

Decision 3219/2018 (VII. 2.) AB of the Constitutional Court of Hungary

On a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Decision No SzF.14/63/2012 of the Service Court of First Instance acting alongside the Regional Court of Appeal of the Judicial District of Budapest and Decision No Szf.F.3/2014/6 of the Service Court of Second Instance acting alongside the Curia

In the matter of a constitutional complaint, with the concurrent reasoning of Justices Dr. Ágnes Czine and Dr. Ildikó Marosi-Hörcher, the Constitutional Court, sitting as the Full Court, has adopted the following

decision:

The Constitutional Court holds that Decision No Szf.F.3/2014/6 of the Service Court of Second Instance acting alongside the Curia and Decision No SzF.14/63/2012 of the Service Court of First Instance acting alongside the Regional Court of Appeal of the Judicial District of Budapest are in conflict with the Fundamental Law and therefore annuls said Decisions.

Reasoning

I

[1] 1. The petitioner lodged a constitutional complaint with the Constitutional Court.

[2] On the basis of Article 24 (2) (d) of the Fundamental Law and Section 27 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), the petitioner sought a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Decision No SzF.14/63/2012 of the Service Court of First Instance acting alongside the Regional Court of Appeal of the Judicial District of Budapest (hereinafter referred to as the "Service Court of First Instance") and Decision No Szf.F.3/2014/6 of the Service Court of Second Instance acting alongside the Curia (hereinafter referred to as the "Service Court of Second Instance"). In the petitioner's view, the contested court decisions violate his right to freedom of expression guaranteed by Article IX (1) of the Fundamental Law and his right to a fair trial guaranteed by Article XXVIII (1) of the Fundamental Law.

[3] 2. The background of the case on which the constitutional complaint is based and the content of the petition can be summarised as follows.

[4] 2.1 The petitioner is a judge of the Tribunal of Buda Region (hereinafter referred to as the "Regional Court"), who acts in liquidation cases in the Division of Economic Matters of the

Regional Court. On 20 December 2012, the President of the Regional Court initiated disciplinary proceedings against the petitioner. The initiative was based on an investigation report, drawn up following an action by the President of the Regional Court, which found that, of the 522 cases pending before the petitioner on 17 July 2012, 233 were affected by procedural or administrative delays of some form, and 52 of those cases were affected by significant delays. By order No SZF.14/11/2012, the President of the Designated Panel of the Service Court of First Instance ordered a preliminary investigation, and by order No SZF.14/21/2012, the Designated Disciplinary Panel decided to initiate disciplinary proceedings.

[5] On 30 April 2013, the President of the Regional Court initiated new disciplinary proceedings against the petitioner. The preliminary investigation was ordered by the Designated Panel of the Service Court of First Instance by order SZF.14/36/2012 and the disciplinary proceedings were opened by order SZF.14/45/2012. The latter disciplinary case was later joined to the earlier case.

[6] By its decision No SzF.14/63/2012 of 12 May 2014, the Service Court of First Instance found that the petitioner's omissions and breaches of duty constituted disciplinary offences (breach of duty in connection with his service) under Section 105 (a) of Act CLXII of 2011 on the Status and Remuneration of Judges (hereinafter referred to as the "Act on the Status and Remuneration of Judges") and therefore issued a reprimand.

[7] According to the facts established by the Service Court of First Instance, it cannot be disputed that the number of cases pending before a judge at the Regional Court significantly exceeded the national average between 2009 and 2011, and the second highest litigant traffic was recorded here. In the liquidation group of the Regional Court, the number of cases closed by the petitioner was the highest in 2009 and 2012. Between 9 February 2009 and 31 October 2009, the petitioner did not receive any meaningful assistance, despite the fact that, in accordance with the working arrangements of the Regional Court, the work of the judges was assisted by a court administrator and court registrar (Assistant Judge) with a higher education degree. It is also a fact that in the liquidation cases, some panels did not use a transfer book and there was no computer program to monitor compliance with procedural time limits.

