Decision 10/2021 (IV. 7.) AB

on declaring section 298 (2) (a) of the Act XC of 2017 on the Criminal Procedure to be in conflict with the Fundamental Law and annulling it

In the posterior examination of an act's compatibility with the Fundamental Law, the plenary session of the Constitutional Court – with concurring reasoning by Justice *dr. Ágnes Czine* – adopted the following

decision:

1. The Constitutional Court declares that section 298 (2) (a) of the Act XC of 2017 on the Criminal Procedure is in conflict with the Fundamental Law, and therefore annuls it with effect from 30 September 2021.

2. The Constitutional Court terminates the procedure in respect of the motion aimed at establishing that section 132 (3a) of the Act XIX of 1998 on the Criminal Procedure is in conflict with the Fundamental Law and at its annulment.

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

Reasoning

I

[1] 1 The Commissioner for Fundamental Rights, in a motion filed pursuant to section 24 (2) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), initiated the declaration of the conflict of section 132 (3a) of the Act XIX of 1998 on the Criminal Procedure (hereinafter: "old ACP") and section 298 (2) (a) of the Act XC of 2017 on the Criminal Procedure (hereinafter: ACP) with the Fundamental Law and their annulment.

[2] 2 In his motion and its supplement, the Commissioner for Fundamental Rights argued that the contested provisions of the old ACP and the ACP constitute a violation of the principle of the rule of law enshrined in Article B (1) of the Fundamental Law and of the right to personal freedom guaranteed by Article IV (1) of the Fundamental Law.

[3] 2.1 The Commissioner for Fundamental Rights explained that the challenged section

132 (3a) of the old ACP was inserted into the existing provisions of the old ACP by the Act CLXXXVI of 2013 amending certain other Acts on criminal law and related matters (hereinafter: "Amendment Act"). Prior to the amendment, the old ACP established an objective upper limit for the duration of pre-trial detention in all cases, which increased in a graduated manner based on the punishment for the offence on which the criminal proceedings were based, but was set at a maximum of four years by regulating that once the period laid down in the old ACP had expired, pre-trial detention automatically ceased, except in cases where pre-trial detention was ordered or maintained after the decision on the merits of the case had been delivered and where the case was subject to third instance proceedings or to retrial by annulment. The contested provision of the old ACP abolished that ceiling in cases where criminal proceedings were brought for an offence punishable by imprisonment for a term of up to fifteen years or life imprisonment. According to the petitioner's arguments, by that solution, the law-maker has changed the four-year limit on pre-trial detention to an indefinite period for persons prosecuted for offences punishable by a sentence of at least fifteen years' imprisonment.

[4] The Commissioner for Fundamental Rights also requested the Constitutional Court, on the basis of the above-mentioned reasons, to conduct a constitutional review of section 298 (2) (a) of ACP, since according to the provision called for, there is no upper limit on the duration of arrest in the case of criminal proceedings for the most serious offences at the stage of the proceedings in question, in the same way as it had been regulated in the old ACP in force at the time of the submission of the petition. This applies to a narrower range of offences, as only offences punishable by life imprisonment are included in this scope.

[5] 2.2 The petitioner – recalling the case-law of the Constitutional Court – explained that it follows from the constitutional provision of the rule of law that the state cannot pass the risk of failure of criminal proceedings on to the accused. He argued that, from a procedural point of view, it is a failure if the court is unable to reach a decision on the criminal liability of the accused after a long period of time. The timeliness of judicial decisions and the efficiency of the procedure are factors which contribute to the achievement of one of the objectives of punishment, namely general prevention. The contested provisions of the old ACP and the ACP impose on the accused the burden of the failure to complete the proceedings, which is reflected in the length of the criminal proceedings, by maintaining the (pre-trial) detention indefinitely in such cases.

[6] 2.3 The petitioner – referring to several previous decisions of the Constitutional Court – also explained that a restriction of the fundamental right to personal freedom is only in compliance with the provisions of the Fundamental Law if it meets the test of necessity and proportionality. (Pre-trial) detention may be a necessary means of restricting personal freedom in order to ensure that the accused is available during the proceedings and that the court judgement, if it is a conviction, can ultimately be enforced. However, the old rules on (pre-trial) detention in the old ACP and the ACP only meet the requirements of Article IV (1) of the Fundamental Law if the restriction of personal freedom is proportionate to the State's need for criminal justice. The more serious the offence, the more the State's need for criminal justice is weighed, therefore in the case of particularly serious offences, a longer upper limit may be acceptable in principle, but in the absence of an upper limit, the testing

of proportionality is conceptually excluded. After a certain period of time, public interest in the exercise of the State's criminal authority is certainly no longer proportionate to the conceptually irreversible restriction of personal freedom. In summary, the petitioner stressed that the constitutional guarantee of the fundamental right to personal freedom is that the period of deprivation of liberty (prior to a final judgement) cannot be unlimited.

[7] In view of all this, the Commissioner for Fundamental Rights requested the Constitutional Court to declare the challenged provisions of the old ACP and the ACP to be in conflict with the Fundamental Law and to annul them.

II

[8] 1 The provisions of the Fundamental Law taken into account by the Constitutional Court:

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

"Article IV (1) Everyone has the right to liberty and security of the person.

(2) No one shall be deprived of liberty except for reasons specified in an Act and in accordance with the procedure laid down in an Act. Life imprisonment without parole may only be imposed for the commission of intentional and violent criminal offences.

(3) Any person suspected of having committed a criminal offence and taken into detention must, as soon as possible, be released or brought before a court. The court shall be obliged to hear the person brought before it and shall without delay make a decision with a written statement of reasons to release or to arrest that person."

"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."

