ON VIOLATION OF THE RIGHT TO A FAIR TRIAL BY INSUFFICIENT REASONING OF THE DECISION[1]

K PORUŠENIU PRÁVA NA SPRAVODLIVÝ PROCES NEDOSTATOČNÝM ODÔVODNENÍM ROZHODNUTIA

***Peter Molnár*[2]**

https://doi.org/10.33542/SIC2022-1-05

ABSTRACT

The author discusses a possible violation of the right to a fair trial due to deficiencies in the reasoning of the court decision. In the previous case law of the ordinary courts, the prevailing view was that deficient reasoning constituted so-called "other deficiency". However, in the author's opinion, the recodification of civil procedure requires a reassessment of the case law from the time before the recodification, because despite different nominal grounds of cassation recourse (the so-called "other deficiency" is no longer a separate ground of cassation recourse) the scope of the right to a fair trial has not changed. The court decision is a part and culmination of the court's conduct of proceedings, and in the reasoning of the decision, the court explains and defends the procedure it applied in establishing the factual and legal basis for its decision and the outcome of the proceedings itself. Therefore, the quality of the reasoning of a court decision must also be subject to effective examination in ordinary and extraordinary redress procedures. The Constitutional Court of the Slovak Republic has also been calling for a reassessment of older case law.

ABSTRAKT

Autor pojednáva o možnom porušení práva na spravodlivý proces v dôsledku nedostatkov odôvodnenia súdneho rozhodnutia. V doterajšej judikatúre všeobecných súdov prevládal pohľad na nedostatok odôvodnenia ako tzv. inú vadu. Rekodifikácia civilného práva procesného si však podľa názoru autora vyžaduje prehodnotenie judikatúry z čias pred rekodifikáciou, nakoľko napriek iným nominálnym dovolacím dôvodom (tzv. iná vada už samostatným dovolacím dôvodom nie je) sa rozsah práva na spravodlivý proces nezmenil. Súdne rozhodnutie je súčasťou a vyvrcholením procesného postupu súdu a v odôvodnení rozhodnutia súd vysvetľuje a obhajuje svoj postup pri budovaní skutkového a právneho základu súdneho rozhodnutia a samotný výsledok konania. Efektívnemu prieskumu v riadnom a mimoriadnom opravnom konaní preto musí podliehať aj kvalita odôvodnenia súdneho rozhodnutia. K prehodnoteniu staršej judikatúry vyzýva vo svojej rozhodovacej činnosti aj Ústavný súd SR.

I. INTRODUCTORY REMARKS

The different forms of civil procedure – whether general contentious proceedings before first-instance courts, various types of non-contentious proceedings, legal remedies, arbitration,

[1] The paper was prepared within the VEGA project no. 1/0765/20 "Protection of Human Values in Private Law in the Context of Modern Trends and Ongoing Recodification of Private Law".

[2] doc., JUDr., PhD., Univerzita Pavla Jozefa Šafárika v Košiciach, Právnická fakulta, Slovenská republika. Pavol Jozef Šafárik University in Košice, Faculty of Law, Slovak Republic.

bankruptcy, restructuring, enforcement proceedings, etc. – all serve to ensure the fundamental right to judicial protection pursuant to Art. 46 par. 1 of the Constitution of the Slovak Republic (hereinafter "the Constitution") and Art. 36 par. 1 of the Charter of Fundamental Rights and Freedoms[3] (hereinafter "the Charter"), and the right to a fair trial pursuant to Art. 6 par. 1 of the Convention on the Protection of Human Rights and Fundamental Freedoms[4] (hereinafter "ECHR"). The wording used in regulating fundamental rights and freedoms in Chapter II Title VII of the Constitution is almost identical to that in Chapter V of the Charter. Moreover, according to the well-established case-law of the Constitutional Court of the Slovak Republic (hereinafter "the Constitutional Court"), the right to a fair trial under Art. 6 par. 1 ECHR does not differ significantly in its content from the right to judicial and other legal protection under Art. 46 par. 1 of the Constitution. An important distinction is to be made, however, as unlike Art. 51 par. 1 of the Constitution, neither Art. 41 par. 1 of the Charter nor the ECHR constrain the exercise of the right to judicial and other legal protection or the right to a fair trial by the limitations of the implementing laws (statutes).[5]

The right to a fair trial, as a manifestation of the protection of human values at the procedural level, contains a number of elements – notably the right to access to a court and the ensuing duty of the court to consider and hear the case,[6] the right to a court established by law, the right to an independent and impartial court, the right to a lawful judge, the right to a hearing within a reasonable time, the right to be properly instructed in procedural rights and obligations, the right to be heard, the right to present evidence and to comment on it, the adversarial nature of proceedings, equality of arms, prohibition of surprising decisions, prohibition of arbitrariness, right to have the court consider all the relevant facts, the right to a proper reasoning of the decision, the right to have the decision reviewed.

The right to a fair trial is considered to be a so-called right to outcome, which means that when examining whether there has been a violation of this right, the intensity of the violations of its individual elements and their impact on the outcome of the provided judicial protection as a whole must be assessed. Individual mistakes (or their combination) thus constitute a violation of the right to a fair trial only if they have adversely affected with the relevant intensity the resulting quality of the proceedings as such (the court's conduct of proceedings in its entirety, including the decision on the merits).

The aim of this paper is to indicate the impact the deficiencies in the reasoning of a court decision have on the fulfilment of the parties' right to a fair trial in the context of the parties' need to effectively challenge this deficiency in proceedings on legal remedies and the obligation of the court of review (under the interpretation of the fulfilment of legal preconditions in conformity with the Constitution) to examine the contested deficiency.

II. THE REASONING OF A COURT DECISION

1. The nature of the reasoning of a judicial decision

The purpose of the judicial protection offered by courts in judicial proceedings is to eliminate legal uncertainty concerning the claimed threat or violation of a right or legally protected interest. The uncertainty is usually resolved by a decision on the merits,[7] in which the court reaches its authoritative opinion regarding the subject matter of the proceedings, and this

[3] Introduced by means of Constitutional Law no. 23/1991.

