Decision 6/2015 (II. 25.) AB

on a finding of unconstitutionality and annulment of the phrase "lawfully" in Section 76 (1) of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals

In the matter of a judicial initiative seeking a finding of unconstitutionality by non-conformity with the Fundamental Law, with the concurring reasoning by Justice *dr. Ágnes Czine*, as well as the dissenting opinions by Justices *dr. István Balsai, dr. Egon Dienes-Oehm, dr. László Kiss, dr. Barnabás Lenkovics, dr. Miklós Lévay, dr. Péter Paczolay, dr. Béla Pokol, dr. László Salamon* and *dr. András Varga Zs.,* the Constitutional Court, sitting as the Full Court, rendered the following

decision:

1. The Constitutional Court holds that the phrase "lawfully" in Section 76 (1) of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals is contrary to the Fundamental Law and therefore annuls the said provision effective as of 30 September 2015.

In accordance with the annulment, Section 76 (1) of the Act shall remain in force with the following wording: "Section 76 (1) Proceedings for the recognition of stateless status are opened upon the submission of a request to the immigration authority for stateless status by a person who is currently residing in the territory of Hungary (hereinafter referred to as the 'Applicant'), which request may be presented verbally or in writing."

2. The Constitutional Court hereby dismisses the petition seeking a finding of prohibition of application in the individual case pending before the General and Budapest Administrative and Labour Court under No 17.K.30.417/2014.

The Constitutional Court shall publish this Decision in the Hungarian Official Gazette.

Reasoning

I

[1] 1. The judge of Budapest Administrative and Labour Court in the case 17.K.30.417/2014 pending before it in the proceedings for review of an administrative decision, with simultaneously ordering a stay of the proceedings, submitted to the Constitutional Court a judicial initiative based on Section 25 (1) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), seeking a finding of unconstitutionality by non-conformity with the Fundamental Law of the term "lawfully residing" in the territory of Hungary, as provided for in Section 76 (1) of Act II of 2007 on the Admission

and Right of Residence of Third-Country Nationals (hereinafter referred to as the "Third-Country Nationals Act"), as well as the ordering of its general prohibition of application and a prohibition of application of such term in specific proceedings.

[2] It is apparent from the judicial initiative and the documents enclosed that the claimant, who was born in Somalia in 1985 to a Nigerian mother and a Somali father, entered Hungary illegally in 2002 and first applied for a declaration of stateless status on 16 September 2010 to the Office of Immigration and Nationality (hereinafter referred to as either the "authority" or the "defendant"). At that time, the claimant was in possession of a certificate of temporary residence valid until 1 October 2010, pursuant to Section 30 (1) (h) of the Third-Country Nationals Act (aliens policing procedure pending for illegal entry and/or residence).

[3] The authority dismissed the claimant's application for a declaration of stateless status on the basis of Section 76 (1) and Section 79 (1) of the Third-Country Nationals Act on 18 November 2010 on the grounds that a finding of stateless status was precluded by law in the absence of legal residence on the one hand and that it had been unable to prove the claimant's identity during the proceedings because of his questionable credibility on the other hand, and that it could not therefore be established on the basis of credible evidence that he was not a national of any State.

[4] The action brought by the claimant against this decision was upheld by Budapest High Court, and by Judgement No.24.K.36.132/2010/14 of 2 February 2012, the court recognised the claimant as a stateless person, reversing the decision of the authority.

[5] On appeal by the authority, Budapest-Capital Regional Court of Appeal, by its final Judgement No 2.Kf.27.209/2012/10 of 17 October 2012, reversed the judgement of the court of first instance and dismissed the claimant's action.

[6] On the basis of the claimant's application for review, the Curia upheld the final judgment by Judgement No Kfv.III.37.229/2013/7 of 11 December 2013, holding that the final judgement did not infringe any legal rule. At the same time, the Curia stated that it did not see any need to initiate constitutional proceedings because Section 78 of the Third-Country Nationals Act expressly refers to the fact that the Statelessness Convention was incorporated into the legislation in the appropriate place.

