

CONSTITUTIONAL COURT DECISION N. 6/2018. (VI. 27.)

The plenary session of the Constitutional Court, in the subject of a constitutional complaint – with concurring reasonings by Justices *dr. Tamás Sulyok* and *dr. Mária Szívós* – adopted the following

decision:

1 The Constitutional Court hereby rejects the constitutional complaint against the ruling No. 36.Kpk.45.927/2016/4 of the Budapest-Capital Administrative and Labour Court.

2 The Constitutional Court – acting *ex officio* – hereby establishes the existence of a situation contrary to the Fundamental Law, violating Article II and XV (2) of the Fundamental Law, manifested in a legislative omission to regulate the procedure of the change of name of lawfully settled non-Hungarian citizens.

The Constitutional Court therefore calls upon the National Assembly to meet its legislative duty by 31 December 2018.

The Constitutional Court orders the publication of its decision in the Hungarian Official Gazette.

Reasoning

I

- [1] 1 The petitioner submitted a constitutional complaint to the Constitutional Court on the basis of Section 27 of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), requesting the establishment of the lack of conformity with the Fundamental Law and the annulment of the ruling No. 36.Kpk.45.927/2016/4 of the Budapest-Capital Administrative and Labour Court.
- [2] The petitioner is a foreign citizen who was acknowledged in a previous procedure as a refugee in Hungary because he had been subject to persecution in his country due to his gender identity (transsexuality). On 6 March 2016 the petitioner filed an application for gender reassignment to the Immigration and Citizenship Office (hereinafter: BÁH) claiming that his official documents issued in his home country

identify him as female, but this description does not match his real gender identity. In its letter dated 30 March, the BÁH informed the applicant about the deficiencies of the applicable legal regulations and that in accordance with the practice developed by the Ministry of Human Capacities(hereinafter: EMMI), it may propose the entry of gender reassignment into the register on the basis of the healthcare documentation attached by the client, and such documentation has not been attached in the case concerned. It also informed the applicant that there shall be no official decision made on the gender reassignment, as the decision-making is not allocated to any authority by any law, thus the entry of the "gender" data modification into the birth register shall be regarded as the decision.

- [3] Then, upon the application of the petitioner, with its final decision No. 106-D-1645/2016 the BÁH rejected the application without examining it on the merits with reference to not having the competence to address the application for gender reassignment and that the "modification of data" shall be "entered into" the birth register by the competent superintendent registrar on the basis of the healthcare expert opinion. However, as the petitioner does not have a certificate of registration of birth in Hungary, it is not possible to transfer the case to the superintendent registrar either.
- [4] The petitioner had submitted an application for judicial review against the ruling of the BÁH and the court rejected it. The court established in its ruling that in the case of Hungarian citizens the legal recognition of the gender reassignment is possible, however, there is no specific legal regulation on the relevant procedure other than the provision under Section 27 of the Decree No. 32/2014. (V. 19.) KIM on the detailed rules of performing the registrar's duties (hereinafter: RD.). The order of the procedure follows the practice developed between the requested party and the EMMI, according to which the recognition of gender is a question of the healthcare profession and it is necessary to obtain medical expert opinions. Gender is recognized on the basis of the expert opinion issued by the Healthcare Policy Department of EMMI and the entry of personal data is connected to the registrar's procedure.
- [5] The court acknowledged that according to Section 69/B (1) of the Act I of 2010 on the Registrar's Procedure (hereinafter: ARP.), the registry of personal identification data in the electronic family register shall contain, among others, the data subject's surname and forename at birth as well as the modification of these data. According to the court, this provision of the law forms the basis of the procedure aimed at gender reassignment. Section 27 of RD also provides that the change of name related to gender reassignment shall be notified without delay by the organ of the family register in charge of the name change to the registrar in charge of registering the birth, for the purpose of having the gender reassignment registered in the family register.

- [6] The court also held that at present there is no law defining the authority empowered to adopt a decision on the merits of the application for gender reassignment. The court underlined, however, that EMMI plays a specific role in the procedure, although its duties and powers are not clarified by the law despite of the fact that the entry of the gender reassignment shall be based on the expert opinion to be formed by it. According to the court's position, under the present regulation, the registrar's act of performing the entry into the family register shall be regarded as the decision on the gender reassignment, nevertheless, the recognition is in fact based on the expert opinion issued by the EMMI. In the court's opinion, Section 27 of RD supports the assumption that no formal official decision is adopted on entertaining the applications, as the registering registrar shall enter the gender reassignment into the family register on the basis of the notification sent by the central organ of family registers. Thus the decision itself is the registration into the – Hungarian – family register, made by the registrar by way of performing the registration into the family register.
- [7] The court also acknowledged that the applicant is a non-Hungarian citizen as he is a foreign national enjoying refugee status in Hungary who does not have any family register record in Hungary, therefore the practice applied regarding Hungarian citizens cannot be applied in his case. Therefore the data on gender reassignment and the connected change of forename cannot be registered. The court holds that neither the proceeding authorities, nor the court in charge has a duty of legislation and the filling up of gaps in the law or substituting missing special regulations by way of interpreting the existing laws.
- [8] 2 According to the petitioner, the ruling of the court violates his right to human dignity enshrined in Article II of the Fundamental Law and the right to respect for private and family life under Article VI (1) of the Fundamental Law, as the court failed to take into account, within the margin of interpretation allowed by the law, that a fundamental right can only be restricted to the extent necessary and proportionate. The petitioner holds that the ruling of the court is a violation of the prohibition of discrimination laid down in Article XV (2) of the Fundamental Law, as the fundamental right was restricted by referring to the fact that the petitioner is a non-Hungarian citizen. Furthermore, according to the petitioner, the judicial ruling violated the right to fair trial enshrined in Article XXVIII (1) of the Fundamental Law, as the proceeding court acknowledged without providing reasoning that the applicant had failed to prove beyond doubt that the official decision had been unlawful.
- [9] The petitioner referred to the holdings of the Decision 58/2001. (XII. 7.) AB, according to which the right to have a name is a fundamental right deductible from human dignity. The reasoning of the Decision also points out that in the case of transsexual persons the right to the change of name is a fundamental right. After the entry into

force of the Fundamental Law, the Decision 27/2015. (VII. 21.) AB reinforced the case law developed earlier in the field on the right to name.

