

DECISION 19/2018 (III. 5.) AB

In the matter of an *ex post* review of conformity with the Fundamental Law of a legal act, with dissenting opinions by Justices *dr. Béla Pokol*, *dr. László Salamon* and *dr. Mária Szívós*, the Constitutional Court, sitting as the Full Court, adopted the following

d e c i s i o n:

1 The Constitutional Court holds that Section 72/D (13) and (14) of Act CXXV of 1995 on National Security Services are in conflict with the Fundamental Law; therefore, the Court annuls said provisions as of 31 March 2019.

2. The Constitutional Court further holds that Section 71 (4) and Section 72/B (8) of Act CXXV of 1995 on National Security Services are in conflict with the Fundamental Law; therefore, the Court annuls said provisions as of 31 March 2019.

3. The Constitutional Court terminates the procedure aimed at a finding that Section 72/B (2) of Act CXXV of 1995 on National Security Services is in conflict with the Fundamental Law and at its annulment.

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

R e a s o n i n g

I

[1] 1. The Chief Public Prosecutor (hereinafter referred to as the petitioner) initiated a procedure of *ex post* norm control on the basis of Article 24 (2) (e) of the Fundamental Law, Section 24 (1) to (2) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act") and Section 11 (2) (h) of Act CLXIII on Public Prosecution (hereinafter referred to as the "Public Prosecution Act"), and he sought the review and a finding of conflict with the Fundamental Law and annulment of Section 71 (4), Section 72/B (2) and (8) as well as Section 72/D (13) to (14) of Act

CXXV of 1995 on National Security Services (hereinafter referred to as the "National Security Services Act"). As stated by the petitioner, the provisions of the law on national security vetting and the closely related review procedure of national security vetting are in conflict with Article B) (1), Article C) (1), Article T) (1), Article 29 (1), (3) and (7), Article XII (1) as well as Article XXVIII (1) and (7) of the Fundamental Law.

[2] 2. First of all, the petitioner requested the Constitutional Court to review Section 71 (4) and Section 72/B (8) of the National Security Services Act. As the legal consequence, the petitioner sought the annulment of the above provisions due to their being contrary the Fundamental Law, as they are in conflict with Article B) (1), Article T) (1), Article XII (1) and they are incompatible with Article 29 (1), (3) and (7) of the Fundamental Law.

[3] The petitioner points out that pursuant to Section 74 (g) of the National Security Services Act, the prosecutor's service is classified as a relationship that serves as the basis for a national security vetting. In line with Section 71 (4) of the National Security Services Act, if the national security vetting established a national security risk, the legal relationship that serves as the basis for the national security vetting can only be established or maintained when its establishment or maintaining is approved by the entity, person or body specified in Subsection (2) or (3). Pursuant to Section 72/B (8) of the National Security Services Act, if the national security service establishes a national security risk during the national security vetting, the legal relationship that serves as the basis for the national security vetting shall not be established or it shall be terminated without delay, unless the person, entity or body specified in Section 71 (2) or (3) has approved the establishment or the maintaining of the legal relationship. In the present case, with regard to the two challenged provisions, the "approving" person is the one specified in Section 71 (2) (f) of the National Security Services Act, that is, the Chief Public Prosecutor. Thus a legal relationship that serves as the basis for the national security vetting may also be established or maintained prior to carrying out the national security vetting, provided that it has been approved by the Chief Public Prosecutor in the case of persons in prosecution service.

[4] 2.1 As stated by the petitioner, the regulation under Section 71 (4) and Section 72/B (8) of the National Security Services Act does not contain the set of criteria that could delimit the Chief Public Prosecutor's scope of action with respect to maintaining, despite the established security risk, the legal relationship that served as the basis for the national security vetting. Unpredictability and legal uncertainty are enhanced by the fact that the Chief Public Prosecutor, who is entitled to approve the maintaining of the legal relationship, shall only be informed of the existence of the national security risk without obtaining any information about the specific cause of the risk, therefore he

has to make a decision in the absence of the data that would be indispensable for making a well-founded decision. There is no justification for preventing the constitutionally empowered Chief Public Prosecutor from knowing the content of the national security risk. As an unlimited discretionary power without any basis and without control does not satisfy the requirement of clear and unambiguous normative content, Section 71 (4) and Section 72/B (8) of the National Security Services Act are contrary to Article B) (1) and Article T) (1) of the Fundamental Law.

[5] 2.2 The petitioner believes these provisions of the law to be also in conflict with Article XII (1) of the Fundamental Law. In the petitioner's view, in the case of establishing the national security risk, the Chief Public Prosecutor shall have two measures to choose from: either to terminate the prosecutor's service or to maintain it in unchanged form. The undifferentiated regulation that disregards the differing weights of national security risks disproportionately restricts, by violating Article I (3) of the Fundamental Law, the right to work in terms of the partial right to keep one's work. The petitioner believes that with a more lenient restriction, the security interest could also be enforced by amending the prosecutor's service in the form of allowing the person concerned to serve only in a position not requiring national security vetting.

[6] 2.3 In the context of Section 71 (4) and Section 72/B (8) of the National Security Services Act, the petitioner finally pointed out that these provisions are also incompatible with Article 29 (1), (3) and (7) of the Fundamental Law. The Fundamental Law defines the prosecution as an independent constitutional institution. Due to its legal status under the Fundamental Law, prosecution service is not subordinated to any of the branches of power in the system of the separation of powers. As put forth by the petitioner, the independence of the prosecution can be interpreted primarily in the context of the two other politically determined branches of power, and it is manifested in the fact that the prosecution shall perform its duties and competences laid down in detail in the Fundamental Law and in Acts of the Parliament by being subordinated exclusively to the laws. Moreover, the guarantees for the independence of prosecutors are an important aspect of the independence of the prosecution service. As an important element of this, pursuant to Article 29 (7) of the Fundamental Law, the detailed rules for the legal status of the prosecutors shall be laid down in a cardinal Act. However, Section 71 (4) and Section 72/B (8) of the National Security Services Act are not aligned with Act CLXIV of 2011 on the Legal Status of the Chief Public Prosecutor, Prosecutors and Other Employees of the Prosecution Service and the Prosecution Career (hereinafter referred to as the "Prosecution Service Act"). Due to the challenged rules of National Security Services Act, the maintenance or the termination of the prosecutors' service becomes subject to an individual decision without any criteria for

exercising discretion.

- [7] The existence of an independent structure of prosecution is the precondition for the independence of the prosecution service. As stated by the petitioner, one of the main guarantees for the independent professional operation of the prosecution service is the actual realisation of the Chief Public Prosecutor's independence, as pursuant to the Fundamental Law, the Chief Public Prosecutor as a single person shall be responsible for managing and heading the independent prosecution service built on the basis of strict hierarchy. Although the National Security Services Act seems to provide the person exercising the employer's right with a wide scale of discretion, in fact it narrows down his choices to only two options to choose from without possession of adequate information. It means an unnecessary and disproportionate restriction of the employer's powers. Concerning continuing the employment of the prosecutor affected with a national security risk, the margin of appreciation of the Chief Public Prosecutor as the person exercising the employer's rights is quite limited: both his access to the information necessary for decision-making and the potential alternatives of his decision are limited.
- [8] 3 The petitioner believes that not only the, above presented, consequences of the national security vetting is establishing the risk, but also the system of legal remedies offered during the national security vetting are contrary to the Fundamental Law. As explained in the petition, the provisions on court appeal as regulated in Section 72/D (13) to (14) of the National Security Services Act are contrary to Article C (1) and Article XXVIII (1) to (7) of the Fundamental Law.
- [9] In accordance with Section 72/D (13) of the National Security Services Act, Budapest-Capital Administrative and Labour Court shall review the lawfulness of the procedure upon which the security expert opinion establishing the national security risk has been based, but its powers shall not include verifying the professional correctness of establishing the national security risk. On the basis of Section 72/D (14) of National Security Services Act, the court may only annul the decision on establishing the national security risk in the case of a breach of the rules of procedure and it may only then bind the national security service in charge of the national security vetting to carry out a new procedure.
- [10] The petitioner points out that the subordination of the national security vetting to the law is an essential requirement originating from the rule of law, and the effective sorting out of any breach of the law during the national security vetting is an important element of guarantee for the above. As claimed in the petition, the system of legal remedies connected to national security vetting does not allow the questioning of the well-

