Decision 3278/2019 (XI. 5.) AB

In the metter of a constitutional complaint, the Constitutional Court, sitting as the Full Court, with the dissenting opinions of *Dr. Ágnes Czine*, *Dr. Egon Dienes-Oehm* and *Dr. Ildikó Marosi Hörcherné,* Justices of the Constitutional Court, has rendered the following

d e c i s i o n:

The Constitutional Court holds that the Order of the Administrative and Labour Court of Veszprém No 3.KpK.50.080/2016/4 is contrary to the Fundamental Law, and therefore annuls such Order with effect to the public authority proceedings reviewed by the contested court order.

R e a s o n i n g

I

[1] 1. The petitioners, Zsuzsanna Belovai and Tamás Váraljai, acting in person, submitted a constitutional complaint.

[2] In their pleadings as contained in a joint petition, the petitioners, on the basis of Section 27 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), filed a constitutional complaint seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of the Order of the Administrative and Labour Court of Veszprém No 3.KpK.50.080/2016/4. In addition to the above, pursuant to Section 26 (1) of the Constitutional Court Act, the petitioners sought a review of consistency by the Constitutional Court of the relevant legislation with the Fundamental Law, namely, Section 4 (1) to (5) of Government Decree 312/2012 (XI. 8.) Korm on Procedures and Inspections of Constructions and Those of the Construction Supervisory Authorities, and on Construction Authorities Services (hereinafter referred to as the "Decree"), Section 15 (6a), second sentence, of Act CXL of 2004 on the General Rules of Public Administrative Proceedings and Services (hereinafter referred to as the "Public Administrative Procedure Act"), and Section 53/C (11) of Act LXXVIII of 1997 on the Formation and Protection of the Built Environment (hereinafter referred to as the "Act on the Built Environment.

[3] In the case giving rise to the constitutional complaint, the petitioners stated that they had a life right of usufruct on the property owned by their children in undivided joint ownership. In the summer of 2015, they were informed by unofficial sources that construction was to begin on the adjacent property, but none of the owners of the property listed on the title deed received official notification of the planned construction. In the petitioners' opinion, the planned construction is unlawful for several reasons and violates the petitioners' rights guaranteed by the Fundamental Law, therefore they have submitted their complaints and requests regarding the issuance of the building permit and the unlawfulness of the procedure in all possible forums, both before the authorities and the courts, in all possible forms. The authorities before them did not, however, consider the merits of the case, given that the building permit had been issued as a public administrative official decision and those who had been served with or communicated the decision had not appealed within 15 days. As the decision had become final for more than six months, the

petitioners were not eligible to become parties to public administrative proceedings. The courts before which the case had been brought did not deal with the merits of the case either, and limited their proceedings to an assessment of the status of the party to public administrative proceedings. In the meantime, the petitioners obtained a building permit document for the adjacent property, at the bottom of which the group of persons to be served only lists the party commissioning the construction as the party to the public administrative proceedings; therefore, the petitioners did not receive any notification or information about the initiation of the proceedings or the decision becoming final. In their pleadings, the petitioners claimed that the fact that they had not received any notification of the opening of the procedure, or even of its conclusion, in the absence of any official notification, was a manifest obstacle to their involvement in the building permit procedure for the adjacent property within six months. The petitioners stressed that they were not at fault for the failure to act, which was not disputed by the authorities and courts seised of the matter.

[4] In response to the submission of the pleadings by the petitioners as applicants, the Department of Construction of Veszprém County Government Office sent an information letter dated 13 August 2015 under case number VED/001/555-8/2015, in which the authority stated that the petitioners were not identified as parties to the public administrative proceedings, and thus they were not notified of the decision that became final and enforceable in 2014. At the same time, the petitioners were informed that, as they were not involved as parties to the public administrative proceedings in the case, the Government Office as authority could not provide further detailed information on the procedure and the decision. Furthermore, the involvement of a new party to the public administrative proceedings in a building authority case which had become final and enforceable more than a year before was not legally possible in the context of a supervisory procedure. In addition, the authority pointed out that the supervisory body is entitled to investigate the procedure and the decision of the authority in charge of the case. However, the decision of the authority at first instance cannot be reversed or annulled if, in the absence of a ground for nullity, it would infringe the rights acquired and exercised in good faith by the party to the public administrative proceedings. According to the authority, in the case of existing buildings, the existing zoning regulations, while recognising vested rights, should only be taken into account in the case of the construction of a new building.

[5] The petitioners disagreed with the statements made in the authority's information and therefore applied to the courts. The court seised of the matter dismissed the application initiating court proceedings summarily without issuing a summons with the proviso that the decision had become final in the absence of an appeal and that the information letter did not constitute a decision or order on the merits of the case within the meaning of Section 72 of the Public Administrative Procedure Act, and therefore no public administrative action could be brought against it. The court of second instance, acting on the petitioners' appeal, set aside the order and ordered the court of first instance to start a new procedure and issue a new decision, in the course of which the respondents' status as parties to the public administrative proceedings should be assessed and whether a decision had been taken which would have established that they did not have any status as parties to the public administrative proceedings. The court of second instance stressed that the protection of the rights acquired and exercised in good faith by the party commissioning the construction could only be based on a lawful decision.

[6] The Order of the Administrative and Labour Court of Veszprém under No 3.Kpk.50.080/2016/4 taken in the resumed proceedings and is sought to be annulled in the

constitutional complaint at issue here, which order dismissed the request for review against the information notice of Veszprém County Government Office No VED/001/555-8/2015, upheld the information letter as lawful in its content, the reasons given being essentially the same as those contained in the official information letter.

[7] 2. The petitioners submit that the order challenged in the constitutional complaint and the application of the contested legal provisions violate the principle of respect for fundamental rights enshrined in Article I (1) to (3) of the Fundamental Law, their right to human dignity under Article II and their right to the protection of privacy under Article VI (1), the right to property under Article XIII (1), the prohibition of discrimination under Article XV (1) to (2), the right to a fair hearing before a public authority under Article XXIV (1), the right to petition under Article XXV, the right to a fair trial under Article XXVIII (1) and the right to legal remedy under Article XXVIII (7). In addition, Article 28 of the Fundamental Law has been mentioned, as well as Article B(1), Article R(1) to (3) and Article T(3).

II

[8] 1. The provisions of the Fundamental Law invoked in the constitutional complaint read as follows:

"Article B (1) Hungary shall be an independent democratic State governed by the rule of law."

"Article R (1) The Fundamental Law shall be the foundation of the legal system of Hungary.
(2) The Fundamental Law and the legislation shall be binding on everyone.
(3) The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical Constitution."

"Article T (3) No law shall conflict with the Fundamental Law."

"Article I (1) The inviolable and inalienable fundamental rights of MAN shall be respected. It shall be the primary obligation of the State to protect these rights.
(2) Hungary shall recognise the fundamental individual and collective rights of man.
(3) The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right."

"Article II Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception."

"Article VI (1) Everyone shall have the right to have his or her private and family life, home, communications and good standing of reputation respected.."

"Article XIII (1) Everyone shall have the right to property and inheritance. Property shall entail social responsibility."

"Article XV (1) Everyone shall be equal before the law. Every human being shall have legal capacity.
(2) Hungary shall guarantee fundamental rights to everyone without discrimination and in particular without discrimination on the grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status."

"Article XXIV (1) Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to state the reasons for their decisions, as provided for by an Act."

"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. [...]
(7) Everyone shall have the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests."

"Article 28 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. When interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good."

[9] 2. The relevant provisions of the Public Administrative Procedure Act in force until 31 December 2017 read as follows:

"Section 15 (1) 'Party to the public administrative proceedings" shall mean any natural or legal person and any association lacking the legal status of a legal person whose rights or legitimate interests are affected by a case, a person which is subjected to regulatory inspection, or a person which is the subject of any data contained in official records and registers. [...]
(3) An act or government decree may define the persons who can be treated as parties to the public administrative proceedings, in connection with certain specific types of cases, without considering the matters referred to in Subsection (1). Without considering the matters referred to in Subsection (1), all owners of immovable property located in the affected area specified in the relevant legislation, as well as any person whose right related to such properties has been registered in the land register shall also be treated as such parties..
(4) The rights of the parties to the public administrative proceedings shall also be conferred upon the bodies of vested competence, other than those participating in the case in the capacity of an authority or special authority.
(5) In certain specific cases the rights of the party to the public administrative proceedings may be vested upon, or such party status may be granted to, civil society organisations whose registered activities are oriented for the protection of some basic rights or the enforcement of certain public interests.

