

Decision 14/2023 (VII. 24.) AB

on establishing a constitutional requirement related to section 22/C (2) (b) of the Act CXVIII of 2017 on the Rules Applicable to Civil Non-Contentious Proceedings and on Certain Non-Contentious Court Proceedings

In the subject-matter of a constitutional complaint, the plenary session of the Constitutional Court has adopted the following

decision:

1. The Constitutional Court holds that it is a constitutional requirement stemming from Articles VI (1) and XVI (1) of the Fundamental Law that on the basis of section 22/C (2) (b) of the Act CXVIII of 2017 on the Rules Applicable to Civil Non-Contentious Proceedings in Court and Certain Non-Contentious Proceedings in Court, the court may order the substitution of any missed contact in any case where the conditions for the issuance of a ruling on the enforcement of a missed contact are fulfilled; the substitution of the missed contact may take place at the latest within six months from the issuance of the court's ruling, at the next appropriate time.

2. The Constitutional Court establishes that the ruling No. 6.Pkf.51.643/2022/4 of the Budapest Environs Regional Court is in conflict with the Fundamental Law, therefore annuls it.

The Constitutional Court orders the publication of its decision in the Hungarian Official Gazette.

Reasoning

I

[1] 1 The petitioner, acting without legal representation, submitted a constitutional complaint pursuant to section 27 of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), requesting the Constitutional Court to state that the ruling No. 6.Pkf.51.643/2022/4 of the Budapest Environs Regional Court is in conflict with the

Fundamental Law and to annul it, with effect also to the ruling No. 15.Pk.50.076/2022/18 of the Buda Environs District Court.

[2] 1.1 According to the facts of the case underlying the constitutional complaint, one child was born in 2015 from the marriage of the petitioner (the applicant in the main proceedings) and the respondent mother. In the course of the divorce of the petitioner and the respondent, the Pest Central District Court, by its judgement, which became final on 11 March 2019, regulated the contact between the petitioner and the child, in such a way that the petitioner is entitled to pick up the child from the kindergarten/school on Fridays at 4 pm every even-numbered week and is obliged to return the child to the mother by 6 pm on Sunday evening. The court ordered the respondent mother to give the child's ID and social security card to the petitioner at the beginning of each contact and the petitioner to return the documents to the mother at the end of the contact.

[3] During the continuous contact from 4 p.m. on 11 February 2022 until 6 p.m. on 13 February 2022, the child and the child's personal documents (ID card, social security card) were handed over to the petitioner. In his application, the petitioner submitted that during the contact he and the child wished to travel to Romania to visit the grandparents, of which he informed the respondent, and that he had previously also requested the respondent to hand over the child's European Health Insurance Card to the petitioner.

[4] During the contacts, it was discovered at the border crossing point in Csengersima that the child's identity card had expired and the planned border crossing was therefore cancelled due to the lack of a valid document. The petitioner asked the respondent to hand over the child's passport the next day so that the planned trip could take place, but the respondent did not comply with this request.

[5] 1.2 The petitioner asked the court to find that the respondent mother's negligent conduct had interfered with the contact and to order the respondent mother to ensure uninterrupted contact and to order that the contact be substituted. The petitioner also sought reimbursement of the costs (petrol, toll sticker) incurred as a result of the interference of contact.

[6] By ruling No. 15.Pk.50.076/2022/18 of 24 June 2022 (hereinafter referred to as the "first instance order"), the Buda Environs District Court rejected the petitioner's application.

