Decision 3046/2019 (III. 14.) AB of the Constitutional Court of Hungary

On the dismissal of a constitutional complaint

In the matter of a constitutional complaint, with the concurring reasoning of Justices Dr. Béla Pokol and Dr. László Salamon, the Constitutional Court, sitting as the Full Court, has passed the following

decision:

The Constitutional Court dismisses the constitutional complaints seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of the Order of the Curia No Bhar.I.1320/2015/47.

Reasoning

I

[1] 1. Two private individual petitioners submitted a constitutional complaint to the Constitutional Court through their legal representative (Dr. Edina Józsa, attorney at law, H-1137 Budapest, Újpesti rakpart 5. IV/17.).

[2] 1.1. Pursuant to Section 27 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the Constitutional Court Act), the two petitioners filed largely identical constitutional complaints directed against the Order of the Curia No Bhar.I.1320/2015/47, alleging a violation of Article II (right to human dignity), Article XXIV (1) (right to a fair hearing before a public authority), Article XXVIII (1) (right to a fair trial), Article XXVIII (2) (presumption of innocence), Article XXVIII (3) (right of defence) and Article XXVIII (7) (right to legal remedy) of the Fundamental Law.

[3] In the case on which the constitutional complaints are based, the petitioners were sentenced to life imprisonment without parole and ten years of deprivation of exercising civil and civic rights for the felonies of homicide, robbery, illegal restraint, and criminal offences with firearms and ammunition. The Curia, acting as a court of third instance, upheld the judgement of the Budapest-Capital Regional Court of Appeal No 5.Bf.399/2014/61 by its order No Bhar.I.1320/2015/47 of 12 January 2016.

[4] The Constitutional Court joined the petitions in view of the identity of their subject matter and the coherence of their content, and reviewed them in a single procedure.

[5] 2. In response to the Constitutional Court's notice of deficiency, the legal representative submitted a supplementary petition in both cases, on the basis of which, taking into account

the content of the original petitions, the substance of the constitutional complaints can be summarised as follows.

[6] The petitioners justify the violation of Article II of the Fundamental Law (right to human dignity) by the fact that the court of first instance held nearly 170 trial days (2 to 3 times a week from morning until late afternoon), and on these days the penal institution only provided them with cold food, the same every day, and no liquid. They claimed that they had to wear handcuffs, belt cuffs, leg cuffs, were driven on a lead shackles and that the transport vehicle did not have a seat belt. They were escorted into the courtroom by armed guards wearing masks, measures that "suggested their guilt". Furthermore, they were insulted and abused from the "gallery" of the courtroom, which was humiliating for them. All of this, they claim, without referring to Article III of the Fundamental Law, but quoting its text, also constitutes inhuman and degrading treatment.

[7] The sentence of life imprisonment imposed is also considered by the petitioners to be an inhuman, degrading and disproportionate sanction, which is "the consequence of the unfair trial complained of". Under the current legislation, the sentence is only reviewed after 40 years, a date which is unlikely to be reached alive.

[8] In their view, their right to a fair trial [Articles XXIV (1) and XXVIII (1) of the Fundamental Law] was violated by the procedural errors committed by the investigation authorities and the courts. In this context, they also invoked in several cases the violation of the right of defence and the right to legal remedy [Article XXVIII (3) and (7) of the Fundamental Law]. In their request, they challenge the DNA sampling carried out during the investigation (which took place before the suspicion was communicated and they were not informed of its legal basis and purpose) and the use of a haemogenetic expert without a decision to appoint him. The first interrogation started after the suspicion had been communicated without a lawyer being appointed and the petitioners were not warned of their legal rights. One of the petitioners expressly complains that his appointed lawyer did not take action against this and did not subsequently act in his best interests. During the investigation, the petitioners were interrogated twice as witnesses by the investigation authority in connection with one of the acts of which they were later accused. Although they refused to confess to the offences charged, they were pressured by the investigation authority and the court to do so. The content of their testimonies was also relied upon in the judgement of the court. The weapons expert's opinion on which the indictment was based was "not documented, it is limited to the disclosure of findings", and the experts changed their findings on several important points during the trial. The investigation authority did not clarify the exact role of the Fourth Defendant as accused in the case, but the court accepted his testimony incriminating the petitioners. Furthermore, "after his co-defendants and defence counsels questioned the credibility of his testimony, the Fourth Defendant refused to testify further" and was therefore not allowed to be cross-examined by the other defendants, but "his incriminating testimonies during the investigation stage were nevertheless taken into account with unchanged weight" and the verdict was based largely on them. The non-Hungarian national aggrieved parties were questioned by the investigation authority without an official witness or interpreter, in violation of the law, and the court of first instance did not even question them, but merely read out their

statements, which the petitioners were therefore unable to challenge. The contradictions in the testimonies were not clarified. The petitioners alleged that they were not allowed to participate in essential procedural steps (e.g. search and inspection) during the investigation and the court proceedings because they were not informed or were 'removed' or their participation was 'obstructed' by the fact that they were held in pre-trial detention in another city.

[9] According to the petitioners, they were charged on the basis of evidence obtained in an unlawful manner (as evidenced by the fact that the court excluded some of the evidence), and the prosecution "justified the charge with irrelevant and incomprehensible evidence". Their concerns in this regard fall into two categories: firstly, they complain that the breaches of the law committed during the investigation were trivialised or legalised *ex post facto* by the court; therefore, the conviction was based in part on unlawful evidence. On the other hand, they point out that "the subsequent omission of the questionable and illegal evidence has resulted in the defence strategy being rendered ineffective time and again". "The defence strategy was systematically undermined", the request states, by the fact that the authorities and experts "introduced a mass of evidence that was already available during the investigation". The court of first instance did not merely seek to clarify the facts, but essentially conducted a supplementary investigation ('ex officio supplementing the prosecution's evidence'), while the prosecution remained passive. The court looked at classified documents but did not disclose this information to the defence. In addition, the court maintained informal contacts with the investigation authority, which provided additional evidence to the court without a specific request, but the defence was not informed of this. In its judgement, the court of first instance relied on the documents produced in the investigation of a witness for the crime of perjury, which the court also only received between the delivery of the judgement and reduction to writing. In the appellate proceedings, the defence applied in vain for access to the entire file of the ongoing investigation. "I only became aware of the witness statement attached to the file, almost by chance, on 30 March 2016," the petition reads. The court, however, had access to the documents of another related investigation, but the petitioners were not allowed to see them. One of the petitioners also invokes a violation of the right to a fair trial and the right of defence in relation to the handling of the evidence: he explains that during the proceedings, one piece of physical evidence was destroyed and another disappeared, although it could have been favourable to him. The petitioners argue that all their requests for evidence, such as the appointment of experts and the hearing of witnesses, were denied by the court, whereas the prosecution's requests for evidence were granted; therefore, the proceedings were unbalanced. In this context, they question, in particular, the impartiality of the court of first instance, which, in their view, had presumed their guilt from the outset. This approach was also evident, for example, from the questions put to witnesses, the pressing of the accused to testify and make comments, and the procedural errors committed. Furthermore, to demonstrate this, a written interview published in the journal Life and Literature, which was conducted in 2016 with the presiding judge of the judicial panel, was attached to the supplement to the petition.

[10] The petitioners complain that they could not appeal against the "fact and manner" of certain investigative acts (e.g. DNA sampling, the appointment of a haemogenetic expert, inspection, search) and their complaints were not reviewed. Furthermore, the court of appeal granted a prosecutor's motion to obtain documents from an ongoing criminal case, but the

court nevertheless failed to obtain the requested documents, and the petitioners were therefore unable to comment on the documents.

[11] In the context of the third-instance proceedings, one of the petitioners considers it particularly prejudicial that he was only allowed to study the case file for three days in the penal institution, and that, according to him, not all the requested documents were made available to him, and that his request for access to the file was not granted at the third-instance court hearing. At the hearing, the presiding judge of the judicial panel, according to the petitioners, restricted oral submissions, urged them to make submissions and the court finally issued its decision very quickly, within six hours of the start of the public hearing. They consider that the Curia failed to consider their written appeal and the written observations submitted at the public sitting, as well as the submission addressed to the Prosecutor General but falling within the competence of the Curia. Lastly, they complain that the presiding judge of the judicial panel deprived one of the petitioners' counsel of his right to speak during the oral argument and did not apply the statutory possibility of interrupting the oral argument [Section 314 (4) of Act XIX of 1998 on Criminal Procedure (hereinafter referred to as the "Code of Criminal Procedure"].

[12] In addition to this, the petitioners argue in detail that the judgements of the courts are unfounded and unlawful, criticising and questioning in particular the working method of the first instance panel (which the petitioners describe as "extraordinary data collection") and the assessment of the evidence and the conclusions drawn from it. In particular, they criticise the fact that the court found that the offence was committed by a criminal organisation without this being stated in the indictment. In addition, they claim that the courts of second and third instance failed to review and fully adjudicate on their appeal.

[13] Finally, the petitioners complain that the proceedings were protracted: the court sought to correct the violation of procedural rules during the investigation by conducting an extensive evidentiary procedure (the court carried out a "verification of the investigative acts in violation of the law"), and the court's failure to repeat certain stages of the judicial proceedings (the court failed to fully instruct the accused and failed to detect the involvement of the excluded defence counsel). The first instance judgement took almost a year to be written, which led to disciplinary proceedings against the presiding judge of the judicial panel that heard the case, and the second and third instance proceedings were also delayed: although the case was considered of high importance, the setting of the trial date was in breach of Section 554/K (1) of the Code of Criminal Procedure. In comparison, the criminal proceedings dragged on for six and a half years, during which time the petitioners were held in pre-trial detention. According to the petitioners, this also violated their right to have the proceedings completed within a reasonable time.

[14] The presumption of innocence [Article XXVIII(2) of the Fundamental Law] was infringed, in the petitioners' view, (a) the fact that the investigation authorities held press conferences prior to the announcement of the suspicions, which focused on the fact that the petitioners had committed the offences subsequently charged against them; (b) during the court proceedings, "excessive and spectacular security measures" were applied, which gave the public the impression that the defendants were guilty; (c) the court of first instance presumed the guilt of the defendants from the outset; and that (d) Decision of principle under criminal law No 1/2014,

even before the conviction of the petitioners, stated that the risk of recidivism as a reason for further pre-trial detention was justified by the fact that the accused had committed the acts of homicide that can be included in the statutory unity for almost one and a half years (Decision of principle under criminal law No 1/2014 B.1. point II).

II

[15] The provisions of the Fundamental Law concerned by the petition read as follows:

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

Article III (1) No one shall be subject to torture, inhuman or degrading treatment or punishment, or held in servitude. Trafficking in human beings shall be prohibited."

"Article XXIV (1) Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to state the reasons for their decisions, as provided for by an Act."

"Article XXVIII (1) Everyone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act.

(2) No one shall be considered guilty until his or her criminal liability has been established by the final and binding decision of a court.

(3) Persons subject to criminal proceedings shall have the right of defence at all stages of the procedure. Defence counsels shall not be held liable for their opinion expressed while providing legal defence.

[...]

(7) Everyone shall have the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests."

III

[16] The Constitutional Court, in accordance with Section 56 (2) of the Constitutional Court Act, reviewed first of all whether the constitutional complaints met the statutory requirements set for petitions and found the following.

[17] On the basis of Section 27 of the Constitutional Court Act, the petitioners requested a review of constitutionality of the decision of the Curia in the third instance procedure on the merits of the case, which could not be challenged by legal remedy, and invoked a violation of their rights guaranteed by the Fundamental Law.