(5a) In proceedings of the authorities, civil society organisations whose registered activities are oriented for the protection of certain basic rights or the enforcement of certain public interests shall have the right to make statements. Such statements shall not be binding upon the acting authority.
(6) The exercise of the rights of the party being a party to the public administrative proceedings, which party has been properly notified concerning the opening of proceedings, may be rendered conditional by law upon such party lodging a statement or request in proceedings of the first instance. The substantive requirements for such statement or request may be laid down by an Act or a government decree adopted under authorisation thereof.
(6a) Where so prescribed by an Act, after six months following the date when the authority's decision became final and enforceable, as specified by an Act, additional parties to the public administrative proceedings may not join the proceedings. In that case no request for a statement of defence shall be accepted upon failure to meet the above time limit.
(7) A natural person party to the public administrative proceedings shall be considered to have capacity to act in terms of administrative proceedings if considered legally competent under civil law. In the cases defined by law persons of limited legal capacity shall also be considered to have capacity to act in terms of administrative proceedings. When in doubt, the competent authority shall ex officio investigate the status of the capacity to act and, if found lacking, shall summon the statutory representative of the party to the public administrative proceedings, or shall request the appointment of a guardian *ad litem* with the relevant documents attached, or, where an Act or government decree so provides, shall provide for the appointment of a guardian *ad litem* at its own discretion, upon laying down the detailed rules for the appointment of a guardian *ad litem*.
(8) An order on the refusal to grant party status to a party to the public administrative proceedings other than the party having submitted a request for the institution of proceedings may be independently appealed."

[10] 3. The relevant provision of the Act on the Built Environment reads as follows:

"Article 53/C (11) After six months following the date when the decision adopted by the competent building authority and construction regulatory authority in conclusion of the proceedings became final and enforceable, no new party to public administrative proceedings may join the proceedings."

[11] 4. The relevant provisions of the Decree read as follows:

"4. Parties to the public administrative proceedings
Section 4 (1) In the authorisation and acknowledgement procedure of the building authority and in the building regulation procedure of the construction supervisory authority, the person commissioning the construction and the owner of the land plot affected by the construction activity, in the case of an agricultural land plot according to the Government Decree on National Settlement Planning and Building Requirements, the owner of all land plots, buildings and parts of buildings belonging to such agricultural land, shall be deemed to be a party to the public administrative proceedings without any special examination.

(2) In addition to the provisions of Subsection (1), the legal status of party to the public administrative proceedings of the person whose right to the plot or building affected by the construction activity has been registered in the land register shall be assessed in all cases in the proceedings of the construction authorities and construction supervisory authorities.
(3) These regulatory authorities may, to the extent of the content of their position statements, determine the affected area in accordance with the law.
(4) No opposing party shall be a party to the proceedings if the person commissioning the construction has submitted a declaration in the form of a private deed with full probative value, made in the knowledge of the architectural and technical documentation and agreeing with the contents thereof, by all parties concerned in the case, for the execution of the requested construction activity.
(5) For the purposes of the application of Subsection (2) of Article 53/G of Act LXXVIII of 1997 on the Formation and Protection of the Built Environment [...], knowledge of facts or evidence which may be used to clarify the facts, or observations relating to the testimony of witnesses, expert opinions, findings made during an on-site inspection or an inspection shall be deemed to be a statement."

III

[12] 1. The Constitutional Court first considered whether the petition meets the statutory criteria for the admissibility of constitutional complaints and on 4 July 2017, the Constitutional Court, acting in deliberation as a panel pursuant to Section 56 (1) of the Constitutional Court Act, admitted the constitutional complaint with the proviso that the question to be determined in the constitutional complaint at issue is as follows: whether the interpretation of the underlying concept of the party to the public administrative proceedings by the authorities is in accordance with the Fundamental Law, and whether the failure to inform the petitioners of the initiation of the public authority proceedings and the failure to notify the petitioners of the official decision (the information on this) affects their rights under the Fundamental Law.
[13] In the course of its proceedings, the Constitutional Court found that some of the provisions challenged in the constitutional complaint submitted by the petitioners, pursuant to Section 26 (1) of the Constitutional Court Act, are no longer in force. The whole of the Public Administrative Procedure Act was repealed by Section 142 of Act CL of 2016 on General Administrative Procedure (hereinafter referred to as the "General Public Administrative Proceedings Act") as of 1 January 2018, while the provisions of Section 53/C of the Act on the Built Environment was amended effective as of 1 January 2018 by Section 130 (4) of Act L of 2017 on the Amendment of Certain Acts in Connection with the Entry into Force of the Act on the General Administrative Procedure Act and the Act on the Code of Administrative Procedure.

[14] 2. The Constitutional Court has consistently held that it only reviews the constitutionality of a repealed statutory provision if its applicability is also a question to be decided. In the specific cases of review of a provision, on the basis of a judicial initiative under Section 25 of the Constitutional Court Act and on the basis of a constitutional complaint under Sections 26 and 27 of the Constitutional Court Act, the Constitutional Court also reviews the unconstitutionality of a provision which is no longer in force, since in such cases a prohibition of application may arise.

Given that the petition at issue was for the initiation of a constitutional complaint procedure under Section 26 (1) and Section 27 of the Constitutional Court Act, the Constitutional Court conducted its review in the light of the provisions of the legislation in force in the main proceedings which were no longer in force.

IV

[15] The constitutional complaint is well-founded as follows.

[16] 1. In their constitutional complaint, the petitioners complained in part that they had not been informed during the construction authority procedure of the planned construction on the adjacent plot and when the building permit was issued, and that they were not allowed to participate in the procedure as parties to the public administrative proceedings. When they were informed about the planned construction from unofficial sources, they immediately expressed their concerns and their intention to act as a party to the public administrative proceedings. However, the competent administrative authority sent an information letter stating that the building permit had become legally binding more than six months ago and that no further parties to the public administrative proceedings could intervene.

[17] 1.1 The Constitutional Court has already dealt with the issue of the concept of the party to the public administrative proceedings on several occasions.

[18] The Constitutional Court has considered the client concept set out in Section 15 (1) of the Public Administrative Procedure Act as a general and guaranteeing provision of the Public Administrative Procedure Act, which must always be given substance by considering the subjective rights and legitimate interests of the subject of the administrative authority in question. To this end, in addition to legal competency, the competency to act as a party to the public administrative proceedings is conditional on being involved in the case. The Public Administrative Procedure Act therefore explicitly provided for a broad scope of the eligibility of being a party to the public administrative proceedings, and did not use an exhaustive list as a means to this end, but allowed for the assessment of the specific circumstances of the individual case {Decision 5/2018 (V. 17.) AB, Reasoning [4]}.

[19] With regard to the status of party to the public administrative proceedings, the Constitutional Court explained that the purpose of the definition of party to the public administrative proceedings in the Public Administrative Procedure Act was to enable everyone to assert their rights, legitimate interests and related claims in public administrative proceedings. This main rule was supplemented by the new provisions of Section 15 (3) of the Public Administrative Procedure Act, in accordance with which an Act or a government decree could determine, in a specific type of case, the persons who qualified as parties to the public administrative proceedings without considering the matters referred to in Subsection (1). This supplementary rule thus allowed for an extension, not a narrowing, of the scope of the parties to the public administrative proceedings. Section 13 (6) of the Public Administrative Procedure Act stated that the legislation could only lay down supplementary provisions in accordance with the statutory provisions of the Act. The Constitutional Court, referring to the Decision 36/2008 (IV. 3.) AB, pointed out that, in addition to the fact that the scope of the quality of the party to the public administrative

proceedings can only be narrowed to a limited extent at the statutory level, a categorical narrowing of the scope of possible parties to the public administrative proceedings in a lower level statute would be contrary to the Fundamental Law. Just as the special procedural rules cannot narrow the general definition of the party to the public administrative proceedings in the Public Administrative Procedure Act, they can only expand or clarify it, based on the specificities and diversity of the public administrative procedure {Decision 5/2018 (V. 17.) AB, Reasoning [5]; Decision 36/2008 (IV. 3.) AB, ABH 2008, 1367; Decision 249/D/2009 AB, ABH 2011, 1940}.