[9] 2 The provision of the old ACP concerned by the motion:

"Section 132 (3) Pre-trial detention shall cease,

(a) if the duration of it is one year or more and the accused is being prosecuted for an offence punishable by a custodial sentence of not more than three years.

(b) if the duration of it is two years or more and the accused is being prosecuted for an offence punishable by a custodial sentence of not more than five years.

(c) if the duration of it – in the cases not falling under items (a) to (b) – is three years or more,

except in the case of pre-trial detention ordered or maintained after the delivery of a decision on the merits of the case, and where the case is subject to a trial at third instance or to a

repeated procedure due to annulment.

(3a) Even in the case provided for in paragraph (3) (c), pre-trial detention shall not be terminated if the accused is under trial for an offence punishable by imprisonment for a term of up to fifteen years or life imprisonment."

[10] 3 The provision of the ACP concerned by the motion:

"Section 298 (1) Pre-trial detention shall not exceed

(a) one year if proceedings against the accused are pending for an offence punishable by imprisonment of not more than three years.

(b) two years if proceedings against the accused are pending for an offence punishable by imprisonment of not more than five years.

(c) three years if proceedings against the accused are pending for an offence punishable by imprisonment of not more than ten years.

(d) four years if proceedings against the accused are pending for an offence punishable by imprisonment of more than ten years.

(2) Paragraph (1) shall not apply,

(a) if proceedings against the accused are pending for an offence punishable by life imprisonment, [...]"

III

[11] 1 First of all, the Constitutional Court examined whether the initiative submitted by the Commissioner for Fundamental Rights complies with the criteria set forth by the law.

[12] 2 Pursuant to section 24 (1) and (2) of the ACC, the Commissioner for Fundamental Rights shall initiate an examination of the conformity of a law with the Fundamental Law at the Constitutional Court on the basis of Article 24 (2) (e) of the Fundamental Law if the Commissioner for Fundamental Rights is of the opinion that the law is contrary to the Fundamental Law.

[13] The petition initiating the *ex post* review procedure shall contain an explicit request within the meaning of section 52 (1) of the ACC. The request shall be held explicit if it indicates a reference to the competence of the Constitutional Court to adjudicate the petition, and establishes that the entity has the right to submit petitions, indicates the essence of the injury of rights granted in the Fundamental Law, the provisions of the Fundamental Law that are violated, and it contains appropriate reasoning. In addition, it identifies the contested provision of the law and expressly requests that it be annulled.

[14] The Constitutional Court found that the motion submitted by the Commissioner for Fundamental Rights complied with the provisions of section 24 (1) and (2) and the provisions of section 52 (1b) *(a)* to *(f)* of the ACC and may therefore be examined on its merits.

[15] 3 After the filing of the petition, on 1 July 2018, the ACP entered into force, section 879 of which repealed the old ACP. As a general rule, the Constitutional Court can examine the compliance of the laws in force with the Fundamental Law. Pursuant to section 41 (3) of the ACC, the Constitutional Court may examine the constitutionality of a repealed provision

of the law only if it should still be applied in a specific case. Given that the contested provision of the law can no longer be applied after the entry into force of the ACP, the part of the petition concerning section 132 (3a) of the old ACP has become irrelevant.

[16] Pursuant to section 59 of the ACC, if a case becomes obviously devoid of purpose, the Constitutional Court – as specified in its Rules of Procedure – may terminate a pending proceeding. According to section 67 (2) *(e)* of the Rules of Procedure, among others, a petition becomes devoid of purpose if it has become irrelevant, therefore the Constitutional Court has terminated its proceedings in the part concerning the said provision of the old ACP.

IV

[17] The petition – in the part concerning section 298 (2) *(a)* of the ACP – is well-founded as follows.

[18] 1 The Constitutional Court first examined the part of the petition that alleges a violation of the fundamental right to personal freedom in connection with the challenged provision.

[19] 1.1. Article IV (1) of the Fundamental Law declares as a general principle the right to personal liberty, which – according to paragraph (2) – may be deprived only for a reason defined by an Act of Parliament and according to a procedure defined by an Act of Parliament {Decision 3025/2014. (II. 17.) AB, Reasoning [49] and [51]}.

[20] According to the consistent case-law of the Constitutional Court, the monopoly of the State's punitive authority clearly implies the obligation to enforce criminal claims and to operate law enforcement and criminal justice under constitutional conditions. This constitutional obligation justifies that the bodies exercising the State's punitive authority are given effective means to perform their tasks, even if these means are severely restrictive of rights in their essence {Decision 61/1992. (XI. 20.) AB, ABH 1992, 280, 281; Decision 31/1998. (VI. 25.) AB, ABH 1998, 240, 247; Decision 13/2002. (III. 20.) AB; reinforced by: Decision 23/2014. (VII. 15.) AB, Reasoning [39]}.