[18] The first petitioner received the order of the Curia on 2 March 2016, and the constitutional complaint was posted to the court of first instance on 11 April 2016. The second petitioner

received the order of the Curia on 12 April 2016 and posted the constitutional complaint on 28 April 2016. Pursuant to Section 30 (1) of the Constitutional Court Act, both petitions are deemed to have been lodged within the statutory time limit.

[19] The request, under Section 52 (1b) of the Constitutional Court Act , with the exception of certain elements of the petition, which will be specified later, meets the requirements of being explicit, as it contains: (a) the statutory provision establishing the competence of the Constitutional Court to adjudicate the petition, and the provision establishing the petitioners' entitlement to file the petition (Section 27 of the Constitutional Court Act); (b) the grounds for initiating the proceedings (the petitioners' conviction was, in their view, in a procedure that violated the Fundamental Law); (c) the court decision to be reviewed by the Constitutional Court (the decision of the Curia Bhar.I.1320/2015/47); (d) the provisions of the Fundamental Law allegedly infringed (Article II, Article XXIV (1), Article XXVIII (1), (2), (3) and (7), and the substantive invocation of Article III without being explicitly mentioned] (e) a statement of the reasons why the contested court decision is contrary to the provision of the Fundamental Law in question; (f) an express request that the Constitutional Court find the contested court decision to be contrary to the Fundamental Law and annul the said decision.

[20] The contested order of the Curia No Bhar.I.1320/2015/47 is a third instance decision on the merits of the case, against which there is no room for appeal or review. On this basis, the Constitutional Court found that the petitioners had exhausted their remedies, and thus the constitutional complaint meets the requirements of Section 27 of the Constitutional Court Act.

[21] The petitioners have the right to file a constitutional complaint, and their involvement, as they were the defendants in the criminal case, is valid. The complaint alleges a violation of rights guaranteed by the Constitution.

[22] In accordance with Section 29 of the Constitutional Court Act, the Constitutional Court admits constitutional complaints in the case of an infringement of the Fundamental Law or a constitutional law issue of fundamental importance that substantially affects the judicial decision. These two conditions are of an alternative nature, the existence of either of them justifies the admission of the complaint {Decision 3/2013 (II. 14.) AB, Reasoning [30] and Decision 34/2013 (XI. 22.) AB, Reasoning [18]}.

[23] The most essential claim of the petition, which is found in almost all the petitioners' references and is also connected with other fundamental rights violations (in particular, e.g. the right of defence), is that the court decision convicting the petitioners is the result of a criminal procedure conducted with a series of procedural violations. The right to a fair or balanced trial has been the subject of extensive judicial practice of the Constitutional Court. In accordance with the constitutional yardstick developed and consistently applied by the Court, the requirement of a fair trial 'includes the guarantees of procedural law and is a quality which can only be assessed by taking into account the whole of the proceedings and the circumstances of the case. Consequently, a proceeding may be unfair, unjust or inequitable, as a result of the absence of certain detailed rules as well as in spite of the existence of all detailed rules. In accordance with the judicial practice of the Constitutional Court, the right to a fair trial includes all the conditions of the right of access to the courts not expressly mentioned in the

constitutional text." {Decision 7/2013 (III. 1.) AB, Reasoning [24]; most recently: Decision 3027/2018 (II. 6.) AB, Reasoning [13]}. It should also be pointed out that while the right to a balanced judicial process is absolute, that is, unlimited, the individual subset of rights are subject to a system of necessity and proportionality criteria in relation to other fundamental rights or constitutional values {see for example: Decision 34/2014. (XI. 14.) AB, Reasoning [142]; Decision 2/2017 (II. 10.) AB, Reasoning [46] to [53]; Decision 3223/2018 (VII. 2.) AB, Reasoning [27]}.

[24] The petitioners' references to the unfairness and imbalance of the proceedings as a whole, in view of their complexity and the fact that they covered all stages of the proceedings, as well as the content of the objections, raise doubts as to the violation of the Fundamental Law which substantially affected the judges' decision. In particular, the petitioners also alleged a breach of certain aspects of the right to a fair hearing, which in themselves justify the admissibility of the complaint, as follows.

[25] In the practice of the Constitutional Court, the question of the impartiality of the judge presiding over the case has already been considered a question requiring substantive review in other cases [Decision 3243/2017 (X. 10.) AB]. In the present case, in light of the provisions of Decision 14/2002 (III. 20.) AB, the petitioner's reference to the requirement of separation of functions raises doubts regarding the conformity of the procedure with the Fundamental Law.

[26] The petitioners referred to the violation of the right to complete the proceedings within a reasonable time, which is a question that can be reviewed in a criminal case according to the decision of the Constitutional Court in Decision 2/2017 (II. 10.) AB.

[27] The presumption of innocence, in accordance with the Constitutional Court's decision 3313/2017 (XI. 30.) AB, is related to the requirement to avoid that the accused is presented as guilty in the course of the proceedings before a final court decision has been made in his criminal case. In the present case, it is precisely this requirement that the petitioners have alleged to have been breached.

[28] In several contexts, the petitioners invoked a violation of the right of defence. For example, they referred to their interrogation without the presence of a defence counsel, which, in the light of Decision 8/2013 (III. 1) AB, could result in the violation of the Fundamental Law of the court decisions challenged in the constitutional complaint. In addition, the petitioners' arguments concerning the exercise of the right of access to the file also require meritorious review. Based on the Decision 6/1998 (III. 11.) AB (ABH 1998, 91, 96.) and Decision 15/2002 (III. 29.) AB (ABH, 2002, 116, 118.), the full knowledge and, subject to appropriate safeguards, possession of the data and documents contained in the proceedings can be included in the "rights to be guaranteed in any event" arising from the requirement of a fair trial {reaffirmed e.g. by Decision 3100/2015 (V. 26.) AB, Reasoning [107] and [108]}. Also justifying the admissibility of the petition is the review of the reference made that the petitioners were not allowed to participate in certain procedural acts and that the court deprived one of the petitioners' counsel of his right to speak during the pleading. The right to participate is intended to ensure the right of defence and the oral plea is one of the most important means of defence in criminal proceedings.

[29] In addition to this, the petitioners also allege a violation of their right to human dignity by claiming inhuman and degrading treatment, and only an review of the merits can determine whether this may have affected the proceedings.

[30] On the basis of all the above, the Constitutional Court reviewed the merits of the constitutional complaints, pursuant to Section 31 (6) of the Rules of Procedure, without conducting the admission procedure.

IV

[31] The constitutional complaints are unfounded.

[32] 1. First of all, the Constitutional Court, relying on its previous practice [see most recently, in summary, e.g. Decision 3080/2018 (III. 5.) AB, Reasoning [16] and [17], also sets out the general limits of its review in the present case as follows.

[33] In accordance with its consistent practice, the Constitutional Court only reviews the constitutionality of judgements, it is not a review forum of the judicial system of general jurisdiction, and the Constitutional Court's competence in relation to constitutional complaints, through the protection of the petitioner's right guaranteed by the Fundamental Law, ensures the protection of the Fundamental Law. Real or perceived breaches of the law by the courts cannot in themselves give rise to a constitutional complaint. Otherwise, the Constitutional Court would implicitly become a court of fourth instance {Decision 3268/2012 (X. 4.) AB, Reasoning [28]}. "The courts interpret the law, and the Constitutional Court can only define the constitutional framework of the scope of interpretation. However, this power cannot create a basis for interfering with the activity of the courts in all cases where (alleged) infringements of the law have been committed which cannot be remedied by other means of legal redress. Neither the abstract principle of the rule of law nor the fundamental right to a fair trial [...] can provide a basis for the Constitutional Court to assume the role of a super-court above the judiciary and act as a traditional forum for judicial review. [...] Any error of fact or law by a judge does not automatically render the whole procedure unfair, since such errors can never be entirely eliminated, they are inherent in the system of justice as we know it today." {Decision 3325/2012 (XI.12.) AB; Reasoning [13] to [15]}.

[34] "Article XXVIII (1) of the Fundamental Law contains a fundamental procedural right, which is primarily a system of procedural guarantees against judicial proceedings." {Decision 3181/2018 (VI. 8.) AB, Reasoning [42]}. Consequently, the Constitutional Court has no competence to rule on a question of technical law or solely on a question of interpretation of the law, which falls within the jurisdiction of the court of appeal {Order 3003/2012 (VI. 21.) AB; Order 3392/2012 (XII. 30.) AB, Reasoning [6]; Order 3017/2013 (I. 28.) AB, Reasoning [3]; Order 3028/2014 (II. 17.) AB, Reasoning [12]; Order 3098/2014 (IV. 11.) AB, Reasoning [28]}. This also includes the fact that the Constitutional Court is not a trier of fact, and that it is the task of the general courts, ultimately the Curia, to conduct the investigation and the evidentiary proceedings, to assess the evidence and, through this, to establish the facts and, to a certain

extent, to review them in the course of the appellate proceedings. It does not have the power to review the direction of judicial decisions, the judicial weighing of evidence (how the general courts have assessed a particular fact) or the entire judicial process. This evaluative activity of the court cannot be subject to the review of constitutionality { Decision 21/2016 (XI. 30.) AB, Reasoning [24], Order 3013/2016 (I. 25.) AB, Reasoning [18]; Order 3221/2014 (IX. 22.) AB, Reasoning [14] and [15], Order 3309/2012 (XI. 12.) AB, Reasoning [5]}. "The mere fact that the court does not grant a request for evidence in its discretion does not render the entire procedure unfair and thus unconstitutional" {Decision 3268/2012 (X. 4.) AB, Reasoning [28]}.

[35] The Constitutional Court notes that the European Court of Human Rights (hereinafter referred to as the "ECtHR") follows a similar principle. "The ECtHR, in its decision in Tánczos v Hungary [(30332/02), 26 April 2005], inter alia, set out its position under Article 6 of the European Convention on Human Rights [hereinafter referred to as the "ECHR"] that it is, as a general rule, for the national courts to assess the relevance of the evidence put before them and the evidence which the accused seeks to adduce. Specifically, Article 6 (3) (d) also leaves, as a general rule, to the national courts the assessment of whether it is necessary to call witnesses; it does not require the appearance and examination of all exculpatory witnesses (cf. Solakov v. the former Yugoslav Republic of Macedonia, Appl. No 47023/99, para. 57, ECHR 2001-X); and this principle also applies to experts (*see* Baragiola v. Switzerland, Appl. No 17265/90, Commission decision of 21 October 1993, Decisions and Reports 75, p. 76)" {Decision 3206/2016 (X. 17.) AB, Reasoning [45]}.

[36] On the basis of the above, it is necessary to assess whether the investigation in the present case was sufficiently careful and thorough, or whether the court's judgement was well-founded (e.g. how thorough and detailed the expert's opinion was; whether the hearing of the petitioners as witnesses was justified; how the court resolved any contradictions between the statements of the witnesses and the experts; whether the role of the Fourth Defendant as accused in the case was clarified by the court with the thoroughness required by the subjective expectations of the petitioners, why and to what extent his testimony was considered credible; what evidence the prosecution considered necessary to adduce; on what grounds the court dismissed certain of the petitioners' evidentiary motions; which witnesses the court considered appropriate to hear; whether the conviction was sufficiently well-founded on the evidence available; whether any evidence that may have been omitted might cast doubt on the grounds for the conviction in the light of the other evidence; whether the legal conclusion that the offence was committed in a criminal organisation was justified in the case, even though it was not expressly stated in the indictment).