- [10] In the opinion of the petitioner, everyone, without regard to their citizenship or alien policing status, shall have the right to human dignity as a fundamental right. Accordingly, the petitioner, as a foreign citizen recognized as a refugee in Hungary has a right deductible from human dignity enshrined in Article II of the Fundamental Law to legally change his name and have his gender reassigned.
- [11] According to the position taken by the petitioner, the right to have a name also follows from the right to respect for private and family life acknowledged in Article VI (1) of the Fundamental Law. In this context the petitioner underlined that the case law of the European Court of Human Rights (hereinafter: ECHR) deducts the right of transsexual persons to have their gender reassigned from Article 8 of the European Convention on Human Rights {*Christina Goodwin v United Kingdom* [GC] (28957/95), 11 July 2002.}.
- [12] The petitioner holds that the challenged ruling is in violation of Article II and Article VI (1) of the Fundamental Law by not complying with the requirement of necessity. The restriction of the fundamental right is deemed necessary when the enforcement of another fundamental right, constitutional institution or interest makes the restriction of the fundamental right unavoidable. According to the petitioner, the rectification of the entry in the register is not indispensable for entertaining the petitioner's application. There is not a single provision of the law in force that would identify the decision on legal gender reassignment with the rectification of the entry in the register of births. Indeed, Section 27 of RD makes an explicit distinction between the decision on the name change of transsexual persons and the registration into the register on the basis of the decision on the change of the name. The registry of personal data and residence addresses contains publicly authentic data about the petitioner's name and gender. The petitioner holds that, on the basis of the decision on the change of name, the name and the gender of the petitioner could freely be entered into the registry of personal data and residence addresses. Accordingly, there is no other fundamental right, constitutional institution or interest the enforcement of which would make the restriction of the petitioner's fundamental right to human dignity and to respect for private and family life, as well as the resulting discrimination unavoidable.
- [13] The petitioner argues that Article II and Article VI (1) of the Fundamental Law safeguard fundamental rights granted by the Fundamental Law not only for Hungarian citizens. Consequently, according to the petitioner, imposing restrictions on non-Hungarian citizens with regard to the change of name and gender reassignment as rights deductible from human dignity and the right to respect for private and family life also violates the prohibition of discrimination declared in Article XV (2) of the Fundamental Law. This has been caused by the standpoint of the

court reached in the course of adjudicating the petitioner's application for the legal change of his forename and gender, stating namely that there is no Hungarian authority having the relevant competence, thus, in material terms, it deprived the petitioner of the possibility of having his forename and gender legally changed.

- [14] In the petitioner's opinion the court should have identified the fundamental rights' implications of the case and it should have interpreted the applicable laws by limiting the restriction of the fundamental right to the level of necessary and proportionate intervention. As argued by the petitioner, the laws in force may be interpreted in a way to grant for the petitioner the discrimination-free enforcement of the right to human dignity and to respect for private and family life. Neither the decision of the authority nor the court's ruling identify any provision of positive law that would exclude, without tolerating any discretion, the adjudication of the petitioner's application for change of name and gender reassignment.
- [15] According to the petitioner, the proceeding court has not provided any justification in its ruling of its failure to follow the interpretation of the law mentioned in the petitioner's application, as one that would allow for the enforcement of the fundamental right; it only laid down without justification that the applicant "failed to prove beyond doubt" the unlawfulness of the ruling of BÁH. This has led to the violation of the right to fair procedure enshrined in Article XXVIII (1) of the Fundamental Law. As stated by the petitioner, if it is possible to enforce the fundamental right by way of interpreting the law and without infringing any positive provision of the law, the court shall be obliged, on the basis of Article I (1) and Article XXVIII of the Fundamental Law, to apply this interpretation of the law. In contrast with the above, in the challenged ruling, the proceeding court neglected completely and without reasoning the fundamental rights' implications of the case, and it failed to carry out in any form the necessity-proportionality test.
- [16] The petitioner also notes that accepting the legal interpretation presented in the ruling of BÁH and in the challenged court decision would imply, as an absurd consequence, that the petitioner should apply for changing his name and for gender reassignment due to his transsexuality in the country of his nationality, i.e. where – as recognized by the Hungarian State – he had been subject to persecution because of his transsexuality.

II

- [17] 1 The affected provisions of the Fundamental Law:

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

"XV (2) Hungary shall guarantee fundamental rights to everyone without discrimination and in particular without discrimination on the grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status."

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

[18] 2 The affected provisions of the Act LXXX of 2007 on Asylum:

Unless an Act of Parliament or a government decree expressly provides otherwise, a refugee shall have the rights and obligations of a Hungarian citizen with exceptions set out in paragraphs (2) and (3).

[19] 3 The relevant provision of the RD:

"Section 27 Within 8 days upon receipt of the healthcare expert opinion supporting the gender reassignment, the gender reassignment and the change of the forename made necessary by the foregoing shall be notified by the organ of the register responsible for the change of the name to the registrar keeping the registry of births in the register, for the purpose of entry into the register. The registering registrar shall enter the gender reassignment into the family register on the basis of the notification made by the the organ of the register responsible for the change of the name, as the basic document, and the certified photocopy of the healthcare expert opinion."

[20] 4 The relevant provision of the Government Decree No. 429/2017. (XII. 20.) Korm. on the detailed rules of performing the registrar's duties:

"Section 7 Within 8 days upon receipt of the healthcare expert opinion supporting the gender reassignment, the gender reassignment and the change of the forename made necessary by the foregoing shall be notified by the organ of the register responsible for the change of the name to the registrar keeping the registry of births in the register, for the purpose of entry into the register. The registering registrar shall enter the gender reassignment into the register on the basis of the notification made by the the organ of the register responsible for the change of the name, as the basic document, and the certified photocopy of the healthcare expert opinion."

[21] 5 The relevant provisions of the ARP:

Section 69/B (1) The register of personal identification data shall contain

[...]

b) the data subject's

ba) surname and forename at birth,

bb) place of birth,

bc) date of birth or, in the absence of the foregoing, his or her age,

bd) personal identification number,

be) gender,

bf) mother's ,surname and forename at birth,

bg) father's surname and forename at birth, ,

bh) verified non-Hungarian citizenship, statelessness or unknown citizenship, acquisition or loss of Hungarian citizenship as well as his or her foreign citizenship acquired after the termination of his or her Hungarian citizenship, provided that the data subject has, after the termination of citizenship, any event in Hungary affecting the register; in the case of registering in the register in Hungary, the date when the child has acquired Hungarian citizenship as well as his or her previous citizenship;

bi) married name,

bj) marital status,

c) the form of married name the data subject is not entitled to bear on the basis of the provision of an Act of Parliament or a court decision,

d) the change of the data listed in point *b)*,

[...]