[8] However, the court also found that the delay was not only caused by objective circumstances, but also by the fact that the judge himself did not do everything in his power to ensure the continuity of case administration. The court did not find that there had been a breach of the reasonable time limit for the administration of cases by reason of the length of time between the receipt and closure of the cases *per se*, but on the basis of the length of time which had elapsed without the administration of cases having been maintained between the measures taken by the petitioning judge, irrespective of their justification and his assessment of their merits.

[9] Both the President of the Regional Court and the petitioner appealed against the decision. By decision No Szf.F.3/2014/6 of 12 May 2014, the Service Court of Second Instance affirmed the decision of the Service Court of First Instance.

[10] In his original complaint dated 3 August 2014, the petitioner sought a finding of unconstitutionality by conflict with the Fundamental Law and annulment of the decisions of

the Service Courts of First and Second Instance , with effect also for the other decisions reviewed by such forums, as well as Section 104/A of the Act on the Status and Remuneration of Judges, Section 103 (1) (d) of Act CLXI of 2011 on the Organisation and Administration of Courts (hereinafter referred to as the "Courts Organisation Act") and the Rules of Procedure of the Service Courts, adopted on 26 October 2012.

[11] In connection with the declaration of unconstitutionality, the petitioner cited Article B (1), Article C (1), Article T, Article VI (1), Article IX (1), Article XXVIII (1) and (7), Article 25 (1), Article 26 (1), Article 27 (1) and Article 28 of the Constitution as the provisions infringed.

[12] In a letter dated 26 September 2014, the Secretary General of the Constitutional Court informed the petitioner that the Act on the Status and Remuneration of Judges and the Courts Organisation Act were not applied by the service courts; therefore, the Constitutional Court could not review them on the basis of Section 26 (1) of the Constitutional Court Act, and that some of the constitutional rules referred to could not be considered a right guaranteed by the Fundamental Law and finally, the petitioner was called for a rectification of the deficiencies in that he failed to provide sufficient reasons why the challenged court decisions were contrary to the Fundamental Law. In his reply of 13 November 2014, the petitioner supplemented and clarified his constitutional complaint, in which he sought only a finding that the decisions of the service courts were contrary to the Fundamental Law and their annulment, referring to Section 27 of the Constitutional Court Act, and only alleging a violation of Article IX (1) and Article XXVIII (1) of the Fundamental Law.

[13] 2.2 The petitioner's position is that the proceedings and decisions of the service courts violated his right to freedom of expression and to a fair trial as follows.

[14] 2.2.1 Violation of the right to freedom of expression

[15] The petitioner believes that the disciplinary proceedings against him were not initiated based on a genuine reason, and that the administrative omissions and delays were only a reason for retaliation for criticising the court's organisational system. The petitioner contended that in 2010 he had raised a number of irregularities affecting the court, including the fact that the husband of a fellow judge was acting as a liquidator, which was incompatible with his judicial service. Despite his report, no disciplinary proceedings were initiated against the judge concerned, and the issue of incompatibility was "resolved" by the judge's retirement. According to the petitioner, the disciplinary proceedings against him were for show, as is indicated by the fact that no disciplinary proceedings were brought against his fellow judges in the liquidation group who were dealing with similar cases and who were unable to comply with procedural time limits.

[16] According to the petitioner, his right to freedom of expression was violated when disciplinary proceedings were initiated against him as a reprisal for his public interest report, which affected the whole of the domestic judiciary. In this context, the petitioner referred to the judicial practice of the Constitutional Court and the case law of the European Court of Human Rights (hereinafter referred to as the "ECtHR").

[17] 2.2.2 Violation of the right to a fair trial

The petitioner complained that the Presiding Judge of the acting Panel of the Service Court had prohibited him from asking a question about the female judge against whom he had previously alleged a conflict of interest. In his view, the result was that he had been unable to prove the “show trial” nature of the proceedings. In fact, it was the court itself which made it impossible to prove what the genuine reason for initiating the disciplinary proceedings was.

The hearing with the investigating officer was delayed and the findings were not included in the investigating officer's report.

