CONSTITUTIONAL COURT DECISION N. 21/2018. (XI. 14.)

In the matter of a judicial initiative seeking the establishment of the violation of an international treaty by a law, the plenary session of the Constitutional Court has – with concurring reasonings by Justices *dr. Ágnes Czine* and *dr. István Stumpf* as well as with dissenting opinions by Justices *dr. Egon Dienes-Oehm, dr. Imre Juhász, dr. Béla Pokol, dr. László Salamon, dr. Mária Szívós* and *dr. András Varga Zs.* – adopted the following

d e c i s i o n:

1 Acting ex officio, the Constitutional Court states that the Parliament failed to fulfil its legislative duty resulting from an international treaty by ordering the application of Section 12 (1) *a)* of the Act CXCI of 2011 on Benefits for Persons with Altered Working Ability and Amendments of Certain Acts in the cases under Section 33/A (1) *a)*, without adopting, at the same time, rules allowing to take into account, during the determination of the benefit amount, the extent of the improvement of the actual physical condition substantially determining the conditions of the beneficiary's life, as well as the amount of the benefit determined before 1 January 2012.

The Constitutional Court calls upon the Parliament to meet its legislative duty by 31 March 2019.

2. The Constitutional Court states: it is a constitutional requirement resulting from Article Q (2) of the Fundamental Law that the text "– with the exception of the improvement of conditions –" in Section 33/A (1) *a)* of the Act CXCI of 2011 on Benefits for Persons with Altered Working Ability and Amendments of Certain Acts shall only be applicable in the case of those persons entitled to benefits whose conditions have improved not only in the legal sense defined on the basis of the categories and values according to the laws, but also in terms of their actual physical conditions that substantially determine their situation of life.

3. The Constitutional Court rejects the judicial motion aimed at establishing the lack of conformity with an international treaty, at annulling and at excluding the applicability of Section 12 (1) *a)* of the Act CXCI of 2011 on the Benefits for Persons of Altered Working Ability and on the Amendment of Certain Acts.

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

R e a s o n i n g

I

[1] 1 The panel of the Curia as the review court (hereinafter: "petitioner") in the litigious procedure No. Mfv.III.10.147/2017, pending before it, for the judicial review of a social security decision initiated, along with suspending the procedure, on the basis of Section 32 (2) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), to the Constitutional Court to declare that Section 12 (1) *a)* of the Act CXCI of 2011 on Benefits for Persons with Altered Working Ability and Amendments of Certain Acts (hereinafter: AAWA) – applicable on the basis of the second part of Section 33/A (1) *a)* – is in conflict with an international treaty and to annul it as well as to prohibit the application of this provision of the law in a particular individual case. According to the petitioner, the challenged provisions of the AAWA are in conflict with the right to property guaranteed in Article 1 of the First Additional Protocol of the European Convention on Human Rights promulgated in Hungary with the Act XXXI of 1993 (hereinafter: "Convention").

[2] 1.1 In accordance with the facts established in the basic case, until 31 December 2011 the plaintiff had received disability pension of group III, and the disbursement of this benefit has continued from 1 January 2012 as rehabilitation benefit on the basis of Section 32 (1) of AAWA. As from 29 February 2016, with the decision dated 15 December 2015 – as the result of the review carried out on the basis of Section 33 (6) of the AAWA – the Government Office of Szabolcs-Szatmár-Bereg County terminated the rehabilitation benefit that had been established for the plaintiff of the basic case in the amount of HUF 91535 in the month before the review, and at the same time, on the basis of the complex classification, as from 1 March 2016, it established disability benefit in the monthly amount of HUF 41850, with the application of Section 33/A (1) *a)*, paragraph (2) *c)* and Section 12 (1) *a)*. The Government Office stated in its decision that the health condition of the plaintiff was of 59%, and on the basis of his condition he belonged to the classification category B2. The National Office for Rehabilitation and Social Affairs acting on the basis of the appeal lodged by the plaintiff of the basic case approved, with its decision of 21 April 2016, the decision of the authority of first instance, stating that the level of the plaintiff's health condition was of 55% and on the basis of his condition he belonged to the classification category B2, presumably from 17 November 2015.

[3] 1.2 In the claim for the review of the social security decision, the plaintiff of the basic case complained about significantly cutting the amount of his disability benefit to less than the half of the amount of his former disability pension by also violating Article 1 of the First Additional Protocol of the Convention. With the judgement No. 1.M.391/2016/9, the Nyíregyháza Administrative and Labour Court annulled the social security decisions and ordered the defendant to carry out a new procedure. According to the judgement, the forensic medical expert appointed in the case agreed with the medical committee of second instance regarding the determination

of the level of the plaintiff's health damage and his health condition, however, the amendment of the expert opinion – as proposed by the petitioner – was not possible, as the authorities did not take a stand concerning the improvement of the condition, thus the reasoning of the decision did not contain the ground for cutting the amount of the benefit by more than the half of it. The change of the percentage values, in itself, does not support the improvement of the conditions as it can only be assessed when the health condition resulting from the diseases before 31 December 2011 is compared to the change of health condition following that date. During this assessment, one should verify on the basis of the new provisions whether the change of the plaintiff's health condition took place only in terms of the percentage values due to the different classification criteria, or there was an actual change.

[4] 1.3 The defendant authority submitted a request for review against the final judgement by referring to the violation of Section 15 (1), Section 33/A (1) of the AAWA and Section 4 (1) of the Decree of the Minister for National Resources No. 7/2012. (II. 14.) NEFMI on the detailed rules of the complex classification. In the counterclaim for the review, the plaintiff continued to argue that significantly cutting the amount of his disability benefit to less than the half of the amount of his former disability pension had also been a violation of Article 1 of the First Additional Protocol of the Convention. The plaintiff also claimed that although the transformation of former pensions to social benefits was possible on the basis of the Fundamental Law, it does not nullify the legal fact that before the year 2012, the beneficiaries had received a benefit that had been subject – at least in part – to a constitutional protection of property, therefore, it may not be decreased without limits.

[5] 1.4 The petitioner claimed that there was a conflict between the challenged provision of the AAWA and Article 1 of the First Additional Protocol of the Convention, on the basis of the obligation originating in Article Q (2) of the Fundamental Law, namely that the courts shall apply and interpret the national law in accordance with the Convention. When interpreting the provisions of the Convention, the national courts shall rely on the interpretation found in the decisions of the European Court of Human Rights (hereinafter: ECHR), and according to this interpretation, it should not be disregarded in the present case that the ECHR established in several decisions – in particular in the cases *Nagy Béláné vs. Hungary* {[GC], (53080/13), 13 December 2016)}, *Baczúr vs. Hungary* [(8263/15), 7 March 2017] and *Lengyel vs. Hungary* [(8271/15), 18 July 2017] – a conflict with the Convention resulting from the significant cut of the benefit provided due to disability or altered working capacity, also challenged by the plaintiff. According to the petitioner, as regards the plaintiff of the basic case and the applicants of the quoted cases of the ECHR, the same type of benefit was cut significantly on the basis of the same

provision of the law and for the same reason, and the petitioning judicial panel cannot identify any circumstance according to which the cases could be distinguished from each other. However, the petitioner holds that it is also prevented from disregarding in the pending case the rule applicable to the calculation of the amount of the benefit due to the plaintiff, i.e. Section 12 (1) *a)* of the AAWA. Therefore, as held by the petitioner, the conflict between the provision of the AAWA challenged in the petition and the Convention may not be remedied by judicial interpretation; it can only be resolved by submitting a judicial initiative.

[6] 2 Before adopting its decision, the Constitutional Court requested the minister for human capacities, the minister of justice, the commissioner for fundamental rights and the National Federation of Disabled Persons' Associations (hereinafter: MEOSZ) to present their position regarding the petition and the relevant provision of the law.

II

[7] The Constitutional Court adopted its decision on the basis of the following provisions of the Fundamental Law, of the international treaty and of the law.

[8] 1 The provision of the Fundamental Law affected by the petition:

"Article Q) (2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law.

(3) Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by publication in rules of law."

[9] 2 The provision of the Convention and of the connecting First Additional Protocol affected by the petition:

“First Additional Protocol

Article 1 Every natural or legal person is entitled to the peaceful enjoyment

of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

[10] 3 The provisions of the AAWA affected by the petition:

“Section 12 (1) The amount of the disability benefit is

a) in the case under Section 3 (2) *b) ba)* and Section 5 (2) *a)*, 40 percent of the average monthly income, but not less than 30 percent of the basic amount and not more than 45 percent of the basic amount,"

"Section 33/A (1) If, after the review of the person receiving disability benefit under Section 32 (1) or of the person receiving rehabilitation benefit under Section 33 (1), the beneficiary is

a) a person entitled to disability benefit, the amount of the benefit shall be determined according to Section 12 (1) with the provision that – with the exception of the improvement of the conditions – the amount shall not be less than the amount payable in the month preceding the review,"

III

[11] The judicial initiative is unfounded.

[12] 1 First of all, the Constitutional Court examined whether the judicial initiative complies with the criteria set forth by the law.