[20] In Decision 12/2015 (V. 14.) AB, the Constitutional Court also ruled on the interpretation of the status of a party to the public administrative proceedings. In the underlying case, in a procedure for the granting of a land conversion permit, the authorities did not notify the decision on the land conversion permit to the owner of the adjacent property, which was later justified by the authorities on the grounds that the law does not require notification of the owner of the adjacent property. However, in the operative part of its decision, the Constitutional Court held that the constitutional requirement under Article XXVIII (7) of the Fundamental Law that for the purposes of applying Section 15 (1), (3) and (8) of the Public Administrative Procedure Act, "the owner of the land immediately adjacent to the land which is the subject of the land conversion procedure must also be considered a party to the public administrative proceedings". The Constitutional Court based this decision essentially on the existence of an infringement of the right to legal remedy. In its reasoning, the Constitutional Court reviewed the relevant legal provisions in detail, including the rules on the law relating to neighbours contained in Act V of 2013 on the Civil Code (hereinafter referred to as the "Civil Code"), and also pointed out that the Public Administrative Procedure Act defined a broad and comprehensive scope of parties to the public administrative proceedings, in connection with which the regulations on various administrative procedures (e.g. fire safety requirements) expressly provided for "*ex officio* review of the status of the party to the public administrative proceedings of the person entitled to disposal of directly adjoining plots". These have been considered by the Constitutional Court as clearly being adopted with regard to the legitimate interests of the neighbours {Decision 12/2015 (V. 14.) AB, Reasoning [19] to [21]}.

[21] Similarly, the constitutionality of the rejection of the status of the party to the public administrative proceedings formed the subject matter of the constitutional complaint reviewed by Decision 3241/2017 (X. 10.) AB. The petitioner also applied for registration as a party to the public administrative proceedings in a land conversion procedure, claiming that he was the owner of a property directly adjacent to the land plot affected by the land conversion and that the planned land conversion violated his legitimate interests and the law. In this case as well, the Constitutional Court ruled that the court order rejecting the status of party to the public administrative proceedings status was contrary to the Fundamental Law and annulled it. Maintaining the findings of its Decision 12/2015 (V.14.) AB, the Constitutional Court pointed out that while in the previous case the violation of the Fundamental Law was based on the violation of the right to legal remedy, in this case it considered the challenged court order to be contrary to Article XXVIII (1) of the Fundamental Law {Decision 3241/2017 (X. 10.) AB, Reasoning [28] to [30] and [37]}.

[22] 1.2 In the present case, however, it was not the denial of the status of party to the public administrative proceedings that gave rise to the petitioners' grievance, given that no such decision had been made. This was also recognised by the court of first instance in the action for review of

the public authority proceedings, which formed the antecedents of the present case, and in view of this it dismissed the application without issuing a summons. Under Order No 3.K.27.157/2016/2 of Veszprém Administrative and Labour Court, it was established from the file that a first instance decision had been made in the building permit case in 2014, which became final at first instance in the absence of an appeal. In the building permit case, there was no appeal at second instance and therefore no decision at second instance, that is, none of the right holders exercised their right to appeal. Since the case was not decided at second instance, there was no decision which could be subject to judicial review in public administrative proceedings. The court pointed out that the defendant administrative authority had responded to the claimants' (the petitioners in the present case) submission of 15 July 2015 by an information letter; however, that letter did not constitute a decision on the merits of the case within the meaning of Section 72 of the Public Administrative Procedure Act. Therefore, no public administrative proceedings could be brought against this information letter.

[23] According to the court, the reasoning in the claimant's application, which referred to the applicability of the uniformity decision on the reviewability of decisions taken in the form of an incorrect decision, was incorrect. According to the court seised, it was not a question of the defendant administrative authority having erroneously reviewed the merits of the appeal against the first instance decision in an informative form, but of the defendant having provided the parties with information concerning their submissions and the merits of the case. The court held that by providing this information, the defendant administrative authority had failed to reach a decision complying with Section 72 of the Public Administrative Procedure Act. The court made it clear that the defendant's information letter did not rule on the merits of the claimant's application against the building permit, but merely served to inform the claimant parties to the public administrative proceedings who had submitted the pleadings in the case. According to the court, therefore, the condition for the court to review the defendant's information letter as an administrative decision taken in an erroneous form was not met in the case at hand (see Order of the Administrative and Labour Court of Veszprém No 3.K. 27.157/2016/2, p. 3, paragraphs 2 and 3).

[24] 1.3 The court of second instance, acting on the appeal of the claimants (the petitioners in the present case), set aside the order of the court of first instance and ordered the court of first instance to hear the application in non-litigious proceedings and to issue a new decision. In its reasoning, it pointed out that the court of first instance would have acted correctly if it had treated the claimants' applications, both to the defendant administrative authority and to the court, as primarily seeking to establish the status of party to the administrative proceedings and should have reviewed the position of the authorities on the matter. The court of second instance referred to the Supreme Court's decision Kfv.III.37.136/2010 (BH2011.82.), in accordance with which the decision in favour of the defendant finding the absence of the status of a party to the administrative proceedings is an order the admissibility of which must be determined in non-litigious proceedings. In view of this, it set aside the order of the court of first instance and ordered the court of first instance to conduct the new proceedings in a non-litigious procedure. It ordered the court to assess whether there was any informal decision on the part of the defendants concerning the claimants' status as parties to the public administrative proceedings and whether the applicants' pleadings referred to a legal remedy in that regard. It noted, however, that the judicial practice is consistent in holding that the protection of rights acquired and exercised in

good faith on the part of the party commissioning the construction is a circumstance to be reviewed only in the case of a final decision (KGD.2010.165.) and that this cannot be based on an unlawful decision (BH2016.25.). Therefore, in the event that the decision of the construction authority under the Public Administrative Procedure Act suffers from a defect which has resulted in it not becoming final, the reference to the bona fide acquired and exercised rights of the party commissioning the construction as against the claimants is also unfounded (*see* Order of the Regional Court of Veszprém acting at second instance No 3Kpkf.20.950/2016/4. pp. 3-4).

[25] 1.4 In the resumed proceedings, the court of first instance in the public administrative non-litigious proceedings for review of the public administrative procedure dismissed by order the applicants' request for review against the authority's information letter No VED/001/555-8-2015. In the grounds of the order, the court stated the following facts: the claimants did not participate in the authorisation procedure as parties to the public administrative proceedings and as beneficiaries of the right of usufruct incumbent on the property directly adjacent to the property for which the building permit was sought. The building permit became final and enforceable in the absence of an appeal. In their application for review of the building permit, the claimants complained that they had not been involved as parties to the public administrative proceedings in the first instance building authorisation procedure, had not been informed of it, had not received the decision and could not therefore appeal against it. In response to this submission, the authority provided information to the effect that the building authorisation procedure had been completed and that the permit had become final and enforceable. The applicants were not involved as parties to the public administrative proceedings in the authorisation procedure, and their involvement as parties to the public administrative proceedings was not possible under Section 15 (6a) of the Public Administrative Procedure Act and Section 53/C (11) of the Act on the Built Environment. In a construction matter, a new party to the public administrative proceedings may no longer participate in the procedure after six months from the date on which the decision closing the procedure becomes final. In the information letter, the authority also pointed out that the applicants' request for review cannot be fulfilled in the context of a supervisory procedure under the provisions of Section 115 (4) (c) of the Public Administrative Procedure Act, as it would violate a right acquired and exercised in good faith. In their pleadings dated 27 February 2016, the applicants sought judicial review of the building permit and the authority's information letter and their annulment on the grounds of breach of law.