founded nature of the national security risk established by the national security services and it is only limited to controlling compliance with the rules of procedure of the vetting, despite the fact that the existence of the national security risk is the sole legal basis of terminating the service that served as the basis for the national security vetting. The reality of the national security risk may not be challenged on the merits before the court. Thus, contrary to Article XXVIII (7) of the Fundamental Law, the legal remedy becomes formal, the merits and the legal questions of the application as well as the factual justification of the decision cannot be reviewed.

[11] As the court can only review the lawfulness of the procedure, the judicial control over the bodies belonging to the executive power is rendered meaningless, the appropriate system of balances resulting from Article C) (1) of the Fundamental Law is prejudiced, just as the requirement of a fair trial laid down in Article XXVIII (1) of the Fundamental Law.

[12] 4 Finally, the petitioner claimed that certain rules of the review procedure connected to national security vetting were contrary to the Fundamental Law. Section 72/B (2) of National Security Services Act contains the scopes of cases when a review procedure is to be carried out, and the petitioner believes them to be in conflict with Article B (1) and Article T) (1) as well as with Article I (3) of the Fundamental Law.

[13] The petitioner refers to Decision 9/2014 (III. 21.) AB of the Constitutional Court, pursuant to which, assessing security risks during the existence of a legal relationship subject to national security vetting is not, in itself, contrary to the Fundamental Law, provided that it guarantees appropriate balance between private life, the protection of family life and the enforcement of national security interest. As stated in the petition, in order to make the restriction of fundamental rights connected to national security vetting comply with the provisions of the Fundamental Law, the minimum requirement is to have the requirement of the clarity of norms enforced regarding the regulation. Section 72/B (2) fails to comply with this requirement as it also specifies, as the basis for ordering the review procedure, scopes of cases where the possibility of ordering the vetting is not clearly defined, it does not rely on grounds with objective criteria and it provides the ordering party with unlimited discretion due to the application of vague definitions. The vague and unclear regulation of ordering the national security vetting is incompatible with the requirement of the clarity of norms.

[14] 5 In addition to the conflicts with the Fundamental Law explained above, the petitioner also called the attention of the Constitutional Court to a collision between the laws. While pursuant to Section 70 (5) of the National Security Services Act, the national security vetting of the prosecutor under Section 14 (2) of Act CLV of 2009 on the

Protection of Classified Information (hereinafter referred to as the "Classified Information Act") shall not be initiated, this is indeed unavoidable, as Section 74 (io) lists the prosecutor entitled to access classified data among the persons subject to national security vetting. These statutory provisions neutralize each other, therefore it is impossible to establish beyond doubt the scope of persons subject to national security vetting.

II

[15] 1 The provisions of the Fundamental Law affected by the petition read as follows:

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

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

"Article T) (1) Generally binding rules of conduct shall be laid down in the Fundamental Law and in legal acts adopted by bodies vested with legislative power by the Fundamental Law, and published in the official journal. Different rules for the promulgation of municipal government decrees and laws adopted under special legal order may be provided for by a cardinal Act."

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

"Article XII (1) Everyone shall have the right to choose his or her work, and employment freely and to engage in entrepreneurial activities. Everyone shall be obliged to contribute to the enrichment of the community through his or her work, in accordance with his or her abilities and potential."

"Article 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."

[...]

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

"Article 29 (1) The Chief Public Prosecutor and the prosecution service shall be independent and shall contribute to the administration of justice by exclusively enforcing the State's demand for punishment as public accuser. The prosecution service shall prosecute criminal offences and take action against other unlawful acts and omissions, as well as contribute to the prevention of unlawful acts.

[...]

(3) The organisation of the prosecution service shall be led and directed by the Chief Public Prosecutor who shall appoint prosecutors. Except for the Chief Public Prosecutor, the service of prosecutors may exist until they reach the general retirement age.

[...]

(7) The detailed rules for the organisation and operation of the prosecution service and for the legal status of the Chief Public Prosecutor and the prosecutors, as well as their remuneration, shall be laid down in a cardinal Act." "Article 46 (3) The fundamental duty of the National Security Services shall be to protect the independence of and maintain law and order in, Hungary, as well as to enforce its national security interests."

[16] 2. The affected provisions in force of National Security Services Act at the time of submitting the petition read as follows:

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

(2) Thus a legal relationship that serves as the basis for the national security vetting may also be established prior to carrying out the national security vetting, provided that

[...]

(f) it has been approved by the Chief Public Prosecutor in the case of persons in prosecution service.

[...]

(4) If the national security vetting established a national security risk, the legal relationship that serves as the basis for the national security vetting can only be

established or maintained when its establishment or maintaining is approved by the entity, person or body specified in Subsections (2) and (3)."

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

(a) the content of the legal relationship, including the duties, rights and obligations connected to performing the job, the character of the circumstances of the work, of the person employed in the relationship that serves as the basis for the national security clearing changes significantly or there is an enhanced national security interest attached to carrying out the changed job free from influences, or if the person engaged in the job of changed content is more prone to attempts of influencing,

(b) the person who holds a valid and risk-free security expert opinion is appointed as a candidate to a legal relationship subject to national security vetting,

(c) on the basis of Section 71/D, the person employed in the legal relationship subject to national security vetting requests it,

(d) the person employed in the legal relationship subject to national security vetting fails to comply with his or her obligation of reporting changes related to the national security vetting, or if it is justified by the nature of the reported change,

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

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

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

(ec) obtaining foreign nationality, foreign passport,

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

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

(ef) violation of the rules applicable to processing classified data, using security

technology systems or of the security rules related to filling the job."

[...]

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

"Section 72/D (13) The court shall review the lawfulness of the procedure upon which the security expert opinion establishing the national security risk has been based; its powers shall not include verifying the professional correctness of establishing the national security risk.

(14) In the case of a breach of the rules of procedure, the court shall annul the decision establishing the national security risk and bind the national security service that carried out the vetting to carry out a new procedure."

[17] 3. The relevant provision of the National Security Services Act in force as from 29 June 2018 due to Decision 12/2017 (VI. 19.) AB of the Constitutional Court reads as follows:

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

(a) the content of the legal relationship, including the duties, rights and obligations connected to performing the job, the character of the circumstances of the work, of the person employed in the relationship that serves as the basis for the national security clearing changes significantly or there is an enhanced national security interest attached to carrying out the changed job free from influences, or if the person engaged in the job of changed content is more prone to attempts of influencing,

(b) the person who holds a valid and risk-free security expert opinion is appointed as a candidate to a legal relationship subject to national security vetting,

(c) on the basis of Section 71/D, the person employed in the legal relationship subject to national security vetting requests it,

(d) the person employed in the legal relationship subject to national security vetting fails to comply with his or her obligation of reporting changes related to the national security vetting, or if it is justified by the nature of the reported change,

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

follows:

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

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

(ec) obtaining foreign nationality, foreign passport,

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

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

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

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

"Section 14 (2) Unless provided otherwise in an Act of Parliament, during the criminal procedure, the prosecutor carrying out or participating in the procedure, the forensic expert appointed to or involved in the criminal procedure may use the national classified data provided to him or her without national security vetting, personal security clearance, confidentiality declaration or user licence."