[7] As early as 10 December 2012, after the final judgement had been delivered, the claimant, in view of the pending proceedings on his earlier application for a declaration of stateless status, in possession of a temporary residence certificate issued to him pursuant to Section 30 (1) (i) of the Third-Country Nationals Act ("who has applied for stateless status, for the duration of such proceedings, if he/she does not have any form of authorization to reside in the territory of Hungary"), reapplied for a declaration of stateless status, claiming that he already fulfilled the conditions for lawful residence on the basis of this certificate of residence.

[8] By its order, the authority first dismissed the claimant's renewed application without considering the merits and then, having found that it had wrongly informed the claimant of his right to apply for a legal remedy, it withdrew that order of its own motion and proceeded to assess the merits of the renewed application for a declaration of stateless status. In its

substantive assessment, having found that the claimant had established a prima facie case of stateless status in accordance with Section 79 (1) of the Third-Country Nationals Act, the authority dismissed the application on the ground that the claimant was subject to a final expulsion order at the time of his application and therefore did not comply with Section 76 (1) of the Third-Country Nationals Act because he was unlawfully present in the territory of the country.

[9] The Hungarian Helsinki Committee and the United Nations High Commissioner for Refugees are intervening in the proceedings brought by the claimant on the basis of the application for review of the decision, which forms the basis of the judicial initiative, in order to promote the claimant's success in the proceedings. The intervening parties for the claimant sent the Constitutional Court their observations in support of the initiative.

[10] 2. It is submitted in the judicial initiative that Article 1 of the Convention relating to the Status of Stateless Persons, signed at the United Nations in New York on 28 September 1954 (hereinafter referred to as the "Statelessness Convention"), promulgated by Act II of 2002, to which no State has the right to make a reservation under Article 38, does not make lawful residence in the territory of the State concerned a precondition for the establishment of stateless status, contrary to Section 76 (1) of the Third-Country Nationals Act. However, under Section 76 (1) of the Third-Country Nationals Act, a person who is a stateless person within the meaning of Article 1 of the Statelessness Convention must be refused recognition of stateless status if he is unlawfully present in Hungary for any reason, and it is therefore necessary to determine whether the wording "lawfully residing" in Section 76 (1) of the Third-Country Nationals Act is contrary to the Statelessness Convention, in breach of Article Q (2) and Article XV (2) of the Fundamental Law.

[11] According to the judicial initiative, statelessness is a declaratory and not a constitutive act, it only establishes statelessness as a fact, but does not create it. A stateless person is stateless even if he or she enters or resides illegally in the territory of a Contracting State. The absence of travel documents is a common feature of statelessness, as no State recognises a stateless person as a national. As a result, the provision on legal residence in Section 76 (1) of the Third-Country Nationals Act deprives persons who are stateless under the Statelessness Convention of the possibility to have their application considered on the merits in Hungary. In addition to the fact that the text challenged by the initiative infringes Article Q (2) of the Fundamental Law on the ground that it is contrary to an international treaty, it also infringes Article XV (2) of the Fundamental Law, because it discriminatorily and unjustifiably introduces a distinction between stateless persons who are in possession of a travel document accepted by Hungary and who fulfil (are able to fulfil) the strict financial conditions for entry and residence and stateless persons who are not in possession of a travel document.

II

[12] 1. The provisions of the Fundamental Law invoked in the petition read as follows:

"Article Q (2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law is in conformity with international law."

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

[13] 2. The relevant provision of the Third-Country Nationals Act reads as follows:

"Section 76 (1) Proceedings for the recognition of stateless status are opened upon the submission of a request to the immigration authority for stateless status by a person who is lawfully residing in the territory of Hungary (hereinafter referred to as the 'Applicant'), which request may be presented verbally or in writing."

[14] 3. The relevant provisions of the Statelessness Convention read as follows:

"Article 1 Definition of the term »stateless person«

1. For the purpose of this Convention, the term »stateless person« means a person who is not considered as a national by any State under the operation of its law.