[13] 1.1 The Constitutional Court's practice is consistent in holding that the requirements laid down with regard to the judicial initiatives in Section 25 of the ACC are also applicable to the judicial initiatives made on the basis of Section 32 (2) of the ACC {see most recently: Decision 31/2017. (XII. 6.) AB, Reasoning [16]}. According to the judicial initiative, Section 12 (1) *a)* of the AAWA is in conflict with an international treaty, namely with Article 1 of the First Additional Protocol of the Convention. The court that proceeded with the basic case had to review a social security decision where the challenged provision of the AAWA had been applied beyond doubt, as the amount of the disability benefit determined for the plaintiff of the basic case had been calculated on the basis of Section 12 (1) *a)* of the AAWA.

[14] 1.2 The petition contains an explicit and exact reasoning why the challenged provision of the law is held to be in conflict with Article 1 of the First Additional Protocol of the Convention. According to Article 24 (2) *f)* of the Constitutional Court, reviewing a conflict with an international treaty falls within the Constitutional Court's scope of competence, and the procedure may be initiated by the persons specified in Section 32 (2) of the ACC, including the petitioning judicial panel. The petition satisfies the requirements under Section 52 (1) and (1b) of the ACC, regarding an explicit request {c.p. Ruling 3058/2015. (III. 31.) AB, Reasoning [8]–[24], Decision 2/2016. (II. 8.) AB, Reasoning [26]–[28], Decision 3064/2016. (III. 22.) AB, Reasoning [8]–[13]}.

[15] 2 The Constitutional Court recalls that the case law of the ECHR is consistent by stating that the ECHR is not in charge of the abstract review of the Member States' laws and of verifying whether the relevant law is compatible with the Convention {see for example: *Nikolova vs Bulgaria* [GC] (31195/96), 25 March 1999, par. 60}, as its primary duty is to assess the results on the individual applicants of the application by the authorities and by the courts of certain provisions of national law, and when it verifies the violation of the Convention, the State subject to the complaint shall bear the legal consequence established by the ECHR in accordance with the provisions of the Convention. In contrast with the above, in the procedure under Section 32 (2) of the ACC, the Constitutional Court shall carry out the abstract review of the conflict between a provision of domestic law and an international treaty, and in line with the provisions of the Fundamental Law and of the Convention, only the Constitutional Court is authorised to carry out this review.

[16] The Constitutional Court has already laid down with regard to the effect of the judgements of the ECHR on its own decisions, that "in the course of exploring the obligation that binds Hungary on the basis of an international treaty (i.e. in the course of reviewing a conflict with an international treaty), not only the text of the international treaty, but also the case law of the body empowered to interprets it shall be taken into account" {Decision 3157/2018. (V. 16.) AB, Reasoning [21]}. When the Constitutional Court acts in the procedure under Section 32 (2) of the ACC, and it carries out the review with regard to the Convention as an international treaty, its arguments shall be based directly on the Convention, rather than on the individual judgements of the ECHR. This is true even if there are, among the individual cases, several decisions explicitly related to Hungary, that may be taken into account by the Constitutional Court when they are relevant. By taking all the above aspects into account, the Constitutional Court may establish the existence of a conflict between a domestic law and an international treaty, if its only possible interpretation and, as appropriate, its only application without discretion is the violation of the international obligation undertaken according to Article Q) (2) of the Fundamental Law. In any other case, the duty of the Constitutional Court is to guarantee that the interpretation of the relevant provision of Hungarian law shall be compatible with the Fundamental Law and with the obligation resulting from the international treaty.

[17] The Constitutional Court also recalls that, according to the Fundamental Law and the ACC, the Constitutional Court does not have a general opportunity to review whether, in the particular case, the law-applying entity assessed the evidences correctly, or whether the facts of the case established as a result of weighing were well-founded. Actually, establishing the facts of the case, together with evaluating and weighing pieces of evidence is a duty reserved for the law-applying entity (authority, court) in a manner specified in the rules of procedure. Similarly, the

interpretation of the laws and the evaluation of the correctness and validity of the positions in the scope of the dogmatics of the branch of law are competences reserved for the law-applying entities {Decision 30/2014. (IX. 30.) AB, Reasoning [22]}. Neither is the Constitutional Court authorised to decide the case that forms the basis of the judicial initiative; the Constitutional Court may only take a stand in the question raised by the judicial initiative on whether the law applicable according to the proceeding judge in the underlying case is in conflict with any provision of the Fundamental Law [or, in the present case, within the framework of the competence under Section 32 (2) of the ACC, of the Convention as an international treaty]. It means that while the Constitutional Court is bound to guarantee that the decisions of the law-applying entities that embody the State's operation shall be in line with the undertaken international (human rights) obligations, the Constitutional Court may not stretch beyond its competences resulting from the Fundamental Law even in the course of performing the above obligation.

[18] 3 The Convention and its additional protocols do not contain any obligation for the States to establish a system of social security and, if they do so, to provide certain types of benefits in certain amounts upon fulfilling specific conditions. However, at the same time, Article 1 of the First Additional Protocol of the Convention orders the States Parties not to deprive any natural or legal person of their possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The benefits provided by the State in cases of old age, disability or another situation of life may only fall under the effect of Article 1 of the First Additional Protocol of the Convention, if the benefit is based – at least partly – on fulfilling an earlier obligation of paying contribution, as in this case the affected person shall have a lawful expectation, as a property right, to also receive in the future the benefit awarded to him or her on the basis of the performance of the earlier obligation of paying contribution, provided that his or her personal circumstances are unchanged and he or she fulfils all obligations of cooperation. However, in this case, too, the State may change – in a general manner, by way of legislation – the amount or the disbursement conditions of the benefit already awarded, if it is appropriately justified by the existence of a pressing public interest. It follows, nevertheless, from the nature of the right to own property that an intervention into the enjoyment of the possessions falling under the effect of Article 1 of the First Additional Protocol of the Convention shall only be regarded as a lawful one, if it is proportionate with the desired objective, even if such an appropriate justification is verified. The modification of the conditions of the benefit system shall not be considered proportionate, if, due to the measures, certain affected persons are forced to bear a disproportionate burden as compared to others.

[19] 4 The Constitutional Court assessed in the present decision Article 1 of the First Additional Protocol of the Convention in the system of further international obligations undertaken by Hungary according to Article Q) (3) of the Fundamental Law, rather than in itself, for the purpose of making the content of the undertaken international obligation binding the Hungarian State clearly definable. The Constitutional Court points out in this context that there is a clearly identifiable European and international consensus concerning the protection of the rights of the persons with disabilities, as verified beyond doubt by the UN Convention on the Rights of Persons with Disabilities (hereinafter: "CRPD Convention") also ratified by Hungary.

[20] Article 28 of the CRPD Convention (promulgated by Hungary with the Act XCII of 2007 and which has 177 States Parties, including the European Union as an international organisation) grants the right of the persons with disabilities to an adequate standard of living, the continuous improvement of living conditions and to social protection. The content of this right is the same as Articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights also ratified by Hungary (promulgated in the Decree-law No. 9 of 1975), and its speciality is to guarantee it explicitly to those with disabilities. The reason for this provision is that the persons with disabilities are among the most vulnerable groups of the society, thus in their case it is more likely, as compared to other groups of the society, that they shall be unable to create, on their own, appropriate living conditions.

[21] In addition to the above, the right to an adequate standard of living can also be found in Article 25 of the Universal Declaration of Human Rights, Article 5 (e) of the International Convention on the Elimination of All Forms of Racial Discrimination adopted in New York (promulgated in the Decree-law No. 8 of 1969), the Convention on the Elimination of All Forms of Discrimination against Women adopted in New York (promulgated in the Decree-law No. 10 of 1982), and Article 27 (3) of the Convention on the Rights of the Child (promulgated in the Act LXIV of 1991).

[22] Article 28 (2) of the CRPD Convention specifies the situations of life when the States Parties of the convention are obliged to provide social protection to the persons with disabilities.

[23] It follows from the wording of Article 28 of the CRPD Convention that a measure by the State decreasing the achieved level of social protection without a serious economic-social public interest (such as the sustainability of the social benefits system or the prevention of a serious economic crisis) shall not be regarded as compatible with the convention (non-derogation), as this is the only case when the State may be allowed to derogate from its obligation – explicitly following from Article 28 of the CRPD Convention – of continuously improving the living conditions.

The category of serious economic-social public interest implies an obligation of verification by the State stricter than the general standard for the restriction of fundamental rights, partly due to its nature and partly because of the enhanced vulnerability of the persons with disabilities. However, even in the cases mentioned above, the State may not decrease the level of social protection to an extent which would make the livelihood of the persons with disabilities impossible in a manner incompatible with human dignity, and therefore it is necessary to determine the minimum level of social protection („fixing social protection floors", see for example: CRPD Committee, Concluding Observations, European Union, CRPD/C/EU/CO/1, 4 September 2015, paras. 66–67.)