According to the court, the applicant could have been expected to check the existence and validity of the documents necessary for travelling abroad before travelling, the failure to do so could not be attributed to the mother, and the applicant could have realised during previous contacts that the identity card would soon expire (ruling of

first instance, Reasoning [18] to [19]). The Buda Environs District Court argued that, according to the contact decision, the defendant mother was in any event only obliged to hand over the identity card and the social security card, so that the failure to hand over the passport could not be enforced in the proceedings for enforcement of the contact decision (ruling of first instance, Reasoning [21]). And since the ongoing contact has been established (only its purpose, the trip abroad, has been frustrated), there is no need to order a substitution of contact (ruling of first instance, Reasoning [22]). In conclusion, the Buda Environs District Court held that the petitioner did not prove that he acted as would normally be expected in the given situation in order to comply with his obligations under the contact order, as he did not check the child's documents when he received them, and therefore he cannot rely on his own fault in order to enforce the contact order (ruling of first instance, Reasoning [23]).

[7] 1.3 The Budapest Environs Regional Court, acting on the second instance upon the petitioner's appeal, found the petitioner's appeal to be partially well-founded and partially reversed the first instance ruling by its ruling No. 6.Pkf.51.643/2022/4 of 10 October 2022 (hereinafter referred to as the "second instance ruling"). According to the Budapest Environs Regional Court, it is clear from the basic decision on contact that the petitioner's right to contact also extends to the taking of the child abroad, and the respondent mother in the present case knew in advance that the petitioner wished to travel abroad with the child to the paternal grandparents (second instance ruling, page 6). According to the second instance court, it is the responsibility of the respondent who exercises parental authority to ensure that the child's documents are valid and to check them, and the respondent mother must prepare the minor child in order to facilitate contact, including, where appropriate, the handing over of the passport, in particular where the need for the child's passport is obvious from the prior indication of the separated parent. According to the Budapest Environs Regional Court, for this reason, the defendant mother cannot be excused from her liability by claiming that, in the absence of an express provision in the basic decision on contact, she was not obliged to hand over the passport (ruling of second instance, page 7).

[8] However, despite the fact that the Budapest Environs Regional Court found that the defendant mother had breached the contact order through the fault of her, it merely ordered the defendant mother to comply with the contact order due after the receipt of the ruling, in accordance with section 22/C (2) (a) of Act CXVIII of 2017 on the Rules Applicable to Civil Non-Contentious Proceedings in Court and Certain Non-Contentious Proceedings in Court (hereinafter: ANCP). In the view of the Budapest Environs Regional Court, the court is not entitled to order the substitution of the interrupted contact, given that the substitution of any contact is possible within six months pursuant to section 4:182 (2) of Act V of 2013 on the Civil Code (hereinafter: Civil Code), after which there is no way to substitute contact even if the conditions for

its substitution would otherwise be met due to the obliged party's culpable conduct. Therefore, the Budapest Environs Regional Court held that the legal consequence under Article 22/C (2) (b) of the ANCP, namely ordering substitution of the missed contact, could no longer be applied in respect of the continuous weekend contact from 11 February 2022, since more than six months had elapsed between the date of the contact and the date of the ruling of the second instance court. (ruling of second instance, page 7).

[9] 2 The petitioner then submitted his constitutional complaint pursuant to section 27 of the ACC, in which he requested a declaration that the ruling No. 6.Pkf.51.643/2022/4 of the Budapest Environs Regional Court was contrary to the Fundamental Law and its annulment, with effect also extending to the ruling No. 15.Pk.50.076/2022/18 of the Buda Environs District Court. According to the constitutional complaint, the contested judicial decisions are contrary to Articles XXVIII (1) and VI (1) of the Fundamental Law, as follows.

[10] According to the arguments presented by the petitioner, Article XXVIII (1) of the Fundamental Law is manifestly violated by the court's arbitrary interpretation of the law, according to which, after 6 months, the parent responsible for the missing of contact is not obliged to provide for substituting the missed contact, since a final decision can only be taken within 6 months from the original date of contact if the respondent acknowledges the facts stated in the application or at least does not appeal against the first instance ruling. The petitioner points out that this was also the case in his situation, as after the interrupted contact, although he had applied to the court within the time limit and had not given any reason for the delay in the proceedings, the court did not give a final decision within 6 months of the date of the contact.

