

Decision 27/2013. (X. 9.) AB

on a constitutional requirement and the rejection of a judicial initiative relating to certain provisions of the Act III of 1993 on Social Administration and Social Benefits

The Constitutional Court, sitting in plenary session, on a judicial initiative seeking to establish a conflict with the Fundamental Law of a law applicable to a pending case, with dissenting opinions of Justices *Dr. Elemér Balogh*, *Dr. László Kiss*, *Dr. Miklós Lévy* and *Dr. István Stumpf*, has adopted the following

d e c i s i o n:

1 The Constitutional Court, acting *ex officio*, on the basis of Article II and Article XVI (4) of the Fundamental Law, and interpreting them in accordance with the National Avowal, establishes as a constitutional requirement: on the basis of section 4 (1) (a) (aa) and section 115 (2) of the Act III of 1993 on Social Administration and Social Benefits, the maintainer the institution shall set the personal fee – if the person referred to in section 114 (2)(c) is obliged to pay it – in such a way that the fee set does not endanger the necessary own maintenance of the person obliged to pay it.

2 The Constitutional Court rejects the petition for a declaration that the phrase “including revenue not taken into account as income and tax-exempt income” in section 4 (1) (a) (aa) of the Act III of 1993 on Social Administration and Social Benefits is in conflict with the Fundamental Law and for the annulment of that phrase, and for a declaration that it is inapplicable in the case No. Kfv.39.051/2012 pending before the Curia.

The Constitutional Court publishes this decision in the Hungarian Official Gazette.

R e a s o n i n g

I

[1] The petitioner, the three-member panel of the Curia, in the case pending before it under No. Kfv.39.051/2012, initiated, under section 25 of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC) the declaration that the phrase “including revenue not taken into account as income and tax-exempt income” in section 4 (1) (a) (aa) of the Act III of 1993 on Social Administration and Social Benefits (hereinafter: Social Benefits Act) is in conflict with the Fundamental Law and its annulment, as well

as the exclusion of its applicability in the case pending before the Curia under No. Kfv.39.051/2012.

[2] In the case pending before the Curia under the number Kfv.39.051/2012, the plaintiff's mother, who was placed in the dementia ward of a municipality-run care institution, is unable to pay from her income of HUF 67 000 the personal fee based on the increased institutional fee. Therefore, the mayor of the municipality acting as first instance authority, and subsequently the representative body of the municipality maintaining the institution, issued an administrative decision ordering the plaintiff to pay the personal fee as a relative obliged and capable of providing maintenance. The relevant local government decree adopted by the municipality does not provide for the possibility of a reduction in the personal fee on grounds of equity, in view of the scarcity of budgetary resources. The applicant brought an action challenging the administrative decision, both as regards its legal basis and the amount. The administrative court dismissed the action in its final judgement. In its application for review, the applicant claimed that the final judgement had unlawfully interpreted the definition of income under section 4 (1) (a) of the Social Benefits Act. If the obliged person's total monthly income is the basis of the obligation, this is contrary to the objectives of the Social Benefits Act as set out in the preamble to the Social Benefits Act. When establishing the relatives' obligations, the Social Benefits Act presupposes income-earning persons of working age, whereas the applicant is himself an invalidity pensioner entitled to state benefits.

[3] The applicant's income consists of an invalidity pension and a public health care allowance, and his degree of disability is 80%. The applicant's liability as obliged person is based on section 114 (1) to (2) of the Social Benefits Act and section 18 of the Government Decree 29/1993 (II.17.) on the fee for social benefits providing personal care (hereinafter: "Decree"). A reduction of the personal fee is not possible under the local government decree issued by the maintaining municipality, notwithstanding the authorisation provided for in section 115 (3) of the Social Benefits Act.

[4] The court is of the opinion that the phrase "including revenue not taken into account as income and tax-exempt income" in section 4 (1) (a) (aa) of the Social Benefits Act is contrary to the Fundamental Law, in breach of Article XV (1) of the Fundamental Law, with regard to the differentiation based on property. According to the court, although there is no doubt that the group of persons liable to pay the fees covered by the Social Benefits Act and the group of persons liable to pay tax under the Act CXVII of 1995 on Personal Income Tax (hereinafter: APIT) can be clearly distinguished from one another, so that the different legislative treatment of the persons in the two groups is, in principle, reasonable, but, on an objective assessment, there is no justification for a legislative decision which makes – when securing care for other persons in need – the state benefit received on the basis of need a compulsory basis for the payment of the

fee, even though it does not provide for a public burden-bearing liability in the case of invalidity pensions received as revenue. The two regulatory concepts have different objectives, one relating to tax liability and the other to the issue of the maintenance of relatives. However, the concept of income, which is the basis of individual autonomy of action, and social benefits as a part of that, create a link between the two sets of regulations. In the Court's view, a distinction which, in the case of one group, assesses the social nature of invalidity benefits, but completely ignores that aspect in the case of the other group, does not seek to reduce the differences which exist in social reality, but, on the contrary, deepens them. In the Court's view, therefore, legislation which makes state benefits provided on the basis of need subject to the payment of fee within the social system of social benefits is arbitrary, in the absence of a reasonable justification.