The Constitutional Court interprets (pre-trial) detention as a preventive measure aimed at the effective enforcement of a criminal claim, thus ensuring the success of criminal proceedings and the possible enforceability of the sentence {Decision 19/1999. (VI. 25.) AB, ABH 1999, 150, 158; Decision 26/1999. (IX. 8.) AB, ABH 1999, 265, 272; Decision 10/2007. (III. 7.) AB, ABH 2007, 211, 218; Decision 3025/2014. (II. 17.) AB, Reasoning [38]} and preventing recidivism [Decision 26/1999. (IX. 8.) AB, ABH 1999, 265, 277]. These objectives may therefore constitute a constitutionally recognised restriction of the right to personal freedom {Decision 3017/2016. (II. 2.) AB, Reasoning [31]}

[22] 1.2. According to Article I (3) of the Fundamental Law, provisions restricting personal freedom are in accordance with the Fundamental Law if the restriction is necessary and proportionate to the constitutionally recognised aim it seeks to achieve {Decision 3025/2014. (II. 17.) AB, Reasoning [50]} In assessing this, the Constitutional Court always keeps in mind

that the judicial deprivation of personal liberty of an individual charged with a well-founded suspicion of a crime and presumed innocent – prior to the final judgement – is the most severe coercive measure restricting personal freedom {Decision 3017/2016. (II. 2.) AB, Reasoning [32]}

[23] 1.2.1 One of the most important guarantee rules concerning coercive measures restricting personal freedom in criminal proceedings is that only the court has the right to decide on them throughout the entire duration of the criminal proceedings. Article IV (3) of the Fundamental Law expressly lays down this requirement for the procedural stage prior to indictment [which is given concrete form in section 278 (1) of the ACP], while the judicial power to order and maintain coercive measures after indictment naturally follows from the fact that, within the limits of the prosecution's competence, the court with jurisdiction and competence becomes the "master of the case" in the judicial stage of the proceedings, as provided for in section 297 (4) (by referring back to sections 290 and 291), section 552 (1), section 602 and section 622 (1) of the ACP {cp. Decision 3017/2016. (II. 2.) AB, Reasoning [30]}.

[24] 1.2.2 At least as important a guarantee is the constitutional system of requirements concerning the duration of (pre-trial) detention, because in the case-law of the Constitutional Court – assessing the constitutionality of deprivation of liberty – the extent of the duration of deprivation of liberty is also of decisive importance {see for example: Decision 166/2011. (XII. 20.) AB, ABH 2011, 545, 574 to 576; Decision 3025/2014. (II. 17.) AB, Reasoning [71] to [76]}.

[25] The Constitutional Court has also previously stated that the time limits and the consequences attached to them by the law-maker for the bodies entitled and obliged to exercise punitive authority, such as the investigating authority, public prosecution and the court, are of guaranteed importance for the enforcement of the constitutional requirements set out in its decisions. The time limits set for the performance of the procedural acts of the authorities may serve to enforce the constitutional values associated with the rule of law, fair trial and personal liberty, in particular the promotion of the continuity and speedy conclusion of criminal proceedings, the predictability of the actions of the competent authorities and the limitation of the time for procedural acts which restrict fundamental constitutional rights [Decision 62/2006 (XI. 23.) AB, ABH 2006, 697, 704 to 705]

[26] 1.3. The above-mentioned case-law of the Constitutional Court is also in line with the case-law of the European Court of Human Rights (hereinafter: ECtHR) concerning Article 5 (3) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: Convention), promulgated by the Act XXXI of 1993. Under that Article of the Convention, a person arrested has the right to be tried within a reasonable time or to be released pending trial. In its decisions interpreting the "reasonable period" of pre-trial detention, the ECtHR, in the course of assessing the length of deprivation of liberty, always takes account of the specific circumstances of the case, whether or not there is compliance with the Convention, taking into account the complexity of the case, the conduct of the accused and the way in which the proceedings are conducted by the authorities.

[27] However, the ECtHR has stated as a matter of principle that "reasonable period of

time" places an absolute limit on the possibility for the authorities to extend the time limit for preventive measures involving deprivation of liberty indefinitely [see Süveges v Hungary (50255/12), 5 January 2016, paragraph 98].

[28] 1.4. Article IV (3) of the Fundamental Law requires the release or trial of the detained person "as soon as possible" and requires the court with jurisdiction to decide on the personal freedom of a person to decide "without delay" whether or not to impose a coercive measure. However, unlike the provision of the Convention on "reasonable period of time" the above-mentioned provision of the Fundamental Law does not contain any provision on the length of time for which deprivation of liberty may last. This does not, of course, mean that the deprivation of liberty of persons – prior to their final conviction – may last indefinitely under the Fundamental Law. Indeed, the obligation under Article XXVIII (1) of the Fundamental Law requires that criminal proceedings must be conducted "within a reasonable period of time". Given that arrest is the most serious measure restricting personal liberty, the requirement of a "reasonable period of time" is obviously stricter in the case of a suspect subject to that coercive measure than in the case of a suspect at large; in other words, in the former case the requirement of a "reasonable period of time" requires even shorter constitutional time limits. As a consequence of the above, in the case of a person under pre-trial detention, a breach of the "reasonable period of time" requirement necessarily entails an unnecessary and disproportionate restriction of the right to personal liberty.

[29] 2 The basic rules of the institution of arrest can be found in Chapters XLV (the purpose and conditions of coercive measures involving personal liberty authorised by a court) and XLVII (arrest) of Part Eight (coercive measures) of the ACP. This is where the law-maker has laid down the general and special conditions of arrest and the procedural rules, including the provisions determining the duration of the coercive measure in question. The ACP lays down different rules for arrests ordered (maintained) before the indictment is filed and those ordered (maintained) after the indictment is filed, both as regards the system of fora authorised to decide on the coercive measure and its duration.

[30] 2.1 Arrest ordered prior to the filing of an indictment may, subject to certain limitations, continue until the decision of the court of first instance in the course of the preparation of the trial. However, for reasons of guarantee, the ACP also contains further restrictions within this time limit, thus first a coercive measure may last for a maximum of one month, provided that the criminal proceedings do not reach the trial preparation stage within this period, this time limit may be extended by up to three months on each occasion until one year after the order has been issued, and by up to two months on each occasion thereafter. At this stage of the proceedings, the question of arrest shall be decided by the investigating judge at first instance or, in the event of an appeal, by the second instance chamber of the regional court of second instance.

