DECISION 12/2017 (VI. 19.) AB

In the matter of an ex post review of conformity with the Fundamental Law of a legal act, with concurring reasoning by Justice *dr. Ágnes Czine* and with dissenting opinion by Justice *dr. Mária Szívos,* the Constitutional Court, sitting as the Full Court, adopted the following

d e c i s i o n :

1. The Constitutional Court holds that the text "judicial service" in Section 74 *(g)* of the Act CXXV of 1995 on National Security Services is in conflict with the Fundamental Law; therefore, the Court annuls it as of 29 June 2018.

Section 74 *(g)* shall remain in force with the following text:

"*(g)* relationship of employment: service in justice, prosecutor's service, professional service, the service of professional and contracted soldiers, public service, government service, state service, public employee relationship, labour relationship, and other legal relationship aimed at employment;"

2. The Constitutional Court further holds that the text "judge" in Section 71 (2) *(e)* of the Act CXXV of 1995 on National Security Services is in conflict with the Fundamental Law; therefore, the Court annuls it as of 29 June 2018.

Section 71 (2) *(e)* shall remain in force with the following text:

"(e) in case of employment under service in justice, the court superior who exercises the right of appointment over the person exercising the employer's rights, in the absence of such a superior, the president of the National Office for the Judiciary,"

3. The Constitutional Court further holds that the texts "or the director general of the national security service having the powers to carry out national security vetting" and "in particular" in Section 72/B (2) *(e)* of Act CXXV of 1995 on National Security Services are in conflict with the Fundamental Law; therefore, the Court annuls them as of 29 June 2018.

Section 72/B (2) *(e)* shall remain in force with the following text:

"(e) with regard to the person employed in the relationship that serves as the basis for the national security vetting, the person entitled to initiate the national security vetting acquires knowledge of a circumstance that refers to a national security risk as follows:"

4. The Constitutional Court dismisses the petition aimed at establishing that the text "judge and" in the second sentence of Section 70 (1) of Act CXXV of 1995 on National Security Services is in conflict with the Fundamental Law and at the annulment thereof.

5. The Constitutional Court terminates the procedure aimed at a finding that Section 71 (4) and Section 72/B (8) of Act CXXV of 1995 on National Security Services are in conflict with the Fundamental Law and at their annulment.

This decision of the Constitutional Court shall be published in the Hungarian Official Gazette.

Reasoning

I

[1] 1. The president of the Curia (hereinafter referred to as the "petitioner") initiated, on the basis of Article 24 (2) *(e)* of the Fundamental Law and Section 24 (1) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), a procedure of *ex post* norm control and he initiated the review and a finding of conflict with the Fundamental Law and the annulment of the text "judicial service" in Section 74 *(g),* the text "judge and" in the second sentence of Section 70 (1), Section 71 (2) (e), Section 71 (4), Section 72/B (2) *(e)* and Section 72/B (8) of Act CXXV of 1995 on National Security Services (hereinafter referred to as the "National Security Service Act").

[2] As the background of his petition, he explained that pursuant to the text of National Security Service Act in force prior to 1 August 2013, a national security vetting was only compulsory and possible in case of judges authorising secret gathering of intelligence and judges engaged in the contentious proceeding specified in the Act on the Protection of Classified Data, and the president of Budapest High Court was empowered to initiate such vetting. As stated by the petitioner, no constitutional concerns were raised regarding these provisions, as the text of the Act was clear and intelligible; the scope of the persons subject to the vetting was well defined. However, the new rules on national security vetting introduced by Act LXXII of 2013 on amending certain Acts for the purpose of establishing the new rules of national security clearing (hereinafter referred to as the "First Amendment Act") reflect a conceptual shift, with regard to the courts as well. in accordance with the First Amendment Act, the provisions determine the scope where initiating the national security vetting is not compulsory, mentioning only the president of the Curia and the president of the National Office for the Judiciary as exceptions. While MPs are generally exempted from the scope of persons affected by national security vetting, judges, the judicial branch of power, do not enjoy a general exception, indeed, as compared with the previous regulation, the right to implement vetting is extended to all the judges by way of defining in Section 74 *(g)* of the National Security Service Act the relationship of employment as containing the judicial service as well.

[3] Acting on the basis of the petition for *ex post* norm control submitted by the Commissioner for Fundamental Rights against the provisions of the First Amendment Act, in Decision 9/2014 (III. 21.) AB (hereinafter referred to as the "2014 Court Decision"), the Constitutional Court established that several elements of the new regulation were in conflict with the Fundamental Law, and it annulled the provision on

continuous national security vetting, the possibility of secret gathering of intelligence lasting thirty days two times a year as well as the provision pursuant to which there was no way for further legal remedy against the decision having decided upon the complaint submitted to the minister. However, the Constitutional Court did not consider whether the judicial service qualified as a relationship of employment for the purpose of the application of the National Security Service Act. On the basis of this decision of the Constitutional Court, the National Assembly adopted the Act CIX of 2014 on amending Act CXXV of 1995 and certain Acts in the context of national security vetting (hereinafter referred to as the "Second Amendment Act").

[4] 2. The petitioner primarily asked the Constitutional Court to examine the text "judicial service" in Section 74 *(g),* the text "judge and" in the second sentence of Section 70 (1) of the National Security Service Act, primarily initiating, as the legal consequence of the conflict with the Fundamental Law, the annulment of the above provisions, with regard to the text "judicial service" in Section 74 *(g)* being in conflict with Article B) (1) (legal certainty originating from the rule of law), with Article C) (1) (separation of powers), with Article XXVIII (1) (right to a lawful judge) and also with Article 26 (1) (judicial independence) of the Fundamental Law, while the text "judge and" in the second sentence of Section 70 (1) of the National Security Service Act is in conflict with Article B) (1) (legal certainty originating from the rule of law) of the Fundamental Law.

[5] 2.1 The petitioner notes the following concerning Section 74 *(g)* of the National Security Service Act. In accordance with Article C) (1) of the Fundamental Law, the Hungarian State shall function based on the principle of the distribution of executive powers. The regulatory concept of the National Security Service Act is fundamentally based on the special features of the executive branch of power and of those who participate in the activities of the executive power. Although it emphasises that judges are not engaged in a hierarchical relation in the traditional sense with the persons exercising employer's rights, still the terminology and the concept of National Security Service Act in force is based upon such a relation. From the moment of placing judges under the remit of the National Security Service Act, they have become more and more subject to the regulatory concept based on the logic of operation of the executive power, as the potential cases and the methods of vetting applicable to judges have been extended.

[6] While MPs, as the members of the legislative branch of power, are exempted, pursuant to Section 70 (4) *(i)* of the National Security Service Act, from national security vetting performed by the executive power, judges, the members of the judicial branch of power, do not enjoy such an exemption. Indeed, pursuant to Section 74 *(g)* of the National Security Service Act, judges fall within the regulatory concept, as judicial service is covered by the concept of employment relationship. The petitioner refers to the Decision 38/1993 (VI. 11.) AB, which established that in today's parliamentary systems, a special emphasis is placed on the independence of the judicial branch of power in contrast to the legislative and executive powers. Therefore there is no constitutional reason for the regulatory concept of the National Security Service Act,

breaching Article C (1) of the Fundamental Law, that in principle exempts the members of the legislative branch of power from national security vetting, but the members of the judicial branch of power are, in principle, subject to national security vetting. In this regard, the petitioner makes references to the German and Austrian regulations as well.

[7] The petitioner also points out that Section 74 point *(g)* of the National Security Service Act, together with points *(in)* and *(io)* may further extend the scope of judges subject to national security vetting, the scope of persons entitled to order vetting and the scope of persons subject to the vetting are not specified accurately that may result in arbitrary decisions, contrary to Article B) (1) of the Fundamental Law.

[8] In the context of Article XXVIII (1) of the Fundamental Law, the petitioner refers to the Decision 36/2013 (XII. 5.) AB of the Constitutional Court, that emphasised the right to a lawful judge and the prohibition of deprivation of the right to a lawful judge. The latter fundamental right of justice would be put to risk if an adjudicating judge could be excluded from a process pending before him or her due to a national security vetting. The requirement of the irremovability of judges is one of the achievements of the historical constitution.

[9] In addition to the principle of the separation of powers and the prohibition of deprivation of the right to a lawful judge, the challenged statutory regulations also violate judicial independence declared in Article 26 (1) of the Fundamental Law. In line with the case law of the Constitutional Court, any external interference with the judicial activity is considered to pose a much more serious threat to the constitutional architecture than the potential preponderance of the judicial power. As pointed out by the petitioner, the latter should be independent from both of the other two branches of power. The independence of the adjudicating activity from any external influence is an unconditional requirement that in fact enjoys an absolute protection under the Fundamental Law.

[10] The petitioner referred to the Decision 33/2012 (VII. 17.) AB, (hereinafter referred to as the "2014 Court Decision2012 Court Decision") pursuant to which judicial service should enjoy enhanced constitutional protection compared to other public service, as judicial independence and the resulting principle of irremovability are not only specific provisions of the Fundamental Law, but they are also achievements of the historical constitution. The petitioner also emphasised that although the national security vetting of judges is not totally unacceptable and contrary to the Fundamental Law, but defining judicial service as an employment relationship and the resulting challenged statutory provisions are in conflict with the Fundamental Law.

[11] 2.2 The petitioner sought the review and annulment of the text "judge and" in the second sentence of Section 70 (1) of the National Security Service Act also with reference to the violation of legal certainty originating under the rule of law enshrined in Article B) (1) of the Fundamental Law, as he holds that, pursuant to this rule, the potential scope of persons who can be made subject to the vetting is not accurately

delimited and it may give rise to arbitrary decisions.

[12] 3. As a secondary request connected to the foregoing, with regard to Section 46 (1) and (2) *(c)* of the Constitutional Court Act, the petitioner initiated the review of Section 70 (4) of the National Security Service Act and a finding of the absence of conformity with the Fundamental Law manifested in an omission. Section 70 (4) of the National Security Service Act contains the scope of persons with regard to whom no national security clearing is to be initiated. The list does not contain judges, with the exception of the president of the Curia and the president of the National Office for the Judiciary, which is contrary to Article C) (1), Article XXVIII (1) and Article 26 (1) of the Fundamental Law.

[13] 4. As a tertiary request, the petitioner worded the following with regard to the text "judicial service" in Section 74 *(g),* the text "judge and" in the second sentence of Section 70 (1) and paragraph (5), Section 74 *(in)* and *(io)* of National Security Service Act and Section 13 (5) of the Act CLV of 2009 on the Protection of Classified Information (hereinafter referred to as the "Classified Information Act"). These statutory regulations neutralise each other: Section 70 (1) and Section 74 *(g)* of the National Security Service Act prevent the enforcement of Section 13 (5) of the Classified Information Act, while Section 13 (5) of the Classified Information Act block the enforcement of Section 70 (5) of the National Security Service Act. As pointed out by the petitioner, in the present case, it is more than a conflict between laws of the same level that can be resolved by way of judicial interpretation: The lack of the possibility for interpretation prevents the enforcement of several constitutional provisions. The clarity, understandability and the possibility for interpretation of the content of the norm are of primary importance concerning national security vetting. The petitioner stressed, quoting an earlier decision of the Constitutional Court, that the requirement of the clarity of norms should be enforced to a greater extent where the given legal provision is directly related to the exercise of fundamental rights or the enforcement of constitutional principles. The petitioner seeks, with regard to the requirement of having a clear, understandable and interpretable content of norm, based on the principle of legal certainty originating in Article B) (1) of the Fundamental Law, a finding of a constitutional requirement pursuant to which these provisions of the National Security Service Act cannot be regarded as a rule covered by the term "unless provided otherwise in an Act" in the application of Section 13 (5) of the Classified Information Act.

[14] 5. As the fourth request, for the case of dispensing with the above legal consequences, the president of the Curia sought the review and annulment of Section 69 (2) (b) of National Security Service Act, as a repeated procedure in its part not affected by the 2014 Court Decision. The authorisation provided in Section 69 (2) (b) of the National Security Service Act, regarding judges, to issue a normative order with the consent of the competent minister, together with a measure by the employer on determining the work positions that fall within the scope of national security clearing, is contrary to Article C) (1) and Article 26 (1) of the Fundamental Law.

