

## Decision 3067/2021 (II. 24.) AB

In the matter of a constitutional complaint, with concurring reasonings by Justices *dr. Ágnes Czine* and *dr. László Salamon* as well as dissenting opinions by Justices *dr. Tünde Handó*, *dr. Imre Juhász*, *dr. Béla Pokol* and *dr. Mária Szívós*, the Constitutional Court, sitting as the full court, adopted the following

decision:

The Constitutional Court hereby holds that Order No. 12.Pkf.20.301/2020/3 of Szekszárd Court of Law and Order No. 7.Pk.50.023/2020 of Paks District Court are contrary to the Fundamental Law; therefore, this Court annuls such Orders.

### Reasoning

I

[1] 1. The petitioner filed a constitutional complaint pursuant to Section 27 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Order No. 12.Pkf.20.301/2020/3 of Szekszárd Court of Law directly applicable to Order No. 7.Pk.50.023/2020 of Paks District Court by reference to Article VI (1), Article XXVIII (1) of the Fundamental Law and Articles 8 (1) and 13 of the European Convention on Human Rights (hereinafter referred to as the "Human Rights Convention").

[2] 2. In essence, the case on which the constitutional complaint is based, the petitioner, a father who lives in Solymár, filed an application in court for to enforce a decision passed in his favour on the rights of access, after the mother, who lives in Paks, failed to hand over their common pre-school child for weekend visits on 21 March 2020, citing the coronavirus situation. The rights of access would have lasted from 9 a.m. Saturday to 6 p.m. on Sunday.

[3] By Order No. 7.Pk.50.023/2020 of Paks District Court (hereinafter referred to as the "trial court"), the application was dismissed. Although the trial court found that the respondent mother had breached her obligation under the decision on the rights of access, pursuant to Section 22/B (4) (a) of Act CXVIII of 2017 on the Rules Applicable in

Civil Non-Litigious Proceedings and on Certain Non-Litigious Court Proceedings (hereinafter referred to as “the Non-Litigious Proceedings Act”), the trial court considered that this was “not attributable to the respondent, her decision was in the best interests of the child”. The court took into account Government Decree 40/2020 (III. 11.) on the Declaration of a State of Danger (hereinafter referred to as the “First Government Decree”) and to the fact that “according to the knowledge available to everyone about the coronavirus, the disease spreads by droplet infection, personal contact or contact with objects. Avoidance of infection can be reduced by minimising the number of such contacts.” Based on the position taken by the trial court, “a parent exercising parental custodial rights [...] will act correctly and responsibly if he or she reduces such occasions in order to avoid infection. In the present case, the applicant wanted to take the child to Solymár, the area of the country most known to be affected by the infection (Pest county); therefore, the applicant reasonably refused to grant him the rights of access, taking into account the child’s overriding health interests.”

[4] Acting on the petitioner’s appeal, the proceeding Szekszárd Court of Law (hereinafter referred to as the “appellate court”) by its Order No. 12.Pkf.20.301/2020/3 upheld the judgement at first instance. Pursuant to the appellate court’s statement of reasons in the specific case, “the failure to provide access to the child occurred in the transitional period of time when the state of danger had already been declared; however, the imposition of confinement measures [Government Decree 71/2020 (III. 27.) on Restrictions of Movement], had not yet been ordered. The applicant refers correctly to the fact that in the period between the declaration of the state of danger and the imposition of the confinement measures free movement, such as personal contact between a non-custodial parent and the child had not been restricted; however, it cannot be ignored that there has been continuous communication at levels of the Government, health care and epidemiological management to the population to ensure that they leave their places of residence and of stay only in urgent cases [...]. At that time the rate of spread of the coronavirus causing the pandemic and the age group threatened by the virus was not unambiguously clarified, nor [...] was it unequivocally stated what constituted the supported order of the rights of access between the non-custodial parent and the child. However, in the light of the decision on the rights of access, it is clear that in the event of failure to provide access to the child not attributable to the father, the non-granted access must be rectified; therefore, by failing to provide such access, the interests of child and those of the parent entitled to access will be impaired; however, such impairment is not irreparable. Consequently, on the side of the parent caring for the child who, during this transitional period, refused to hand over the child for access by the non-custodial parent relying on the epidemiological state of danger, giving priority to the child’s health, must be taken into account as a circumstance that is more

appreciable among attributability, as the parent's decision did not cause a disproportionate harm to the interests of the child. In the specific case, the respondent has notified the applicant in advance by requesting cooperation and understanding, proposing alternative ways of granting access and offering to rectify the loss of access on a voluntary basis. In such circumstances there could be no doubt that the mother was guided by the best interests of the child in refusing to hand over the child."

[5] 3. Subsequently, the petitioner brought the case before the Constitutional Court. In his request, the petitioner pointed out that the First Government Decree did not contain any restrictions on the exercise of parental rights and subsequently, Section 4 (1) (t) of Government Decree 71/2020 (III. 27.) on Restricting Movement (hereinafter referred to as the "Second Government Decree") explicitly confirmed that the exercise of parental rights and obligations is not affected by the confinement measures. Holding that the parent caring for the child is not obliged to grant access during the state of danger is a *contra legem* application of the law, which infringes Article XXVIII (1) of the Fundamental Law and prevention of access also contravenes Article VI (1) of the Fundamental Law. The "rate of infection" is not related to the issue of the rights of access; moreover, there was no difference in the number of infections between the two settlements concerned: One infected person was registered in each place until the end of July 2020. Furthermore, in Budapest, where the rate of infection was much higher than Pest County, the courts usually ruled that the reference to an state of danger could not be accepted as a reason for obstructing access to the child. Lastly, as put forth by the petitioner, the rectification of the loss of access is not a realistic option, as it can only be requested within two months, which period had already lapsed by the time decision at second instance was adopted.

## II

[6] 1. The relevant provisions of the Fundamental Law regarding the present case are as follows:

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

"Article XVI (1) Every child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development.

(2) Parents shall have the right to choose the upbringing to be given to their children."

"Article XX (1) Everyone shall have the right to physical and mental health."

“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] 2. The relevant provisions of the Non-Litigious Proceedings Act are as follows:

“Section 22/B (4) It shall be a violation of the provisions of the decision on the rights of access if the persons entitled or obliged to access, for reasons attributable to them,

(a) fail to meet their obligation to grant rights of access;

(b) fail to rectify the loss of access within the time limit set out in the decision;

(c) obstruct access without a due cause; or

(d) frustrate unfettered access to the child in any other manner.”

### III

[8] Upon reviewing the conditions for admissibility pursuant to Section 56 (2) of the Constitutional Court Act, the following could be established in the present case.