(3) The change of the data on the parents' gender and of their connected forename shall not be entered into the registry under the personal identification data of the child.

(4) The entry of the gender reassignment into the register shall be rejected if a marriage or registered partnership of the affected person exists."

III

[22] The petition is unfounded.

- [23] 1 The Constitutional Court first examined the compliance with the conditions of admissibility laid down in the ACC. According to Section 27 of ACC, persons or organisations affected in an individual case may submit a constitutional complaint to the Constitutional Court against a judicial decision contrary to the Fundamental Law, if the decision adopted in the merits of the case or another decision terminating the judicial proceedings violates the petitioner's right granted in the Fundamental Law and the possibilities for legal remedy have already been exhausted by the petitioner or no possibility for legal remedy is available for him or her.
- [24] On the panel sitting of 13 July 2017, the panel of the Constitutional Court established that the petition complied with the conditions of admission, and therefore admitted the petition.
- [25] 2 According to Article 24 paragraph (1) of the Fundamental Law, the Constitutional Court is the principal organ for the protection of the Fundamental Law. Thus the Constitutional Court is the guardian of the constitutionality of the special legal interpretations by setting out, as necessary, the direction of interpretation to be followed and by delimiting its constitutional boundaries. An institution serving the above purpose is the constitutional complaint on the basis of which the Constitutional Court shall examine the compatibility with the Fundamental Law of the interpretation of law found in the judicial decision, i.e. whether the court enforced the constitutional content of the rights granted in the Fundamental Law. In this regard, the constitutional complaint is a legal institution serving the purpose of enforcing Article 28 of the Fundamental Law, which states that the courts shall interpret the laws in accordance with the Fundamental Law. The courts should enforce the relevant constitutional requirements within the limits of interpretation allowed by the special legal regulations. {C.p. Decision 3/2015. (II. 2.) AB, Reasoning [17]–[18]}.
- [26] Article 28 of the Fundamental Law is directly connected to Article I (1) of the Fundamental Law, which states that "the inviolable and inalienable fundamental rights of MAN must be respected. It shall be the primary obligation of the State to protect these rights." This obligation of protection shall apply to all organs of the State, including the legislator and the courts.
- [27] According to Section 1 (2) of the Act CLXI of 2011 on the Organisation and Administration of Courts (hereinafter: AOAC), "courts shall provide for the enforcement of laws in the course of their judicial activity". Laws are listed in Article T (2) of the Fundamental Law: "laws shall be Acts, government decrees, prime ministerial decrees, ministerial decrees, decrees of the Governor of the Hungarian National Bank, decrees of the heads of independent regulatory organs and local government decrees. In addition, decrees of the National Defence Council adopted during a state of national crisis and decrees of the President of the Republic adopted during a state of emergency shall also be laws." According to Article T (3) of the Fundamental Law, no law shall conflict with the Fundamental Law. In line with Article R (1) of the

Fundamental Law, the Fundamental Law shall be the foundation of the legal system of Hungary. Consequently, the Fundamental Law is separated from the laws placed under it in the hierarchy of the sources of law, and this separation is supported by several provisions of the Fundamental Law [Article C) (3), Article R) (2), Article T) (2), Article 28 second sentence].

- [28] This distinction is in correlation with the order laid down in the first sentence of Article 28 of the Fundamental Law calling for the indirect effectiveness of the Fundamental Law realised by way of the legal interpretation of the Fundamental Law. The indirect enforcement of the Fundamental Law is manifested in the provision of the AOAC, stating that the courts shall apply the laws in the course of their judicial activity. It means that the courts shall not act directly on the basis of the Fundamental Law as it does not serve as the legal basis of adjudicating the debates before them, it rather determines the correct interpretation of the laws applied: if more than one interpretation can be attributed to a law, the judge should choose the one, which complies with the Fundamental Law, irrespectively to making a decision in a vertical legal relationship between the State and the individuals or in a horizontal one between private parties.
- [29] It follows from the above that the set of values of the Fundamental Law are enforced through the laws and the constitutional interpretations of the laws. If such an interpretation of the law cannot be applied in the debate, the judge shall suspend the proceedings and turn to the Constitutional Court on the basis of Article 25 (1) of the ACC. In any other case, the judge shall decide the case and the Constitutional Court shall carry out the constitutional review of the judge's interpretation in the case of initiating a constitutional complaint procedure. If there is a margin of interpretation, the Constitutional Court may also remedy the constitutional defects or deficiencies of the applied norm by sparing the norm, and it may provide the exact meaning of the norm by setting a constitutional requirement {C.p. Decision 34/2017. (XII. 11.) AB, Reasoning [19]}
- [30] The constitutional review by the Constitutional Court is the ultimate control for the enforcement of the fundamental rights' criteria laid down in the Fundamental Law. While the courts may not step beyond the limits of the margin of interpretation allowed by the law, the Constitutional Court may also remedy the constitutional problems of the applied norm. To achieve this, the Constitutional Court may lay down in a constitutional requirement the interpretation of the applied law in conformity with the Fundamental Law, however, it has a limitation set forth in the Fundamental Law: Article C) (1) of the Fundamental Law, stating that the operation of the Hungarian State is based on the principle of the division of powers. Actually, the constitutional requirement "is not a new regulation, but a correct interpretation directly and clearly based on and originally embedded in a provision of the Fundamental Law, which is only recognized and stated by the Constitutional Court"

{Decision 25/2017. (X. 17.) AB, Reasoning [22]}. It is the limitation of determining the constitutional requirement "that the Constitutional Court should not attribute to a norm any content, which cannot be read out from the norm, as it would imply the distraction of the legislator's duties; neither may the constitutional requirement overwrite the legislator's genuine interpretation. Additionally, the requirement should implicitly be suitable for resolving in line with the Fundamental Law the situations, which are in conflict with the Fundamental Law" {Decision 25/2017. (X. 17.) AB, Reasoning [23]}.