[37] It should also be recalled that "the imposition of a sentence is a matter of technical law, a right of the judge acting as the custodian of justice to decide on the basis of judicial independence. It is part of the judicial administration of justice to determine both the facts and the applicable law and to determine the legal consequences. This complex process, irrespective of the procedural stage, involves the objective discovery, summarisation and assessment of the relevant legal facts and the determination of the legal issues. The judge's inner conviction, which enables him to make a decision in accordance with his conscience, as protected by the constitutional principle of judicial independence, is shaped by these factors." {Decision

3031/2017 (III. 7.) AB, Reasoning [54], see also Decision 3080/2018 (III. 5.) AB, Reasoning [20]}. Consequently, the Constitutional Court is not in a position to take a position on whether the sentence imposed by the court is appropriate and proportionate.

[38] Finally, the Constitutional Court stresses that, in order to determine whether the fundamental rights alleged by the petitioners had been infringed, it was necessary in certain cases to take into account the facts of the case, but this does not mean that the Constitutional Court reviewed the facts established by the court or reassessed the evidence.

[39] 2. The petitioners primarily alleged a violation of the right to a fair trial, the other alleged violations of fundamental rights are partly or wholly related to this right. Therefore, the Constitutional Court also primarily focused its review on this fundamental right.

[40] However, in view of the fact that the petitioners, in addition to the right to a fair trial [Article XXVIII (1) of the Fundamental Law], also invoked the violation of the right to a fair hearing before a public authority [Article XXIV (1) of the Fundamental Law] in connection with the investigation, the Constitutional Court points out the following.

[41] In the case of criminal proceedings, the judicial procedure is preceded by an investigation, which is a separate stage of the criminal procedure. "The investigation is the preparatory stage for the prosecution of a criminal claim before the court. It is a series of official actions", which "progresses from the suspicion that a criminal offence has been committed to the certainty required for the prosecution of a specific person for a precisely defined act contrary to the criminal law, which is liable to give rise to legal proceedings" (Decision 209/B/2003, ABH 2008, 1926, 1940-1941). Its objective is therefore to discover the offence, the identity of the perpetrator and to search for the means of proof. As a result, a decision may be taken to prosecute or to terminate the proceedings.

[42] "In accordance with the consistent practice of the Constitutional Court, the obligation to enforce criminal claims and to operate law enforcement and criminal justice under constitutional conditions clearly follows from the monopoly of the State's punitive power." {Decision 3017/2016 (II. 2.) AB, Reasoning [31]}. The activities of the investigation authority are therefore subject to constitutional control, and respect for fundamental procedural rights is a fundamental requirement in the proceedings, as in judicial proceedings. The criminal procedure as a whole must also be designed and operated at the legislative level in a manner that satisfies the requirements of fair trial, since '[t]he rule of law and the requirements of constitutional criminal law require that the State exercise its punitive power in accordance with rules that balance the safeguards protecting individuals against the State, in particular the protection of the constitutional rights of the person subject to criminal proceedings, on the one hand, and the need for security in the community, the social expectations as to the functioning of the criminal justice system and the protection of the rights and interests of persons who have suffered harm as a result of criminal offences, on the other" (Decision 209/B/2003 AB referred to the ECtHR's practice in this respect as follows: '[The] Court has consistently held that, although Article 6 lays down the requirements of a fair trial for the prosecution, they must also apply, *mutatis mutandis*, to the pre-trial stage of the proceedings. The requirements of Article 6, [...] the minimum rights of a person suspected of having

committed a criminal offence, are also relevant in the pre-trial procedure, since failures on the part of the authorities in this respect may also lead to irreparable harm to the fairness of the trial itself (Imbrioscia v Switzerland, judgement of 24 November 1993, para. 36; John Murray v United Kingdom, judgement of 26 January 1996, para. 62)' (OJ 2008, 1926, 1935).

[43] In a criminal procedure consisting of several stages, the investigation prepares the charge and only the court can decide with legal binding force on the guilt or acquittal of the accused. This means that, unlike in public administrative proceedings, it is not a review of a basic procedure that is the subject of the judicial proceedings. The review of constitutionality must also be adapted to this: if the investigation results in an indictment and a court trial, the Constitutional Court does not, on the basis of a constitutional complaint under Section 27 of the Constitutional Court Act, review the right to a fair trial and certain of its subset of rights in the investigative stage of criminal proceedings as if they were a separate official procedure. As pointed out in Decision 21/2016 (XI. 30.) AB: 'Article XXIV (1) of the Fundamental Law lays down the requirement of a fair trial in relation to public administrative proceedings, and thus does not apply to the investigative stage of criminal proceedings or to the judicial proceedings, which also assess the outcome of the investigation. Consequently, there is no connection between the judicial decisions challenged in the complaint and this provision of the Fundamental Law" (Reasoning [21]). Thus, when the fairness of the criminal proceedings as a whole is being considered, the investigative and judicial stages of the proceedings must generally be considered as a whole, and the conduct of the investigation authority may come within the scope of the Constitutional Court's review of the unconstitutionality of the judicial decision. It is important to note, on the one hand, that "the primary instrument for successfully remedying the consequences of infringements and omissions committed during the investigative stage of criminal proceedings is the legal instrument of the complaint, as known in criminal procedural law" {Decision 3207/2015 (X. 27.) AB, Reasoning [10]}. On the other hand, a constitutional complaint under Section 27 of the Constitutional Court Act is also filed against a judicial decision; therefore, the constitutionality of this complaint must take into account whether the fundamental right to a fair trial was violated during the investigation in a manner that could lead to irreparable damage to the fairness of the judicial proceedings.

[44] To sum up, the review of a constitutional complaint against a decision of a court in criminal proceedings filed under Section 27 of the Constitutional Court Act, but also challenging the conduct of the investigation authority, may be conducted not on the basis of Article XXIV (1) of the Fundamental Law, but on the basis of Article XXVIII (1) of the Fundamental Law in relation to the criminal proceedings as a whole. In this way, it can be ensured that the criminal proceedings as a whole comply with the requirement of fairness [the "inalienable quality of criminal proceedings under the rule of law is the fairness of the proceedings" (Decision 14/2004 (V. 7.) AB, ABH 2004, 241, 255; Decision 209/B/2003 AB, ABH 2008, 1926, 1938-1939)]. {*Cf.* Decision 8/2013 (III. 1) AB, which reviewed the right of defence in relation to the investigation, but did not annul the challenged judicial decision because the constitutional issue identified did not affect the merits of the judgement, see Reasoning [56]}.

[45] However, it should also be stressed that the right to a fair trial does not necessarily imply the same guarantees at all procedural stages: in comparison with the pre-trial procedure,

certain procedural guarantees may be limited in the course of an investigation, given the role of the State in the process of prosecuting criminal claims and the professional rules of the investigation.

[46] 3. In the context of the right to a fair trial, it should first of all be recalled that in accordance with Decision 21/2014 (VII. 15) AB, "there is no obstacle to the use of certain statements of principle of Constitutional Court decisions interpreting the right to a fair trial, which have already been overturned, in the interpretation of the Fundamental Law, as they are in line with the purpose and interpretative provisions of the Fundamental Law" (Reasoning [50] to [60]).

[47] Specifically with regard to criminal proceedings, the Constitutional Court summarised its practice in Decision 14/2004 (V. 7.) AB as follows: 'In order to enforce substantive justice, the Constitution grants the right to a procedure which is necessary and in most cases appropriate therefor. However, the procedural method for the assertion of the right to prosecute, the criminal procedure, is subject to the fundamental requirement of establishing the truth as to the commission of the offence, the identity of the perpetrator and his or her being subject to criminal punishment. This is a fundamental condition for a fair judicial decision on the question of criminal responsibility. [...] the right to a fair trial is an absolute right, against which there is no other fundamental right or constitutional objective that can be weighed, because it is itself the result of a balancing exercise. From the point of view of criminal procedure, these propositions are based on the accumulated experience of the historical systems of criminal justice. Accordingly, the most appropriate way to ascertain the truth is for an independent and impartial tribunal to determine the facts necessary for the determination of criminal responsibility by freely weighing the evidence obtained by direct observation in a public trial, as a result of a procedure conducted with the active participation of parties having equal rights to participate in the taking of evidence." (ABH 2004, 241, 266.) At the same time, "fair trial is a quality factor that may only be judged by taking into account the whole of the procedure and all of its circumstances. Therefore, despite the absence of some details, as well as the observance of all the rules of detail, a procedure may be ”inequitable”, ”unjust” or ”unfair”.." {Decision 6/1998 (11.3.1998) AB, ABH 1998, 91, 95; Decision 2/2017 (10.2.2017) AB, Reasoning [45] to [53]}.

[48] Some of the requirements determining the quality of the judgement are institutional and procedural guarantees directly regulated by the Fundamental Law, which can also be considered as a part of the right to a fair trial {such as the court established by law, the requirement of judicial independence and impartiality, the fairness and publicity of the trial and the requirement of a judgement within a reasonable time, see Decision 22/2014 (VII. 15.) AB, Reasoning [49]}. Another group of rights, which are ultimately also traceable to the right to a fair trial as a "maternal right" and which are logically linked to it, have been formulated as independent fundamental rights in the Fundamental Law [e.g. the presumption of innocence, the right of defence, see Article XXVIII (2) and (3) of the Fundamental Law]. There is also a subset of rights derived from the right to a fair trial, which is not mentioned in the Fundamental Law, but which have been recognised by the Constitutional Court {e.g. the requirement of equality of arms, see Decision 22/2014 (VII. 15.) AB, Reasoning [49], the right to a reasoned

decision by a judge, see Decision 7/2013 (III. 1.) AB, Reasoning [28] to [34]}. In several cases, these powers are reinforced by specific rules and detailed rules in procedural law.

[49] Approached from the side of the possibility of limitation, there are procedural rules, procedural guarantees, the violation of which can only be included in the scope of investigation in the course of the review of the procedural "quality" enforcing the fundamental right. The aim here, however, is not to identify any breach of the law: a breach of procedural rules does not necessarily mean that the procedure as a whole was unbalanced. In such a case, it is necessary to consider whether the alleged infringement was of such a nature and gravity that, taken as a whole, it was unfair to the petitioner and therefore infringed the right to a fair trial as a fundamental right of the procedure as a whole.

[50] Certain subset of rights or entitlements that are explicitly assumed to be part of a fair procedure [to use the terminology of Decision 14/2002 (III. 20.) AB: "components", "requisites" (ABH 2002, 101, 109.)] are also of an absolute nature in the sense that their violation, in essence, since they are themselves the result of a discretionary act, automatically leads to a finding of an infringement of the Fundamental Law (e.g. the infringement of the right to a fair trial, which, if established, cannot be justified).

[51] However, the restriction of other subset of rights and specifically mentioned fundamental rights does not necessarily mean an absolute violation of the Fundamental Law {e.g. the right to hold a hearing, see Decision 3027/2018 (II. 6.) AB, Reasoning [33] to [50]}. The limitation of "the subset of rights which are part of the right to a fair trial [...] is possible by applying the necessity and proportionality test of Article I (3) of the Fundamental Law, which imposes strict requirements" {Decision 17/2015 (VI. 5.) AB, Reasoning [103]}.

[52] 4. The Constitutional Court first reviewed the alleged violation of the right to an impartial tribunal guaranteed by Article XXVIII (1) of the Fundamental Law. The petitioners alleged a violation of that right on three grounds: first, that the presiding judge of the first-instance panel had conducted a supplementary investigation to remedy the defects in the prosecution's case; second, that their requests for evidence had been rejected by the Court of First Instance; and third, that the conduct of the presiding judge of the first-instance panel at the hearing had led them to believe that the judge had presumed their guilt. (They also applied for recusal of the judge on similar grounds, but this was dismissed, cf. judgement at second instance, pp. 101-103.)

[53] 4.1 The right to an impartial tribunal is a specifically mentioned component right attached to the right to a fair trial in the Fundamental Law, which is an essential and at the same time absolute requirement: it cannot be subjected to the necessity and proportionality test, and its restriction cannot be justified. In the case of a restriction, a violation of the right to a fair trial must be established.