III

[19] 1. First of all, the Constitutional Court established that the petition for *ex post* norm control received from an entitled person [Article 24 (2) (e) of the Fundamental Law] complies with the requirement of explicitness under Section 52 (1b) of the Constitutional Court Act; therefore, the Court considered the petition on its merits.

[20] 2. Prior to considering the merits of the petition, the Constitutional Court reiterates that the Chief Public Prosecutor submitted a petition for an *ex post* norm control in parallel with the president of the Curia. The president of the Curia also challenged the rules of the National Security Services Act connected to the national security vetting and the related review procedure. The Constitutional Court held the petition submitted by the

president of the Curia to be well-founded and with Decision 12/2017. (VI. 19.) AB (hereinafter referred to as the "2017 Court Decision") the Court annulled, effective as of 29 June 2018, certain parts of the text under Section 74 (g), Section 71 (2) (e) and Section 72/B (2) (e) of the National Security Services Act. Just as the petitioner, also the president of the Curia considered Section 71 (4) and Section 72/B (8) of the National Security Services Act to be contrary to the Fundamental Law. However, as the Constitutional Court terminated in the 2017 Court Decision its procedure related to the above sections, in the present case, these elements of the petition do not qualify as *res judicata*.

[21] At the same time, the 2017 Court Decision had assessed on the merits Section 72/B (2) of the National Security Services Act that was also challenged by the petitioner, and it established that the texts "or the director general of the national security service having the powers to carry out national security clearing" and "in particular" in Section 72/B (2) (e) of National Security Services Act were contrary to the Fundamental Law and annulled them effective as of 29 June 2018.

[22] The Constitutional Court may, exceptionally, terminate the procedure pending at the Court on the basis of Section 59 of the Constitutional Court Act where the case becomes causeless beyond doubt. Pursuant to Section 67 (2) (e) of the Rules of Procedure, the petition shall become causeless in particular if the circumstance that justified the continuing of the procedure does not exist anymore, or the petition has become causeless for another reason. The petitioner requested the review of Section 72/B (2) of the National Security Services Act. As the Constitutional Court established that the texts "or the director general of the national security service having the powers to carry out national security clearing" and "in particular" in Section 72/B (2) (e) of National Security Services Act were contrary to the Fundamental Law, the Constitutional Court holds that the review of Section 72/B (2) of National Security Services Act with regard to its conflict with the Fundamental Law has become causeless. With account to the above, the Constitutional Court terminated the relevant part of the procedure pursuant to Section 59 of the Constitutional Court Act and Section 67 (2) (e) of the Rules of Procedure.

IV

[23] The petition of the Chief Public Prosecutor is well-founded.

[24] 1. The Constitutional Court first examined the petitioner's concerns related to the legal

remedies of national security vetting. In the course of this review, it provided an overview of the legislative environment in force, the case law of the Constitutional Court connected to the legal remedies of national security vetting as well as its general case law related to legal remedies.

[25] 2. In reviewing the legislative environment, the Constitutional Court had to review not only the rules of legal remedies related to national security vetting, but also the main regulations applicable to the way leading to the legal remedy, that is, the national security vetting. This is why the Constitutional Court has also provided an overview of the issues related to ordering, implementing and remedying the national security vetting as follows.

[26] 2.1 The purpose of national security vetting performed by the national security services is to check if there is any national security risk regarding the person subject to the national security vetting, in the context of the security conditions necessary for the lawful operation of State life and that of the national economy, or on the basis of international commitments. [Section 68 (1)] The existence of such risk may be established if there is any circumstance due to which the person under vetting is unsuitable for carrying out lawfully and free from unauthorised influencing the legal relationship subject to the national security vetting, or if there is any circumstance connected personally to him or her that prejudices or threatens the interest in the protection of classified data. [Section 68 (2)].

[27] On the basis of Section 69 (1) of the National Security Services Act, the persons subject to national security vetting are specified in Section 74 (i) of the National Security Services Act in the Chapter on Interpreting provisions. In this context the Constitutional Court recalls that as Section 74 (g) of the National Security Services Act defines also the "prosecution service" as an "employment relationship", all prosecutors may fall under national security vetting on the basis of Section 74 (in), (io) and (is) of the National Security Services Act. The Constitutional Court interpreted these rules in the 2017 Court Decision as follows.

[28] In the case of a person in prosecution service, the Chief Public Prosecutor shall initiate the national security vetting in writing [Section 70 (1) and Section 71/A (4)]. A legal relationship that serves as the basis for the national security vetting shall be established only after carrying out a national security vetting, in case the national security vetting has not identified any national security risk [Section 71 (1)]. However, it may also be set up prior to carrying out the national security vetting, provided that the Chief Public Prosecutor approved it [Section 71 (2) (f)]. If the national security vetting established a national security risk, the legal relationship that serves as the basis for the national

security vetting can only be established or maintained when its establishment or maintaining is approved, in the present case, by the Chief Public Prosecutor [Section 71 (4)]. The Chief Public Prosecutor shall inform about these measures the national security service carrying out the national security vetting.

[29] 2.2 Pursuant to Section 71/A (1) of the National Security Services Act, the national security vetting may only be carried out upon the prior written consent, including the potential review procedure, of the person subject to the national security vetting. If the person fails to provide consent, the relationship that serves as the basis for the national security vetting shall not be established or maintained.

[30] The main element of the national security vetting is filling out the security questionnaire specified in Annex 2 to the National Security Services Act. "It also requires information about any adultery or homosexual relation, habits of consuming alcohol or drugs, participation in a rehabilitation treatment programme concerning alcohol or drugs, and the person has to indicate his or her knowledge of any risk factor due to which he or she could be babsencemailed. To verify the information provided on the data sheet, three persons, not family members, shall be indicated, who can provide an objective opinion about the cleared person. Some of the questions refer to circumstances the existence of which in itself can even substantiate a conduct that qualify as a criminal offence, e.g. trafficking in illegal drugs, contact with subversive organisations. Then the staff members of National Security Services prepare an environmental study, with open and with operative means (interception, surveillance), about the person. The vetting shall cover the complete connection network of the cleared person. One of the methods of the vetting is verifying the data indicated in the security questionnaire by way of crosschecking the supporting data in registries, data processing systems, data files, while the other method is gathering intelligence." {2017 Court Decision, Reasoning [58], see in detail: Government Decree 418/2016 (XII. 14.) Korm on the rules of procedure of filling out the security questionnaire during the national security vetting and the review procedure, and on the order of reporting changes concerning essential data in the context of the national security vetting}. Pursuant to Section 71/C (1) of the National Security Services Act, the national security service shall prepare a security expert opinion on the basis of the information and data acquired during the national security vetting, including, among others, the establishing of the absence of any national security risk or the establishing of a national security risk and the reasons for establishing it.

[31] The director general of the proceeding national security service shall then send the prepared national security expert opinion to the initiating person; however, the national

security service shall indicate in the security expert opinion the classified data of the person subject to the national security vetting shall not be informed about [Section 71/C (2) and (5)]. Within eight days, the initiating person (in the present case the Chief Public Prosecutor) shall inform the person subject to the national security vetting on finishing the national security vetting and on the content of the security expert opinion, with the exception of the circumstances that refer to committing a criminal offence and the data indicated by the services. The national security service carrying out the national security vetting shall be responsible for the statements made in the security expert opinion [Section 71/C (3)].