[15] 6. In addition to the above, the petitioner also claimed that Section 71 (2) *(e)* and Section 71 (4) are in conflict with the Fundamental Law. These statutory provisions are contrary to Article XXVIII (1) (the right to a lawful judge) and Article 26 (1) (judicial independence and irremovability) of the Fundamental Law due to their applicability concerning judges. According to Article 71 (4) of the National Security Service Act, if the national security vetting establishes a national security risk, the legal relationship that serves as the basis for the national security vetting can only be established or maintained when it is approved by the entity, person or body specified in Subsections (2) and (3). Pursuant to Subsection (2) (e), in the case of judges and employees serving in justice, the court superior who exercises the right of appointment over the person exercising the employer's rights, and in the absence of such a superior, the president of the National Office for the Judiciary are entitled to provide this approval. As a consequence of this provision of the National Security Service Act, if the president of the National Office for the Judiciary does not provide for an exemption, the service of the judge shall not be upheld, which can only be achieved through the termination of the relationship of the judicial service that is contrary both to judicial independence and the right to a lawful judge. Such a cause cannot be found in Sections 89 to Section 98 of Act CLXII of 2011 on the Legal Status and the Remuneration of Judges (hereinafter referred to as the "Act on the Legal Status of Judges"). If the National Security Services establish any risk, it should not bear the direct consequence of terminating the relationship of judicial service. The petitioner pointed out, by quoting the relevant words of 2014 Court Decision and 2014 Court Decision2012 Court Decision, that the irremovability of judges enshrined in the Fundamental Law is a personal guarantee, which is a guarantee of the decision-making autonomy of judges, excluding the possibility of any retaliation over the judge in relation to his or her service because of his or her judgement being in line with the laws and with his or her conscience. The irremovability of judges is at the same time a guarantee of the right to an independent and impartial court. It is contrary to Article 26 (1) of the Fundamental Law to have judges removed on the basis of the information received from the executive branch of power, the National Security Services, as well as to vest on the president of the National Office for the Judiciary a discretionary power without well-defined criteria that may also result in removing the proceeding judge. The petitioner pointed out with regard to the latter that the independence of the judge concerning his or her adjudicating activity is also applicable against the administration of the courts, and making removability dependent on a personal decision without specific criteria is contrary to the Fundamental Law. These provisions also contradict Article 26 (1) of the Fundamental Law regarding its part requiring that judges may only be removed from their office on grounds and pursuant to procedures specified in a cardinal Act. Additionally, the right to a lawful judge is also deemed to be violated if, due to the above procedure, the judge is removed from the pending cases that have been assigned to the judge in accordance with the rules of case allocation.

[16] 7. In addition to the rules of national security vetting challenged above, the petition also alleged that certain provisions of the closely related review procedure of national

security vetting (hereinafter referred to as the "review procedure") are also in conflict with the Fundamental Law. The Second Amendment Act adopted and introduced new rules to replace the ones annulled in the 2014 Court Decision, including the "review procedure" instead of the annulled "continuous vetting", and the petitioner believes that the application of these rules to judges is problematic. Pursuant to Section 72/B of the National Security Service Act, the review procedure may be applied not during the national security vetting to be carried out in cycles of five years, but within these cycles. The review procedure may be ordered, in case of judges, by the person exercising the employer's rights or, independently, by the director general of the national security service. The vetted person shall only be informed about the review procedure after the completion of the review procedure. As put forth by the petitioner, Article C) (1), Article XXVIII (1) and Article 26 (1) of the Fundamental Law are violated where the director general of the national security service may initiate, without informing in advance the judge or the person exercising the employer's rights, a review procedure (that is, a vetting procedure involving means of intelligence) against the adjudicating judge of the judicial branch of power (who, notably in addition to his or her other adjudicating activity may also approve the secret gathering of intelligence or may use classified data); therefore, he requests the annulment of the vetting affecting judges and the text "or the director general of the national security service having the powers to carry out national security vetting" in Section 72/B (2) *(e)* of the National Security Service Act.

[17] The grounds for initiating the review procedure are also laid down in Section 72/B (2) *(e)* of the National Security Service Act, pursuant to which, as held by the petitioner, the review procedure practically offers an unlimited authorisation to initiate a national security vetting and the content of these new provisions are essentially the same as that of the ones that had been provided under continuous vetting and that were annulled by the 2014 Court Decision. The causes introduced by the Second Amendment Act are "flexible concepts", which are only casually related to national security risks and they may be applied to anyone. These rules continue to be incompatible with the requirements specified by the Constitutional Court in the Reasoning [45] of the 2014 Court Decision. Section 72/B (2) *(ec)* to *(ef)* are not considered to be exactly defined as they contravene the the 2014 Court Decision. This list cannot be regarded to be an exact one, as Section 72/B (2) *(e)* contains the term "in particular", consequently the list that appears to be an exhaustive one is in fact an illustrative list that, which is open to any unlimited extension in the practice. Moreover, these rules of the review procedure are also in conflict with Article I (3) and Article VI (1) of the Fundamental Law.

[18] The petitioner finally sought, on the basis of the same arguments, the review and annulment of Section 72/B (8) of the National Security Service Act, that has the same content as Section 71 (2) *(e)* and (4), but here it is applicable to the review procedure, as he believes this provision to be in conflict with Article XXVIII (1) and Article 26 (1) of the Fundamental Law.

[19] 8. Order 13/2015 (XII. 29.) OBH on the work positions, offices, positions and duties falling within the scope of national security vetting was issued by the president of National Office for the Judiciary after the petition had been submitted. As the order had been issued on the basis of Section 69 (2) (b) of the National Security Service Act, requested in the fourth rank by the petitioner to be reviewed and annulled, the Constitutional Court called upon the petitioner to make a statement. In his reply, the president of the Curia stated to uphold his petition with the same content. According to his reply, the order of the National Office for the Judiciary does not replace the regulation that needs to be of statutory level for reasons of guarantee and the constitutionality of an Act should not depend on the actual content of a normative order issued on a lower level of the hierarchy of sources of law.

[20] 9. The Constitutional Court acquired the written observations from the Minister of the Interior, the Minister of Justice and the president of the National Office for the Judiciary.

II

[21] 1. The provisions of the Fundamental Law affected by the petition read as follows:

"Article B) (1) Hungary shall be an independent and democratic State governed by the rule of law."

"Article C) (1) The Hungarian State shall function based on the principle of the distribution of executive powers."

"Article I (3) The rules relating to fundamental rights and obligations shall be laid down in an Act of Parliament. A fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right."

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

"Article XXVIII (1) In the determination of his or her civil rights and obligations or of any criminal charge against him or her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

"Article 26 (1) Judges shall be independent and shall answer only to the law. Judges shall not be instructed in relation to judicature. Judges may only be removed from office on grounds and according to procedures specified in a cardinal Act. Judges may not be members of political parties and may not engage in political activities."

"Article 46 (3) The fundamental duty of the National Security Services shall be to protect the independence of and maintain law and order in Hungary, as well as to

enforce its national security interests."

[22] 2. The provisions of the National Security Service Act challenged and affected in the petition read as follows:

"Section 69 (1) The persons falling within national security vetting shall be determined in Section 74 *(i)*.

(2) In the scope specified in Section 74 *(i) (in)* and *(io),* the work positions, offices and positions falling within national security vetting (hereinafter jointly referred to as the "work position")

[...]

(b) in case of an employing organisation not supervised by the Government, shall be determined in writing by the leader of the employing organisation in a legal act for the governance of bodies governed by public law, in agreement with the minister supervising the National Security Services having the powers to carry out national security vetting, or, if he or she is not entitled to issue such an act, in an employer's measure issued with the approval of the minister supervising the national security services having the powers to carry out national security vetting."

"Section 70 (1) Unless provided otherwise in this Act, the person entitled to establish the legal relationship that serves as the basis for the national security vetting shall initiate the vetting of the person falling within national security vetting before the establishment of the legal relationship that serves as the basis for the national security vetting. The vetting of judges and of employees under service in justice employed by a judicial body shall be initiated by the person exercising the employer's rights. In the case of a person in prosecutor's service, the Prosecutor General shall initiate the national security vetting.

[...]

(4) No national security vetting shall be initiated with regard to the following persons:

(a) the President of the Republic,

(b) the Prime Minister,

(c) Justices of the Constitutional Court,

(d) the Speaker of the House,

(e) the president of the Curia, the president of the National Office for Judiciary,

(f) the Prosecutor General,

(g) the Commissioner for Fundamental Rights and his deputies,

(h) the president of the National Authority for Data Protection and Freedom of Information,

(i) the Member of the European Parliament elected in Hungary and, unless provided otherwise in this Act, the Member of Parliament, and

(j) the nationality advocate.

(5) Additionally, no national security vetting shall be initiated with regard to a person determined in Section 74 *(i),* who is entitled under an Act to have access to or use classified data without national security vetting."

"Section 71 (1) A legal relationship that serves as the basis for national security vetting, unless provided otherwise in this Act, shall be established only after carrying out a national security vetting, in case the national security vetting has not identified any national security risk.

(2) The legal relationship that serves as the basis for the national security vetting may also be established before carrying out the national security vetting, if

[...]

(e) in case of judge, employment under service in justice, the court superior who exercises the right of appointment over the person exercising the employer's rights, in the absence of such a superior, the president of the National Office for the Judiciary,

[...]

(4) If the national security vetting established a national security risk, the legal relationship that serves as the basis for the national security vetting can only be established or maintained when its establishment or maintaining is approved by the entity, person or body specified in paragraph (2) and (3)."

"Section 72/B (2) A review procedure may be carried out, if
[...]

"(e) with regard to the person employed in the relationship that serves as the basis for the national security vetting, the person entitled to initiate the national security vetting or the director general of the national security service acquires knowledge of a circumstance that refers to a national security risk in particular as follows:

(ea) if a criminal procedure or an infraction procedure because of an infraction punishable with custodial arrest has been started against the vetted person or his or her close relative as defined in the Civil Code,

(eb) any substantial change that occurred in the circumstances related to foreign persons, organisations or foreign interests of the vetted person or his or her close relative as defined in the Civil Code,

(ec) obtaining foreign nationality, foreign passport,

ed) consuming narcotics, alcoholism, conduct disorders related to consuming alcohol,

(ee) significant indebtedness compared to the verifiable income, significant negligence of performing financial obligations, significant increment of property from unknown source, leading a way of life that cannot be financed from the verifiable income,

(ef) violation of the rules applicable to processing classified data, using security technology systems or of the security rules related to filling the work position.

[...]

(8) If the national security service establishes a national security risk during the national security vetting, the legal relationship that serves as the basis for the national security clearing shall not be established or it shall be terminated without delay, unless the person, entity or body specified in Section 71 (2) or (3) has approved the establishment or the maintaining of the legal relationship."

"Section 74 For the purposes of this Act,

[...]

(g) relationship of employment: relationship of judicial service, service in justice, prosecutor's service, professional service, the service of professional and contracted soldiers, public service, government service, state service, public employee relationship, labour relationship, and other legal relationship aimed at employment;

[...]

(i) the person falling within national security vetting:

(in) who is in an employment relationship or in a contractual relationship based on the provisions of the Civil Code with an entity processing classified data specified in the Act on the Protection on Classified Data, and in relation to this legal relationship he or she is exposed to a greater extent to intentions of unlawful influence, concealed attack or threat;

(io) who is entitled to have access to or use data classified as "Confidential!", "Secret!" or "Top Secret!" according to the Act on the Protection on Classified Data, based on his or her employment relationship or a contractual relationship based on the provisions of the Civil Code;"

[23] 3. The provision of Classified Information Act affected in the petition reads as follows:

"Section 13 (5) Unless provided otherwise in an Act, the judge shall be entitled to exercise the rights of disposal necessary for the consideration of the cases allocated to him or her according to the rules on case-allocation without a national security vetting,

Personal Security Clearance, confidentiality declaration or user licence."

III

[24] The petition submitted by the president of the Curia is well-founded.