[26] 1.5 Pursuant to the order of the regional court, as the court of appeal at second instance, setting aside the decision and ordering a new trial, the court of first instance, acting in the resumed proceedings, took the view that the information letter of the authority, although not a formal decision on the pleadings of the applicants, contains findings on the status of the applicants as parties to the public administrative proceedings. It emphasised, in essence, that the applicants were not parties to the public administrative proceedings in the main proceedings and that their subsequent recognition as parties to the public administrative proceedings could not be made by virtue of a statutory provision. In that regard, the court stated that, in terms of its content, the information letter was a public administrative act on the recognition of the applicants' status as parties to the public administrative proceedings, the review of which was conducted on the basis of Act XVII of 2005 on Public Administrative Non-Litigious Proceedings (hereinafter referred to as

the “Public Administrative Non-Litigious Proceedings Act”). Pursuant to Uniformity Decision No 1/2009 KJE, a public administrative act which is incorrect or not in due form is subject to review in accordance with the procedure laid down in its content, which in the present case is the public administrative non-litigious proceedings. The court recalled that in accordance with Section 3 (1) of the Public Administrative Non-Litigious Proceedings Act, the party to the public administrative proceedings and, in the case of a provision to which he is subject, the other party to the proceedings may initiate judicial review of the order on the grounds of breach of the law within 30 days of the communication of the order. Pursuant to Subsection (2), the administrative and labour court shall issue an order on the subject of the application in non-litigious proceedings, while pursuant to Subsection (4), in the event of a material procedural violation, the court shall set aside the order and, if necessary, order the authority to initiate new proceedings. No further appeal shall lie against the order of the court.

[27] 1.6 In view of the above, the court of first instance concluded in the course of its resumed proceedings that the authority had made correct findings on the merits in the information letter. It is no longer possible to establish the status of the applicants as parties to the public administrative proceedings because there is a statutory obstacle to doing so. The court emphasised that the Decree was applicable under the legislation in force at the time the building permit was submitted. According to the court, the applicants, who are the owners of the property directly adjacent to the property for which the building permit is sought, were not considered to be parties to the public administrative proceedings in the main proceedings under Section 4 (1) to (3) of the Decree, and therefore the authority was under no obligation to include them in the proceedings as parties to the public administrative proceedings, and the applicants therefore complained without justification that it had failed to do so. The court also referred to the fact that the Decree entered into force on 1 January 2013, at the same time Government Decree 193/2009 (IX. 15.) Korm, which contained the previous procedural rules, expired, and pursuant to Section 3 (3) of which, in the previous proceedings, the status of the persons entitled to own land directly adjacent to the property subject of the application as parties to the public administrative proceedings had to be considered in all cases.

[28] In the resumed first instance proceedings, the court concluded from the change in the law that the authority no longer had to include in the proceedings the applicants as parties to the public administrative proceedings. In view of this, it held that the authority had correctly assessed the application for recognition of the applicants’ status as parties to the public administrative proceedings, even if it had not done so by way of a formal decision. The decision of the authority could not be set aside because, in the Court’s view, the authority’s decision was lawful and "not vitiated by any breach of law".

[29] 2. The Constitutional Court does not share the position of the court in the Order of the resumed first instance non-litigious procedure.

[30] The Constitutional Court states that in the procedure of a constitutional complaint under Section 27 of the Constitutional Court Act, its task is also to review the conformity with the Fundamental Law. The establishment of the facts, the procedure of taking evidence, including the evaluation of evidence, is part of the adjudicative activity of the courts. Pursuant to Article 24 (2) of the Fundamental Law and Section 27 of the Constitutional Court Act, the Constitutional Court

does not have the task of adjudicating on specific disputes, it only has the power to review the constitutionality of the judicial decision submitted to it and to eliminate the Fundamental Law violation that has a material impact on it {Order 3315/2014 (XI. 21.) AB, Reasoning [16]; Order 3014/2015 (I. 27.) AB, Reasoning [14]; Order 3029/2013 (II. 12.) AB, Reasoning [16]}. With all this in mind, the Constitutional Court could only review in the constitutional complaint proceedings at issue whether the court order challenged in the constitutional complaint is in accordance with the Fundamental Law and whether the rights claimed in the petition. as guaranteed by the Fundamental Law, have been infringed.

[31] In the court order challenged by the constitutional complaint under review, the court based its position on the fact that the applicable Government Decree came into force on 1 January 2013, at the same time Government Decree 193/2009 (IX. 15.) Korm expired, within the meaning of Section3 (3) of which the status of party to the public administrative proceedings of the persons entitled to dispose of land directly adjacent to the property subject of the application had to be reviewed in all previous proceedings. However, the applicable legislation did not contain a clear provision to this effect; therefore, the owners of the adjacent property did not have to be notified.

[32] Pursuant Section 28 (1) of the Constitutional Court Act, the Constitutional Court may also conduct an review of the conformity of a statute under Section 26 with the Fundamental Law in proceedings for the review of a court decision under Section 27. On this basis, the Constitutional Court has reviewed the legislation in force at the time of the contested court order and considers it necessary to highlight the following.

[33] The cited Decree does not indeed state by name that the owners of the neighbouring land should be notified. However, with regard to the eligible parties to the public administrative proceedings, it is worded as follows: "Section 4 (1) In the proceedings of the construction and construction supervisory authorities, the owner of the building plot, building or part of a building affected by the construction activity and the party commissioning the construction shall be considered a party to the public administrative proceedings without need for further consideration." Subsection (2) states that "[i]n addition to the provisions of Subsection (1), the status as party to the public administrative proceedings of the person whose right to the land or building structure affected by the construction activity is registered in the land register shall be reviewed in all cases in the proceedings of the construction and construction supervisory authorities." In addition, it refers to the possibility of establishing the scope of the impact area, that is, "[t]he regulatory authorities may, to the extent of the content of their position statement, establish the scope of the parties to the public administrative proceedings, the impact area, as provided for by law" [see Section 4 (3) of the Decree]. Within this impact area, the holders of rights registered in the land register automatically have the status of party to the public administrative proceedings without need for further consideration. At the same time, the legislator also states that there is no opposing party in the proceedings only if the person commissioning the construction has submitted a statement in the form of a private deed with full probative value made by all the parties concerned in the case, in the knowledge of the architectural and technical documentation and in agreement with the content thereof, that the requested construction work may be carried out [*see* Section 4 (4) of the Decree].

[34] The legislation distinguishes two main categories of parties to the public administrative proceedings. On the one hand, it defined a class of persons who automatically had a status as party to the public administrative proceedings, and on the other hand, it provided for those whose

status as party to the public administrative proceedings was to be reviewed in the case in question. In addition, the rights of the party to the public administrative proceedings are also conferred on a body other than the public authority or the specialised authority whose competence is affected by the case. In addition, in certain cases, the law may grant rights of a party to the public administrative proceedings or status as party to the public administrative proceedings to civil society organisations whose registered activities are aimed at protecting a fundamental right or pursuing a public interest. A complex interpretation of the legislation makes it clear that the legislator did not intend to include only the owner of the property on which the construction is planned or the party commissioning the construction. This is the reason for the use of the term "concerned", which implies a much broader scope than the respondent (immovable property or activity). This is also confirmed by the scope of the statutory provisions on the opposing party, by which the legislator recognises that, in addition to the holder of the property (activity) of the respondent, the rights of others than the applicant may be affected by the public authority's case (in this case, the construction authority matter).

[35] The potential group of eligible parties to the public administrative proceedings is not to be considered the same as the actual eligible parties to the public administrative proceedings, but in order for the person concerned to exercise his / her rights as a party to the public administrative proceedings or to decide whether he / she wishes to exercise his / her status as a party to the public administrative proceedings, it is necessary that he / she is duly informed of the opening of the public authority proceedings. Section 15 (6) of the Public Administrative Procedure Act specifically emphasised that, in respect of a party to the public administrative proceedings who has been duly notified of the opening of the procedure, the law may make the exercise of the rights of the party to the public administrative proceedings conditional upon the party to the public administrative proceedings making a statement or submitting an application in the first instance procedure. However, due notification is an essential element of the procedure within the meaning of the Act.