The principle of administration of justice in judicial panels was also violated, as the Presiding Judge of the acting Panel of the Service Court, in violation of Section 111 of the Act on the Status and Remuneration of Judges, decided alone to open a preliminary investigation in disciplinary proceedings, although this falls within the competence of the judicial Panel. The petitioner also relied on Decision 21/2014 (VII. 14.) AB (hereinafter referred to as the “2014 Court Decision”), in which the Constitutional Court found a violation of the right to a fair trial, because the decision to initiate disciplinary proceedings was not taken by the members of the judicial panel in a panel sitting.

The petitioner also complained that he had not been notified of the panel sitting, had not received the record of the hearing, and had not been sent the documents obtained from the Regional Court concerning complaints criticising his activities, despite his request.

According to the petitioner, his right to a judge assigned by law was also violated, as the service courts did not have a case allocation system based on automatism under the Rules of Procedure of the Service Courts at the time. This was held by the Constitutional Court in the 2014 Court Decision to be a violation of the right to a fair trial.

[18] The Constitutional Court admitted the constitutional complaint at its sitting of 5 May 2015, as it considered that the elements of the complaint related to the violation of the right to a fair trial could raise the possibility of the judicial decision being contrary to the Fundamental Law.

II

[19] The constitutional complaint is well-founded.

[20] 1. The preliminary investigation against the petitioner was ordered by the Presiding Judge of the acting Panel of the Service Court of First Instance by decision SZF.14/11/2012. The objection of the petitioner in this regard was found unfounded by the Service Court of First Instance. According to the interpretation of the Service Court of First Instance, the presiding judge of the panel did not act in accordance with the powers under Section 111 of the Act on the Status and Remuneration of Judges, that is, he did not decide on the preliminary investigation, which is indeed within the competence of the panel, but ordered the preparation of disciplinary proceedings. As the legal basis for the decision, the order itself also indicated the provisions of Section 113 of the Act on the Status and Remuneration of Judges and Section 9 (2) of the Rules of Procedure of the Service Courts (hereinafter referred to as the “Service Court Rules”).

[21] According to the Service Court of First Instance, this interpretation is supported by the fact that in the joint disciplinary case, in the order SZF.14/36/2012, in reliance upon Section 111 of the Act on the Status and Remuneration of Judges 111, the Disciplinary Panel had indeed decided to open a preliminary investigation. Even so, it was the view of the Service Court of First Instance that the petitioner's objection would only have been relevant until the investigating officer's report was received. The fact that the decision complained of had not been taken by the service court acting as a panel could not have given rise to any legal prejudice once the disciplinary proceedings had been initiated by the panel after the report had been drawn up.

[22] The Service Court of Second Instance found that the petitioner's objection based on the absence of a panel decision was well-founded. The Service Court of First Instance had therefore infringed a procedural rule, but this did not result in a violation of the right to a fair trial, the Service Court of Second Instance held, since the Service Court of First Instance had already acted in a panel after the investigating officer's report had been drawn up and could have decided to refuse disciplinary proceedings at that time pursuant to Section the 121(1) of the Act on the Status and Remuneration of Judges. In addition, the petitioner had the opportunity to study the documents and to present his evidence.

[23] 1.1 In the petitioner's view, his right to a fair trial was violated when the Presiding Judge of the acting Panel of the Service Court, acting as a single judge instead of the panel, contrary to the provisions of Section 111 of the Act on the Status and Remuneration of Judges, *de facto* ordered the initiation of disciplinary proceedings (the preliminary investigation) by decision SZF.14/11/2012. In his opinion, the statutory provisions on the composition of the court are imperative rules, the violation of which necessarily leads to the repetition of the proceedings, regardless of whether the decision is correct on the merits. Referring to the 2014 Court Decision, the petitioner considered that a violation of the right to a fair trial could be established in any case where, despite a statutory requirement, the panel sitting was not held, regardless of the reason for such failure.

