Decision 10/2020 (V. 28.) AB

on the establishment of a constitutional requirement related to the determination of the period of time under Section 2 (1) (a) (aa) to (ac) of Act CXCI of 2011 on the Benefits for Persons of Reduced Working Capacity and on the Amendment of Certain Acts

In the matter of, judicial initiatives seeking a finding of a conflict with an international treaty, with concurring reasoning by *Dr. Egon Dienes-Oehm,* Justice of the Constitutional Court, and the dissenting opinion of *Dr. Béla Pokol,* Justice of the Constitutional Court, the Constitutional Court, sitting as the Full Court, has adopted the following

decision:

1. The Constitutional Court finds that in determining the period of time under Section 2 (1) (a) (aa) to (ac) of Act CXCI of 2011 on Benefits for Persons of Reduced Working Capacity and on the Amendment of Certain Acts, it is a constitutional requirement under Article Q (2) of the Fundamental Law that if the European Court of Human Rights, in a final decision binding Hungary in a specific individual case, establishes the violation of Article 1 of the First Additional Protocol to the European Convention on Human Rights on the grounds that a benefit which should have been paid to the applicant and which would otherwise have also given rise to insurance periods was not paid, the insurance period accrued by the non-payment of the benefit must also be taken into account.

2. The Constitutional Court dismisses the petitions seeking a finding of Section 2 (1) (a) (aa) to (ac) of Act CXCI of 2011 on Benefits for Persons of Reduced Working Capacity and on the Amendment of Certain Acts being contrary to an international treaty and annulment of the provisions, as well as seeking the disapplication of the provisions in the cases pending before the Curia under No Mfv.NL10.563/2018 and No Kfv.X.37.415/2019.

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

Reasoning

I

[1] 1. The Panel of the Curia as the review court (hereinafter referred to as the "petitioner") in the litigious proceedings No Mfv. III. 10.563/2018/4 and No Kfv.X.37.415/2019/4, pending before it, for the judicial review of a social security decisions initiated, along with ordering a stay

in proceedings, on the basis of Section 25 (1) and Section 32 (1) to (2) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), to the Constitutional Court seeking a finding of Section 2 (1) (a) (aa) to (ac) of Act CXCI of 2011 on the Benefits for Persons of Reduced Working Capacity and Amendments of Certain Acts (hereinafter referred to as the "Reduced Working Capacity Act") being in conflict with an international treaty and the annulment thereof as well as a prohibition the application of this provision of the law in specific individual cases. The petitioner is of the opinion that the challenged provision is contrary to Article 1 of the First Additional Protocol to the European Convention on Human Rights (hereinafter referred to as the "Convention") and thus violates Article Q (2) of the Fundamental Law.

[2] 1.1 The claimant in the main proceedings is the applicant in the case of Béláné Nagy v. Hungary [GC] (53080/13), decided by the Grand Chamber of the European Court of Human Rights (ECtHR) on 13 December 2016. According to the facts set out in the judgement of the ECtHR, the applicant was in receipt of a invalidity pension from 2001 onwards, as it was established that she had lost 67% of her capacity to work from 1 April 2001 onwards due to various illnesses. This qualification was confirmed in 2003, 2006 and 2007. As from 2008, the legislation on the methodology for assessing occupational disability changed and, based on the new methodology, on 1 December 2009, an expert diagnosed the petitioner as having 40 % disability as a result of which the Pension Insurance Directorate terminated her entitlement to a invalidity pension on 1 February 2010. The petitioner initiated a review of her disability in 2011, and in the review procedure, the second-instance authority established 50 % disability on 13 December 2011 and recommended complex rehabilitation and entitlement to a rehabilitation allowance for a period of 36 months. However, no rehabilitation took place and no rehabilitation allowance was paid until 31 December 2011 before the entry into force of the Reduced Working Capacity Act.