[36] 3. The Decree under the Title of "The initiation of the procedure and notification of the initiation of the procedure" provides that the administrator shall notify the party commissioning the construction and the known party to the public administrative proceedings of the initiation of the procedure within three days of the initiation of the procedure by means of a document issued in the ÉTDR-system (electronic documentation system supporting the procedure for the granting of building permits) in accordance with the provision on the manner of contacting the party to the public administrative proceedings [see Section 10 (3)]. While Subsection (5) specifies the means by which the construction authority and the building control authority may obtain the details of the notifiable persons if they are not available at the time of the application. This includes the land register, the national register of residential addresses or, in the case of electronic contact details, the register of administrative dispositions, which may be used by the construction authority and construction supervisory authority to obtain the details of those to be notified. Of particular relevance to the present case is the provision whereby a party commissioning the construction may, prior to the intended submission of an application for a building permit, submit a request for a construction authority service to the construction authority (either electronically or on paper), in which he may request a preliminary clarification of the prospective eligible parties to the public administrative proceedings [see Section 3 (1) to (2) (d) of the Decree)].

[37] It should also be emphasised that pursuant to Section 19 (5) of the Decree the statement of reasons of the decision taken by the authority must, in addition to the provisions of Section 72 (1) of the Public Administrative Procedure Act, contain the manner in which the scope of parties to the public administrative proceedings is to be determined and the reasons for this determination, depending on the provision. With regard to the communication of the decision of the authority, the Decree provides that the decision taken in the application for a building permit must be communicated in the capacity of a party to the public administrative proceedings, indicating the persons notified: the party commissioning the construction or his authorised representative, the owner of the land, building or part of a building affected by the construction activity, the person involved as a party to the public administrative proceedings in the procedure by the construction authority, and the scope of the parties to the public administrative proceedings determined by the specialised authorities. On the other hand, the person whose right to the land or building affected by the construction activity is registered in the land register and who does not have the status of a party to the public administrative proceedings must be informed [see Section 20 (2)]. The legislator has thus regulated the issue of the determination of the scope of parties to the public administrative proceedings in a special manner; the manner of determination of the scope of parties to the public administrative proceedings and the reasons for it (or the lack thereof) may lead to a deficiency of the official decision, a procedural irregularity.

[38] The Decree was issued as an implementing rule by the Government along the lines of the authorisation provided for in Section 174/A (1) of the Public Administrative Procedure Act. The Public Administrative Procedure Act contained the concept of the party to the public administrative proceedings in a general sense and, as laid down in the general explanatory memorandum to the Public Administrative Procedure Act, the basic purpose of the Act was to serve the interests of parties to the public administrative proceedings, to lighten their procedural burden, to facilitate the enforcement of their rights and to make the administrative procedure simpler, faster and more transparent for them, even at the cost of transferring certain additional tasks to the administrative bodies. However, some of the constitutional rights of parties to the public administrative proceedings, which must also be asserted in the public administrative procedure, must never be considered in isolation, nor must the rules governing them be in and of themselves. Any such regulation affecting a fundamental right must be balanced with other fundamental rights, in conjunction with them and, as far as possible, giving priority to the greater interest and the fundamental rights which secure it. However, the need to make the procedure faster and more efficient should not in itself be a basis for restricting the exercise of fundamental rights of the parties to the public administrative proceedings. It is precisely with this in mind that the legislator has added a separate legal remedy to the definition of the general concept of the party to the public administrative proceedings as a guarantee provision. Within the meaning of Section 15 (8) of the Public Administrative Procedure Act, "[A]n independent appeal shall be possible against an order refusing a status as party to the public administrative proceedings to a non-party to the public administrative proceedings who has submitted an application to initiate proceedings." Accordingly, the legislator intended to treat the determination of the existence of the status of the party to the public administrative proceedings as a guarantee element, in the event of the denial of which the legislator provided for an independent right of appeal. The possibility of appealing against an order refusing the status as a party to the public administrative proceedings also demonstrates that the legislature considered this to be a fundamental issue for

which the possibility of appeal must be available to the person seeking to intervene in the proceedings even before the proceedings have been concluded. Thus, if a person other than the party to the public administrative proceedings who initiated the procedure wishes to become a party to the procedure, but the authority rejects the notification / request to that effect, an appeal may be lodged against the decision of the authority expressly refusing to grant the status of party to the public administrative proceedings, which would require the authority acting as a second instance forum to carry out a substantive review of the merits of the status as party to the public administrative proceedings itself, in accordance with the constitutional substantive requirement of the right to legal remedy.

[39] The speedy conduct of the proceedings and the need to ensure that all information and interests are disclosed as fully as possible in the proceedings at first instance are legitimate interests on behalf of which it is acceptable to require that the party to the public administrative proceedings be required to participate in the proceedings at first instance and that no further parties to the public administrative proceedings be allowed to participate in the proceedings after a certain period of time, which is set by law and which must be at least six months from the date on which the decision of the authority becomes final. Section 15 (6a) of the Public Administrative Procedure Act is in line with the previously in force Section 53/C (11) of the Act on the Built Environment. Pursuant to this provision, "After six months following the date when the decision adopted by the competent building authority and construction regulatory authority in conclusion of the proceedings became final and enforceable, no new party to public administrative proceedings may join the proceedings" However, this requires ensuring the possibility to participate in the procedure of the public authority, as a first step, by informing the potential parties to the public administrative proceedings.

[40] After reviewing the Decree and comparing it with the provisions of the Public Administrative Procedure Act, the Constitutional Court came to the conclusion that the inference of the Order of the first instance court’s resumed proceedings regarding the status of the party to the public administrative proceedings cannot be derived from the legislation in force at the time of the Order, that is, the complex interpretation of the Decree cannot lead to the result that the holder of the right registered in the land register in respect of the plot of land of the respondent directly adjacent to the property applied for should not be notified at the commencement of the building authorisation procedure. Such an interpretation results in a narrowing of the general concept of the party to the public administrative proceedings in the Public Administrative Procedure Act and also raises the question of compatibility with the fundamental right to a fair trial enshrined in the Fundamental Law. Under Article XXVIII (1) of the Fundamental Law, everyone has the right to have his rights and obligations adjudicated within a reasonable time by an independent and impartial tribunal established by law, in a fair and public hearing, while under Article XXVIII (7) everyone has the right to legal remedy against a decision of a court, public authority or other administrative body which affects his rights or legitimate interests. With regard to administrative proceedings, Article XXIV (1) of the Fundamental Law contains the requirement of a fair trial. However, if the persons concerned are not informed of the public authority proceedings affecting their rights, they cannot effectively exercise their right to a fair trial, either in terms of the fair handling of the case or in terms of the right to seek legal redress. In the specific case, the Constitutional Court finds that, in order to exercise the right to a fair procedure, it is

essential that the right holder of the right registered in the land register of the adjacent property is informed by the authorities of the commencement of the building procedure.

[41] 4. The principle of *ex officio* initiation of proceedings applies in administrative regulation as well. The ex officio conduct of the proceedings includes the obligation of the authority to clarify the facts. At this stage of the procedure, the public authority must, in accordance with its statutory competences, discover and prove the relevant facts on which its decision is based. The administrative procedure is based on the principle of unfettered adduction of evidence and the unfettered assessment of the evidence, that is, the authority itself chooses the means of proof and makes its decision on the basis of a free assessment of these means. If it fails to fulfil this obligation, the consequence in judicial review of the administrative decision is that it is for the authority as defendant to prove the facts on which the decision is based [see for example: how and why the scope of the parties to the public administrative proceedings was established].