[24] General Comment No. 5. of the International Covenant on Economic, Social and Cultural Rights (Persons with Disabilities) underlines in particular that for the most vulnerable groups of the society, such as the disabled persons in the present case, Article 2 (2) of the Covenant implies not only the State's obligation of abstaining from violating their rights, but it should also take positive measures to promote the progressive realization of the relevant rights (General Comment No. 5., para. 9.). As the goals of the Covenant and of the CRPD Convention as well as the wording of the provisions of the two international treaties are similar, the provisions of the Covenant as interpreted by the General Comments are applicable as appropriate to the CRPD Convention as well.

[25] In the context of the above, the Constitutional Court also refers to the reply sent by the commissioner for fundamental rights to the Constitutional Court's request, according to which, "within the Member States of the European Union, Article 28 of the CRPD is realised primarily by way of the social benefits securing appropriate conditions of life and through the right to social protection, rather than by way of the rights to food, clothing and housing as «partial rights»". It means that in the Member States of the European Union, including Hungary, the State facilitates the realisation of social security primarily by way of providing adequate pecuniary benefits, and the essential element of the case subject to this judicial initiative is indeed the legal evaluation of the significant cut of the pecuniary benefits also protected by an obligation undertaken under international law as presented above.

[26] The social protection under Article 28 of the CRPD Convention may also fall under the force of Article 1 of the First Additional Protocol of the Convention, if a State is a party to both the CRPD Convention and the Convention. It means that a step-back from the level of social protection already achieved (cutting the amount of benefits determined earlier) shall only be considered lawful if it can be justified in the context of the right to own property.

[27] Finally, with regard to the interpretation of the CRPD Convention, the Constitutional Court also refers to the fact that the European Union is a party to the CRPD Convention under its own right. Consequently, based on the primacy of the international treaties concluded by the Union over secondary Union law, not only the national law of the States Parties, but also the secondary Union law shall be interpreted in a way to make it compliant with the CRPD Convention [Joined Cases C-335/11 and C-337/11, Case HK Danmark, points 28–30, ECLI:EU:C:2013:222]. As a consequence, the provisions of the CRPD Convention should be equally taken into account in the course of interpreting the relevant international law, the Union law and the national law (thus, with regard to the full spectrum of the legal system).

[28] The Constitutional Court states, by taking into account all the above aspects, that the content in principle summarised in point 3 of this decision and deductible from Article 1 of the First Additional Protocol of the European Convention on Human Rights is essentially the same as the further international obligations undertaken by Hungary, in particular the content that follows from Section 28 (2) of the CRPD Convention.

[29] 5 The Constitutional Court then examined the changes implemented by the AAWA concerning the benefits awarded before 31 December 2011 to persons with disabilities, and it reviewed the compatibility of these provisions with the requirements resulting from the international treaty indicated by the petitioner.

[30] 5.1 On 20 December 2011, the National Assembly adopted the AAWA that provides, as from 1 January 2012, to the persons with altered working ability instead of pension social insurance benefits having a character of income replacement, i.e. they can only be awarded when and to the extent that the beneficiary is unable to work due to his or her state of health. AAWA has been adopted for the purpose of the implementation of point 6 of Chapter 11 subtitled "Debt and Action Plan" of the Széll Kálmán Plan, according to which "maintaining the balance of public finances requires the sparing in the budget with the State expenditures where the citizen may become an active contributor to creating values in the society – instead of using State benefits – and they may provide for themselves." In the framework of this judicial initiative, the Constitutional Court had to examine the question whether, due to the reform, certain beneficiaries who had received disability pension before the entry into force of the AAWA bear excessive burdens – resulting directly from the law implementing the reform and applied without allowing discretion – that are contrary to Article 1 of the First Additional Protocol of the Convention.

[31] 5.2 The AAWA has several provisions applicable to the pecuniary benefits awarded before 1 January 2012. Section 31 of the AAWA provided for the continued

disbursement of the disability pension as old-age pension for the persons who receive pension and who reach the age-limit of retirement until 31 December 2011. According to Section 32 of the AAWA, the State continued the disbursement of benefits as disability benefit for those persons who received earlier group I-II disability or accident disability pension, group III collective disability or accident disability pension, provided that they reach the age-limit of retirement within five years, or regular social allowance or temporary allowance, provided that they have reached or reach within five years the age-limit of retirement. On the basis of Section 33 of the AAWA, in the case of the persons who had received earlier group III collective disability or accident disability pension or regular social allowance, in the transitional period, their benefits shall be transformed to rehabilitation benefit with the same amount as before, and until 31 March 2012 the beneficiary had the opportunity to request the complex reclassification of his or her health condition, in the absence of which the rehabilitation benefit was terminated as from 1 May 2012.

[32] According to the provision of the AAWA in force on 1 January 2012, the amount of the disability benefit after the first review shall be the same as the amount of the benefit payable in the month before the awarding, irrespectively to the condition of the person obliged to be reviewed. Section 33/A of the AAWA, introduced by the Act CXVIII of 2012 on Amending Certain Social Acts and Other Connected Acts, provided an opportunity for the amount of the benefit to follow the change of the health condition, resulting in a situation where the beneficiaries may be entitled to a disability benefit of different amount as compared to their benefits received before the entry into force of the AAWA (in some cases this amount may be significantly less than before, even by more than 50% of the previous benefit). Section 33/A (4) of the AAWA in force from 26 July 2012 regulated that if the first review had been made after 1 January 2012 but before the entry into force of the amendment, the authority had to recalculate the amount of the benefit and it had to make a decision about the modification until 31 October 2012. Thus, while the amendment of the AAWA, on the one hand, offered a possibility for awarding benefits of higher amount for those whose health conditions have deteriorated in comparison with the earlier review, on the other hand, it also offered a chance for decreasing the amount of the benefit awarded earlier in case of the improvement of the health condition. The cut of the benefit amount had a serious effect especially on those beneficiaries whose complex review with the repeated awarding of the benefit has already taken place, therefore, they had a justified expectation of keeping their benefit amount unchanged until the date specified in the decision and under the conditions laid down in the decision adopted as the result of their complex review. At the same time, the option of decreasing the benefit amount subject to the improvement of the health conditions, is a rule applicable in general in the case of all beneficiaries.

[33] By taking all the above aspects into account, the Constitutional Court had to examine in which cases is the application of Section 12 (1) *a)* (i.e. in fact, Section 33/A (1) *a)* of the AAWA) or the result of the application of Section 12 (1) *a)* ordered by the AAWA (or in which cases is it applied in the case law).

[34] 5.3 First of all, the Constitutional Court examined the compatibility with the Convention of those cases when the AAWA [in the present case with Section 33/A (1)] orders the application of Section 12 (1) *a)*. In this context, the Constitutional Court refers to Section 52 (2) of the ACC, according to which the examination carried out by the Constitutional Court shall be limited to the specified constitutional request, but this provision shall not affect the competence of the Constitutional Court with regard to declarations that are specified in Section 28 (1), Section 32 (1), Section 38 (1), Section 46 (1) and (3) and which may be performed ex officio, and neither shall it affect the provisions under Article 24 (4) of the Fundamental Law {similarly see: Decision 6/2014. (II. 26.) AB, Reasoning [7]}.

[35] According to Section 33/A (1) *a)* of the AAWA, after the review, the amount of the benefit shall be determined according to Section 12 (1) with the provision that – with the exception of the improvement of the conditions – the amount shall not be less than the amount payable in the month preceding the review. Consequently, in line with Section 12 (1) *a)*, the rule on the calculation of the disability benefit amount shall only be applicable in the case of the improvement of the beneficiary's condition, and if there is no improvement, the level of the disability benefit awarded earlier may not be decreased. At the same time, the AAWA does not specify explicitly (for example among the interpreting provisions) the definition of the improvement of conditions. The Act defines health condition as «a state of the individual's physical, mental and social well-being, taking into account the permanent or final adverse changes developed due to an illness or an injury, or existing due to a congenital abnormality (hereinafter: "health damage")» [Section 1 (2) *a)* of AAWA].

[36] The Ministry of Human Capacities stated in its reply sent to the Constitutional Court's request that Decree of the Minister for National Resources No. 7/2012. (II. 14.) NEFMI on the detailed rules of the complex classification, issued for the implementation of the AAWA, had raised the former professional rules to the level of a legal norm, but the professional criteria of the classification have not been changed. The reason for raising the rules to the level of laws was to provide a foundation for the decisions made concerning the benefits awarded on the basis of a heath damage, such as the benefits of persons with altered working abilities, as well as to let the forensic medical experts also examine, in the course of the judicial review of the decisions, the professional question of health condition by applying the professional rules laid down in the decree. A change of condition occurs when the classification category established during the review in accordance with Section 3 (2) of the AAWA

differs from the classification category established before the review, i.e. a change has taken place concerning the extent of the health damage and the health condition.