[5] According to the Curia, the wording of section 4 (1) (a) (aa) of the Social Benefits Act also infringes the fundamental right to the protection of human dignity, as laid down in Article II of the Fundamental Law, and the minimum subsistence level necessary to maintain human quality. The minimum subsistence level can only be defined and standardised at the level of abstraction by means of sufficiently careful legislation. According to the Court, the mere fact that section 18 of the Decree, in line with the Social Benefits Act, sets the current minimum amount of the old-age pension at two and a half times as the basis for the obligation to pay the fees does not mean that the State fulfils its obligation to protect the institutions if, as in the present case, it indicates the State benefits provided under invalidity benefits and public medical care as income on which the obligation to pay the fee is based. Where invalidity pension is considered to be included in the concept of income under section 4 (1) (a) of the Social Benefits Act, this means – according to the court – that the state “redistributes” the state benefit, i.e. although in the interest of a person in need, it deprives another person in need of the material basis for the maintenance of human dignity, and therefore the State intervenes in violation of a fundamental right in order to protect human dignity, since it unconstitutionally restricts and violates the fundamental right of the person living on invalidity benefit in order to protect the rights of the person receiving care in an institution.

II

[6] In its proceedings, the Constitutional Court took into account the following statutory provisions:

[7] 1 The provisions of the Fundamental Law affected by the petition:

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

"Article XV (1) Everyone shall be equal before the law. Every human being shall have legal capacity."

[8] 2 The relevant provisions of the Social Benefits Act:

"Section 4 For the purposes of this Act

(a) income: – with the exception under paragraph (1a) and subject to paragraphs (1b) to (1c) – property value (revenue), reduced by recognised expenses and the liability to pay contributions, which

(aa) is derived from within the country or from abroad as defined in the Personal Income Tax Act, including revenue not taken into account as income and tax-exempt income,"

"Section 114 (2) The fee shall be paid pursuant to the provisions of this Act

[...]

(c) by the spouse, cohabitant, lineal relative, adopted child, adoptive parent of a beneficiary whose family income per person, along with the performance of the maintenance obligation, exceeds two and a half times the minimum amount of the old-age pension, [...]

[the persons under subparagraphs (c) to (e) hereinafter are jointly referred to as: persons obliged and capable of providing maintenance]

[the persons under subparagraphs (a) to (e) hereinafter are jointly referred to as: obliged person]."

"Section 115 (2) The amount of the fee payable by the obliged person (hereinafter: "personal fee") shall be fixed by the head of the institution in a specific amount and shall be communicated to the person requesting care in writing at the time of the conclusion of the agreement. The local government responsible for the maintenance of the institution may also fix the personal fee by means of a decision. The personal fee may not exceed the amount of the institutional fee. If the calculation of the institutional fee does not produce a positive figure, the amount of the personal fee shall be zero."

III

[9] 1 The Constitutional Court first examined the alleged violation of the right to human dignity.

[10] The Curia justified its motion based on the violation of human dignity mainly on the grounds that if the concept of income under section 4 (1) (a) of the Social Benefits Act is considered to include invalidity pension as well, then – according to the court – this means that the State is “redistributing” state benefits, i.e. although in the interest of a person in need, it deprives another person in need of the material basis for the maintenance of human dignity, therefore the State is violating a fundamental right in order to protect human dignity, since it unconstitutionally restricts and violates the fundamental right of the person receiving invalidity benefits in order to protect the rights of the institutionalized person.