[9] According to the available electronic download certificate, the impugned order was received by the petitioner on 5 August 2020 and the complaint was submitted on 4 September 2020, that is, within the sixty-day period specified in Section 30 (1) of the Constitutional Court Act. The petitioner is deemed an entitled person to submit a constitutional complaint, he participated in the procedure as applicant; therefore, he shall be regarded as a party concerned; furthermore, the possibilities for legal remedy have already been exhausted by the petitioner. The decision in the matter of enforcing the application on the rights of access is a final judgement which can be challenged by a constitutional complaint [*Cf.* Decision 3273/2019 (X. 30.) AB].

[10] With regard to the fact that pursuant to Section 27 of the Constitutional Court Act, only a petition seeking a review of the conformity of a judicial decision with the Fundamental Law could be submitted, there is no possibility for assessing the reference made to the violation of Article 8 (1) and Article 13 of the European Convention on Human Rights (hereinafter referred to as the “Convention”). The Constitutional Court does not have jurisdiction to review the conformity of a judicial decision compatibility with international conventions under either Article 24 of the Fundamental Law or the Constitutional Court Act {*See* most recently in Decision 3252/2020 (VII. 1.) AB, Reasoning [17]}.

[11] As to the remainder, the petition meets the requirements of being explicit listed under Section 52 (1b) of the Constitutional Court Act, because it clearly indicates (a) the provision of the Fundamental Law or of an Act that establishes the competence of the Constitutional Court to adjudicate the petition, and establishes that the entity has the right to submit petitions (Section 27 of the Constitutional Court Act); (b) the reasons for initiating the proceedings (the court did not order enforcement of the decision on the rights of access, thereby preventing the petitioner from personally exercising his right to access to his child); (c) the judicial decision to be examined by the Constitutional Court (Order 12.Pkf.20.301/2020/3 of Szekszárd Court of Law); (d) the provisions of the Fundamental Law alleged to be violated [Articles VI (1) and XXVIII (1) of the Fundamental Law]; (e) reasoning that specifies why the contested judicial decision is contrary to the specified provision of the Fundamental Law; as well as to the remainder (f) an explicit request for the Constitutional Court to declare unconstitutionality by non-conformity with the Fundamental Law and annulment of the Order by the Court of Law directly applicable to the judicial decision of the trial court.

[12] The Constitutional Court takes the view that what was submitted by the petitioner addresses a constitutional law issue of fundamental importance (Section 29 of the Constitutional Court Act). The contested judicial decision concerns the exercise of a fundamental right; since Decision 3312/2017 (XI. 30.) AB set out, *inter alia*, that "Article VI (1) of the Fundamental Law seeks to guarantee the rights of access of the child and the parent" (Reasoning [40]). The restriction on the rights of access due to the epidemiological state (of danger) is such novelty in the judicial practice that it deserves to be accorded a substantive review of constitutionality. Although the judicial decision had affected one specific contact occasion; thus, it had resulted an single and temporary restriction on the rights of access by the father to the child, its principled substance could influence further contact occasions in light of the (possibly durable) epidemiological situation. With particular regard to the substance of the appeal as lodged by the father, "the mother still does not provide him personal access to his child," which is confirmed, by the fact that as evidenced by order of the Court of Law, in the course of the court proceedings, the mother "emphasized that, once the state of danger was lifted, personal access would be granted in lieu of the missed occasion," which actually indicates several such missed occasions.

[13] The Constitutional Court adjudicated the constitutional complaint on its merits by application of Section 31 (6) of the Rules of Procedure of the Constitutional Court, simultaneously with disregarding the admission proceedings.

[14] The petition is well-founded.

[15] In the case under review, the mother had refused to provide access to the father for weekend contacts with the child on 21 March 2020, with reference to the general epidemiological situation, the court seised of the case did not find any breach of the decision on the rights to access by applying Section 22/B (4) of the Non-Litigious Proceedings Act, since the court was mindful of the fact that on the mother's side, due to the pandemic and the protection of the child's health, there was no fault to be attributed.

[16] 1. On the basis of the petition, the Constitutional Court primarily assessed the rights to access by the parent to the child from a fundamental rights perspective.

[17] 1.1 In the context of the breakup of marriage and such unions, the international documents and practice principally approach the issue of the rights to access of the parent and the child from the child's perspective {pursuant to Article 9 (3) of the Convention on the Rights of the Child signed New York on 20 November 1989, (promulgated by Act LXIV of 1991, hereinafter referred to as the "Convention of the Rights of the Child") "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests}, although the need maintain such contact also arises on the side of the non-custodial parent as well. It is a bipolar right, where one side is taken by the right of the child and the other by the parent, in the current case affected by the constitutional complaint, namely, the father; therefore, one can simultaneously speak of the child's right and parental rights.

[18] 1.2 Decision 3018/2016 (II. 2.) AB of the Constitutional Court, referring to Decision 17/2014 (V. 30.) AB, summarised its case law in connection with Article VI (1) of the Fundamental Law that this article "comprehensively protects privacy: the individual's private and family life, the home, communications and reputation. The key element of the concept [...] of privacy is that no one else may intrude upon, and catch a glimpse of, such spheres of privacy against the will of the person concerned. That Decision underscored that between the right to privacy as guaranteed by Article VI (1) of the Fundamental Law and the right to human dignity enshrined under Article II of the same, there is significantly close correlation Article II of the Fundamental Law provides a ground for the protection of the inviolable part of privacy, which is totally precluded from any state interference, since it constitutes the basis for human dignity. Pursuant to the Fundamental Law, the protection of privacy shall not narrow down to the internal or intimate sphere protected by Article II of the Fundamental Law, but rather extends to the wider privacy (rights of access), as well as to the spatial sphere, in which private and family life develops (the home). In addition to the foregoing, views

of an individual's life enjoy independent protection (right to the good standing of reputation)." (Reasoning [27])

Observance of the right to access, as laid down in Article VI (1) of the Fundamental Law, means the protection and the integrity, essentially its non-disclosure to third parties, of primarily the communications and those between the parties; however, Decision 3312/2017 (XI. 30.) AB of the Constitutional Court (Reasoning [40]) accorded a broader meaning to this provision by extending its scope of protection on the rights of access in the children-parents relationship as well, {"[a]dditionally, Article VI (1) of the Fundamental Law shall guarantee the rights of access of the child and the parent"}.

[20] 1.3 The rights of access also follows from other provisions of the Fundamental Law.