[4] Notice of the Federal Ministry of Foreign Affairs no. 209/1992.

[5] Cf. DRGONEC, J. Ústava Slovenskej republiky. Teória a prax. 2. prepracované a doplnené vydanie. Bratislava: C.H. Beck, 2019, p. 1022.

[6] Of course, a case may only be hear and decided on the merits if the procedural rules are met.

[7] It should be added that this legal uncertainty is only removed by the final decision on the merits, and also that the right to judicial protection is not exhausted by the finality of the main proceedings, but (if necessary) also includes enforcement proceedings, since the real fulfilment of the right to judicial and other legal protection is only achieved by the fulfilment of the adjudicated obligation or the respect of the adjudicated right.

opinion becomes binding for the parties as soon as the decision becomes final. Naturally, no judicial ruling may be arbitrary. Although the court is a state body endowed with decision-making authority over rights and obligations of legal subjects under its jurisdiction, it follows from the social contract on which the judicial branch's powers are based that court rulings must be the result of a fair procedure and must follow from the established facts and their legal assessment.

Despite the common distinction between "conduct of proceedings" and "decision" in everyday language, we consider court decisions part of the conduct of proceedings, as even a decision on the merits clearly constitutes a procedural act; in fact, it is the court's most important procedural act and the aim of the court's entire conduct of proceedings. In other words, it represents the culmination of the whole judicial procedure.

The reasoning of the decision is precisely that part of the judicial activity which "sells" the administration of justice as carried out in a particular case and through which the court performs important functions, in particular the justification function in relation to the conduct of the proceedings and the resulting decision itself, the educational and preventive function the court's reasoning has in relation to the public, and that of public scrutiny of the court. The court's reasoning must justify and explain in a clear and logical manner to the parties, to the (lay) public and the court of review the manner in which the court conducted the proceedings, the factual findings made and the conclusions reached on their basis, the law applied in their legal qualification, the court's legal considerations and the legal conclusions it reached.

It must therefore be clear from the reasoning of the decision why the court decided the way it did and why it was not possible to decide in any other way in the given situation. With a certain amount of exaggeration, we could say that the reasoning should ideally convince even the unsuccessful party of the necessity of a given outcome. On the other hand – and this time without exaggeration – if the court does not give proper reasons for its decision, however correct as it may be, i.e., the reasons for the decision do not clearly show why the court decided in that way, its decision is unreviewable and arbitrary.

2. Essential elements of a court decision's reasoning

The essential elements a judgment[8] must contain are prescribed in Section 220 par. 2 of Law no. 160/2015 Code of Civil Contentious Procedure, as amended (hereinafter "CCCP"). According to this provision, the court shall state in the reasoning what the plaintiff claimed, what facts they alleged, what evidence they offered, what means of procedural attack they used, the defendant's reply and their means of procedural defence. It shall explain clearly and concisely how it has assessed the factual allegations and the legal arguments of the parties, which facts it considers to have been proved and which not, which pieces of evidence it has taken, on which pieces of evidence it has based its decision and how it has assessed them, why it has not taken some of the evidence proposed and how it has assessed the case legally (or, where appropriate, refer to settled case law). If the court wishes to depart from the settled case law, it must thoroughly justify this departure, as it is expressly bound to give convincing reasons for its decision.

With regard to the factual basis for the decision, the court is also obliged to explain how it reached the respective factual conclusions other than those based on evidence. Even though evidence is the most important basis for reaching factual conclusions, it is not the only one. In gathering the factual basis for its decision, the court also takes into account notorious facts and information known to it from its judicial activity, binding decisions of other authorities, reflects on facts falling within the competence of other authorities, accepts those facts on which both

[8] The same applies by analogy to the reasoning of court orders if a full statement of reasons is to be produced (see Section 234 par. 2 CCCP).

parties agree, accounts for factual allegations made by one party and not contested by the other party, and may ignore those allegations of the parties made late or made in procedurally deficient manner.[9] It still applies even to those kinds of factual conclusions that the court is obliged to explain how it has reached them and show that the relevant pre-conditions for such conclusions have been met. Let us consider as an example a situation in which the court draws factual conclusions from one party's failure to properly contest the other party's factual allegation (Section 151 CCCP), in which case the law obliges the court to consider the allegation uncontested and as a result, no taking of evidence is to be carried out regarding the alleged fact (on which the court may later base its decision), which will thus remain unverified, but will be established by the court by other means prescribed by the law. Of course, the application of Section 151 CCCP, insofar as it renders the party's allegation uncontested, presupposes that the party first properly discharged her burden of allegation, i.e. not only specifies that which she demands (e.g. the amount claimed) but supports her claim with factual arguments (stating the facts from which the plaintiff derives the amount claimed).[10] Should the other party contest that allegation late in the proceedings, i.e. after the reply and rejoinder have been filed, the court having duly notified the parties about the possibility of disregarding submissions filed late or not according to proper procedure (Section 167 par. 3 and 4 CCCP), the court will have to justify why it disregarded the party's delayed submission.[11]

It should be added that the court must also state convincingly (albeit briefly) the reasons why it considered the respective means of procedural attack or defence or the party's offer of evidence to be irrelevant.[12] A mere laconic statement of the irrelevance of a party's factual allegation or offer of evidence without giving reasons for it (except in cases of manifest irrelevance) is unpersuasive and unreviewable. A court's complete disregard of means of procedural attack, defence or offer of evidence constitutes arbitrariness.

The court must also clearly substantiate the legal considerations which guided it and led it to the legal conclusions forming the basis for the decision. It must make it clear which legal provisions the court used and why, how it interpreted them and applied them to the factual findings and, where appropriate, to the substantive objections raised,[13] and what legal conclusions it reached. The reasoning must also explain the manner in which the court conducted the proceedings. This is especially true in situations in which there are several procedural courses of action at the court's discretion (such as the possibility to ignore those allegations of the parties made late or made in procedurally deficient manner).