[37] The MEOSZ underlined in particular in its reply sent to the Constitutional Court's request that the Decree of the Minister for National Resources No. 7/2012. (II. 14.) NEFMI changed – compared to the guideline previously applied – in many respect the percentage levels attributable to the health damages caused by illnesses or states, which in many cases resulted in placing, on the basis of the new classification, the relevant person in a category lower than the previous one, despite of experiencing no actual change in his or her health conditions. In addition, the law failed to provide a correlation rule between to the classification categories applied after 2012 on establishing altered working ability (B1, B2, C1, C2, D, E) and the classification categories used before 2012; moreover, concerning the classification systems introduced both in 2008 and in 2012, the rules did not regulate the manner of establishing any change of condition – as well as its extent – in the case of persons possessing earlier classifications.

[38] The Ministry of Human Capacities explained in its reply sent to the Constitutional Court's request that the Curia had laid down in more than one judgement: in the absence of any provision of the law to the contrary, the only option of the court is to compare the levels of the earlier and the subsequent health damages (see for example: judgements No. Mfv.III.10.408/2014/4, No. Mfv.III.10.117/2015/6, No. Mfv.III.10.577/2015. of the Curia). However, in some cases, lower courts decided that a change in the percentage values merely due to the change of the professional guidelines was not to be regarded as an improvement of condition under Section 33/A (1) *a)* (see for example: Judgement No. M.412/2013/17 of the Debrecen Administrative and Labour Court and the same position was taken by the Nyíregyháza Administrative and Labour Court in the case No.1.M.391/2016/9, as the basis of the present judicial initiative).

[39] The commissioner for fundamental rights, in his reply sent to the Constitutional Court's request, explicitly held that "merely the modification of the percentage values and the change of the legislative environment cannot be identical with the concept of the change of condition, in particular with the improvement of condition. The improvement of condition is more than merely a point of law, it is a factual issue; it should be based, in each case, on the change of the beneficiary's physical condition and not just upon the change of the legislative environment." The commissioner for fundamental rights also emphasized that "there have been cases – also according to experiences gained in my office – where the applicant's actual health condition, as verified by a medical expert, has not improved, still it was evaluated in the new system as an »improvement of conditions« due to the modified legislative environment, resulting in the termination or the drastic cut of the affected

person's benefit." These statements of the commissioner for fundamental rights has also been supported by the position taken by MEOSZ, which provided detailed data as well.

[40] As neither Section 33/A (1) *a)* of AAWA, nor any other provision of the Act provides an explicit definition of the "improvement of conditions", it was the duty of the Constitutional Court to examine which of the interpretations – mutually excluding each other – of the term "with the exception of the improvement of the conditions" in Section 33/A (1) *a)* of AAWA can be regarded as one being in line with the Convention.

[41] The Constitutional Court underlined in this context: a regulation transforming the system of benefits for the persons with altered working ability in a manner resulting in placing excessive burdens on the individuals due to this reform is in conflict with Article 1 of the First Additional Protocol of the Convention. The burden is considered to be excessive when, without the significant change of other circumstances, merely due to the change of the legal framework of the benefit system, the disabled persons' conditions improve in the legal sense and this way the amount of their benefits decrease without any actual change in the affected persons' physical conditions. Indeed, in this case, there is no real change of circumstances on the side of the beneficiary that would allow the State to review the amount of the benefit. The Constitutional Court also refers to the fact that the relevant provision of the Convention is in line with other international obligations undertaken by Hungary, in particular with Article 28 of the CRPD Convention.

[42] By taking all the above factors into account, the Constitutional Court establishes as a constitutional requirement for the purpose of the enforcement – based on Article Q (2) of the Fundamental Law – of the Convention as an international obligation undertaken by Hungary that the text "– with the exception of the improvement of conditions –" in Section 33/A (1) *a)* of the AAWA shall only be applicable in the case of those persons entitled to benefits whose conditions have improved not only in the legal sense defined on the basis of the categories and values according to the laws, but also in terms of their actual physical conditions that substantially determine their situation of life. Only an actual improvement of the physical conditions that substantially determine the situation of life shall be regarded as a real improvement of the conditions of the persons entitled to benefits, and this interpretation is in compliance with Article 1 of the First Additional Protocol of the Convention as well as with the case law of the ECHR. Nevertheless, examining whether the applicants entitled to benefits in the individual cases comply or not with this requirement is, in each case, the obligation of the court proceeding with the case, and it is not within the competence of the Constitutional Court.

[43] 6 Section 12 (1) *a)* of the AAWA [and its Section 12 (2) *a)* not challenged in the petition] specify the amount of the disability benefit in the specific cases when, on the basis of the health conditions of the person with altered working ability, his or her employability could be restored through rehabilitation, but his or her rehabilitation is not advisable due to his or her other relevant personal circumstances defined by the law [Section 3 (2) *b) ba)*], or when his or her employability is restorable through rehabilitation, but at the time of filing the application or at the time of the review, the time until reaching the age limit of old-age retirement is 5 years or less [Section 5 (2) *a)*].

[44] According to Section 12 of AAWA, as the general rule on determining the benefit amount, a distinction is to be made between the beneficiaries who possess an average income under Section 1 (2) point 3 of the AAWA and the one who do not. According to Section 12 (1) *a)* of the AAWA challenged by the petition, the amount of the disability benefit shall be, in the case of beneficiaries possessing a monthly average income, 40 percent of the average monthly income, but not less than 30 percent of the basic amount and not more than 45 percent of the basic amount. In the case of beneficiaries not possessing a monthly average income, the amount of the disability benefit shall be 30 percent of the basic amount in accordance with Section 12 (2) *a)* of the AAWA.

[45] According to Section 11 of the Government Decree No. 359/2017. (XI. 30.) Korm., in the case of an entitlement to disability or rehabilitation benefit awarded with a starting date after 31 December 2017, the basic amount under Section 9 and Section 12 of the AAWA shall be 98 890 Forints, thus the minimum amount of the disability benefits to be awarded after 31 December 2017 shall be 29 670 Forints, and its maximum amount shall be 44 500 Forints.

[46] Section 12 (1) *a)* of the AAWA only contains the amount of the disability benefit; the cases of applying the rule can be found in other provisions of the AAWA (not challenged directly in the petition). A subjective right to receive a benefit of a certain amount is not deductible from any of the international obligations undertaken by Hungary – including the Convention – irrespectively to the fact that according to the international obligations undertaken by Hungary, in particular Article 28 of the CRPD Convention, the State shall be obliged to provide to the persons with disabilities an adequate standard of living, the continuous improvement of living conditions and social protection. By taking the above arguments into account, the Constitutional Court stated that the provision of the AAWA only providing for the amount of the disability benefit cannot, in itself, be incompatible with the Convention as an international treaty. On this ground, the Constitutional Court has rejected the petition.

[47] 7 Finally, also acting ex officio, the Constitutional Court examined – with account to the content of the constitutional requirement laid down in point 5 as well – the results of Section 12 (1) *a)* of the AAWA with regard to the amount of the disability benefits of the persons with altered working abilities, when its application is explicitly ordered in Section 33/A (1) *a)* of the AAWA.

[48] Although no constitutional concerns may be raised against the level of the amount of the disability benefit awarded to the beneficiaries exclusively on the basis of the provisions of the AAWA, the amount of the disability benefit awarded to the group of those beneficiaries to whom, due to the actual improvement of their physical conditions, Section 33/A (1) *a)* of the AAWA orders the awarding of a benefit under Section 12 (1) *a)* of the AAWA instead of their disability pension disbursed before the entry into force of the AAWA, shall fall under a different legal assessment. In this case, the subject of the constitutional evaluation is not the regulatory environment of a newly awarded benefit, but the regulation applicable to the transformation of a benefit awarded by the State, before the entry into force of the AAWA, on the basis of a final administrative or judicial decision.

[49] According to Section 33/A (1) *a)* of the AAWA, the amount of the disability benefits – with the exception of the improvement of the conditions – shall not be less than the amount payable in the month preceding the review. However, if the conditions of the beneficiary have improved, the amount of the disability benefit shall be determined in accordance with the general rules of the AAWA.

[50] It means that if there is an improvement in the health conditions of the beneficiary, the amount of the benefit shall be determined in a way to guarantee that the amount of the disability benefit does not exceed the maximum amount according to Section 12 (1) *a)* of AAWA, and it shall be 40 percent of the monthly average income, but not more than 45% of the basic amount under the AAWA, actually without regard to the amount of the disability pension disbursed to the beneficiary before 1 January 2012. While Section 34 (5) of the AAWA provides for an auxiliary rule on awarding benefits under the AAWA for the persons who receive rehabilitation allowance on 31 December 2011, stating that 140 percent of the rehabilitation allowance payable in the month preceding the termination shall be taken into account as the monthly average income – if this is more preferable for the beneficiary –, the AAWA does not contain any similar transitory provision applicable to the disability pensions disbursed until 31 December 2011, and neither does it provide any possibility for taking into account as the basis of calculating the disability benefit the period of the insured legal relationship justifying the amount of the earlier disability pension or the amount of the income behind the contribution payment. Similarly, the

provisions of the AAWA mandatorily applicable by the proceeding authorities and by the courts do not allow the taking into account of the level of the improvement experienced in the beneficiary's actual physical conditions when the amount of the disability benefit is determined according to Section 12 (1) *a)* on the basis of Section 33/A (1) *a)* of the AAWA.