[31] 2.2 After the filing of the indictment, the court that has the right to decide on the

arrest is always the court before which the case is pending, i.e. the court that is also entitled to decide on the merits of the case (the question of guilt) (trial court). Accordingly, the arrest ordered (maintained) by the court of first instance lasts until the delivery of the decision of the court of first instance on the merits of the case, the arrest ordered (maintained) by the court of first instance after the delivery of the decision of the court of first instance lasts until the end of the proceedings at second instance, while – in the case of third instance proceedings – the arrest ordered (maintained) by the court of second instance after the delivery of its decision on the merits of the case or the arrest ordered (maintained) by the court of third instance lasts until the end of the proceedings at third instance. At this procedural stage, the ACP provides for a judicial review of the coercive measure every six months [see section 291 (1) of the ACP].

[32] 2.3 The Constitutional Court notes that the time limits described above – in view of the fact that they are either linked to circumstances occurring at an uncertain point in time (for example, the date of a decision taken in preparation for a hearing) or cover periods of time that are specifically defined but which can, in principle, be extended indefinitely – are not in themselves capable of providing effective constitutional guarantees of the right to personal liberty in every case. Although the law-maker also declares in section 79 (1) (a) and section 279 (1) of the ACP that "[a] criminal proceeding shall be conducted out of order [...] if the accused is subject to a coercive measure under a judicial authorisation affecting personal liberty [...]" and "[the] court, the public prosecution and the investigating authority shall endeavour to ensure that the period of the judicial coercive measure involving personal liberty is as short as possible", these rules cannot be considered as a real constitutional limitation either, in the absence of an effective accountability or sanction. It was precisely for this constitutional reason that the law-maker, in the wording of the old ACP promulgated on 23 March 1998, had already laid down rules which, in the various stages of criminal proceedings, set an absolute, specific upper limit on the duration of pre-trial detention, and those provisions are also contained in the ACP, with the exception of the rule affected by the contested amendment, in essentially identical terms.

[33] The Constitutional Court considers it necessary to highlight the following points in relation to these time limits.

[34] 2.3.1. The first such limitation is the so-called "two-year rule", which relates to the termination of an investigation. Under – the promulgated text of – section 176 (2) of the old ACP, if an investigation is continued against a specific person, the time limit for the investigation may be two years from the date of the interrogation of that person as a suspect, and therefore, after this time limit, the investigation had to be terminated pursuant to section 190(1) *(i)*. Section 136 (3) of the old ACP – also in relation to the above – provided that the pre-trial detention also ceased upon termination of the investigation.

[35] According to the ACP currently in force, the investigation may also last for two years from the date of the suspect's interrogation, however, this period may be extended by the public prosecutor once by a maximum of six months [see section 351 (3) and (4) of the ACP]. Pursuant to section 279 (2) (b) and (c) of the ACP, the arrest shall also cease if the time limit for the investigation has expired and no charges have been brought, and also if the investigation has been terminated. The relevant provision of the ACP thus allows the

maintenance of coercive measures for a somewhat longer period than the original wording of the old ACP, nevertheless the provision still retains its guarantee character, since it contains a concrete, quantifiable, absolute limit.

[36] 2.3.2. The second upper limit was regulated by the original section 132 (3) of the old ACP, by stipulating that pre-trial detention shall cease when its duration reaches three years, except in the case of pre-trial detention ordered or maintained after the delivery of a decision on the merits of the case, and where the case is subject to a trial at third instance or to a repeated procedure due to annulment. According to the detailed reasoning attached to section 132 of the draft old ACP, the law-maker considered it necessary to set a maximum period of three years for pre-trial detention because it is not possible to expose the suspect to uncertainty as to his fate for longer than that. In addition, the provision was also intended to encourage the investigating authorities, public prosecutors and courts to deal with cases more quickly.

[37] The provision was amended by the Act LXXXIII of 2009 amending the Act XIX of 1998 on Criminal Procedure to improve the timeliness of criminal proceedings, by applying, instead of the general time limit of three years,

- differentiated upper time limit for pre-trial detention in these cases – based on the potential punishment of the criminal offences. Accordingly, pre-trial detention ceased if its duration
- reached one year in the case of a criminal procedure pending for an offence punishable by up to three years' imprisonment.
- reached two years in the case of a criminal procedure pending for an offence punishable by up to five years' imprisonment.
- reached three years in the case of a criminal procedure pending for an offence punishable by imprisonment of more than five years but less than fifteen years.
- reached four years in the case of a criminal procedure pending for an offence punishable by imprisonment of at least fifteen years or life imprisonment.

[38] The legislative justification for the amendment (raising the three-year upper limit to four years in certain cases) was that in cases requiring complex evidence-taking – in which the length of the pre-trial detention of the accused during the investigation approached the absolute time limit for this stage of the procedure {so-called “two-year rule”, see point IV/2.3.1 of the reasoning of the decision (Reasoning [34] et seq.)} – the court of first instance had approximately only one year left to make a decision on the merits of the case. In the light of this, in order to strike a balance between the judicial phase and the preceding investigative and prosecutorial phase, the law-maker has set, in cases posing a high risk to society, the maximum period of pre-trial detention ordered before the promulgation of the decision on the merits of the case at four years from the date of ordering the arrest. The law-maker, having analysed the case-law of the ECtHR, considered that a maximum period of four years could be set which would not be contrary to the provisions of the Convention if there were no apparent evidence of delay on the part of the authorities proceeding with the criminal procedure (see points 2 and 3 of the detailed reasoning attached to section 18 of the draft Act LXXXIII of 2009 amending Act XIX of 1998 on Criminal Procedure to improve the timeliness of criminal proceedings).