---

[9] On the ways of establishing the factual basis of a judicial decision, see in more detail MOLNÁR, P. IN ŠTEVČEK, M., FICOVÁ, S., BARICOVÁ, J., MESIARKINOVÁ, S., BAJÁNKOVÁ, J., TOMAŠOVIČ, M. A kol.: Civilný sporový poriadokk. Komentár. Praha: C.H. Beck, 2016, p. 797 to 799.

[10] On the unfoundedness of the application of Section 151 CCCP in the event of a party's failure to properly discharge the mere burden of allegation, see, for example, the judgment of the Regional Court in Trnava no. 23Co/58/2018 of 10 December 2018 and the decision of the Constitutional Court of the Slovak Republic no. I. ÚS 246/2019 of 11 June 2019.

[11] If the court takes that submission into account, the fact in question will again be "disputed" and the conclusion on it will most likely be the result of taking new evidence.

[12] The standard grounds for rejecting a motion to take evidence are: a) the fact to be proved by the evidence is not relevant to the subject matter of the proceeding, b) the evidence is, in the opinion of the court, incapable of proving the fact under consideration (this includes the irrelevance of the evidence as well as its inadmissibility), and c) the evidence is (already) superfluous because the court has already formed a conclusion as to the fact in question. Another ground for dismissing an offer of evidence (or disregarding an applied means of procedural attack or procedural defence) is the application of Section 153 par. 3 CCCP, which allows disregarding submissions filed late or not according to proper procedure.

[13] On the plea of limitation, possible abuse of rights and the court's treatment of these defences, see for example ČOLLÁK, J.: Procesnoprávne zneužitie práva: vlastnosti, aplikácia a následky v civilnom súdnom procese (1 časť). In: Justičná revue: časopis pre právnu teóriu a prax. Roč. 72, č. 11 (2020), p. 1298-1310; ČOLLÁK, J.: Procesnoprávne zneužitie práva: vlastnosti, aplikácia a následky v civilnom súdnom procese (2. časť). In: Justičná revue : časopis pre právnu teóriu a prax. Roč. 72, č. 12 (2020), p. 1463-1485; ČOLLÁK, J.: Hmotnoprávne a procesnoprávne súvislosti zákazu zneužitia práva a východiská „testu" zneužitia práva. In: Banskobystrické zámocké dni práva na tému "Identifikácia únosnej miery autonómie právnych odvetví a súčasnej potreby ich synergie" : zborník z 3. ročníka medzinárodnej vedeckej konferencie. Banská Bystrica, Vydavateľstvo Univerzity Mateja Bela v Banskej Bystrici - Belianum, 2018, p. 108-132.

We can thus conclude that the statutory regulation of the reasons for the court decision is logical and consistent. The requirements for the statement of reasons for a decision are clear and unquestionable. However, their material fulfilment in an individual case is conditional on the court's correct "grasp of the subject matter" in the sense of identifying the specific questions to be answered in the statement of reasons and then providing relevant answers to those questions.

Both parties to the dispute have the right to a proper statement of reasons. It is therefore incumbent on the court to provide a satisfactory answer not only to the question of whether the lawsuit or other motion to initiate proceedings have merits, but also to the questions which arose during proceedings, since the outcome of the proceedings is based in no small measure on the answers to those questions. This equally applies to proceedings before first-instance courts (Section 220 par. 2 CCCP) and before courts of review (Sections 393, 451 par. 2 and 3, 452 par. 1, and 464 CCCP). The latter, however, have specific subject matter and the related degree of inquiry or review by the court (see below).

The European Court of Human Rights has long consistently stressed in its case law the relevance of the quality of reasoning. While it does not consider that the right to proper statement of reasons entails the right of the party to have each and every argument addressed by the court,[14] it does require specific response to arguments relevant for the decision,[15] stressing that the question of relevance of a given claim or motion must be assessed according to the circumstances of the particular case.[16] The Constitutional Court and ordinary courts commonly refer to that case law.

3. Deficiencies in the reasoning of a court decision

The requirements as to the content and logical coherence that a properly written statement of reasons should meet in a concrete case will differ depending on the nature and extent of the subject matter and conduct of the case. From that point of view, the most detailed must be the reasoning of the first-instance court's decision on the merits, since at that instance the court (figuratively speaking) "investigates everything" there is about the subject matter of the case, providing the widest scope for the anticipated procedural activity of the parties, to which it must subsequently respond. The reasoning of a reviewing court's decision is governed by the usually narrower subject matter those proceedings have, where the scope of the review is limited by the inherent limits of the review proceedings themselves, the type of remedy lodged and the subsequent procedural course of action.

In general, a statement of reasons is vitiated by deficiencies if it lacks any of the prescribed essentials or one or more of them lack the requisite quality. The result of such critical failure to give reasons for the decision is that the decision becomes unreviewable.

Accepting the axiom that the court should explain and substantiate the manner it conducted the proceedings and the resulting decision in the reasoning leads us to conclude that the absence of an answer to a specific question means that the court failed to take that question (such as a contract formality or a plea of limitation) into consideration and the court's conduct may appear arbitrary (such as by not explaining the factual findings on which it based the decision). This then raises the question whether this is a case of a mere gap in the statement of reasons or whether it indicates a different kind of deficiency, such as that the factual situation has been

[14] For example ECtHR judgment of 19 April 1994 in the case Van der Hurk v. the Netherlands, no. 16034/91, § 61.

[15] For example judgment of the ECtHR of 9 December 1994 in Ruiz Torija v. Spain, no. 18390/91, § 30; judgment of the ECtHR of 29 May 1997 in Georgiadis v. Greece, no. 21522/93, § 43; judgment of the ECtHR of 24 May 2005 in Buzescu v. Romania, no. 61302/00, § 67.

