Decision 15/2002 (III. 29.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a judicial initiative seeking a posterior examination of the unconstitutionality of a statute, the Constitutional Court has adopted the following

decision:

1. The Constitutional Court holds that Section 197 of Act CXII of 1996 on Credit Institutions and Financial Enterprises is unconstitutional, and therefore annuls it as of 31 December 2002.

2. The Constitutional Court holds that Section 197 of Act CXII of 1996 on Credit Institutions and Financial Enterprises shall not be applicable in Case No 2. K. 31212/1997 pending at the Metropolitan Court.

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

Reasoning

I.

1. The Metropolitan Court, having suspended the case, initiated proceedings at the Constitutional Court on the basis of Section 38 para. (1) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC) in Case No 2. K. 31212/1997 on the review of a public administration decision and asked for establishing that Section 197 of Act CXII of 1996 on Credit Institutions and Financial Enterprises (hereinafter: the ACF) violated Article 57 para. (1) of the Constitution, and therefore the provision concerned was unconstitutional.
According to the petitioner, the provision in Section 197 of the ACF "violates the principle of equality before the law granted in Article 57 para. (1) of the Constitution. This provision deprives one of the parties (usually the plaintiff) of the chance to have access to and study – in line with his rights specified in Sections 93 para. (2) and 97 of the Act on Civil Procedure (hereinafter: the ACP) – the contents of the documents enclosed by the adverse party. If the intention of the legislature was to make it possible for the adverse party to obtain information

on the contents of bank secrets only by means of the oral information given by the court, the principle of equality is violated – in the legal opinion of the Metropolitan Court – also because only one of the parties is required, in order to elaborate his arguments, to spend hours putting down written notes about the presented bank secrets, which might contain a lot of figures and tables. In the case concerned, the defendant asked for handling as bank secret a set of documents of almost 100 pages, 30% of which were tables."

2. In the case serving as the basis of the judicial initiative, the defendant, as a supervisory organisation empowered to take measures, with reference to the relevant provisions of the ACF, ordered the plaintiff – employed as an executive officer at a financial institution – to pay a fine, and at the same time, it decided to prohibit the plaintiff's employment as an executive officer by any financial institution. The defendant's decision was based upon the findings of an on-site inspection. The plaintiff challenged the grounds of the inspection and the public administration decision condemning him, and filed a claim for judicial review. The defendant requested rejection of the claim, and attached notes made at various dates, the inspection report, furthermore, the documents containing proposals on the supervisory measures to be taken. The defendant made reference to the fact that these documents and the data contained therein qualified as bank secrets pursuant to Section 50 of the ACF. In addition to ordering the case to be heard at a closed session, the court ordered the defendant to send to the plaintiff the documents deemed to be bank secrets.

With reference to Section 197 of the ACF, the Supreme Court, as the court of second instance, accepted the appeal filed against the above ruling and decided that the documents would not have to be sent to the plaintiff.

3. According to Article 57 para. (1) of the Constitution referred to in the judicial initiative:

"Article 57 para. (1) In the Republic of Hungary everyone is equal before the law and has the right to have the accusations brought against him, as well as his rights and duties in legal proceedings, judged in a just, public trial by an independent and impartial court established by law."
Section 197 of the ACF provides for the following:

“Section 197 The court may only read out at the hearing the documents submitted by the Supervisory Authority and containing bank secrets necessary for the substantiation of the decision. The court shall treat such documents as closed files, it shall hand out no copies thereof, and shall return them to the Supervisory Authority upon the completion of the procedure with final force.”

II.

The judicial initiative is well-founded.

1. The Constitutional Court has, in several decisions, already dealt with the fundamental right specified in Article 57 para. (1) of the Constitution – with special emphasis on certain elements of the criminal procedure and the constitutional principle of the right to defence – and the constitutional contents thereof, including the requirement of fair trial as well as the relevant international regulations and practice [e.g. Decision 6/1998 (III. 11.) AB, ABH 1998, 91; Decision 5/1999 (III. 31.) AB, ABH 1999, 75]. Concerning the case judged upon in Decision 6/1998 (III. 11.) AB, it was established that Article 57 para. (1) of the Constitution – taking into account the interpretation of Article 14 point 1 of the International Covenant on Civil and Political Rights promulgated in Hungary in Law-Decree 8/1976 and Article 6 point 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms promulgated in Hungary in Act XXXI of 1993 (hereinafter: the Convention) – provides for constitutional requirements extending beyond the right to have a trial. “The requirement of a ‘fair trial’ is not simply one of the requirements set out here for the court and the procedure (e.g. as a ‘just trial’), but, in addition to the requirements specified in the Constitution as referred to above, particularly in respect of criminal law and criminal procedure, it encompasses the fulfilment of the other guarantees of Article 57. Moreover, according to the generally accepted interpretation of the articles of the Covenant and the European Convention on Human Rights that contain procedural guarantees, forming the basis of the content and structure of Article 57 of the Constitution, fair trial is a quality factor that may only be judged by taking into account the whole of the procedure and all of its circumstances.” [Decision 6/1998 (III. 11.) AB, ABH 1998, 91, 95] Article 6 point 1 of the Convention provides – among others – for the requirement of fair trial in relation to rights and obligations under civil law. Among its provisions formally applicable to criminal cases only, the principle of “equal

arms" is an acknowledged element of fair trial to be applied to civil cases, too, in line with the consistent practice of the European Court of Human Rights.