[25] 1. The Constitutional Court first held that the petition for ex post norm control sent by an entitled party [Article 24 (2) *(e)* of the Fundamental Law] complies with the requirement of explicitness under Section 52 (1b) of the Constitutional Court Act; therefore, the Court decided on the merits of the petition as follows.

[26] 2. The Constitutional Court examined Section 74 *(g)* of the National Security Service Act primarily challenged in the petition, together with its closely related regulatory environment, with particular regard to the persons, who, regarding the organisational system of courts, may become subject to national security vetting, or who may initiate such procedure.

[27] Section 74 *(g)* of the National Security Service Act was introduced into the system of the National Security Service Act by the First Amendment Act. The provision that has been in force since 1 August 2013, defines the content of "employment" among the "Interpretative provisions" [Sections 74 to 75] of the National Security Service Act. Pursuant to Section 74 *(g)* of the National Security Service Act, for the purpose of the application of the National Security Service Act, employment is a relationship of judicial service, service in justice, prosecutor's service, professional service, the service of professional and contracted soldiers, public service, government service, public employee relationship, labour relationship, and other legal relationship aimed at employment". The Constitutional Court noted during deciding in the present case that the legislator extended Section 74 *(g)* of the National Security Service Act after the submission of the petition. With effect as of 1 July 2016, "State service" has been introduced into the list under Section 74 *(g)* of the National Security Service Act by Section 23 of the Act LXIV of 2016 on amending certain Acts in the context of the taking force of Act LII of 2016 on State Officials. This change, however, does not influence the procedure of the Constitutional Court.

[28] There are altogether seven definitions in the "interpretative provisions" of the National Security Service Act. They provide definitions of the concepts of national security interest, State body, flat, family member, company vetting, employment relationship and the person falling within national security vetting. The role and the importance of an interpretative provision may also be determined by the frequency it is used in the relevant statutory regulation or referred to in other provisions of the Act. The term "employment" is used in the National Security Service Act in only three places: Section 71/D (2) and Section 74 *(in)* and *(io)*. The latter two provisions are also among the interpretative provisions of the National Security Service Act, Section 74 *(i)*

defines the scope of persons falling within national security vetting. In accordance with Section 74 *(in),* a person falling within national security vetting is the one "who is in an employment or in a contractual relationship based on the provisions of the Civil Code with an entity processing classified data specified in the Act on the Protection on Classified Data, and in relation to this legal relationship he or she is exposed to a greater extent to intentions of unlawful influence, concealed attack or threat". Pursuant to Section 3 point 4 of Classified Information Act, the body processing classified data is "a body, organisation, or organisational unit as well as a business entity engaged in processing classified data for the purpose of performing a duty of the State or public duty". This definition contains the courts as well.

[29] Due to the inclusion, by Section 74 *(g)* of the National Security Service Act, of judicial service within "employment" as well as the inclusion of courts among the "bodies processing classified data" as defined in Section 3 point 4 of Classified Information Act, Section 74 *(in)* of the National Security Service Act may also be interpreted in relation to the judicial branch of power, the organisational system of courts, that, practically all, persons in judicial service are subject to national security vetting provided that they are exposed to a greater extent to intentions of unlawful influence, concealed attack or threat.

[30] By using the same concepts, one may also establish that under Section 74 *(io)* of the National Security Service Act, the person who is in judicial service and who is entitled to have access to or use data classified as "Confidential", "Secret" or "Top Secret" shall also fall within national security vetting.

[31] In the system of the National Security Service Act in force, Section 74 *(in)* and *(io)* presented above generalised the national security vetting of judges in principle, therefore in the review of the current regulatory environment the Constitutional Court paid special attention to the assessment if there are exceptions and exemptions from this general rule in the National Security Service Act or in any other law, and whether they are broad or indeed narrow ones.

[32] Pursuant to the second sentence of Section 70 (1) of the National Security Service Act, the person exercising the employer's rights shall initiate the national security vetting of the judge. In accordance with Section 99 (1) of Act CLXII of 2011 on the Legal Status and the Remuneration of Judges (hereinafter referred to as the "Act on the Legal Status of Judges"), the person exercising the employer's rights is the president of the Curia (in case of a judge of the Curia), the president of the regional court of appeal (in case of a judge of the regional court of appeal), the president of the court of law (in case of judges of the district court, the court of law or of the administrative and labour court), or the president of the National Office for the Judiciary in the case of the court superiors appointed by her. If the person entitled to initiate the national security vetting cannot be identified, the head of the National Security Authority shall initiate it on the basis of Section 70 (3) of the National Security Service Act.

[33] Section 70 (4) of the National Security Service Act contains an exhaustive list

concerning the offices where no national security vetting is to be initiated. The exceptions include MPs, but only the president of the Curia and the president of National Office for the Judiciary are exempted among the judges. Section 70 (5) of the the National Security Service Act provides another exception from national security vetting. In accordance with this provision, "additionally, no national security vetting shall be initiated with regard to a person determined in Section 74 (*i*), who is entitled under an Act to have access to or use classified data without national security vetting." As the general national security vetting of judges is allowed by items *(in)* and *(io)* in Section 74 *(i)* of the National Security Service Act, the rule of exception provided in Section 70 (5) of the National Security Service Act could possibly be applicable to judges as well. Moreover, as the latter provision uses the term "an Act" instead of "this Act", other laws in addition to the National Security Service Act may also contain provisions on exceptions. As applied to judges, it means at least that the provision of the National Security Service Act and of another Act may also establish an exemption from national security vetting, if it provides access to or use of classified data for the judge without national security vetting. Section 13 (5) of Classified Information Act contains a conceptually similar provision of exception. Pursuant to it, "unless provided otherwise in an Act, the judge shall be entitled to exercise the rights of disposal necessary for the consideration of the cases assigned to him or her according to the rules on case-allocation without a national security vetting, Personal Security Vetting, confidentiality declaration or user licence". However, the Act orders the other way round, as presented above.

[34] To sum up: Section 74 *(in)* of the National Security Service Act [interpreted jointly with Section 74 *(g)* of the National Security Service Act and Section 3 point 4 of Classified Information Act] provides a possibility for, though not directly, but by way of interpreting the law, making the national security vetting of all the judges the general rule. An exception from the above is provided by Section 70 (5) of the National Security Service Act, but it makes further reference to other legal provisions. With regard to courts, this "other" legal provision is Section 13 (5) of Classified Information Act. However, with the clause "unless provided otherwise in an Act", Section 13 (5) of Classified Information Act necessarily refers back to the provisions of the National Security Service Act as they do provide otherwise. This way, although in principle the National Security Service Act provides a possibility for exceptions from the general rule and indeed there is such an exception regulated in an Act of the relevant field, since the latter refers back to the National Security Service Act, in fact there is *no exception provided at the level of an Act* from the general rule: pursuant to the statutory regulations in force, all judges could become subject to national security vetting.

[35] The system of the National Security Service Act contains one more rule that could also be regarded as an exception. Pursuant to Section 69 (1) of the National Security Service Act, the persons falling within national security vetting shall be determined in Section 74 (*i*). However, in the scope specified in Section 74 *(i) (in)* and *(io),* in accordance with Section 69 (2) of the National Security Service Act, the work positions,

offices and positions falling within national security vetting shall be determined in a regulation under Section 69 (2) *(a)* in the case of bodies supervised by the Government, and, pursuant to Section 69 (2) (b), in a legal act for the governance of bodies governed by public law or in an employer's measure in the case of an employing organisation not supervised by the Government. Regarding the court system, Section 69 (2) (b) of the National Security Service Act is applicable, according to which "in the case of an employing organisation not supervised by the Government" the work positions, offices and positions falling within national security vetting "shall be determined in writing by the leader of the employing organisation in a normative decision or order, in agreement with the minister supervising the National Security Services having the powers to carry out national security vetting". On the basis of this authorisation, the president of the National Office for the Judiciary adopted Order 13/2015 (XII. 29.) OBH, which entered into force on 1 January 2016. P to Section 2 (3) of this National Office for the Judiciary order, only the presidents of the regional courts of appeal and of courts of law, and their deputies, appointed by the president of the National Office for the Judiciary, as well as the investigating magistrates shall fall under national security vetting.

[36] The Constitutional Court notes that it had already reviewed in the 2014 Court Decision a provision similar to Section 69 (2) (b) of the National Security Service Act, and the Court did not find it to be contrary to the Fundamental Law {2014 Court Decision, Reasoning [50] to [58]}. The content of Section 69 (4) (b) of the National Security Service Act that was in force at the time of its review in the 2014 Court Decision was almost identical to that of Section 69 (2) (b) currently in force.

[37] As explained above, the Constitutional Court established that the term "employment" defined among the interpretative provisions is only used in the Act on limited occasions. The Constitutional Court then provided an overview of the current provisions, seeking an answer to the question whether the legislator had made a reference to the concept of "employment relationship" by using the terms of "employer" or “employee". Nevertheless, it had to conclude after this review that only Section 69 (2) (b) of the National Security Service Act uses such a terminology, as presented above, by providing relevance to the concept found under Section 74 (g).

[38] After the assessment of the regulations in force of the National Security Service Act, the Constitutional Court establishes that the primary and almost only role of the term "employment" defined in Section 74 *(g)* of the Act is to determine and clarify the scope of interpretation of Section 74 *(in)* and *(io)*. It can also be established on the basis of the above that the text " judicial service" in Section 74 *(g)* of the National Security Service Act allows, through Section 74 *(in)* of the National Security Service Act, as the general rule, to draw all and any judge under national security vetting. The Constitutional Court then considered the content of national security interest and the petitioner's concerns related to judicial independence.

[39] 3. Pursuant to Article 46 (3) of the Fundamental Law, the fundamental duty of the

National Security Services shall be to protect the independence of and maintain law and order in Hungary, as well as to enforce its national security interests. Article 46 (4) provides that the operation of the National Security Services shall operate under the direction of the Government. The importance of this field of law is marked by the fact that the Fundamental Law requires a cardinal Act to regulate the detailed provisions concerning the organisational structure and operation of the National Security Services, the rules for using secret service means and methods, as well as national security activities.

[40] Pursuant to the preamble to the Act, the National Assembly adopted the the National Security Service Act in order to ensure the sovereignty and constitutional order of Hungary and the constitutional operation of the National Security Services. The current concept of "national security interest" has been introduced into the system of the National Security Service Act by Section 28 of the Act CCVII of 2011 on Amending Certain Acts on Law Enforcement and on Further Related Amendments of Acts. Pursuant to Section 74 *a)* of the National Security Service Act:

"*(a)* national security interest: protecting the independence of and maintain law and order in, Hungary, including

(aa) the detection of any endeavours with offensive intentions against the independence and territorial integrity of the country,

(ab) detection and warding off of any concealed endeavours interfering with or threatening the political, economic, and defence interests of the country,

(ac) acquisition of information on foreign countries or of foreign origin required for government decisions,

(ad) detection and warding off of any concealed endeavours aimed at the alteration or disturbance with unlawful means of the lawful order of the country ensuring the exercising of fundamental human rights, the democracy of representation based on a multi-party system, and the operation of institutions based on the law, and

(ae) detection and preventing of acts of terrorism, illegal arms and drug trafficking, as well as the illegal circulation of internationally controlled products and technologies".

[41] It should be noted that the Constitutional Court has already established in its earlier Decision 2/2014 (I. 21.) that "national security interest" as specified in Section 74 *(a)* of the National Security Service Act should not be regarded as an undefined legal concept (Reasoning [52]).

[42] The Constitutional Court also emphasises in the context of the present case that the protection of national security interests is not only a constitutional objective; it is also the duty of the State. The sovereignty of the country and its constitutional order laid down in the Fundamental Law are fundamental values necessary for the operation of a democratic State under the rule of law. The enforcement of the country's sovereignty, the safeguarding of its political, economic and defence interests, detecting and

warding off the activities that violate or threat the sovereignty or the constitutional order are obligations of the State that are directly derived from the Fundamental Law {Decision 26/2013 (X. 4.) AB, Reasoning [144]}.