[21] On the one hand, the parent-child relationship is explicitly protected as the basis for the family relationship by Article L (1) of the Fundamental Law, and Article VI (1) of the Fundamental Law also guarantees, in addition to the rights of access, the right to respect for private and family life. A child's relationship with his or her non-custodial separated parent is by nature different from his or her relationship with a parent living with him or her in a household, as the separated parent is periodically involved in caring for the child and does not make day-to-day parenting decisions. However, just as the parent-child relationship with the child is not limited to a parent living in the same household, parental status is not terminated by the cessation of the parents' cohabitation in union, nor does "family life " necessarily encompass only the day-to-day care of the child. In the constitutional sense, the relationship between the child and the separated parent, depending on the specific circumstances, as long as the separate parent performs the parental functions due to his or her situation, falls within the concept of family life and is protected {*Cf.* Compendium of Judicial Decisions BDT2018. 3822, Reasoning [24]; European Court of Human Rights, *Moog v. Germany* (23280/08 and 2334/10), 6 October 2016, paragraph 53}.

[22] On the other hand, Article XVI (1) lays down that every child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development. The Fundamental Law does not specifically mention those incurring the obligation, but in line with the case law of the Constitutional Court, although the child may need the necessary protection and care for everyone, its implementation is primarily the duty of the family, preceding that of the state and society {*Cf.* Decision 3047/2013 (II. 28.) AB, Reasoning [55]; Decision 3018/2016 (II. 2.) AB, Reasoning [33] and [34]}. "Duties to ensure physical development are to enable maintenance, care, and spiritual and moral development by choosing education [...] by providing world view, religious, cultural, artistic, scientific education, and by creating a loving family atmosphere." {Decision 3047/2013 (II. 28.) AB, Reasoning [55]} The family is a lasting emotional and economic community based on mutual care

{Decision 13/2020 (VI. 22.) AB, Reasoning [58]}; however, from the point of view of family care and protection, not only uninterrupted contact with the cohabiting parent, but also with the separated parent, who is not directly or only intermittently involved in the actual day-to-day care of the child, is essential. The end of the parents' cohabitation does not change the fact that the joint presence and support of the parents is decisive for the child's healthy development, the fact that the child can rely on the proximity of and count on both parents, the parent caring for the child and the separated parent as well, and receive from both of them the protection and care necessary for his or her development (unless, for some reason, it is not in his or her best interests).

[23] Third, Article XVI (2) of the Fundamental Law provides that parents have the right to choose the education to be given to their child. The right to parental education means that "parents themselves decide how to choose the institution, method and means of educating the child according to their traditions, family customs, social status, religious and moral beliefs as well as financial means", in a general sense "[t]he parents (guardians) in particular have the right to decide on issues related to the physical and mental development of their children" {Decision 3047/2013 (II. 28.) AB, Reasoning [59]}. Education, which is partly the same as the exercise of parental supervision (Sections 4:150–4:160 of the Civil Code), but partly different and more than that, is the participation in the life of the child, which, in addition to participating in the decision on material issues concerning the fate of the child, which belongs to the separated parent even if parental supervision is exercised by the other parent [Section 4:175 (1) of Act V of 2013 on the Civil Code (hereinafter referred to as the "Civil Code")], can be ensured primarily through regular and continuous contact.

[24] 1.4 It should also be noted that contact is also a parental obligation: Pursuant to Article XVI (3) of the Fundamental Law, parents are obliged to take care of their minor child, thus, "a parent's right to parental education also includes an obligation to provide for the care and protection of his or her child" {Decision 3018/2016 (II. 2.) AB, Reasoning [43]}.

[25] 1.5 In summary, the rights of access of the separated parent and the child is an entitlement raised to the level of a fundamental right in the Fundamental Law as part of the protection of privacy [Article VI (1) of the Fundamental Law], the child's right to care [Article XVI (1) of the Fundamental Law] and the parent's right to parental education [Article XVI (2) of the Fundamental Law].

[26] 2. The Constitutional Court reviewed whether in the specific case, also in view of the fact that the appellate court had expressly stated that "in the event of failure to provide access to the child not attributable to the father, the non-granted access must be rectified", a restriction of fundamental rights is at issue.



[27] Section 4:180 (1) of the Civil Code defines the content of the rights of access as covering “personal contact with the child, the removal of the child from his/her home or place of residence on a regular basis, for a prearranged period of time, spending longer time with the child at specific times, such as school breaks and lengthy holidays, as well as maintaining contact by ways other than in a personal manner”.

[28] Access or contact thus means the continuous presence of the separated parent in the child’s life. There is no clear hierarchy between the various means of communication, the parties may communicate directly, personally or indirectly, for example by correspondence or technical means, all forms of contact play a role in the parent-child relationship and may complement each other. The directness of contact, the regular meeting and the undisturbed personal communication, that is, the coexistence, are still extremely important parts of the parent-child relationship. Typically, this is the most intense, and traditionally, the possibility of personal contact is especially important in the case of a younger child in the formation and maintenance of attachment and in the prevention of estrangement. Accordingly, Article 9 (3) of the Convention on the Rights of the Child, Article 24 (3) of the Charter of Fundamental Rights and Section 4:178 (1) of the Civil Code guarantee the right to maintain a personal and direct relationship with the separated parent. Explicit exclusion of the possibility of face-to-face contact is in principle only possible if it is in the best interests of the child, and it can also be considered a restriction on the rights of access if alternative means of communication are available or can be rectified if missed. The fact and time of the alternative means of communication and rectification of missed occasions may play a role in assessing the proportionality of the restriction.

[29] In the specific case, one weekend of direct and personal contact was missed, at the mother’s discretion, and the court, on the basis of the interpretation of the “attributability” phrase of Section 22/B (4) of the Non-Litigious Proceedings Act, did not order enforcement, it can therefore be concluded that her decision restricted the petitioner’s right of contact guaranteed by Article VI (1) of the Fundamental Law as well as Article XVI (2) guaranteeing the right to parental education.

[30] 3. The Constitutional Court then reviewed the justification of the restriction and its constitutionality.

[31] 3.1 Considering that fundamental rights cannot be directly invoked in such a legal relationship, the Constitutional Court summarised the practice of assessing the conflict of fundamental rights between private entities in a non-hierarchical relation in its Decision 3145/2018 (V. 7.) AB as follows: “The State has an active duty to protect fundamental rights [Article I (1) of the Fundamental Law]. In this context, the first sentence of Article 28 of the Fundamental Law [...] obliged the courts, as public authorities exercising State power through the exercise of the function of administering

justice, to enforce fundamental rights also in relations between subjects of private law. In doing so, the activity of administering justice by the courts became de facto constitutionally bound, as they had assumed an active duty of protection in the field of protection of fundamental rights.