[16] For example, judgment of the ECtHR of 29 May 1997 in Georgiadis v. Greece, no. 21522/93; judgment of the ECtHR of 19 February 1998 in Higgins and Others v. France, no. 20124/92; judgment of the ECtHR of 19 February 1998 in Higgins and Others v. France, no. April 1994 in Van de Hurk v. the Netherlands, no. 16034/90; judgment of 9 December 1994 in Ruiz Torija v. Spain, no. 18390/91; judgment of 9 December 1994 in Hiro Balani v. Spain, no. 18064/91.

insufficiently or even incorrectly established, the legal assessment is arbitrary, or a procedural rule has not been complied with. In judging whether a specific deficiency can be remedied in review proceedings (whether it is possible to challenge an individual deficiency in the respective type of review proceedings, whether the higher court may examine it and what the corresponding decision on the merits will be), the argumentation of the party initiating the review will be crucial since on her argumentation the classification by the reviewing court of the alleged deficiency of the procedure and of the lower court's decision will depend.

III. ADMISSIBILITY OF APPEAL WITH REGARD TO THE REASONING OF THE CONTESTED FIRST-INSTANCE COURT'S DECISION

1. Subject matter of appellate proceedings and grounds for appeal

As a remedy designed to review a decision of the court of first instance which is not final and the proceedings which preceded the decision, an appeal allows the decision to be challenged in its widest scope. The appellant may contest the failure to comply with procedural rules, the conduct of proceedings made by the court in the broadest sense, the findings of fact and the conclusions of law the court reached, and include all those alleged deficiencies under the grounds of appeal provided for in Section 365 CCCP.

In general terms, the appellant determines the subject matter of the appellate review by choosing the scope of what is being contested and giving reasons for why it is being claimed that the impugned decision is incorrect and/or unlawful.[17] Section 379 and Section 380 par. 2 CCCP contain an exception to this rule by allowing the appellate court to expand the scope of review beyond the appellant's determination. In addition, if either the appellant or the other party submit any procedural motions in the course of the appellate proceedings, these will also be included in the scope of review (Section 373 par. 3 and 4, Section 374 CCCP).

It must, however, be borne in mind that the appellant is obliged to substantiate the grounds for appeal. The court is bound by the appellate grounds not only as to their statutory categorisation but also as regards the specific arguments put forth by the appellant (the specific errors the appellant claims that the first-instance court committed in the context of the respective grounds for appeal). The appellant thus defines the specific subject matter of the appellate review.

2. The first-instance court decision's deficiency consisting in insufficient reasoning and the appellate court's options

It is the first-instance court's task to properly establish the facts,[18] assess them in law, take an authoritative view on the subject-matter of the proceedings and give sufficient reasons for that view. In this respect, the first-instance court is expected to do most of the work in its reasoning. The components of the right to a fair trial extend to all the requirements for the court's activity.

A key issue in assessing the quality of the reasoning of a decision is the quality of the answers to questions raised in the course of the proceedings. However, as already indicated, it is important for the court to first clarify which questions it is has to answer before even formulating the answers themselves. Failure to include a question that should have been answered (i.e. the complete absence in the statement of reasons of justification for a particular part of the procedure, a particular fact, etc.), as well as an insufficient, illogical, inconsistent, or

[17] The failure to state grounds of appeal is the only deficiency of the appeal the court does not invite the appellant to remedy (Section 373 par. 1 in fine CCCP).

[18] On fact-finding in contentious proceedings, see for example KUŠNÍRIKOVÁ, M.: Prejednací princíp v civilnom procese. In: Zborník príspevkov z 2. ročníka Vedeckej konferencie doktorandov na Akadémii Policajného zboru v Bratislave. Bratislava, 2019, p. 222-233; Koľveková, V.: Sudcovská koncentrácia konania vo svetle budovania skutkového základu súdneho rozhodnutia v civilnom sporovom konaní. In: Studia Iuridica Cassoviensia, ročník 9, číslo 1, 2021, p. 34-43.

incomprehensible answer, all constitute a departure from the ideal statement of reasons and reduce the persuasiveness of the judicial decision as a whole. However, not every imperfection constitutes a deficiency to which it is necessary to respond by quashing the impugned decision. In some cases, even a cursory statement of reasons may be acceptable; after all, a statement of reasons is supposed to be concise, and the quantity of the reasons is certainly not a measure of their quality. The relevance of the fact or issue in question (not at all or inadequately substantiated in the reasoning) to the contested decision is crucial in determining whether an interference by the appellate court is called for. If the reasoning is silent about a marginal issue, the appellate court will undoubtedly criticise the first-instance court for that omission, but an error like this does not in itself constitute a sufficient ground for quashing the decision.[19] On the other hand, if the impugned decision contains no or only unsatisfactory reasons with regard to the facts on which the court based its decision, or lacks reasons for its legal conclusions, such deficiency reaches a critical intensity and thus constitutes a violation of the right to a fair trial, since such a decision becomes unreviewable (a deficiency falling under Section 365 par. 1 lit. b) CCCP).

As already indicated, a deficiency in the statement of reasons may also indicate the presence of another deficiency. Indeed, the statutory enumeration of the different grounds for appeal makes it possible to initiate a review of the decision and of the court's procedural conduct preceding it by allowing the appellate court to examine whether all the elements of the right to a fair trial have been respected. If an appellant appeals on a number of grounds, as long as a breach of any of the elements of a fair trial is found, he or she will succeed on appeal even if the deficiencies in the reasoning itself do not reach the critical intensity (e.g. inadequate or incorrect finding of facts) and even if the first-instance court gave consistent reasons for its erroneous decision.

However, if the appellant merely challenges terminological inconsistencies or poor drafting of the reasoning and not a more "fundamental" deficiency (i.e. does not argue that the court reached the decision without sufficient grounds) and does not also challenge the decision on any other ground of appeal, the limits of the appellate court's power of review will not allow it to establish that there are sufficient reasons to quash the impugned decision (with the exception of violations of procedural rules).

Consequently, an unsuccessful appellant who incorrectly substantiates his/her appeal is later going to have limited possibilities in filing a cassation recourse (appeal on points of law).