[3] The petitioner repeatedly applied for invalidity benefit after the entry into force of the Reduced Working Capacity Act, on the basis of which the competent authority established a 50 % disability. This level of disability reached the level of deterioration of health that would have entitled the petitioner to benefits under the Reduced Working Capacity Act, but the competent authority also found that the petitioner did not have the required 1,095 days of insured period in the 5 years preceding the submission of the application. The Reduced Working Capacity Act would have allowed an exception from the requirement of the necessary insured period only if the petitioner had been receiving an invalidity pension or a rehabilitation allowance on 31 December 2011 (the day before the Reduced Working Capacity Act entered into force), however, the conditions for the application of this exception were also not met.

[4] Following the final dismissal of the application for invalidity benefit, the petitioner appelied to the ECtHR, whose Grand Chamber held that although the conversion of invalidity benefits under the Reduced Working Capacity Act was justified by the objective of protecting public funds, the applicant had to bear an excessive individual burden in the specific case. Although the applicant had continuously cooperated with the authorities and had accumulated a total of

23 years and 71 days of service, she could not prove the required 1,095 days of insurance in the five years preceding the submission of her application, because she was no longer insured in the period after the termination of her invalidity pension and the transitional provisions of the Reduced Working Capacity Act could not be applied to her, as she had no benefits in payment on 31 December 2011. The Grand Chamber therefore found a violation of Article 1 of the First Additional Protocol and awarded (among others) a lump sum in compensation for the total of 68 months of invalidity benefits not paid, as indicated by the applicant.
[5] 1.2 Following the decision of the Grand Chamber, on 24 April 2017, the claimant in the main proceedings formally applied for the "payment of her invalidity pension", in substance for the award of a benefit for persons with reduced working capacity. The Szabolcs-Szatmár-Bereg County Government Office Nyíregyháza District Office dismissed the application by decision of 29 May 2017, as it found that the applicant's health condition classified her in the classification group C2 and she was considered to have a reduced working capacity, but she did not have the required insurance period under Section 2 (1) (a) (aa) to (ac) of the Reduced Working Capacity Act. The claimant appealed against the decision, arguing that she was entitled to a invalidity pension on the basis of the ECtHR's decision. In its decision of 4 October 2017, the Budapest-Capital Government Office acting as the second instance forum held that the ECtHR's judgement does not change the fact that all the conditions for the establishment of the benefit for persons with reduced working capacity must be fulfilled at the same time, but the applicant does not have the necessary insurance period. The decision stated that the Reduced Working Capacity Act does not grant either discretionary or equitable competence to the competent authority; therefore, in the absence of meeting the eligibility criteria, there is no legal possibility to establish an exceptional benefit on the grounds of equity.

[6] The claimant in the main proceedings brought an action against the decision, in which she requested that the decision of second instance be set aside, including the decision of first instance, and that the first instance authority be ordered to initiate new proceedings, and also requested that the proceeding court initiate proceedings before the Constitutional Court, as she considered that the applicable law was in breach of an international treaty. Nyíregyháza Administrative and Labour Court dismissed action by its judgement No 6.M.695/2017/11, considering that the decision of the second instance is lawful also with regard to the decision of the first instance, since it can be established beyond doubt that the applicant does not have the required insurance period under the Reduced Working Capacity Act, which is a precondition for entitlement to benefits. The judgement stated that the court could review the contested decision only from a legal point of view and could not exercise any equitable competence. The claimant brought an appeal against the judgement.

[7] 1.3 Simultaneously with the proceedings described in the previous point, on 14 August 2017, the claimant in the main proceedings also submitted a claim for benefits for persons with reduced working capacity. The Szabolcs-Szatmár-Bereg County Government Office Nyíregyháza District Office also dismissed this application by its decision of 13 October 2017, as it found that the applicant's health condition renders her in the classification group C2 and

she is classified as a person with reduced working capacity, but she does not have the required insurance period under Section 2 (1) (a) (aa) to (ac) of the Reduced Working Capacity Act. The petitioner filed an appeal against the decision, in which she did not contest the findings concerning her health condition, but at the same time she argued that it was precisely because of her health condition that she could not work, and thus could not meet the statutory requirement of the period of insurance. By decision of 18 May 2018, the Hajdú-Bihar County Government Office, acting as the second instance forum, upheld the decision of first instance on the grounds of its correct reasoning.