The above-mentioned provisions of the Fundamental Law thus impose an obligation on the courts to recognise the constitutional aspect and the relevance of the fundamental rights of the cases to be adjudicated, to reveal the content of the relevant fundamental rights and to interpret and apply legal regulations in specific legal disputes. [...]

All the foregoing, as the Constitutional Court has emphasised on several occasions, does not mean that courts should base their decisions directly on the provisions of the Fundamental Law, but that they must take into account the relevant constitutional aspect when interpreting and applying the applicable legal provisions to the specific set of facts in dispute. {Decision 7/2013 (III. 7.) AB, Reasoning [33]; Decision 3/2015 (II. 2.) AB, Reasoning [20]}

The Constitutional Court has thus made it clear that it is the duty of the courts to enforce fundamental rights in relations between subjects of private law. In this context, a special situation arises in the case of competing fundamental rights positions, that is, in cases where a conflict of fundamental rights arises in the relationship between legal entities where the fundamental rights of one individual are jeopardised by the exercise of the fundamental rights of the other individual. In this regard, the Constitutional Court emphasized that the courts must play a mediating and balancing role in such cases {Decision 14/2016 (VII. 18.) AB, Reasoning [65]; Decision 3312/2017 (XI. 30.) AB, Reasoning [30]}. As a measure of this, the Constitutional Court explained that »[i]n fulfilling the obligation to provide the above protection, both the legislator and those applying the law must take into account the fact that the essential content of none of the fundamentals right may be restricted and that they must also strive for striking a fair balance in accordance with the principle of proportionality (*schonender Ausgleich*). In these respects, the Constitutional Court continues to exercise control« {Decision 13/2016 (VII. 18.) AB, Reasoning [55]}.

Therefore, where the courts are required to act in a dispute in which a conflict of fundamental rights arises between legal entities by affecting the fundamental rights of one individual from the exercise of the fundamental rights of the other individual, in the light of the criteria set out above, they must make their decision by exploring the scope of protection of the fundamental rights concerned and weighing up the fundamental rights concerned (»by striking a fair balance«). In doing so, it is an essential consideration for the courts that the essential content of the fundamental rights in question cannot be vacated and that the obligation to protect fundamental

rights under Article I (1) of the Basic Law must be ensured.” (Reasoning [66]–[70]) {See more in a similar vein in Decision 14/2016 (VII. 18.) AB, Reasoning [65]–[66]; Decision 3312/2017 (XI. 30.) AB, Reasoning [30]; Decision 3212/2020 (VI. 19.) AB, Reasoning [52]}

[32] 3.2 Based on the presented constitutional standard, the Constitutional Court assessed in the context of the individual case on which the present constitutional complaint is based whether the legal interpretations of the proceedings courts ensure a fair balance of competing fundamental rights positions and their gentle equalisation (*schonender Ausgleich*). In doing so, this Court considered, on the merits of the case, whether the judicial decision impugned by way of the constitutional complaint under review was in conformity with the fundamental rights concerned.

[33] In the present case at issue, as explained in point IV/1 (Reasoning [16] et seq.), the petitioner’s rights of access under Article VI (1) and Article XVI (2) of the Fundamental Law were restricted. On the mother's side, this is contrasted by her right to parental education through a reference to the risk of the epidemiological danger [Article XVI (2) of the Fundamental Law] and the right of the child to protection and care [Article XVI (1) of the Fundamental Law] as well as the right to health [Article XX (1) of the Fundamental Law].

[34] The Constitutional Court states at the outset that the coronavirus pandemic and the resulting epidemiological measures cannot, in general, preclude a personal and direct contact between parents and their children. The sustainability of the direct relationship between the minor child and the parent, even in times of special legal order, is the minimum between human relations, which is not subject to the requirement of the measure known as social distancing, and this is as true for the cohabiting as for the separated parent (unless the separated parent has been barred from access). Granting a separated parent the rights of access is also specifically in the best interests of the child. This is also supported by the fact that the exercise of parental rights and obligations, even in the case of the confinement measures, which entered into force on 28 March 2020, was a legitimate reason for leaving the place of residence, stay or private residence [Section 3 and Section 4 (1) (t) of the Second Government Decree].

[35] However, the epidemiological situation may, in some cases, affect the rights of access by limiting them to alternative means of communication. This may arise in particular cases where specific epidemiological measures are taken because, for example, the child or parent becomes ill or is quarantined, and if, in view of the state of health of the persons concerned, the mode of travel, the duration of the contact, the personal circumstances of the parties, personal contact would, in objective

circumstances, present a special and identifiable health risk and the parties concerned fail to take the necessary precautions.

[36] In a situation that requires consideration, the most important aspect is to find a flexible solution, preferably based on parental consent. Failing that, the court will satisfy the requirement of gentle equalisation and fair balance based on the principle of proportionality of competing fundamental rights positions if it conducts a complex inquiry in the light of the facts available to it. The most important aspect of the comparison is that the need to protect the fundamental rights of all persons concerned must be recognised, and that none of them can be deprived of their fundamental rights.

[37] It is primarily necessary to assume that contact with the separated parent is in the best interests of the child; however, one must also take into account the objective factors endangering the child's health, as well as the probability and severity of the damage to health [Article XVI (1) and Article XX (1) of the Fundamental Law]. The more specific the health risk, the greater its significance, but the more general, distant and abstract it is, based solely on subjective fears and assumptions, the less weight it can be given to the rights of access [Article VI (1) and Article XVI (1) and (2) of the Fundamental Law]. If the merely general and abstract possibility of infection, though never subject to be ruled out completely, were sufficient to preclude the possibility of a face-to-face meeting again, even for long months in general, the rights of access could be vacated. The longer the period of time, the less suitable it is to compensate for it, taking into account, where appropriate, the child's age and resorting to the use of rectifying the missed occasions as well as alternative means of communication.

[38] In the specific case, the ordering of the health state of danger and the existence of a general epidemic risk were not disputed: The state of danger was declared on 11 March 2020 and the missed contact fell on the weekend of 21 and 22 March 2020. There were neither curfew nor confinement measures in force at the time (as mentioned above, the curfew that entered into force on 28 March 2020 did not affect the rights of access of separated parents). In addition, it has not been established that the mother, father or child, or any other person living in or coming into contact with their household, has been shown to be infected with a coronavirus or has been quarantined, nor the fact that they would have been at risk due to another (previous, current acute or possibly chronic) illness. Furthermore, there was no indication that the personal circumstances of the trip itself or of the father, or possibly the circumstances of the meeting, posed a particular risk of infection.

