

Decision 3002/2022 (I. 13.) AB
on the annulment of a judicial decision

In the subject-matter of a constitutional complaint, the panel of the Constitutional Court has adopted the following

decision

The Constitutional Court establishes that the ruling No.104.Kpk.750.204/2021/5. of the Budapest-Capital Regional Court and the resolutions No.102/2021 (XI. 9.) and No.105/2021 (XI. 9.) of the General Assembly of the National Roma Self-Government are contrary to the Fundamental Law, and therefore annuls them.

Reasoning

I

[1] 1 Petitioner 1 and petitioner 2 through their authorized legal representative (Dr. György Mester, attorney-at-law) submitted a constitutional complaint on the basis of section 27 (1), section 26 (2) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC) and section 233 of the Act XXXVI of 2013 on Electoral Procedure (hereinafter: AEP) against the ruling No. 104.Kpk.750.204/2021/5 of the Budapest-Capital Regional Court and against section 117/A and section 117/B of the Act CLXXIX of 2011 on the Rights of Nationalities (hereinafter: ARN)

[2] The Constitutional Court establishes that the constitutional complaint filed on the basis of section 27 (1) of the ACC can be interpreted in relation to petitioner 1, while the constitutional complaint filed on the basis of section 26 (2) of the ACC can be interpreted in relation to petitioner 2, therefore, in accordance with section 58 (3) of the ACC and section 34 (4) of the Rules of Procedure, the Constitutional Court shall the examine and decide the two complaints separately. The present procedure only covers the examination of the complaint pursuant to section 27 (1) of the ACC, and therefore in this document petitioner shall mean petitioner 1. The Constitutional Court shall consider the complaint pursuant to section 26 (2) of the ACC separately, under case number IV/4730/2021.

[3] 1.1 The petitioner is a member of the General Assembly of the National Roma Self-Government (hereinafter: NRSNG), a representative of the nationality self-government, and the applicant of the non-contentious proceedings that preceded the constitutional complaint. The petitioner submitted that at the General Assembly of NRSNG on 9 November 2021, the NRSNG adopted by qualified majority Annex 7 of its Rules of Organisation and Operation (hereinafter: ROO) on the internal procedures for setting up the nationality list. On the basis of the amended ROO, the General Assembly also decided by qualified majority in its Resolution No. 102/2021 (XI.9.) on setting up the list for the 2022 parliamentary elections and the number of candidates to be included on the list, and finally, in closed session, following a secret ballot, in its General Assembly Resolution No. 105/2021 (XI.9.) on the names and order of the candidates. The petitioner filed an application for review with the Budapest-Capital Regional Court against the resolutions of the NRSNG containing the above decisions, due to infringements of the law that he had experienced.

[4] 1.2 The Regional Court upheld the revised resolutions. In the challenged ruling, the court justified the rejection of the petitioner's application partly on the basis of the fact that the petitioner failed to substantiate with evidence the allegations concerning the violation of the internal rules of procedure for setting up the nationality election list, thus the violation of the secrecy of the voting and the lack of influence on the decision. The court emphasised that the General Assembly adopted the contested resolutions by qualified majority and that the ROO is not a law, its application is not subject to publication, and its adoption and amendment are not subject to the formal requirements of a legislative act. The court established that no infringement of the law had been found in connection with the contested amendment to the ROO and that the General Assembly was free to decide on the selection of candidates and their order of precedence, and that no unlawful act had been committed in this respect.