[8] The claimant in the main proceedings brought an action against the decision, seeking primarily the annulment of the decision of the second instance, including the decision of the first instance, and an order that the first instance authority should be ordered to initiate new proceedings, and alternatively the changing of the decision of the second instance. In her claim, she invoked Article 1 of the First Additional Protocol to the Convention, which was promulgated in Hungary by Act the XXXI of 1993, as the infringed rule. In view of the infringement of the international treaty, she also initiated that the court of first instance initiate the Constitutional Court's proceedings. Nyíregyháza Administrative and Labour Court dismissed action by its judgement No 15.K.27.259/2018/9, considering that there was no dispute between the parties as to the extent of the claimant's health condition or the period of insurance acquired. However, the court found, in line with the revised decision, that the claimant did not fulfil the condition of eligibility for insurance periods under Section 2 (1) (a) (aa) to (ac) of the Reduced Working Capacity Act in respect of the insurance period acquired. The court stated in its judgement that, in its view, the provision of the Reduced Working Capacity Act that determines the amount of the insurance period required for the provision of benefits does not violate an international treaty, and the claimant is prejudiced by the fact that the Reduced Working Capacity Act does not contain any transitional provisions that would be applicable in the specific case, however, in accordance with the provisions of the Constitutional Court Act, the judge is not entitled to initiate a declaration of legislative omission. The claimant brought an appeal against the judgement.

[9] 1.4 In the proceedings described in points I/1.2 (Reasoning [5] et seq.) and I/1.3 (Reasoning [7] et seq.) of the decision's reasoning, the Curia sought, with its decisions No Mfv.III.10.563/2018/4 and No Kfv.X.37.415/2019/4, pursuant to Section 25 (1) and Section 32 (1) to (2) of the Constitutional Court Act, the finding of Section 2 (1) (a) (aa) to (ac) of the Reduced Working Capacity Act being in conflict with an international treaty and the annulment of that provision as well as a finding that it is not applicable in the two pending proceedings, on the following grounds.

[10] The petitioner submits that in 2001 (the year in which the petitioner's invalidity pension was established), the entitlement to invalidity pension was conditional on proof of a certain period of service (at least 10 years in the claimant's case), which the claimant in the main proceedings had unquestionably fulfilled by paying contributions for more than 20 years. Due to the change in the methodology of the health assessment regulation, the percentage of the

claimant's health status has temporarily improved slightly, while her actual health status has not changed significantly. As a result of this improvement in the status, the claimant in the main proceedings did not have any benefits paid on 31 December 2011 and thus she lost the possibility to claim benefits under the Reduced Working Capacity Act, as the transitional provision was not applicable to her and she did not comply with the main rule under Section 2 (1) (a) (aa) to (ac) of the Reduced Working Capacity Act. The petitioner pointed out that the Reduced Working Capacity Act does not provide for the possibility for the bodies applying the law to refrain from assessing the condition of the period of insurance during the prescribed period; therefore, the Curia cannot disregard the application of the relevant provision.

[11] The application of the provision, however, would, according to the petitioner's argument, render the decision of the Curia contrary to Article 1 of the First Additional Protocol to the Convention and Article Q (2) of the Fundamental Law, as it would result in a situation that has already been classified as contrary to the Convention in the applicant's case by the decision of the ECtHR, due to the fact that, this time again, the claimant in the main proceedings has not been granted the benefit under the Reduced Working Capacity Act, despite the fact that she would be entitled to it on the basis of her health condition. In this context, the petitioner also referred to the Constitutional Court's Decision 21/2018 (XI. 14.) AB (hereinafter referred to as the "2018 Court Decision"), in which the Constitutional Court stated that a regulation transforming the system of benefits for the persons with reduced working capacity in a manner resulting in placing excessive burdens on the individuals due to this reform is in conflict with Article 1 of the First Additional Protocol of the Convention, and the burden is considered to be excessive when, without the significant change of other circumstances, merely due to the change of the legal framework of the benefit system, the disabled persons' conditions improve in the legal sense and this way the amount of their benefits decrease without any actual change in the affected persons' physical conditions.