- [31] The situation is different, however, when there is no regulation in the legal system that could be interpreted by the judge. In the absence of an applicable law and interpretation the Fundamental Law cannot be enforced: there is no forcing need to choose between concurring interpretations with the help of the provisions of the Fundamental Law and the guiding interpretation provided by the Constitutional Court. The judge may not deter from the framework of the laws. This has already been examined by the Constitutional Court in the context of judicial independence and it concluded that subordination to the law is not a limitation of judicial independence, it is much more a guarantee of it: "the judge shall make his decision on the basis of the laws. If the court frees itself from the subordination to the law, it dispenses with one of the material bases of its own independence. A court that does not obey the law is actually misusing its own independence, which may, in a given case, thus result in the violation of the right to a fair trial. A judicial judgement, which neglects the law in force without any due ground is arbitrary and conceptually unfair: it is incompatible with the principle of the rule of law" {Decision 20/2017. (VII. 18.) AB, Reasoning [23]}
- [32] In the present case the Constitutional Court established that the case concerned is the second one of the situations mentioned above, the lack of regulations: according to the court's interpretation of the law, there was no guiding law it could have applied in the particular case, therefore it could not take into account the application solely based on certain provisions of the Fundamental Law as the case was not about choosing between different interpretations of an existing law, enforcing or excluding fundamental rights. Nevertheless, the court examined the particular elements of the case and it referred to the fact that the petitioner had failed to attach to his application the healthcare documentation required according to the practice developed in the absence of any legal regulation. It has also made a reference to the findings of the report No. AJB-883/2016 of the Commissioner for the Fundamental Rights (hereinafter: "Commissioner's report"), and it presented in details the administrative authority's rejecting decision that had quoted the lack of competence and which had procedurally followed the issuing of an information letter.
- [33] Based on the above, the Constitutional Court found that while the petitioner complains about the failure to apply, within the range of interpretation allowed by

the law, the interpretation that would enforce the fundamental rights to the greatest extent, both the administrative authority and the court emphasize the deficiencies of the legal regulation. As argued by the petitioner, the breach of the fundamental right results from the court's failure to apply the general rules of changing the name to the legal recognition of gender and its failure to apply a broad interpretation of the regulations in order to allow the legal recognition of gender in another way, in the absence of any birth certificate located in Hungary due to the refugee status of the petitioner, for example by proceeding with the name changing procedure alone.

- [34] The Constitutional Court reached the following conclusions regarding the case. Although the regulations in force handle the legal recognition of gender as a special name changing procedure, its subject is related to the essential content of one's privacy and to the inner core of human dignity. At the same time, the conclusions reached by the adjudicating judge – i.e. rejecting, due to the deficiencies of the legal regulations, the application for review against the decision of the administrative authority stating the lack of competence – are in compliance with the Fundamental Law, as the basic case cannot be adjudicated by interpreting the applicable laws, therefore the Constitutional Court rejected the constitutional complaint.

IV

- [35] 1 Stemming from the objective constitutional protection function of the Constitutional Court, the constitutional problem raised in a constitutional complaint under Section 27 of the ACC may be resolved by the Constitutional Court with the annulment of the court decision in the case of a question of interpretation, or with the establishment of an omission contrary to the Fundamental Law when there is no law and no question of interpretation.
- [36] According to Section 46 (1) of the ACC, if the Constitutional Court, in its proceedings conducted in the exercise of its competences, establishes an omission on the part of the law-maker that results in violating the Fundamental Law, it shall call upon the organ that committed the omission to perform its task and set a time-limit for that. The omission of the law-maker's tasks shall be established when the essential content of the legal regulation that can be derived from the Fundamental Law is incomplete.
- [37] 2 The Constitutional Court stated in the Decision 30/2017. (XI. 14.) AB in the context of Article XV of the Fundamental Law that "the Constitutional Court shall decide about the petition on the basis of Article XV (2) in the case of affecting fundamental rights and the alleged violation of the individual's protected characteristics and on the basis of Article XV (1) if other rights are affected." The Constitutional Court took a similar position in the Decision 32/2015. (XI. 19.) AB as well, where it stated that "the private individual petitioners had founded their petition upon Article XV (2) of the

Fundamental Law [...], however, the differentiation created by determining the effect of the Act may not be linked to any of the characteristics under Article XV (2) of the Fundamental Law. Consequently the constitutionality of the challenged provision of the law should be decided on the basis of Article XV paragraph (1), rather than paragraph (2), of the Fundamental Law" {Decision 32/2015. (XI. 19.) AB, Reasoning [79]}" (Reasoning [49]).

- [38] Article XV (2) of the Fundamental Law contains the equality of fundamental rights and the prohibition of discrimination. "In addition to the itemized list of the characteristics, the wording »discrimination on other grounds« provides a guarantee that the persons who live in unforeseeable situations, which are remarkably similar to the listed characteristics, shall not suffer from a negative discrimination. This phrase offers a possibility for the Constitutional Court to react in due time to the current changes in the society and to always determine by itself what the vulnerable groups of the society are, i.e. the members of which group should be held defenceless, excluded or subject to continuous and unjustified discrimination. Accordingly, Article XV (2) of the Fundamental Law contains an open list, but this open list may not be extended without limits. Indeed, it shall not offer protection for those persons who are currently negatively affected by a certain rule, but who are not subject of a discrimination. Actually, the prohibition of discrimination granted in Article XV (2) of the Fundamental Law only covers the situations of life where people face a prejudice or social exclusion due to their essential characteristics that determine their identity. Consequently the constitutional clause of the prohibition of discrimination primarily serves the purpose of protecting the groups of the society differentiated according to their personal characteristics that cannot be changed by one's free discretion" {Decision 3206/2014. (VII. 21.) AB, Reasoning [27]; reinforced by the Decision 30/2017. (IX. 14.) AB, Reasoning [52]}.
- [39] Thus most of the violations of fundamental rights may be examined on the basis of Article XV (2) of the Fundamental Law, as according to this provision, the fundamental rights must be granted to everyone without any discrimination on the basis of race, colour, gender, disability, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other status whatsoever. At the same time, in the case of fundamental rights, the fundamental rights' test according to Article I (3) of the Fundamental Law has to be followed with regard to their restrictability, and it is the primary guarantee for not applying any discrimination of this kind to the granting of fundamental rights. It means that any constitutional aim, which realises a discrimination shall not be acceptable as a necessary one, and any restriction leading to a discriminative situation shall not be considered as proportionate.
- [40] 3 According to Article II of the Fundamental Law, human dignity shall be inviolable; every human being shall have the right to life and human dignity. After the entry into

force of the Fundamental Law, the Constitutional Court reinforced its decisions connected to the right to human dignity and it stated that "the Fundamental Law stresses, with even more emphasis than the Constitution did, the fundamental role of human dignity in its set of values: it explicitly declares human dignity to be 'inviolable'" {Decision 11/2014. (IV. 4.) AB, Reasoning [29]}.

