

Decision 3417/2022 (X. 21.) AB
on the annulment of a judicial decision

The panel of the Constitutional Court, in the subject-matter of a constitutional complaint – with concurring reasoning by Justice dr. Ildikó Hörcherné dr. Marosi – adopted the following

decision:

1. The Constitutional Court establishes that the ruling No. 3.M.17/2018/7 of the Gyula Administrative and Labour Court and the ruling No. 9.Mpkf.25.782/2018/3 of the Gyula Regional Court are contrary to the Fundamental Law and, therefore, annuls them.

2. The Constitutional Court establishes that the ruling No. 3.M.24/2018/7 of the Gyula Administrative and Labour Court and the ruling No. 9.Mpkf.25.781/2018/3 of the Gyula Regional Court are contrary to the Fundamental Law and, therefore, annuls them.

3. The Constitutional Court dismisses the constitutional complaints aimed at establishing that section 227 (3) of the Act CXXX of 2016 on Civil Procedure is in conflict with the Fundamental Law and at its annulment.

Reasoning

I

[1] 1 The petitioner, through its legal representative (Independent Police Trade Union, Dr. Gábor Tordai and Dr. Tamás Oláh appointed bar counsels), filed a constitutional complaint with the Constitutional Court pursuant to section 26 (1) and section 27 of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC). In its application, the petitioner asked for the declaration that the ruling No. 9.Mpkf.25.782/2018/3 of the Gyula Regional Court was contrary to the Fundamental Law and for its annulment with an effect to be extended to the ruling No. 3.M.17 /2018/7 of the Gyula Administrative and Labour Court, and the declaration that section 227 (3) of the Act CXXX of 2016 on Civil Procedure (hereinafter: ACP) is contrary to the Fundamental Law and the

annulment of the same, on the grounds of the alleged infringement of Article XXIV (1), Article XXVIII (1) and (7) and Article XIII (1) of the Fundamental Law.

[2] The substance of the case on the basis of which the constitutional complaint was lodged may be summarised as follows, on the basis of the facts established by the courts hearing the case, the decisions they had taken and the submissions made by the petitioner.

[3] 1.1 The petitioner, through his legal representative, brought an action before the court for the payment of his salary arrears for a period of about two years, because, in his view, his employer had not paid him the salary guaranteed to him by law in accordance with the relevant legal provisions. Consequently, the applicant suffered financial loss as quantified in the application, for the reimbursement of which by the employer police headquarters he sought an order within the time-limit for bringing his claim. In the statement of claim, the applicant's legal representative expressly requested that the hearing be held in his possible absence. The court of first instance, in its ruling of summoning, scheduled a hearing in which the petitioner was summoned by providing the information that the party must ensure that he is able to make a statement on matters of fact and evidence at the hearing in person or through his legal representative. The petitioner appeared in person at the hearing, but the administrative and labour court terminated the proceedings on the basis of section 227 (3) of the ACP, as the legal representative failed to attend the first hearing. The court found that the petitioner was qualified as a party with legal representation, but the legal representative failed to appear at the first hearing, despite being duly summoned, and requested that the hearing be held in absentia. The petitioner did appear in person at the hearing, but nevertheless, in accordance with section 227 (3) of the ACP, "the applicant failed to appear at the first hearing in terms of procedural law", therefore the court, applying the rule laid down in section 227 (3) of the ACP, terminated the proceedings of its own motion pursuant to section 240 (1)(g) of the ACP.

[4] The Gyula Regional Court, acting on the appeal of the petitioner – who in his appeal referred, inter alia, to the fact that the court, in the information notice attached to the summons to appear at the hearing, had merely reminded him that he was obliged to ensure that he could make a statement on matters of fact and evidence at the hearing, either in person or through his representative, and that the national case-law also supported his position, that the presence of either the party or its legal representative at the hearing is required, and that therefore, on the whole, he disputed that there had been any failure on his part – upheld the ruling of the first instance administrative and labour court that had terminated the proceedings, as one being correct with regard to its reasoning as well. In the reasoning of its decision, the court of second instance first of all pointed out the provisions of section 227 (3) of the ACP, according to which a hearing must be deemed to have been missed by a party acting with legal

representation even if the party itself appeared in person but the legal representative did not appear despite being duly summoned to do so, and that the petitioner confirmed the right of representation of his legal representative in a statement made at the hearing, while the respondent did not request that the hearing be held. The provisions of the law relied on by the applicant in the appeal are provisions relating to the conciliation of the parties and their statements, which may be applied only in cases where the parties have appeared at the hearing, and the hearing is not to be regarded as a default or the proceedings terminated in view of the statement of the other party.