[39] The court attached decisive importance to the fact that the Government had ordered the emergency and that the virus "spreads by droplet infection, personal contact or contact with objects" and that the father lives in Pest County, which the court

found was “the area of the country most known to be affected by the infection”. In this context, the courts did not address why county data on infections rates were attached importance or why a greater risk could be identified for the father than for the mother’s place of residence and to what extent. The arguments on which the decision is based refer to an abstract, general epidemic risk from which no clear conclusion in the specific case can be drawn as to the risk of a parent-child meeting in person. And if a specific, realistic hazard cannot be identified and the father takes the necessary precautions to minimise the health risk associated with the coronavirus in advance and during the contact, both when travelling and at the place of the meeting, such as in his own household, then, given that, similarly in the case of the mother, the father is equally obliged to comply with epidemiological regulations, the general risk of an epidemic and the precaution associated with it are not in themselves sufficient grounds for restricting personal contact.

[40] There is no doubt that, as the proceeding court argues, there was uncertainty during this early period about the rate of spread of the coronavirus and the age group threatened by the virus. However, the reference that the applicant “will act correctly and responsibly if he or she reduces such occasions in order to avoid infection” allows for allusion to the lack of a incontrovertible fundamental balance in the specific case and risks vacating the rights of access. This, in turn, if the coronavirus epidemic persists, could even lead to the estrangement of the separated non-custodial parent and the pre-school child (the second instance order suggests that the mother only wanted to grant access to the child by the father after the state of danger was lifted). In addition, in the case of a pre-school child, alternative contact options are less capable of replacing or rectify a missed personal encounter.

[41] 3.3 Based on the above, the Constitutional Court found that the court had not complied with the requirement of gentle equalisation and fair balance of fundamental rights positions because it decided to limit the rights of access solely on the basis of general epidemic risk as a remote and abstract health risk. The judicial decisions may therefore lead to rendering this right nugatory. For all the foregoing reasons, the Constitutional Court found a violation of Article VI (1) of the Fundamental Law and annulled the second-instance court order challenged pursuant to Section 43 (1) of the Constitutional Court Act, and annulled the first-instance court order pursuant to Section 43 (4) of the Constitutional Court Act in accordance with the provisions of the operative part.

[42] 4. With regard to the annulment of the court orders, the Constitutional Court, based on its most recent case law referred to in Decision 3390/2020 (X. 29.) AB, waived the review of the petition element based on the violation of Article XXVIII (1) of the Fundamental Law.

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

*Dr. Tamás Sulyok, sgd.,*  
Chief Justice of the Constitutional  
Court  
on behalf of  
*dr. Ágnes Czine*  
Justice, prevented from signing

*Dr. Tamás Sulyok, sgd.,*  
Chief Justice of the Constitutional  
Court  
on behalf of  
*dr. Tünde Handó*  
Justice, prevented from signing  
*Dr. Tamás Sulyok, sgd.,*

Chief Justice of the Constitutional  
Court  
on behalf of  
*dr. Ildikó Hörcher-Marosi,*  
Justice delivering the opinion of the  
Court, prevented from signing

*Dr. Tamás Sulyok, sgd.,*  
Chief Justice of the Constitutional  
Court  
on behalf of  
*dr. Mikós Juhász,*  
Justice, prevented from signing

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

*Dr. Tamás Sulyok, sgd.,*

Chief Justice of the Constitutional  
Court  
on behalf of  
*dr. Marcel Szabó,*  
Justice, prevented from signing

*Dr. Tamás Sulyok, sgd.,*  
Chief Justice of the Constitutional  
Court  
on behalf of  
*dr. Egon Dienes-Oehm,*  
Justice, prevented from signing

*Dr. Tamás Sulyok, sgd.,*  
Chief Justice of the Constitutional  
Court  
on behalf of  
*Dr. Attila Horváth,*  
Justice, prevented from signing

*Dr. Tamás Sulyok, sgd.,*  
Chief Justice of the Constitutional  
Court  
on behalf of  
*dr. Imre Juhász,*  
Justice, prevented from signing

*Dr. Tamás Sulyok, sgd.,*  
Chief Justice of the Constitutional  
Court  
on behalf of  
*dr. Béla Pokol,*  
Justice, prevented from signing

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

on behalf of  
*dr. Balázs Schanda,*  
Justice, prevented from signing  
*Dr. Tamás Sulyok, sgd.,*

Chief Justice of the Constitutional  
Court  
on behalf of  
*dr. Péter Szalay,*  
Justice, prevented from signing

*Dr. Tamás Sulyok, sgd.,*  
Chief Justice of the Constitutional Court  
on behalf of  
*dr. Mária Szívós,*  
Justice, prevented from signing

Concurring reasoning by *dr. Ágnes Czine:*

[43] I agree with the decision in the operative part. With regard to the Reasoning, I consider it important to emphasise the following.

[44] 1. It is the constitutional obligation of the courts to interpret the law in accordance with the Fundamental Law in the course of their judicial activity (Article 28 of the Fundamental Law). Based on this obligation, the proceeding courts should identify the fundamental rights' aspects of the relevant case within the limits of interpretation provided by the law, and it should interpret the law applied in the judicial decisions with due account to the constitutional content of the fundamental right involved {Decision 7/2013 (III. 1.) AB, Reasoning [33]; Decision 28/2013 (X. 9.) AB, Reasoning [29]; Decision 3002/2018 (I. 10.) AB, Reasoning [58]}.

[45] According to the consistent practice of the Constitutional Court, a constitutional complaint enabling the review of the constitutionality of judicial decisions (Section 27 of the Constitutional Court Act) is a legal institution serving the enforcement of Article 28 of the Fundamental Law {Decision 3/2015 (II. 2.) AB, Reasoning [17]}

[46] The Constitutional Court must therefore, on the basis of a constitutional complaint, first assess whether the dispute on which the main court proceedings are based has a fundamental rights link. In this context, I consider it important to highlight the following.

[47] 2. The protection of children's rights has always occupied a prominent place in the practice of the Constitutional Court. As the Constitutional Court has already pointed out in Decision 995/B/1990 AB, the child "shall enjoy all constitutional rights as everyone else, but in order to be able to enjoy the full range of rights, he or she must

be provided with all the conditions appropriate to his or her age to become an adult". Therefore, in addition to the simultaneous definition of the fundamental rights of the child, the constitutional provisions determine the basic obligations of the family (parents), the state and society (ABH 1993, 515, 524). The Constitutional Court added that "[t]he enforcement of children's rights on the part of the State requires legal activism, that is, the normative and institutional connections of different rights [...] must be taken into account when shaping the legal system. The functioning of the legal system as a whole must reflect a balanced comparison of legal and non-legal interests arising under the performance of different public tasks." (Decision 1091/B/1999 AB, ABH 2002, 1081, 1086)

[48] In addition to reaffirming the above, the Constitutional Court emphasized in Decision 3375/2018 (XII. 5.) AB that Article XVI of the Fundamental Law is of paramount importance in all proceedings directly affecting the interests of the child.