[51] The MEOSZ took a similar position in its reply sent to the Constitutional Court's request, when it stated that "with regard to the disability benefit, paragraph (1) *a)* orders the application of Section 12 on the calculation of the new benefits with the provision that, according to the Act, a certain percentage of the benefit payable on 31 December 2011 is considered as the monthly average income. Thus, this is the only role played by the old benefit in the calculation of the new one."

[52] By taking the above into account, a single group may be identified (thus, in particular, those beneficiaries who received disability pension before 1 January 2012 and who, because of their earlier contribution-payment or due to their service time, received a disability pension significantly exceeding the maximum amount of the disability benefit that may be awarded according to the AAWA) on whom the regulation itself introduced by the AAWA imposes a disproportionate burden by not allowing the assessment of the amount of their earlier benefit, their earlier service-time and the level of their income as the basis of the payment of contribution, or the extent of their actual physical improvement of conditions in the course of determining their disability benefit according to Section 12 (1) *a)* of the AAWA ordered to be applied by Section 33/A (1) *a)* of the AAWA. As another deficiency of the regulation, in the course of determining the disability benefit under Section 12 (1) *a)* of the AAWA, the basis of determining the benefit amount shall be, in each case, the average income, which is not, in the case of the disbursement of an earlier disability pension awarded before 1 January 2012, the income of the beneficiaries used as the basis for determining the disability pension, but the disability pension itself calculated from this income and naturally being of lower amount than the relevant income. It means that according to the applicable provisions of the AAWA, due to the deficiency of the regulation, those who have already received disability pension at the time of the entry into force of the AAWA may become entitled to a benefit of lower amount, even with the same service-time and the same level of income as the basis of contribution-payment, as compared to those beneficiaries who become entitled to disability benefit only after the entry into force of the AAWA.

[53] The lack of regulating makes the situation of this group especially burdensome due to the enhanced vulnerability resulting from their conditions, therefore the legislator is explicitly obliged, partly according to the Convention and partly under the CRPD Convention, to adopt further special measures to protect this group.

[54] As it has already been pointed out by the Constitutional Court in this decision, it follows from the international obligations undertaken by Hungary, in particular from Article 1 of the First Additional Protocol of the Convention, that in the course of transforming the system of benefits for the persons with altered working ability, the specific individual beneficiaries should not be made subject to excessive burdens in the context of this reform. The burden is considered to be excessive when, without the significant change of other circumstances, merely due to the change of the legal framework of the benefit system, the disabled persons' conditions improve in the legal sense and this way the amount of their benefits decrease without any actual change in the affected persons' physical conditions.

[55] According to Section 46 (1) of the ACC, if the Constitutional Court, in its proceedings conducted in the exercise of its competences, establishes an omission on the part of the legislator that results in violating the Fundamental Law, it shall call upon the organ that committed the omission to perform its task and set a time-limit for that. In line with Section 46 (2) *a)*, the failure to perform a duty deriving from an international treaty shall be regarded as an omission on the part of the legislator.

[56] As held by the Constitutional Court, it's beyond doubt that Section 12 (1) *a)* ordered to be applied by Section 33 (1) *a)* of the AAWA, shall result in a significant cut – in some cases by more than 50% – of the disability pension awarded before 1 January 2012 not only in exceptional individual cases, because the regulation does not allow, in the case of the beneficiaries, the assessment of the amount of their earlier benefit, their earlier service-time and the level of their income as the basis of the payment of contribution, or the extent of their actual physical improvement of conditions in the course of determining their disability benefit, leading to a consequence contrary to the Convention as an international treaty, when determining the amount of the benefit of the individual persons entitled to disability benefit, in a manner not allowing the proceeding authorities or courts to deter from this result, due to the text of the law.

[57] Bearing the above in mind, the Constitutional Court, acting ex officio, established the violation of Article Q) (2) of the Fundamental Law, manifested in an omission, as the legislator ordered the application of Section 12 (1) *a)* in the cases falling under Section 33/A (1) *a)* (i.e in the case of benefits awarded before 1 January 2012) by failing to adopt, at the same time, regulations allowing to take into account, in the course of determining the benefit amount, the level of the improvement of the actual physical condition substantially determining the life condition of the beneficiary, or the amount of the benefit awarded before 1 January 2012. The Constitutional Court calls upon the Parliament to comply with its legislative duty by 31 March 2019.

[58] 8 The publication of the decision in the Hungarian Official Gazette is based upon the second sentence of Section 44 (1) of the ACC.

Dr. Tamás Sulyok
President of the Constitutional Court

Dr. István Balsai
Justice of the Constitutional Court

Dr. Egon Dienes-Oehm
Justice of the Constitutional Court

Dr. Ildikó Hörcherné dr. Marosi
Justice of the Constitutional Court

Dr. Béla Pokol
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Dr. Balázs Schanda
Justice of the Constitutional Court

Dr. Marcel Szabó
Justice of the Constitutional Court,
rapporteur

Dr. Mária Szívós
Justice of the Constitutional Court

Dr. Ágnes Czine
Justice of the Constitutional Court

Dr. Tamás Sulyok
President of the Constitutional Court,
on behalf of
Dr. Attila Horváth
Justice of the Constitutional Court
unable to sign

Dr. Imre Juhász
Justice of the Constitutional Court

Dr. László Salamon
Justice of the Constitutional Court

Dr. István Stumpf
Justice of the Constitutional Court

Dr. Péter Szalay
Justice of the Constitutional Court

Dr. András Varga Zs.
Justice of the Constitutional Court

Concurring reasoning by Justice *Dr. Ágnes Czine*

[59] I agree with the decision laid down in the holdings, but at the same time I also hold it important to point out the following.

[60] 1 The relevant case also made it necessary to examine how the Constitutional Court can exercise its competence based on Section 32 (2) of the ACC concerning international treaties the authentic interpretation of which is within the jurisdiction of an international court. To what extent is the Constitutional Court bound, in such a case, by the points of interpretation presented in the case law of the body authorised to interpret the international treaty.

[61] In this context, I hold it important to underline that the Constitutional Court pointed out in the Decision 6/2014. (II. 26.) AB that Article Q) (2) of the Fundamental Law binds the State to secure the harmony of domestic law with the international law in order to fulfil its obligations assumed under international law. The Constitutional Court made a reference to the Decision 7/2005. (III. 31.) AB and it reinforced that "The constitutional principle of the rule of law [Article 2 (1) of the Constitution, at present: Article B) (1) of the Fundamental Law] means on the one hand the submission of the subjects of law to domestic law (the Constitution and constitutional statutes), and on the other hand the obligation to comply with the obligations assumed by the State of Hungary under international law. Article 7 (1) of the Constitution regulating the relation between provisions of domestic law and obligations undertaken under international law is a special constitutional provision as compared to the provision on the rule of law. The performance of the international obligation (the performance of the task of legislation when necessary) is a duty resulting from Article 2 (1) of the Constitution enshrining the rule of law including the bona fide performance of international law obligations, as well as from Article 7 (1) of the Constitution requiring the harmony of international law and domestic law, and this duty emerges as soon as the international treaty becomes binding upon Hungary (under international law) [ABH 2005, 83, 85-87.]" (Reasoning [29]–[30]). Therefore, the breach of the obligation assumed in an international treaty is in conflict not only with Article Q) (2) of the Fundamental Law, but also with Article B) (1) guaranteeing the rule of law.

[62] 2 Hungary joined the Convention in 1992. The Convention was promulgated by the Act XXXI of 1993 on the Promulgation of the Convention on the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and the related eight Additional Protocols, and, therefore, it has become a part of the Hungarian legal system. According to Article 32 of the Convention, The jurisdiction of the ECHR shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34 and 47. With account to these provisions, one may conclude that the Convention is the authentic source for the interpretation of certain freedoms laid down in the Convention.

[63] As pointed out by the Constitutional Court in its earlier decisions, it may not disregard the Convention's interpretation related to certain fundamental freedoms with regard to the fundamental rights identified in the Fundamental Law, provided that the essential content of the fundamental right is formulated in the Fundamental Law the same way as in the Convention. The Constitutional Court underlined that in these cases the level of the protection of the fundamental rights provided by the Constitutional Court should never be lower than the level of legal protection provided by ECHR. It follows from the principle of *pacta sunt servanda* [Article 7 (1) of the

Constitution, Article Q) (2) to (3) of the Fundamental Law] that the Constitutional Court should follow the case law of the ECHR as well as the level of protecting the fundamental rights as provided there, even if it does not follow with a compelling force from its own earlier "precedent decisions" {Decision 61/2011. (VII. 13.) AB, ABH 2011, 291, 321; reinforced in: Decision 32/2012. (VII. 4.) AB, Reasoning [41]; Decision 7/2013. (III. 1.) AB, Reasoning [30]; Decision 8/2013. (III. 1.) AB, Reasoning [48]; Decision 22/2013. (VII. 19.) AB, Reasoning [16]; Decision 13/2014. (IV. 18.) AB, Reasoning [33]}.