[42] 4.1 The 2008 Public Administrative Procedure Amendment Act introduced Section 15 (6) to the Public Administrative Procedure Act partly because of the abusive exercise of rights by certain parties to the public administrative proceedings. In addition to the general need for a speedy procedure, the reason for its introduction was to ensure that all the information and interests necessary for the procedure were already revealed in the main proceedings, so that the validity of the administrative decision could not be called into question later on due to the intervention of a new party to the public administrative proceedings. In addition, the legal instrument also provides for the possibility to exclude the exercise of a remedy in bad faith if the party to the public administrative proceedings abstains in the first instance proceedings in order to delay the case for the sake of a later finality of the decision. Given the complexity of some cases and the large number of interests involved, the failure to use the first instance procedure to establish the facts of a case may lead to a breach of legal certainty. It is in view of the foregoing that the legislator has created the possibility of not exercising certain rights of the party to the public administrative proceedings in special cases after the first instance decision has been communicated. Due to the regulatory scheme of the Public Administrative Procedure Act, it was questionable whether and if so to what extent Section 15 (6) of the Public Administrative Procedure Act can be brought into line with the right to legal remedy guaranteed by Article XXVIII (7) of the Fundamental Law if the party to the public administrative proceedings did not wish to make an application or a statement during the first instance proceedings, but would nevertheless exercise his right of appeal against the first instance decision, and if he was unaware of the proceedings through no fault of his own. The exercisability of the right of redress as provided by an Act also means that the specific content of the right of redress (such as its scope, the persons entitled thereto, the conditions for its submission, the procedural rules) may be laid down differently in different laws.

[43] 4.2 With Section 15 (6a) of Act CCX of 2012 being inserted into the Public Administrative Procedure Act, the legislator’s intention was to completely exclude the possibility of action by the party to the public administrative proceedings, and consequently the exercise of the right of redress, after the six-month time limit, thus ensuring the irreversibility of the final decision. According to consistent case law, failure to take action after the date on which the decision was

notified precludes the party to the public administrative proceedings from exercising his right of redress at a later date. However, in a number of cases, the Supreme Court has ruled that a decision which has not been duly notified to all parties to the public administrative proceedings cannot be considered final. The constitutional interest in the irreversibility of final decisions and the exercisability of the right of redress can only be reconciled if the relevant fact to be reviewed is the date on which the party to the public administrative proceedings became aware of the decision, where the party to the public administrative proceedings was not duly notified of the decision at first instance but, after a considerable period of time, challenges it by means of an appeal. Consequently, in line with judicial practice, the legislature may only restrict the rights of additional parties to the public administrative proceedings who have been duly notified in this way. Due to the obligation of good faith arising from Section 6 (1) of the Public Administrative Procedure Act, non-notified parties to the public administrative proceedings who, despite the fact that they were not notified, become aware of the decision, may, within the time limit laid down by law, apply for an extension by request for a statement of defence or appeal against the decision or, after requesting service of the decision, exercise their right of appeal (see Commentary to the Public Administrative Procedure Act).

[44] Section 15 (8) of the Public Administrative Procedure Act expressly granted an independent right of appeal against the denial of the status as party to the public administrative proceedings, that is, the legislator did not consider it to be an official decision that could be challenged only in the context of an appeal against the decision on the merits that terminated the procedure, but an official decision that was granted an independent appeal.

[45] Thus, in the case where the potential party to the public administrative proceedings is not aware of the initiation of the construction authority procedure that infringes his right or legitimate interest, or even of the issuance of the building permit, he is obviously not in a position to exercise his independent right of appeal. As a consequence, he cannot participate in the proceedings at first instance, which means that he is also precluded from appealing against the decision on the merits.

[46] 4.3 In the resumed first instance proceedings, the court held that the authority had correctly assessed the application for recognition of the applicants' status as parties to the public administrative proceedings, even if it had not done so by means of a formal decision. The decision of the authority could not be annulled because, in the court's view, the authority's decision not to review the merits of the applicants' status as parties to the public administrative proceedings, on the ground that six months had elapsed since the grant of the building permit, was lawful and "not vitiated by any breach of law".

[47] The Constitutional Court considers, however, that, as the regional court acting at second instance pointed out, the protection of rights acquired and exercised in good faith is a circumstance to be assessed only in the case of a final decision, and cannot be based on an unlawful decision. If the procedure or decision of the authority is vitiated by a defect within the meaning of the Public Administrative Procedure Act which prevents it from becoming final, the protection of rights acquired and exercised in good faith cannot be derived from it.

[48] 4.4 In summary, the Constitutional Court considered that the position statement issued by the authority, which refused to assess the petitioners' application for a status as parties to the

public administrative proceedings on the ground of the time that had elapsed, without considering due notification, did not provide the petitioners with the opportunity to avail themselves of the independent legal remedy provided for by law as a guarantee, thereby depriving the petitioners of the possibility of an actual and effective legal remedy, which is a violation of fundamental rights which, by substantially affecting the decision of the court, infringes Article XXVIII (1) and (7) of the Fundamental Law {see Decision 9/2017 (IV. 18.) AB, Reasoning [38]}.

[49] This interpretation is also supported by the judicial practice, which considers the complete disregard of the rules guaranteeing the participation of the immovable property owner as party to the public administrative proceedings in the first instance proceedings, due to the direct involvement of the rights of the parties to the public administrative proceedings, as a violation of a procedural rule that could affect the merits of the case [Supreme Court of Hungary, Case No IV.37.431/2010 (EBH2011.2364.)].

[50] The Constitutional Court considers it necessary to note that the General Public Administrative Procedure Act replacing the former Public Administrative Proceedings Act essentially defines the concept of the party to the public administrative proceedings in an identical manner. Section 10 of the General Public Administrative Proceedings Act provides that "(1) [p]arty to the public administrative proceedings means any natural or legal person, other entity whose rights or legitimate interests are directly affected by a case, a person which is the subject of any data contained in official records and registers, or a person which is subjected to regulatory inspection." Subsection (2) provides that "[a]n Act or government decree may define the persons and entities who can be treated as parties to the public administrative proceedings, in connection with certain specific types of cases, by operation of law." According to the explanatory memorandum of the General Public Administrative Proceedings Act, although the Act simplifies the rules on the status of the party to the public administrative proceedings significantly compared to the Public Administrative Procedure Act, the classical concept of the party to the public administrative proceedings (the natural or legal person whose right or legitimate interest is affected by the public authority's case) is maintained. With regard to legitimate interest, it clarifies, mainly for reasons of the application of the law, that only direct involvement in the case can be taken into account for the purpose of party to the public administrative proceedings status. At the same time, the sectoral legislation may continue to define the persons and entities which, without a specific review to that effect, may have the status of a party to the administrative proceedings by virtue of the law. There are also procedures in which the scope of the party to the public administrative proceedings is narrower than in what can be considered typical and mass cases. In these proceedings, the parties to the public administrative proceedings may be limited to the necessary persons by means of a mandatory documentary proof of the status as party to the public administrative proceedings, which is laid down in the sectoral legislation (or Act).

[51] The General Public Administrative Proceedings Act, similarly to the Public Administrative Procedure Act, provides for an independent appeal against the first instance decision on the status of the party to the public administrative proceedings [Section 116 (3) (b) of the General Public Administrative Proceedings Act], at the same time it clearly states that the law considers as a ground for nullity if additional parties to the public administrative proceedings would have been involved. In other words, the decision must be annulled or revoked and, if necessary, a new procedure must be initiated if there had been a need to include a further party to the public

administrative proceedings in the procedure [Section 123 (1) (g) of the General Public Administrative Proceedings Act].

[52] 5. In view of all the above, the Constitutional Court found that the Order of the Administrative and Labour Court of Veszprém No 3.KpK.50.080/2016/4 was contrary to the Fundamental Law, and therefore annulled it with effect for the public authority proceedings reviewed by the decision.

[53] Pursuant to Section 43 of the Constitutional Court Act, if the Constitutional Court finds that a judicial decision is contrary to the Fundamental Law on the basis of a constitutional complaint under Section 27, it shall annul the decision, the procedural legal consequence of which shall be governed by the provisions of the Acts containing the rules of court proceedings, with the proviso that the court proceedings to be conducted as necessary shall be conducted not inconsistent with the decision of the Constitutional Court on the constitutional issue.