[43] National security tasks cover a much broader spectrum than law enforcement tasks as they do not primarily assess the reality according to the criminal law relevance of the events and they do not necessarily imply consequences under criminal procedure. The safeguarding of the country's independence, the detection and the averting of the attempts to commit certain acts that bear relevance with relation to protecting the country's law and order are usually outside the scope of specific criminal offences {Decision 32/2013 (XI. 22.) AB, Reasoning [105]}. The Constitutional Court acknowledges in the present procedure as well that the legislator may prescribe compliance with the requirements of national security as a precondition of performing certain activities of the State, filling certain work positions, thus protecting the democratic State governed by the rule of law, society and its values.

[44] As declared in Order 3142/2014. (V. 9.) AB of the Constitutional Court on national security interest restricting access to data of public interest, "it is within the competence of the Constitutional Court to establish (interpret) the limits of the national security interest, identified as the basis for the restriction, of the rights of others and of the discretionary power." (Reasoning [22]) The existence of a national security risk may endanger national security interests. With regard to Decision 26/2013 (X. 4.) AB establishing that "the risk to national security interest and the necessity to restrict constitutional fundamental rights in the interest of protecting them are also conceivable at the necessarily abstract levels of legislation and constitutional review" (Reasoning [143]), the Constitutional Court then had to implement the weighing between the alleged or real national security interest and the violation of the fundamental rights claimed by the petitioner, and resolve their relation pursuant to the requirements of the rule of law.

[45] 4. The Constitutional Court first unfolded in the 2012 Court Decision the content of the rule of interpretation specified in Article R) of the Fundamental Law; as the primary subject of that decision was actually the status of judges, the reiteration of what has been established there bears a special significance in the present case.

[46] Acknowledging that the Acts that constituted the civil transformation of the society in the 19th century form part of the historical constitution is a minimum element of the consolidated interpretation of the Hungarian historical constitution. These were the Acts that established, after not insignificant antecedents, the firm foundations upon which the modern State governed by the rule of law is built. Accordingly, when the Fundamental Law "opens a window" on the historical dimensions of our public law, it makes us focus on the precedents of institutional history, without which our public law environment of today and our legal culture in general would be rootless (2012 Court Decision, Reasoning [75]).

[47] In Hungary, the process towards securing the independent adjudicating activity of the

judges started with laying down the principle of the irremovability of judges, the separation of the judiciary and the public administration. Act IV of 1869 on exercising judicial power contained the following provision: the judiciary shall be separated from public administration, thus neither the administrative nor the judicial authorities may interfere with each other's competences; professional judges were appointed by the king with the counter-signature of the minister of justice. A lawfully appointed judge shall not be removed from office with the exception of the cases and the ways specified in the Act, and he may only be transferred, to another court or office, or even to be promoted, in the cases specified in the Act or upon his own will. These provisions contain the most important elements considered as the guarantees of judicial independence; on the personal side, the rules on appointment, discharge, removal from office or transfer, and promotion; on the organisational side, the separation of the scopes of competence (2012 Court Decision, Reasoning [77]).

[48] With regard to the provisions of Act IV of 1869 and the Act of 1871, the Constitutional Court established that these sources of law represent at the same time the complete historical honour paid to the status of judges and the determined and specific normative content strongly required under the attitude of the civil State governed by the rule of law. In this respect, the Constitutional Court acknowledged, as an achievement of our historical constitution, the legislator's humble attitude presented towards the members of the judiciary who, since 1869, have filled an independent "stately" status. However, with regard to the present case, the most important statement made in the 2012 Court Decision is the following: "[the] principle of judicial independence, with all of its elements, is an achievement beyond doubt. Therefore the Constitutional Court establishes that judicial independence, and the resulting principle of irremovability, is not only a normative rule of the Fundamental Law, but also an achievement of the historical constitution. Thus it is an interpreting principle obligatory to everybody, based on the provisions of the Fundamental Law, and which is to be applied also in the course of exploring other potential contents of the Fundamental Law. (2012 Court Decision., Reasoning [80]). After adopting the 2012 Court Decision, the Constitutional Court has consistently maintained and reinforced that the institution of judicial independence and its safeguards are exemplary achievements of our historical constitution {*See* Decision 25/2013 (X. 4.) AB, Reasoning [26].; Order 3015/2014 (II. 11.) AB, Reasoning [26]; Decision 21/2014 (VII. 15.) AB, Reasoning [35]; Decision 2/2016 (II. 8.) AB, Reasoning [32].} In deciding on the petition of the Curia's president for *ex post* norm control, the Constitutional Court used the above statements of principle as a point of departure and judged upon the petition in the spirit of the foregoing considerations.

[49] Judicial power, separated from the legislative and executive powers in the Hungarian parliamentary democracy, is a manifestation of State power that decides with binding force, through an organisation dedicated for this purpose, about the law disputed or breached, in the course of a procedure regulated in an Act {Decision 3242/2012 (IX. 28.) AB, Reasoning [11]}. In the interpretation of the Constitutional Court, the

independence of the judiciary enjoys a prominent role in the constitutional system of the separation of powers. Stability, neutrality and continuity are the most significant features of judicial power in contrast with the two other branches of power that have a "political" character. Thus the courts are not placed in a mutual inter-determination and interdependence with the other branches of power, as those are with each other. Guaranteeing the independence of judges cannot be identified with separating the judicial power from the two other branches of power, it is a broader issue that has to be addressed within the organisation of the courts as well. While ensuring the limitation of the executive power is justified and constitutionally necessary both through the establishment of the institutions of parliamentary control and by way of the general application of judicial control over public administration, any external interference with the judicial power should face more severe constitutional limitations based on fundamental principles of guarantee. Judicial power should be independent from the political determination of the two other branches of power and from their changes; this requirement shall exclude any influence from the two other branches of power over the adjudicating activity of the courts.

[50] In this scope, the Constitutional Court refers to the following. Section 1 of the National Security Service Act lists the National Security Services of Hungary: the Intelligence Office, the Constitution Protection Office, the Military National Security Service, the Special Service for National Security and the Counter-terrorism Information and Criminal Analysis Centre. Four of these five National Security Services perform national security vetting on the basis of Section 4 *(g),* Section 5 *(f),* Section 6 *(r)* and Section 8 *(f)* of the National Security Service Act. Pursuant to Section 12 (1) of the National Security Service Act, National Security Services are headed by directors general appointed and dismissed by the Prime Minister upon the minister's proposal. Section 10 of the National Security Service Act and Annex 1 of the Government Decree 152/2014. (VI. 6.) Korm on the Tasks and Powers of the Members of the Government specify the minister supervising the National Security Services. Pursuant to Section 21 point 21 of the latter decree, the minister of the interior is the member of the Government responsible for the supervision of civil national security services. The affected ministers, among others, control the lawful and appropriate operation of National Security Services and the implementation of their tasks. The minister shall submit a proposal to the Prime Minister on appointing and dismissing the directors general and, with the exception of appointment and dismissal, he or she shall exercise the employer's rights over the director general. The deputies of the director general shall be appointed and dismissed by the minister and he or she shall exercise the employer's rights over them.

[51] The Constitutional Court also pointed out that the separation of powers does not mean, at the same time, the nature of the branches of powers subject to no restriction. Indeed, it is the essence of democratic State organisations that the different branches of powers also function as limitations on each other. Accordingly, the judicial power enjoys rights that restrict the executive and vice-versa. However, even if constitutional justifications do exist, the enforcement of any external authoritative power affecting

the judiciary shall only be allowed and accepted as constitutional if it does not impair the independence of justice.

[52] As laid down in an earlier decision of the Constitutional Court, "the enforcement of the separation of powers and the independence of judges shall not be guaranteed by the lack of connections between the judicial system and the two other branches of power, the *»non-governmental«* organisations and other actors of the political and social system. From this point of view, it is important to note that the constitutional principle of the independence of judges applicable to the activity of adjudication is not identical to the independence of the court structure that provides a framework for the function-specific activity of courts. The public authority activity of the independent judicial power materialises in performing judicial tasks {Decision 13/2013 (VI. 17.) AB, Reasoning [61]}. In this decision, the Constitutional Court also explained that the existence of a constitutional issue could indeed be considered, if there was a unilateral shift of power to the detriment of the judges and to the benefit of other branches of power.

[53] Judges enjoy a privileged position not only in the system of the branches of power. Judicial service enjoys enhanced constitutional protection compared to other public service. The constitutional protection of judicial service results not only from the right to hold a public office but also from Article 26 (1) of the Fundamental Law. Pursuant to this provision of the Fundamental Law, judges shall be independent and only subordinated to the law. The independence of judges is the most important guarantee of the judiciary's independence.

[54] The Constitutional Court attributed great importance to the organisational and status-related guarantees in the guarantee-system of judicial independence. The institutional protection of judicial independence and autonomy by way of safeguarding laws is an unquestionable value, as an important guarantee of the enforcement of human and civil rights as well as of the rule of law. { 2012 Court Decision, Reasoning [82] and [83]} The Fundamental Law, Act CLXI of 2011 on the Organisation and Administration of Courts (hereinafter referred to as the "Act on Court Organisation") and the Act on the Legal Status of Judges, overlapping and supplementing each other at the points of connection, provide a triple safeguarding system that excludes the limitation of the sovereignty of the judicial power.

[55] The Constitutional Court emphasised several times that the judicial branch of power enjoys a prominent position in the system of the State and it is also a consistent position taken by the Court that the adjudicating activity of the judges being free from any external influence, originating from judicial independence, is an unconditional requirement and it is essentially under absolute constitutional protection. In line with the consistent case-law of the Constitutional Court, guarantees of status and of the organisation are necessary for the independence of the decision-making. Judges have to be independent from everybody, including other judges {Decision 13/2013 (VI. 17.) AB; Reasoning [117] and [118], [125]}. Judicial power is represented by judges who are

independent of each other as well.

[56] Financial independence is one of the aspects of independence. In structural terms it means that pursuant to Section 4 of Act on Court Organisation, courts form an independent budget chapter in the Act on the Central Budget, within which the Curia is under a separate title. In addition to the above, pursuant to Section 86 (1) of the Act on Court Organisation, National Office for the Judiciary is a central budgetary institution with independent economic management. With regard to the individual judges, material independence is manifested in the right of the judges, pursuant to Section 35 (4) of the Act on the Legal Status of Judges, to receive remuneration proportionate to the dignity of their office and to the weight of their responsibility, securing their independence. The Act on the central budget determines each year the base remuneration of judges and its amount shall not be less than the previous year's.

[57] 5. Similarly to the arguments explained in the 2014 Court Decision (Reasoning [23] to [32]), the Constitutional Court's point of departure was that the purpose of vetting is to reveal circumstances that classify as national security risks concerning the affected person, before or during his or her appointment, and to allow the appointing person to decide about the appointment (or about the continuation of employment) in the possession of this knowledge. One should emphasise that the vetting concerned does not serve the purpose of law enforcement; it is a risk assessment procedure and the reason of it is not a suspicion, attempt of or the preparation to a criminal offence (if the law orders to punish the latter).

[58] Vetting begins with filling in a questionnaire containing almost fifty questions (*see* annex 2 to the National Security Service Act). In addition to personal data, it requires information, among others, about any foreign connection of the spouse's interest and whether there has been any criminal, contravention, disciplinary or compensation procedure started against the person subject to the vetting or against his or her spouse (unmarried partner). It also requires information about any adultery or homosexual relation, habits of consuming alcohol or drugs, participation in a rehabilitation treatment programme concerning alcohol or drugs, and the person has to indicate his or her knowledge of any risk factor due to which he or she could be blackmailed. To verify the information provided on the data sheet, three persons, not family members, shall be indicated, who can provide an objective opinion about the cleared person. Some of the questions refer to circumstances the existence of which in itself can even substantiate a conduct that qualify as a criminal offence, e.g. trafficking in illegal drugs, contact with subversive organisations. Then the staff members of National Security Services prepare an environmental study, with open and with operative means (interception, surveillance), about the person. The vetting shall cover the complete connection network of the vetted person. One of the methods of vetting is verifying the data indicated in the security questionnaire by way of cross-checking the supporting data in registries, data processing systems, data files, while the other method is secret gathering of intelligence. The latter could be means not linked to external approval (*see* more in the 2014 Court Decision, Reasoning [38]) or means

linked to judicial or ministerial approval (*see* more in the 2014 Court Decision, Reasoning [39]).