[64] Based on the above, in the case law of the Constitutional Court, the legal interpretation by the ECTHR and the protection of rights based on it is presented as the constitutional content of the fundamental right specified in the Fundamental Law, the minimum level of the elaborated protection of the fundamental rights. It is beyond doubt, however, that due to the nature of adjudication on the basis of the case law, the final consequences drawn by the ECHR always depend on the circumstances of the case concerned. Nevertheless, there are areas of the case law of the court, where a clear set of principles has been set up: it is called the well-established case-law. The Constitutional Court should take this into account in the course of exercising any of its competences.

[65] 3 Therefore, I hold that in the case concerned the Constitutional Court could have reached in more than one way the decision laid down in the holdings. One of the options is to apply Article 24 (2) *f)* of the Fundamental Law (Section 32 of the ACC) (point 3.1, Reasoning [66]–[63]), while the other way is to apply the legal consequence based on Article 46 (1) of the ACC – based on the Constitutional Court's discretion ˜– (point 3.2, Reasoning [69]–[71]).

[66] 3.1 In the present case, the Constitutional Court acted in its competence based on Article 24 (2) *f)* of the Fundamental Law (Section 32 of the ACC). Consequently, the Constitutional Court did not have to examine the case law of the ECHR in the context of a fundamental right laid down in the Fundamental Law; it had to directly interpret the affected provisions of the Convention (Article 1 of the First Additional Protocol).

[67] In my opinion, in such a case, i.e. when the Constitutional Court is directly interpreting any provision of the Convention with account to Article Q) (2) of the Fundamental Law, it should act with extra caution, in particular when it has to take a stand in a question of interpreting the law that has not yet been explicitly examined by the ECHR – with the facts of the particular case. In this case, exploring the case law related to the relevant freedom is indispensable. Therefore, in the particular case, it should have reviewed the factors of interpretation presented in the decisions adopted in the cases – also referred to in the petition – *Nagy Béláné vs. Hungary* {[GC], (53080/13), 13 December 2016)}, *Baczúr vs. Hungary* [(8263/15), 7 March 2017]

and *Lengyel vs. Hungary* [(8271/15), 18 July 2017], and it should have used them as the basis of its decision.

[68] Based on the above arguments, I disagree with the statement made in the reasoning of this decision that "the Constitutional Court may establish the existence of a conflict between a domestic law and an international treaty, if its only possible interpretation and, as appropriate, its only application without discretion is the violation of the international obligation undertaken according to Article Q) (2) of the Fundamental Law" (Reasoning [16]). I hold that this statement does not follow from the established case law of the Constitutional Court and it narrows down in an unjustified way the Constitutional Court's decision-making powers in the procedures based on Article 32 of the ACC.

[69] 3.2 However, I hold that in the given case the Constitutional Court could have also based its decision on Section 46 (2) *c)* of the ACC. According to this provision, if the Constitutional Court, in its proceedings conducted in the exercise of its competences, establishes an omission on the part of the legislator that results in violating the Fundamental Law, it shall call upon the organ that committed the omission to perform its task and set a time-limit for that. An omission on the part of the legislator shall be established if the legal regulation's essential content that can be derived from the Fundamental Law is incomplete [Section 46 (2) *c)* of the ACC]. In the course of applying this legal consequence, the Constitutional Court is not bound to the constitutional request indicated in the petition [Section 52 (2) of the ACC].

[70] In my view, in the course of applying Section 46 (2) *c)* of the ACC, the Constitutional Court's action should be based on enforcing the criteria of the ECHR's case law interpreting the convention, as the minimum requirement of the protection of rights, when it elaborates the Hungarian constitutional standards. {Decision 61/2011. (VII. 13.) AB, reinforced in: Decision 22/2013. (VII. 19.) AB, Reasoning [16]; Decision 7/2014. (III. 7.) AB, Reasoning [25]; Decision 13/2014. (IV. 18.) AB, Reasoning [33]}.

[71] Consequently, the Constitutional Court may also enforce the ECHR's case law through the provisions of the Fundamental Law, and it should not necessarily build directly upon the Convention the review on the merits. In the case concerned, therefore, the Constitutional Court could have also examined in the context of Article XIII (1) of the Fundamental Law the violation of the Fundamental Law alleged in the petition, as – according to the consistent case law of the Constitutional Court – "the Constitutional Court's conception of the protection of property accords with that of the European Convention on Human Rights and the case-law of the European Court of Human Rights" {Decision 64/1993. (XII. 22.) AB, ABH 1993, 373, 380., reinforced in Decision 20/2014. (VII. 3.) AB, Reasoning [154]}.

Budapest, 6 November 2018.

Dr. Ágnes Czine

Justice of the Constitutional Court

Concurring reasoning by Justice *Dr. István Stumpf*

[72] 1 In accordance with the petition claiming a conflict with an international treaty, the majority decision examined the challenged regulation by comparing it to the Convention, in particular to Article 1 of its First Additional Protocol.

[73] In the course of interpreting the provisions of the Convention, its interpretation by the ECHR should not be left disregarded. This is the approach in principle adopted by the Constitutional Court – practically unanimously – in its decision adopted half a year ago, and the present decision acknowledges this approach as well (point III. 2, Reasoning [15] and the following): "the Constitutional Court has already laid down with regard to the effect of the judgements of the ECHR on its own decisions, that »in the course of exploring the obligation that binds Hungary on the basis of an international treaty (i.e. in the course of reviewing a conflict with an international treaty), not only the text of the international treaty, but also the case law of the body empowered to interpret it shall be taken into account« {Decision 3157/2018. (V. 16.) AB, Reasoning [21]}". In our precedent, we acted by taking into account the fact that "in the concrete case the international treaty referred to is the Convention. Based on Article 32 (1) of the Convention, the ECHR is authorised to interpret the Convention (authentic interpreter), therefore, the Constitutional Court provided an overview of the ECHR's case law related to article […] of the Convention, then it examined whether the arguments put forward by the initiating judge justify the declaration of being contrary to the international treaty" (Reasoning [22]).

[74] Against this background, it is difficult to conceive how could the presentation of the case law stemming from the decisions of the ECHR (reasonably together with references to the supporting judgements) be left out from the reasoning, when the question is the assessment of compliance with the Convention in the course of examining a conflict with an international treaty.

[75] The decision presents in point III 5.3 (Reasoning [34]–[42]) the requirements originating from the right to own property enshrined in Article 1 of the First Additional Protocol of the Convention, but it fails to make a reference to any of the ECHR's decisions. However, neither does the reasoning of the decision support its

statements with an independent argumentation based on the international law or on constitutional law. This way, the content of the right to the protection of property (peaceful enjoyment of possessions) formulated on an abstract level in the Convention was practically defined without reasoning (even though it actually presents the content of the same requirements as the case law of the ECHR). Without arguments to support, for the general public, the Constitutional Court's decision, the interpretation contained in our decision qualifies as an ex cathedra statement and it may be seen from outside as arbitrary and unlimited legalism. In the future – in other cases examining conflicts with the Convention – this approach may actually bear a risk of the arbitrary interpretation of the law.

[76] 2 In the present case, as the justification of violating the convention, the petitioning judge referred to the fact that the significant cut of the benefit provided due to disability or altered working ability was found to be in conflict with the convention by several decisions of the ECHR, in particular in the cases *Nagy Béláné vs. Hungary* {[GC], (53080/13), 13 December 2016)}, *Baczúr vs. Hungary* [(8263/15), 7 March 2017] and *Lengyel vs. Hungary* [(8271/15), 18 July 2017]. The petitioners of all the three cases had received disability pension before the entry into force of the AAWA and after the transformation of this disability pension they either lost their benefit completely (Case *Nagy Béláné vs. Hungary*) or it was significantly cut by more than half of the previous benefit (Cases *Baczúr vs. Hungary* and *Lengyel vs. Hungary*) while the actual health condition of the applicants has not changed significantly despite of the formal improvement of their health conditions' legal classification. None of the cases contained any data about the petitioners ever acting in bad faith or failing to fulfil their obligation of cooperation. According to the ECHR, although Hungary verified the existence of a serious lawful economic-social public interest that may justify that the reform of the benefit system was acceptable, but such a lawfully verified intervention shall not be held proportionate, if the individual persons bear excessive burdens in the context of the transformation. The burden is considered to be excessive when, without the significant change of other circumstances, merely due to the change of the legal framework of the benefit system, the disabled persons' conditions improve in the legal sense and this way the amount of their benefits decrease without any actual change in the affected persons' physical conditions. The burden is also considered to be excessive when, without the significant change of other circumstances, merely due to the change of the legal framework of the benefit system, the disabled persons' conditions improve in the legal sense and this way the amount of their benefits decrease without any actual change in the affected persons' physical conditions.