[5] 2 According to the petitioner's position expressed in the constitutional complaint, the court did not properly conduct the evidentiary procedure with regard to the violations he had experienced, which violates his right to a fair trial under Article XXVIII (1) of the Fundamental Law. As a basis for this, he submitted that, in view of the closed session, the parties concerned had no real opportunity to prove the unlawfulness of the acts committed during the procedure for setting up the nationality list, but that the trial court could have examined the veracity of the allegations of its own motion. The petitioner pointed out that persons who were not entitled – on the grounds of unworthiness – to take part in the decision-making of the General Assembly had also taken part in making the decision, but that the court had not taken this into account because of an inadequate assessment of the evidence. That omission, in addition to emptying out the right to hold public office, also resulted, according to the petitioner, in a breach of the prohibition of discrimination laid down in Article XV (2) of the

Fundamental Law, since the rights of a homogeneous group of persons entitled to hold public office could also be exercised by persons not belonging to that group. Furthermore, according to the petitioner, the court failed to remedy the breach of fundamental rights caused by the resolutions infringing Article XXIV (1) of the Fundamental Law.

He also invokes a breach of legal certainty enshrined in Article B (1) of the Fundamental Law, since the persons entitled to stand as a candidate were not informed in good time of the rules governing the nomination and election, nor were the members of the General Assembly of the NRSZ entitled to set candidates given the opportunity to consult the potential candidates. Thus, the number of persons entitled to stand as a candidate was practically limited to the members of the General Assembly present, and the necessary time to familiarise themselves with the amended rules of the ROO was not provided. He stressed that the text of Annex 7 to the ROO in force before 9 November 2021 did not contain any substantive rules on setting up the list. In his view, the way of convening the General Assembly, the short time between sending out the invitation and holding the General Assembly, and even more so the short periods between the access to the information of the set of rules on the nomination and the election and the adoption and application of these rules substantially limited the relevant rights and legitimate interests.

II

[6] The provisions of the Fundamental Law referred to by the petitioner:

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

"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."

"Article XXIV (1) Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to state the reasons for their decisions, as provided for by an Act."

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

III

[7] 1 The Constitutional Court proceeded with the case in a panel on the basis of section 50 (1) of the ACC and section 5 (1) of the Rules of Procedure.

[8] 2 Pursuant to section 233 (1) of the AEP, constitutional complaint against a judicial decision taken in a legal remedy procedure concerning a resolution of an electoral body may be submitted to the Constitutional Court within three days of the notification of the resolution challenged. The ruling of the Budapest-Capital Regional Court was received by the former legal representative of the petitioner on 25 November 2021, and his constitutional complaint was submitted on 28 November 2021, within the deadline.

[9] The applicant's legal representative has attached his power of attorney.

[10] The petition complies with the requirements for an explicit request under section 52 (1b) (a) to (f) of the ACC only in the scope of the alleged violation of due preparatory time stemming from the rule of law guaranteed in Article B (1) of the Fundamental Law and the right to a fair trial enshrined in Article XXVIII (1) of the Fundamental Law. Article XXIV of the Fundamental Law is not applicable to judicial proceedings, and the infringement of Article XV (2) of the Fundamental Law is invoked by the petitioner solely through Article XXVIII (1) of the Fundamental Law, without submitting any individual substantive reasoning.

[11] On the basis of section 56 (1) and (2) of the ACC, the Constitutional Court shall examine in its discretionary power the content-related requirements of the admissibility of a constitutional complaint – in particular the affectedness pursuant to sections 26 to 27 of the ACC, the exhausting of legal remedies and the conditions specified in sections 29 to 31 of the ACC.

[12] It can be concluded that the petitioner is considered both entitled and concerned, as he submitted his constitutional complaint in the context of his individual case. The petitioner lodged the constitutional complaint against the decision of the Budapest-Capital Regional Court on the merits of the case, which could not be challenged by further appeal, on the grounds of violation of his rights guaranteed by the Fundamental Law, and thus the petition also meets the statutory requirements in this respect.

[13] 3 Section 29 of the ACC specifies as a substantive condition of admissibility that the constitutional complaint should refer to a violation of fundamental law or a question of fundamental constitutional significance that has a substantial impact on the judicial decision.