IV. ADMISSIBILITY OF CASSATION RECOURSE WITH REGARD TO THE REASONING OF THE CONTESTED APPELLATE COURT'S DECISION

1. The subject-matter of proceedings on cassation recourse and grounds for cassation

If the appellate court affirms the impugned decision or supplants it by its own decision, its finality brings the proceedings to a final conclusion, resolves the legal uncertainty of the parties as to the subject matter of the proceedings, and renders the conclusion of the appellate court binding on the parties and (in principle) unchangeable.[20] The resulting legal situation (*res iudicata*) determines the possibilities of reviewing the appellate court's decision.

In order to properly understand the possible subject matter of cassation proceedings, it is necessary to note that it was not the role of the appellate court in the appellate proceedings to

[19] For the assessment of the relevance of objections not addressed in the reasoning for the contested decision, see ECtHR judgment of 21 July 2009 Luka v. Romania, no. 34197/02, § 52.

[20] This does not apply to those decisions by which the appellate court merely quashes the first-instance court's decision. While such a decision concerns the merits of the case and constitutes a decision on the merits from the viewpoint of appellate proceedings, it does not constitute a decision on the merits in the context of the proceedings as a whole; cf. BAJÁNKOVÁ, J. A GEŠKOVÁ, K. IN: IN ŠTEVČEK, M., FICOVÁ, S., BARICOVÁ, J., MESIARKINOVÁ, S., BAJÁNKOVÁ, J., TOMAŠOVIČ, M. a kol.: Civilný sporový poriadokk. Komentár. Praha: C.H. Beck, 2016, p. 1353 and 1354.

establish the facts of the case. The appellate court examined (within the limits of the grounds of appeal raised and the respective arguments put forth by the appellant) the "quality of the finding of truth" by the first instance court. The appellate court's answers are therefore, in principle, not answers to the question "what is the truth" but whether "the truth" as established by the first-instance court was established in a correct manner and whether its conclusions are acceptable. Under certain conditions (if the appellate court takes new evidence or takes old evidence anew), the court's finding of facts could also be supplemented on appeal. In the situation envisaged by Section 390 CCCP, the supplementation of the factual basis by the appellate court will even be mandatory in the event of its insufficient establishment by the first-instance court. Notwithstanding the above exception, it can be summarised that the role of the appellate court is to review the procedure and conclusions of the first-instance court in such manner as to allow its own decision to be later reviewed.

The subject matter of appellate proceedings and the fact that a confirmatory or supplanting appellate decision concludes the entire proceedings with finality influence the very conception of cassation proceedings, the enumeration of cassation grounds and the scope of cassation review. The cassation proceeding is not conceived as yet another appeal in disguise, a third instance allowed to once again fully examine the way the case has been heard by the courts of first and second instance. A cassation recourse is a remedy allowing an unsuccessful appellant to challenge the appellate court's decision. As was the case with appellate proceedings, the court of cassation is not in search of the truth, but rather reviews the quality of review carried out by the appellate court and is even more limited in its review than the appellate court was in its own. The purpose of cassation proceedings is limited to eliminating null decisions of appellate courts, correcting serious deficiencies (such as violations of the right to a fair trial) and, wherever possible, ensuring the uniformity of the lower courts' case law.[21] The statutory enumeration of cassation grounds is also adapted to this purpose (Section 431 CCCP – cassation on grounds of nullity as enumerated in Section 420 CCCP; Section 432 CCCP – cassation on grounds of incorrect legal assessment in the case law situations referred to in Section 421 CCCP).

2. Do deficiencies in the appellate court's reasoning fall under one of the cassation grounds?

This paper deals with the deficiencies in the reasoning of the contested decision. The cassation proceedings are particular in that they consist in reviewing a final decision that either has concluded the proceedings as a whole or has definitively resolved a particular issue relevant to the proceedings.[22] It is only natural then that the scope of review in the cassation proceedings (as compared with the appellate proceedings) will be restricted.

Deficiencies in the reasoning of the appellate court's decision are not expressly included among the cassation grounds (more precisely among the deficiencies rendering the decision null). However, violation of the right to a fair trial is defined as a deficiency rendering the decision null in those situations where the court applied incorrect procedure and by so doing has to a relevant extent prevented a party from exercising their procedural rights (Section 420 lit. f) CCCP). The right to a proper statement of reasons is an indisputable part of the right to a fair trial and its violation in the relevant intensity (as stated above) renders the decision unreviewable or even arbitrary. The author of this article considers it natural and necessary that

[21] According to Section 8 par. 3 of Law no. 757/2004 on Courts, as amended, the Supreme Court shall ensure uniform interpretation and application of laws and other generally binding legal regulations through its own case law and by adopting opinions on the harmonization of the interpretation of laws and other generally binding legal regulations and by publishing final court decisions of fundamental importance in the Collection of Opinions of the Supreme Court and Decisions of the Courts of the Slovak Republic.

[22] For example, the issue of entitlement to reimbursement of costs of proceedings (see decision of the Constitutional Court no. I. ÚS 257/2018 of 15 August 2018 and judgment of the Constitutional Court no. I. ÚS 387/2019 of 2 April 2020).

this deficiency should be remediable within the system of ordinary courts, since the protection of fundamental rights is also and primarily the task of ordinary courts.

Under the previous legislation (Law no. 99/1963 Civil Procedure Code, as amended, hereinafter "CCP"), the cassation grounds were regulated in Section 241 par. 2 and included nullity grounds referred to in Section 237 CCP, other deficiencies of the proceedings which resulted in an incorrect decision in the case, and incorrect legal assessment of the case. The controversy existing at the time on whether deficiencies in the reasoning of the decision constituted nullity of the proceedings under Section 237 par. 1 lit. f) CCP ("the party was deprived of the opportunity to be heard by the court by the manner in which the court proceeded in the case") or rather should have been considered "other deficiency" under Section 241 par. 2 CCP[23] was resolved in a binding manner by the opinion of the Civil Division of the Supreme Court of the Slovak Republic of 3 December 2015 published in the Collection of Opinions of the Supreme Court and Decisions of the Courts of the Slovak Republic No. 1/2016 under No. 2 (R 2/2016). This happened shortly before the repeal of the old code during the *vacatio legis* of the new and current Code of Civil Contentious Procedure.