2. This Convention shall not apply:

(i) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance;

(ii) To persons who are recognised by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country;

(iii) To persons with respect to whom there are serious reasons for considering that:

(a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;

(b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;

(c) They have been guilty of acts contrary to the purposes and principles of the United Nations."

"Article 38 Reservation

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1) and 33 to 42 inclusive.

2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations."

[15] The judicial initiative is in part well-founded.

[16] 1. On the basis of the authorisation granted by Article 24 (2) (b) of the Fundamental Law, the Constitutional Court shall review the conformity of the applicable legislation in an individual case with the Fundamental Law on the basis of a judicial initiative pursuant to Section 25 (1) of the Constitutional Court Act. In the case giving rise to these proceedings, both the claimant and the intervening parties and the defendant, with a conclusion which is, of course, contrary to the present case, have set out in great detail their position on the comparison of Section 76 (1) of the Third-Country Nationals Act with the Statelessness Convention and, in its earlier proceedings, the Curia also expressed an opinion, in a tangential manner, on the unnecessity of constitutional court proceedings in respect of the contested provision. In that regard, the Constitutional Court considers it necessary to state that, first, the decision in the specific case falls within the remit of the court seised and, second, the Constitutional Court assessed the content of the initiative of the judge in the course of its proceedings, and the arguments of the other motions attached to the court case file and the observations made directly to the Constitutional Court were subject to scrutiny only in so far as they were directly related to the content of the petition of the presiding judge.

[17] 2. In view of the fact that, as the petition contends, the contested provision of the legislation precludes the proceedings primarily in the case of stateless forced migrants who are stateless and have never been in possession of a travel document, the Constitutional Court considered it appropriate to consider the specific links between the right of asylum and statelessness.

[18] The Preamble to the Statelessness Convention and, in line with it, the United Nations High Commissioner for Refugees' Guidelines No 2 on Statelessness of 5 April 2012 (hereinafter referred to as the "Guidelines"), also state that the Statelessness Convention was primarily established to regulate the treatment of stateless persons who are not refugees. Refugees, and thus, as a rule, stateless refugees, are governed by the provisions of the Convention relating to the Status of Refugees of 28 July 1951, the Law Decree No 15 of 1989 on the proclamation of the Protocol relating to the Status of Refugees of 31 January 1967 and Act LXXX of 2007 on the Right of Asylum (hereinafter referred to as the "Asylum Act"). Pursuant to Section 6 of the Asylum Act, Hungary recognises as a refugee a foreign national who fulfils the conditions set out in Article XIV (3) of the Fundamental Law ("who is persecuted in his or her country of origin or habitual residence on account of his or her race, nationality, membership of a particular social group, religion or political opinion, or where the fear of such persecution is well founded."), a foreign national who does not qualify as a refugee but runs the risk of serious harm if returned to his country of origin and is unable or, for fear of such risk, unwilling to avail himself of the protection of his country of origin, is granted subsidiary protection as a beneficiary of protection. Finally, pursuant to Section 19 of the Asylum Act, Hungary shall grant temporary protection to a foreigner who belongs to a group of displaced persons arriving in the territory of Hungary *en masse* which was recognised by the Council of the European Union by the Government as eligible for temporary protection as the persons belonging to the group had been forced to leave their country due to an armed conflict, civil war or ethnic clashes or