[39] 2.3.3. Finally, the absolute limit of arrests ordered (or maintained) after the first instance decision on the merits of the case is formulated – in the same way as the rules of the old ACP – in section 297 (4) of the ACP, according to which the duration of arrest at this stage of the criminal proceedings may not exceed the duration of the imprisonment imposed in the non-final judgement.

[40] 2.3.4. The Constitutional Court notes, first of all, that the relevant time limit in the present case {presented in point IV/2.3.2. of the reasoning of the decision (Reasoning [36] et seq.} only applies to arrests that exist at the stage of the criminal proceedings up to the promulgation of the first instance decision on the merits of the case and does not affect the final time limit {as described in point IV/2.3.3 of the reasoning of the decision (Reasoning [44])} for arrests ordered (maintained) after the promulgation of the first instance decision on the merits of the case. This also means that the time limits for arrests ordered (maintained) after the first instance decision on the merits of the case may, in certain cases, exceed the absolute limit relevant in the present case. The reason for this is that the law-maker, when determining the absolute maximum time limit of arrest in criminal proceedings prior to delivering the first instance decision on the merits of the case, can only proceed from the abstract gravity of the potential punishment for the criminal offence which is the subject of the criminal proceedings, whereas thereafter it can only proceed from the specific and individualised legal disadvantage for the accused set out in the non-appealable decision. In addition, at the two procedural stages mentioned above, arrest serves to enforce different elements of the effective enforcement of punitive authority. While in the former case arrest serves the successful conduct of the criminal proceedings (typically to ensure personal presence at the proceedings and to avoid collusion) or to prevent recidivism, in the latter case it serves much more the subsequent enforceability of the sentence {cp. Decision 3017/2016. (II. 2.) AB, Reasoning [42]}.

[41] Here the Constitutional Court points out that the maximum periods of pre-trial detention described above explicitly include the time spent in pre-trial detention, which, however, does not typically coincide with the period from the opening of the investigation, but is shorter, since it starts from a later date. In other words, pre-trial detention typically takes place only after a certain period of time (often several months or years) has elapsed since the opening of criminal proceedings (the ordering of an investigation). This also means that when the (pre-trial) detention of a suspect reaches its maximum, the criminal proceedings are in progress for a period longer than this term. Therefore, from the start of the criminal proceedings, the time open for delivering the first instance (non-final!) decision on the merits of the case – for example by taking into account the upper limit of four years – is not only four years, but it can be much more, often five to six years.

[42] The Constitutional Court notes that the old ACP – before its contested amendment – contained a multi-stage, interdependent, complementary and tiered regulation on the duration of pre-trial detention, which also assessed the specificities of the different stages of criminal proceedings and took into account the complex system of constitutional guarantees arising from the right to personal liberty, the presumption of innocence and the requirement of a reasonable time limit, which is part of the right to a fair trial {Cp. in particular: Decision 19/1999. (VI. 25.) AB, ABH 1999, 150, Decision 158; 62/2006. (XI. 23.) AB, ABH 2006, 697, 704-705; Decision 166/2011. (XII. 20.) AB, ABH 2011, 545, 574-576; Decision

3025/2014. (II. 17.) AB, Reasoning [71] to [76]; Decision 3017/2016. (II. 2.) AB, Reasoning [32]; Decision 3074/2016. (IV. 18.) AB, Reasoning [58]; Decision 2/2017. (II. 10.) AB, Reasoning [59] to [63]}.

[43] 2.3.5. This regulation was changed by the Amendment Act by abolishing the four-year upper limit for offences punishable by imprisonment for at least fifteen years or life imprisonment, as part of the provisions explained above in point IV/2.3.2 of the decision's reasoning (Reasoning [36] et seq.). The law-maker justified its decision by stating that "[the] recent unfortunate events have shown" that four years are not always sufficient for having a first instance decision on the merits of the case delivered, and that the termination of pre-trial detention in cases where the conditions for pre-trial detention (in particular the risk of escape or absconding) are met, seriously complicates or jeopardises the completion of the criminal proceedings, and that it is therefore justified that the institution of pre-trial detention should not be subject to a time limit in such cases (see: the detailed reasoning attached to section 14 of the draft Amendment Act). The law-maker has maintained this regulatory concept also in the ACP, with the restriction that it has restricted its application to proceedings commenced for offences punishable by life imprisonment, while the upper limit for arrest in criminal proceedings for offences punishable by a definite term of imprisonment of more than ten years has been set at four years [see section 298 (1) *(d)* and (2) *(a)* of the ACP].

[44] 3 In the present case, the Constitutional Court has to take a stance on whether the legislative decision, which abolished the presented absolute upper limit of (pre-trial) detention in the old ACP and the new ACP with regard to a specific scope of criminal offences, is in conformity with the guarantee requirements of the right to personal liberty outlined in point IV/1 of the decision's reasoning (Reasoning [18] et seq.).

[45] 3.1 The Constitutional Court has already pointed out above {see point IV/2.3.2. of the decision's reasoning (Reasoning [36] et seq.)} that prior to the contested amendment, the constitutional justification for the regulation under examination, which set an absolute limit, was twofold. On the one hand, by laying down the period of time described, it defined the thresholds beyond which, at the procedural stage in question, it could in no circumstances be considered necessary or proportionate to restrict the fundamental right to personal liberty of the accused person, guaranteed by Article IV (1) of the Fundamental Law, by the most severe coercive measure affecting personal liberty. On the other hand, the law-maker has also created a legal consequence to encourage compliance with the relatively general obligation laid down in sections 79 (1)*(a)* and 279 (1) of the ACP as cited above, and thus ultimately facilitating compliance with the reasonable time-limit guaranteed by Article XXVIII (1) of the Fundamental Law.