[59] The person working in a position that falls within the vetting may be intercepted or monitored during the vetting; this may affect all the persons the judge is connected to, for example his or her family members, but in a given case it may also involve his or her colleagues working at the court and it shall necessarily affect the information related to the cases allocated to the judge who is engaged in adjudicating activity. Pursuant to Section 50 (1) of the National Security Service Act, National Security Services may take over from the registries of the bodies authorised for data processing and process the data created during the performance of the duties of national security vetting for 20 years from the termination of the position or office.

[60] In Decision 31/2003 (VI. 4.) AB, the Constitutional Court reviewed several provisions of Act XXIII of 1994 on the Lustration of Persons Holding Certain Important Positions and Positions of Public Trust as well as Influencers of Public Opinion. In this decision, the Constitutional Court examined for the third time the important provisions of the Act, including the constitutional issues of the scope of persons to be vetted. One of the elements of the petition was aimed at establishing that the National Assembly had been in a breach of the Constitution through omission by not regulating, not prescribing in an Act the national security vetting of all judges and prosecutors, thus violating the right to a, independent and impartial, judicial way enshrined in Article 57 (1) of the Constitution. Sections 67 to Section 72 of and, Annex 2 to, the National Security Service Act in force at the time (containing the rules of national security protection and vetting as well as the determination of persons holding important and confidential positions) did not provide for the national security vetting of all judges and prosecutors. After an examination on the merits of the case, the Constitutional Court established in that decision that "[o]n the basis of the aims and the subject matter of the Security Services Act, as well as its rules on the scope of concerned persons, it can be established that the fundamental right to take legal action does not entail a constitutional requirement to make all judges and public prosecutors subject to a national security vetting" [Decision 31/2003 (VI. 4.) AB, ABH 2003, 372.].)

[61] 6. Pursuant to the Constitutional Court's interpretation, the protection of national security interests is a constitutional objective and at the same time it is the duty of the State. One of the objectives of national security vetting is to detect the potential existence of risk factors in the case of activities of primary importance for the security of the society and for law and order, and in relation to the persons being candidates for or holding important and confidential positions and engaged in such activities, provided that the activity of these persons may become subject to unlawful influence or attacks by the utilisation of such risk factors. Accordingly, the purpose of vetting is to detect any external influence over the activity of the person concerned related to the legal relationship falling within the national security vetting, or whether the person concerned may or have become influenced on the basis of his or her circumstances.

[62] One may establish in the context of the national security vetting of judges that it affects both the fundamental right to the respect of privacy and judicial independence and the resulting irremovability of judges.

[63] Judges perform their judicial activities and the administrative activities that secure their autonomy as the members of the court structure and of the judicial branch of power that forms part of the state structure. They are obliged by the Fundamental Law and by Acts to perform judicial activities independently that may be influenced by the circumstances to be examined during a national security vetting. The risk factors potentially detectable in the scope of the national security vetting should also be taken into account with regard to the administrative activities of judges. Nevertheless, the constitutionally assessable purpose of national security vetting is the exploring of national security risks. These aspects may form a legitimate and constitutional value justifying the restriction of privacy and the requirement for judicial independence and the resulting irremovability of judges. Thus the national security vetting of judges is not, in itself, against the Fundamental Law.

[64] The justification of the exemption in principle of all judges from the obligation of national security vetting does not result directly from the provisions of the Fundamental Law. However, there is no national security interest resulting directly from Article 46 (1) of the Fundamental Law that would constitutionally justify the requirement of the national security vetting of all judges. The constitutionality of the limitation and its compliance with the Fundamental Law could only be secured by a statutory regulation, duly balancing between the enforcement of private interests, national security interests and the independence of judges, that clearly determines the scope of judges falling within national security vetting by taking into account who those judges who act in sensitive cases or serve in sensitive positions concerning national security are.

[65] 7. Based on the above arguments, the Constitutional Court establishes that the text "judicial service" in Section 74 *(g)* of the National Security Service Act is in conflict with Article 26 (1) of the Fundamental Law as in the current legislative environment it makes the potential national security vetting of all judges the general rule, which is contrary to the principle and the requirement of judicial independence, therefore the Court annulled the text "judicial service" in Section 74 *(g)* of the National Security Service Act. In the course of drawing the legal consequences, the Constitutional Court established that partial annulment is explicitly possible with due account to the context of the wording and the practical applicability of the Act.

[66] Pursuant to the general rule laid down in Section 45 (1) of the Constitutional Court Act, the annulled legal regulation shall cease to have effect on the day after the publication of the Constitutional Court's decision on annulment in the Hungarian Official Gazette and shall not be applicable from that day. The Constitutional Court may, however, pursuant to the Constitutional Court Act and the established case-law, deter from this rule, if the protection of the Fundamental Law, the legal certainty or a particularly

important interest of the petitioner justifies it.

[67] It is a precondition of *pro-futuro* annulment that the calculable operation of the legal order should be secured until putting into force the new law, and that provisionally maintaining the force of a law in conflict with the Fundamental Law should pose less risk to the integrity of the legal order than the immediate annulment. Since the constitutional re-regulation of the provisions annulled in this decision poses a legislative duty on the Parliament, and as the examined provisions of the the National Security Service Act attempt to regulate different situations of life, the Constitutional Court holds that the immediate annulment of the rule examined in Chapter III would cause legal uncertainty, thus maintaining in force the text ordered to be annulled poses less risk to the integrity of the legal order and the to the application of the law, therefore the text "judicial service" in Section 74 *(g)* of the National Security Service Act, with regard to Section 45 (4) of the Constitutional Court Act, shall be annulled as of 29 June 2018.

[68] In his primary request, the petitioner alleged a conflict with the Fundamental Law not only in respect of Section 74 *(g)* of the National Security Service Act but he also initiated the annulment of the text "judge and" in the second sentence of Section 70 (1). The petitioner holds the latter provision to be in conflict with Article B) (1) of the Fundamental Law (*see* point I.2.2., Reasoning [11]). In the opinion of the Constitutional Court, the petitioner's arguments in this respect do not comply with the statutory criteria related to the explicitness of the request; therefore, it dismissed this part of the petition pursuant to Section 64 *(d)* of the Constitutional Court Act.

[69] As the Constitutional Court established that the text "judicial service" in Section 74 *(g)* of the National Security Service Act was contrary to the Fundamental Law, the Court has not reviewed the related requests of the secondary, tertiary and fourth order.

IV

[70] 1. The petitioner also claimed that Section 71 (2) *(e)* and Section 71 (4) of the National Security Service Act were in conflict with the Fundamental Law due to their applicability to judges. Pursuant to the petitioner, the challenged legal provisions violate the right to a lawful judge as well as judicial independence and the requirement of the irremovability of judges as a part of the latter.

[71] As provided in Section 71 (4) of the National Security Service Act: "if the national security vetting established a national security risk, the legal relationship that serves as the basis for the national security vetting can only be established or maintained when its establishment or maintaining is approved by the entity, person or body specified in Subsections (2) and (3)." Section 71 (2) and (3) of the National Security Service Act provide the specific definition of the latter entity, person or body. Pursuant to Section 71 (2) *(e)* of the National Security Service Act: "the legal relationship that serves as the basis for the national security vetting may also be established before carrying out the national security vetting, if [...] in case of a judge, employment under service in justice,

the court superior who exercises the right of appointment over the person exercising the employer's rights, in the absence of such a superior, the president of the National Office for the Judiciary" approves to it.

[72] The petitioner believes that the rules quoted above are in conflict with the Fundamental Law due to their applicability to judges. As applied to judges, these rules mean that "if the national security vetting establishes a national security risk, the legal relationship that serves as the basis for the national security vetting can only be [...] maintained when it is approved by the court superior who exercises the right of appointment over the person exercising the employer's rights, in the absence of such a superior, the president of the National Office for the Judiciary." The Constitutional Court had to consider the constitutionality of this regulation.

[73] 2. Prior to determining the constitutionality of not maintaining the judicial service due to establishing a national security risk, the Constitutional Court provided a brief overview of the regulations on establishing judicial service, the main rules on the appointment of judges.

[74] Only the most important rules pertaining to the courts can be found in the Fundamental Law. Pursuant to Article 9 (3) *(k)* and Article 26 (2) of the Fundamental Law, professional judges are appointed by the President of the Republic, as regulated a cardinal Act. A special rule can be found in Article 25 (6) and Article 26 (3) of the Fundamental Law, providing that the president of the National Office for the Judiciary and the president of the Curia shall be elected by the National Assembly from among the judges on a recommendation made by the President of the Republic. In Decision 13/2013 (VI. 17.) AB, the Constitutional Court provided a detailed examination of the appointment procedure of judges and court executives where it established that "the constitutional status of the judge to be appointed is the basis for determining the constitutional requirements that can be raised in respect of the procedure of appointing judges (as well as of the preparatory applications and other procedures). Pursuant to the Fundamental Law, judges are independent and they shall answer only to the law, they may not engage in political activities and they can only be removed in exceptional cases [Article 26 (1) of the Fundamental Law]. The clear purpose of the appointment procedure is that the President of the Republic should appoint persons who are suitable for holding the office of a judge [Article 26 (2) of the Fundamental Law]". (Reasoning [173])

[75] The regulated procedure of the applications and of the appointment as well as the appointment by the President of the Republic as granted in the Fundamental Law provide a high level of legitimacy and it is more than of symbolic importance that the neutral judicial power is vested in the judge by way of an appointment received from the neutral President of the Republic.

[76] 3. Detailed provisions on the court structure and on the status of judges may be regulated in cardinal Acts as required under Article 25 (7) and Article 26 (1) and (2) of the Fundamental Law. The cardinal regulations required in the Fundamental Law can

be found in the Act on the Legal Status of Judges and the Act on Court Organisation. Judges are appointed by the President of the Republic, judicial service is established by virtue of this appointment. [Section 3 (1) and (2) of Act on the Legal Status of Judges] Act on the Legal Status of Judges provides the list of the conditions of appointment and it also enumerates the grounds that preclude the appointment [Section 4 of Act on the Legal Status of Judges]. The most important condition of a judicial appointment is a successful application process and the Constitutional Court has reviewed several times the set of its regulations, even after the entry into force of the Fundamental Law. Judicial appointments are in principle for indefinite term and the appointed judge shall enjoy the same immunity as MPs have [Section 23 and Section 2 (1)]. In the individual aspect of judicial independence the Act on the Legal Status of Judges and the Act on Court Organisation have a prominent role as they regulate the relationship of judicial service for the purpose of guaranteeing freedom of the judicial status necessary for the uninfluenced adjudicating activity. {Similarly in 2012 Court Decision, Reasoning [84]}

[77] Although pursuant to the Fundamental Law the detailed regulations on the legal status of judges are to be regulated in a cardinal Act, including the rules on establishing and terminating the judicial office, the Fundamental Law provides a specific provision, embedded in the rules on judicial independence, that "judges may only be removed from office on grounds and pursuant to procedures specified in a cardinal Act." This way, the Fundamental Law itself considers irremovability from office to be an element not only of the legal status of judges, but also of judicial independence {the 2012 Court Decision, Reasoning [86]}.

[78] 4. Pursuant to Section 89 of the Act on the Legal Status of Judges, judicial service shall terminate on the following grounds: the death of the judge, dismissal by the President of the Republic, the expiry of the definite period in case of the judge appointed for a definite period, provided that the judge does not request appointment for indefinite term or if the judge is found unsuitable for such appointment.

[79] The termination of judicial service shall be the result of dismissal; pursuant to Section 98 of the Act on the Legal Status of Judges. "The termination of judicial service shall be established in the dismissal". This act of public law is separated from the actual grounds that lead to the termination of the service. The cases and the detailed rules of dismissal are regulated in the Act on the Legal Status of Judges. In the case of judicial service, dismissal is a general measure to terminate the service; Section 90 of the Act on the Legal Status of Judges enumerates the grounds that lead to dismissal, listing exhaustively in 16 points the cases when a judge *shall* be dismissed, Accordingly, a judge must be dismissed for example if he or she resigned, became permanently incapable due to a health reason, deprivation of liberty with final and binding force was imposed on him or her, he or she fulfilled the age limit for old-age pension, or the dismissal from judicial office has been initiated as a disciplinary punishment in the course of a disciplinary procedure conducted against the judge [Section 90 *(a) to (p)]*.