the general, systematic or gross violation of human rights, in particular, torture, cruel, inhuman or degrading treatment. Stateless status is established on the basis of the Third-Country Nationals Act and the Government Decree 114/2017 (V. 24.) Korm on the Implementation of the Third-Country Nationals Act (hereinafter referred to as the "implementing Decree"), while the procedure for recognition as a refugee or a beneficiary of protection is based on the Asylum Act. However, the difference in the status and the procedures for establishing it does not mean that the foreign national can only meet one or the other set of criteria, nor can it be excluded that he or she can meet neither or both. The Guidelines propose solutions to the procedural problems arising from these duplications. Although the Guidelines are one of what are known as non-binding international legal instruments, it is nonetheless undeniable that the United Nations High Commissioner for Refugees is best placed to interpret the international legal issues and to explore the practice in relation to the Statelessness Convention. This is supported by the fact that, on the one hand, the UN General Assembly has, by resolution, given the High Commissioner general responsibility for all stateless persons, including the recognition/identification, prevention, reduction and protection of statelessness, and, on the other hand, the legislator itself has provided in Section 81 of the Third-Country Nationals Act for the possibility for the representative of the United Nations High Commissioner for Refugees to participate in the procedure for the determination of statelessness. Section 164 of the Implementing Decree obliges the authority to take into account the opinion of the High Commissioner when taking evidence. Points 26 to 30 of the Guidelines contain detailed proposals for the coordination of the asylum and statelessness procedures. They state that where a person makes both an application for stateless status and an application for asylum, it is important that both applications are assessed and, where appropriate, the applicant is granted recognised status in both cases. Although the Guidelines do not contain legally binding provisions, it recommends that in cases of simultaneous submission, it is advisable, for reasons of confidentiality regarding identity, to conduct the asylum procedure first and suspend the procedure for stateless status for that period. It should be noted that Section 42 (1) of the Asylum Act expressly provides that Hungarian authority or court may not enter into contact with the country of origin of the person seeking recognition, a country, in respect of which it may be presumed that it forwards information to the country of origin, a person or organisation, in respect of whom or which it may be presumed that he or she or it persecuted or would persecute the person seeking recognition or would forward information to the persecutors of the person seeking recognition, if, as a result of such entry into contact, the persecutors would become aware of the fact that the person seeking recognition submitted an application for recognition or if, as a consequence of such entry into contact, the person seeking recognition or a member of his or her family were exposed to a physical threat or the liberty or security of the family members of the person seeking recognition living in his or her country of origin were exposed to a threat. It follows from that recommendation, as well as from the statutory provision which is binding on the authority, even if not in a non-exclusive manner, that the asylum procedure must be conducted as a matter of priority. However, with regard to the procedure for determining statelessness, it is necessary to highlight Section 160(1) of the Implementing Decree, which provides, as a rule of guarantee, that if the possibility of a third-country national being stateless arises in connection with the procedures covered by the Third-Country Nationals Act, the aliens policing authority must inform the person

concerned, while drawing up the record, of the possibility of applying for stateless status, the procedure to be followed and the rights and obligations associated with stateless status. In conclusion, asylum and statelessness are subject to different substantive and procedural rules, which are very different legal instruments, but in practice, the need to apply them in a simultaneous manner may arise on a case-by-case basis.

[19] 3. Article 1 (1) of the Statelessness Convention, the provisions of which have been applicable to Hungary since 19 February 2002, defines the concept of a stateless person ("a person who is not considered as a national by any State under the operation of its law"), and then, in paragraph 2 of the same Article, gives a detailed list of the grounds and conditions in which the application of the provisions of the Statelessness Convention to the person concerned is excluded.

[20] Accordingly, the Statelessness Convention does not apply to persons who are in receipt of protection or assistance from United Nations organs or bodies, other than the United Nations High Commissioner for Refugees, for the duration of such protection or assistance, or who are recognised by the authorities of their country of residence as persons having the rights and obligations pertaining to the possession of the nationality of that country; and to persons who are reasonably believed to have committed crimes against peace, war crimes or crimes against humanity as defined in international instruments; who have committed serious non-political crimes outside the State of their residence before being admitted to it; or who are guilty of acts contrary to the purposes and principles of the United Nations.

[21] However, the authentic Hungarian text of the Statelessness Convention, promulgated by Act II of 2002, leaves no doubt that both the definition and the taxonomy in paragraph 2 are to be interpreted without derogation. It is also a fact that Hungary (at the date of accession and entry into force: the Republic of Hungary) has not made any reservation to the said Article 1, and Article 38 in any event effectively excludes the possibility of such a reservation. It should be noted that the provisions of Chapters II to V of the Statelessness Convention confer certain rights (such as the right of association under Article 15, the right to engage in wage-earning employment, self-employment and liberal professions under Articles 17 to 19, housing under Article 21, public relief, labour legislation and social security under Articles 23 and 24) are linked to lawful residence in the territory of the Contracting States, while other rights do not require this (e.g. acquisition of movable and immovable property under Article 13, access to courts under Article 16). These provisions do not, however, weaken but rather strengthen the linguistic interpretation of Article 1 as set out above, since the wording makes it clear that the Contracting States have deliberately imposed an additional condition in some cases, while in others they have considered it unjustified.