[77] In the course of adopting the decision, for the purpose of exploring the well-founded case law on the basis of which the petition is to be decided, we have

provided an overview of the ECHR's relevant case law also beyond the Hungarian cases referred to in the petition. The Convention and its additional protocols do not contain any obligation for the States to establish a system of social security and, if they do so, to provide certain types of benefits in certain amounts upon fulfilling specific conditions [*Sukhanov and Ilchenko vs. Ukraine* (Cases 68385/10 and 71378/10), 26 June 2014, par. 34 to 38]. The benefits provided by the State in cases of old age, disability or another situation of life may only fall under the effect of Article 1 of the First Additional Protocol of the Convention, if the benefit is based – at least partly – on fulfilling an earlier obligation of paying contribution. Only in this case is it possible to accept as a lawful expectation of the affected person, in the sense of a property right, to also receive in the future the benefit awarded to him or her earlier [*Kjartan Asmundsson vs. Iceland* (60669/00), 12 October 2004, par. 39]. If the change of the amount of the benefit awarded earlier was due to the amendment of the laws that form the legal basis of the benefit, it shall be considered as an intervention to the possessions, which requires justification by the State [*Grudic vs. Serbia* (Case 31925/08), 17 April 2012, par. 72]. The ECHR accepted as adequate reasons the social changes, the changing evaluation of the categories of persons in need of social assistance as well as the answers given to the changes of individual situations [*Wieczorek vs. Poland* (Case 18176/05), 8 December 2009, par. 67], and the ECHR also reinforced that the legislator shall enjoy a very wide scale of discretion available for the implementation of the social and economic policies, therefore, the ECHR may only declare a reform in itself to be contrary to the Convention, if it is clearly without any reasonableness [*Gogitidze and others vs. Georgia* (Case 36862/05), 12 May 2015, par. 96]. Similarly, the ECHR accepted as an adequate reason for example the protection of public funds [*N.K.M. Vs. Hungary* (Case 66529/11), 14 May 2013, par. 49 and 61]. If also follows from Article 1 of the First Additional Protocol of the Convention that an intervention into the enjoyment of possessions shall only be held lawful, if it is proportionate with the desired objective, even if its justification is appropriately verified [*Jahn and others vs. Germany* [GC] (Cases 46720/99, 72203/01, 72552/01), 30 June 2005, par. 81 to 94]. The intervention shall not be regarded as proportionate, if the affected person bears an excessive individual burden [*Sporrong and Lönnroth vs. Sweden* (Cases 7151/75, 7152/75), 23 September 1982, par. 69 to 74; *Kjartan Asmundsson vs. Iceland* (Case 60669/00), 12 October 2004, par. 45, *Sargsyan vs. Azerbaijan* [GC] (Case 40167/06), 16 June 2015, par. 241; *Maggio and others vs. Italy* (Cases 46286/09, 52851/08, 53727/08, 54486/08, 56001/08), 31 May 2011, par. 63; *Stefanetti and others vs. Italy* (Cases 21838/10, 21849/10, 21852/10, 21855/10, 21860/10, 21863/10, 21870/10), 15 April 2014, par. 66].

[78] Therefore, I continue to support the approach of taking into account – and referring to – the relevant decisions of the ECHR in the course of examining compliance with the Convention in order to make our decisions not only correct in

terms of their final results, but also clearly well-founded and transparently reasoned. I hope that after the present detour our judicial practice shall return to the solution according to the Decision 3157/2018. (V. 16.) AB.

Budapest, 6 November 2018.

Dr. István Stumpf

Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Egon Dienes-Oehm*

[79] I agree with point 3 of the holdings of the decision, which is in line with the statements made in the Decision 3252/2017. (X. 10.) AB adopted in a similar case, regarding the rejection of a constitutional complaint aimed at the declaration of the conflict with the Fundamental Law and the annulment of Section 33/A (1) *a)* of the Act CXCI of 2011 on Benefits for Persons with Altered Working Ability (c.p. Reasoning [13])

[80] At the same time, I do not agree with points 1 and 2 of the holdings of the decision. The euphemism of "legislative duty resulting from an international treaty" in the first point intermixes with unconstitutionality the conflict with an international treaty, although they are not automatically interchangeable, and a direct violation of fundamental rights (of first degree) was not a subject matter of the examination on the merits, as it was aimed exclusively at reviewing the conflict with an international treaty, alleged in the judicial initiative. I cannot accept the formal constitutional requirement laid down in point 2 of the holdings, as it is based solely on Article Q (2) of the Fundamental Law, from which alone it is not possible to draw such a conclusion. To find the appropriate legal basis, it would be necessary to have an affected right enshrined in the Fundamental Law, however, neither the petition, nor the holdings refer to such a violation of rights.

[81] In addition to the above, the following main statements are also applicable with the regard to the arguments used in the reasoning to justify the holdings of the decision:

a) Taking part, in itself, in the Convention does not mean and does not result in transferring the competences of the sovereign. The State shall be obliged to perform the individual decisions adopted in particular legal cases by the ECHR set up for providing an individual remedy for the fundamental rights enshrined in the Convention, provided that Hungary is an obliged party in the decision. Nevertheless, such a decision and the case law of the ECHR followed in similar cases shall not result

in any formal force in terms of legislation or the application of the law by the competent bodies of the Hungarian State. Of course it is justified for the legislative, the executive and the judicial powers to take into account the decisions adopted in the course of following the case law of the ECHR. I hold that in this scope the duty of the Constitutional Court is to take, as necessary, the measure needed for securing the harmony between the international law and the Hungarian law. This call may take the form of a formal constitutional requirement made in the holdings of the decision, if a right enshrined in the Fundamental Law is affected. When only Article Q) (2) is concerned, the reasoning of the decision should provide a guidance for the legislator as well as for the law-applying authorities and courts, by making a reference – especially for the courts – to the constitutional rule applicable to the interpretation of the law as laid down in Article 28 of the Fundamental Law. (In the present case, I also proposed to apply the signalling option mentioned here.)

b) Regarding the CRPD Convention, the statements made under the above sub-paragraph *a)* are to be followed in general, as the subject matter of the Convention affects the fundamental rights regulated in the constitutions of the Member States. However, it may be worth mentioning in the context of the CRPD Convention that the UN body vested with the right to interpret the legal questions related to the provisions laid down in the convention does not possess any compelling legal tool – neither in general, nor in a particular case – for the purpose of enforcing its own standpoint against any State Party.

Budapest, 6 November 2018.

Dr. Egon Dienes-Oehm

Justice of the Constitutional Court

[82] I second the dissenting opinion.

Budapest, 6 November 2018.

Dr. Imre Juhász

Justice of the Constitutional Court

[83] I second the dissenting opinion.

Budapest, 6 November 2018.

Dr. Mária Szívós

Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Béla Pokol*

[84] I have not supported the declaration of the omission set forth in point 1 of the holdings of the majority decision. I would have supported the constitutional requirement elaborated in point 2 of the holdings, but only on the basis of Article XV (5) and Article XIX (1) of the Fundamental Law, however, I could not accept the majority decision of using Article Q) (2) as the basis of the constitutional requirement. This way, the majority decision followed the petitioner's request by including the decision of the ECHR into deciding the case. However, there is a fundamental problem – that has become public recently – with the functioning of the ECHR, namely that the decisions of the ECHR are not elaborated by the competent judicial panels on the basis of the Convention, but by an apparatus of some 300 human rights experts that has developed throughout the years, with the manifest lack of judicial independence. (See for example, among others, the study by Matilde Cohen from 2017 entitled "Judges or Hostages?" presenting the complete absence of the independence of the Strasbourg judges: Judges or Hostages? In: Nicola/Davies eds: EU Law Stories. Cambridge University Press 2017, p. 58 to 80) The Copenhagen professor and former Strasbourg judge David Thór Björgvinsson also formed, in an interview he gave in 2015 after the expiry of his mandate, sharp criticism about the researchers for not noting the complete vulnerability of the judges of the ECHR by the apparatus of lawyers permanently residing in Strasbourg for decades [see Utrecht Journal of International and European Law (Vol. 81.) 2015. No. 31.]

[85] It is the duty and the responsibility of the ministries of foreign affairs and of justice of the States participating in the international treaty to eliminate this situation and to develop an operation guaranteeing the independence of the judges, but I hold that we, justices of the Constitutional Court, do also bear a responsibility, and based on this declared responsibility we shall not rely, in our decisions, on any explicit reference to the decisions of the ECHR as authentic court decisions. Actually, these decisions are made by the lawyer-apparatus of Strasbourg and the judges delegated by the Member States are only used as a camouflage, therefore, I hold that we should not take these decisions, as court decisions, into account as long as this situation exists. Although I can support, in the course of preparing our decisions in *pro domo* form, the observation of these materials as simple lawyers' opinions without any authenticity, I propose to leave them out of the texts of our public decisions in the future.

[86] If the petitions referring on due grounds to an international treaty can be addressed, differently from their argumentation, by interpreting the provisions of the

international treaty itself and by neglecting references to the ECHR, then we can also build our decisions on that. However, if the elimination of the alleged injury can also be resolved with the inclusion of the Fundamental Law's relevant provisions – just as in the present case – then, in my view, we need to shift to this option when we decide the case, as from the two parallel decision-making grounds we are primarily bound by the Fundamental Law.

Budapest, 6 November 2018.