[54] In accordance with the consistent case law of the Constitutional Court, since an infringement of the Fundamental Law has been established with regard to Article XXVIII (1) and (7) of the Fundamental Law and the challenged court order has been annulled, it did not review the further fundamental rights violations alleged in the constitutional complaint.

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court

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Dr. István Balsai, sgd.,
Justice-Rapporteur

Dr. Ágnes Czine, sgd.,
Justice of the Constitutional Court

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

Dr. Attila Horváth, sgd.,
Justice of the Constitutional Court

Dr. Imre Juhász, sgd.,
Justice of the Constitutional Court

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court,
on behalf of Dr. Ildikó Hörcher-Marosi,
Justice of the Constitutional Court
prevented from signing

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court,
on behalf of Dr. László Salamon
Justice of the Constitutional Court
prevented from signing

Dr. Béla Pokol, sgd.,
Justice of the Constitutional Court

Dr. Marcel Szabó, sgd.,
Justice of the Constitutional Court

Dr. Balázs Schanda, sgd.,
Justice of the Constitutional Court

Dr. Szívós Mária, sgd.,
Justice of the Constitutional Court

Dr. Péter Szalay
Justice of the Constitutional Court

Dr. Varga Zs. András, sgd.,

Justice of the Constitutional Court

Dissenting opinion of *Dr. Ágnes Czine*, Justice of the Constitutional Court

[55] I do not agree with the decision as contained in the operative part for the reasons set out below.

[56] 1. The court in the present case dismissed the petitioners' request for review on two grounds.

[57] First, because the petitioners, as holders of the right of usufruct of the property adjacent to the property subject to the building authorisation proceedings, are not parties to the public administrative proceedings under Section 4 (1) and (2) of the Decree.

[58] On the other hand, because within the meaning of Section 15 (6a) of the Public Administrative Procedure Act which is no longer in force and pursuant to Section 53/C (11) of the Act on the Built Environment, no further party to the public administrative proceedings may participate in the proceedings beyond a period of six months from the date on which the decision of the authority becomes final and enforceable. In the light of these legal provisions, the court emphasised in its decision that, in the present case, the building permit had become final and enforceable on 21 February 2014, but the petitioners had only submitted their application on 15 July 2015, more than a year after the building permit procedure had been completed.

[59] In my view, for the reasons set out below, the court before which the application was brought could not have reached a different interpretation on the basis of the legislation applied and the Constitutional Court could not therefore have found that the decision of the court was contrary to the Fundamental Law.

[60] 2. The court before which the case was brought had to assess Section 4 of the Decree in relation to the status of the petitioners as parties to the public administrative proceedings. The court expressly emphasised that pursuant to Section 4 (1) of the Decree, the owner of the land, building or part of a building affected by the construction activity and the owner of the land, building or part of a building are considered to be parties to the public administrative proceedings in construction proceedings without need for further consideration. Section 4 (2) of the Decree requires the authority to further consider the status of the party to the public administrative proceedings in relation to the owner of the land, building or part of a building affected by the construction activity.

[61] In the present case, the petitioners do not qualify under any of the provisions of the Decree as persons whose status as parties to the public administrative proceedings should have been recognised or assessed by the authority. They are neither owners of the land involved in the construction activity nor of the property immediately adjacent to the land involved in the

construction activity. Consequently, the court correctly held, within the margin of interpretation provided by the applicable legal provision, that the applicants "are not parties to the public administrative proceedings in the main proceedings and that the authority was therefore not under an obligation to include them as parties to the public administrative proceedings in the proceedings".

[62] Moreover, the court expressly pointed out that the legislator had repealed the previous regulation [Section 3 (3) of Government Decree No 193/2009 (IX. 15.) Korm, under which the authority had to assess the status of the party to the public administrative proceedings of the persons entitled to dispose of the land directly adjacent to the property which was the subject of the application]. Consequently, the legislator has limited the recognition and assessment of the status of the party to the public administrative proceedings precisely in relation to persons with a right of disposal other than the owners (such as usufructuaries).

[63] It should be noted that the subject of a substantive review of constitutionality could therefore have been whether the changed statutory provisions raised a violation to the Fundamental Law.

[64] 3. In addition to the above, the court also found that under Section 15 (6a) of the Public Administrative Procedure Act and Section 53/C (11) of the Act on the Built Environment "there is no legal possibility to involve a new party to the public administrative proceedings in a building authority case that was closed more than one year ago by a final and enforceable decision on the basis of the cited legal provision."

[65] The cited legal provision of the Public Administrative Procedure Act was established by Act CCX of 2012. The reasons for this were set out in detail by the legislator in the explanatory memorandum to the proposed text. It was necessary to amend the provisions of the Act because "in the field of construction affairs, it often happens that in the case of an official procedure initiated by a particular party [or undertaking] to the public administrative proceedings for the implementation of a project, after the official decision has become final and enforceable, someone becomes a[n opposing] party to the public administrative proceedings in the procedure, claiming to be affected. This typically happens or causes problems when, in the case of a procedure which appears to have been closed, someone claims to be a party to the public administrative proceedings on the grounds that he or she has not been contacted by the authority and has not been informed of the decision taken in the case. In such cases, the authority will normally communicate to the new party to the public administrative proceedings the first instance decision of the closed procedure, provided that the party to the public administrative proceedings is identified as a party to the public administrative proceedings, and the party to the public administrative proceedings may appeal on the grounds that the decision has not yet become final against him / her because it has not been communicated. [...] In such cases, the formal validity of the previous decision of the public authority is lost, and this can cause major problems for investments which have already been started or even completed, often of considerable value. In order to address this, Section 15 should be supplemented by a Subsection (6a), which allows the sectoral law to stipulate that beyond the six-month period from the date on which the official decision becomes final and enforceable, it is not possible to be included in the scope of parties to

the public administrative proceedings of the already closed procedure on the grounds of party to the public administrative proceedings involvement or to initiate the continuation of the procedure on this ground."

[66] The legislature has expressly emphasised that "[i]f a sectoral law makes use of this possibility, the time limit is in any event a timelimit which is time-barred and preclusive, thus facilitating a more efficient procedure against unjustified and frivolous applications for legal remedies." With regard to the procedure of the building authority, the Act on the Built Environment, in its 53/C (11), in force at the time of the petitioners' application, clearly provided for this: "After six months following the date when the decision adopted by the competent building authority and construction regulatory authority in conclusion of the proceedings became final and enforceable, no new party to public administrative proceedings may join the proceedings."

[67] In my view, that provision of the law could not have been disregarded in the present case, neither by the authority seised nor by the court. Consequently, I consider that the court correctly concluded that there was no legal possibility for the petitioners to be subsequently involved as parties to the public administrative proceedings.

[68] 4. In addition to the above, I consider it important to emphasise that the Constitutional Court's practice typically points out that courts must endeavour, within the margin of interpretation provided by the substantive and procedural rules applicable to the case before them, to have regard to the fundamental rights involved in the case and to give effect to the constitutional content of the fundamental right concerned in their decisions in accordance with the applicable rules. If the applicable rule does not provide for such an interpretation, the rule is contrary to the Fundamental Law.

[69] In my view, also taking into account that Article 28 of the Fundamental Law requires the court, in the application of the law, to interpret the wording of the law in accordance with its purpose, the legal provisions applied in the case at hand, that is, Section 15 (6a) of the Public Administrative Procedure Ace, Section 53/C (11) of the Act on the Built Environment and Section 4 of the Decree, do not have the possibility of interpretation that the Constitutional Court has identified.

[70] 5. Lastly, I consider that the following could not have been disregarded in the specific case.

[71] The petitioners claim that the construction authorised by the authority will result in a reduction in the sun exposure, intimacy and value of the property they occupy, and will also entail fire and hydrological risks.

[72] The fact that the status of the petitioners as parties was not established in the prior administrative procedure does not mean that the petitioners are deprived of legal protection. The alleged infringements of rights typically give rise to claims for the protection of property or the law relating to neighbours, which the petitioners can enforce, as their own subject matter, under Sections 5:5 and 5:23 of the Civil Code. (see in particular the applicable legislation: EBH 2011.2397, EBH 2010.2219, BH 2011.279, BH 2000.244).