[12] 2. The Constitutional Court consolidated the petitions on the basis of their related subject-matter and judged them in a single procedure on the basis of Section 58 (2) of the Constitutional Court Act and Section 34 (1) of the Rules of Procedure.

[13] 3. The Secretary of State for Social Affairs of the Ministry for Human Capacities (hereinafter referred to as the "Ministry for Human Capacities") sent its observations on the petitions to the Constitutional Court in accordance with Section 57 (1b) of the Constitutional Court Act.

II

[14]1. The provisions of the Fundamental Law relevant to the petition read as follows:

"Article Q) (2) In order to comply with its obligations under international law, Hungary shall

ensure that Hungarian law be in conformity with international law."

[15] 2. The provision of the Convention relevant to the petition reads as follows:

"First Additional Protocol

Article 1 Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

[16] 3. The provision of the Reduced Working Capacity Act challenged by the petition reads as follows:

"Section 2 (1) A person aged 15 or over at the time of application who has a health condition of 60% or less according to the complex assessment of the rehabilitation authority [...] and who,

(a) during the period of time, before the submission of the application, of

(aa) 5 years, during 1,095 days,

(ab) 10 years, during 2,555 days, or

(ac) 15 years, during 3,650 days,

was insured according to Section 5 of the Social Security Act [Act LXXX of 1997 on the Eligibility for Social Security Benefits and Private Pensions and the Funding for These Services];"

III

[17] The judicial initiatives are unfounded.

[18] 1. First of all, the Constitutional Court reviewed whether the judicial initiatives comply with the criteria set forth by the law.

[19] 1.1 The Constitutional Court's practice is consistent in holding that the requirements laid down with regard to the judicial initiatives in Section 25 of the Constitutional Court Act are also applicable to the judicial initiatives made on the basis of Section 32 (2) of the Constitutional Court Act {*see* most recently: the 2018 Court Decision, Reasoning [13]}. According to the judicial initiatives, Section 2 (1) (a) (aa) to (ac) of the Reduced Working Capacity Act are in conflict with an international treaty, Article 1 of the First Additional Protocol of the Convention. The petitioner must review social security decisions in which the contested provision of the Reduced Working Capacity Act was unquestionably applied, since the claim for invalidity benefit of the claimant in the main proceedings was dismissed on the basis of the contested provision of the Reduced Working Capacity Act.

[20] 1.2 The petitions contain an explicit and exact reasoning why the challenged provision of the law is held to be in conflict with Article 1 of the First Additional Protocol of the Convention.

Pursuant to Article 24 (2) (f) of the Fundamental Law, reviewing a conflict with an international treaty falls within the Constitutional Court's scope of competence, and the procedure may be initiated by the persons specified in Section 32 (2) of the Constitutional Court Act, including the petitioner. The petitions satisfy the requirements under Section 52 (1) and (1b) of the Constitutional Court Act, regarding an explicit request {cf. Order 3058/2015 (III. 31.) AB, Reasoning [8] to [24], Decision 2/2016 (II. 8.) AB, Reasoning [26] to [28], Decision 3064/2016 (III. 22.) AB, Reasoning [8] to [13]}.