[54] The Constitutional Court has already dealt with this right in a number of decisions, and most recently summarised its practice as follows: '[the] fundamental constitutional right to an impartial tribunal, also under Article XXVIII (1) of the Fundamental Law, requires the court to be free from prejudice and impartial towards the person subject to the proceedings. On the one hand, this is an expectation of the judge himself, his conduct and attitude, and on the

other hand, it is an objective requirement relating to the regulation of the procedure: any situation which would give rise to legitimate doubts as to the impartiality of the judge must be avoided (ABH 1995, 346, 347). The question of impartiality must be reviewed from both an objective and a subjective point of view. Impartiality requires, on the one hand, that the members of the court be free from personal prejudices and, on the other hand, from an objective point of view, that there be a sufficient appearance of impartiality [*cf*. Decision 67/1995 (XII. 7.) AB, ABH 1995, 346; Decision 32/2002 (VI. 4.) AB, ABH 2002, 153; Decision 17/2001 (VI. 1.) AB, ABH 2001, 222]." {Order 3109/2013 (V. 17.) AB, Reasoning [7], Order 3343/2017 (XII. 20.) AB Decision, Reasoning [19]}. In accordance with Decision 14/2002 (III. 20) AB, the subjective point of view means an assessment of the personal conduct and attitude of the judge acting as judge, for example, whether he or she has made any statements during the proceedings from which it can be inferred that he or she lacked impartiality. The objective viewpoint, on the other hand, is an assessment of the circumstances independent of the judge's personal conduct, and in this context it is necessary to review whether there are legitimate, justified and objectively justifiable grounds for assuming that the judge lacked impartiality. In accordance with the ECtHR's practice on the objective test, for example, what is termed as the 'cumulation of functions', that is, where a judge performs non-judicial tasks related to the investigation or prosecution, may give rise to legitimate doubts as to his impartiality. The performance of prosecution and adjudication functions by the same person in the same proceedings is therefore in itself susceptible of calling into question the judge's impartiality. The Constitutional Court has stated that "[t]he confusion of the role of the public prosecutor and that of the judge, the intervention of the court on the side of the prosecution in the proceedings, may, by its very nature, be capable of raising doubts as to the impartiality of the court" [Decision 14/2002 (III. 20.) AB, ABH 2002, 101, 109].

[55] To sum up, the requirement of impartiality requires the judge to base his decision solely on objective facts and not to allow any circumstances other than those facts to influence his judgement, that is, "not to be prejudiced in the matter to be judged, and not to be biased in favour of or against any party to the case." {Decision 3080/2018 (III. 5) AB, Reasoning [21]}. Furthermore, the procedure must be one that conveys the fact of impartial, unbiased judgement to the participants in the proceedings and to society.

[56] As regards the nature of the Constitutional Court's review, it should be recalled that in cases where there is doubt as to the impartiality of the judge, the doubt of the person subject to the proceedings is important, but the decisive factor is whether this doubt can be justified by objective criteria {Decision 34/2013 (XI. 22.) AB, Reasoning[32]; Decision 3038/2017 (III. 7.) AB, Reasoning [24] and [25]; Decision 3185/2017 (VII. 14.) AB, Reasoning [21] and [22]; most recently: Decision 3080/2018 (III. 5.) AB, Reasoning [21]}. Impartiality "can only be reasonably doubted if there are tangible signs of a lack of impartiality in the course of the proceedings." {Decision 3243/2017 (X. 10.) AB, Reasoning [30]}.

[57] 4.2 The constitutional complaint in the case at hand essentially concerns the subjective viewpoint of the right to an impartial tribunal, the personal conduct of the judge concerned. The petitioners also invoked a substantive cumulation of functions, a violation of the

requirement of separation of functions, when they claimed that the presiding judge of the first instance panel had essentially conducted a supplementary investigation.

[58] The Constitutional Court has based its position on the court decisions and the records of the hearings in the case.

[59] It may be noted that the number of rejected evidentiary motions alone does not allow a conclusion to be drawn as to whether the judge had a personal bias or prejudice in the case. The court dealt with the merits of all the requests for evidence and, in the case of rejection, gave a detailed account of the process of consideration and the precise reasons for its decision (see pages 877-894 of the judgement of the First Instance Judgement of Budapest Environs Regional Court No 8.B.101/2010/1010). On the other hand, there is no other objective evidence to suggest that the judge acted on the basis of a previously formulated preconception and sought to justify his convictions in the case from the outset, or that his decision was influenced by personal prejudice or sympathy or antipathy towards the participants in the proceedings.

[60] In connection with the petitioner's reference to the requirement of separation of functions, the Constitutional Court refers to the following. There was no question of the same person performing the functions of prosecution and judgement in the same proceedings, and the fact that the court of first instance exercised the option of ordering the taking of evidence of its own motion does not mean that there was a cumulation of functions which called into question its impartiality.

[61] An essential element of criminal proceedings is the need to establish the truth, to establish the truthfulness of the facts. The pursuit of objective, material truth does not mean that the judge takes over the prosecution, that is, that the functions of prosecutor and judge are merged. With appropriate guarantees, a procedural system based on more active judicial involvement can be just as constitutional as a system that gives the judge a more passive role in proving the prosecution. Decision 3242/2012 (IX. 28.) AB, assessing the constitutionality of the rules of the Code of Criminal Procedure on the taking of evidence by the judge ex officio, pointed out that "[the] taking of evidence by the judge aims at the full investigation of the facts, that is, the full establishment of the data necessary for a well-founded decision on criminal liability. However, the establishment of the facts is not the same as the necessary proof of guilt. The Constitutional Court points out that proof by the judge, in the absence of a motion, that is to say, *ex officio*, may lead to the obtaining of evidence in support of the innocence of the accused, that is to say, in support of the defence, just as much as to the confirmation of the accusation. [...] In this chain of evidence, evidence ordered by the judge which in itself appears to support the accusation may necessitate the use of a new means of proof which, by reversing the direction of the evidentiary procedure, strengthens the position of the defence. [...] The rule in question helps to ensure that the facts are fully established and, through them, that the court reaches a well-founded decision, in other words, that it seeks to establish the objective truth" (Reasoning [26] to [28]). The Constitutional Court therefore held in the judgement cited by it that the provision of the Code of Criminal Procedure which allows the judge to order the taking of evidence *ex officio*, that is, in the absence of a motion to that effect by the prosecution or the defence, does not infringe the right to a fair trial and the right of

defence, does not conflict with the principle of the separation of functions and does not affect the balance between the prosecution and the defence (Reasoning [30]).

[62] The petitioners considered that the lack of impartiality of the trial judge was due to the evidence ordered *ex officio* by the court. However, the Constitutional Court concluded that the activity of the judge in the specific case did not lead to a violation of the requirement of separation of functions in the constitutional sense: it reflected the desire to investigate the facts as fully as possible and, through this, to reach an informed judicial decision, that is, to establish objective truth. It should be noted that this issue was also addressed by the court of appeal at second instance, following the petitioners' appeal, and the evidence, the result of the secret data gathering, which the court of first instance had obtained ex officio, not only ex officio, but also by overruling the prosecutor's decision, was excluded from the scope of the assessment (see pages 114 and 115 of the judgement of the court of appeal). Impartiality, which can be justified on the basis of objective criteria, was not called into question either as regards the procedure itself or the assessment of the case or the parties, and therefore no infringement of the right to an impartial tribunal as part of the right to a fair trial can be established.

[63] 5. The petitioners' position is that since the case was considered to be of high importance (Section 554 of the Code of Criminal Procedure), the rules governing the priority of proceedings had to be applied, but the proceedings were nevertheless delayed, which violated their right to a hearing within a reasonable time, which is a specifically mentioned component right of the right to a fair trial guaranteed by Article XXVIII (1) of the Fundamental Law.

[64] As regards the facts of the proceedings, it can be stated that the criminal proceedings on which the constitutional complaint is based were initiated on 21 August 2009, when the petitioners were informed of the accusation, and were concluded by the third instance order of the Curia of 12 January 2016, which was served on the petitioners on 2 March and 12 April 2016. These two dates are significant because, from a constitutional point of view, the requirement of reasonable time is to be assessed in relation to the time between the communication of the suspicion and the service of the final decision {see Decision 3342/2017 (XII. 20) AB, Reasoning [25], Decision 2/2017 (II. 10.) AB, Reasoning [102]}. On this basis, the duration of the proceedings exceeded the period of six years and six months by a few days.

[65] The petitioners also complained about the objective length of the proceedings, and as a specific objection they raised the fact that there was extensive evidence in the first instance proceedings and that several trial days had to be repeated due to procedural errors. In addition, they argued that the one-year period between the delivery of the judgement at first instance and its entry into writing was unduly long and that the court had unlawfully delayed in setting the trial dates in the proceedings at second and third instance.

[66] 5.1 The Fundamental Law also lays down the requirement of a decision within a reasonable time in Article XXVIII (1). In its decisions relating to Article XXVIII (1) of the Fundamental Law, the Constitutional Court has held that the right to be tried within a reasonable time is a fundamental right to a fair trial and that, consequently, a constitutional complaint may be based on a violation of this right.

[67] In principle, "the Constitutional Court has no power to mitigate or remedy the consequences of a significant delay in a particular judicial proceeding. The Constitutional Court may, in the case of a complaint under Section 27 of the Constitutional Court Act, only rule on the annulment of the judgement challenged in the petition (if the Constitutional Court were to annul the judgements challenged in the present case, the court proceedings would be reopened, and the trial would therefore only be prolonged)" {Order 3237/2012 (IX. 28.) AB, Reasoning [8]; *cf.*: Order 3174/2013 (IX. 17.) AB , Reasoning [18], [20]; Decision 3115/2013 (VI. 4.) AB, Reasoning [28]–[30]; Order 3196/2013 (X. 22.) AB , Reasoning [38]; Order 3236/2013 (XII. 21.) AB , Reasoning [42]–[44]; see with a conceptual nature: Decision 3024/2016. (II. 23.) AB, Reasoning [14]–[21]; Decision 2/2017 (II. 10.) AB, Reasoning [51]–[54]; see also: Order 3078/2016 (IV. 18.) AB , Reasoning [21]; Order 3113/2016 (VI. 3.) AB , Reasoning [16]–[20]; Order 3249/2016 (XI. 28.) AB , Reasoning [19]; Order 3004/2017 (II. 1.) AB , Reasoning [21]; Order 3094/2017 (IV. 28.) AB , Reasoning [14]; Order 3091/2017 (IV. 28.) AB , Reasoning [42]; Order 3158/2017 (VI. 21.) AB , Reasoning [21]; Order 3194/2017 (VII. 21.) AB , Reasoning [24]-[27]; Decision 3209/2017 (IX. 13.) AB, Reasoning [35]; Order 3301/2017 (XI. 20.) AB , Reasoning [13]; Order 3294/2017 (XI. 20.) AB , Reasoning [18]; Order 3073/2018 (II. 26.) AB , Reasoning [27]; Order 3249/2018 (VII. 11.) AB , Reasoning [13]}. As a consequence, the claim of the petitioner arising from the delay in the proceedings can only be enforced by other legal means, primarily by civil action.

[68] However, a different approach applies in criminal cases, as the court in criminal proceedings has the possibility to remedy the prejudice caused by the delay in the criminal proceedings: the violation of fundamental rights caused by the delay in the proceedings can be remedied in the course of the imposition of the sentence.