[11] Section 4 (1) of the Social Benefits Act provides definitions. The petitioner considers that the definition of income under section 4 (1) of the Social Benefits Act infringes human dignity only in relation to the determination of the standard for the obligation to pay the personal fee. On the other hand, section 4 (1) of the Social Benefits Act lays down the calculation of the amount of income not only in respect of the obligation to pay fees for personal care benefits but also in respect of social benefits in kind and social benefits in cash. In addition to the Social Benefits Act, the interpretative provision of the Act XXXI of 1997 on the Protection of Children and Guardianship Administration also refers to the definition of income specified in the Social Benefits Act [section 5 (r)]. The law-maker has a wide margin of discretion to determine and modify the material value or the amount of income of social security and benefits, the possibility of claiming the forms of social benefits defined in the Social Benefits Act does not constitute a fundamental right; citizens do not have a right guaranteed by the Fundamental Law to maintain their standard of living, since this depends, among others, on the capacity of the national economy, the state of social security, the institutions for the enforcement of interests and a number of other factors.

[12] Article N (1) of the Fundamental Law also expressly requires the State to enforce the principle of balanced, transparent and sustainable fiscal management, and – under Article N (3) – local authorities and public bodies are also expected to respect this in the performance of their tasks, including the provision of various social benefits.

[13] According to the Constitutional Court, the mere fact that the contested provision of the Social Benefits Act – which, by way of a reference regulation, applies the definition of income laid down in the APIT to the definition of income under the Social Benefits Act – includes tax-exempt income among the income that may be taken into account in the supplement of the personal fee regarding the person liable for providing maintenance, does not violate the fundamental right to human dignity enshrined in Article II of the Fundamental Law. Only some of the tax exemptions provided for in the APIT are based on welfare considerations, such as certain social benefits granted by the municipality in the context of social security or social assistance. Certain types of income are exempt from taxation for practical, administrative reasons, such as accident

and compensation allowances established before 1 January 1988 and not grossed up, or interest and dividends on bonds and trust certificates issued before 1 January 1988. In order to avoid double taxation, certain types of income are exempted in the APIT from the obligation to pay tax, such as the acquisition of assets that are subject to the payment of duty. Many exemptions are justified by socio-economic considerations, such as certain foundation payments.

[14] In the light of the foregoing, there is no need to annul the contested provision, since where section 4 (1) (a) of the Social Benefits Act may give rise to problems, these can be eliminated by declaring it a constitutional requirement.

[15] The Constitutional Court therefore rejected the part of the petition based on the violation of human dignity.

[16] At the same time, according to section 46 (3) of the ACC, in the procedure carried out in the course of exercising its competences, the Constitutional Court may specify constitutional requirements – that result from the regulation under the Fundamental Law and that enforce the provisions of the Fundamental Law – the reviewed law has to comply with.

[17] Among the rules on the maintenance of relatives, maintenance of the parents is now defined as a fundamental obligation in Article XVI (4) of the Fundamental Law. The purpose of the rules on the maintenance of relatives is to ensure that the person in need of maintenance receives the care and support necessary for his or her subsistence. This can take two main forms, with different legal characteristics. Maintenance of relatives in a legal relationship under civil law is based on the mutual cooperation of the parties (or a court decision) and may be paid in cash or provided in kind, depending on the circumstances of the beneficiary and obliged person. A substantially different situation is where, for example, the state of health of the beneficiary, the circumstances of the obliged person or the relationship between the beneficiary and the obliged person make it impossible to expect the obliged person to meet his or her obligations in kind, or the necessary care cannot be provided in this way. In such cases, care shall be provided through the social assistance system organised by the State. As laid down in Article XIX (1) of the Fundamental Law, "Hungary shall strive to provide social security to all of its citizens. Every Hungarian citizen shall be entitled to assistance in the event of maternity, illness, invalidity, disability, widowhood, orphanage and unemployment for reasons outside of his or her control, as provided for by an Act." In accordance with paragraph (2), "Hungary shall implement social security for those persons referred to in paragraph (1) and for others in need through a system of social institutions and measures." It is the duty of the State, by virtue of these provisions of the Fundamental Law, to organise and maintain a system of institutions to care for those in need. The basic rules for this are laid down in the Social Benefits Act, which – among other things

– also defines the guarantee rules for the establishment and payment of institutional and personal fees (sections 114 to 119/B of the Social Benefits Act). Social care is thus provided under precisely regulated conditions in institutions run by the State, municipalities and other bodies. However, by providing the conditions necessary for the provision of care or – where circumstances do not permit care at home – by assuming the task of care, the State relieves the obliged person of the actual (in kind) performance of the tasks of maintenance. Part of the costs of organising and providing care is collected by the State in the form of a fee payable by the beneficiary of care or by his or her dependant who is obliged and able to provide maintenance.

[18] In the statutory rules governing the establishment of payment of the fee for social assistance, the law-maker intended to reflect the indigence of the recipients. Indigence in old age may also be due to lack of means of subsistence or, in the case of people in need of care, to the lack of ways to provide for their personal needs. It is therefore not contrary to the Fundamental Law for the State or the municipality to assume responsibility for the payment of the fee only if it is justified by indigence.