[11] According to the petitioner, the interpretation of the law by the Budapest Environs Regional Court is not only arbitrary and contrary to the requirement of the right to a fair trial, but also makes it impossible for the petitioner to exercise her right to private and family life, protected by Article VI (1) of the Fundamental Law, by making it difficult for the party not involved in the disruption of contact (in this case the petitioner) to maintain contact with the child and to maintain the family bond. The final failure to substitute for the missed contact and obliging the respondent to act properly during the next contact is not a suitable legal consequence to safeguard the maintenance of the family bond between the petitioner and his child.

[12] The petitioner in his constitutional complaint, in addition to the above, also referred to Article R (2) of the Fundamental Law and Article 8 (right to private and family life) and Article 13 (right to an effective remedy) of the European Convention on Human Rights, but the constitutional complaint does not contain any specific grounds for these violations.

[13] 3 The Constitutional Court has applied section 57 (2) of the ACC and section 36 (3) of the Rules of Procedure, and, before ruling on the petition, contacted the Minister of Justice.

II

[14] 1 The provisions of the Fundamental Law affected by the petition:

"Article VI (1) Everyone shall have the right to have his or her private and family life, home, communications and good reputation respected. Exercising the right to freedom of expression and assembly shall not impair the private and family life and home of others."

"Article XVI (1) Every child shall have the right to the protection and care necessary for his or her proper physical, intellectual and moral development. Hungary shall protect the right of children to a self-identity corresponding to their sex at birth, and shall ensure an upbringing for them that is in accordance with the values based on the constitutional identity and Christian culture of our country."

"Article XXVIII (1) Everyone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act."

"Article R (2) The Fundamental Law and the other laws shall be binding upon everyone."

[15] 2 The provision of the ANCP affected by the petition:

"Section 22/C (2) If the court finds that the defendant has violated the provisions of the decision on maintenance of contact, it shall order enforcement. In the order of enforcement, the court shall require the requested party to

[...]

(b) provide for the substitution of any contact missed reasons not attributable to the beneficiary of contact at the earliest convenient date, but not later than in six months, and shall indicate the final date for substitution; or

[16] 3 The provision of the Civil Code affected by the petition:

"Section 4:182 (2) Any contact missed due to reasons not attributable to the beneficiary shall be made up at the earliest convenient date, but not later than six months."

[17] As provided for in section 56 (1) of the ACC, the Constitutional Court first examined the existence of the statutory conditions for the admissibility of the constitutional complaint.

[18] 1 In accordance with section 30 (1) of the ACC, the constitutional complaint under section 27 of the ACC may be submitted within sixty days from the date of delivery of the challenged decision. The Constitutional Court has found that the petitioner received the judgement of the Budapest Environs Regional Court on 17 November 2022 and that his constitutional complaint was lodged on 18 November 2022, within the time limit. The petitioner exhausted the available legal remedies. The petitioner is considered entitled and concerned, as she submitted her constitutional complaint under section 27 of the ACC in the context of her individual case.

[19] 2 Pursuant to Article 24 (2) (f) of the Fundamental Law, only the examination of the conflict between a provision of the law (rather than an individual judicial decision) and an international treaty may be requested, and the Constitutional Court has no competence to examine the conflict of a judicial decision with an international treaty in proceedings under section 27 of the ACC {see for example the Decision 3105/2023. (III.14.) AB, Reasoning [21]}. Therefore, in the absence of competence, the Constitutional Court could not examine whether the ruling of the Budapest Environs Regional Court violated the European Convention on Human Rights.

[20] 3 Pursuant to section 27 (1) of the ACC, a constitutional complaint may be lodged on the grounds of violation of a right guaranteed by the Fundamental Law. According to the consistent case-law of the Constitutional Court, Article XV (2) of the Fundamental Law does not contain a right guaranteed by the Fundamental Law for the purposes of the adjudication of constitutional complaints, and, with regard to this element, the constitutional complaint therefore does not fulfil the statutory requirement laid down in section 27 (1) (a) of the ACC. {for example: Decision 3213/2023. (V.5.) AB, Reasoning [26]}.