[46] 3.2 When assessing the constitutionality of a restriction of a fundamental right, the Constitutional Court always examines whether the necessity and proportionality of the restriction of the fundamental right concerned can be established. In its constitutional review of the challenged provision, the Constitutional Court must therefore first of all determine whether there is a compelling reason which could justify the complete removal of the

constitutional guarantee previously granted by the law-maker in the context of the relevant stage of the procedure and the presented scope of offences (criterion of necessity).

[47] Thus, the Constitutional Court first of all examined in the case whether the reason for the amendment could justify the criterion of necessity. The requirement that the objective pursued would be achievable exclusively and unavoidably by restricting the fundamental right – in this case, by further restricting the fundamental right of personal liberty in the most severe manner, without time limitation – is a conceptual element of the necessity of restricting a fundamental right. The identifiable purpose of the legislative amendment is to prevent the successful conduct of criminal proceedings from being hindered by the accused, thereby making it possible to obtain a decision at first instance on the merits of the case within a reasonable period of time. The means of achieving the objective is the complete abolishment by the law-maker of the period of time set as an absolute upper limit in the previous regulation in the case of persons in (pre-trial) detention, i.e. the guarantee limitation mentioned, allowing their continued custody for an indefinite period of time.

[48] The Constitutional Court considers that, for the reasons set out below, there are no identifiable compelling reasons in relation to the amendment described which, in the context of the procedural stage and the category of persons in question, would make it necessary for the aforementioned purpose to provide for the possibility of pre-trial detention without an upper limit.

[49] 3.2.1. The above-mentioned purpose of the amendment (to exclude the possibility of obstruction of the proceedings by the accused) is clearly reflected in the prevention of the escape of the accused at this stage of the criminal proceedings, in ensuring his personal presence, with a view to the completion of the proceedings within a reasonable time. However, that objective cannot serve as a ground for depriving a person of his liberty for an indefinite period of time, even in the case of criminal proceedings for the most serious offences. In the scope of cases examined in the present case, the person subject to the deprivation of liberty is the accused who enjoys the presumption of innocence and who has therefore been deprived of his liberty solely by virtue of a preventive measure and not by a final judgement.

[50] The Constitutional Court has already pointed out {in point IV/3.1 of the decision's reasoning (Reasoning [45])} that the consequence of the coercive measure's absolute duration is that reaching the fixed date terminates the arrest, also serving as a "sanction" to facilitate the enforcement of the requirement of a reasonable time-limit, which is an element of the right to a fair trial. It encourages the authorities proceeding with the criminal procedure to take a decision in the first instance on the merits of the case by the date until which the accused, because of his arrest, has the least possible chance of obstructing the proceedings. Of course, compliance with this obligation, by speeding up the conclusion of the proceedings, also has the positive effect of shortening the period of the provisional restriction of personal liberty. If, on the other hand, the law-maker abolishes the "sanction" described above altogether, this would obviously also work against compliance with the reasonable time-limit. All these also follow from the relationship between the two fundamental rights as outlined above {see point IV/1.4 of the decision's reasoning (Reasoning [28])}.

[51] On the basis of the above, the Constitutional Court also notes that if the failure to

deliver the first instance decision on the merits of the case – a delay of the proceedings – occurs while the accused is under arrest, the reason for this is almost without exception a circumstance beyond the control of the accused. It also follows from this that in such cases exceeding a reasonable period of detention also implies allocating the risk of criminal prosecution on the accused, which is constitutionally impermissible according to the case-law practice of the Constitutional Court {see for example: Decision 14/2004. (V. 7.) AB, ABH 2004, 241, 254; Decision 3103/2013. (V. 17.) AB, Reasoning [27]; Decision 3231/2013. (XII. 21.) AB, Reasoning [27]; Decision 3074/2016. (IV. 18.) AB, Reasoning [58]; Decision 3180/2016. (X. 4.) AB, Reasoning [29]}.

[52] 3.2.2. The Constitutional Court considers that when examining the criterion of necessity, great importance is also attached to the fact that the bodies involved in the enforcement of punitive claims are not left without means even after the absolute time limits have expired, thus reaching the upper limit does not mean that coercive measures restricting personal freedom cannot continue to be applied against the person charged, but only excludes the possibility of the most severe coercive measure. The Constitutional Court notes that the institution of criminal supervision which may be applied after the maximum limit of arrest has been reached does not indeed imply the same degree of close supervision of the person charged as the most severe coercive measure, but – particularly in view of the fact that, where criminal supervision is ordered because the maximum limit of arrest has been reached, the simultaneous use of a technical instrument to monitor the movements of the person charged is mandatory [see section 283 (2) of the ACP; section 6 (1) of the Decree of the Minister of Justice No. 15/2018 (VI. 15.) IM on the implementation of criminal supervision and restraining (hereinafter: Decree)] – it is equally suitable for achieving the legislative objective.

[53] As a further guarantee – which also serves to advance the proceedings –, in the event that the suspect violates the rules of criminal supervision ordered upon termination of the arrest due to reaching its maximum duration (including the case where the suspect obstructs the operation of a technical device monitoring his movements), arrest may be ordered again and its maximum duration shall be counted from the date of the new ordering [see section 298 (3) of the ACP, section 9 (2) and (3) of the Decree].