[80] The Constitutional Court emphasises its statement made in the 2012 Court Decision,

pursuant to which "judges can only be discharged by the President of the Republic, similarly to their appointment" (Reasoning [99])

[81] However, neither the Act on the Legal Status of Judges nor the Act on Court Organisation contain any provision on establishing the consequences of the national security vetting, and neither is it regulated among the rules on disciplinary procedure [Section 101 to 130 of the Act on the Legal Status of Judges].

[82] Another statement made in 2014 Court Decision2012 Court Decision is also necessary to be mentioned: "in the context of judicial independence, one may conclude that securing the stability of the legal relationships of judicial service is a requirement based on the Fundamental Law, demanding extra guarantees in comparison to other legal relations. The guarantees include that a cardinal Act is required to regulate the reasons of terminating judicial service, the term of exercising the profession, and the upper age limit under which judges are irremovable; judicial services can only be terminated, in the absence of the agreement of the judge, on exceptional basis (in case of a serious disciplinary misdemeanour, committing a crime, becoming incapable to practice the profession)." (Reasoning [84])

[83] 5. The case-law of the Constitutional Court is consistent in stating that the independence of judges is the most important guarantee of the independence of the judiciary. The Constitutional Court holds the requirement of irremovability to be a guarantee of judicial independence. [Decision 13/2013 (VI. 17.) AB, Decision 21/2010 (II. 25.) AB, Decision 1/2008 (I. 11.) AB]. Personal independence is a part of judicial independence: A judge shall not be instructed, he or she cannot be dismissed or removed from his or her position against their will, only as a result of the grounds and through a procedure specified in a cardinal Act. The fact that the office of a professional judge is for a "lifetime" is also a part of personal independence.

[84] The Constitutional Court stressed in this procedure, too, that it attributes great importance to the organisational and status-guarantees in the system of the guarantees of judicial independence. The irremovability of judges enshrined in the Fundamental Law is a personal guarantee, which is an assurance of the decision-making autonomy of judges, excluding the possibility of any retaliation over the judge in relation to his or her service because of his or her judgement being in line with the laws and with his or her conscience {the 2012 Court Decision; Reasoning [84]}. The irremovability of judges is at the same time a guarantee of the right to an independent and impartial court.

[85] Pursuant to Section 71 (4) and Section 72/B (8) of the National Security Service Act,, and subject to Section 71 (2) *(e)* as well, the president of the National Office for the Judiciary may decide on maintaining the service of the judge concerned despite of the existence of the national security risk. This provision, however, only provides a discretionary right to the president of the National Office for the Judiciary exercising the employer's rights to maintain the service of the judge concerned despite of the existence of the national security risk. Nevertheless, this discretionary right seems to be

a rather formal one: Taking into account the constitutional position of the president of the National Office for the Judiciary and his or her oath taken before the National Assembly, she or he would have to undertake the risk of continued employment along with a national security risk based on an expert opinion, that is, to take the risk of the occurrence of the risky event. Indeed, the Act does not provide for any possibility to maintain the service by posting or to make the affected judge posted to another position. Thus, pursuant to the above interpretation, in fact, the issuer of the expert opinion prepared on the basis of the national security vetting may become an actor of determining role concerning the appointment of all judges and regarding the maintenance of their service.

[86] The regulation of the termination of the service of judges is, in the context of personal independence and irremovability, an essential element of the legal status of judges. Pursuant to Section 71 (2) and point *(e)* as well as paragraph (4), if the national security vetting established a national security risk, the legal relationship that serves as the basis for the national security vetting can only be maintained when it is approved by the court superior who exercises the right of appointment over the person exercising the employer's rights, in the absence of such a superior, the president of the National Office for the Judiciary. This rule is directly related to the requirement of irremovability as a part of judicial independence and to the termination of judicial service. However, neither the National Security Service Act, nor the Act on the Legal Status of Judges nor the Act on Court Organisation contain any further rule on how to proceed with the procedure. Consequently, the application of the law, the "discontinuation" of judicial service may be casual and arbitrary, allowing potential misuses, which is irreconcilable with the requirement of irremovability that forms part of judicial independence or with the requirement, detailed above, stating that judges may only be removed from office on grounds and pursuant to procedures specified in a cardinal Act. Therefore the Constitutional Court established a conflict with the Fundamental Law.

[87] 6. In the course of establishing the legal consequence of the conflict with the Fundamental Law, the Constitutional Court had to take into account that Section 71 of the National Security Service Act, similarly to the majority of the rules of the National Security Service Act established by 2014 Court Decision2012 Court Decision, is a set of uniform rules that order the application of the same provisions to very different professions. The Constitutional Court can terminate the regulation being in conflict with the Fundamental Law due to violating judicial independence as described above by only annulling from the set of uniform rules the text "judge" in Section 71 (2) *(e)* of the National Security Service Act, this way making inapplicable only to judges the clause in Section 71 (4), pursuant to which, in the total absence of detailed rules and guarantees, judicial service could not be maintained at all in the case of a national security risk.

[88] Similarly to what has been explained in Chapter III (Reasoning [24] and following), in establishing the legal consequences of the conflict with the Fundamental Law, the Constitutional Court paid attention to the fact that Section 71 (4) of the National

Security Service Act regulates not only "non-maintenance", but also "establishing". The *ex nunc* annulment of the set of uniform rules would jeopardise the establishing of legal relationships and the related functioning of the National Security Services, which would be contrary to what has been expressed in point III.3. (Reasoning [39] to [44]).

[89] Having regard to what has been explained in part III and to the fact that the constitutional re-regulation of the provisions annulled in this decision poses a legislative duty on the General Assembly, and as Section 71 (4) of the National Security Service Act aims to regulate different situations of life, the Constitutional Court holds that the immediate annulment of the rule examined in part IV, similarly to the rule examined in part III, would cause legal uncertainty, thus maintaining in force the text ordered to be annulled poses less risk to the integrity of the legal order and the to the application of the law, therefore the text "judge" in Section 71 (2) *(e)* of the National Security Service Act, with regard to Section 45 (4) of the Constitutional Court Act, shall be annulled as of 29 June 2018.

V

[90] 1. Finally the Constitutional Court was required to determine the constitutionality of the "review procedure" (Section 72/B of the National Security Service Act) introduced by the Second Amendment Act.

[91] 1.1 As the 2014 Court Decision established that the text in Section 9 and Section 13 of the First Amendment Act that had determined Section 68 (4) and Section 72 (3) of the National Security Service Act were contrary to the Fundamental Law and annulled these provisions, these rules have not taken effect. Pursuant to the rules assessed as being in conflict with Article VI (1) and Article I (3) of the Fundamental Law, the person who fell within national security vetting could have been under continuous national security vetting during the term of the legal relationship that formed the basis of the national security vetting, and the national security service engaged in carrying out the national security vetting could have used the means of secret gathering of intelligence subject to external approval on two occasions, for not more than 30 days per occasion.

[92] National security vetting offers a chance to monitor and register the life, the personal contacts or the most intimate moments of the vetted person and of his or her family members. As established in the 2014 Court Decision: "the persons concerned with irreproachable conduct, family life and personal network, in terms of national security, can be monitored at any time together with their family members and any information about them becomes accessible. By providing the continuity of the vetting and by allowing secret gathering of intelligence, these two rules in the amendment of the National Security Service Act go beyond the limit of necessity and proportionality with regard to the restriction of the right to privacy. It allows the most extreme constant monitoring during the complete term of the legal relationship together with stocking

data collection concerning the persons against whom there are no incriminatory data of any kind. The vetting allowed in the authorisation, during the whole term of the existence of the relationship that forms the basis of the national security vetting, is not a periodically recurring vetting for specific purpose, but a long-lasting screening-survey activity without specific cause or purpose. The absolute necessity of authorising the body empowered to carry out the vetting to engage in continuous monitoring applicable at any time and thus to constantly apply means that unnecessarily intrude into privacy cannot be justified in accordance with Article I (3) of the Fundamental Law." (Reasoning [44])

[93] 1.2 The Constitutional Court emphasised, and it also stresses in this Decision as well, that if any suspicion of misuse or of a criminal offence occurs during the work of the person subject to the vetting, an investigation can be launched even with the application of operative means or secret gathering of intelligence. (Reasoning [44]) However, neither the preliminary national security vetting, nor the review procedure refers to such an investigation.

[94] In addition to the annulment, the Constitutional Court established as a requirement that "the constitutional regulation should be different from the one applied in the amendment of the National Security Service Act, creating the necessary balance between the protection of privacy and family life and the enforcement of national security interests. The possibility of such an investigation, including ordering it, its means, methods, the verification of the lawfulness of the investigation, the affectedness of other persons not falling within the scope of the vetting etc., should be determined in details and it *should be safeguarded with guarantees*." (Reasoning [45])

[95] In the decision affecting not the national security vetting but also secret gathering of intelligence and covert acquisition of data, the Constitutional Court pointed out that "in the interest of protecting the society, methods and means are needed in order to allow the law enforcement bodies to make up their potential fall-back behind the criminals. Accordingly, the restriction of the examined fundamental rights due to the application of the methods used in covert actions is not constitutionally unnecessary. However, the protection of the State under the rule of law and of the fundamental rights requires that the law should regulate in details and in a differentiated manner the order of using such means. As the application of covert means and methods implies a serious interference into the life of individuals, they can only be used exceptionally, temporarily, as solutions of last resort." {Decision 32/2013 (XI. 22.) AB, Reasoning [69]}

[96] Methods and means should be differentiated. In this regard, the Constitutional Court also emphasised earlier that "it is not all the same whether the authorisation is given for the purpose of covert surveillance to search one's flat, to open postal mail, to monitor electronic mails, or to search, record and use all the data stored on one's IT tool (online search)." {Decision 32/2013 (XI. 22.) AB, Reasoning [131]}

[97] As a result of the 2012 Court Decision, the Second Amendment Act introduced into the

system of the National Security Service Act the new review procedure regulated in Section 72/B. Pursuant to the new rules, in the framework of the review procedure, the national security service may screen, among others, the person who holds a valid and risk-free security clearing. Pursuant to Section 72/B (2) *(e),* with regard to the person employed in the relationship that serves as the basis for the national security vetting, the person entitled to initiate the national security vetting or the director general of the national security service acquires knowledge of a circumstance that refers to a national security risk in particular of the ones detailed in points *(ea)* to *(ef)*.

[98] The national security vetting, and in its present form the review procedure as well, provides broad possibilities to intervene into the privacy of not only the person vetted but also of other persons in contact with him or her. Such an interference may be justified by the national security interests safeguarded by the Fundamental Law as argued above. However, this interference is only compatible with the Fundamental Law under strict guarantees provided in an Act. Inadequate statutory guarantees, in particular authorisations providing free discretion do not comply with this requirement. The term "in particular" as used in Section 47/B (2) *(e)* of the National Security Service Act make the statutory guarantees illusory, as the person entitled to initiate the vetting or the director general of the competent national security service shall enjoy unlimited freedom to add risk factors to the causes established by the National Assembly. This way not only the cardinal character of the Act but also the requirement of regulating the issue in an Act becomes senseless.

[99] In the view of the Constitutional Court, the term "in particular" as used in Section 47/B (2) *(e)* of the National Security Service Act continues to be incompatible with the requirements laid down in the 2014 Court Decision and it is contrary to Article VI (1) of the Fundamental Law. Due to this term, the review procedure becomes a limitless provision without an exhaustive list and without any exact definition.