[69] The Constitutional Court therefore defined the constitutional criteria necessary to assess the requirement of a judgement within a reasonable time in its Decision 2/2017 (II. 10.) AB (hereinafter referred to as the "2017 Court Decision") (Reasoning [82]), and stated as a constitutional requirement that if the court mitigates the penalty or measure imposed on the defendant expressly with regard to the length of the proceedings, the reasons for this must be explained in detail in the reasoning for the judgement. On the basis of that decision, the duration of criminal proceedings may be held to be in breach of Article XXVIII (1) of the Fundamental Law, in particular, where "there are unjustified periods of inactivity attributable to the courts acting in the case and the excessive length of the criminal proceedings is not justified by the complexity of the case" (2017 Court Decision, Reasoning [82]). In line with this, Decision 3342/2017 (XII. 20.) AB reaffirmed that "[t]he passage of time cannot be fully identified with the time elapsed due to the delay in the proceedings, which also implies inactivity of the court" (Reasoning [25]). However, in accordance with the 2017 Court Decision, in exceptional cases, a delay in criminal proceedings in the constitutional sense may be established without a detailed review if "the absolute length of the criminal proceedings has in itself exceeded the period which may be regarded as reasonable for the purposes of a judgement within a reasonable time" (Reasoning [103]).

[70] 5.2 The Constitutional Court has so far found in two cases that the absolute length of the procedure exceeded the time that could be considered acceptable for a judgement within a

reasonable time: In the case underlying Decision 3024/2016 (II. 23.) AB, the civil action for the payment of an additional fee for the use of a property lasted eighteen years in total; and in the case of the 2017 Court Decision. The case where seven years had elapsed between the commencement of the investigation and the final judgement, with less than a few days between the commencement of the investigation and the final judgement, did not constitute a violation of the right to complete the proceedings within a reasonable time {Decision 3342/2017 (XII. 20.) AB, Reasoning [25]}. In the present case, the proceedings lasted approximately six years and six months; therefore, this procedural duration does not in itself infringe the right to be tried within a reasonable time. The absolute length of the proceedings does not indicate that the criminal proceedings were protracted.

[71] However, a criminal proceeding that cannot be considered to be of long duration in absolute terms may also be protracted, as mentioned above. This requires a more detailed assessment, taking into account the circumstances of the specific proceedings, the individual procedural stages and procedural acts. This analysis can be dispensed with if the court itself assesses as a mitigating circumstance not only the passage of time, the longer period of time since the offence was committed, as an objective factor, but also the length of the court proceedings for which the defendant is not responsible.

[72] The criminal proceedings in the case at hand can be considered complex due to the substantive gravity of the case, the wide-ranging nature of the evidence and the extensive evidentiary procedure conducted during the investigation and at the trial. The court of first instance in the case established 12 elements of the offence against the four accused, held nearly 170 days of hearings in which 202 witnesses and 44 experts were heard, and reviewed nearly 400 items of physical evidence. Some of the witnesses and experts were recalled several times. The investigative file consists of 114 volumes and 32 854 pages, and the first instance court file consists of 11 volumes of 1010 numbered documents, totalling several thousand pages. The first instance judgement alone is 894 pages. The Court of Appeal held five trial days and recorded the judgement of the Court of Appeal in 208 pages. The third instance order of the Curia, issued in a public sitting on 12 January 2016, is 36 pages long.

[73] The Constitutional Court emphasises that the determination of the direction and scope of the necessary evidence is a matter within the professional competence of the court and is not subject to a review of constitutionality. The determination of the length of the proceedings may essentially be based on the detection of periods of unjustified inactivity attributable to the courts acting, and not on excessive activity, as the petitioner considers. Moreover, the repetition of evidence taken on trial days with an excluded defender or the repetition of a certain stage of the trial because of procedural irregularities does not negate the court's concern to deal with the prosecution within a reasonable time. The reason for the resumption is to correct procedural errors made by the court and is expressly intended to ensure a fair trial for the accused.

[74] The court of first instance delivered its judgement on 6 August 2013, the judgement was not entered into writing until almost a year later (one of the petitioners refers to the fact that the judgement was served on him on 23 July 2014 and that disciplinary proceedings were also brought against the presiding judge of the first instance panel for delay in the entry into

writing). The court of second instance held its first hearing on 15 April 2015 and delivered its judgement on 8 May. On 12 January 2016, the Curia heard the case and finally closed the criminal proceedings with its order of the same day.

[75] On the basis of the dates outlined above, taking into account the time limits for appeals and the breaks in the proceedings, only the length of the time taken to reduce the judgement to writing at first instance can be considered to be a "judicial inactivity" which results in a delay in the proceedings.

[76] However, this was addressed by the court of second instance, when it stated in its judgement that "the significant lapse of time since the commission of the offence, the delay of the proceedings for reasons beyond the control of the accused, cannot be disregarded as a mitigating circumstance" (see page 205 of the judgement of the court of second instance). (In accordance with the third instance order of the Curia, 'the courts before them fully investigated the circumstances relevant to the imposition of the sentence and assessed them in the light of their gravity', p. 34.) It is clear from this formulation of the grounds of the judgement that the court did not merely assess the lapse of time but also the responsibility for the delay in the proceedings, since it found that the accused could not be held liable for it. The circumstances which prompted the court to make that finding are not set out in detail, but it is clear from the context of the text, the court expressly refers to it after stating that 'the circumstances of the sentencing decision were largely correctly listed by the court of first instance and need only be supplemented in substance in the light of the changed classification', that it can only be a matter of assessing the events which occurred after the judgement of first instance was delivered. In accordance with the 2017 Court Decision., "an infringement of fundamental law due to the length of the criminal proceedings may be remedied at the time of sentencing. If it can be established from the statement of grounds of the judgement that the court, in view of the length of the proceedings, 'favoured' the accused in the imposition of the sentence, that is to say, imposed a lighter sentence in view of the lapse of time, the length of the proceedings or applied a measure in lieu of a sentence, the accused may no longer legitimately plead infringement of his right to a trial within a reasonable time' (Reasoning [88]). There is no indication in the judgement that the court gave the defendants any preferential treatment as compensation for the length of the proceedings, in view of the length of the proceedings, and the defendants were sentenced to life imprisonment without parole. Nor is compensation an automatic consequence of the length of the proceedings (e.g. reduction of the sentence). It is a factor to be assessed in the circumstances of sentencing, but one which may be overridden by them. The delay in the proceedings has not affected the merits of the case and the Constitutional Court has no means of remedying the delay.

[77] On the basis of the foregoing, no infringement of the right to be tried within a reasonable time as part of the right to a fair trial can be established.

[78] 6. In accordance with the petitioners, the presumption of innocence [Article XXVIII (2) of the Fundamental Law] was violated during the investigation and the court proceedings. The investigation authority by its statements made during the press conference before the announcement of the suspicion, and the court by taking excessive security measures, by

prejudging the case and by the reasoning of the Curia in its decision of principle on the petitioners' pre-trial detention.

[79] 6.1 The presumption of innocence is a fundamental right in the Fundamental Law, but "as a guarantee of criminal procedure, it is an element of the right to a fair trial" {Decision 3313/2017 (XI. 30.) AB, Reasoning [42]}. In several decisions, the Constitutional Court has stated that the constitutional requirement for the person entitled to decide on criminal liability based on the presumption of innocence is, first and foremost, to act impartially and unbiased in the proceedings to establish liability, to fulfil its burden of proof in a substantiated manner and not to be prejudiced. At the same time, this system of requirements constitutes an obstacle of guarantee significance that the person subjected to the proceedings suffers the adverse legal consequences of the establishment of liability without having established his liability {Decision 26/B/1998 AB, ABH 2003, 1202, 1206; reaffirmed by Decision 30/2014 (IX. 30.) AB, Reasoning [56], Decision 3258/2015 (XII. 22.) AB, Reasoning [34]}. The presumption of innocence, as a principle of constitutional rank, is the content of the protection which applies to the finding of guilt and the legal consequences of the finding of guilt. The presumption of innocence, in addition to the process of deciding on the issue of liability, is primarily intended to prevent the legal damage that may be caused by the legal disadvantages caused by the use of legal measures without reparation in the absence of liability established in the course of proceedings conducted in accordance with the law {Decision 3087/2016 (V. 2.) AB, Reasoning [33], Decision 3243/2014 (X. 3.) AB, Reasoning [22], Decision 26/B/1998 AB, ABH 1999, 647, 650}.

[80] The ECtHR has dealt with the issue of statements by representatives of the authorities in criminal proceedings in several decisions relating to the presumption of innocence in Article 6 (2) ECHR. In accordance with the ECtHR, not only the person competent to decide on criminal liability, that is, the judge, but also other representatives of the authorities, are required not to express an opinion explicitly alleging the guilt of the person charged with a criminal offence before the final conviction of that person. When assessing statements relating to a breach of the presumption of innocence, a fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question (Fatullayev v Azerbaijan, 40984/07, 22 April 2010, paragraph 160). The ECtHR has therefore consistently stressed the importance of the need for representatives of state bodies to be selective in their statements about the guilt of a person who has not yet been finally convicted (Khuzhin and Others v. Russia, 13470/02, 23 October 2008, p. 1).Only in the light of the specific circumstances of the challenged statement can it be judged whether the statement of the representative of the public body violated the presumption of innocence (Butkevicius v. Lithuania, 48297/99, 26 March 2002, para. 49).

[81] 6.2 In accordance with the petitioners, on the day of their arrest, before they were questioned as suspects, the investigation authority held a press conference stating that they had committed the crimes and thus violated the presumption of innocence. However, the specific statement made at the press conference was not specified and the constitutional grounds for the violation were not explained. As a consequence, the Constitutional Court was

unable to review the merits of this element of the petition, since it did not meet the requirement of a definite request.

[82] 6.3 The Constitutional Court has already dealt with the connection between security measures used during criminal proceedings and the presumption of innocence {Decision 3313/2017 (XI. 30.) AB, Reasoning [33] to [46]}. It held that the use of coercive measures, such as pre-trial detention, does not in itself violate the presumption of innocence. At the same time, the decision, referring to the ECtHR judicial practice and Directive 2016/343/EU of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, also pointed out that the image of the accused conveyed to the public (e.g. handcuffs, lead shackles, prisoner's uniforms) cannot be explicitly intended to suggest his guilt before the decision is taken.

[83] In the present case, it was a well-known fact that the petitioners had been held in pre-trial detention, and the security measures (handcuffs, lead shackles) complained of were directly related to this fact. In the Constitutional Court's view, it cannot be established that the authorities' action was taken in order to make the petitioners appear guilty in the courtroom or in the wider public, in breach of the presumption of innocence.

[84] 6.4 The petitioners' claim that the court presumed their guilt from the outset is closely related to the right to an impartial tribunal. As explained above, the right to an impartial tribunal requires the judge to base his decision solely on objective facts and not to allow any circumstances other than those facts to influence his judgement, that is to say, "not to be prejudiced by the case to be judged and not to be biased in favour of or against any party to the case." {Decision 3080/2018 (III. 5.) AB, Reasoning [21]}. And the presumption of innocence means that in the proceedings to determine liability, the judge "must take an unbiased and impartial approach to the assessment of criminal liability, and the decision must be based on well-founded evidence, without prejudice to the prohibition of bias." {Order 3367/2017 (XII. 22.) AB, Reasoning [21]; see similarly: Decision 3017/2016 (II. 2.) AB, Reasoning [47]}. The prohibition of bias and the obligation to provide substantiated evidence are therefore at the core of the presumption of innocence and impartiality is at the core of the right to an impartial tribunal, but it is not possible to completely separate these requirements. {This is also supported by the fact that in Decision 3080/2018 (III. 5.) AB, the Constitutional Court also reviewed the possible violation of these rights together, with regard to each other (Reasoning [21])}. Therefore, the relevant factor in the review of the presumption of innocence is that, although the doubt of the person subject to the proceedings is important, the decisive circumstance is whether this doubt can be justified by objective criteria.