[54] 3.2.3. Based on the constitutional context outlined above, the Constitutional Court summarises that the time spent in pre-trial detention in the examined stage of the criminal proceedings (in the absence of a decisive first-instance decision) is in conflict with the Fundamental Law after exceeding a certain absolute limit (reasonable duration of time), regardless of the circumstances. The determination of this absolute deadline is the duty of the law-maker, and the Constitutional Court is competent to review the constitutionality of the legislative decision. The Constitutional Court observes that, in its examination of the constitutionality of the legislative provision at issue in the present case, it was only able to examine the condition of necessity of the restriction of fundamental rights, given that it provided for a time-limit without a ceiling, and, as a result, to find that the condition of necessity was not satisfied, but did not rule on the question of the extent to which an absolute time-limit could be regarded as proportionate in the case in question. Therefore, the Constitutional Court found the challenged regulation to be contrary to the Fundamental

Law because, due to its indeterminacy, it also allows for deprivation of liberty to an extent that restricts, by violating the Fundamental law, the fundamental right of the accused to personal liberty, regardless of the circumstances. In the light of the foregoing, the Constitutional Court annulled the contested provision of the ACP

[55] 4 Given that the Constitutional Court found the said provision of the Constitution Act to be in conflict with the Fundamental Law on the grounds that it infringed Article IV (1) of the Fundamental Law, it did not examine the conformity of the legislative provisions with Article B (1) of the Fundamental Law.

[56] 5 According to section 45 (1) of the ACC, the annulled law or the provision thereof shall cease to have effect on the day after the publication of the Constitutional Court's decision on annulment in the Hungarian Official Gazette; a law, which has been promulgated, but has not yet entered into force shall not enter into force. However, section 45 (4) of the ACC provides for the possibility of derogating from the general rule as the Constitutional Court may set a different date for annulment if this is justified by the protection of the Fundamental Law, legal certainty or the particularly important interest of the initiator of the proceedings.

[57] The Constitutional Court ordered the annulment of section 298 (2) *(a)* of the ACP with effect from 30 September 2021. In determining the date of annulment, it took into account that in the present case, in relation to the procedural section and the criminal offence concerned, it only declared the possibility of pre-trial detention without a maximum duration to be in conflict with the Fundamental Law, and did not take a position on the question of what specific quantified duration is compatible with the Fundamental Law.

[58] In the context of the above, the Constitutional Court has also held that the annulment of the provision *ex nunc* could directly and immediately affect several ongoing criminal proceedings (the periods of arrest in those proceedings).

[59] Therefore, the Constitutional Court held that, bearing in mind the requirement of predictability, it would result in a lesser breach of legal certainty if the challenged provision of the ACP is maintained in force temporarily – but until a specific date – than if it is annulled with immediate effect. In so doing, the Constitutional Court provides the opportunity and sufficient time for the bodies involved in criminal proceedings to adapt their activities to the decision of the Constitutional Court in pending cases and for the law-maker to redefine the provision concerned on constitutional grounds, if it considers it necessary.

[60] 6 The Constitutional Court ordered the publication of the decision in the Hungarian Official Gazette on the basis of the first sentence of section 44 (1) of the ACC.

Budapest, 2 March 2021.

Dr. Tamás Sulyok,
President of the
Constitutional Court

Dr. Tamás Sulyok, President

Dr. Tamás Sulyok, President

of the Constitutional Court on behalf of Justice *dr. Ágnes Czine* unable to sign

of the Constitutional Court on behalf of Justice *dr. Egon Dienes-Oehm* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Tünde Handó* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Attila Horváth* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Ildikó Hörcherné dr. Marosi* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Imre Juhász* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Miklós Juhász* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Béla Pokol* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. László Salamon* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Balázs Schanda* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Marcel Szabó* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Péter Szalay* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Mária Szívós* unable to sign

Concurring reasoning by Justice *Dr. Ágnes Czine*

[61] I agree with the holdings of the decision and its reasoning. I would, however, have considered it necessary to add the following to the system of arguments in the reasoning.

[62] 1 As the reasoning of the decision itself indicates, the case-law of the Constitutional Court outlined therein is in line with the case-law of the ECtHR in relation to Article 5 (3) of the Convention. However, of the relevant cases, the decision mentions only one requirement laid down in a specific case [Süveges v Hungary (50255/12), 5 January 2016, para 98]. Accordingly, the "reasonable period of time" imposes an absolute limit on the possibility for

the authorities to extend the period of preventive measures involving deprivation of liberty indefinitely.

[63] In addition to highlighting this requirement, I would have considered it necessary to provide a detailed presentation of the ECtHR's guiding case-law. I believe that it can help to identify a constitutional system of criteria which, when applied in individual cases, will enable the duration of arrest to be determined in accordance with the requirements of both the Fundamental Law and international law.

[64] According to the ECtHR, the justification for the duration of detention cannot be assessed in abstract terms, but must always be assessed in the light of the facts and characteristics of the particular case. Prolonged detention can be justified only if there are tangible indications that the detention serves a genuine public interest need which, notwithstanding the presumption of innocence, outweighs the individual's right to personal liberty {Kudła v Poland [GC] (22277/93), 26 October 2000, para 110}. The ECtHR considers a detention to be lawful if, in addition to the general and special grounds for detention (arrest), it is satisfied that the national authorities have exercised "particular diligence" in the proceedings {Labita v Italy [GC] (26772/95), paragraphs 152 and 153}. The requirement of "particular diligence" implies that, where a coercive measure involving deprivation of liberty is applied, the criminal proceedings proceed at a satisfactory pace and that the authorities conducting the criminal proceedings are not subject to delays {Assenov and Others v Bulgaria [GC] (24760/94), 28 October 1998, para. 157; Vaccaro v Italy (41852/98), 16 February 2001, para. 43}. It is also a clear violation of the right to liberty if the trial of a suspect under arrest is not to begin until ten months after the indictment has been filed [Szepesi v Hungary (7983/06), 21 December 2010, para 28].