Budapest, 22 October 2019

Dr. Ágnes Czine, sgd.,
Justice of the Constitutional Court

Dissenting opinion of *Dr. Ildikó Hörcher-Marosi*, Justice of the Constitutional Court

[73] I do not agree with the operative part of the majority decision and the reasoning of the majority decision for the following reasons.

[74] 1. The legal relationships involved in the present case are of a dual nature: a formal legal situation is created by the clarification of the legal status of the person holding the permit and the authority on the one hand, and of the petitioner as a party to the public administrative proceedings on the other. In the first of these, the petitioner sought, in his complaint, a review of the unconstitutionality of the decision of the court refusing to recognise his status as a party to the public administrative proceedings. However, the Constitutional Court's reasoning in the majority decision, which is based on an interpretation of the law, interferes with the legal relationship of the construction authority (construction regulatory authority); it has thus adapted its decision to the assessment of the legal validity of the building permit.

[75] In contrast, in my view, constructions regulation, and within its sphere, the legal concept which embodies the strongest State control, the building permit, must be taken as a point of departure. In the pre-2015 legislation, the existence of a building permit was the general rule and Annex 1 and 2 to Government Decree 312/2012 (XI. 8.) Korm on procedures and inspections by the construction authorities and construction supervisory authorities and on services provided by the building authorities listed the activities for which a building permit was not required. In this approach, the building permit had a number of functions: firstly, it was a legal act, activating the subjective right of the owner of the building plot to build; secondly, it had a regulatory function, if the authority laid down additional requirements and conditions; and finally, it could also have an evidentiary function for subsequent proceedings.

[76] It was not, however, suitable for settling civil law claims (disputes) relating to the construction work. The rules of civil law, and not those of administrative law, are applicable to the settlement of any disputes of law relating to neighbours arising in connection with the construction activity. In the present context, the relationship between the two branches of law is seen in the preventive role of administrative law: it is by granting status as party to the public administrative proceedings in the procedure before the construction authority that it is possible to enforce rights arising under the law relating to neighbours that may be considered to be infringed. However, there are limits to this preventive role: the discretionary power of the public authority, the statutory rule providing for forfeiture of rights, and the passage of time, which is a factual limit to be assessed by the

administrative judge. The judge cannot turn the clock back after five and a half years, even if it seems (subjectively) fair from one point of view or another.

[77] 2. In the proceedings before the Constitutional Court, the acquisition of the status of a party to the public administrative proceedings, as also referred to in the decision of the Administrative and Labour Court of Veszprém, which is the subject of the majority decision, in its decision No. 3.Kpk.50.080/2016/4, also has discretionary and objective "limits". Section 4 (1) of the Decree contains the determination of the *ex lege* scope of the parties to the public administrative proceedings without the discretion of the authority; whereas Section 4 (2) of the same Decree leaves the determination of the further scope of the parties to the public administrative proceedings to the discretion of the authority with the clause "shall be assessed in all cases". In addition, Section 53/C (11) of the Act on the Built Environment, which was in force at the time of the main proceedings, sets a(n objective) time limit: no new party to the public administrative proceedings may participate in the proceedings beyond six months from the date on which the decision on the merits of the building and building supervision proceedings becomes final and enforceable.

[78] The expiry of that time limit in itself, independently of any discretion on the part of the public authority, justifies, as, in my view, it did in the present case, the exclusion of the status of party to the public administrative proceedings in the case in question. A limitation period which is calculated from a date fixed by the legislature in relation to the facts and not to a presumed event always has a specific function, namely to protect the established situation. In the present case, it is the enforcement of the subjective right guaranteed by the public authority's decision, the pursuit of the construction activity: it must not be impossible to start or complete the economic and construction activity in time. This is also confirmed by the practice of the Constitutional Court. Accordingly, "the legislator also has a great deal of freedom as to the general and specific legal rules which may be laid down to limit the time limit for the exercise of the subjective right [limitation period]." {more recently: Decision 17/2019 (V. 30.) AB, Reasoning [63]}. The assessment and enforcement of this may differ depending on whether the parties to the underlying relationship are the public authority and the party to the public administrative proceedings; or, as in the present case, between the opposing parties to the public administrative proceedings (the applicant for the building authority procedure and the party to the public administrative proceedings concerned) and the public authority.

[79] 3. In my view, the judicial decision which took into account, and on that basis dismissed the request for review, the fact that the petitioner in the present case applied to the authority for review of the building permit 17 months after the decision on the merits had become final does not infringe the right to a fair trial declared in Article XXVIII (1) of the Fundamental Law.

[80] In accordance with the practice of the Constitutional Court, the procedure of a court is in conformity with the Fundamental Law if it is conducted in circumstances which are, on the whole, fair, equitable and balanced. In addition, the partial powers that the panel has developed in its practice as fitting the content of the fundamental right are fully exercised {more recently: Decision 3046/2019 (14.III.) AB, Reasoning [48] to [51]}. In other words, a judicial procedure is deemed to

be in breach of fundamental rights if it was generally not considered fair or if the judge unnecessarily or disproportionately restricted the petitioner's subset of rights. In the present case, no breach of fundamental rights was established. A violation of rights (breach of the law) in the course of the procedure does not necessarily mean that the entire procedure was unbalanced. I am convinced that it is not within the competence of the Constitutional Court to investigate any infringement that may have been committed. "However, alleged or actual breaches of the law committed by the general courts cannot in themselves give rise to a constitutional complaint. Otherwise the Constitutional Court would become a quasi-judicial court. [...] Neither the abstract principle of the rule of law nor the fundamental right to a fair trial [...] can provide a basis for the Constitutional Court to assume the role of a super-court above the judiciary and act as a traditional forum for legal remedies." {See, in particular, Order 3325/2012 (XI. 12.) AB, Reasoning [13] and [14]; Order 3208/2019 (VII. 16.) AB, Reasoning [33]} On the basis of all these grounds, I am of the opinion that the possible prejudice to the petitioner's rights should have been remedied by other forms of legal redress, more than five years after the issuance of the final building permit by the building authority (namely, on 21 February 2014).

[81] The annulment of the court's decision was also justified by the majority reasoning on the basis of the right to legal remedy. However, in my view, the fact that the petitioner was able to apply to the administrative court exhausted in itself the fundamental right enshrined in Article XXVIII (7) of the Fundamental Law, which is not altered by the fact that the court did not reach a decision in favour of the petitioner.

[82] 4. In my view, the petitioner's complaint may have been caused by the fact that the Decree settled the question of the status of the party to the public administrative proceedings differently from the previous ones.

[83] In this context, it would have been advisable to review the petition filed under Section 26 (1) of the Constitutional Court Act and to assess whether the definition of the party to the public administrative proceedings by the statutory provision applicable in the proceedings was the cause of the infringement of the Fundamental Law. The relationship between the provision of the Decree and Article XXIV (1) of the Fundamental Law could thus have been assessed. Indeed, the Decree provides for a narrower scope of the possibility to examine the legal status of the party to the public administrative proceedings than Government Decree 193/2009 (IX. 15.) Korm on the procedures of the building authorities and the control of the building authorities. A specific review procedure based on Section 26 (1) of the Constitutional Court Act would have provided an opportunity for the Constitutional Court to give guidance to the court in a possible resumption of proceedings.

[84] In addition, it should be pointed out that the regulation of the construction process may also be subject to a procedural defect (lack of assessment of the quality of party to the public administrative proceedings) or, in the case of a substantive infringement, to the possibility of remedying the situation created unlawfully by means of a retention permit.

[85] 5. To sum up, in my view, the Constitutional Court has no competence to review judicial decisions from the point of view of legality. If, notwithstanding the provision of the Act on the Built Environment setting a preclusive time limit, the Court nevertheless wished to uphold the constitutional complaint, it could have done so by reviewing the constitutionality of the legal provisions applied in the proceedings.

Budapest, 22 October 2019

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court,
on behalf of Dr. Ildikó Hörcher-Marosi
Justice of the Constitutional Court
prevented from signing

[86] I hereby second the above dissenting opinion.

Budapest, 22 October 2019

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