed with an authority responsible for the State's administration of courts that they cannot be regarded as an effective remedy because they do not confer a subjective right on the party to the proceedings to make the State perform its review competence (and that they only are sort of information or suggestion with which the competent authority can, but does not have to, deal), this deficiency has been repaired precisely by introducing the following step: if this procedure (its nature being rather informal and therefore potentially very flexible) does not result in a satisfactory outcome in the particular case, the party concerned will receive an opportunity to file a motion for the determination of a time limit for making a procedural act; the superior court shall decide on the motion in formal proceedings.

Thirdly, if the use of one remedy is conditional on the exhaustion of another remedy, which *per se* cannot be considered to be effective, this alone should not mean that these remedies cannot be considered to be an effective remedy when they are taken together as a whole. As in fact the Court itself constantly notes, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (*Kudła v. Poland*, No. 30210/96, judgment of 26 October 2000, § 157).

Fourthly, there is an inherent discrepancy in the argumentation itself in the *Vokurka* decision, because the Court justifies, ultimately paradoxically, its different view of the Slovenian and Czech legislation by noting that in the Slovenian case not only another preventive remedy but also a compensatory remedy is tied to an ineffective remedy.

63. If, then, in the case in question the Court should consider it to be necessary to examine the question of whether the Applicant Vomočil and other landlords in the similar situation have had or have at their disposal an effective preventive remedy against violations of their right to a hearing within a reasonable time, the Government kindly ask the Court to consider the above arguments instead of merely referring to its conclusion in the *Vokurka* decision.

Nevertheless, *pro futuro* the Government would remark that despite the above reservations to the Court's arguments, the *Vokurka* decision was reflected at the domestic level in an amendment to the relevant provisions of the law on courts and judges, which removed the contentious connection between the complaint filed with an authority responsible for the State's administration of courts and the motion for the determination of a time limit for making a procedural act (see § 22 above).

64. Finally, the Government would add that the third question posed by the Court seems to be directed towards a general question of whether the effectiveness of a remedy against violations of the rights and freedoms guaranteed by the Convention cannot be undermined by the length of the decision-making on such remedy. This would perhaps then have the consequence that potential applicants would not be obligated to exhaust this domestic remedy at all and could resort to the Court directly.

The Government believe that a general principle formulated in a similar tenor would clearly be contrary to the principle of subsidiarity, on which the review mechanism of the Convention is based. In their opinion, its application can perhaps be only seen in the case of a remedy against violations of the right to a hearing within a reasonable time (see *Apicella v. Italy*, No. 64890/01, judgment of 29 March 2006, § 84), and it would have to take, at most, the following form: it would not be possible to require the applicants to exhaust, at the domestic level, not only the available remedies against violations of the right to a hearing within a reasonable time within the meaning of Article 6 § 1 of the Convention, but also to use these remedies against delays in proceedings on those remedies.

Nevertheless, the situation in the case of any other rights than the right to a hearing within a reasonable time is fundamentally different. Therefore if the applicants or other landlords in the similar situation believe that there are delays in proceedings on the above actions for rent increase against the tenant or for compensation against the State, the Government do not see any reason why they should not use the remedies against violations of their right to a hearing within a reasonable time, which are available to them at the domestic level and which the Government mention above. It is entirely inconceivable that the landlords would not be obligated to even bring actions against the tenant or the State.

(iv) Conclusion

65. The Government would therefore summarise that in their opinion, it is not possible to speculate at the general level on whether the proceedings on the

actions of the applicants and other landlords in the similar situation could have taken place within a reasonable time.

In any case, the Government are convinced that the proceedings conducted by the Applicant Vomočil satisfied the requirement of a reasonable time.

66. However, the applicants and other landlords in the similar situation have had and have at their disposal effective remedies against violations, if any, of their right to a hearing within a reasonable time as required by Article 13 taken together with Article 6 § 1 of the Convention.

OVERALL CONCLUSION

67. In these Observations the Government answer the questions posed by the Court.

68. As regards the other aspects of the admissibility and merits of the applications submitted to the Court by Mr Jan Vomočil and Art 38, a.s., the Government fully refer to their initial observations of 31 December 2007.

69. The Government continue to be ready to provide the Court with all information as may be necessary for assessing admissibility and merits of the submitted applications.

Vít A. S c h o r m
Agent of the Government

Enclosures:

1. Development of the amount of rent for model flats
2. The Government's Bill amending the Civil Code (Chamber of Deputies doc. No. 805/0)
3. The opinion of the Constitutional Court's plenum, File Ref. Pl. ÚS-st 27/09 of 28 April 2009
4. The Constitutional Court's Finding File Ref. I. ÚS 2220/08 of 10 June 2009
5. Rent for flats in housing cooperatives