[14] 3.1 The petitioner's allegation of a violation of the right to a fair trial under Article XXVIII (1) of the Fundamental Law was based primarily on the fact that the court did

not find evidence for the petitioner's objections concerning the voting method at the general assembly and the persons participating in the voting.

[15] The constitutional requirement of the right to a fair court procedure sets the minimum expectation for judicial decisions to have the participating parties' comments on the essential parts of the case examined with due scrutiny and to give account of evaluating it in the decision {Decision 7/2013. (III.1.) AB, Reasoning [34]}. In the course of examining the fairness of the procedure, the Constitutional Court shall not examine whether or not the pieces of evidence and the arguments presented in the reasoning are well-founded, whether the law-applying authority evaluated correctly the pieces of evidence obtained and the arguments presented in the procedure, or whether the facts established in the particular case, as a result of judicial assessment, are well-founded. Actually, establishing the facts of the case as well as evaluating and weighing pieces of evidence is a duty reserved in the rules of procedural law for the law-applying body{for example, most recently: Decision 3481/2021. (XI.30.) AB, Reasoning [21]}.

[16] In the light of all these aspects, the Constitutional Court concluded that the constitutional complaint, in the context of the alleged violation of Article XXVIII (1) of the Fundamental Law, in fact challenges the correctness of the judicial assessment of the evidence and the conclusions drawn by the court as a result. These arguments, however, neither individually nor taken as a whole, raise a question of fundamental constitutional significance or a doubt of violation of the Fundamental Law which would have a material effect on the judgement of the court. The constitutional complaint does not fulfil any of the alternative conditions for admissibility under section 29 of the ACC in relation to the alleged infringement of Article XXVIII (1) of the Fundamental Law.

[17] 3.2 At the same time, the Constitutional Court considers it a question of fundamental constitutional importance to examine whether the requirement of sufficient time to prepare, arising from the rule of law under Article B (1) of the Fundamental Law, was fulfilled in connection with the adoption of the NRSZ General Assembly resolutions reviewed by the ruling of the Budapest-Capital Regional Court.

[18] 4 On the basis of the above, the Constitutional Court examined the merits of the constitutional complaint, applying section 31 (6) of the Rules of Procedure, without conducting an individual admission procedure.

IV

[19] 1 According to section 21/A of the ARN, the representation of national minorities in the National Assembly may be performed by a) the national minority representative obtaining a mandate from the national minority list, b) the national minority advocate. Section 50 of the ARN provides that national minorities may establish, by way of direct

elections national-level self-governments of national minorities. According to section 52 of the ARN, the number of the representatives of national self-governments of national minorities shall be forty-seven if the number of voters recorded in the national minority register is more than fifty thousand on the day when the election is called.

[20] According to section 88/A of the ARN, the detailed rules of the operation of the national minority self-government are determined by the organisational and operational regulations. Based on section 113 (a) of the ARN, the local national minority self-government shall determine – within the statutory framework including – with a qualified majority, in their non-delegable powers, the conditions of its lawful operation, including the detailed rules of its organisation and operation within three months of its inaugural sitting, and shall further amend them within thirty days as and when it becomes necessary.

[21] Pursuant to section 117 (1) of the ARN, the national self-governments of national minorities shall determine the conditions of their lawful operation in accordance with section 113. According to section 117/A (1), the general assembly of the national self-government of the national minority shall decide on setting up the national minority list by a resolution in its non-delegable competence not earlier than 1 October of the calendar year preceding the general election of Members of Parliament, and not later than twenty calendar days after the general election of Members of Parliament has been called. Pursuant to section 117/A (3) (a), the decision shall contain, in addition to the other conditions specified in the Act, the names of the candidates and the serial number of their places on the list.