The guiding principle of Opinion R 2/2016 reads as follows: "Unreviewable decisions suffer from so-called "other deficiency" within the meaning of Section 241 par. 2 lit. b) CCP. Exceptionally, if the written version of the decision fails to provide even rudimentary explanation of the reasons for the court's decision, this may render the cassation recourse admissible pursuant to Section 237 par. 1 lit. f) CPP." The Civil Division of the Supreme Court thus concluded that only extremely unreviewable decisions may lead to nullity and this only includes cases in which the written version of the decision fails to provide even rudimentary explanation of the reasons for the court's decision. However, according to the case law of the European Court of Human Rights, this only covers exceptional situations where the inadequacy of the reasoning lies in deficiencies of "the most fundamental importance for the judicial system" or "fundamental, gross and substantial deficiencies", or where it is necessary to quash the contested decision in order to correct judicial errors and miscarriages of justice. Only decisions marked by such serious deficiencies in the reasoning may reach the intensity necessary to exceed the boundaries of the so-called "other deficiency". The second important line of argument is the strict distinction between the court's conduct of proceedings and its decision. In that sense, decisions do not constitute conduct of proceedings and therefore the court does not conduct the proceedings in giving reasons for the decision. Therefore, the court cannot commit a procedural error in giving reasons for the decision.

We find the Supreme Court's opinion to be somewhat inconsistent in both its lines of argument. First, we understand the effort to distinguish the intensity of deficiencies in the reasoning, but even the "mere" unreviewability referred to in the first sentence of the opinion nevertheless arises because the decision does not contain an explanation of the cardinal reasons for the decision. If the reasoning of the decision were deficient only in minor respects (failure to state reasons on a minor point or stylistic inadequacies), it would not be classified as

[23] In the past, the Supreme Court and the Constitutional Court both produced divergent case law. In some cases, the Supreme Court took the view that insufficient reasoning of the decision constituted violation of the right to a fair trial (for example no. 4 Cdo 171/2005 of 27 April 2006, no. 7 Cdo 134/2011 of 27 November 2012, no. 6 Cdo 209/2013, no. 4 Cdo 319/2013 and no. 1 Cdo 253/2013). In other cases, it considered the insufficient reasoning of the decision as covered by the "other deficiency" ground, for example, in no. 2 Cdo 5/1997 of 28 August 1997 (also published in the Collection of Opinions of the Supreme Court and Decisions of the Courts of the Slovak Republic as R 111/1998), and in no. 3 Cdo 176/2013, no. 7 Cdo 86/2012 and no. 1 ECdo 10/2014. The Constitutional Court sometimes upheld the "other deficiency" line of case law (e.g. decision no. I. ÚS 184/2010 of 27 May 2010, decision no. IV. ÚS 481/2011 of 10 November 2011, decision no. III. ÚS 148/2012 of 3 April 2012, judgment no. III. ÚS 551/2012 of 30 January 2013, decision no. IV. ÚS 90/2013 of 14 February 2013, decision no. III. ÚS 1/2015 of 14 January 2015, decision no. I. ÚS 364/2015 of 26 August 2015, judgment no. II. ÚS 184/2015 of 11 November 2015), while in other cases it prioritised the right to a fair trial (e.g. judgment no. I. ÚS 226/03 of 12 May 2004, judgment no. II. ÚS 261/06 of 13 December 2007, judgment no. II. ÚS 261/06 of 13 December 2007, judgment No. III. ÚS 198/2011 of 27 July 2011).

unreviewable in its entirety. Second, as we have stated earlier, we regard the judicial decision as a procedural act of the court and thus clearly part of the court's conduct of proceedings. This also applies to the drafting of the written version of the decision, including its reasoning. We therefore consider this distinction to be incorrect and, moreover, inconsistent, since, in the case of extreme deficiencies in the reasoning, the opinion concedes that the reasoning may be considered a case of deficiency in the court's conduct of proceedings.

The opinion tried to strike a balance with regard to the question of under which of the existing cassation grounds deficiencies in the reasoning should be classified. The result is not clearly in favour of any of them and the classification of a particular case depends on the assessment by the court of cassation of how serious the deficiencies in the appellate court's reasoning are.

It should be noted with regard to the above classification that decisions unreviewable merely to an "ordinary" extent could also be subject to review in cassation proceedings and the court of cassation could, if need be, remedy the procedural situation by quashing such decisions. However, it must also be added that unlike Section 237 CCP, the "other deficiency" ground allowed for submitting a cassation recourse only against decisions of appellate courts specified in Sections 238 and 239 CCP, which narrowed the possibilities of redressing deficiencies of unreviewable decisions in cassation proceedings.

The above approach to cassation recourse admissibility meant that unreviewable decisions, i.e. decisions objectively lacking even rudimentary explanation of their principal reasons, against which no cassation recourse was admissible because they did not reach the required degree of unreviewability, were immediately reviewed by the Constitutional Court in constitutional complaint proceedings through the prism of the right to a fair trial, instead of being reviewed by ordinary courts.

The new Code of Civil Contentious Procedure came into force on 1 July 2016 and together with two other new procedural codes replaced the old Code of Civil Procedure. The new legislation changed the wording of the original nullity ground under Section 237 par. 1 lit. f) CCP and the new Section 420 lit. f) CCCP considers as deficiency a situation where "the court, by applying incorrect procedure, has prevented a party from exercising their procedural rights to such an extent that their right to a fair trial has been violated". The new legislation thus explicitly refers to the right to a fair trial. At the same time, it should be emphasised that the new principal procedural code has left out the previous "other deficiency" reference of Section 241 par. 2 lit. b) CCP when enumerating cassation grounds.

If we compare the approach expressed in opinion R 2/2016, according to which only extremely unreviewable decisions lead to nullity and any other unreviewable decisions merely suffer from "other deficiencies", with that of the new legislation, which more clearly ties the nullity ground to a result consisting in violation of the right to a fair trial and no longer lists "other deficiencies" among cassation grounds, a crucial question arises of the impact this change has had for the admissibility of cassation recourse in those cases in which the unsuccessful appellant contests the appellate court's ruling by claiming violation of the right to proper reasoning of the decision as part of the right to a fair trial.