- [32] 2.3 On the basis of Section 72/D (1) of National Security Services Act, the person subject to the national security vetting may file a complaint to the minister via the director general of the national security service carrying out the national security vetting against the statements made in the security expert opinion that he or she holds to be false as well as against the risk factor established in the security expert opinion. Subsection (2) explicitly provides that the complaint filed shall have no suspensory effect concerning the termination, on the basis of Section 71 (4) or Section 72/B (8) of the National Security Services Act, of the legal relationship that serves as the basis for the national security vetting. It is worth noting that these two provisions of the law, that is, Section 71 (4) and Section 72/B (8) of the National Security Services Act are considered by the petitioner to be contrary to the Fundamental Law.
- [33] If the director general disagrees with the content of the complaint, then he or she shall forward it to the minister together with his or her statement of comments. If the person subject to the national security vetting does not agree with the content of the decision adopted on the basis of Section 72/D (7) of the National Security Services Act, he or she may file further complaint to the National Security Committee (hereinafter referred to as the "Committee"). During its procedure, the Committee may have access to the documents of the national security vetting, it may request information from the minister and from the director general of the national security service issuing the security expert opinion and it also may hear the complainant [Section 19/A (1)].
- [34] Pursuant to Section 72/D (10), "if the legal relationship of the person subject to the national security vetting has been terminated under Section 71 (4) or Section 72/B (8) on the basis of the security expert opinion establishing the national security risk, the person subject to the national security vetting may initiate, within 15 days from receiving the decision on the termination, at the Budapest-Capital Administrative and Labour Court the review of the Committee's decision dismissing the complaint pursuant to [...]". In such cases, the court shall act in a closed sitting and the judge proceeding in

the case shall be one who has already been subject to a national security vetting. Pursuant to the provisions deemed by the petitioner to be in conflict with the Fundamental Law: "the court shall review the lawfulness of the procedure upon which the security expert opinion establishing the national security risk has been based; its powers shall not include verifying the professional correctness of establishing the national security risk" [Section 72/D (13)]. "In the case of a breach of the rules of procedure, the court shall annul the decision establishing the national security risk and bind the national security service that carried out the vetting to carry out a new procedure." [Section 72/D (14)]

[35] 3 In its earlier decisions, the Constitutional Court has already dealt with the importance of the legal remedy following the national security vetting, and it underlines the following.

[36] 3.1 The legal remedy system created at the time of the entry into force of National Security Services Act in 1996 has been unchanged essentially until 2010. Pursuant to these rules, on the basis of the information and the data obtained during the vetting, the national security service prepared a security expert opinion that contained all the security risk factors found. The national security service was responsible for the statements made in the expert opinion as well as for the omission of providing the necessary information. The expert opinion prepared was countersigned by the minister and the national security service forwarded it to the initiating person. Pursuant to one of the most important guaranteeing rules, the initiating person was then free to consider the expert opinion received from the national security service when he or she formed a decision affecting the person subject to the vetting. The initiating person had to inform the person concerned on finishing the vetting and on the content of the security expert opinion, with the exception of the circumstances that refer to committing a criminal offence.

[37] In the context of these rules, Decision 629/B/2005 AB of the Constitutional Court (ABH 2006, 1768) did not establish the unconstitutionality of Section 72 (3) of National Security Services Act, pursuant to which the person concerned may file a complaint, on the basis of Section 11 (5), to the minister and subsequently to the Committee against the statements made in the security expert opinion that he or she holds to be false. In Decision 629/B/2005 AB, the Constitutional Court had to review the fundamental issue whether the absence of the judicial way against the allegedly false statements made in the national security expert opinion (with the option to apply to the minister and to the Committee instead of a court) was unconstitutional or not. The Constitutional Court pointed out in its decision that the national security expert opinion is a collection of

information for the person who initiated the vetting, containing the analysis of the risks. However, there are no rights and obligations resulting directly from the security expert opinion. It is important that on the basis of the expert opinion presenting the risk factor, the person exercising the employer's rights shall have a right of discretion in deciding whether or not the person subject to the vetting would pose a risk in the given job to the operation of the State. The Constitutional

Court established that the person exercising the employer's rights shall not be bound, in making his or her decision, by the statements made in the national security expert opinion, he or she may also involve other information available in the decision-making, and he or she may also assess the security risk differently. On the basis of the expert opinion presenting the risk factor, the person exercising the employer's rights, the head of the body that initiated the process, shall consider whether: not to employ the candidate, to discharge the person from the important and confidential job and to assign him in another position, or to keep on employing the person in the important and confidential job even in the knowledge of the risk factor. The decision also states that a dispute of labour law or a legal dispute of public service shall occur in the context of the employer's decision made on the basis of the expert opinion, if the employer's decision results in the termination of the employment relationship, and resolving the dispute may be requested from the court in accordance with the laws regulating the relevant employment relationship. Therefore, in Decision 629/B/2005 AB, the Constitutional Court did not find it unconstitutional to apply a legal solution, pursuant to which the person concerned could apply to the minister and to the Committee against the statements made in the security expert opinion and held to be false, instead of turning to the ordinary courts as a legal remedy before the courts was only possible after the adoption of a potential decision by the employer.

[38] 3.2 Act LXXII of 2013 on amending certain Acts for the purpose of establishing the new rules of national security vetting (hereinafter referred to as the "National Security Services Amendment Act") planned to comprehensively amend the system of the National Security Services Act, including the legal remedy of national security vetting. Acting on the basis of the petition submitted by the commissioner for fundamental rights, the Constitutional Court first suspended, with its Decision 19/2013 (VII. 19.) AB, the entry into force of several provisions of National Security Services Amendment Act, then, with its Decision 9/2014 (III. 21.) AB (hereinafter referred to as the "2014 Court Decision") it also annulled some provisions. The Constitutional Court annulled, among others, Section 72/C (4) of the National Security Services Act, planned to be newly introduced in connection with the legal remedy against the national security vetting, pursuant to which there was no further legal remedy available against the minister's

decision about the complaint submitted against the statements made in the national security vetting. Section 13 of National Security Services Amendment Act, also annulled, would have blocked the opportunity of the person subject to the vetting to turn to an external forum of legal remedy concerning the security expert opinion.

[39] In the course of reviewing the legal remedy connected to the national security vetting, the Constitutional Court pointed out in the 2014 Court Decision that "based on the principle of the separation of the branches of power, the National Assembly is not only entitled but also obliged to set up and operate the appropriate mechanisms of control. The external control exercised by the National Assembly over the activities of the secret services is a general power of parliamentary democracies that do not require, even in special cases, a specific justification. However, a balance should be created between the principle of parliamentary openness and the secrecy of the operation of the services: the scope of persons entitled to access classified information may be restricted. The constitutional question arises not in the form of why the services should be controlled at all, but in the form of why their activities could at all remain an area exempted from control" (Reasoning [64]). The Constitutional Court emphasised both in the 2014 Court Decision and in the 2017 Court Decision that national security vetting is a risk assessment process rather than a procedure of criminal prosecution (the 2014 Court Decision, Reasoning [65]; the 2017 Court Decision, Reasoning [57]). the 2014 Court Decision also declared that it is a requirement stemming from the rule of law enshrined in Article B) (1) of the Fundamental Law that the procedure of the national security services shall be subordinated to the law and the rule of law shall be enforced in the issues affecting national security as well. (Reasoning [66]). Pursuant to the 2014 Court Decision, the absence of an external control over national security vetting, the single-tier system of legal remedies was in conflict with the Fundamental Law.

[40] 3.3 The current regulation, challenged in the petition, related to the legal remedies of national security vetting is a combination of earlier forms of legal remedies presented above: Although the system of legal remedies has multiple stages, but the proceeding court may only examine the lawfulness of the procedure that served as the basis forfor issuing the expert opinion.