[24] 1.2 The Constitutional Court reaffirmed its previous practice on the right to a fair trial in its Decision 7/2013 (III. 1.) AB. According to the constitutional standard elaborated in the Decision 6/1998 (III. 11.) AB, "the requirement of a fair trial also encompasses the guarantees of procedural law and is a quality that can only be judged by taking into account the whole of the proceedings and the circumstances of the case. It follows that a trial may be unfair, unjust or not fair, as much because of the absence of certain detailed rules as in spite of the existence of all detailed rules. In line with the judicial practice of the Constitutional Court, the right to a fair trial includes all the conditions of the right to a court not expressly mentioned in the constitutional text (ABH 1998, 91, 98-99)" (Reasoning [24]). {More recently, see Decision 3027/2018 (II. 6.) AB, Reasoning [13]}.

[25] 1.3 In the case at hand, not contested by the Service Court of First Instance, the preliminary investigation was ordered by the Presiding Judge of the acting Panel of the Service Court of First Instance by order No SZ.F14/11/2012, although under Section 111 of the Act on the Status and Remuneration of Judges, although this falls within the competence of the judicial panel. The Service Court of Second Instance held that this procedural violation was clearly unlawful;

however, the petitioner's right to a fair trial had not been violated. Especially in view of the fact that the judicial panel of the Service Court of First Instance, by its order No SZF14/21/2012, in accordance with the provisions of Section 121 (1) of the Act on the Status and Remuneration of Judges, subsequently ordered the initiation of disciplinary proceedings.

[26] However, the Constitutional Court does not share this view. The Constitutional Court dealt in detail with the initiation of disciplinary proceedings against judges (ordering a preliminary investigation) in the 2014 Court Decision, also cited by the petitioner, and more precisely with the fact that the decision to do so is the responsibility of the competent panel of the service court and that its violation is not merely a breach of legality and procedure, but also a violation of the right to a fair trial [Article XXVIII (1) of the Fundamental Law].

[27] In the 2014 Court Decision, the Constitutional Court stated that Article 27 of the Fundamental Law considers the principle of administration of justice in judicial panels to be fundamental when it states that in Hungary courts, as a general rule, shall sit in a panel, unless otherwise provided by law.

[28] The Constitutional Court has also stated that the "strength of the independence of the judiciary" and the "enhanced guarantee of a fair trial" are expressed in the fact that the decision is the result of the deliberative activity of a panel of judges, who are empowered to make a lawful decision in accordance with their conscience. It follows from the principle of administration of justice in judicial panels that the members of the panel of judges are jointly responsible for establishing the facts, interpreting the law and deciding, and are obliged to act jointly (Reasoning [68]).

[29] In the 2014 Court Decision, the Constitutional Court highlighted the violation of the principle of administration of justice in judicial panels as an element of the right to a fair trial, since one of the fundamental issues in the underlying case was whether the meeting of the panel had taken place at all when the members of the panel of the service court decided by telephone to order a preliminary investigation. The petitioner also argued in the present case that the decision to order a preliminary investigation was not taken by the panel of the service court, but by the Presiding Judge of the acting Panel of the Service Court. He therefore relied on the 2014 Court Decision as he considered that the principle of administration of justice in judicial panels, and thus his right to a fair trial, was infringed when the presiding judge of the panel decided alone.

[30] According to the Constitutional Court, in the present case, it is not disputed that the order No SZF.14/11/2012 decided to order a preliminary investigation, nor is it disputed that the order was issued by the presiding judge of the disciplinary panel as a single judge, despite the fact that under Section 111 (1) of the Act on the Status and Remuneration of Judges the disciplinary panel is competent to decide on this matter. The Presiding Judge of the acting Panel of the Service Court of First Instance therefore ordered the preparation of the disciplinary proceedings in breach of the principle of administration of justice in judicial panels. The Service Court of Second Instance correctly recognised that the Service Court of First Instance had acted unlawfully in that regard, but erred in holding that that unlawfulness did not amount to a breach of the right to a fair trial.

[31] The Constitutional Court reiterates that one of the guarantees of a fair trial and one of the guarantees of judicial independence is that judges make their decisions in accordance with the law, sitting in a panel. It follows from the principle of administration of justice in judicial panels that the establishment of the facts, the assessment of the evidence, the interpretation of the law and the decision are a matter for the members of the panel of judges and that they are bound to act jointly.