Does the new legislation lead to greater or more restricted availability of cassation recourse? The Supreme Court has repeatedly expressed the view that the new legislation does not warrant any departure from the conclusions of Opinion R 2/2016 and continues to dismiss any cassation recourse contesting deficient reasoning of the appellate court's decision as inadmissible under Section 447 lit. c) CCCP for challenging a decision not subject to cassation recourse. It justifies this approach with the argument that a court decision's reasoning does not constitute conduct of proceedings and refuses to examine the reasoning in cassation proceedings, sometimes

adding that unreviewable decisions may only be subject to cassation review if the reasoning is extremely deficient and the case at hand does not pass the threshold.[24]

The current approach of the court of cassation in cases where the appellate court's decision is claimed to be unreviewable thus fails to take into account the change of the statutory wording of the relevant nullity ground and its now explicit connection to cases of violation of the right to a fair trial (in other words, the explicit emphasis on the constitutional dimension of the judicial protection to be provided), as well as the fact that the number of cassation grounds has been reduced. This approach seems dubious since the courts are obliged to interpret and apply the law in conformity with the Constitution (Art. 152 par. 4 of the Constitution). The logical consequence is that objectively unreviewable decisions which the Supreme Court considered in its Opinion R 2/2016 as merely unreviewable (without any further qualifier) and which under previous legislation were susceptible to review in cassation proceedings at least to a limited extent are currently not subject to challenge in cassation proceedings at all.

The Supreme Court's failure to change its approach with regard to deficiencies in the reasoning of court decisions has not escaped the attention of the Constitutional Court. Initially, the Constitutional Court tended not to find any unconstitutionality in the Supreme Court's insistence on the interpretation stemming from Opinion R 2/2016.[25] However, it has since ruled on several occasions that "the procedure" should not be interpreted to mean only the actual conduct of proceedings as carried out by the court, but should also cover the decision itself and its reasoning.[26] In the opinion of the Constitutional Court, when assessing the gravity of the appellate court's error, it is necessary to view the right to a fair trial comprehensively and its violation referred to in Section 420 lit. f) CCCP as a violation of any of the elements of the right to a fair trial. The reference to the "conduct of proceedings" should thus also cover the court's decision itself and all the related elements of the right to a fair trial. If the court lets the parties exercise their procedural rights but the court's reasoning then lacks any proper explanation of how the court assessed the respective means of procedural attack and defence applied by the parties, such conduct by the court does, first of all, constitute "conduct of proceedings", and secondly, it renders the exercise of the right to a fair trial a mere illusion.[27] As the Constitutional Court further states, when providing judicial protection, the priority is to ensure the constitutionally required standard of the right to a fair trial, not to maintain the stability of the court of cassation's case law despite a fundamental change in the legislation. The fact the new Code of Civil Contentious Procedure no longer includes the former "other deficiency" ground must have as a result that the most import part of the court's conduct of proceedings remains either not at all or only in extreme cases subject to review in cassation proceedings. The Constitutional Court sees no legitimate reason to accept such outcome of the recodification of civil procedure; on the contrary, it sees the recodification as a good reason for the Supreme Court to reconsider its own case law. The Constitutional Court thus held that the party's claim that the appellate court's decision is arbitrary may suffice for the conclusion that the court's incorrect conduct of proceedings prevented them from exercising their procedural rights to such extent that their right to a fair trial has been violated.[28] The recent case law of the Constitutional

[24] Among the many decisions, see for example 1 Cdo 202/2017, 1 Cdo 18/2018, 2 Cdo 162/2017, 2 Cdo 39/2018, 3 Cdo 173/2017, 3 Cdo 22/2018, 4 Cdo 87/2017, 5 Cdo 112/2018, 7 Cdo 202/2017, 8 Cdo 85/2018.

[25] Among the decisions of the Constitutional Court of the Slovak Republic taking this position, see, for example, decision of the Constitutional Court of the Slovak Republic no. III. ÚS 614/2017 of 10 October 2017, decision of the Constitutional Court of the Slovak Republic, no. IV ÚS 88/2018 of 1 February 2018, judgment of the Constitutional Court of the Slovak Republic, no. IV ÚS 279/2018 of 16 November 2018.

[26] See, for example, judgment of the Constitutional Court of the Slovak Republic, no. II. ÚS 120/2020 of 21 January 2021, judgment of the Constitutional Court of the Slovak Republic, no. II. ÚS 169/2021 of 2 December 2021, judgment of the Constitutional Court of the Slovak Republic, no. II. ÚS 169/2021 of 2 December 2021.

[27] Judgment of the Constitutional Court of the Slovak Republic, no. II.ÚS 120/2020 of 21 January 2021.

[28] Judgment of the Constitutional Court of the Slovak Republic, no. II. ÚS 120/2020 of 21 January 2021, judgment of the Constitutional Court of the Slovak Republic, no. I. ÚS 116/2020 of 23 February 2021.

Court has also stabilized in the position that the distinction of the "other deficiency" under the previous legislation has become meaningless and the incorporation of the reference to the right to a fair trial in Section 420 lit. f) CCCP has not liberalized the requirements for the justification of the decision, but on the contrary, it has made them stricter. If the reasoning of a decision does not sufficiently meet the standards stemming from Art. 46 par. 1 of the Constitution and Art. 6 par. 1 ECHR, this constitutes violation of the right to a fair trial, which then results in cassation recourse being admissible under Section 420 lit. f) CCCP.[29] If the court's reasoning fails to address a party's argument potentially relevant for the decision of the case, this in itself makes the decision null, which means that the decision does not need to be "extremely unreviewable", as envisages in the last paragraph of Opinion R 2/2016.

The Constitutional Court thus takes the view that the recodification of civil procedure has shifted the protection of human values in cassation proceedings in favour of a more substantive understanding, which in the context of this paper and the question posed in the title of this subchapter means greater availability of cassation recourse.