[21] 4 The constitutional complaint fulfils the requirement of an explicit request in connection with Articles VI (1) and XXVIII (1) of the Fundamental Law.

[22] 5 According to section 29 of the ACC, the constitutional complaint may be admitted if a concern of conflict with the Fundamental Law significantly affects the judicial decision, or the case raises constitutional law issues of fundamental importance. These admissibility conditions are of an alternative nature, therefore the Constitutional Court examines their existence separately {Decision 3/2013. (II. 14.) AB, Reasoning [30]}

[23] In the Constitutional Court's view, it can only be established as a result of an examination of the merits whether the interpretation of the law, which finds that -- according to section 22/C (2) (b) of the ANCP -- it is only possible to order the substitution of the missed contact within 6 months of the original date of the missed contact, empties out the right to contact between the parent and the child, as protected by Article VI (1) of the Fundamental Law, together with the essence of the non-contentious procedure for the substitution of the missed contact. The Constitutional Court therefore also reviewed the merits of the constitutional complaint with the application of section 31 (6) of the Rules of Procedure, without a specific procedure of admitting the complaint.

IV

[24] The constitutional complaint is well-founded.

[25] 1 According to the consistent case-law of the Constitutional Court, the right of the separated parent and the child to maintain contact is a right elevated to the rank of a fundamental right in the Fundamental Law as part of the protection of privacy (Article VI (1) of the Fundamental Law), as well as the right of the child to care (Article XVI (1) of the Fundamental Law) and the right of the parent to provide upbringing (Article XVI (2) of the Fundamental Law) {Decision 3067/2021. (II.24.) AB, Reasoning [25]; recently: Decision 30/2021. (XII.1.) AB, Reasoning [16]}. Accordingly, the procedure for the enforcement of a contact order under the ANCP enforces Article XVI (1) of the Fundamental Law on the side of the child (safeguarding the best interests of the child) and Article VI (1) (right to private and family life, right of the separated parent to contact) and Article XVI (2) (right of the parent to upbringing) on the side of the parent. Continuity of contact is an essential part of the relationship between the (separated) parent and the child, as it ultimately ensures that the child can rely on both parents to provide the education, protection and care necessary for his or her development {see primarily: Decision 3067/2021. (II. 24.) AB, Reasoning [28]}. When the law-maker created the procedure for the enforcement of a contact decision under sections 22/A to 22/E of the ANCP, it essentially laid down the procedural means for the enforcement of the rights guaranteed by the Fundamental Law, as a result of the State's objective obligation to protect institutions.

[26] 2 In the case giving rise to the constitutional complaint, the Budapest Environs Regional Court concluded in its ruling No. 6.Pkf.51.643/2022/4 that the mother had, through her fault, prevented the undisturbed contact with the child in respect of the continuous weekend contact due from 11 February 2022 (ruling of second instance,

page 7). However, the Budapest Environs Regional Court held that under section 4:182 (2) of the Civil Code, the possibility to substitute for a missed contact is possible within six months of the failure to establish contact, and section 22/C (2) (b) of the ANCP refers back to this deadline, beyond which the missed contact cannot be substituted even if the conditions for substituting the contact would otherwise exist due to the fault of the obliged party. Since, in the case giving rise to the constitutional complaint, the Budapest District Court made its decision six months after the date of the contact due from 11 February 2022, the legal consequence under section 22/C (2) (b) of the ANCP, namely ordering the substitution of the missed contact, is no longer applicable.