[41] 4 Acting on the basis of the petition for an *ex post* norm control, the Constitutional Court first considered whether Section 72/D (13) and (14) violate Article XXVIII (1) and (7) of the National Security Services Act. Therefore, the Court provided an overview of its case law relevant in the assessment of this case and related to the right to legal remedy and to fair trial.

[42] 4.1 Pursuant to Article XXVIII (7) of the Fundamental Law, the right to legal remedy shall

grant everyone the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests.

[43] In line with the decades-long practice of the Constitutional Court, the essential content of the right to legal remedy requires the legislator to allow to apply to another body or to a higher forum within the same organisation with regard to the decisive decisions of the authorities adopted on the merits {most recently in Decision 3146/2018 (V. 7.) AB, Reasoning [23]}. The Constitutional Court holds that the requirement of providing legal remedy applies essentially to decisions on the merits. With regard to assessing which decisions qualify as such, the decisive factors are the subject of the decision and its effect upon the person concerned, that is, whether the decision significantly influences the situation and the rights of the person concerned {most recently in Decision 18/2017 (VII. 18.) AB, Reasoning [10]}.

[44] The Constitutional Court pointed out in its Decision 2/2013 (I. 23.) AB adopted after the entry into force of the Fundamental Law that the enforcement of the right to legal remedy has two elements: On the one hand, access to the system of fora for legal remedy should not be blocked by provisions of the law, and on the other hand the extent, that is, the completeness or the restricted nature of the legal remedy {Decision 2/2013 (I. 23.) AB, Reasoning [35] to [37]} The reason for this is the fact that the requirement of the effectiveness of the legal protection offered by the right to legal remedy also follows from the Fundamental Law, that is, it should be capable of remedying the injury caused by the decision. As stated by the Constitutional Court, it means that the possibility of remedying is an essential and immanent element of all legal remedies, that is, the concept and the substance of a legal remedy contains the possibility to remedy the rights prejudiced" {Decision 9/2017. (IV. 18.) AB, Reasoning [20]}.

[45] In the context of the present case, it is also important that the panel of the Constitutional Court did not state any conflict with the Fundamental Law in its recent Decision 3148/2018 (V. 7.) AB with regard to Article XXVIII (7) of the Fundamental Law. It held in the context of the legal remedy that "a non-supporting opinion shall bind the authorities acting in the scope of public administration (in a case to the contrary it would not qualify as a competence of the local government), but it may be contested successfully before the court. The judge is empowered to review the mayor's opinion on the merits of it, as the judicial review shall cover not only the decision adopted in the merits of the case, but also the opinion on the townscape as the basis for the decision" (Reasoning [31]).

[46] 4.2 Most recently, the Constitutional Court reinforced its earlier judicial practice

connected to fair trial in the Decision 3027/2018 (II. 6.) AB. Pursuant to it, "the requirement of a fair trial includes the enforcement of procedural guarantees, as a quality that should be assessed in the light of the full procedure as well as its circumstances. Therefore, a procedure may be inequitable, unjust or unfair even despite the absence of certain details or of adopting all the detailed rules. In line with the case law of the Constitutional Court, the right to a fair trial shall also include all the conditions of the right to a court not explicitly mentioned in the text of the constitution. Thus, as interpreted by the Constitutional Court, the requirement of effective judicial legal protection shall form part of the right to a fair trial: there is a constitutional requirement regarding the legal regulation, pursuant to which the court should be able to decide on the merits of the rights put before the court" (Reasoning [13]).

[47] Furthermore, in the assessment of the present case the Constitutional Court emphasised its case law pursuant to which: "the formal granting of access to the judicial way does not, in itself, fulfil the realisation of procedural guarantees, as the guarantees laid down in the constitutional regulation indeed serve the purpose of allowing the court to adopt a final decision on the merits by obeying these guarantees. The requirement of effective judicial legal protection thus shall form part of the right to a fair trial" {Decision 3027/2018. (II. 6.) AB, Reasoning [13]}.

[48] 5 To sum up, pursuant to the regulation previously in force, and held as constitutional {see point IV.3.1. (Reasoning [38] and [39])}, the person who initiated the national security vetting was free to weigh the expert opinion received from the national security service when he or she formulated his or her decision affecting the person subject to vetting. Thus the initiating person could decide not only about establishing, maintaining or immediately terminating the legal relationship, but also on transferring the person concerned into another position. Consequently, no rights and obligations resulted directly from the security expert opinion and the person concerned had the opportunity to use the ordinary judicial channel after any decision has been made by the employer.

[49] However, pursuant to the regulations presently in force, the person subject to the vetting may only challenge the merits of the security expert opinion (its factual correctness, authenticity, etc.) at the minister by way of the director general and then at the Committee. It is of constitutional significance, that among the persons subject to the national security vetting there are also representatives of State bodies independent from the Government, as pointed out by the Constitutional Court in the 2014 Court Decision (Reasoning [69]), and this had been considered as a major problem in the regulation affecting the judges reviewed in the 2017 Court Decision, as well as in the

present case, where the provisions under review also affect the status of prosecutors.

- [50] The initiating person (in this case the Chief Public Prosecutor) may not act in free discretion any more, pursuant to the wording of the Act: such person may either establish, maintain or immediately terminate the legal relationship. It follows from the fact that the Chief Public Prosecutor appoints prosecutors, as laid down in the first sentence of Article 29 (3) of the Fundamental Law, that the Chief Public Prosecutor, who directs and leads the prosecution service, shall also be in charge of making a decision about the prosecution service after the national security vetting. The person concerned shall not have the possibility to act against the employer's measures pursuant to the general rules, as this is not allowed by Section 72/D (10) of the National Security Services Act. Section 72/D (13) and (14) of the National Security Services Act explicitly prevent the court from reviewing the case beyond the lawfulness of the procedure and any breach of the rules of procedure. Consequently, the expert opinion exercises a significant and essential effect on the person subject to the vetting and it essentially influences his or her situation: in the present case, the constitutional status of prosecutors. However, a solution of legal remedy can only be considered as constitutional if its extent is aligned with the above and it is capable to remedy the injury caused by the national security expert opinion and by the decision, by way of providing real and effective external control, judicial legal protection.
- [51] By taking the above arguments into account, the Constitutional Court establishes that Section 72/D (13) and (14) are contrary to the Fundamental Law due to being in conflict with Article XXVIII (7) of the Fundamental Law; therefore, the Constitutional Court annulled these provisions.
- [52] As the Constitutional Court declared, on the basis of a constitutional review based on Article XXVIII (7) of the Fundamental Law, that the regulation was contrary to the Fundamental Law, the Constitutional Court did not carry out the review of the well-founded nature of the petitioner's arguments related to Article C) (1) of the Fundamental Law.
- [53] 6 Pursuant to the general rule laid down in Section 45 (1) of Constitutional Court Act, the annulled legal regulation shall cease to have effect on the day of the publication of the Constitutional Court's decision on annulment in the Hungarian Official Gazette and shall not be applicable from that day. The Constitutional Court may, however, pursuant to the Constitutional Court Act and the established judicial practice, deviate from this rule, if the protection of the Fundamental Law, the legal certainty or a particularly important interest of the petitioner justifies it.

[54] It is a precondition of *pro futuro* annulment that the calculable operation of the legal order should be secured until entering the new law into force, and that provisionally maintaining the force of a law in conflict with the Fundamental Law should pose less risk to the integrity of the legal order than immediate annulment. As the constitutional re-regulation of the provisions annulled in this decision imposes a legislative duty on the National Assembly, and as without the reviewed provisions of the National Security Services Act there would be no judicial protection of rights available for the persons concerned, the Constitutional Court holds that an immediate annulment would result in legal uncertainty. Maintaining in force the provisions of the law ordered to be annulled poses less risk to the integrity of the legal order and the to the application of the law, therefore the Constitutional Court annulled Section 72/D (13) and (14) of the National Security Services Act, in accordance with Section 45 (4) of the Constitutional Court Act, with future effect as of 31 March 2019. A similar legal consequence was applied by the Constitutional Court in adopting the 2017 Court Decision as well.