3. Insufficient reasoning of the contested decision of the appellate court

The appellate court is obliged to give reasons for its decision. In other words, it must explain how it conducted the proceedings, its reflections on the case and what conclusions it reached and applied. Section 220 par. 2 CCCP applies by analogy to the various components and the required quality of the reasoning, with the proviso that appellate review was (with the exceptions noted above) limited by the appeal filed.

Since the appellate court examines whether the first-instance court applied the correct procedure and reached the correct decision and its own decision constitutes a final ruling on the case, the appellate court should also provide answers to questions the first-instance court failed to address (Section 387 par. 3 first sentence CCCP) so that the decisions of both instances together provide sufficient explanation of the reasons of the case heard and concluded with a final ruling. This requires the appellate court's decision to be examined together with the decision of the first-instance court.

The subject matter of review in cassation proceedings will then be the constitutional conformity of the manner in which the appellate court assessed the first-instance court's decision, namely the acceptability of the confirmation or modification of the first-instance court's decision. The appellate court's reasoning shall be deficient if it fails to provide a sufficient basis for that review.

V. CONCLUSION

The right to a proper statement of reasons is an indispensable element of the right to a fair trial and is present at all levels of the judicial system. The manner in which judicial protection is granted must be explainable and explained in a reviewable manner. The statutory requirements for the reasoning of a decision are intelligible and implementable. The reasoning of the decision need not be ideal, but the court cannot fail to deal with facts relevant to the consideration and decision of the case, i.e. facts on which the outcome of the case depends. Such deficiencies in the reasoning make the decision unreviewable and constitute therefore violation of the right to a fair trial, with the consequence being the quashing of the decision. It must be possible even at the highest level in the judicial system to carry out such assessment, which must not be limited to cases of extreme deficiencies or total absence of the reasoning. Not even the parties' legal certainty may excuse the opposite approach, since even legal certainty must be ensured in conformity with the right to a fair trial. We therefore consider

[29] See, for example, decision of the Constitutional Court of the Slovak Republic, no. IV. ÚS 314/2020 of 1 July 2020, judgment of the Constitutional Court of the Slovak Republic, no. IV. ÚS 80/2021 of 11 May 2021, judgment of the Constitutional Court of the Slovak Republic, no. I. ÚS 432/2021 of 9 November 2021.

necessary a change in approach to the examination of the reasoning of appellate courts' decisions contested in cassation proceedings.

KEY WORDS
right to a fair trial, reasoning of a court decision, reviewability of a decision, arbitrariness, nullity of a decision, material approach to administration of judicial protection

KĽÚČOVÉ SLOVÁ
právo na spravodlivý proces, odôvodnenie súdneho rozhodnutia, preskúmateľnosť rozhodnutia, arbitrárnosť, zmätočnosť rozhodnutia, materiálny prístup k poskytovaniu súdnej ochrany

BIBLIOGRAPHY

1. ČOLLÁK, J.: Procesnoprávne zneužitie práva: vlastnosti, aplikácia a následky v civilnom súdnom procese (1. časť) In: Justičná revue : časopis pre právnu teóriu a prax, Roč. 72, č. 11 (2020), s. 1298-1310, ISSN 1335-6461
2. ČOLLÁK, J.: Procesnoprávne zneužitie práva: vlastnosti, aplikácia a následky v civilnom súdnom procese (2. časť) In: Justičná revue : časopis pre právnu teóriu a prax, Roč. 72, č. 12 (2020), s. 1463-1485, ISSN 1335-6461
3. ČOLLÁK, J.: Hmotnoprávne a procesnoprávne súvislosti zákazu zneužitia práva a východiská „testu" zneužitia práva. In: Banskobystrické zámocké dni práva na tému "Identifikácia únosnej miery autonómie právnych odvetví a súčasnej potreby ich synergie" : zborník z 3. ročníka medzinárodnej vedeckej konferencie, Banská Bystrica: Vydavateľstvo Univerzity Mateja Bela v Banskej Bystrici - Belianum, 2018, s. 108-132, ISBN 978-80-5571-405-9
4. FICOVÁ, S.: Cumulative Grounds in Petitions for Appellate Review and the Right to Fair Judicial Process. In: International and Comparative Law Review, 2020, vol. 20, no. 1, pp. 304–319. DOI: 10.2478/iclr-2020-0015
5. KOĽVEKOVÁ, V.: Sudcovská koncentrácia konania vo svetle budovania skutkového základu súdneho rozhodnutia v civilnom sporovom konaní. In: Studia Iuridica Cassoviensia, ročník 9, číslo 1, 2021, s. 34-43, ISSN 1339-3995. DOI: 10.33542/sic2021-1-03
6. KUŠNÍRIKOVÁ, M.: Prejednací princíp v civilnom procese. In: Zborník príspevkov z 2. ročníka Vedeckej konferencie doktorandov na Akadémii Policajného zboru v Bratislave. Bratislava, 2019, s. 222-233, ISBN 978-80-8054-824-7
7. ŠTEVČEK, M., FICOVÁ, S., BARICOVÁ, J., MESIARKINOVÁ, S., BAJÁNKOVÁ, J., TOMAŠOVIČ, M. a kol.: Civilný sporový poriadokk. Komentár. Praha: C.H. Beck, 2016, 1540 s., ISBN 978-80-7400-629-6
8. ŠTEVČEK, M., MALÁ, D.: The Re-Codification of the Slovak Civil Procedure Code with a Special Emphasis on Remedial Measures. In: International and Comparative Law Review, 13(1)/2013, pp. 121-135. Online ISSN: 2464-6601. DOI: 10.1515/iclr-2016-0063

CONTACT DETAILS OF THE AUTHOR

doc. JUDr. Peter Molnár, PhD.
Associate Professor
Pavol Jozef Šafárik University in Košice
Faculty of Law, Department of Civil Law
Kováčska 26 040 75 Košice
Phone number: + 421905405975
E-mail: peter.molnar@upjs.sk