[21] 2. In point [15] of the reasoning of the 2018 Court Decision, the Constitutional Court summarised its position on the Convention and the case law of the ECtHR as follows. "The ECtHR is not in charge of the abstract review of the Member States' laws and of determining whether the relevant law is compatible with the Convention {see for example: Nikolova v. Bulgaria [GC] (31195/96), 25 March 1999, paragraph 60}, as its primary duty is to assess the results on the individual applicants of the application by the authorities and by the courts of certain provisions of national law, and when it verifies the violation of the Convention, the State subject to the complaint shall bear the legal consequence established by the ECtHR in accordance with the provisions of the Convention. In contrast with the above, in the proceedings under Section 32 (2) of the Constitutional Court Act, the Constitutional Court shall carry out an abstract review of the conflict between a provision of domestic law and an international treaty, which, however, is a review which, by virtue of the provisions of the Fundamental Law and the Convention, is the exclusive prerogative of the Constitutional Court." However, in the context of the proceedings under Section 32 (2) of the Constitutional Court Act, the standard for the Constitutional Court's assessment is not the Fundamental Law, but the international treaty referred to in the petition. The Constitutional Court has already laid down that "in the course of exploring the obligation that binds Hungary on the basis of an international treaty (that is, in the course of reviewing a conflict with an international treaty), not only the text of the international treaty, but also the case law of the body empowered to interpret it shall be taken into account" {Decision 3157/2018 (V. 16.) AB, Reasoning [21]}.

[22] Based on the above findings of principle, the Constitutional Court notes that the applicant in the case of Béláné Nagy v. Hungary is the same person as the claimant in the proceedings underlying the judicial initiatives, and in view of this, the Constitutional Court has expressly used the relevant findings of the Grand Chamber of the ECtHR in the present proceedings, since they could be directly taken into account in the proceedings underlying the court initiatives.

[23] 3. In its decision in the case of Béláné Nagy v. Hungary, the ECtHR ruled the following. When the legislator adopted the Reduced Working Capacity Act, the interference complained of pursued the communal interest in protecting the public purse, by means of rationalising the system of disability-related social-security benefits (paragraph 121). However, the application of the Reduced Working Capacity Act in a specific individual case resulted in the applicant having beeb subjected to a complete deprivation of any entitlements, rather than to a commensurate reduction in her benefits, such as by, for example, calculating an allowance pro

rata on the basis of the existing and missing days of social cover (paragraph 123). The ECtHR also referred to the fact that the applicant had been recommended for rehabilitation in December 2011, which had not been carried out and therefore no rehabilitation allowance had been paid. However, the authorities did not implement this recommendation. Had they done so, the applicant might have been in receipt of a benefit on 31 December 2011, which would have altered her situation under the new law (paragraph 104). The ECtHR also specifically emphasised that the applicant was deprived of entitlement to any allowance, despite the fact that there is no indication that she failed to act in good faith at all times, to co-operate with the authorities or to make any relevant claims or representations (paragraph 125). For these reasons, the ECtHR considered that there was no reasonable relation of proportionality between the objective pursued and the means applied. The ECtHR therefore found that, notwithstanding the State's wide margin of appreciation in this field, the applicant was to bear an excessive individual burden (paragraph 126).

[24] 4. The Constitutional Court then reviewed the contested provision of the Reduced Working Capacity Act. Section 2 (1) of the Reduced Working Capacity Act lays down the conditions under which an applicant may become entitled to benefits for persons with reduced working capacity. The condition of eligibility challenged by the petitioner requires that the applicant be insured for at least 1,095 days in the 5 years, at least 2,555 days in the 10 years or at least 3,650 days in the 15 years preceding the submission of the application. The benefits under the Reduced Working Capacity Act are income replacement benefits, that is, they can be granted if the claimant is unable to engage in gainful activity due to his or her condition. Benefits are cash health insurance benefits and can therefore only be provided to those who have a defined period of insurance. It is precisely in view of this insurance period that the ECtHR has previously held that the benefits under the Reduced Working Capacity Act fall within the scope of Article 1 of the First Additional Protocol, which was also confirmed by the Secretary of State for Social Affairs of the Ministry for Human Capacities in the observations sent to the Constitutional Court. When the Reduced Working Capacity Act entered into force on 1 January 2012, under Section 2 (1) (a) of Act, in the assessment of the insurance period, the insurance period acquired in the five years preceding the submission of the application could be taken into account, which was amended on 1 January 2014 to allow taking into account the insurance period acquired during a longer time preceding the submission of the application (benefits may also be awarded in the case of having insurance period of 1,095 days within 5 years, 2,555 days within 10 years or 3,650 days within 15 years).