V

[55] 1 Finally, the Constitutional Court had to examine the constitutionality of Section 71 (4) and Section 72/B (8) of the National Security Services Act.

[56] Pursuant to Section 71 (4) of the National Security Services Act: "if the national security vetting established a national security risk, the legal relationship that serves as the basis for the national security vetting can only be established or maintained when its establishment or maintaining is approved by the entity, person or body specified in Subsections (2) and (3)." Similarly, pursuant to Section 72/B (8) of the National Security Services Act, "if the national security service establishes a national security risk during the national security vetting, the legal relationship that serves as the basis for the national security vetting shall not be established or it shall be terminated without delay, unless the person, entity or body specified in Section 71 (2) or (3) has approved the establishment or the maintaining of the legal relationship." Section 71 (2) and (3) of the National Security Services Act specifies the particular entity, person or body referred to by both of the quoted provisions. The relevant one in the present case is Section 71 (2) (f), pursuant to which: A legal relationship that serves as the basis for the national security vetting may also be established prior to carrying out the national security vetting, provided that it has been approved by the Chief Public Prosecutor in the case of persons in prosecution service.

[57] The petitioner holds that these rules are in conflict with several provisions of the Fundamental Law due to their applicability to the prosecution service, the prosecutors and the Chief Public Prosecutor. As applicable to prosecutors, these rules mean that if a national security risk is established by the national security vetting or by the review procedure, the legal relationship that serves as the basis for the national security vetting, that is, the prosecution service, may only be established or maintained if it is approved by the Chief Public Prosecutor. In the absence of this approval, it shall not be established or it should be terminated without delay. The Constitutional Court had to examine the constitutionality of this regulation.

[58] 2 On the one hand, the Constitutional Court reminds that with regard to Section 71 (4) and Section 72/B (8) of the National Security Services Act, it has made some statements in the 2017 Court Decision that are explicitly relevant for the present case (see: Reasoning [85]), as follows.

[59] Pursuant to Section 71 (4) and Section 72/B (8) of the National Security Services Act,, with account also to Section 71 (2) (f), the Chief Public Prosecutor may decide, disregarding the national security risk, on maintaining the legal relationship of the affected prosecutor. This provision, however, only provides a discretionary right to the Chief Public Prosecutor exercising the employer's rights to maintain the service of the prosecutor concerned despite the existence of the national security risk. As in the case of the 2017 Court Decision, the Constitutional Court still holds that this discretionary right seems to be a rather formal one: taking into account the constitutional position of the Chief Public Prosecutor and his oath taken before the National Assembly, he would have to undertake the risk of continued employment along with a national security risk based on an expert opinion, that is, to take the risk of the occurrence of the risky event. However, the Act does not provide for any possibility to maintain the service by posting or make the affected prosecutor posted to another position. Thus, pursuant to the above interpretation, in fact, the issuer of the expert opinion prepared on the basis of the national security vetting, rather than the Chief Public Prosecutor, may become an actor of determining role concerning the appointment of prosecutors and regarding the maintenance of their service.

[60] On the other hand, similarly to the arguments explained in the the 2014 Court Decision (Reasoning [23]-[32]) and in the 2017 Court Decision (Reasoning [57]), the Constitutional Court's point of departure is that the purpose of the vetting is to reveal circumstances that classify as national security risks concerning the affected prosecutor, before or during his or her appointment, and to allow the appointing person to decide about the appointment (or the continuation of employment) in the possession of this

knowledge. Regarding this case, one should emphasise that the vetting concerned does not serve the purpose of law enforcement; it is a risk assessment procedure and the reason of it is not a suspicion, attempt of or the preparation to a criminal offence (if the law orders to punish the latter).

[61] Based on the two arguments above, the Constitutional Court had to strike a balance between the national security interest and the constitutional rules applicable to the prosecution service. The Constitutional Court reviewed the relation between national security interest and other constitutional rights in the Decision 3142/2014 (V. 9.) AB (Reasoning [22]), the Decision 26/2013 (X. 4.) AB (Reasoning [143]) and in the 2017 Court Decision (Reasoning [44]) as well.

[62] 3 Pursuant to Article 46 (3) of the Fundamental Law, the fundamental duty of the National Security Services shall be to protect the independence of and maintain law and order in Hungary, as well as to enforce its national security interests. Article 46 (4) provides that the operation of the national security services shall operate under the direction of the Government. The importance of this field of law is marked by the fact that the Fundamental Law fundamentally requires the regulation of national security services to be laid down in cardinal Acts.

[63] Pursuant to the preamble of the Act, the National Assembly adopted the National Security Services Act in order to ensure the sovereignty and constitutional order of Hungary and the constitutional operation of the national security services. As laid down in Section 74 (a), declared by the Decision 2/2014 (I. 21.) AB not to be an undefined legal concept, of the National Security Services Act:

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

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

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

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

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

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

[64] The case law of the Constitutional Court is consistent by stating that the protection of national security interests is not only a constitutional objective, it is also the duty of the State. The sovereignty of the country and its constitutional order laid down in the Fundamental Law are fundamental values necessary for the operation of a democratic State under the rule of law. The enforcement of the country's sovereignty, the safeguarding of its political, economic and defence interests, detecting and warding off the activities that violate or threaten the sovereignty or the constitutional order are obligations of the State that are directly deductible from the Fundamental Law (Similarly: Decision 26/2013 (X. 4.) AB, Reasoning [144]; 2017 Court Decision, Reasoning [42]).

[65] One of the aims of the national security vetting is to detect the potential existence of risk factors in the case of activities of primary importance for the security of the society and for law and order, and in relation to the persons who are candidates for or hold important and confidential positions and engaged in such activities, provided that the activity of these persons may become subject to unlawful influencing or attacks by the utilisation of such risk factors. Accordingly, the purpose of the vetting is to detect any external influence over the activity of the person concerned related to the legal relationship falling within the national security vetting, or whether the person concerned may or have become influenced on the basis of his or her circumstances (2017 Court Decision, Reasoning [61])

[66] The Constitutional Court also acknowledged in the 2017 Court Decision that the legislator may prescribe compliance with the requirements of national security as a precondition of performing certain activities of the State, filling certain jobs, thus protecting the democratic State governed by the rule of law, the society and its values (See Reasoning [43]).

[67] 4 The Constitutional Court underlines the following in the context of the constitutional role of the prosecution service. The State shall exercise the activity of public authority aimed at the enforcement of the State's punitive power through the organisational system of criminal justice. In this organisational system, in accordance with Article 25 of the Fundamental Law, courts shall administer justice, while, pursuant to Article 29 of the Fundamental Law, the prosecution service shall act in the role of the public accuser. As stated clearly in Article 29 (1) of the Fundamental Law, "the Chief Public Prosecutor and the prosecution service shall be independent". It is also declared in the

Fundamental Law that the prosecution service shall contribute to the administration of justice by exclusively enforcing the State's demand for punishment as public accuser. Pursuant to the second sentence of Article 29 (1) of the Fundamental Law, it is a constitutional duty of the prosecution service to prosecute criminal offences and take action against other unlawful acts and omissions, as well as contribute to the prevention of unlawful acts.