[22] Point 17 of the Guidelines explicitly state the following: "Everyone in a State's territory must have access to statelessness determination procedures. There is no basis in the Convention for requiring that applicants for statelessness determination be lawfully within a State. Such a requirement is particularly inequitable given that lack of nationality denies many stateless persons the very documentation that is necessary to enter or reside in any State lawfully".

[23] The judicial initiative therefore rightly points out that Section 76 (1) of the Third-Country Nationals Act interprets Article 1 of the Statelessness Convention restrictively, when it provides that "[p]roceedings for the recognition of stateless status are opened upon the submission of a request to the immigration authority for stateless status by a person who is lawfully residing in the territory of Hungary [...]". Apart from "administrative assistance", the Statelessness Convention contains no substantive provisions on the procedure for determining statelessness, so that it is for the Contracting States to determine the procedure, but the legislature, by the contested turn of events, has not in fact created a procedural rule, but has defined the concept of "stateless person" and thus, in relation to Hungary, the status of statelessness, in a manner different from that of the Statelessness Convention.

[24] The explanatory memorandum of the Third-Country Nationals Act states the following with regard to the provision challenged in the petition: "The procedure for the determination of statelessness is initiated upon application, the submission of which is not subject to any formal requirements. However, in order to minimise the possibility of abuse, it is not sufficient merely to fall within the personal scope of the 1954 Convention, but also to reside lawfully in the territory of Hungary, which is an indispensable condition for the initiation of the procedure. It is therefore possible to exclude the possibility of irregular migrants applying for statelessness status immediately at the border or, in bad faith, immediately after a certain period of unlawful stay and after being apprehended by the aliens policing authorities. During the procedure, the law provides adequate safeguards to protect and ensure the applicant's fundamental right to a fair trial [...]".

[25] The legislator itself therefore makes it clear that, in order to exclude abuses and procedures applied for in bad faith, it has built into the procedural provisions a "check" according to which it is not enough to be a person covered by the Statelessness Convention, but that lawful residence in Hungary is also an indispensable condition.

[26] According to the defendant's decision challenged in these proceedings, both the defendant and the claimant had contacted the Embassy of the Federal Republic of Nigeria in Budapest on several occasions over the last 10 years, but the Embassy was unable to identify the claimant and therefore refused to issue a return document. According to the information provided to the defendant by the Ministry of Foreign Affairs, it is not possible to request administrative assistance for Somalia through delegations and the region of the claimant's place of birth is inaccessible to international organisations. The defendant contacted the Constitutional Protection Office and the Counter-Terrorism Centre, acting as the competent authorities in the matter of the application for stateless status, which stated that there was no risk to national security in relation to the claimant's application. On the basis of the above, the defendant concluded in its decision that the claimant had supplied indicative evidence of his statelessness in accordance with Section 79 (1) of the Third-Country Nationals Act. The asylum authority thus essentially found that the claimant was stateless, but dismissed the application on the basis of Section 76 (1) of the Third-Country Nationals Act.

[27] The Constitutional Court considers that the petitioner's argument that the rule in question, which is in fact of a substantive nature, is intended to narrow the scope of the personal scope is also confirmed by the above.

[28] Furthermore, the Constitutional Court held that the fact that Section 78 of the Third-Country Nationals Act, as well as the explanatory memorandum to the Act, contains a reference to the taking into account of the Statelessness Convention does not mean that the legislature has complied with it without any concerns.