[49] In my view, therefore, the fundamental relevance of the dispute in the present case arises primarily in the context of the protection of the rights and interests of the child. I therefore consider it particularly important to state in the Reasoning that "[t]he end of the parents' cohabitation does not change the fact that the joint presence and support of the parents is decisive for the child's healthy development, the fact that the child can rely on the proximity of and count on both parents, the parent caring for the child and the separated parent as well, and receive from both of them the protection and care necessary for his or her development". Contact with a separated parent is therefore specifically in the best interests of the child and, therefore, the protection of the best interests of the child is also at the heart of the protection of the fundamental rights of access.

[50] 3. In the light of the above, I therefore consider that it can be clearly established in the present case that the main court proceedings raise, in addition to the right to protection of private and family life, the fundamental legal relevance of Article XVI of the Fundamental Law. The resulting constitutional considerations, however, have not been assessed by the trial and appellate courts. The courts attached decisive importance to the fact that, on the side of the parent in whose care the child had been placed and who refused to provide access to the child for contact on the basis of the child's health, citing the epidemiological state of danger, should be taken into account as a circumstance that is more appreciable in the scope of attributability of fault. However, it does not necessarily follow that the best interests of the child were protected solely by the refusal to grant such access. The decisions of the courts do not reveal the specific reasons which made it really necessary to restrict contact with the separated parent in order to protect the child involved in the proceedings.



[51] I also consider it important to emphasise the fact in the Reasoning for the Decision that face-to-face meetings are of particular importance for a pre-school child, and this circumstance reinforces the relevance of the fundamental rights aspects referred to above.

[52] In the light of the above, I agree that no specific reasons for refusing to contact have been identified in the present case, and, thus, the manner in which the constitutional aspects of Article XVI of the Fundamental Law have been considered by the courts.

Budapest, 9 February 2021

*Dr. Tamás Sulyok, sgd.,*  
Chief Justice of the Constitutional Court  
on behalf of  
*dr. Ágnes Czine*  
Justice, prevented from signing

Concurring reasoning by *dr. László Salamon*:

[53] I agree with the part of the Reasoning for the Decision relating to the constitutional links between the (personal) contact of the separated parents with the child and the existence of the epidemiological situation, and the health risks which may be taken into account in refusing to grant access to the child on the grounds of epidemic risk in the proceedings in similar cases. In view of all this, I also support the decision contained in the operative part.

[54] However, in line with my previous position on a number of decisions of the Constitutional Court, I do not agree with the essential element of the Reasoning which makes fundamental rights compete (see first in the concurring reasoning enclosed to Decision 4/2015 (II. 13.) AB, Reasoning [59] and [60] and in more detail, the concurring reasoning to Decision 30/2015 (X. 15.) AB, Reasoning [59] to [92]).

[55] In my view, the rule of restriction on fundamental rights in Article I (3) of the Fundamental Law is only a legislative provision. Accordingly, in my view, (i) a fundamental right may be restricted only by an Act of Parliament; (ii) law enforcers (including courts) shall not restrict a fundamental right (even in order to enforce another fundamental right); however, (iii) in the application of Acts which may restrict fundamental rights, they are to assess and consider whether the conditions for the restrictions prescribed or permitted by the Act exist in the particular case and, if so,

apply those restrictions in individual cases {Cf. Decision 30/2015 (X. 15.) AB, Reasoning [62]}.

[56] The restriction of Article VI (1) of the Basic Law, similarly the restriction of all fundamental rights, can only be carried out by an Act of Parliament, in connection with which the subsequent government decree (Act replacement decree) established a regulation in connection with confinement measures, after deliberation and without prohibiting contact.

[57] In the present case, the infringement of Article VI (1) stemmed, in my view, from the court's finding that the mother's conduct was lawful without the possibility of a legal restriction on that fundamental right (finding no attributability by fault in that regard).

Budapest, 9 February 2021

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

Dissenting opinion by *dr. Imre Juhász:*

[58] I do not agree with the decision supported by the majority, because the substantive petition should have been rejected by the Constitutional Court.

[59] 1. Article 24 of the Fundamental Law lays down the basic rules concerning the tasks and competences of the Constitutional Court. Under Article 24 (d), which is invoked in the present case, the Constitutional Court reviews the compatibility of a judicial decision with the Fundamental Law on the basis of a constitutional complaint. By contrast, Article 25 of the Fundamental Law sets out that the courts shall administer justice and decide, *inter alia*, in private law disputes. However, it also follows that the courts may not take over the competence of protecting the Fundamental Law reserved to the Constitutional Court and that the Constitutional Court may not take over the administration of justice.

[60] 2. Accordingly, it has developed the practice of the Constitutional Court, under which "Legislation is interpreted by the courts, while the Constitutional Court can only designate the constitutional framework of the area of interpretation. However, this

competence may not constitute a basis for interfering with the activities of the courts in all cases where an (alleged) infringing law has been applied which can no longer be remedied by other means of redress. Neither the abstract principle of the rule of law, nor the fundamental right to a fair trial, nor the prohibition of discrimination can provide a basis for the Constitutional Court to act as a »super-court« above the judiciary and to act as a traditional forum for redress.” {Order 3325/2012 (XI. 12.) AB, Reasoning [14]} "Pursuant to Article 24 (2) (d) of the Fundamental Law and Section 27 of the Constitutional Court Act, the Constitutional Court has the power to eliminate unconstitutionality by non-conformity with the Fundamental Law that substantially affects the judicial decision; however, it no longer has the power to re-examine the direction of the judicial decision, the judicial assessment of the evidence and the court proceedings as a whole.” {Order 3231/2012 (IX. 28.) AB, Reasoning [4]}

[61] Since the entry into force of the Fundamental Law, the Constitutional Court has consistently refrained from reviewing court decisions on issues of legality, justifying the rejection of many hundreds of constitutional complaints based on the above principles, also from assessing the facts established by the courts or overruling the conclusions drawn from it (in this case, those relating to attributability).

[62] In the present case, the Constitutional Court, interrupting its above-cited case law in the first days of the COVID epidemic period, annulled the first and second instance court decisions subsequently declaring the parental action taken on 21 March 2020 to be lawful by reviewing the findings of fact directly based on Article VI of the Fundamental Law.