[68] The power that adopted the constitutional regulations clearly manifested that it is the fundamental duty and the right of the prosecution service to enforce the State's demand for punishment objectively, impartially and in a manner guaranteeing the protection of fundamental rights. It is the duty of the State to guarantee the power of public authority of the prosecution service laid down in the Fundamental Law as well as the conditions of exercising this power. This is how it fulfils its obligation of enforcing without delay the State's demand for punishment stemming from Article B) (1) of the Fundamental Law {Decision 7/2018 (VII. 5.) AB, Reasoning [32], [59]}.

[69] 4.1 Pursuant to Article 1 (2) (e), Article 9 (3) (j) and Article 29 (4) of the Fundamental Law, the National Assembly shall elect the Chief Public Prosecutor for a term of 9 years upon the proposal of the President of the Republic. On the basis of the authorisation provided in the Fundamental Law, the Chief Public Prosecutor shall lead and direct the organisation of the prosecution service and appoint the prosecutors. The Constitutional Court interpreted the constitutional status and the position under public law of the Chief Public Prosecutor and of the prosecution service in the Decision 3/2004 (II. 17.) AB. Pursuant to the decision, the prosecution service, in contrast with the courts, is not an independent branch of power, but it is an independent constitutional organisation (ABH 2004, 48, 58).

[70] As stated in Decision 42/2005 (XI. 14.) AB, it follows clearly from the constitutional requirements and guarantees pertaining to the separation of the branches of power and to the punitive power that the State organisations exercising public authority may only participate in the process of enforcing criminal liability on the basis of an explicit authorisation and task-setting in the Constitution or in Acts on organisation and procedure/execution based on the Constitution (ABH 2005, 504, 517-518). The Constitutional Court stressed in its Decision 14/2002 (III. 20.) AB that "it is a requirement resulting from the essence of the adversarial and prosecution-based procedure that the competence, scope of action and manoeuvre of both the court, having the monopoly of administering justice, under the Constitution, and the public prosecutor's office, possessing exclusively the power of public prosecution, must be transparent and predictable. [...] It follows from the foregoing provisions of the

Constitution that the monopoly of public prosecution vested in the public prosecutor should be just as intact as the independence and impartiality of the judge in respect of passing judgement." (ABH 2002, 101, 113) The constitutional position of the prosecution service has not changed with the entry into force of the Fundamental Law: it is not an independent branch of power, but it is a constitutional body pursuant to Article 29 of the Fundamental Law, contributing to the administration of justice. It is also important that the Fundamental Law also mentions the independence of the Chief Public Prosecutor and of the prosecution service in addition to the independence of the courts [Article XXVIII (1)] and of the judges [Article 26 (1)] as well as of the authority set up on the basis of Article VI (4) (National Authority for Data Protection and Freedom of Information).

- [71] 5 As it has been pointed out above by the Constitutional Court (Reasoning [58]-[61]), by agreeing with the petitioner Chief Public Prosecutor, Section 71 (4) and Section 72/B (8) of the National Security Services Act only seems to provide an option for discretion for the Chief Public Prosecutor. The National Security Services Act does not provide any possibility for the Chief Public Prosecutor to maintain the service of the affected prosecutor by posting him or her to another job within the prosecution service or make the prosecutor concerned posted to another position. The Chief Public Prosecutor should decide on the basis of the fact of establishing a national security risk as stated in the expert opinion prepared, but, pursuant to the petitioner, he shall not have access to the details of the risk.
- [72] On the one hand, the legislator may require compliance with the conditions of national security for the performance of various activities of the State. Thus it is beyond doubt that a national security vetting, in the present case the national security vetting of the prosecutors, may be necessary. On the other hand, however, the extent and the depth of the national security vetting should not be unlimited, therefore the necessity as well as the proportionality of the interference should also be taken into account. As pointed out by the Constitutional Court in the 2017 Court Decision, the system of rules of National Security Services Act on national security vetting is a set of uniform rules: it provides for the application of the same provisions to professions being very different from a constitutional point of view. However, as the Fundamental Law regulates the different professions in a different way and to various extent, the protection under the Fundamental Law is also different.
- [73] At the same time, pursuant to Article 29 (1) of the Fundamental Law, the Chief Public Prosecutor and the prosecution service are independent, and on the basis of Article 29 (3) of the Fundamental Law, the prosecution service shall be led and directed by the

Chief Public Prosecutor. The Constitutional Court holds that the rules under review disproportionately restrict the constitutional scope of action of the Chief Public Prosecutor and of the prosecution service that has been granted in Article 29 (1) and (3) of the Fundamental Law. As held by the Constitutional Court, Section 71 (4) and Section 72/B (8) of the National Security Services Act are in conflict with the relevant provisions of the Fundamental Law, therefore it decided on the annulment of the provisions of the law that are contrary to the Fundamental Law.

[74] As the Constitutional Court established above, on the basis of Article 29 (1) and (3) of the Fundamental Law, that the challenged provisions are in conflict with the Fundamental Law, it dispensed, in accordance with its established case law, with considering the elements of the petition related to Article B) (1), Article T) (1), Article XII (1) and Article 29 (7) of the Fundamental Law.

[75] 6. In the course of establishing the legal consequences of the conflict with the Fundamental Law, the Constitutional Court had to take into account the fact that Section 71 (4) and Section 72/B (8) of the National Security Services Act are, similarly to most of the rules of procedure of the national security vetting and of the review procedure as regulated in the National Security Services Act, a set of uniform rules that order the application of the same provisions to very different professions. The *ex nunc* annulment of the set of uniform rules would jeopardise and make the establishment of legal relationships and the related functioning of the national security services impossible.

[76] Taking into account what has been explained under point IV.6 (Reasoning [53] and [54]) and as the constitutional re-regulation of the provisions annulled in this decision imposes a legislative duty on the National Assembly, as well as that Section 71 (4) and Section 72/B (8) of the National Security Services Act attempt to regulate several different situations of life, in the opinion of the Constitutional Court, the immediate annulment of the rules reviewed in point V (Reasoning [55] and the following), similarly to the rules reviewed in point IV (Reasoning [23] and following), would cause legal uncertainty. Maintaining in force the provisions ordered to be annulled poses less risk to the integrity of the legal order and the to the application of the law, therefore the Constitutional Court annulled Section 71 (4) and Section 72/B (8) of the National Security Services Act, in accordance with Section 45 (4) of the Constitutional Court Act, with future effect as of 31 March 2019.

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

Budapest, 6 November 2018

Dr. Tamás Sulyok sgd.,

Chief Justice of the Constitutional Court

Dr. István Balsai sgd.,

Justice of the Constitutional Court

Dr. Egon Dienes-Oehm sgd.,

Justice of the Constitutional Court

Dr. Ildikó Hörcher-Marosi sgd.,

Justice of the Constitutional Court

Dr. Béla Pokol sgd.,

Justice of the Constitutional Court

Dr. Balázs Schanda sgd.,

Justice of the Constitutional Court

Dr. Marcel Szabó sgd.,

Justice of the Constitutional Court

Dr. Mária Szívós sgd.,

Justice of the Constitutional Court

Dr. Ágnes Czine sgd.,

Justice of the Constitutional Court

Dr. Tamás Sulyok sgd.,

Chief Justice of the Constitutional
Court,

on behalf of

Dr. Attila Horváth

Justice of the Constitutional Court,
prevented from signing

Dr. Imre Juhász sgd.,

Justice of the Constitutional Court

Dr. László Salamon sgd.,

Justice of the Constitutional Court

Dr. István Stumpf sgd.,

Justice of the Constitutional Court

Dr. Péter Szalay sgd.,

Justice of the Constitutional Court,
Justice-Rapporteur

Dissenting opinion by Justice *Dr. Béla Pokol*

[78] I could accept the proposed annulment under point 1 of the operative part of the Decision, because of limiting the legal remedy option to a formal level, but instead of the annulment of Section 71 (4) and the related Section 72/B (8) under point 2, I rather supported the declaration of a constitutional requirement, as I held that the constitutional problem existing here could have also been remedied this way. I proposed a constitutional requirement of the following text: "The Constitutional Court declares as a constitutional requirement regarding Section 71 (4) of Act CXXV of 1995 on the National Security Services that all the information supporting the decision establishing the existence of a national security risk shall be provided to the entity, person or body specified in Subsections (2) or (3) as authorised to make a decision on the further existence of the legal relationship, in order to allow the decision to be well-founded." In my opinion, this solution could have also prevented the problem that the two annulled statutory provisions are applicable, in addition to prosecutors, to the members of many different professions as well.