[25] Taking into account the nature of the benefits under the Reduced Working Capacity Act the assessment of the insurance period requirement as a precondition for the payment of benefits is unquestionably justified. The provision of the Reduced Working Capacity Act, which determines the number of years of insurance after which the applicant becomes entitled to one of the benefits under the Reduced Working Capacity Act is not in conflict with Article 1 of the First Additional Protocol to the Convention, as an international treaty. On the contrary, it is precisely the requirement of a period of insurance under Article 2 (1) (a) of the Reduced Working

Capacity Act that makes the benefits comply with the criteria under the scope of the Convention. In this context, the Constitutional Court refers to its finding in the 2018 Court Decision considering the violation of international treaties by certain provisions of the Reduced Working Capacity Act that "the Convention and its additional protocols do not contain any obligations as to whether States shall establish a social security system and, if they do so, whether to provide certain types of benefits in certain amounts upon fulfilling specific conditions." (Reasoning [18]).

[26] The Constitutional Court also emphasises that the annulment of the contested provision would essentially make the benefits under the Reduced Working Capacity Act available to those who fulfil the conditions under Section 2 (1) of the Reduced Working Capacity Act regardless of the period of insurance, which would directly eliminate the health insurance nature of the benefits, and would explicitly run counter to the objective of protecting public funds, as recognised by the ECtHR as one of the reasons for the creation of the legislation. Accordingly, the Constitutional Court finds that it follows from the Convention that, as regards the conditions for the payment of benefits under the Reduced Working Capacity Act, which are covered by Article 1 of the First Additional Protocol to the Convention, the Contracting States enjoy a wide margin of appreciation in the determination of such conditions.

[27] The regulation itself, which requires as a condition for the payment of benefits that the applicant be able to prove insurance for two thirds of the period preceding the submission of the application (1,095 days in the case of 5 years, 2,555 days in the case of 10 years, 3,650 days in the case of 15 years), can clearly not be considered an unreasonable requirement that exceeds the limits of this discretion, not least because health insurance cash benefits (such as the one provided for in the Reduced Working Capacity Act at issue in the present action) are distinguished from benefits payable under a subjective right by, among others, the requirement of proof of a previous period of insurance.

[28] In view of the above, the Constitutional Court dismissed the judicial initiatives to declare Section 2 (1) (a) (aa) to (ac) of the Reduced Working Capacity Act being contrary to an international treaty and to annul it. Considering that the Constitutional Court did not annul the challenged provision, it did not order the prohibition of applying the provision at issue in view of Section 45 (1), (2) and (4) of the Constitutional Court Act.

[29] 5. At the same time, the Constitutional Court also found that the petitioner had rightly argued that if the provisions of the Reduced Working Capacity Act under review were applied in the cases giving rise to judicial initiatives, the result would be that the claimant in the main cases would not be entitled to the benefits under the Reduced Working Capacity Act in accordance with the provisions of the Reduced Working Capacity Act. Such a decision would be substantially similar in result to the one on the basis of which the ECtHR previously found Hungary liable for breach of the Convention in the case of Béláné Nagy v. Hungary (the individual case of the claimant in the main proceedings). All the above means that while the challenged provision of the Reduced Working Capacity Act is not in itself in conflict with the

Convention as an international treaty, the application of that provision in a specific, individual case may exceptionally lead to a result contrary to the Convention as an international treaty, with particular regard to the individual circumstances of the particular case.