[85] In the Constitutional Court's view, the claim made by the petitioners can in fact be qualified as a criticism of the decision on the merits, a premise that is not supported by objective criteria. The court did not make any prior prejudicial statement as to the guilt of the accused prior to the decision and, in any event, it cannot be concluded from the procedure, given the large number of evidentiary acts ordered, that the court took a preliminary position on the issue of criminal responsibility without knowledge of the facts. The judicial procedure reflected the most complete and detailed review of the facts of the case (the court of first instance held

nearly 170 days of hearings and explained its findings in great detail) and, through this, the fundamental concern to reach an informed judicial decision, that is, to establish objective truth.

[86] 6.5 In accordance with the petitioners, the Curia's Decision in principle under criminal law No 1/2014, which was issued in connection with the extension of the pre-trial detention, also violates the presumption of innocence. In accordance with the decision of principle, the risk of recidivism as a reason for the continued pre-trial detention is justified by the fact that the accused persons had committed the acts of homicide that can be included in the statutory unity for almost one and a half years (Decision in principle under criminal law No 1/2014, point B.1.II).

[87] The Constitutional Court has already stated in previous decisions that coercive measures in criminal proceedings, such as custody or pre-trial detention, although they entail the temporary deprivation of liberty even without a court judgement, cannot be considered a violation of the presumption of innocence, but a precautionary measure in the public interest based on specific measures {Decision 3017/2016 (II. 2.) AB, Reasoning [48], Decision 26/B/1998 AB, ABH 1999, 647, 650; Decision 183/B/1992 AB ABH 1995, 598, 602.} Consequently, the reasoning of decisions extending pre-trial detention does not constitute a basis for a breach of the presumption of innocence.

[88] On the basis of all the above, the Constitutional Court found the petitioner's complaint under Article XXVIII (2) of the Fundamental Law to be unfounded.

[89] 7. The petitioners invoked the violation of Article XXVIII (3) of the Fundamental Law (the right of defence, which is a guarantee of the right to a fair trial, but is regulated as a separate fundamental right) for several reasons.

[90] 7.1 Primarily in the context of not being warned of their legal rights after being informed of the suspicion and being questioned without a lawyer, and also because they believe that their appointed lawyer did not do a proper job.

[91] The violation of the right of defence can be raised in connection with the complaint, since the Constitutional Court stated in the operative part of its Decision 8/2013 (III. 1.) AB that "it is a constitutional requirement under Article XXVIII (3) of the Fundamental Law that, when applying Section 48 (1) of Act XIX of 1998 on Criminal Procedure, the defence counsel appointed in the interest of the accused must be notified of the place and time of the hearing in a verifiable manner and in sufficient time to enable the defence counsel to exercise his rights under the Code of Criminal Procede and to participate in the hearing. In the absence of such notification, the statement of the accused shall not be admissible as evidence." The Constitutional Court reviewed whether the procedure in the present case complied with this constitutional requirement. In doing so, it acted in the light of the limits of the constitutional procedure as set out in point IV.1 (Reasoning [32] to [38]) this Decision: in order to determine whether there had been a restriction of a fundamental right, it was necessary to take account of the facts of the case, but this did not mean that the Constitutional Court reviewed the facts as established by the court or reassessed the evidence. The Constitutional Court has reviewed whether the facts alleged by the petitioners are supported by the available documents, that is, whether the alleged violation of fundamental rights can arise at all.

[92] In accordance with the investigative documents made available to the Constitutional Court, the first suspect interview of both petitioners was started without the presence of a lawyer, after the petitioners had been warned of their legal rights. However, one of the petitioners did not make any statement on the merits of the case. It can therefore be concluded that the right of defence enshrined in Article XXVIII (3) of the Fundamental Law, that 'the authorities acting in criminal matters must ensure in a verifiable manner that the person charged is able to be questioned in the presence of a lawyer appointed in his interest, to communicate with the person charged and to exercise the other rights conferred on him by the Code of Criminal Procedure', is not respected. {Decision 8/2013 (III. 1.) AB, Reasoning [38]}, were not restricted in the case at hand. The facts alleged by the petitioner were not confirmed by the documents.

[93] In the case of the other petitioner, the right of defence under Article XXVIII (3) of the Fundamental Law cannot be infringed because, as is evident from the report of 15 September 2009 (see Volume 45 of the investigation file), the petitioner expressly maintained his first statement, made without the presence of a defence lawyer, in response to a question asked in the presence of a defence lawyer. In the light of the above, the failure to observe the procedural guarantee cannot lead to a finding that the right of defence or the criminal proceedings are unfair and to the annulment of the judgement.

[94] It is not the task of the Constitutional Court to review the quality of the work of the appointed defence counsel in the criminal proceedings.

[95] 7.2 In addition, one of the petitioners complains that the court of first instance relied in its reasoning on the incriminating testimony of a witness in other criminal proceedings, which was sent to him by the prosecution between the delivery of the judgement and its recording. This testimony was in the file of the first instance proceedings, but the petitioner only became aware of it after the third instance proceedings. Furthermore, he applied in vain for the entire file of the investigation in question in the second instance proceedings. Thirdly, they both complained that the court of second instance had obtained the documents of another parallel investigation for 'brief inspection', but that they had not been allowed to inspect those documents. In the fourth place, the petitioners also claimed that the presiding judge of the first instance judicial panel had "consulted classified documents which the defence was not allowed to consult" and that the investigation authority had provided the court with evidence which the defence had not been aware of. In the fifth place, one of the petitioners claimed that his right of defence was also violated by the fact that he was only allowed to study the documents for three days before the trial. Lastly, one of the petitioners complained that the court had not complied with his request for access to the file at the trial.

[96] The Constitutional Court notes that the petitioners invoke in part the right to an impartial tribunal in connection with access to documents, however, the right to access to documents (which means "full knowledge and possession, subject to appropriate safeguards, of the data and documents in the proceedings") is considered by the Constitutional Court as part of the right to an effective and adequate defence/being defended and as a guarantee of equality of arms {Decision 6/1998 (III. 11.) AB, ABH 1998, 91, 96; Decision 3223/2018 (VII. 2.) AB, Reasoning [60] and [61]}. As stated in Decision 15/2016 (IX. 21.), "[t]he right of defence include the right to know the case and the right to advance the case. The right of access to the case include the

right to be informed of decisions and measures taken by the authorities, the right to inspect the file and the right to be present" (Reasoning [38]). It is therefore in this context that the Constitutional Court reviewed the petitioners' arguments in the present case. The alleged violations are not related to the right to a fair trial.

[97] After assessing the petitioners' objections, the Constitutional Court did not find that the court had concealed from the petitioner a document, received after the first instance hearing had been closed, on which it had otherwise based the conviction: (a) the testimony relied on by the petitioner was undisputedly produced after the first instance decision, the delivery of the judgement, and could not therefore have affected the merits of the judgement; (b) the document was itself declared by the petitioner to be on the court file and there was no question of his request for access to the file having been refused at any stage of the proceedings; (c) there is no indication in the parts of the judgement at first instance referred to by the petitioner that the court took into account in its reasoning the testimony of the witness in the other case in question.

[98] On the other hand, it must be emphasised that the right of access to the file applies expressly and exclusively to the documents of a specific case which is pending [or, where applicable, has been concluded, see Decision 61/2009 (VI. 11.) AB]. A request to obtain and inspect the documents of another case, in this case another investigation, constitutes a motion in evidence and cannot be linked to the subset of rights of the right to a fair trial under review.

[99] Thirdly, the Constitutional Court held that the third, fourth, fifth and sixth parts of the request did not satisfy the requirement of explicitness for the following reasons.

[100] The petitioners alleged, but did not substantiate, that their right of access to the documents obtained in the parallel investigation had been infringed: they did not indicate that they had requested it in the proceedings, nor did they explain the connection between the investigation and the decision in their case, nor what prejudice they had suffered from the possible restriction of access to the documents.

[101] In a similar vein, the petition does not contain any specific information as to how the presiding judge of the first instance judicial panel, if he had indeed learned classified information during the proceedings that was otherwise closed to the defence, had an impact on the decision on the merits. None of the court decisions indicate that such information was used.

[102] The request is also lacking in being explicit as to why and to what extent the three-day period for the inspection of documents relied on in the context of the third instance proceedings prevented the preparation of the proceedings before the third instance court, and what documents were prevented from being inspected. It should be stressed that the requirement of sufficient time to prepare the defence [Decision 20/2005 (V. 26.) AB, ABH 2005, 202, 227] is part of the fundamental right guaranteed by Article XXVIII (3) of the Fundamental Law, but the time required may vary from case to case depending on the circumstances of the particular case (e.g. the extent of the documents concerned by the request for access). What may constitute a blatantly short time in one case may not necessarily constitute a breach of

the requirement of sufficient time in another. It is not possible to assess general references without specifics.

[103] Finally, the petition does not contain any specific information as to which documents the petitioner requested to be disclosed at the third instance hearing. It is to be noted that, in accordance with the record of the hearing, the Curia, as the court of third instance, refused to grant the request for access to documents relating to the investigation, which cannot be linked to the right of defence.

[104] 7.3 The petitioners complained that they were not allowed to attend certain procedural acts (two judicial inspections and a witness hearing) despite their request, because they were not informed or were removed or their participation was made impossible by the choice of the place of pre-trial detention.

[105] The Constitutional Court considers the provisions which grant the accused the right to participate in procedural acts as provisions intended to ensure the right of defence and as provisions related to the institutional protection aspect of this right (Decision 302/B/2007 AB, ABH 2007, 2171, 2174).

[106] The above-mentioned objections of the petitioners were also raised during the court proceedings, and the court of appeal found the following in relation to them: the witness hearing "due to the confidential treatment of the personal data of the witness, the accused and their defence counsel were not allowed to participate in the hearing, in light of Section 304 (5) of the Code of Criminal Procedure, and their objection is therefore unfounded." The petitioners were indeed not allowed to attend one of the court inspections mentioned by the petitioners, but at the same time the "members of the court did not have access to the house concerned by the inspection; therefore, this procedural act did not lead to any result and did not contain any information that would have influenced the substantive assessment of the case; therefore, the relative procedural violation committed by the court of first instance, complained of by the defence, did not have a material impact on the conduct of the proceedings." As regards the second inspection, the court found that it was not a judicial inspection but a so-called expert inspection, as provided for in the first sentence of Section 105 (2) of the Code of Criminal Procedure, and that "the latter is a procedural act which takes place without the presence of the court, the prosecution, the defence and the accused and is aimed at obtaining information for an expert opinion" (see page 108 of the judgement of the court of second instance).

[107] In this context, the Constitutional Court considers that there is no violation of the right of defence: in two cases, the petitioners were not allowed by law to be present at the procedural acts indicated, and contrary to their claims, they were not prevented from doing so by the subjective discretion of the court; in the third case, the procedural act did not lead to a result, and therefore had no effect on the right of defence and the content of the judgement in the case.

[108] 7.4 One of the petitioners claimed that his right to make oral observations was restricted at the public sitting of the Curia, which also constituted a violation of his right of defence.

[109] In this context, the Constitutional Court held the following. In accordance with the minutes of the hearing, the court gave the petitioner the floor after the defence had been delivered, and the essence of the constitutional complaint is that this was not a statement made "with the right to have the last word" under Section 319 of the Code of Criminal Procedure, but a comment under Section 317 (1) of the Code of Criminal Procedure. However, this is of no significance for the right of defence: The petitioner was able to speak at the hearing without any doubt and was free to say whatever he considered necessary to bring to the attention of the court for the purposes of his defence. From a constitutional law point of view, it is irrelevant whether the statement was made on the basis of Section 317 or Section 319 of the Code of Criminal Procedure. No restriction of the right of defence can be found in the case.