- [41] The right to human dignity has several elements, partial rights that have an unrestrictable inner core {c.p. Decision 7/2014. (III. 7.) AB, Reasoning [24]; Decision 28/2014. (IX. 29.) AB, Reasoning [36]; Decision 3001/2018. (I. 10.) AB, Reasoning [27], [41]}. The right to bear a name is a fundamental right deductible from the right to human dignity.
- [42] In the Decision 13/2013. (VI. 17.) AB the Constitutional Court took the following stand. "The road of Hungarian and European constitutional development that has been completed so far and the rules of constitutional law have a necessary impact on the interpretation of the Fundamental Law as well. In the course of reviewing the constitutional questions to be examined in the new cases, the Constitutional Court may use the arguments, legal principles and constitutional relationships elaborated in its previous decisions if the application of such findings is not excluded on the basis of the identical contents of the relevant section of the Fundamental Law and of the Constitution, the contextual identification with the whole of the Fundamental Law, the rules of interpretation of the Fundamental Law and by taking into account the concrete case, and it is considered necessary to incorporate such findings into the reasoning of the decision to be passed." (Reasoning [32]).
- [43] In the context of the right to bear a name, in the Decision 27/2015. (VII. 21.) AB "the Constitutional Court provided an overview of its former case law related to the relevant scope of questions and in connection with the particular case it compared the underlying provisions of the Constitution and of the Fundamental Law to find that there was no obstacle of applying as appropriate the formerly developed relevant case law." (Reasoning [23]) Based on the above, the Decision 27/2015 (VII. 21.) AB reinforced the Decision 58/2011 (XII. 7.) AB (hereinafter: CCDec.) "the CCDec dealt comprehensively with the right to a name as well as the right to bear a name and the right to change one's name as parts of the foregoing. As stated in the CCDec, the right to have a name, as a right to have a denomination that serves the purpose of representing one's identity, is a fundamental right of absolute structure, i.e. it shall not be restricted by the State. According to the CCDec: "the right to have one's own name is conceptually identical with the entirety of the right only, and thus it is an «essential content» as it is: consequently, it may not be restricted and it is an inalienable and untouchable right the State may not dispose over. Everyone must have his own name which may not be substituted for by a number, a code or any other symbol. One's own name is one of the – fundamental – determinants of personal identity, serving the purpose of identification and distinction from others,

thus it is one of the manifestations of one's individuality and unique character which cannot be substituted for. [...] the right to bear one's own name, as an external representation towards others of the right to have one's own name, may be valued similarly and it may enjoy the same protection. Its content represents that the existing name – as registered by the State – of someone may not be taken away from that person, and the State is not allowed to change the name without the consent of the affected person. Consequently, the right to bear one's own name is an unrestrictable fundamental right, too." (ABH 2001, 527, 542) (Reasoning [24])

[44] Accordingly, everyone has got the inalienable right to have and bear his own name representing his (self)-identity. Therefore, the right to have one's own name is one of the fundamental elements of the self-identification, a fundamental right coming about with the birth of a child, which may not be withdrawn by the State and which is unrestrictable. However, according to the first point of the holdings of the CCDec, other elements of the right pertaining to names, and in particular choosing, changing and amending names, may be constitutionally restricted by the legislator. The right to choose one's name is one of the tools of determining the identity of the individual (own one, or the descendant's), as one of the ways of manifesting one's personality. The State has more room for action in respect of choosing names: it may set up restrictions in this respect, and such barriers originate from the fact that the choosing of names is "bound by traditions". In addition to that, protecting the rights of others and securing the enforceability of such rights, may force the State to interfere.

[45] In its earlier decisions, the Constitutional Court has already touched upon the question of the rights of transgender persons and of name changes that realise the recognition of gender. The reasoning of the CCDec pointed out in particular that in the case of transsexual persons the right to the change of name is a fundamental right. (CCDec, ABH 2001, 527, 543) The decision also made a reference to the early practice of the ECtHR, according to which "in the case of transsexuals, the right to change their names may lead to allowing them to request the changing of their names as registered, and the registers must be changed accordingly because of the change of both their sex and names. Thus the State is bound to accept the changing of their sex – together with name changing. (*Eur.Court HR,B. v. France judgment of 25 March 1992, Series, A.no.232-C.*)" (CCDec, ABH 2001, 527, 543.) The Decision 154/2008. (XII. 17.) AB established, by quoting the ECtHR's judgement in the *Christine Goodwin v. United Kingdom Case* that "with respect to transgender persons, the right to marry should be interpreted in a way to allow them to marry a person of their new opposite sex." (ABH 2008, 1203, 1211-1212) The Decision 43/2005. (XI. 14.) AB mentioned the gender correction operation of transsexual persons as an example for the protection of physical and mental health and the safeguarding of the integrity of one's personality. (ABH 2005, 536, 550).