[1] [30] In accordance with Article Q (2) of the Fundamental Law, in order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law. Section 46 (3) of the Constitutional Court Act authorises the Constitutional Court to specify in a decision, in the procedure carried out in the course of exercising its competences, the constitutional requirements, which result from the Fundamental Law and enforce the provisions of the Fundamental Law, the application of the reviewed law has to comply with. In the event that the legal provision under review has (one or more) interpretations that are in line with the Fundamental Law or, in this case, the Convention as an international treaty, the Constitutional Court, based on the principle of saving the law in force, should not annul the challenged provision of the law; however, it should ensure, in accordance with Section 46 (3) of the Constitutional Court Act, that the application of the norm leads in all cases to a result which is in conformity with the Fundamental Law (or, in the present case, with the Convention as an international treaty). Therefore, the Constitutional Court was required to consider whether the provisions of the Reduced Working Capacity Act could be interpreted in such a manner as to bring about the possibility of a result in conformity with the Convention as an international treaty, even in the specific case on which the present judicial initiatives are based.

[31] The Constitutional Court points out that if the person entitled to benefits is in receipt of one of the benefits under the Reduced Working Capacity Act, with the exception of exceptional invalidity benefit, this period is considered a period of insurance within the meaning of Section 2 (3) (b) of the Reduced Working Capacity Act. In the event that the ECtHR, by its decision delivered in a specific individual case, finds a violation of Article 1 of the First Additional Protocol to the Convention because the applicant had not been granted a benefit which also gives rise to a period of insurance under the Reduced Working Capacity Act, it also finds in substance that the applicant should have been granted a benefit which otherwise also gives rise to a period of insurance.

[32] Therefore, the Constitutional Court, in order to ensure the enforcement of the Convention as an international obligation assumed by Hungary by an international treaty, states as a constitutional requirement, arising from Article Q (2) of the Fundamental Law, that in the course of determining the period under Section 2 (1) (a) (aa) to (ac) of the Reduced Working Capacity Act, the insurance period accrued by the non-payment of benefits must also be taken into account, if the ECtHR in a final decision binding Hungary in a specific individual case finds a violation of Article 1 of the First Additional Protocol to the Convention because the applicant has not been granted a benefit which would otherwise have been paid, in the case underlying the judicial initiative pursuant to Section 2 (3) (b) of the Reduced Working Capacity Act, and which would have given rise to a period of insurance, and after the final decision of the ECtHR

the applicant applies again for the award of a benefit under the Reduced Working Capacity Act. The assessment of the conditions under the constitutional requirement (including, in particular, the subject of the ECtHR judgement delivered in the applicant's own individual case and the period that may be taken into account on the basis of the judgement) is always a duty of the authorities or courts seised of the case.

[33] 6. The publication of this Decision in the Hungarian Official Gazette (Magyar Közlöny) is based on Section 41 of the Constitutional Court Act.

Budapest, 12 May 2020

Dr. Tamás Sulyok,

Chief Justice of the Constitutional Court

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Ágnes Czine prevented from signing

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr.Tünde Handó prevented from signing

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Ildikó Hörcherné-Marosi prevented from signing

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

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. László Salamon prevented from signing

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Marcel Szabó prevented from signing

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Mária Szívós prevented from signing

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Egon Dienes-Oehm prevented from signing

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Attila Horváth prevented from signing

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

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Béla Pokol prevented from signing

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Balázs Schanda prevented from signing

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

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. András Varga Zs. prevented from signing

Concurring reasoning by Justice Dr. Egon Dienes-Oehm

[34] I agree with the decision, and I add the following concurring reasoning to it.

[35] I can support the decision despite the fact that I have issued a dissenting opinion against the 2018 Court Decision underlying the present case in order to support my position in principle and in the specific case. The only reason I agree with this Decision is that the petitioner in the present case was the claimant in the proceedings leading to the ECtHR's decision in the individual case condemning Hungary. Consequently, the decision of the ECtHR delivered in a particular case must be implemented by the State bound by it, insofar as it is not contrary to its constitution, and this circumstance was also expressed in my dissenting opinion.