[19] At the same time, the Constitutional Court considers it incompatible with the Fundamental Law that in the case of the scope of obliged persons under section 114 (2)(c) of the Social Benefits Act the court may not examine whether, after the payment of the monthly supplementary personal fee by the relative obliged to provide maintenance, the remaining income of the person obliged to provide maintenance is sufficient to ensure his or her subsistence.

[20] According to Article 28 of the Fundamental Law, in the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with Fundamental Law. Pursuant to section 114 (2) of the Social Benefits Act, the fee is payable by the beneficiary subject to care and the legal representative with parental authority, as well as by the persons listed under subparagraphs (c) to (e) who are obliged and able to provide maintenance. It follows, therefore, from the regulatory purpose of the Social Benefits Act that the law expects the person who is liable and able to provide maintenance to pay the personal fee. The obligation to pay the fee by the scope of persons liable under section 114 (2) (d) of the Social Benefits Act – that is to say, the person who has contractually undertaken to maintain the beneficiary – is based on a contractual obligation to maintain concluded under the private autonomy of the individual, therefore the persons subject to that voluntary obligation are rightly considered by the law-maker to be persons liable and capable of maintenance, having regard also to the principle of contractual freedom.

[21] The scope of obliged persons under section 114 (2) (e) of the Social Benefits Act is comprised of those who are ordered by the court to maintain the beneficiary. The court establishes the maintenance obligation in accordance with the provisions of the Act IV

of 1952 on Marriage, Family and Guardianship (hereinafter: "Family Law Act"), including, among others, section 66 (1) of the Family Law Act, which provides that no one is obliged to support another person who would thereby endanger his or her own maintenance.

[22] According to section 114 (2) (c) of the Social Benefits Act, the law includes among those obliged to provide maintenance – and therefore to pay the fee – the spouse, cohabitant, lineal relative, adopted child, adoptive parent of a beneficiary whose family income per person, along with the performance of the maintenance obligation, exceeds two and a half times the minimum amount of the old-age pension. In their case, however, there is no constitutional reason why the court should not take into account the need to ensure their own subsistence. In the case of some of the same category of obliged persons, namely children of full age, the duty to care for their parents in need is declared as a fundamental duty (under the Fundamental Law) in Article XVI (4) of the Fundamental Law. However, under Article R (3) of the Fundamental Law, the provisions of the Fundamental Law shall not be interpreted alone, but in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution. According to the National Avowal: "We hold that we have a general duty to help the vulnerable and the poor", and "We hold that the common goal of citizens and the State is to achieve the highest possible measure of well-being [...]." The National Avowal also implies an obligation to take responsibility for our descendants ("We are responsible for our descendants").

[23] The obligation of parental maintenance under Article XVI (4) of the Fundamental Law, as a fundamental obligation, is also – according to the Constitutional Court – only in accordance with the principles – as just quoted – laid down in the National Avowal, if the obligation of maintenance imposed on the descendants does not impose on them a disproportionate burden that exceeds their capacity to fulfil. Maintenance provided by an adult child shall therefore not jeopardise the obliged person's own subsistence and self-support, and the assessment of the obligation to pay a personal fee on that basis shall therefore also take account of the necessary costs of the individual to maintain his or her own subsistence. The obligation to take account of the individual's necessary maintenance cannot be replaced by the fact that section 114 (2) (c) of the Social Benefits Act applies only to persons whose per capita income, with account to performing the maintenance obligation, exceeds two and a half times the current minimum amount of the old-age pension. This alone does not necessarily guarantee the obliged person's own necessary maintenance. The question of when maintenance is at risk can only be decided by taking into account all the circumstances of the case, the obliged person's income, assets, housing, health (and the reasonable costs incurred), capacity to work and living conditions at the time. This must therefore always be examined and determined by the law-applying authorities in the context of

the individual case, also in respect of the persons defined in section 114 (2) (c) of the Social Benefits Act.

[24] The right to human dignity guaranteed by Article II of the Fundamental Law may not be infringed in the determination of the obligation to pay the personal fee. The original content of that fundamental right is the prohibition of humiliation. Therefore, in order to uphold the dignity of the human person, the bodies administering the law shall in each case examine the extent to which the remaining income of the person liable to pay the personal fee pursuant to section 114 (2) (c) of the Social Benefits Act is sufficient to meet his or her monthly subsistence needs, that is to say, to provide living conditions which do not result in a breach of the prohibition of humiliation as a breach of human dignity, so that he or she can feel as being a valuable member of society.