[65] The reasonable period of detention may also be influenced by the conduct of the accused, since the passage of time attributable to the conduct of the accused cannot be assessed against the prosecuting authorities. However, it cannot be considered as such if the accused makes full use of the legal remedies available to him and frequent production of documents is therefore necessary {Assenov and Others v Bulgaria [GC] (24760/94), 28 October 1998, para 157}. According to ECtHR's case-law, a longer period may be considered reasonable in cases of a complex nature, for example where there is a serious international context or a complex factual or legal assessment [Bogdanowicz v Poland (38872/03), 16 April 2007, para 51].

[66] The ECtHR's finding that, as time goes by, the original grounds of arrest become less relevant and domestic courts must find other "adequate" and "sufficient" reasons to justify deprivation of liberty {Labita v Italy [GC] (26772/95), para 153} is also an important standard. Accordingly, the risk of collusion is more relevant at the outset of the criminal proceedings. As it progresses, particularly if coercive measures have been taken against the accomplices, its importance may diminish [Imre v Hungary (53129/99), 2 December 2003, para 45]. The ECtHR has also emphasised that the material gravity of the offence cannot in itself be the basis for arrest on the ground of flight risk. In addition, the authorities must examine all the circumstances which may be connected with the risk of escape and must substantiate this ground for detention in their decision with sufficient specificity [Maglódi v Hungary (30103/02), 9 November 2004, paragraph 39; Bárkányi v Hungary (37214/05), 30 June 2009, paragraph 28].

[67] The manual on Article 5 of the Convention, prepared by the ECtHR, also contains the

following general principles (Guide on Article 5 of the European Convention on Human Rights, 31 August 2018, points 180 to 187 and 31 December 2020, points 197 to 204; Manual on Article 5 of the Convention, 2014, points 155 to 163):

- the question of whether or not the duration of an arrest is reasonable cannot be assessed in an abstract way, but must be assessed on a case-by-case basis, according to the specific characteristics of each case. There is no fixed time-limit applicable to each case {Buzadji v. the Republic of Moldova [GC] (23755/07), 5 July 2016, paras 89 to 91; McKay v. the United Kingdom [GC] (543/03), 3 October 2006, paras 41 to 45; Bykov v. Russia [GC] (4378/02), 10 March 2009., paras 61 to 64; Idalov v Russia [GC] (5826/03), 22 May 2012, paras 139 to 141; see also Labita v Italy [GC] (26772/95), 6 April 2000, paras 152 to 153; and Kudła v Poland [GC] (32310/96), 26 October 2000, paras 110 to 111}

- the arguments in support of or against release cannot be "general and abstract" [Boicenco v Moldova (41088/05), 11 July 2006, para 142; Khudoyorov v Russia (6847/02), 8 November 2005, para 173], but must contain references to the specific facts and personal circumstances justifying the applicant's arrest [Aleksanyan v. Russia (46468/06), 22 December 2008, para 179; Rubtsov and Balayan v. Russia (33707/14 and 3762/15), 10 April 2018, paras 30 to 32]

- the quasi-automatic prolongation of the arrest is contrary to the guarantees laid down in Article 5 (3) [Tase v Romania (29761/02), 10 June 2008, para 40]

- in these matters, the burden of proof cannot be reversed by shifting to the person arrested the burden of proving the existence of the grounds justifying his release {Bykov v Russia [GC] (4378/02), 10 March 2009, para 64}

- public scrutiny of the administration of justice is possible only if the courts give adequate reasons for their decisions [Tase v Romania (29761/02), 10 June 2008, para 41].

[68] Furthermore, there is no objective upper limit to arrest under the ECtHR's system of requirements, but its case-law is clear:

- deprivation of liberty for a period exceeding three years may be justified only in exceptionally complex cases and only if there is evidence of a real risk that the accused will engage in conduct prejudicial to the prosecution [W v Switzerland (14379/88), 26 January 1993, para 42];

- in the case of arrests exceeding four years, there is generally no justification for a significant lapse of time [Tomasi v France (12850/87), 27 August 1992, paras 85 to 99].

[69] In my opinion, the conformity of the regulation with the Fundamental Law could have been fully explored by examining all these aspects arising from the case-law of the ECtHR and the guarantee requirements contained in the ACP.

[70] 2 I would also have considered it reasonable that the decision should attach importance to the legislative arguments expressed in the Amendment Act in connection with the amendment in the context of the examination of the necessity of the restriction of fundamental rights.

[71] The decision also refers to the fact that, according to the reasoning attached to the relevant provision of the draft Amendment Act, "»[the] recent unfortunate events have highlighted« that four years is not always sufficient to obtain a decision at first instance on the merits of the case".

[72] I would also have considered it important to emphasise that the clear and direct reason for the creation of the contested provision was a specific criminal procedure. In that

case, the pre-trial detention of one of the accused persons for a period of approximately four years – in view of the fact that no decision on the merits of the case was taken in the first instance during that period – would have ended within a short period of time without the contested amendment to the ACP, and only a less severe coercive measure would have been available to further restrict the personal liberty of the accused person.

[73] In my view, the very fact that the direct reason for the creation of the contested legislation was clearly and expressly to prevent the termination of the pre-trial detention of the accused in a specific, ongoing criminal proceeding casts doubt on the necessity of the regulation in question.

[74] The mere fact that in the phase of a specific criminal proceeding up to the decision of the first instance on the merits of the case the arrest of the accused must be terminated – with the possibility of applying a less severe coercive measure – cannot be considered a reason, even in the case of the most serious crimes, which would justify the need for the law-maker to provide for the possibility of extending the length of arrest indefinitely in such cases.

Budapest, 2 March 2021.

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