[110] 7.5 Finally, the petitioners considered as a violation of the right of defence that the court of third instance deprived one of the petitioners' counsel of his right to speak during the pleadings.

[111] In its previous decision, the Constitutional Court has already stated that the defence pleading, the "defence pleading is one of the most important instruments of the defence in criminal proceedings, in which the defence counsel may present the facts and other circumstances which he considers important for the defence, summarising the outcome of the proceedings before the verdict is rendered. The defence counsel must be given the opportunity to present his case without interruption and continuously, and this right is protected, inter alia, by Section 314 (3) of the Code of Criminal Procedure, which states that 'the right to speak may not be withheld during the pleadings (Decision 459/B/1998 AB, ABH 2003, 1060, 1061). In line with this, Decision 3244/2018 (VII. 11.) AB also recalled that "[t]he right of defence include the rights to know the case and to advance the case. [...] The rights to advance the case include [...] the right to be heard {Decision 15/2016 (IX. 21.) AB, Reasoning [36] to [39]}" (Reasoning [37]). The petitioners' reference in the constitutional complaint is therefore clearly linked to the right to a fair trial guaranteed by Article XXVIII (3) of the Fundamental Law.

[112] Section 314 of the Code of Criminal Procedure distinguishes the case of interruption of the pleading from the case of the interruption of the pleading during the pleading. Interruption of the pleading is permitted if it involves expressions that constitute a criminal offence, creates disorder and is necessary to prevent the proceedings from being delayed. If the interruption is justified, the presiding judge of the judicial panel shall warn the person concerned to maintain the order of the proceedings and shall then restore him to the chair; therefore, the pleading may continue. Withdrawal of the floor, on the other hand, shall mean the end of the pleading.

[113] In the present case, it was recorded in the record of the public sitting of the Curia that during the defence counsel's pleading, which lasted approximately 2.5 hours, the presiding judge of the judicial panel, interrupting the defence pleading, warned him three times to refrain from repeating and thereby prolonging the proceedings. After that, the presiding judge of the judicial panel, although the defence counsel had indicated that he had not yet finished his pleading, did not give the floor back to the defence counsel, although this would have been mandatory under the Code of Criminal Procedure following the warning given in the event of interruption of the pleading. The court thus deprived the defence of the floor during the pleading on the ground of delaying the proceedings.

[114] Decision 459/B/1998 AB considered the interruption of the defence pleading as a restriction of the right of defence, and consequently the interruption of the defence pleading during the pleading, since it affects the defence more seriously than the interruption, is also considered as such. It was therefore necessary to review whether the restriction of the fundamental right guaranteed by Article XXVIII (3) of the Fundamental Law was in accordance with Article I (3) of the Fundamental Law.

[115] As the Constitutional Court has already recalled, the defence pleading is one of the most important tools of the defence in criminal proceedings, as it gives the defence counsel the opportunity to convince the court of his client's position (the innocence of the accused, the existence of exculpatory/mitigating circumstances) on the basis of the material of the trial, but in a relatively informal manner, by means of facts and arguments. Thus, before the court reaches its decision, the defence counsel should once again summarise the outcome of the proceedings in a coherent and synthesising manner, and may present all the facts and other circumstances and arguments that he or she considers relevant to the defence. In the course of this closing argument, he may also challenge or refute the prosecution case (a rejoinder is possible by the prosecution, but the defence can always respond to it). The defence pleading typically contains detailed reasoning and exhaustive justification, but its layout, structure and content are always at the discretion of the defence. As with the content, the length of the pleading depends on the defence counsel, on what the defence counsel considers appropriate to persuade the court, given the complexity of the case or other circumstances. The defence will be followed only by the defendant's right of final argument, after which the court will render its decision.

[116] Starting from this consideration, the restriction of the defence, in particular the permanent deprivation of the right to speak, can be considered constitutional only in special circumstances, especially when, as in the present case, it is followed by the adoption of a decision that cannot be challenged either by ordinary or extraordinary remedies. In the Constitutional Court's view, the prevention of delay in proceedings, where such delay is manifest, may be of such constitutional value. In the present case, the trial court based its decision on that ground in the context of the conduct of the trial, and the necessity of the restriction can therefore be established.

[117] In the context of proportionality of the restriction, in accordance with the practice of the Constitutional Court, it must be reviewed whether the importance of the objective to be achieved and the gravity of the fundamental rights violation caused for this purpose are in a proper proportion. That is, whether the court, when making its decision, took into account that in the course of the restriction it is obliged to use the least restrictive means suitable for achieving the given objective, and whether the restriction does not exceed the level that is absolutely necessary to achieve the constitutionally justifiable objective {*see* for example: Decision 24/2014 (VII. 22.) AB, Reasoning [135], cf. Decision 879/B/1992 ABH 1996, 397, 401.} In the case at hand, the court made it clear that it considered the repetitions during the pleadings on all three occasions as being intended to prolong the proceedings. Furthermore, it withdrew the right to speak after a relatively long period of time and only after the third warning (interruption) of the defence. It is also important to note that, as entered in the court

record, the defendant read out the pleading which had been prepared in advance and was also attached in writing; therefore, the content of the pleading was otherwise available to the court, which could take it into account, even though it was not delivered in full orally. The court had no other means at its disposal to prevent the unjustified delay in the conduct of the trial. In the light of the foregoing, the restriction of a fundamental right imposed in order to achieve a constitutionally justifiable aim cannot be regarded as disproportionate.

[118] 8. In addition to the foregoing, the petitioners also raised a number of other objections in connection with the criminal proceedings in their case, which were not related to the specifically mentioned component right of the right to a fair trial.

[119] 8.1 The petitioners' objections concerning the DNA sampling and the method of appointing the haemogenetic expert, the questioning of the non-Hungarian national aggrieved parties and the conduct of the investigation in general, the search for and recording of evidence and the documentation thereof, as well as the conduct of the court proceedings, are essentially of a legal nature.

[120] With regard to the taking of evidence, it should be emphasised that "the right to a fair trial guaranteed by Article XXVIII (1) of the Fundamental Law does not expressly lay down any requirement as to the system and rules of evidence, nor as to the exclusion of evidence, nor does Article 6 (1) ECHR. However, the Constitutional Court has borne in mind the approach taken by the ECtHR judicial practice, in accordance with which the admissibility of evidence is primarily a matter for national law and that, as a general rule, it is for the national courts to consider the evidence before them. It is not for the ECtHR to take a position on whether the admissibility of evidence (including witness testimonies) was proper, but rather to consider whether the proceedings as a whole, including the manner in which the evidence was obtained, were fair. The ECtHR cannot, as a general rule and in the abstract, rule out the admissibility of evidence obtained improperly in a particular proceeding. {Schenk v Switzerland [PS] (10862/84), 12 July 1988, para. 46; Kostovski v Netherlands [PS] (11454/85), 20 November 1989, para. 36, Doorson v Netherlands (20524/92), 26 March 1996, paras. 67 and 78}" {Decision 3104/2014 (IV. 11.) AB, Reasoning [17]}.

[121] The petitioners also raised their objections in the criminal proceedings, and they were also dealt with by the courts. The first instance court conducted a detailed evidentiary hearing in relation to the DNA sampling procedure and the circumstances surrounding the appointment of the haemogenetic expert, and ordered a new DNA test. The courts of second and third instance also reviewed these issues following an appeal by the petitioners. However, the Curia also expressly recorded that there was no case under Section 78 (4) of the Code of Criminal Procedure that would exclude the assessment of the fact from the evidence as evidence (see pages 20-21 of the third instance order).

[122] In addition to claiming that the manner in which the hearing of the non-Hungarian citizens was conducted was unlawful, the petitioners did not explain why and to what extent this affected the decision they considered to be prejudicial. Their request therefore fails in this respect to satisfy the requirement of being explicit.

[123] The petitioners also complain that they were prosecuted on the basis of evidence obtained in a generally unlawful manner, which they claim is evidenced by the fact that some of the evidence obtained during the investigation was excluded from the proceedings. The Constitutional Court points out that the investigation stage cannot be considered in isolation in this respect. The fact that the court excluded evidence obtained unlawfully from the court proceedings, and thus could not have affected the merits of the decision, was done in the interests of the protection of the administration of justice under the rule of law and to ensure the fairness of the proceedings. Even if the fundamental right to a fair trial may have been infringed in the course of the investigation because of the manner in which the evidence was obtained, this did not lead to an irreparable breach of the fairness of the judicial proceedings. The right to a fair trial cannot be found to have been infringed when the investigative and judicial stages are considered as a whole.

[124] 8.2 In addition, the petitioners present the alleged or actual procedural violations that were reviewed by the courts in the criminal proceedings on which the petition is based (e.g. the recusal of the presiding judge of the first instance panel from the case, the use of the findings of secret information gathering). In the order under review, the Curia overruled the judgement of the second instance, which was challenged on appeal, together with the proceedings of the first and second instance courts. The third instance order of the Curia stated that "although the court of first instance had infringed several procedural rules, it had itself detected most of them and had remedied them in its proceedings. The regional court of appeal assessed the infringements that were not remedied with the utmost care and took the view that the court of first instance had not committed any procedural irregularity that would have led to an absolute setting aside of the judicial decision, and what is termed as "relative procedural irregularities" were not of such gravity as to justify setting aside the judgement of the first instance; neither individually nor collectively did they prevent or affect the review on the merits" (see page 8 of the order of the third instance). The Curia also stated that "the court of second instance fully complied with the provisions of the procedural law and did not violate any procedural rule" (see page 9 of the third instance order).

[125] The Constitutional Court is competent to review the overall constitutional framework of criminal proceedings. In accordance with Section 27 of the Constitutional Court Act, the Constitutional Court cannot therefore be regarded as a forum for review of the judicial system, and in fact, in the context of the constitutional complaint procedure, it ensures the protection of the Fundamental Law through the protection of the petitioner's right guaranteed by the Fundamental Law [Article 24 (1) of the Fundamental Law]. On the basis of the petitioners' pleas, it cannot be established that the alleged procedural violations, individually or in their entirety, have resulted in a violation of the right to a fair trial in constitutional law terms. The relative procedural irregularities reviewed by the higher court and which do not justify setting aside do not in themselves render the proceedings as a whole unfair from a constitutional point of view.

[126] 8.3 The petitioners complained that they had been pressured to confess during the criminal proceedings.

[127] Although the discovery of the material truth is rather facilitated by the active cooperation of the accused in the proceedings, the right to refuse to testify, together with the prohibition

of obligation of self-incrimination, is, in accordance with the practice of the ECtHR [John Murray v. United Kingdom (18731/91), 1996. 8 February 2007, paragraph 45], is also considered by the Constitutional Court as an important element of a fair trial and the administration of justice under the rule of law [Decision 41/2003 (2 July 2003) AB, ABH 2003, 430, 438].

[128] The testimony of the accused serves two purposes: on the one hand, it can contain his defence and, on the other hand, it can provide evidence for the investigation of the facts. The accused's testimony carries important information and, particularly if it is revealing, can make a significant contribution to the success of the evidence. It is therefore an important piece of evidence in its own right, which can also play a role in assessing the credibility of other pieces of evidence in conjunction with each other. The right to a fair trial is not infringed by inducements to testify, such as references to the suspect's interest, as long as the suspect is warned of his right to remain silent and as long as this does not constitute physical or psychological coercion.