[79] The core of the problem indicated by the petitioner Chief Public Prosecutor regarding his right to decide about maintaining the employment relationship despite an expert opinion indicating a risk is that "the person who is entitled to approve the maintaining of the legal relationship, shall only be informed of the existence of the national security risk without obtaining any information about the specific cause of the risk. Therefore, he has to make a decision in the absence of the data that would be indispensable for making a well-founded decision." (Petition, page 2). I hold that the constitutional problem can be found in this respect, and I did not see any constitutional concern in what has been underlined by the decision (*see Reasoning [71] to [74]*), namely that the Act does not allow to decide about posting the person in another or a lower job in the case of maintaining the employment. Therefore, I did not agree with the annulment under point 2 of the operative part of the Decision.

Budapest, 6 November 2018

Dr. Béa Pokol

Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. László Salamon*

[80] Although the petition raises real constitutional questions, I hold that a part of them may be answered differently as compared to the majority decision.

[81] 1. I agree with declaring Section 72/D (13) of the National Security Services Act being

in conflict with the Fundamental Law and with its annulment, although not on the basis of Article XXVIII [Article XXVIII (7) of the Fundamental Law does not grant a right to legal remedy against a decision adopted by the parliamentary committee], but because in a question of such nature, in a State governed by the rule of law, the final word should be uttered by the court, with the possibility of a review on the merits of the content,, rather than by (an body) of the legislative power. [I hold that the violated provision of the Fundamental Law is Article B) (1).]

[82] 2. I do not agree with the annulment of Section 72/D (14), as this rule has a function irrespective of the foregoing: It is not contrary to the Fundamental Law to vest a cassation power upon the court for the case of a breach of the rules of procedure. [The power of full-scale review of the merits of the content to be vested upon the court shall also include, as the greater includes the lesser, the possibility of review due to a breach of the rules of procedure. It is not contrary to the Fundamental Law to have a specific rule on this situation in Section 72/D (14) of the Fundamental Law. At the same time, assessing the constitutionality of the relevant provision of the law in this way does not restrain the legislator from applying a different regulation within the constitutional limits.]

[83] 3 I assess the constitutionality of Section 71 (4) and Section 72/B (8) of the National Security Services Act differently from the majority decision.

[84] I hold that the entity (person or body) entitled to make a decision about establishing the legal relationship or about its further status should inevitably be provided with all the information on the reasons of establishing the national security risk in order to enable it to make a well-founded decision. The question is whether declaring this would require active legislation (in this case, an absence of conformity with the Fundamental Law manifested in an omission should be established), or the statement of a constitutional requirement connected to the application of the relevant laws.

[85] Taking the above possibilities into account, I hold that the declaration of the relevant statutory provisions' conflict with the Fundamental Law and their annulment is unfounded.

[86] As another factor, not evaluated in the majority decision, to be assessed, the Chief Public Prosecutor may order, pursuant to the applicable Acts, the posting of prosecutors within the organisation of the prosecution service (within the framework of the rules applicable to the appointment and the modification of the appointment of prosecutors and executives, as well as to transfer and the withdrawal of executive appointment) despite the fact that the National Security Services Act under review does

not contain any provision in this respect. This may offer a possibility, by taking into consideration the nature and the gravity of the indicated national security risk, for the placement of the prosecutor into a position without a real risk, instead of dispensing with establishing his or her service or terminating the existing service.

Budapest, 6 November 2018

Dr. László Salamon
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Mária Szívós*

- [87] I disagree with point 2 of the operative part of the decision, therefore, based on my powers granted in Section 66 (2) of the Constitutional Court Act, I attach the following dissenting opinion to the Decision.
- [88] 1 Regarding the relevant point of the operative part, the reasoning of the majority decision is based on the following: pursuant to the provisions of the National Security Services Act, "all prosecutors may fall under national security vetting". (Reasoning [27]). In my opinion, as I have already explained it in my dissenting opinion attached to Decision 12/2017. (VI. 19.) AB in the context of the judges {see Reasoning [130] to [136]}, this point of departure is false.
- [89] There is a misunderstanding because the majority decision holds that the concept of "legal relationship that serves as the basis for the national security vetting" and the definition of "employment relation" found among the interpreting provisions are the same. Nevertheless, the latter provision has an interpreting function in the case of "persons subject to national security vetting" and there are no rules in the National Security Services Act referring to the alleged equality between the "legal relationship that serves as the basis for the national security vetting" and the "employment relation". Indeed, by specifically mentioning certain positions of the prosecutors (or judges) in the definition of the "persons subject to national security vetting" [for example: Section 74 (ir) and is of the National Security Services Act)], the National Security Services Act actually refers to the fact that it does not require the national security vetting of the prosecutors' (and of the judges') service in general. In a case to the contrary, it would not be necessary to name specific positions of the prosecutors (and of the judges). Thus it can be clearly verified, a contrario, on the basis of the National Security Services Act that not all prosecutors, and this way not the prosecution service in general, are considered to be the subject of national security vetting. [This is further reinforced by the Order of the Chief Public Prosecutor 24/2013 (X. 31.) LÜ, which contains an

exhaustive list of the positions of prosecutors (and of other jobs within the prosecution service) that may fall under national security vetting.]

[90] As a logical consequence of the above, in case of the existence of a national security risk, contrary to what has been stated in the majority reasoning,, the prosecution service relation itself is not to be terminated and the relevant person should be dismissed only from his or her special position (e.g. executive) fulfilled.

[91] 2 Of course, my position explained in the above point does not mean that there are no constitutional concerns raised by the regulation of the National Security Services Act is the relevant scope. I also hold that the wording of National Security Services Act is not totally unambiguous and, as I also indicated in my dissenting opinion attached to Decision 12/2017 (VI. 19.) AB, the constitutional review of the regulation would be inevitably necessary regarding Article B) of the Fundamental Law. {see: Reasoning [128], [137] and [139]}. Actually, the core of the problem is that the National Security Services Act, although its personal scope of application is clearly identifiable (see "persons subject to national security vetting") fails to exactly define its scope in relation to subject matter, that is, it does not define in details what is meant by the concept of "legal relationship that serves as the basis for the national security vetting".

[92] In my view, however, the above constitutional problem should not be resolved in the way provided for in the majority decision, thus, the correct solution of the case is not to annul, by the Constitutional Court, the legal consequence applicable in the case of the existence of a national security risk, but to clearly define that the legal consequence shall not be applicable in general to the service, but only to the special cases of it [clearly defined in the relevant order of the Chief Public Prosecutor (and in the relevant order of National Office for the Judiciary)]. Since this result is deductible by way of grammatical and logical interpretation from the National Security Services Act itself, as I referred to it above,, I hold that in the present case the Constitutional Court should have formulated a constitutional requirement of the above content.

Budapest, 6 November 2018

Dr. Mária Szívós

Justice of the Constitutional Court