[63] The reasoning of a majority decision which I do not support is difficult to assess other than as a review of the procedure, in the procedural sense, that is to say, the fact that the Constitutional Court itself “adjudicated the matter” by a manifest deprivation of jurisdiction. This is supported by the fact that the majority decision blames the courts for attaching importance to the county-level infection rate data, the lack of testing for the mother's, the father's or the child's coronavirus infection, and the failure to identify past or current acute or chronic illness. The majority opinion, which is indirect but difficult to misunderstand, formulates a suggestion that the mother would have taken advantage of the danger to obstruct access to the child.

[64] In conclusion, in my view, the petition should have been rejected in the present case, since the courts hearing the case had given adequate reasons for their decision, there was no doubt as to the conflict of those decisions with the Fundamental Law, just as, at least on the basis of the consistent practice of the Constitutional Court so far, in my opinion, the decision rendered by the judge on the issue of contact did not raise any constitutional law issues of fundamental importance.

Budapest, 9 February 2021

*Dr. Tamás Sulyok, sgd.,*  
Chief Justice of the Constitutional Court  
on behalf of  
*dr. Imre Juhász,*  
Justice, prevented from signing

[65] I second the above dissenting opinion:

Budapest, 9 February 2021

*Dr. Tamás Sulyok, sgd.,*  
Chief Justice of the Constitutional Court  
on behalf of  
*dr. Tünde Handó*  
Justice, prevented from signing

Dissenting opinion by *dr. Béla Pokol*:

[66] In principle, I also disagree with the reasoning logic of the majority decision and the annulment as held in the operative part.

[67] 1. The Decision extends the position of protection of fundamental rights in the Reasoning to the vertical relationship between the State and individuals and declares their horizontal scope in general terms between private parties (see point IV/3.1 of the Reasoning, in Reasoning [31] et seq.), and I cannot fathom any ways to accept this. It expresses this extension by postulating the active duty of the state to protect relations between private parties, and reiterates this by interpreting Article 28 of the Fundamental Law as meaning that the order of interpretation of judicial law in accordance with the Fundamental Law also stated the scope of fundamental rights between private parties. This, in my view, constitutes an erroneous interpretation.

[68] Throughout European history, constitutional fundamental rights have protected individuals and their privacy against the state since the late 1700s. Modern states based on democratic legislation are thus free to change simple law, but if it is a fundamental right, and it arises in the relationship between the State and the individual, its regulation is subject to constitutional review, at least where constitutional justice exists. In this narrow but important area, therefore, the freedom to regulate democratic legislation is abolished and the Constitutional Court brings legislation under control.

This possibility of restricting democracy is, as an exception, justified by the autonomy of individual individuals and the private sector vis-à-vis the State. However, if fundamental rights are extended to the interrelationships of private individuals, democratic legislation will be essentially entirely under the control of the Constitutional Court. At this point, however, there is a loss of democratic authority, an essential feature of the system, and a tendency to render the component of political democracy meaningless.

[69] This consideration requires that we do not accept the horizontal effect of fundamental rights beyond the vertical scope of fundamental rights. However, moving forward in a narrow area, it is conceivable that in the case of a fundamental right, if public relations and involvement affect the relationship between individuals and private organisations, then following a degree of this influence we exceptionally recognise the horizontal effect. I would like to point out here that, in my view, Article 28 of the Fundamental Law, which obliges judges to interpret the law in accordance with the Fundamental Law in the application of the law by the judiciary means that if the specific case before the judge concerns the relationship between the state and the individual, that judge must also include any relevant fundamental rights. (Typically, this is the general rule in administrative justice.) However, in the case of a relationship between private parties, it only has to do so if the case between the private parties carries a public orientation and relevance. However, in addition to fundamental rights, the issue of constitutional values must also be addressed, which the old Hungarian Constitutional Court worded as a "State objective". The dilemma with these is whether they also require limited enforcement of the relationship between the state and private parties, or do they require application in all legal relationships? In my view, if a declaration of constitutional value arises in a case between private parties, it must also be included in the interpretation of the relevant simple legal provision, and this is not limited to the relationship between the State and private parties. For example, Article M) of the Fundamental Law on the prohibition of dominant position has such a fundamental legal value, and judges must also involve it in the settlement of contractual disputes between private parties. Therefore, in my view, a distinction needs to be made between fundamental rights and fundamental values when deciding on horizontal scope, and while fundamental effects cannot be recognised only to a limited extent, fundamental effects must be recognised.

[70] I would also like to point out that, following the early decisions of German constitutional justices recognising the horizontal effect on fundamental rights, some constitutional courts followed them down this path, as opposed to the first European Constitutional Court and that of the Austrians, neither of whom took this path. I do not consider this divergence to be accidental. This is because while one-third of German constitutional justices are always elected by the Bundestag from among the judges of

the highest courts (there are five), in the case of Austrians, as a rule, former administrative chief officials, attorneys-at-law and university professors become constitutional justices. In addition, it has become a firm customary rule for Germans to select all staff members from among young judges with a few years of experience who will return to the ordinary judiciary at a higher judicial level after a few years of work here. Here, therefore, through the recognition of horizontal effect, essentially former supreme court judges and their judicial staff decide on constitutional complaints challenging thousands (approximately five thousand) of ordinary court judgements per year, and this makes another constitutional complaint and the constitutional judge a further forum for judicial redress. Well, I do not have to outline that here the constitutional justices and their staff do not take the position according to the selection rules based on the German model, it is more close to the Austrians, and those who tend to follow the German model should take into account that for us largely theoretical university lecturers, legal-political scientists, theoretical legal historians, criminologists and lawyers have constituted the main basis for the selection of constitutional justices for a quarter of a century.

[71] 2. Even if such a solution existed, which we do not accept, but if the rights of access of the divorced parent with his or her child, which is regulated by Section 4:180 of the Civil Code, could be discussed in substance, the interpretation of Articles II, VI and XVI of the Fundamental Law should be disputed. Article II, by protecting against violations of human dignity, protects the human person from humiliation, while here it shifts completely to the protection of privacy. But then it also distorts Article VI of the protection of privacy itself, because in this way it does not turn out that Article VI protects the private sector from the State or from its interference. In fact, in the present case, in a dispute between two private parties to a divorced marriage, only Article XVI, in particular the first three paragraphs thereof, comes into play if the case has been cleared of the misinterpretation of Articles II and VI. If this were not a dispute between two private parties, but, for example, between a guardianship authority and one of the parents, or if the parents challenged the legal regulation, this could be interpreted more closely by the Constitutional Court. But the dispute between two private parties in this case belongs to the forum of ordinary courts, which are obliged to decide on this matter under Section 4:180 of the Civil Code.