2. In Decision 6/1998 (III. 11.) AB, the Constitutional Court, examining the regulations relevant to a concrete case, concerning the interrelations between the principle of fair trial, the efficiency of the right to defence, and the time as well as the tools necessary to prepare for the defence, pointed out the following: "Full access to and possession – subject to due security measures – of the data and documents of the proceedings is one of the rights that 'must be ensured in any case'." The Constitutional Court also established in the above-mentioned decision that "Fundamental rights may only be restricted beyond the limits of the essential content of such rights: according to Article 8 para. (2) of the Constitution, the essential content of a fundamental right shall not be limited even by an Act of Parliament. Under the established practice of the Constitutional Court, any limitation violates the essential content of a fundamental right if it is not unavoidably necessary for the exercise of another fundamental right or for another constitutional purpose, or if it is necessary but the *injuria* caused is disproportionate in relation to the desired goal.

However, in addition to the above constitutional standard applicable as the general rule, the Constitution itself contains further criteria in respect of certain fundamental rights, which, on the one hand, make the general standard more concrete in line with the content of the fundamental right in question, and which, on the other hand, by being concrete, define the essential content of the particular fundamental right on the basis of more stable and inherent features instead of the relative approach of the general rule. The latter general standard applicable to every fundamental right is necessarily an abstract methodological rule that prescribes relativity to the particular limitations; therefore, the latter is the concrete element here, and the protected content of the individual fundamental rights is different case by case. In contrast, the individual standards used for the individual fundamental rights actually link the essential content to the features of the endangered fundamental right, and therefore, they do not necessarily evaluate the cause and the weight of the restriction; the same limits are applied to any restriction. In certain cases, this method sets absolute limits to restrictions, while in other cases it allows the constitutionality of restriction to be decided on the basis of specific features, possibly even by allowing consideration of necessity/proportionality only within the scope of concrete and narrower requirements as defined in the Constitution. Thus, the essential content of such fundamental rights can be defined more clearly and constantly than that of the rights to which the general rule applies." As far as the contents of the

constitutional guarantees defined in Article 57 para. (1) of the Constitution are concerned, the decision mentions the following: “The guarantees specified in Article 57 para. (1), i.e. that everyone has the right to have the accusations brought against them, as well as their rights and obligations judged in a just and public trial by an independent and impartial court established by the law, contain many concrete conditions concerning the ‘right to the court’, which are not absolute in the same sense as, for example, the presumption of innocence, but which are still absolute limitations of assessment according to the general rule. There is no necessity that would justify even a proportionate limitation of the ‘fair’ nature of a trial; it is within the notion of fair trial that a set of characteristics is to be established in order to define its content, and the necessity/proportionality of certain limitations must be assessed within such scope. (In a similar way, there is a specific dogmatic definition of the terms ‘court’, as well as ‘lawful’, ‘independent’ and ‘impartial’ boards in charge etc.)” (ABH 1998, 91, 95, 98-99)

3. In the present case, Constitutional Court, following the approach of principle detailed above, has examined the constitutionality of Section 197 of the ACF on the basis of the procedural guarantee contained in Article 57 para. (1) of the Constitution, according to which everyone has an equal chance to enforce his rights at the court. As a consequence, in the case concerned, too, all parties to the litigation must have equal rights, in terms of depth, extent and manner, of access during the procedure to all documents relevant to the subject of litigation (and in the given situation, the document containing bank secrets necessary for the substantiation of the decision is undoubtedly a document like that). This ensures the “equality of arms” between the adverse parties in the legal debate, thus guaranteeing the constitutional requirement of fair trial. The restriction specified in Section 197 of the ACF affects the right of the party condemned in the decision of the supervisory authority (the plaintiff). There is no “absolute necessity” that could justify the restriction of his right to have a fair trial, as in the present case the requirement of fair trial, and in particular the “equality of arms” – i.e. the summary of its components – is the essential content of the fundamental right.

The Constitutional Court has established that Section 197 of the ACF limits in an unconstitutional way the above-mentioned content of Article 57 para. (1) of the Constitution, as it fundamentally and generally restricts the procedural right related to the learning and evaluability of the grounds of the decision that constitutes the subject of litigation. It makes more difficult for one of the parties to the litigation (in the procedure mentioned in the judicial initiative, for the plaintiff) to exercise his rights of appropriate preparation. As the subject of

litigation is a decision – related to a person and containing sanctions – the grounds of which are debated by the plaintiff, it is an important guarantee that he should have direct access to, and should possess the "document containing bank secrets necessary for the substantiation of the decision". The Constitutional Court points out that, in view of Section 197 of the ACF, the document containing bank secrets is such a tool of evidence in the procedure concerned that offering only indirect access to it and preventing its possession acts against the equality of the litigating parties at the court. The reference to bank secrets against the above-mentioned right is constitutionally unfounded. There are sanctions in criminal law for allowing access to bank secrets for unauthorised persons. Thus, the person possessing a document which contains bank secrets – such as the litigating party – is aware of his criminal law liability related to the possession of such documents.

The Constitutional Court, leaving due time for adopting a new regulation taking into account the other provisions on bank secrets as well, has annulled the statutory provision in Section 197 of the ACF objected to in the judicial initiative, as it does not ensure the full-scale realisation of the elements of fair trial. At the same time, the Constitutional Court has excluded the possibility of applying the provision in the case concerned, as such exclusion is justified by the particularly important interests of the plaintiff in the case concerned [Section 43 para. (4) of the ACC].

The publication of this Decision in the Official Gazette is based on Section 41 of the ACC.

Budapest, 25 March 2002

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