[100] 1.3 The national security service prepares a security opinion on the basis of the information and data acquired during the national security vetting. Pursuant to Section 71/C (7) of the National Security Service Act, the risk-free security expert opinion shall be valid for 5 years from issuing it. The regulation that empowers the director general of the competent national security service to start the review procedure independently from the court executive authorised to initiate the vetting against a judge engaged in adjudicating activity is also an extraordinary right that allows free discretion. The risk-free security expert opinion of a judge who successfully passed a national security vetting shall be valid for 5 years. The term "director general of the competent national security service" in Section 72/B (2) *(e)* empowers (in addition to the person exercising the employer's rights) the director general of the national security service to start, within the period of 5 years, a review procedure against a judge engaged in adjudicating activity and possessing a valid and risk-free security expert opinion. The Constitutional Court holds this right to be an extensive authorisation, which is in conflict with the principle of judicial independence explained in points III.4 (Reasoning [45] to [56]) and IV.1.4. (Reasoning [83] to [86]) of this Decision.

[101] Similarly to what has been stated in part III, the Constitutional Court considered during drawing the legal consequences of the conflict with the Fundamental Law, that partial annulment is possible with due account to the context of the wording and the practical applicability of the legal regulation, therefore it annulled the texts "the director general of the national security service having the powers to carry out national security vetting" and "in particular" in Section 72/B (2) (e).

[102] As the constitutional re-regulation of the provisions annulled in this decision imposes a legislative duty on the National Assembly and as Section 72/B (2) of the National Security Service Act attempts to regulate several different situations of life, the Constitutional Court holds that an immediate annulment would result in legal uncertainty. However, since maintaining in force the text ordered to be annulled poses less risk to the integrity of the legal order and the to the application of the law; therefore, in particular and subject to what has been explained in detail in points III.7. (Reasoning [65] to [69]) and IV.6. (Reasoning [87] to [89]), texts "the director general of the national security service having the powers to carry out national security vetting" and "in particular" in Section 72/B (2) *(e)* of the National Security Service Act, on the basis of Section 45 (4) of the Constitutional Court Act, shall be annulled as of 29 June 2018.

[103] 2. In addition to the conflict with the Fundamental Law established above, the Constitutional Court recalls in this case, too, that "it is one of the fundamental requirements of a State under the rule of law that the bodies vested with pubic authority shall function within the organisational framework laid down by the law, in the operational order specified by the law, within the limits regulated by the law in a manner the citizens can learn about and calculate with." {Decision 13/2013 (VI. 17.) AB, Reasoning [80]} Legal certainty, which should cover the entirety of the law as well as its partial fields, is one of the most important elements of a State governed by the rule of law. Legal certainty requires, on the one hand, the clarity of norms and on the other hand it raises requirements towards certain legal institutions, including the National Security Services,, expecting their operation to be calculable and foreseeable. The enforcement of the guarantees of the rule of law during the operation of legal institutions is one of the most important pillars of the set of values of a State governed by the rule of law. In the absence of the above, legal certainty and the calculability of the consequences of the laws become infringed, and the enforcement of the fundamental rights enshrined in Article XXVIII (1) of the Fundamental Law become also incidental. {Decision 21/2014 (VII. 15.) AB, Reasoning [88]} The Constitutional Court emphasises in the context of this case, too, that the prominent role fulfilled by judicial independence and the legal certainty in terms of the rule of law, requires the rules applied in the given case to be extremely clear, to provide clear guarantees for the purpose of objectivity and transparency and primarily in the interest of preventing the slightest sign of arbitrariness. {Decision 36/2013 (XII. 5.) AB, Reasoning [48]}

[104] 3. The Constitutional Court may, exceptionally, terminate the procedure pending at the Court on the basis of Section 59 of the Constitutional Court Act when the case

becomes causeless beyond doubt. Pursuant to Section 67 (2) *(e)* of the Rules of Procedure, the petition shall become causeless in particular if the circumstance that justified the continuing of the procedure does not exist anymore, or the petition has become causeless for another reason. The petitioner requested the examination of both Section 71 (4) of the National Security Service Act (in more details in point I.6., Reasoning [15]) and Section 72/B (8) of almost the same content (in details in point I.7., Reasoning [16] and [17]). Both provisions refer back to Section 71 (2) of the National Security Service Act. As the Constitutional Court established that in part IV the text "judge" in Section 71 (2) *(e)* was contrary to the Fundamental Law, together with the applicable legal consequence as specified in point 2 of the operative part of this Decision, the Constitutional Court holds that the review of Section 71 (4) and Section 72/B (8) of the National Security Service Act with regard to their conflict with the Fundamental Law has become causeless. With account to the above, the Constitutional Court terminated the relevant part of the procedure pursuant to Section 59 of the Constitutional Court Act and Section 67 (2) *(e)* of the Rules of Procedure.

[105] Pursuant to the first sentence of Section 44 (1) of the Constitutional Court Act, this decision shall be published in the Hungarian Official Gazette.

Budapest, 13 June 2017

Dr. Tamás Sulyok

Chief Justice of the Constitutional Court

Dr. Ágnes Czine
Justice of the Constitutional Court

Dr. Egon Dienes-Oehm
Justice of the Constitutional Court

Dr. Attila Horváth
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Dr. Ildikó Hörcher-Marosi
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Dr. Béla Pokol
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Dr. László Salamon
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Dr. Balázs Schanda
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Dr. István Stumpf
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Dr. Péter Szalay
Justice of the Constitutional Court
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Dr. Mária Szívós
Justice of the Constitutional Court

Dr. András Varga Zs.

Justice of the Constitutional Court

Concurring reasoning by Judge *Dr. Ágnes Czine*

[106] I agree with the legal consequences of the annulment as specified in points 1 to 3 of the operative part of the Decision; however, in this respect, I hold it necessary to add the following to the reasoning.

[107] 1. The petitioner's arguments alleging that the challenged regulation was contrary to the Fundamental Law were based on the constitutional content of the principle of the separation of powers [Article C) (1) of the Fundamental Law], the principle of judicial independence [Article 26 (1) of the Fundamental Law] and the right to a fair trial at court [Article XXVIII (1) of the Fundamental Law]. I hold that the Constitutional Court should have delimited from each other the constitutional contents of the above provisions and it should have assessed the challenged provisions with regard to their conflict with the Fundamental Law by taking into account this division.

[108] 1.1 Prior to the entry into force of the Fundamental Law, the Constitutional Court had derived the principle of the separation of powers from the principle of the rule of law and considered it as one of the most important organising principles of State power [Decision 38/1993 (VI. 11.) AB, 1993, 256, 261.]. However, the Fundamental Law, states explicitly: the Hungarian State shall function based on the principle of the separation of powers [Article C) (1)]. Therefore, regarding the regulations in force, the Constitutional Court's practice developed in connection with the principle of the separation of powers shall be applicable in the context of Article C) (1) of the Fundamental Law.

[109] As interpreted by the Constitutional Court, the essence of the separation of powers is that "the branches of powers mutually control, counterbalance and restrict on the merits of each other's activities; in the course of exercising their competences, the branches of powers are bound to engage in cooperation in the cases specified in the Fundamental Law and they have to respect the decisions and the autonomy of the divided organisations of authority [Decision 62/2003 (XII. 15.) AB, ABH 2003, 637, 645.]. Furthermore, the Constitutional Court pointed out that "in the complex system of counterbalancing, mutual control, checks and balances mutually restricting the counterbalancing powers and institutions, there should be no institution with a dominant role that turns the restriction of power into deprivation of power" (ABH 2003, 645.). Accordingly, the separation of powers shall be enforced when "the branches of powers can restrict each other on the merits" (ABH 2003, 645).

[110] The Constitutional Court placed the judicial power, in the system of the separation of powers, under extra protection and it stressed that courts are one of the most important guardians of the rule of law. Therefore any external interference into the judicial power "has more severe constitutional limitations based on fundamental principles of guarantee". The constitutional guarantees should "basically focus on preventing from the development of any politically determined dependence between the courts and the two other branches of power, like the one that exists between the parliament and the government". [Decision 17/1994 (III. 29.) AB, ABH 1994, 84 to 85]

[111] Based on what has been explained above, I agree with the statement made by the petitioner that "judicial power should be independent from the political determination of the two other branches of power and from their changes. The independence of the adjudicating activity from any external influence is an unconditional requirement that in fact enjoys an absolute protection under the Fundamental Law." In my opinion, the provision in Section 72/B (2) *(e)* of the National Security Service Act, prescribing, also with regard to Section 72/B (4) (b) of the National Security Service Act, that the director general of the national security service may initiate a review procedure against judges, even without informing in advance the judge or the person exercising the employer's rights, is in conflict with the above constitutional requirement. Consequently, I hold that Section 72/B (2) *(e)* of the National Security Service Act is contrary to Article C) (1) of the Fundamental Law.

[112] 1.2 Beyond doubt, the principle of judicial independence based on Article 26 (1) of the Fundamental Law is closely linked to the constitutional status of the judicial branch of power. However, these two constitutional principles are not identical. This is why I hold it necessary to separate the two principles.

[113] The Constitutional Court expressed its position on judicial independence also in the Decision 38/1993 (VI. 11.) AB. In this context the Constitutional Court emphasised that "judicial independence refers to the adjudication" and its essence is that the judges interpret the Acts as well as other norms independently(ABH 1993, 262). The Constitutional Court reinforced this judicial practice in its Decision 19/1999 (VI. 25.) AB. Here it emphasised that "judicial power, to which judicial independence is connected, is fundamentally embodied in adjudication". Guarantees of status and of the organisation are also necessary for the independence of the decision-making. Consequently, "in the individual aspect of judicial independence [...] it means the organisational and the status-freedom of the judge, allowing the judge to pass binding and executable decisions in individual cases, in the subject of deciding in legal debates and remedying infringements, without any external influence, on the basis of the Acts and the laws in general, pursuant to his or her inner conviction." (ABH 1993, 150)

[114] The Constitutional Court also made it clear in its case law that it holds the independence of judges to be the most important guarantee of the judiciary's independence. "Independent judiciary is the basis of the functioning of a State governed by the rule of law. Judicial independence is not a fundamental right, neither is it a privilege of the judge; it serves the interest of those who seek justice" {Decision 4/2014 (I. 30.) AB, Reasoning [43]}. At the same time, however, the Constitutional Court acknowledged in the context of the remuneration of judges that judicial independence "is not only a principle applicable to the judiciary and to the organisation-administration: it is, in certain elements of it, the right, granted in the Fundamental Law, of the person holding the judicial function" (Reasoning [43]). It also established in another case that "the regulations on the termination of the legal relationship of judges is an essential element of the legal status of judges in the context of their personal independence and of their irremovability." {Decision 33/2012 (VII. 17.) AB,

Reasoning [87]}

[115] Therefore one may establish on the basis of the Constitutional Court's case law mentioned above that judicial independence is primarily a constitutional principle linked to the functioning of the State under the rule of law. Nevertheless, the Constitutional Court also acknowledged that it is, in certain elements of it, a right granted to judges in the context of their remuneration and the termination of their relationship of service.

[116] The international documents related to judicial independence also reflect the aspects presented in the Constitutional Court's case law [e.g. the European Convention on Human Rights (ECHR), Basic Principles on the Independence of the Judiciary adopted by the General Assembly of the United Nations in November 1985].

[117] The Committee of Ministers of the Council of Europe adopted on the basis of the international documents referred to above, its Recommendation No. R (94) 12 on the independence, efficiency and role of judges (hereinafter referred to as the "Recommendation"). As primarily underlined in the reasoning of the Recommendation, "the aims of the Council of Europe include the setting up and the protection of a democratic political system characterised by the rule of law and the establishment of a State governed by the rule of law, as well as the promotion and the protection of human rights and fundamental freedoms." Therefore the Recommendation on the independence, efficiency and role of judges acknowledges and stresses the primary and significant role of judges in implementing these aims. As pointed out by the Recommendation, "the independence of judges is one of the central pillars of the rule of law. The need to promote the independence of judges is not confined to individual judges only but may have consequences for the judicial system as a whole. States should therefore bear in mind that, although a specific measure does not concern any individual judge directly, it might have consequences for the independence of judges."