- [46] The Constitutional Court laid down in the Decision 27/2015. (VII. 21.) AB that "in determining the rules of bearing and changing names the primary duty of the State is registration" (Reasoning [42]). According to the Decision, the right to human dignity was restricted contrary to the Fundamental Law by the rule requiring that surnames consisting of two words must be connected with a hyphen and that such double surnames can only be registered in the register in a form connected with a hyphen.
- [47] Based on the above, the Constitutional Court stated that it continues to consider the regulation on the changing of names as a question of fundamental rights. The name changing connected to gender reassignment is a special case of the above: it is based on the identity of "MAN" and the inviolability of equal human dignity. In the opinion of the Constitutional Court, the special name changing connected to gender reassignment as a fundamental determinant of a person's identity, as a right to have one's own name, shall fall into the unrestrictable realm of the right to have a name. The change of name is auxiliary to gender reassignment as everyone is entitled to have a name aligned with his or her gender, indeed, it is their obligation to have a name complying with their actual gender registered into the registries.
- [48] On the basis of Article I (1) of the Fundamental Law, the obligation of the State to respect and protect the fundamental rights shall include the obligation of the State to provide the conditions necessary for the enforcement of the fundamental rights, thus the State's duty of protecting the institutions shall contain the development of appropriate procedural frameworks to secure the enforcement of specific fundamental rights. As the name change realising the legal recognition of gender has a fundamental rights' background, the State – in accordance with its obligation of protection – must develop a regulation that acknowledges gender reassignment and provides a discrimination-free possibility for entering the resulting name change into the registry/registries. In this regard, the Constitutional Court took into account that at present it is possible in Hungary to legally recognize one's gender. According to Section 69/B (1) of the ARP, the personal identification data registry of the electronic register shall include, among others, the data subject's surname and forename at birth [Section 69/B (1) *ba*) of ARP], gender [Section 69/B (1) *be*) of ARP], as well as the change of these data [Section 69/B (1) *d*) of ARP]. The clients have to submit an application for data modification and the change of gender shall become legally recognized upon entering the amended data into the electronic register. Until 1 January 2017 the registration authority responsible for name changing had been the BÁH established by the Government Decree No. 162/1999. (XI. 19.) as a central budgetary organ operating as a central office. From 1 January 2017 the new name of BÁH is Immigration and Asylum Office. According to Section 9 (2) of the Government Decree No. 378/2016. (XII. 2.) Korm. on the legal succession connected to the review of certain central offices and ministerial background institutions operating as budgetary organs and on the takeover of certain public duties, from 1 January 2017,

the Budapest-Capital Government Office (hereinafter: "Government Office") has taken over the duties and competences of domestic family register registration specified in Section 12/A (2) *a) ab*), Section 14 (2), Section 46 (4), Section 70 (3) and (5) of ARP as well as the procedure under Section 89 (4) of ARP and the duties and powers connected to the name changing procedure.

- [49] The Constitutional Court also noted that the practice developed in Hungary does not require, in line with the international standards, the carrying out of gender affirming interventions as the precondition for a legally recognized gender and name change, but the personal scope of the regulation is limited to Hungarian citizens.
- [50] 4 In its procedure, the Constitutional Court examined the decisions of the European Court of Human Rights (hereinafter: ECHR) passed in questions of fundamental rights affecting transsexual persons.
- [51] In the beginning, the ECHR took a position of acknowledging that the Member States enjoy a significant margin of discretion regarding the legal recognition of gender. Nevertheless the ECHR has underlined already in these decisions that the States Parties should take into account the scientific and societal developments related to transsexual persons. [*Rees v. United Kingdom* (9532/81), 17 October 1986, paragraph 47; *Sheffield and Horsham v. United Kingdom* (22985/93, 23390/94), 30 July 1998, paragraphs 54–58].
- [52] As regards the rights of transsexual persons, – on the basis of the doctrine of the Convention as "living law", according to which the Convention should be interpreted within the circumstances of the present with due account to the changes of sociology, technology and science, as well as to the development of human rights norms – the cases of *Christine Goodwin v. United Kingdom* [(28957/95), 11 July 2002] and of *I. v. United Kingdom* [(25680/94), 11 July 2002] resulted in a shift. Subsequently several judgements providing protection for the legal recognition of gender have been adopted. [See for example the Cases *Van Kück v. Germany* (35968/97), 12 June 2003; *Grant v. United Kingdom* (32570/03), 23 May 2006; *L. v. Lithuania* (27527/03), 11 September 2007; *Schlumpf v. Switzerland* (29002/06), 8 January 2009; *Y.Y. v. Turkey* (14793/08), 10 March 2015; A.P., *Garçon and Nicot v. France* (79885/12, 52471/13, 52596/13), 6 April 2017]
- [53] The case-law of the ECHR protects the issue of the legal recognition of gender as a part of the right to privacy and the States Parties are obliged to provide for the appropriate relevant procedure. In accordance with the above, the ECHR established the responsibility of Lithuania as the Lithuanian legal regulation was deficient with regard to the gender correction operations. [*L. v. Lithuania* (27527/03), 11 September 2007, paragraphs 57, 59]. With regard to the complex aspects of the legal recognition of gender related to the fundamental rights and to healthcare, in its most recent decisions the ECHR concluded that requiring certain medical examinations shall not be regarded as a disproportionate burden for the applicants, but it does not apply for

the advance requirement of carrying out more serious interventions that imply a high risk of sterility. [*A.P., Garçon and Nicot v. France* (79885/12, 52471/13, 52596/13), 6 April 2017, paragraphs 135, 153–154].

- [54] The Constitutional Court also underlined that there is still no consensus on certain specific questions concerning the legal recognition of gender. For example, the ECHR accepted as a proportionate restriction the Finnish regulation that made the legal recognition of gender dependant on transforming marriage into a registered partnership [*Hämäläinen v. Finland* (37359/09), 16 July 2014], but according to the German Federal Constitutional Court this would qualify as an unjustified restriction with regard to those who wish to keep on living in a marriage with each other. In the decision, the Federal Constitutional Court also pointed out that the right to sexual self-determination and sexual identity belong to the narrowest and the most intimate sphere of personhood. While a person's affiliation with a particular gender is initially determined by outward physical characteristics at the time of birth, a person's gender affiliation is not limited to the above and it is dependent on his/her psychological make-up. If a person's perceived affiliation with a particular gender contradicts his/her outward sexual characteristics, respect for human dignity and the fundamental right to protection of personhood require that the transsexual person should be allowed to have his/her physical and mental make-up aligned, including both the surgery and its legal implications concerning personality rights (1 BvL 10/05, 27 May 2008, paragraphs 37–38).
- [55] From among the connected documents of international law, the Constitutional Court refers to the resolution of the Parliamentary Assembly of the Council of Europe on the "Discrimination against transgender people in Europe" adopted in 2015 (hereinafter: CoE Res.). In the resolution, the Assembly called upon the member States, as concerns legal gender recognition, to develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards, passports, educational certificates and other similar documents (CoE Res. 6.2.1.). The Assembly also emphasized the need that the member States should abolish sterilisation and other compulsory medical treatment, as well as a mental health diagnosis, as a necessary legal requirement to recognise a person's gender identity in laws regulating the procedure for changing a name and registered gender (CoE Res. 6.2.2.).
- [56] The Constitutional Court also refers to the 1996 judgement of the Court of Justice of the European Union (hereinafter: CJEU), according to which the CJEU considers the discrimination between persons who undergone gender reassignment as a case of negative discrimination according to gender. The decision made a link between the CJEU's duty to protect the right to human dignity and the action against the

discriminative situation [C-13/94 *P. v. S & Cornwall County Council* ECR 1996 I-02143, par. 22].