[5] The petitioner, through his legal representative, resubmitted his application to the court, but due to the rules on the limitation of actions, he could only submit his claim for a limited period of time, and thus for a reduced amount, compared to the original application.

[6] The petitioner then brought a constitutional complaint before the Constitutional Court, supplemented by documents submitted following the Secretary General's request for the submission of missing documents. According to his application, the judicial decisions in his case, which led to the termination of the proceedings, infringed Article XXVIII (1) of the Fundamental Law by disregarding his "right to adequate, comprehensive and lawful information", included in his "right to a fair trial". Thus, the ruling of the court of first instance summoning the applicant to a hearing should, in the petitioner's view, have clearly set out in the ruling the legal consequence of the failure to act, which was subsequently applied, thereby drawing the applicant's attention to the legal consequences applicable. The court failed to comply with this obligation to inform the applicant, since the ruling summoning the applicant merely required the applicant to make a statement in person or through his representative. In support of this argument, the petitioner cites in his application the first sentence of section 133 (2) of the ACP, according to which "the addressee shall be warned in the summons of the consequences of his failure to appear and shall be provided with the necessary information in relation to his position in the proceedings".

[7] According to the petitioner, the use of a term referring to alternativity in the court's notice of summons in relation to the litigant and his legal representative "presumed that his personal presence and statement could not in any event be regarded as a default". In addition, the petitioner also criticises the courts' incorrect interpretation of the special rules of the ACP relating to labour disputes, and – as a further basis for his claim – points out that, in his view, based on his action, the failure of the legal representative to act should not impair the right of the litigant to have the proceedings carried out on the merits before the court. In his view, the fact that he, as the applicant, appeared in person at the hearing clearly demonstrated that he had "the will to bring proceedings, the demand to proceed and to settle the dispute". In his view, "circumstances beyond the control of the litigant", such as the absence of the legal

representative due to the clash of dates of the hearing, may not have the effect of restricting or excluding his right to pursue his interests, particularly in view of the fact that in labour disputes the termination of proceedings may result not only in the limitation of part of the claim but also in the loss of the possibility of pursuing the claim in its entirety.

[8] In support of the alleged violation of the Fundamental Law by section 227 (3) of the ACP, the petitioner submits that the termination of proceedings on the ground of the representative's failure to attend is not known in other codes of procedure and that, in his view, introducing and applying this rule in the field of labour law is also unjustified. In his view, the mandatory rule of the ACP challenged by him is also contrary to the provisions known as the general rules of procedure, as they contain possibilities of excuse for absence, prior notification of the absence or the remedying of any deficiencies. In his opinion, the termination of the proceedings based on the absence of the legal representative is not proportionate to the gravity of the omission, since while in the case of other deficiencies the rules provide for the possibility of remedying the deficiencies, the consequences of the absence – which are typically due to difficulties in work organisation or transport – cannot be excused or remedied under the provisions of the ACP challenged by the petitioner. In his view, this new rule in the ACP has not stood the test of practice, its application causes unjustified or disproportionate difficulties in the work of legal representation, therefore "our trade union had to submit some fifty applications for postponement, which has made the work of both parties and the court unnecessarily difficult. On several occasions we have had to file repeated applications for postponement in the same case."