[22] 2 On the basis of the above provisions, it may be established that the national minority representative of the National Self-Government of the National Minority (hereinafter: NSG) may participate in the work of Parliament as a Member of Parliament, if applicable, according to the votes cast for the national minority list in the parliamentary elections, on the basis of the result obtained there. In view of this circumstance, the decision on the members of the NSG on the nationality list, on the one hand, and on the order of precedence of the members, on the other, may have national significance – ultimately even affecting the composition of the National Assembly. For all these reasons, the guarantee provisions relating to the electoral procedure are of particular importance in the context of this election.

[23] In the present case, the NRSNG decided in a single sitting on the amendment of the OOR, which also related to the electoral procedure, and then, at the same sitting, essentially as a continuation of the sitting, decided on the candidate leading the list of self-government and the order of precedence of the representatives on the list.

[24] 3 Most recently, the Constitutional Court summarised in the Decision 9/2021 (III.17.) AB its case-law in relation to the due preparatory time deducted from Article B

(1) of the Fundamental Law. "According to the consistent case-law of the Constitutional Court, ensuring sufficient time for preparation is a principle deriving from the rule of law and the requirement of legal certainty that is part of the rule of law, according to which the date of entry into force of a law shall be determined in such a way as to allow the addressees sufficient time to prepare for the application of the law. This requirement is also reiterated in section 2 (3) of the Act CXXX of 2010 on Legislation (hereinafter: AL).

It is an essential element of sufficient time to prepare, following from Article B (1) of the Fundamental Law, that all the recipients of the legislative provisions for whom the law imposes new or additional obligations – let them be the bodies responsible for implementing the law (law-applying bodies) or other persons and bodies concerned with voluntary compliance with the law – are potentially able to fulfil their obligations and do not commit a breach of duty or unlawful conduct against their will. Both the application of the law and the observance of the law require knowledge of the law, therefore from this point of view, preparation for the application of the rule and knowledge of the law are in a goal-means relationship with each other {Decision 6/2013. (III.1.) AB, Reasoning [233] to [236]; Decision 24/2019. (VII.23.) AB, Reasoning [43]}. The determination and provision of sufficient time to prepare for the application of the law is a matter for the discretion and decision of the law-maker, in which context an infringement of the Fundamental Law can only be established in the event of a blatant failure to provide or the absence of a period of time to prepare for the application of the law which seriously jeopardises or infringes legal certainty {Decision 3209/2015. (XI.10.) AB, Reasoning [51]}. Accordingly, the Constitutional Court's competence in the context of the requirement of preparation time cannot extend to the examination of the exact time required for the preparation for the application of a specific piece of legislation, as this is not a question of constitutional law; the Constitutional Court may assess, in the context of the requirement of preparation time stemming from Article B (1) of the Fundamental Law, only if the preparation time is missing or is so blatantly short that it is clear that the addressees of the legislation would not be able to fulfil their obligations, despite their good faith, best intentions and efforts, or would be able to do so only at the cost of extraordinary efforts {Decision 24/2019. (VII.23.) AB, Reasoning [43]}." {Decision 9/2021. (III.17.) AB, Reasoning [61] to [62]}

[25] 4 Based on section 23 (3) of the AL, the examined resolutions of the General Assembly of the NRSNG are based on the amended OOR of the national minority self-government as a public law regulatory instrument functioning as a norm, because they apply to the activities of the national minority self-government by determining the nomination of candidates and the order of precedence of the candidates on the national minority list. Pursuant to section 117/A (1) of the ARN, the general assembly

of the NRSNG must decide on setting up the nationality list within the statutory time limit specified, on the basis of a non-delegable competence. Thus a statutory provision determines the specific activity which must be regulated by the NRSNG in a normative decision based on a public law regulatory instrument. In order to set up a nationality list, it is necessary to regulate the procedural rules and the details of the procedure. Because of the close link with the right to vote as a fundamental political right, the Constitutional Court considers the resolutions of the general assembly based on these public law regulatory instruments to be decisions with normative content that must also comply with the requirements of the rule of law regarding sufficient time for preparation. The fundamental rights involved (active and passive electoral rights) and the rules guaranteeing them (nomination, nationality list, order of candidates on the list), as well as the national importance of the election, justify the application of the requirement of sufficient time for preparation to these normative decisions as well, as the "appropriate period" between the adoption of a decision having an impact on fundamental rights and its application.