[32] On the basis of the above, the Constitutional Court, upholding the provisions of the 2014 Court Decision, found the element of the constitutional complaint to be well-founded that the petitioner's right to a fair trial had been violated, since the presiding judge of the panel decided to order the preliminary investigation instead of the disciplinary panel.

[33] The Constitutional Court further points out that both in civil proceedings [Section 252 (1), Section 275 (2) of Act III of 1952 on the Code of Civil Procedure, in force at the time of the decision of the service courts, and Section 380 and Section 423 of Act CXXX of 2016 on the Code of Civil Procedure, currently in force] and in criminal proceedings [Section 373 (1) (II) (a) and Section 428 (2) of Act XIX of 1998 on Criminal Procedure], where the court is not duly constituted, this shall constitute an absolute ground for setting aside the decision. The court is not duly constituted, *inter alia*, if the case should have been heard by a panel but was heard by a single judge, or *vice versa*. This also demonstrates that, in the case which is the subject of the constitutional complaint, the Presiding Judge of the acting Panel of the Service Court committed a serious procedural irregularity which would be an absolute ground for setting aside the decision in civil and criminal proceedings.

[34] The fundamental rights and constitutional principles declared in the Fundamental Law, such as the right to a fair trial, equality before the law, impartiality, the principle of the adjudication of cases within a reasonable time, are reflected in the fundamental provisions and, sometimes, in the detailed rules of the procedural code. In close connection with this, the legal institution of absolute setting aside of the decision can also be traced back to the Fundamental Law, where the legislator has already considered the fairness of the procedure and decided that if the grounds for absolute annulment exist, the judicial decision is clearly contrary to the Fundamental Law, and the sanction for this can be no other than setting aside the decision.

[35] The court in these cases therefore has no discretion, that is, if it finds a serious procedural violation that constitutes an absolute ground for setting aside the decision, it must set aside the decision of the lower court. If this does not occur, it is for the Constitutional Court to determine whether the proceedings of the courts before it violated Article XXVIII (1) of the Fundamental Law.

[36] In view of all the foregoing considerations, the Constitutional Court found to be contrary to the Fundamental Law, as stated in the operative part, and thus annulled pursuant to Article 43 (1) of the Constitutional Act Decision No Szf.F.3/2014/6 of the Service Court of Second Instance acting alongside the Curia and Decision No Szf.14/63/2012 of the Service Court of First Instance acting alongside the Regional Court of Appeal of the Judicial District of Budapest

[37] 2. The Constitutional Court has not reviewed the other claims by the petitioner concerning the violation of the right to a fair trial, or the elements of the petition alleging a violation of Article IX (1), in view of the annulment of the challenged court decisions. In accordance with the established practice of the Constitutional Court, if the Constitutional Court finds that the legislation or part of the legislation challenged by the petition is contrary to a provision of the Fundamental Law and therefore annuls it, it does not review the merits of the possible infringement of the other constitutional provision in connection with the provision of the legislation already annulled. {Decision 18/2016 (X. 20.) AB, Reasoning [21]}. The Constitutional Court has maintained this practice also in the context of the review of the constitutionality of judicial decisions {Decision 21/2016 (XI. 30.) AB, Reasoning [46]}.

Budapest, 11 June 2018

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court

Dr. István Balsai sgd., Justice of the
Constitutional Court

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

Dr. Tamás Sulyok sgd., Chief Justice of the
Constitutional Court, on behalf of Dr.
Ágnes Czine, Justice of the Constitutional
Court, who was unable to sign

Dr. István Stumpf sgd., Justice of the
Constitutional Court

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

Dr. Tamás Sulyok sgd., Chief Justice of the
Constitutional Court, on behalf of Dr.
Marcel Szabó, Justice of the Constitutional
Court, who was unable to sign

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

Dr. Péter Szalay sgd., Justice of the
Constitutional Court

Dr. Dr. Ildikó Marosi-Hörcher, Justice of the
Constitutional Court, s.a.

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

Dr. Imre Juhász sgd., Justice -Rapporteur

Dr. Varga Zs. András sgd., Justice of the
Constitutional Court

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