[9] 1.2 Another petitioner also filed a constitutional complaint with the Constitutional Court by way of his legal representative of (Independent Police Trade Union, Dr. Gábor Tordai and Dr. Tamás Oláh bar counsels) under section 26 (1) and section 27 of the ACC. In its application completed upon the Secretary General's call for the submission of missing documents, the petitioner asked for the declaration that the ruling No. 9.Mpkf.25.781/2018/3 of the Gyula Regional Court was contrary to the Fundamental Law and for its annulment with an effect to be extended to the ruling No. 3.M.24./2018/7 of the Gyula Administrative and Labour Court, and the declaration that section 227 (3) of the ACP is contrary to the Fundamental Law and the annulment of the same, also on the grounds of the alleged and claimed infringement of Article XXIV (1), Article XXVIII (1) and (7) and Article XIII (1) of the Fundamental Law. The Constitutional Court found that this application was identical in scope and content to the application for annulment of the decision, except for the amount of the amount claimed for the salary loss, the identity of the applicants and the date on which the judicial decisions were taken, and also in its reasoning and the identity of the legal representatives, as well as the content and grounds of the judicial decisions, in full

compliance with the petition presented in point I/1. 1 of the decision's reasoning (Reasoning [3] et seq.), the Constitutional Court has therefore refrained from giving a detailed presentation of the case and the motion, registered before it under No IV/173/2019.

[10] 2 At the same time, the Constitutional Court, in accordance with section 58 (2) of the ACC and section 34 (1) of the Rules of Procedure of the Constitutional Court, merged the petitions – specifically joining case No. IV/173/2021 to the case No. IV/172/2019 – and examined it in one procedure, in one decision, because it had found on the basis of the above that the petitioners had submitted to the Constitutional Court constitutional complaints with identical content with essentially identical facts, against court decisions having identical reasoning and identical content, against the same legal provision, and acting with the same legal representatives.

[11] 3 The Constitutional Court first of all, had to examine on the basis of section 56 of the ACC whether the constitutional complaints fulfilled the statutory conditions for admissibility.

[12] 3.1 In this context, the Constitutional Court found that the petitioners had filed their complaints under section 27 of the ACC within the sixty-day time limit set out in section 30 (1) of the ACC against the challenged judicial decisions. As regards their complaints against the statutory provision, it can be established that the challenged provision was and is applied by the courts which heard their case, and their complaints under section 27 of the ACC are directed against the court rulings which constitute the final decision of the proceedings. The applicants have the right to lodge a constitutional complaint, and their involvement is beyond doubt, since they were parties to the proceedings concluded by the contested decision and the contested provision of the law which led to the result they complain of was applied in their case.

[13] 3.2 The applications submitted in the constitutional complaints comply with requirement of explicitness under section 52 (1b) of the ACC, as they contain (a) the statutory provisions that establish the competence of the Constitutional Court to rule on the petitions and establish the petitioners' entitlement to file a petition [section 26 (1) and section 27 of the ACC]; (b) the grounds for initiating the procedure (the procedure and decision of the courts and the legal norm applied by them have caused a violation of the fundamental rights guaranteed by the Fundamental Law); (c) the judicial decisions or provisions of the law to be examined by the Constitutional Court; (d) the provisions of the Fundamental Law that are alleged to have been infringed; (e) in relation to Article XXVIII (1) of the Fundamental Law, a statement of reasons as to why the challenged judicial decisions or norm of the law are contrary to their right to a fair trial; (f) an express request that the Constitutional Court declare the judicial

decisions or the norm challenged in the petitions to be contrary to the Fundamental Law and annul them.

[14] Section 52 of the ACC thus expressly lays down the requirement of an explicit request, which includes the obligation to state the reasons why the challenged provision of the law or judicial decision is contrary to the provision of the Fundamental Law stated in the petition [section 52 (1b) (e)]. The petitions do not satisfy this requirement in relation to Article XIII (1), Article XXIV (1) and Article XXVIII (7) of the Fundamental Law, since, apart from the wording of the provisions of the Fundamental Law cited, the petitions do not contain any reasoning as to why and to what extent the rights guaranteed by those provisions of the Fundamental Law are infringed by the judicial decisions or the provision of the law challenged. As already stated by the Constitutional Court in its Decision 34/2014 (XI.14.) AB (Reasoning [212]): "In the absence of a statement of reasons, the petition fails to meet the requirement of explicitness under section 52 (1b) of the ACC, therefore it is not possible to judge upon it", accordingly, the elements of the complaint based on the alleged and claimed violation of Article XXIV (1), Article XIII (1) and Article XXVII (7) of the Fundamental Law could not be examined by the Constitutional Court on the merits.