[36] Nevertheless, my agreement with the decision is expressed on the assumption that I have a reasonable expectation that there are no other similar cases in which the constitutional requirement accepted by myself as well in the present decision could be applied, and therefore it cannot serve as a precedent in other cases.

Budapest, 12 May 2020

Dr. Tamás Sulyok,
Chief Justice of the Constitutional Court
on behalf of Justice *dr. Egon Dienes-Oehm* prevented from signing

Dissenting opinion by Justice Dr. Béla Pokol

[37] I could not support the majority decision due to its reasoning, because it decides the case by confirming an older Constitutional Court position, which violates our State sovereignty to such an extent that it keeps the use of international treaties as a basis for our decision-making practice on an unacceptable course in the context of delivering a decision in a case of minor importance. Based on this earlier position, the Constitutional Court grounds its assessment of the conflict of laws with international treaties not only on the text of the international treaty signed by the Hungarian State, but also on the case law of the international court allocated to it {*see* Part III, point 3 of the Reasoning (Reasoning [23])}.

[38] In order to understand this problem, it must be seen that in international law, in contrast to a looser adherence to the text and the involvement of legal principles and open concepts of law in the case of jurisprudence based on domestic law, the determining factor has always been the treaty text of the contracting states. This is what the contracting states sign and, on the basis of the centuries-old international principle of *pacta sunt servanda,* the treaty must be honoured. This exclusive adherence to the treaty text was also reflected in the fact that, until the early 1900s, there were no permanent international courts and in the case of a dispute an ad hoc arbitration tribunal set up by the contracting states decided on the basis of the meaning of the treaty text alone. This has begun to change, especially in the years after the Second World War, and in recent decades permanent courts have been attached to a number of multilateral international treaties, such as the ECtHR in Strasbourg, to the Convention. However, this does not alter the fact that the contracting Member States are bound by the principle of *pacta sunt*

servanda only to the treaty they have accepted and signed, and that if a permanent court attached to a treaty wishes to impose a broader obligation on Member States by reference to an extending case law, this can be dismissed by the Member State concerned as *ultra vires,* an overstepping of the treaty. Any opposite view implicitly supports a partial renunciation of the international sovereignty of the state.

[39] The political and power struggle that has intensified in Europe in recent decades between the forces of maintaining the autonomy of states or, on the contrary, of integrating them into a global world state, in the first stage, the federal structure of the United States of Europe, has created an influential group of legal policy among international and constitutional lawyers that seeks to move, by reinterpreting existing legal concepts, towards the reduction of sovereignty subordinated to the organisation of a global state. As an aspect of this, by reinterpreting obligations under international law, they hold that not only the text of the international treaty is binding on the states parties to the treaty, but also the judicial case law that constantly extends the treaty. This may be acceptable for the forces of federalism, but it runs counter to the opinions of jurists who wish to preserve state sovereignty.

[40] The Constitutional Court of Hungary had adopted a position on the ground of the latter view in the years after the change of regime, but it should be realised that in recent years the extension of judicial case law has made a qualitative leap in the case of certain multilateral treaties, which makes this position untenable. Most problematic in this respect is the case law of the ECtHR in Strasbourg, which underwent a fundamental transformation in 1999 by allowing NGOs and citizens to bring proceedings against their own state, instead of the previous sporadic inter-state adjudication. In this way, a considerable part of political struggles has moved from the framework of parliamentary and party struggles to the arena of political litigation before the ECtHR through NGOs, and - according to a series of research and studies - the ECtHR's case law has become a major arena of this global political struggle, radically extending the original convention.

[41] Taking all this into account, in my view, the old Constitutional Court position on the acceptance of the binding force of case law beyond the international treaty could not be maintained, and since I could not convince the majority of the panel to abandon the confirmation of the old position, I could not support the decision, which contains this confirmation.

Budapest, 12 May 2020

Dr. Tamás Sulyok,
Chief Justice of the Constitutional Court
on behalf of Justice *dr. Béla Pokol* prevented from signing