[29] The breach of an obligation undertaken in an international treaty is not only contrary to Article Q (2) of the Fundamental Law, but also to Article B (1), which guarantees the rule of law. Bearing in mind that a statute may not be contrary to the Fundamental Law [Article T (3) of the Fundamental Law], the Constitutional Court must annul a domestic statute (legislative provision) which is contrary to international law on the ground that it infringes Article Q (2) or Article B (1).

[30] On the basis of the foregoing, the Constitutional Court held that Section 76 (1) of the Third-Country Nationals Act, by its restrictive interpretation of Article 1 of the Statelessness Convention, infringes Article Q (2) of the Fundamental Law, which provides that Hungary shall ensure the consistency of international law and Hungarian law in order to fulfil its obligations under international law.

[31] However, the Constitutional Court stresses that neither Article 1 (1) of the Statelessness Convention nor the provision of Section 76 (1) of the Third-Country Nationals Act which remains in force after its annulment by this Decision implies that the act of a foreign national who has unlawfully entered or stayed in Hungary becomes lawful. The provision which remains in force means nothing more than that, in the case of an application by a foreign national, the initiation and conduct of the procedure for the establishment of stateless status may not be refused on the ground of the absence of lawful residence.

[32] 4. The judicial initiative sought a finding that Section 76 (1) of the Third-Country Nationals Act, which states that the wording "lawful residence" is unconstitutional. However, in the Constitutional Court's view, since the regulation of the procedure arising from the Statelessness Convention falls within the competence of the Contracting States, it is a specifically procedural issue that the Third-Country Nationals Act only entitles an applicant residing in Hungary to submit an application for stateless status, and therefore the annulment of the term "lawfully" would ensure the removal of the fundamental law violation. However, in the course of its proceedings, the Constitutional Court found that the partial annulment of the contested provision of Section 76 (1) of the Third-Country Nationals Act by this Decision necessitates a review of the Third-Country Nationals Act, in particular with regard to the provision of stateless persons with identity and travel documents on the basis of Articles 27 and 28 of the Statelessness Convention, and a review of certain legislation also applicable to stateless persons with regard to the specific rights regulated by the Statelessness Convention, which are made conditional on the lawfulness of residence. In the Constitutional Court's view, it is of fundamental importance for legal certainty to ensure the necessary time for legislative measures concerning alien policing procedures, taking into account both national interests and the obligations of the European Union, and therefore, based on Section 45 (4) of the Constitutional Court Act, it decided to annul the challenged legislative provision *pro futuro*. Since the Constitutional Court found that Article Q (2) of the Fundamental Law was

unconstitutional, it did not examine the contested provision in the context of Article XV (2) of the Fundamental Law invoked by the petitioner.

[33] 5. In addition to finding that the provision at issue was in conflict with the Fundamental Law, the judge hearing the case also sought a finding that the provision at issue was inapplicable generally and in the specific case. The Constitutional Court decided, for reasons of legal certainty, to annul the contested provision *pro futuro*, thus the annulled provision must be applied until the date of its expiry. In the light of the foregoing, the Constitutional Court dismissed the application of the general prohibition of application of the provision in question to the specific case, as set out in Section 45 (4) of the Constitutional Court Act, also in the interests of legal certainty.

[34] 6. The Constitutional Court ordered the publication of this Decision in the Hungarian Official Gazette pursuant to Section 44 (1) of the Constitutional Court Act.

Budapest, 23 February 2015

Dr. Péter Paczolay sgd.,
Chief Justice of the Constitutional Court

Dr. István Balsai sgd., Justice	Dr. Miklós Lévay sgd., Justice
Dr. Ágnes Czine sgd., Justice-Rapporteur	Dr. Béla Pokol sgd., Justice
Dr. Egon Dienes-Oehm sgd., Justice	Dr. László Salamon sgd., Justice
Dr. Imre Juhász sgd., Justice	Dr. Tamás Sulyok sgd., Justice
Dr. László Kiss sgd., Justice	Dr. Péter Szalay s.k., Justice
Dr. Barnabás Lenkovics sgd., Justice	Dr. Mária Szívós sgd., Justice

Dr. András Varga Zs. sgd., Justice