[27] 3 The Minister of Justice clearly stated in his response to the Constitutional Court's request that section 4:182 (2) of the Civil Code provides a six-month period of time, as a time-limit of substantive law nature, for the obliged party to voluntarily substitute the missed contact. This provision does not exclude the possibility of substituting the contact after six months if the obliged party fails to comply voluntarily and is obliged to do so by a court decision. On the other hand, the six-month time-limit under section 22/C (2) (b) of the ANCP is a procedural time-limit in proceedings for enforcement of a decision on contact. Pursuant to section 22/C (2) (b) of the ANCP, if the court finds that the defendant has breached the provisions of the decision on contact, it shall issue a ruling requiring the defendant to substitute the contact missed for reasons beyond the control of the beneficiary of the right of contact at the earliest appropriate time, but not later than in six months, and shall specify the final date for substituting the missed contact. This time-limit (as pointed out by the Minister of Justice) always starts on the day following the notification of the ruling rather than the original date of the contact. This also means that the six-month period under section 4:182 (2) of the Civil Code and the one under section 22/C (2) (b) of the ANCP are necessarily different from each other.

[28] 4. Accordingly, section 22/C (2) of the ANCP allows the court to order the enforcement of the missed contact in all cases where the court finds that the defendant has violated the provisions of the decision on contact. The Constitutional Court observes that this interpretation of the law is, moreover, in accordance with the grammatical interpretation of section 22/C (2) (b) of the ANCP.

[29] 5 The interpretation of any provision of the ANCP (in this case, the "not later than in six months" provision of the Act) is generally a question of interpretation of the law within the special field of law, which is outside the competence of the Constitutional Court. However, this is only true as long as the question is the correctness or incorrectness of the interpretation of the law chosen by the court, i.e. if the interpretation of the law chosen by the court is otherwise within the constitutional limits of the margin of interpretation granted to the trial courts under Article 28 of the Fundamental Law. However, in the event that the interpretation of the law chosen by

the court acting in the case at hand goes beyond the scope of interpretation under the Fundamental Law, this will necessarily result in the judicial decision being in conflict with the Fundamental Law, an aspect which is within the competence of the Constitutional Court to examine.

[30] As the Constitutional Court has already pointed out, the right of contact between a separated parent and a child is also protected, *inter alia*, by Article VI (1) of the Fundamental Law. According to the first sentence of Article 28 of the Fundamental Law, "in the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law". The courts are also obliged to enforce fundamental rights in relations between private law subjects, which effectively makes the courts' adjudicative activity bound by constitutional law. In such cases, it is a fundamental expectation regarding adjudication by the courts that the essential content of the fundamental rights concerned should not be emptied out and that the obligation to protect fundamental rights under Article I (1) of the Fundamental Law must be ensured {Decision 3145/2018. (V.7.) AB, in particular, Reasoning [66] to [70]}. This means that, in accordance with the Constitutional Court's guiding case-law, courts must take into account in the course of their adjudicating activity which meaning of a law is in line with the Fundamental Law, and they shall apply the law with this meaning to individual cases, otherwise the Constitutional Court will annul the court's decision for exceeding the limits of interpretation as set by the Fundamental Law. {see for example the Decision 16/2021. (V. 13.) AB, Reasoning [36]}.

[31] 6 As the Minister of Justice pointed out in her reply to the Constitutional Court's request, and as also follows directly from the grammatical interpretation of section 22/C of the ANCP, the Act does not expressly and clearly exclude the failure to substitute a missed contact where the court delivers its decision after six months from the original date of contact. Accordingly, the Constitutional Court concludes that there is a possible interpretation of section 22/C (2) (b) of the ANCP which allows the court to order the substitution of a missed contact, thus enforcing the right of the separated parent under Article VI (1) of the Fundamental Law, even if more than six months have elapsed since the initial date of contact, a situation which, taking into account nothing else but the duration of court proceedings, necessarily affects a significant proportion of the non-contentious proceedings under the ANCP for the enforcement of contact orders. In this context, however, the interpretation of the law chosen by the Budapest Environs Regional Court, which excludes the substituting of a missed contact in cases such as that of the petitioner, actually completely empties out the fundamental right between the separated parent and the child, which is also protected by Article VI (1) of the Fundamental Law, and this interpretation of the law is therefore outside the limits of interpretation conferred on the trial court by Article 28 of the Fundamental Law, and thus it is contrary to the Fundamental Law.