Budapest, 9 February 2021

*Dr. Tamás Sulyok, sgd.,*  
Chief Justice of the Constitutional Court  
on behalf of  
*dr. Béla Pokol,*

Justice, prevented from signing

Dissenting opinion by *dr. Mária Szívós*:

[72] I do not agree with the provision of the majority decision annulling the judicial decisions challenged in the constitutional complaint, therefore I attach the following dissenting opinion to the decision based on my authority under Section 66 (2) of the Constitutional Court Act.

[73] 1. First of all, I would like to point out that in the case under review the Constitutional Court could not have assessed the merits of the constitutional complaint for several reasons, because the conditions for admissibility were not fully met.

[74] Pursuant to Section 52 (1) of the Constitutional Court Act, the petition must contain an explicit request; furthermore, pursuant to Section 52 (1b) (e), the application is, subject to other conditions, deemed to be explicit if the petitioner provides a justification as to why the contested court decision is contrary to the specified provision of the Fundamental Law. Although the petitioner mentioned Article VI (1) of the Fundamental Law in his constitutional complaint, he failed to provide a substantive, constitutionally assessable justification as to why the contested judicial decisions violate his right to contact and to what extent. In view of this, the petitioner did not fulfil the obligation to state reasons contained in Section 52 (1b) (e) of the Constitutional Court Act; therefore, his constitutional complaint was not suitable for a substantive assessment.

[75] 2. Even if it were accepted that the constitutional complaint contained an adequate statement of reasons, the conditions under Section 29 of the Constitutional Court Act were certainly not met in the case. In this connection, I would like to point out the following.

[76] The courts hearing the case had to rule on the question whether the parent at issue in the main proceedings had impeded contact with the applicant for a reason attributable to the impeding parent. We can talk about attributability of fault if someone does not engage in conduct in a way that can be reasonably expected in a given situation. In the present case, the assessment of the expected conduct cannot deviate from the information available on 21 March 2020, the date on which the contact was barred. At that time, the knowledge available about the epidemic was limited, reports of countries previously affected by coronavirus infection (particularly Italy) provided predominantly disturbing information threatening with the collapse the health system. Data on many deaths came from several countries in Europe as well as the United States, and in this situation it was also well-known that there was no drug

yet to cure people with coronavirus. In line with this (panic) fear in the country, official state communication on defence was also clearly aimed at leaving the place of residence and stay strictly only in urgent cases ("Stay at home!"). At that time, no precise data were available on the spread of the virus or on which age group was most at risk. (We now know that with the preschool age group, the infection is almost asymptomatic, followed by serious complications months later.) Education shifted overnight to distance education, and following the announcement of the state of danger on 11 March 2020, countless public institutions also switched to working from home within a few hours. Therefore, when the courts seized of the case ruled that the condition of attributability could not be established in respect of the respondent parent, the above-mentioned circumstances were included in the assessment, and it was clearly concluded that the respondent parent was guided by the best interests of the child, that is, the protection of his or her health, when refusing to hand over the child. In making their decision, they also took into account that the decision refusing to hand over the child did not cause a disproportionate harm to the child's interests and, given the possibility of compensating for the missed contact occasions, the applicant parent did not suffer an irreparable harm, either. The courts proceedings in the case, therefore, made a thorough assessment of the circumstances of the case and gave an account of the outcome of their deliberations.

[77] In view of the above, I find it unacceptable, for two reasons, that the majority decision annulled the judgments.

[78] 2.1 By examining the merits of the decisions of the proceeding courts, the majority opinion did nothing more than carry out a clear review, taking a decision that overruled the evidence assessment activity of the courts. All this is clearly in conflict with the practice of the Constitutional Court, pursuant to which Article 24 (2) (d) of the Fundamental Law and Section 27 of the Constitutional Court Act, that the Constitutional Court has the competence to review decisions terminating court proceedings only from a constitutional point of view. A constitutional complaint filed against judicial decisions cannot therefore be considered as a means of general review of court decisions that cannot be challenged with further legal remedies, as the Constitutional Court also protects the Fundamental Law and the rights guaranteed therein through a constitutional complaint {Order 3231/2012 (IX. 28.) AB, Reasoning [3]}. Consequently, the Constitutional Court cannot provide assessment whether the proceeding courts have correctly assessed the evidence in a particular case or whether the facts established as a result of its assessment are well-founded, thus refraining from taking a position on the issues of assessment of evidence and facts in the main proceedings.



[79] 2.2 Moreover, the majority opinion of the Constitutional Court carried out its overruling activity in such a way that, more than three-quarters of the year after the impugned parental decision, it apparently did so in possession of much more information. The majority opinion establishes that “the exercise of parental rights and obligations, even in the case of the confinement measures, which entered into force on 28 March 2020, was a legitimate reason for leaving the place of residence, stay or private residence [Section 3 and Section 4 (1) (t) of the Second Government Decree]” (Reasoning [34]) and in assessing the judicial activity of the courts seised, states that “[t]he arguments on which the decision is based refer to an abstract, general epidemic risk from which no clear conclusion in the specific case can be drawn as to the risk of a parent-child meeting in person (Reasoning [39]). I consider it important to emphasise that on 21 March 2020 the respondent parent was clearly unaware of what would be included in the government decree issued a week later and, as I pointed out earlier, the information available during this period did not point at all towards any abstract danger. These findings therefore stem from the inclusion in the assessment of circumstances which the parent making the decision could not have been aware of at the time of the decision.

[80] What the child’s mother knew at the time was that the father intended to take the preschool child from the relatively least infected area of the country to the most infected area of the country.

[81] In view of the foregoing, it can be concluded that, in my firm opinion, the conditions set out in Section 29 of the Constitutional Court Act were not met with regard to the constitutional complaint, as the constitutional complaint was purely to overrule by re-evaluating the circumstances of the courts.

[82] Unfortunately, the majority opinion, disregarding the settled case-law of the Constitutional Court, nevertheless assessed the merits of the complaint and, on the basis of our current knowledge of the epidemic situation, simply reviewed the evidence assessment activities of the trial courts.

Budapest, 9 February 2021

*Dr. Tamás Sulyok, sgd.,*  
Chief Justice of the Constitutional Court  
on behalf of  
*dr. Mária Szívós,*  
Justice, prevented from signing

[83] I second the above dissenting opinion:

Budapest, 9 February 2021

*Dr. Tamás Sulyok, sgd.,*  
Chief Justice of the Constitutional Court  
on behalf of  
*dr. Tünde Handó*  
Justice, prevented from signing