Dr. Béla Pokol

Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. László Salamon*

[87] Point 1 of the holdings of the decision declares an omission on behalf of the legislator; I also hold that there is a constitutional problem as explained there with regard to Section 33/A (1) of the AAWA. However, in my opinion, as detailed below, the declaration of an omission is not the right tool for resolving it.

[88] 1 Section 33/A (1) *a)* is not deficient, as it reflects the legislator's explicit, direct regulatory will, namely that if there has been an improvement in the beneficiary's health conditions, then he or she should only receive the benefit of the amount specified in Section 12 (1) *a)* of the AAWA, irrespectively to the level of the improvement of the conditions, to the amount of the benefits awarded to him or her earlier or to any other factor. There has been no ground for declaring an omission in the relevant scope, as it was the legislator's clear intention to provide the persons, who had already received benefits earlier, with a benefit of the amount specified in Section 12 (1) *a)* – the current amount of which is not more than 44500 forints –, provided that there has been any actual or even "legal" improvement of conditions of any extent.

[89] 2 Accordingly, I hold that the real constitutional problem manifested in the omission is the content of the regulation (the actual provision) found in Section 33/A (1) *a)*. However, it was not possible to examine this in the present procedure. Actually, the petitioner requested the declaration of a conflict with the international treaty with respect to Section 12 (1) *a)* of the AAWA, rather than claiming the violation of the international treaty by Section 33/A (1) *a)*. Nevertheless, due to being bound by the petition according to Section 51 (1) of the ACC, the Constitutional Court could neither examine the constitutionality of Section 33/A (1) *a)* of AAWA, nor could it review its conflict with an international treaty on the basis of Section 32 (1) of the ACC (even ex

officio). Based on the above, in my view, the Constitutional Court was not in a position of making, in the present procedure, constitutional declarations affecting the legal provision under Section 33/A (1) *a)* of AAWA and to draw a consequence from it.

Budapest, 6 November 2018.

Dr. László Salamon

Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. András Varga Zs.*

[90] I could not support points 1 and 2 of the majority decision for the following reasons of principle:

[91] 1 The Constitutional Court may never disregard its fundamental function when it exercises its competence of reviewing the conflict between a law and an international treaty. This competence is also exercised by the Constitutional Court as the principal organ for the protection of the Fundamental Law [Article 24 (1)]. The protection of the Fundamental Law shall include – as an indispensable element after the entry into force of the seventh amendment of the Fundamental Law – the protection of our national identity rooted in our historic constitution [National Avowal and Article R) (4)]. Therefore, in the course of interpreting international treaties – similarly to our statements made about Article E) –, we should rely on the principle of maintained sovereignty {Decision 22/2016. (XII. 5.) AB, Reasoning [60]}. Consequently, in the course of interpreting an obligation based on an international treaty, the Constitutional Court should adopt an interpretation that offers the least restrictions possible and the widest possible scope of action for the Government.

[92] 2 According to Article B) (1) of the Fundamental Law, the rule of law is a part of our national identity rooted in Hungary's historic constitution, thus it requires unconditional protection by the Constitutional Court. If we value the State under the rule of law is developed, operated and respected by governance and protected by the courts, then first of all we need to understand very clearly the nature of a State governed by the rule of law.

[93] The rule of law is a constitutional requirement transforming the relation between the State and the society into a legal form (as well), which, at the same time, expresses the way and the character of exercising power, but never the aim and the content of the State's operation. The aim of the State is originally set: it is nothing else but the protection of the interest of the society, i.e. the rights of the individual and the freedom of the community. The content of the State's operation, the

implementation of the aims of the State, is being crystallized in the course of exercising everyday power, governance. When this exercising of power is restricted in legal ways by the State under the rule of law, at the same time setting in laws the limits of governance, it does not create an arbitrary doctrine: it is done for the sake of protecting the society.

[94] Governance, therefore, should not be limited to executing laws, as it primarily means an activity, thus the rule of law is to focus on the executive power and its freedom of action. In a State regulated by the law, the executive power's will, expressed in the interest of the society shall be controlled by independent courts. As a precondition of the above, the legislative power shall, on the one hand, transform the State's will into legal form, and, on the other hand, this way it also restricts the freedom of action enjoyed during governance. The legislative formulation of fundamental rights – being essentially based on natural law and, therefore, being essentially inalienable – grows and crystallises out of this fundamental structure, and the constitution itself is the framework of governance solidified in legal form. It is a set of norms restricting the power of the Government, but not eliminating it and not weakening it fundamentally. State governed by the rule of law in the above sense is not an aim in itself; it is a way of exercising power guaranteeing that the executive governance shall not become tyrannous.

[95] The doctrinal (ideological) approach contrary to the above shall endanger the very State governed by the rule of law. Replacing the features of nation states by artificial normative paradigms, weakening the governing power by the authority of the administration, overshadowing the values of identity by neutral theoretical paradigms, replacing the judiciary respecting and enforcing the law by a judicial governance empowered to interpret the law freely are all serious threats to the State governed by the rule of law. Therefore, the Constitutional Court should not rely on these approaches.

[96] 3 Based on the two conclusions above, the Constitutional Court should not accept the concept, which states that an interpretation of the ECHR – even if it is clearly authentic – expressed in a decision adopted in an individual case and establishing a breach of the law by the Member State means that the Member State's law is in breach of the Convention (as a source of international law) that served as the basis of the ECHR's decision. In fact, this would grant to the ECHR a power allowing the unlimited extension of rights, as well as legislative and indeed governmental powers. Accepting this, would be contrary to the rule of law as well as the Fundamental Law itself.

[97] It should have been declared in principle that no decision of the ECHR shall mean that the "existence" of any provision of domestic law is a breach of the treaty.

As the Convention does not vest the ECHR with a competence of norm control, none of the signatory parties, including Hungary, subordinated itself (and its legal system) to the norm control by the ECHR (also applicable to pilot procedures). Therefore, the Constitutional Court should have used the following arguments from the dissenting opinion of Justice *Ödön Tersztyánszky* attached to the Decision 20/1997. (III. 19.) AB (to which Justice *János Zlinszky* joined as well). The individual complaints dealt with by the Court [ECHR] are always related to the alleged violation of the Convention in a given case rather than to the harmonisation of the Convention with the law in force in the country concerned. No consequence may be drawn from the practice of the Court alone concerning the harmony of the Convention and the internal law. Undoubtedly, the application of a law not being in line with the Convention would result in violating the Convention. The importance of harmony between the internal law and the Convention is only indirectly related to the case law of the Court" (ABH 1997, 85, 101).

[98] Following from the above, a norm control of domestic law due to a conflict with an international treaty can only be carried out by the Constitutional Court of Hungary. We should stick to this on the basis of maintained sovereignty. Furthermore, the examination of a conflict with an international treaty shall not mean that the Constitutional Court could take the international treaty into account independently from the domestic legal system based on the Fundamental Law. Thus, on the basis of examining the conflict with an international treaty by a law, no decision shall be made, which is, in itself, contrary to the Fundamental Law (the violation of an international treaty may not be "replaced" by the violation of the Fundamental Law).

[99] Consequently, in the case of petition aimed at reviewing the conflict with an international treaty by a law, it is mandatory to examine, in addition to the collision of the domestic and the international norm, the compliance with the Fundamental Law as well. In particular: even if the Constitutional Court would reach a well-founded conclusion stating that the reviewed law violated the international law, still it should have examined whether or not it violates the Fundamental Law in particular [i.e. not merely through Articles Q)]. In other words: if the debated situation may be resolved within the system of domestic law, then this option should be used.

[100] 4 It shall be applicable in particular when the relevant interpretation of the law raises a claim for a specific income to the level of fundamental rights. The Constitutional Court is not entitled to make a decision of governance that binds the State to grant a particular level of income. The ECHR or any other international or supranational institution would be even less entitled to do this.

[101] Thus, it is not the duty of the Constitutional Court to set in general a specific level of a benefit provided from the budget. It would be infeasible both on the basis

of the Fundamental Law or under an international treaty, unless the Fundamental Law or the international treaty itself contained an explicit provision on it (i.e. specifying the exact amount, proportion or level). If there was such an exact provision, then it would bind both the legislator and the Constitutional Court, but on this occasion this is not the case.

[102] 5 On the one hand, in the particular case, the decision was not deductible from Article Q), and on the other hand, with the parallel application of Article B) and Article R), the interpretation of the law excluding the establishment of "legal improvement of conditions" without any real improvement of conditions would have been deductible from the Fundamental Law. Namely, the legislator is not allowed to apply a solution, which is conceptually contrary to the wording of the Fundamental Law, based on the content of the words, according to their generally accepted meaning. The anomaly found in the case could have been eliminated (by declaring that creating a gap between the legal environment and the reality cannot, *in abstracto*, be lawful) without opening up the Hungarian legal system to the intervention by the international courts, not deductible from Article Q).

Budapest, 6 November 2018.

Dr. András Varga Zs.

Justice of the Constitutional Court

[103] I second the dissenting opinion.

Budapest, 6 November 2018.

Dr. Mária Szívós

Justice of the Constitutional Court