[118] Based on the arguments expressed, "the independence of judges is first and foremost linked to the maintenance of the separation of powers". As underlined in the Recommendation, "the organs of the executive and the legislature have a duty to ensure that judges are independent. Some of the measures taken by these organs may directly or indirectly interfere with or modify the exercise of judicial power. Consequently, the organs of the executive and legislative branches must refrain from adopting any measure which could undermine the independence of judges."

[119] Due to the reasons referred to above, I hold it important to stress that the judicial office cannot be regarded as a typical employment relationship. Nevertheless, the challenged rules of the National Security Service Act disregard the features of this special service. I agree with the statement made by the petitioner alleging that even the regulatory concept raises concerns about the conflict with the Fundamental Law regarding Section 74 *(g)* and Section 71 (2) *(e)* of the National Security Service Act.

[120] In the case concerned, the infringement of the principle of judicial independence is

raised in relation to the protection of the State's national security interests. In this regard, one should note that the Constitutional Court underlined in the Decision 52/2009. (IV. 30.) AB: "the Constitutional Court acknowledges that the legislator may prescribe compliance with the requirements of national security as a precondition of performing certain activities of the State, filling certain work positions, thus protecting the State [...] against the acts of individuals or groups that attack the democratic State under the rule of law, the society or their essential values." (ABH 2009, 396, 402) I agree with the point made that the institutional system of national security is not segmented pursuant to the branches of power. Consequently, the judicial system cannot be removed from the scope of national security vetting. Nevertheless, in the context of the principle of judicial independence, I hold due to the constitutional aspects emphasised above that the legislator should take into account the special character of the judicial branch of power, and it should develop a regulation that only covers the persons who work in positions (hold offices) that bear national security risks. The personal scope of the regulation should be well-defined beyond doubt. In my opinion, the provisions challenged by the petitioner do violate these constitutional requirements.

[121] 1.3. The petitioner alleged that the challenged regulation was in conflict with the Fundamental Law in the context of Article XXVIII (1) of the Fundamental Law. In this respect, I hold that it would have been important to include in the reasoning of the decision the delimitation of the constitutional contents of judicial independence from the right to a fair trial at court.

[122] In the case concerned, the question of protecting the right to an independent court is raised in connection with the right to a fair trial at court. The Constitutional Court detailed the constitutional content of the right to an independent court in the Decision 20/2005. (V. 26.) AB. Accordingly, "the judiciary activity of the court includes both establishment of the facts of the case and the law to be applied, and determination of the legal consequences. This complex process covers the objective exploration, summary and evaluation of the legally relevant facts, and the examination of legal questions, independently from the procedural periods. These are the factors influencing the judge in making a decision on the basis of his or her inner conviction, in line with his or her conscience, safeguarded by the constitutional principle of judicial independence." (ABH 2005, 202, 219-220)

[123] Also the Constitutional Court has made a reference in the Decision 33/2012. (VII. 17.) AB to the difference between the principle of judicial independence and the right to an independent court. Accordingly, it follows from the constitutional content of the principle of judicial independence that "in the individual aspect of judicial independence Act on the Legal Status of Judges has a prominent role, regulating judicial service for the purpose of guaranteeing the freedom of the judicial status necessary for the uninfluenced adjudicating activity. In the context of judicial independence, one may conclude that securing the stability of the legal relationships of judicial service is a requirement based on the Fundamental Law, demanding extra

guarantees in comparison with other legal relations. The guarantees include that it takes a cardinal Act to regulate the reasons of terminating the judicial service, the term of exercising the profession, and the upper age limit under which judges are irremovable; judicial services can only be terminated, in the absence of the agreement of the judge, on exceptional basis (in case of a serious disciplinary misdemeanour, committing a crime, becoming incapable to practice the profession). The irremovability of judges enshrined in the Fundamental Law is a personal guarantee, which is an assurance of the decision-making autonomy of judges, excluding the possibility of any retaliation over the judge in relation to his or her service because of his or her judgement being in line with the laws and with his or her conscience." The Constitutional Court, underlining the constitutional relation between judicial independence and the right to a fair trial at court, stressed in this decision that the right to an "independent judge" is at the same time also a right granted to the subjects of the procedure in Article XXVIII (1) of the Fundamental Law." (Reasoning [84])

[124] The case law of the European Court of Human Rights (ECtHR) also reflects these aspects. The ECtHR typically emphasizes that in the application of Article 6 (1) of ECHR the term "independent" refers to the independence from other branches of power (the executive and the legislatur(e) *[Beaumartin* vs. *France* (15287/89), 24 November 1994, point 38]. Additionally, the ECtHR also pointed out in its case law that the independence of judges is undermined when the executive branch intervenes into a case pending at the courts in order to influence its outcome *[Sovtransavto Holding* vs. *Ukraine* (48553/99), 25 July 2002, point 80; *Mosteanu and others* vs. *Romania* (33176/96), 26 November 2002, point 42].

[125] In general, ECtHR also stresses that judicial independence refers to the uninfluenced adjudicating activity and requires, in the interest of it, the existence of procedural guarantees that separate the courts from other branches of power. ECtHR protects these requirements from the aspect of the right to fair trial, that is, from the side of the litigant parties.

[126] 2. As seen from the above, the case law of the Constitutional Court, the international treaties as well as the international judicial practice clearly manifest the prominent importance of the principle of judicial independence and of the right to an independent court in the context of the functioning of the rule of law. I hold that, due to the aspects presented, the legislator should take great care in developing any regulation that affects this, closely interrelated, set of constitutional requirements, and the regulation should not raise any uncertainty of interpretation. I agree with the statement made in the decision that "the prominent role fulfilled by judicial independence and legal certainty in terms of the rule of law, requires the rules applied in the given case to be extremely clear".

[127] Nevertheless, I hold that it would have been important to delimit the constitutional contents of the provisions of the Fundamental Law referred to in the decision, as these provisions cover different constitutional requirements and their infringement should

be assessed on the basis of different sets of criteria.

Budapest, 13 June 2017

Dr. Ágnes Czine
Justice of the Constitutional Court

Dissenting opinion by Judge *Dr. Mária Szívós*

[128] I do agree with the point that the current regulation of the National Security Service Act raises many constitutional issues, that is why I supported point 3 of the operative part of the decision, still, I cannot agree with point 1 of the operative part of the decision due to the reasons explained below.

[129] 1. In his petition, the president of the Curia referred to the infringement of several provisions of the Fundamental Law regarding Section 74 *(g)* of the National Security Service Act, and enumerated many reasons to support his standpoint. The majority decision clearly established that the challenged provision was in conflict with the Fundamental Law due to the violation of judicial independence, as it allows, in principle, to draw all and any judge under national security vetting. {*see* Reasoning, points III/2. (Reasoning [26] to [38]) and III/7. (Reasoning [65] to [69])}

[130] In addition to the fact that the president of the Curia has not presented in his petition an argument of such content, I hold that the above statement made in the majority decision are not supported neither by the grammatical interpretation of the legislative text of the National Security Service Act, nor by the content of the norm manifested in the "living law" of the provisions on the national security vetting of judges, therefore, in my view, the Constitutional Court should not have annulled the challenged provision for this reason.

[131] 1.1. Section 74 *(in), (io)* and *(ir)* of the National Security Service Act specify the scope of judges who can be subjects of national security vetting. [The interpreting provision of Section 74 *(g)* partially annulled by the majority decision is applicable for the first two subparagraphs.] Pursuant to the National Security Service Act, a judge may become the subject of national security vetting, if he or she

- approves the secret gathering of intelligence;

- is exposed to a greater extent to intentions of unlawful influence, concealed attack or threat in relation to judicial service;

- entitled to have access to or use data classified as "Confidential!", "Secret!" or "Top Secret!" on the basis of judicial service;

[132] Accordingly, the National Security Service Act mentions other conditions in addition to

judicial service, in other words, it shrinks significantly the scope of potential subjects as, pursuant to the grammatical interpretation of the legal regulation, the national security vetting is not applicable in case of all judges: it is only applicable to those judges who meet any of the conditions mentioned above.

[133] 1.2 Moreover, in the course of determining the personal scope, the reasoning of the majority decision should have actually interpreted, in addition to presenting, Section 69 (2) of the National Security Service Act and the National Office for the Judiciary-Order 13/2015 (XII. 29.) OBH based upon its authorisation.

[134] In my opinion, Section 69 (2) of the National Security Service Act indeed serves the purpose of specifically identifying the *other conditions* mentioned, as it provides that the personal scope specified in Section 74 *(in) (io)* of the National Security Service Act can *only* be drawn under national security vetting, if the persons concerned serve in a *work position, office and position* specified in the legal act for the governance of bodies governed by public law issued by the president of the National Office for the Judiciary (that is, the National Office for the Judiciary Order mentioned). Therefore, pursuant to the joint interpretation of the National Security Service Act and the National Office for the Judiciary-order, one may establish that under the rules presently in force, a judge can *only* be made subject of a national security vetting if he or she is

- a judge who approves the secret gathering of intelligence,

- a judge engaged in the judicial review of a decision dismissing a complaint submitted against a national security vetting,

- a judge engaged in the judicial review of a decision made in the subject of the violation of the laws related to the classification of classified information by the National Authority for Data Protection and Freedom of Information in an administrative procedure for the control of classified data,

- a judge engaged in the judicial review of the classifier's decision dismissing the issue of an access permission

- the president of a regional court of appeal or of a regional court, and their deputies, appointed by the president of the National Office for the Judiciary, and

- investigating magistrate.

[135] It means that the order issued by the president of National Office for the Judiciary provides specific regulations concerning the enhanced existence of the risk of "intentions of unlawful influence, concealed attack or threat" in the context of judicial service, mentioned in general in the National Security Service Act, and it also specifies the judges authorised to have access to and to use the classified information mentioned in the National Security Service Act.

[136] I hold it important to point out that even the president of the Curia noted in his petition-supplement that the National Office for the Judiciary-order clarified, in the

manner detailed above, the scope of judges affected by a potential national security vetting. Therefore one may establish pursuant to the provisions in force that in the practice no national security vetting can be carried out against a judge not mentioned in the list, not to mention any judge. In other words, the scope of judges who fall under national security vetting is a clearly defined and narrowly delimited scope as regulated in the National Office for the Judiciary- order issued on the basis of the authorisation provided in the National Security Service Act.

[137] 2. The potential conflict between the regulation and the Fundamental Law for another reason is a question to be separated from what has been explained in point 1 of my dissenting opinion. Unfortunately, pursuant to the majority decision, the Constitutional Court has not taken a position concerning the elements of the petition submitted by the president of the Curia that, although acknowledges that the scope of affected judges is now clearly defined due to the regulation by the National Office for the Judiciary-order,- raises concerns about providing the whole regulation on a level other than an Act and alleges its conflict with the Fundamental Law. I hold that it would have been desirable for the Constitutional Court to take a position on the issue whether the challenged provisions of the National Security Service Act raise concerns about the violation of the right to a lawful judge. In my opinion, certain arguments put forward by the president of the Curia regarding Article B) of the Fundamental Law are also worth considering.

[138] Thus I could not support point 1 of the operative part of the decision together with its reasoning unfortunately because the ground of the annulling provision in the majority decision is a statement, made on the basis of interpreting the laws related to the national security vetting of judges, that identifies an actually non-existing problem. In addition to the above, due to the majority decision of the above content, the Constitutional Court missed the chance to examine the arguments raised in the petition of the Curia's president, regarding actually existing constitutional concerns worth considering, and to pass a decision in this important question.

[139] 3. Finally I would like to briefly mention a lack related to the reasoning of point 2 of the operative part of the decision, which is not unrelated to what I explained in point 1 of my dissenting opinion, as in this respect the Constitutional Court should have actually and thoroughly examined whether the maintenance or non-maintenance of the legal relationship affects in fact *judicial service* or the *work position, office or position* that falls under national security vetting. In my view, the annulment of Section 71 (2) of the National Security Service Act would have only been justified if the majority decision had also provided an appropriate reasoning to support the statement that the challenged provision clearly affects (or may affect) judicial service. I am convinced that the constitutional concerns raised by the statutory provision examined in this scope could have been clarified satisfactorily by including Article B) of the Fundamental Law into the examination.

Budapest, 13 June 2017

Dr. Mária Szívós
Justice of the Constitutional Court