[129] It can be concluded that the petitioners' right to remain silent was not violated in the proceedings, as it was always their own decision whether they wished to cooperate in the proceedings, to testify and to defend themselves on the merits or not. The investigation and trial records establish that both of them exercised this right throughout the criminal proceedings: in some cases they stated that they would not make a statement, in others they refused to answer certain questions, and in several cases they were questioned as suspects by the investigation authority at their express request. In doing so, they partially confessed to having committed the offences. The lack of voluntariness of the confession and of the statement in general, the coercion of the confession, was not alleged by the petitioners in their constitutional complaint, nor was it claimed that they had decided to do so as a consequence of the interrogation method.

[130] 9. In conclusion, the Constitutional Court finds that, on the basis of the foregoing, neither the subset of rights that are part of the right to a fair trial, nor the other fundamental rights that can be derived from it, guaranteed by Article XXVIII of the Fundamental Law, can be found to have been infringed in the case under review. In the light of the proceedings as a whole and the circumstances of the case, the proceedings as a whole complied with the requirement of a fair trial.

[131] 10. The petitioners alleged a violation of Article II (right to human dignity) and, without specifying the article of the Fundamental Law, but quoting it, Article III (1) (prohibition of inhuman or degrading treatment) of the Constitution by the way in which they were transported to the court hearing (speed, lack of seat belt), and the means of restraint used (handcuffs, belt cuffs, leg cuffs and lead shackles), and other security measures (escorted by armed masked guards) and in relation to their alimentary sustenance and the behaviour of the public in the courtroom and, finally, the imposition of a life imprisonment without parole.

[132] "Although the Fundamental Law regulates the right to human life and dignity (Article II) and the prohibition of torture, inhuman and degrading treatment or punishment (Article III) in separate articles, the way the constitutional power drafts the norms only creates a formal distinction; therefore, in the interpretation of the Constitutional Court the prohibitions in Article

III (1) are also separate, special formulations of the prohibition of the violation of the right to human life and dignity. This understanding is also in line with the content of Article 3 of the Convention, as developed by the ECtHR, in accordance with which a violation of these prohibitions also constitutes a violation of human dignity." {Decision 32/2014 (XI. 3.) AB, Reasoning [46]}. Accordingly, the Constitutional Court has reviewed the petitioners' arguments in relation to these two articles of the Fundamental Law together in the present case. In view of the fact that the petitioners expressly referred to Article II and referred to Article III (1) in substance, there is sufficient basis for a decision on the merits, despite the fact that Article III (1) was not referred to numerically in the petition.

[133] Decision 32/2014 (XI.3.) AB contains the basic criteria for the establishment of "inhuman treatment" and "degrading treatment" with reference to the ECtHR's practice (Reasoning [33] to [38]). In accordance with the cited decision, inhuman treatment is defined as conduct which causes serious physical and / or mental suffering to the person concerned, which does not go beyond what is necessary to establish the existence of torture, or which lacks intentionality and purpose. Degrading treatment is the least painful and the conduct that can be assessed in this context typically causes mental anguish to the aggrieved party, manifested in a feeling of inferiority. In the case of a lawful deprivation of personal liberty, only further suffering and humiliation beyond the suffering necessarily associated with it causes a fundamental right to be violated.

[134] In the present case, the Constitutional Court held that the objection concerning the conduct of the public in the courtroom, which was in any case general and lacking in specifics, could only be linked to the maintenance of the order and dignity of the hearing. The attending public is not entitled to speak during the hearing and it is for the court to prevent any interference. However, in the interpretative framework outlined, no restriction on Article II or Article III (1) of the Fundamental Law can be identified.

[135] The objections in the present case relating to the manner in which the petitioners were transported and alimented do not raise the possibility of serious physical and / or mental suffering or mental anguish in the form of a feeling of inferiority caused to the persons concerned, which would constitute a restriction of Article II or, in conjunction therewith, Article III (1) of the Fundamental Law.

[136] The coercive measures and other security measures referred to by the petitioners were directly linked to their pre-trial detention. Nor did they allege that the use of those means was unlawful or that they had to endure any further physical or mental suffering or humiliation beyond the suffering necessarily associated with their use.

[137] The Constitutional Court also notes that these elements of the petition are not directly related to the challenged judgements, the manner of execution of the detention, in itself, did not affect the merits of the criminal proceedings, was not causally related to the subsequent conviction, and the petitioners have not claimed otherwise.

[138] The petitioners did not attach any constitutionally assessable reasoning to their objection regarding the life imprisonment without parole, this element of the petition therefore does not

comply with Section 52 (1b) (b) and (e) of the Constitutional Court Act, and therefore there is no possibility to assess its merits.

[139] 11. Finally, the Constitutional Court reviewed whether the petitioners' right to legal remedy in the case had been infringed.

[140] The essential content of the right to legal remedy guaranteed by Article XXVIII (7) of the Fundamental Law is the possibility to appeal to another body or to a higher forum within the same organisation with regard to decisions on the merits {see: Decision 5/1992 (I. 30.) AB, ABH 1992, 27, 31; reaffirmed by Decision 14/2015 (V. 13.) AB, Reasoning [29]}.

[141] In the present case, the petitioners allege the violation of their right to legal remedy in connection with other cases (e.g. the adjudication of a complaint of abuse of office, the adjudication of an application to the Prosecutor General's Office), which cannot be a basis for the establishment of a restriction of a fundamental right in the present case.

[142] The petitioners also object to certain procedural violations already mentioned in the criminal proceedings (e.g. DNA sampling, the method of appointing a haemogenetic expert, participation in procedural acts), these objections were reviewed in detail in the court proceedings in connection with the petitioners' requests and their express appeal, and they proved to be unfounded. The petitioners were therefore expressly given the opportunity to challenge the contested procedure in the course of the proceedings. The right of appeal does not include the right to a decision in favour of the petitioner.

[143] Thirdly, they complain that they were not allowed to comment on the documents of another criminal proceeding because they were not obtained by the court of appeal. This objection, since the documents were not used by the court in the case because they were not available, is not related to the right to judicial remedy.

[144] In the fourth place, they claim that the court of appeal and the Curia did not fully assess their appeals, but in this context the petition does not indicate any specific points, therefore it is not possible to review whether the second and third instance decisions in the appellate proceedings initiated by the petitioners complied in this respect with the requirements of the right to an effective and efficient remedy under Article XXVIII (7) of the Fundamental Law [cf. e.g. Decision 3146/2018 (V. 7.) AB].

[145] According to the petitioners, the written observations submitted by one of the petitioners were also not taken into account by the Curia. It should be recalled in this regard that the obligation of the courts to state reasons does not imply an obligation to rebut each and every submission made by the parties, in particular not to present a system of arguments of a depth satisfying the subjective expectations of the petitioner {Decision 3107/2016 (V. 24.) AB, Reasoning [38]; Decision 30/2014 (IX. 30.) AB, Reasoning [89]}.

[146] On the basis of the above, the Constitutional Court did not find a violation of Article XXVIII (7) of the Fundamental Law.

[147] 12. On the basis of the foregoing, the Constitutional Court found the constitutional complaints to be unfounded and dismissed them as set out in the operative part.

Budapest, 5 March 2019

Dr. Tamás Sulyok,
Chief Justice of the Constitutional Court

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

Dr. Ágnes Czine , sgd.,
Justice of the Constitutional Court

Dr. Egon Dienes-Oehm , sgd.,
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Dr Ildikó Hörcher-Marosi , sgd., Justice of the Constitutional Court, Justice-Rapporteur

Dr. Tamás Sulyok , sgd., Chief Justice of the Constitutional Court,
on behalf of Dr. Imre Juhász,
Justice of the Constitutional Court,
prevented from signing

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

Dr. László László Salamon , sgd.,
Justice of the Constitutional Court

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

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

Dr. Marcel Szabó, sgd.,
Justice of the Constitutional Court

Dr. Tamás Sulyok , sgd.,
Chief Justice of the Constitutional Court,
on behalf of Dr. Péter Szalay,
Justice of the Constitutional Court,
prevented from signing

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

Concurring reasoning by *Dr. Béla Pokol*, Justice of the Constitutional Court

[148] I support the operative part of the Decision, but I have reservations about part of the Reasoning appended thereto.

[149] I do not consider it correct to include the ECtHR case law in the Reasoning (see points 1, 6.1, 8.1, 8.3 and 10 of Part IV of the Reasoning, Reasoning [32] to [38], [79] to [80], [119] to [123, [126] to [129], [131] to [138]]). The fundamental problem of the ECtHR's functioning, which has recently been made public, is that its decisions are not in fact formulated by the competent judicial panels on the basis of the European Convention on Human Rights, but by a human rights apparatus of some 300 judges that has been built up over the years, with the most basic lack of independence of judges. In Nicola/Davies eds EU Law Stories, Cambridge University Press 2017, pp. 58-80.) But former Strasbourg judge and Copenhagen professor David Thór Björgvinsson, in an interview after the end of his term in office in 2015, also sharply criticised academics for failing to recognise the total vulnerability of ECtHR judges to the human rights legal apparatus that has been based in Strasbourg for decades [see Utrecht

Journal of International and European Law (Vol. 81.) 2015]. It is the task and responsibility of the Ministries of Foreign Affairs and Justice of the States parties to the international treaty to put an end to this anomalous situation and to establish a functioning that will ensure the independence of the ECtHR judges, but in my view, as Justices of the Constitutional Court, we also have the responsibility to avoid explicit reliance on ECtHR decisions in the future and to avoid referring to them as authentic court decisions in our Decisions. These are in fact decisions of the Strasbourg legal apparatus, to which the judges seconded by the Member States are only being drawn as a front. Therefore, as long as this situation persists, I believe that we cannot take these decisions into account as judicial decisions. I also support the consideration of simple legal opinions, in the form of *pro domo*, as information, in the course of the preparatory work for the decision, as lacking authenticity, but I propose that they be omitted from the text of the published decisions of the Constitutional Court in future.

Budapest, 5 March 2019

Dr. Béla Pokol , sgd.,

Justice of the Constitutional Court

Concurring reasoning by *Dr. László Salamon*, Justice of the Constitutional Court

[150] I agree with the dismissal of the petition, but on the basis of the Reasoning other than those set out in Part IV, point 7.5 of the reasoning for the Decision (Reasoning [110] to [117]), I do not see any violation of the right to protection laid down in Article XXVIII (3) of the Fundamental Law.

[151] 1. I reiterate and maintain unchanged my position that a restriction of a fundamental right may be imposed only by law and not in the course of judicial proceedings, at the discretion of the court. Considering that Decision 459/B/1998 AB reviewed the unconstitutionality of Section 314 (4) of the Code of Criminal Procedure and not the procedure of the law enforcement, this decision of the Constitutional Court is therefore in line with my above view.

[152] 2. However, the relationship between Sections 314 (3) and 314 (4) of the Code of Criminal Procedure is not clear to me, as regards the interruption and the withdrawal of the right to speak in order to prevent the proceedings from being prolonged. Is there any point in interrupting if, as in the present case, it has not led to a result for the third time? On that basis, I doubt whether there has been a clear breach of Section 314 (3) of the Code of Criminal Procedure.

[153] 3. In my view, the infringement of Section 314 (3) of the Code of Criminal Procedure is a fundamental procedural violation in connection with which the right of defence can be found to have been infringed and must lead to the setting aside of the judgement delivered (in respect of the accused and the judgement of the court).

[154] 4. However, even assuming that the judge has infringed Section 314 (3) of the Code of Criminal Procedure, this does not, exceptionally, in the present case, constitute a breach of the

right of defence, because the defence of the accused concerned either, including the function of the pleading, has become known to the court by the written pleading becoming part of the case file. Consequently, the fact that the defence was not able to read out the full text of the pleading did not, in my view, lead to a restriction of the defendant's rights of defence in the present case and, therefore, the dismissal of the petition in that regard is also justified.

Budapest, 5 March 2019.

Dr. László Salamon , sgd.,

Justice of the Constitutional Court