- [57] Finally, the Constitutional Court also took into account in adopting its decision that in some of the Member States of the European Union there are specific laws dealing with the issue of the legal recognition of gender. [For example, Belgium: *Loi réformant des régimes relatifs aux personnes transgenres en ce qui concerne la mention d'une modification de l'enregistrement du sexe dans les actes de l'état civil et ses effets* (25 June 2017); Finland: *Laki transseksuaalin sukupuolen vahvistamisesta* (1 January 2003); Ireland: *Gender Recognition Act 2015* (22 July 2015); Germany: *Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen* (10 September 1980)] These laws allow the legal recognition of gender not only in the case of the citizens of the relevant Member States, but for foreigners as well: in the case of the latter they took account of the title of residence as well as whether or not the country of origin offers an appropriate procedure for the legal recognition of gender. In this context, the German Federal Constitutional Court established in its decision adopted on 18 July 2006 that the Act pertaining to transsexual persons violated the German Basic Law as it was not applicable to the non-German citizens who lawfully and permanently stay in Germany in the cases when their country of origin does not offer a possibility for gender reassignment (1 BvL 1 and 12/04, 18 July 2006., BVerfGE 116, 243). Subsequently the German legislator extended the personal scope of application of the regulation.
- [58] 5 According to Section 10 (1) of the Act LXXX of 2007 on Asylum unless an Act of Parliament or a Government decree expressly provides otherwise, a refugee shall have the rights and obligations of a Hungarian citizen with exceptions set out in paragraphs (2) and (3). Consequently, it is possible to differentiate between refugees and Hungarian citizens, but it should be supported with a due constitutional reason.
- [59] In line with Section 49 of the ARP, the change of the surname and the forename at birth of a Hungarian citizen may be authorized – upon his or her request – by the registration authority. The change of the name shall be registered by the registration authority into the family register. According to Section 51 (1), the registration authority shall issue a document on the change of the name. Documents on the name change may not be rolled out and they shall be retained in the Hungarian National Archive with due account to compliance with data protection rules and by the registration authority as regulated in paragraph (1a).
- [60] As a special case of the above, on the basis of Section 7 of the Government Decree No. 429/2017. (XII. 20.) Korm., within 8 days upon receipt of the healthcare expert opinion supporting the gender reassignment, the gender reassignment and the change of the forename made necessary by the foregoing shall be notified by the organ of the register responsible for the change of the name to the registrar keeping the registry of births in the register, for the purpose of entry into the register.

- [61] The Constitutional Court noted that both the general procedure of changing name and its special type, the name changing procedure connected to gender reassignment are only available for Hungarian citizens. It has, however, resulted in a paradox situation for the petitioner of the present case as a person who had been persecuted in his country of origin due to his transsexuality and who was granted asylum in Hungary with respect to this persecution is unable to have his real gender recognized in Hungary either.
- [62] According to Article XV (2) of the Fundamental Law, Hungary shall guarantee fundamental rights to everyone without discrimination and the exemplary list in particular mentions the prohibition of discrimination based on origin. It is based on the fact that Article I (1) of the Fundamental Law, which lays down respect for the inviolable and inalienable fundamental rights of humans and not of the Hungarian citizens. Nevertheless, the regulations in force on name change applies only to Hungarian citizens, therefore the Constitutional Court established that the legislator had differentiated between Hungarian citizens and non-Hungarian citizens with respect to their access to the name changing procedure. The Constitutional Court holds that this differentiation is a regulatory deficiency. Although it may be justified and at the same time necessary to apply it as the general rule, the complete lack of regulations shall lead to a general exclusion from the effect of name changing procedures, resulting in a disproportionate restriction.
- [63] The disproportionality of the general prohibition shall, at the same time, cause a discriminative situation in the field of the access to the name changing procedure by the subjects of law. Thus the restriction regarding the right to name change of lawfully settled non-Hungarian citizens (for example persons possessing a national permanent residence permit, refugee, foreign national beneficiary of subsidiary protection status, stateless person), whose country of origin does not allow the name change procedure, is disproportionate and constitutionally unacceptable. Due to the above, the Constitutional Court – acting ex officio – hereby establishes the existence of a situation contrary to the Fundamental Law, violating Article II and XV (2) of the Fundamental Law, manifested in an omission due to the failure of the legislator to regulate the procedure of the change of surname of lawfully settled non-Hungarian citizens.
- [64] As non-Hungarian citizens do not have a register in Hungary, the legislator has to find another solution to resolve this situation that is in conflict with the Fundamental Law. An evident constitutional solution could be the entry of the change of name into other documents or certificates received from the Hungarian authorities.
- [65] The Constitutional Court therefore calls upon the National Assembly to meet its legislative duty by 31 December 2018.
- [66] 6 Regarding the constitutional complaint against the judicial decision, the Constitutional Court notes the following. In the case concerned – as it has been

explained – the proceeding judge could not have made another decision within the framework of the laws. However, as soon as the legislator remedies the unconstitutional deficiency established in this decision, the petitioner shall have the opportunity to repeatedly enforce his claim he was unable to have enforced in the present legal environment.

Dr. Tamás Sulyok,
President of the Constitutional Court,
Justice Rapporteur

Dr. István Balsai,
Justice of the Constitutional Court

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

Dr. Ildikó Hörcherné dr. Marosi,
Justice of the Constitutional Court

Dr. Béla Pokol,
Justice of the Constitutional Court

Dr. Balázs Schanda,
Justice of the Constitutional Court

Dr. Marcel Szabó,
Justice of the Constitutional Court

Dr. Mária Szívós,
Justice of the Constitutional Court

Dr. Tamás Sulyok,
President of the Constitutional Court,
on behalf of
Dr. Ágnes Czine
Justice of the Constitutional Court
unable to sign

Dr. Attila Horváth,
Justice of the Constitutional Court

Dr. Ildikó Hörcherné dr. Marosi,
Justice of the Constitutional Court,
on behalf of
Dr. Imre Juhász
Justice of the Constitutional Court
unable to sign