[32] The Constitutional Court therefore annulled the ruling No. 6.Pkf.51.643/2022/4 of the Budapest Environs Regional Court as set out in the holdings of the decision. With regard to the finding the ruling of the Budapest Environs Regional Court to be in conflict with the Fundamental Law and its annulment, the Constitutional Court, in accordance with its consistent case-law, no longer examined the element of the petition alleging a violation of Article XXVIII (1) of the Fundamental Law {see for example the Decision 3104/2023. (III.14.) AB, Reasoning [64]}.

[33] 7 Section 46 (3) of the ACC authorises the Constitutional Court to specify in a decision, in the procedure carried out in the course of exercising its competences, the constitutional requirements – that result from the Fundamental Law and enforce the provisions of the Fundamental Law – the application of the law reviewed, and applicable in the judicial procedure, has to comply with. Since there is an interpretation of section 22/C (2) (b) of the ANCP, which was also applied by the Budapest Environs Regional Court, and which is not obviously *contra legem* on the basis of a purely grammatical interpretation of the provisions of the ANCP, which is capable of making it impossible to substitute contact between the separated parent and the child, this interpretation (which is formally deductible from the provisions of the ANCP, but is contrary to the Fundamental Law) is capable of infringing both the right of the separated parent to maintain contact with his or her child under Article VI (1) of the Fundamental Law and the paramount best interests of the child enshrined in Article XVI (1) of the Fundamental Law. In this context, the Constitutional Court could not ignore the fact that it is in the interest of the child and the parent to ensure that a missed contact is substituted as soon as possible. This (and thus, as far as possible, a continued contact between the child and the parent) can be ensured with the correct interpretation of the law. Nor could the Constitutional Court disregard the fact that the subsequent substitution of a request for contact-substitution, which was rejected in the present case on the basis of an interpretation of the law which was contrary to the Fundamental Law, after the Constitutional Court's decision, would be to the detriment of both the child and the parent who had not caused the missing of contact, also because of the length of the proceedings. Finally, the Constitutional Court also took into account that, pursuant to section 2 (g) of the ANCP, there is no right of review in the case of non-litigious proceedings governed by the ANCP (and thus in the proceeding giving rise to the constitutional complaint). Since the Curia cannot act in non-litigious proceedings under the ANCP, there is no room for a uniformity of law complaint either under the Act CLXI of 2011 on the Organisation and Administration of Courts (see section 41/B of the Act).

[34] In the light of all these aspects, the Constitutional Court establishes, on the basis of section 46 (3) of the ACC, as constitutional requirement under Article VI (1) and Article XVI (1) of the Fundamental Law that, on the basis of section 22/C (2) (b) of the

ANCP, the court may order the substitution of any missed contact in any case where the conditions for the issuance of a ruling on the enforcement of a missed contact are fulfilled; the substitution of the missed contact may take place at the latest within six months from the issuance of the court's ruling, at the next appropriate time.

[35] 8 The Constitutional Court ordered the publication of the Decision in the Hungarian Official Gazette on the basis of the second sentence of section 44 (1) of the ACC to ensure the effective protection of the rights of the child and the contact between the parent and the child, which is also protected by the Fundamental Law.

Budapest, 11 July 2023.

Dr. Tamás Sulyok,
President of the Constitutional Court

Dr. Egon Dienes-Oehm, Justice of the
Constitutional Court

Dr. Béla Pokol, Justice of the
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Dr. Tünde Handó, Justice of the
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Dr. Attila Horváth, Justice of the
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Dr. László Salamon, Justice of the
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Dr. Ildikó Hörcherné dr. Marosi, Justice
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Dr. Marcel Szabó rapporteur, Justice of
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Dr. Miklós Juhász, Justice of the
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Dr. Péter Szalay, Justice of the
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Dr. Zoltán Márki, Justice of the
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Dr. Mária Szívós, Justice of the
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