[26] It is contrary to the Fundamental Law if the preparation period is so short that it is impossible to adapt to the changed legislation or if no preparation period is provided at all. This constitutional limitation is of particular importance, either as a new regulation or an amendment of an existing regulation.

[27] In the present case, the circumstance that the General Assembly of the NRSNG had substantially amended Annex 7 to the ROO, which directly affected the election procedure, and then immediately applied it (without providing a preparation period), was a circumstance that substantially affected the voting and thus the nomination of candidates, making it essentially impossible to adapt to the amended rules. Neither the members of the ORÖ present nor the members not present but with active voting rights had the opportunity to participate directly in the vote on the basis of their position formed in the context of the amendment. In addition, voters belonging to the national Roma community were not given the opportunity to express their views on the amendment by informing their representatives of their position on the nomination of candidates, who could then vote on the order of candidates based on their own convictions. This infringes the requirement of legal certainty enshrined under Article B (1) of the Fundamental Law to such an extent that the resolutions of the general assembly ordering the setting up of the list and declaring the act of voting, as well as the court decision reviewing their legality, are therefore also contrary to the Fundamental Law. In the context of this case, the Constitutional Court established that in electoral matters of national significance affecting fundamental rights, a sufficient period of time must elapse between the substantive amendment of the ROO of the self-government affecting the electoral procedure and the vote held on the basis of the amended rules, which satisfies the requirement under the Fundamental Law for a

sufficient preparation time in such a way that the representatives of the self-government can prepare for it.

[28] 5 The finding made by the Budapest-Capital Regional Court that “in the absence of an unlawful act, the requirement of legal certainty laid down in Article B of the Fundamental Law could not be infringed” cannot be upheld.

[29] A violation of the requirement of sufficient time to prepare cannot be inferred from a violation of the law alone, since it derives from Article B (1) of the Fundamental Law itself, and therefore the absence of a violation of the law does not in itself allow a reasonable inference to be drawn as to the absence of a violation of the constitution. On the basis of this element of the reasoning, it can be clearly established that the court failed to recognise the fundamental rights context of the case and failed to assess it in accordance with the Fundamental Law.

[30] Despite the extremely short time-limit applicable in electoral cases, the court should have examined all the circumstances which could in any way adversely affect the fairness of an election of national importance.

[31] 6 Based on the above, the Constitutional Court established that the ruling No. 104.Kpk.750.204/2021/5 of the Budapest-Capital Regional Court was in conflict with the Fundamental Law, therefore annulled it in accordance with section 43 (1) of the ACC.

[32] According to section 43 (4) of the ACC, the Constitutional Court, when annulling a judicial decision, may also annul other judicial decisions or the decisions of other authorities which were reviewed by the given decision. In the given case, the Constitutional Court is of the opinion that since the lack of sufficient time for preparation is directly related to the resolutions No. 102/2021 (XI.9.) and No. 105/2021 (XI.9.) of the General Assembly of the NRSZ, and since the resolutions in this election case are subject to the same legal effect as the decisions of public authorities, their annulment is justified.

Budapest, 13 December 2021.

Dr. Miklós Juhász head of the panel,
Justice of the Constitutional Court

Dr. Miklós Juhász head of the panel,
Justice of the Constitutional Court on
behalf of Justice *dr. Ágnes Czine* unable
to sign

Dr. Miklós Juhász head of the panel,
Justice of the Constitutional Court on
behalf of Justice *dr. Attila Horváth*
unable to sign

Dr. Miklós Juhász head of the panel,
Justice of the Constitutional Court on
behalf of Justice *dr. Imre Juhász* unable
to sign

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