Dr. László Salamon,
Justice of the Constitutional Court

Dr. István Stumpf,
Justice of the Constitutional Court

Dr. Péter Szalay,
Justice of the Constitutional Court

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

Concurring reasoning by Justice *Dr. Tamás Sulyok*

- [67] As Justice Rapporteur I agree with the decision establishing the conflict with the Fundamental Law manifested in an omission as stated in the holdings of the decision, but with respect to the reasoning I hold it important to provide a concurring reasoning aimed at calling the attention of the legislator to the following.
- [68] In the case under review, the Constitutional Court acted in its competence of "real" constitutional complaint under Section 27 of the ACC, in the matter of a non-Hungarian petitioner. Due to being bound to the petition, the Constitutional Court could not take a position on the constitutionality of the regulations that apply to transsexual persons who are Hungarian citizens, however, in my opinion, the reasoning of the majority decision has an implication on the merits of it. As underlined in the reasoning of the majority decision: "in the opinion of the Constitutional Court, the special name changing connected to gender reassignment as a fundamental determinant of a person's identity, as a right to have one's own name, shall fall into the unrestrictable realm of the right to have a name." Taking into account the Constitutional Court's practice connected to the rule laid down in Article I (3) of the Fundamental Law, I hold it necessary to call the attention of the legislator to the fact that the present government decree-level regulation of the name change attached to the gender reassignment of Hungarian citizens needs to be reviewed.
- [69] In addition to examining the appropriateness of the level of the regulation in the sources of law, one should also emphasize that the requirement of legal certainty compels the State to ensure that the rules of law are clear and unambiguous and that their operation is ascertainable and predictable by the addressees of the norm. The subordination of public authority and public administration to the law is one of the most important fundamental requirements resulting from the principle of the rule of law laid down in Article B) (1) of the Fundamental Law: the bodies vested with public authority shall function within the organisational framework laid down by the law, in the operational order specified by the law, within the procedural limits regulated by the law in a manner the citizens can learn about and calculate with. However, according to the report No. AJB-883/2016 of the Commissioner for Fundamental Rights, based on the regulations in force on the legal recognition of gender, the role played in the procedure by the department of the Ministry of Human Capacities is not clear, the legal nature of the "information note" placed on the website of the Budapest-Capital Government Office is questionable and it is problematic that the fundamental right to legal remedy cannot be enforced in the case of a "rejecting decision" as in fact there is no formal decision.
- [70] Based on the above, I hold that the legislator should consider the re-regulation of the whole issue on the appropriate level of the sources of law, taking Hungarian citizens into account as well, and similarly to the Act of Parliament adopted in Germany decades ago (*Gesetz über die Änderung der Vornamen und die Feststellung der*

Geschlechtszugehörigkeit in besonderen Fällen), the adoption of a separate Act on the legal recognition of gender should be taken into consideration.

Budapest, 19 June 2018.

Dr. Tamás Sulyok
Justice of the Constitutional Court

Concurring opinion by Justice *Dr. Mária Szívós*

- [71] 1 I supported both the holdings of the decision and the reasoning thereof. By establishing the conflict with the Fundamental Law manifested in an omission, in the applicable legislative environment, the Constitutional Court called upon the legislator to remedy the regulatory deficiencies.
- [72] 2 However, in the context of rejecting the constitutional complaint I hold it necessary to record that in my opinion the constitutional complaint should have been refused on the basis of Section 30 (2) c) of the Rules of Procedure with account to the following.
- [73] The petitioner showed the following conduct during the non-contentious administrative procedure and in the court proceedings to make his affectedness verifiable.
- [74] On 6 March 2016 the petitioner filed an application for gender reassignment to the BÁH claiming that his official documents issued abroad identify him as female, but this description does not match his gender identity. In its letter dated 30 March 2016, the BÁH informed the applicant about the deficiencies of the applicable legal regulations and that in accordance with the practice developed by the EMMI, it may propose in an expert opinion the entry of gender reassignment into the register on the basis of the healthcare documentation attached by the client, and such documentation has not been attached in the case concerned.
- [75] The petitioner then – instead of obtaining the necessary healthcare documentation, as the medical professional documents absolutely necessary for the gender reassignment, according to the developed practice –, clearly with the intention of submitting an application for judicial review, requested the BÁH to deliver a formal decision of rejection.
- [76] Thus, in my view, the petitioner clearly violated the fundamental mandatory provision requiring the client's acting in good faith as laid down in Section 6 of the Act CXL of 2004 on the General Rules of Public Administration Authority Procedure and Services, and neglected the guidance provided by BÁH to facilitate the petitioner's position.
- [77] This is how the petitioner became entitled to file an application for judicial review. The Budapest-Capital Administrative and Labour Court performed the review on the

basis of the Act XVII of 2005 on the amendment of the Act III of 1952 on the civil procedures and on the rules applicable in certain non-contentious administrative procedures (hereinafter: ANCP). According to Section 1 (2) of ANCP, unless an Act of Parliament provides otherwise, only documentary evidence shall be used in the non-contentious administrative procedures. The Budapest-Capital Administrative and Labour Court also pointed out in its rejecting ruling that the petitioner failed to submit to the court the healthcare documentation as the basis of the expert opinion to be issued by the EMMI, in the absence of which the recognition of gender reassignment is ipso facto excluded.

- [78] The petitioner's constitutional complaint was submitted following the events described above. According to Section 52 (1) of the ACC, the petition should contain an explicit request. In line with Section 52 (1b), this shall require – among others – the clear indication of the reasons of starting the procedure as well as the essence of the violation of the right granted in the Fundamental Law. Even before the Constitutional Court, the petitioner did not give account of why he had failed to initiate the obtaining of the healthcare documentation as the basis of the expert opinion to be issued by the EMMI, and why he had made efforts to put his case before the Constitutional Court by formally exhausting his possibilities of legal remedies.
- [79] Although the ACC does not require it specifically, it follows clearly from the legal institution of the procedural fine regulated in Section 54 (2) of the ACC that exercising the petitioner's rights in good faith and in a proper manner is a requirement before the Constitutional Court, too.
- [80] Based on all the above, I hold that the affectedness of the petitioner may not be based merely on the ground of his participation as a litigant party in a court procedure he created, as he willingly failed to attach the medical expert opinion necessary for the gender reassignment and thus for the adjudication of the case, although he could have obtained it during his lawful stay in Hungary.

Budapest, 19 June 2018.

Dr. Mária Szívós
Justice of the Constitutional Court