[25] In view of all the above, the Constitutional Court held that on the basis of Article II and Article XVI (4) of the Fundamental Law, it is a constitutional requirement – in accordance with the National Avowal – that the statutory provisions of section 4 (1) (a) (aa), section 114 (2) (c) and section 115 (2) of the Social Benefits Act shall be applied in determining the obligation to pay the personal fee in such a way that the fee set does not endanger the necessary own maintenance of the person obliged to pay it.

[26] 2 The petition alleges that the contested provision is unconstitutional on the grounds of a distinction made on the basis of property, contrary to Article XV (1) of the Fundamental Law. The petitioner submits that there is no doubt that the group of persons liable to pay the fee under the Social Benefits Act and the group of persons liable to pay tax under the APIT are clearly distinguishable, so that the different legislative treatment of persons belonging to the two groups is, as a general rule, reasonable. However, according to the petitioner, on an objective assessment, there is no justification for the law-maker's decision of mandatorily taking into account state benefit based on indigence as a basis for the payment of the fee – when providing care for other persons in need – even though it does not impose any obligation to bear a public burden in the case of invalidity pension as a revenue. The two regulatory concepts express different objectives, since one deals with the obligation to pay tax and the other relates to the issue of maintenance of relatives, but the definition of income, which is the material basis for individual autonomy of action, and the social benefits that it includes, create a link between the two regulations. The distinction which, in the case of one group, assesses the social nature of invalidity benefits, but completely ignores that aspect in the case of the other group, does not – in the opinion of the petitioner – seek to reduce the differences which exist in social reality, but, on the contrary, deepens them. In the petitioner's view, therefore, legislation which makes state benefits provided on the basis of need subject to the payment of fee within the social system of social benefits is arbitrary, in the absence of a reasonable justification.

[27] As interpreted by the Constitutional Court, unconstitutional negative discrimination between persons can only be established if a person or a group of people are discriminated against in comparison with other persons or a group in the same position. The discrimination shall be considered unconstitutional if the regulation differentiates, without a constitutional reason, between the subjects of law who belong to the same group in terms of the regulation (i.e. they are comparable). {Most recently: Decision 3086/2013. (III.27.) AB, Reasoning [32] to [37]; Decision 3087/2013. (III.27.) AB, Reasoning [39] to [41]}.

[28] According to the petitioner, these two categories of obliged persons are “well distinguishable”, but the social benefit included in the definition of income creates a link between the two.

[29] The persons liable to pay the fee are listed in section 114 (2) of the Social Benefits Act, in which the scope of persons covered by subparagraph (c), which is also at issue in the present case, is listed after the beneficiary and the legal representative, namely the entitled person’s spouse, cohabitant, lineal relative, adopted child or adoptive parent whose family income per person, taking into account the performance of the maintenance obligation, exceeds two and a half times the minimum amount of the old-age pension. According to the Constitutional Court, the scope of persons who may become liable to pay the fee under section 114 (2) (c) to (e) of the Social Benefits Act, and who are able and obliged to provide maintenance, should be regarded as a homogeneous group falling within the same regulatory field. Within that scope, the law-maker – having regard to the constitutional requirement set out in the preceding part of the decision – does not make any arbitrary distinction.

[30] In view of this – i.e. the lack of a homogeneous group and the constitutional requirement – the Constitutional Court rejected the petition concerning Article XV (1) of the Fundamental Law.

[31] The publication of this decision of the Constitutional Court in the Hungarian Official Gazette is based upon the second sentence of Section 44 (1) of the ACC with consideration to the importance of the matter in principle.

Budapest, 7 October 2013.

Dr. Péter Paczolay, President of the Constitutional Court

Dr. Elemér Balogh, Justice of the Constitutional Court

Dr. András Bragyova, Justice of the Constitutional Court

Dr. Imre Juhász, Justice of the Constitutional Court

Dr. Péter Kovács, Justice of the Constitutional Court

Dr. Miklós Lévy, Justice of the Constitutional Court

Dr. László Salamon, Justice of the Constitutional Court

Dr. Péter Szalay, Justice of the Constitutional Court

Dr. István Balsai, Justice of the Constitutional Court

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

Dr. László Kiss, Justice of the Constitutional Court

Dr. Barnabás Lenkovics, Justice of the Constitutional Court

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

Dr. István Stumpf, Justice of the Constitutional Court

Dr. Mária Szívós, Justice of the Constitutional Court