[15] 4 Section 29 of the ACC stipulates as a substantive condition for admissibility that a constitutional complaint that meets the other statutory conditions shall raise a question of fundamental constitutional significance or refer to an infringement of fundamental law that materially affects the judicial decision. It is for the Constitutional Court to assess whether these conditions are met. In the cases examined, the Constitutional Court assessed as a fundamental constitutional issue, on the basis of the petitions, whether the judicial decisions resulting in the termination of the proceedings, i.e. the absence of the administration of justice on the merits or the failure of the court to do so, were due to the absence of the legal representative from the hearing, and thus to the party's default, taking into account the fact that, the failure to inform and instruct the litigant on the legal consequences of the failure to act, as required by the code of procedure, could have caused a violation of the petitioners' right to apply to the courts, including the right to a hearing on the merits and to a fair hearing of their claim, and thus to a reasoned decision on the merits, in breach of Article XXVIII (1) of the Fundamental Law.

II

[16] 1 The provisions of the Fundamental Law referred to in the motions:

"Article XIII (1) Everyone shall have the right to property and inheritance." Property shall entail social responsibility."

“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”.

[...]

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

[17] 2 The provision of the ACP challenged by the petitioners:

“Section 227 (3) If the legal representative of a party fails to appear despite having been duly summoned to do so, and if the person appearing as legal representative fails to prove his right to represent the party or is not entitled to act as representative, the hearing shall be deemed to have been missed on the part of the party even if he or his other representative appeared in person. If providing the proof of the right of representation is not carried out as required, the court shall summon within a short time the person who has appeared to furnish proof of the right of representation in due form.”

III

[18] The constitutional complaints are in part well-founded, for the reasons set out hereunder.

[19] 1 In order to assess the issue raised by the constitutional complaints, the Constitutional Court first examined the petitioners' concerns against the judicial decisions, which are based on Article XXVIII (1) of the Fundamental Law, and the infringement of certain elements of this fundamental right, namely the right to access to a court, the right to a fair hearing of the merits of the case and the right to a fair judicial decision taking a position regarding the claim brought before the court, i.e. the right to a reasoned decision on the merits of the case.

[20] The petitioners argued that the court decisions in their case, which resulted in the termination of the proceedings, caused a violation of their right to a fair trial by ignoring the violation by the courts of their right to adequate, comprehensive and lawful information as also provided for specifically in the ACP. The rulings of the courts of first instance summoning for a hearing, if they had complied with the relevant statutory provision, should have clearly drawn the applicants' attention to the legal

consequences of the absence of the legal representative, in particular in view of the fact that the legal disadvantage applicable in this case could result in the termination of the proceedings, that is to say, the refusal of the administration of justice by the court, under the statutory provision. The courts failed to comply with their obligation to provide information, which is set out in the ACP with specific content and binding effect, and indeed provided information which was manifestly incomplete, misleading and ambiguous, by merely drawing the attention of the applicants in the summoning rulings to the fact that either they or their legal representatives were required to make a statement at the hearing and then applied a possible legal consequence of the party's failure to appear at the hearing to their case; i.e. the termination of the proceedings, and ultimately the refusal to commence the administration of justice.

[21] 2 According to Article XXVIII (1) of the Fundamental Law, 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.

[22] The Constitutional Court recalls, first of all, that it has a well-established and consistently applied case-law on the content of Article XXVIII (1) of the Fundamental Law relied on by the applicant. As it pointed out by the Constitutional Court in its Decision 8/2020 (V.13.) AB, the right guaranteed by this Article "does not imply a fundamental right to a judicial procedure leading to material justice. Nor does this fundamental procedural right express a moral value judgement. The right to a fair trial protects the quality of the proceedings as a whole, which is unlimited because it is itself the result of a legal discretion. Its content consists of various sub-rights. One of these is the right to turn to court, [...]" which "[...] does not detach the court from the laws, but requires the court to measure the claims in dispute against the standards of the applicable substantive and procedural law, to identify all relevant questions of law and to decide them by interpretation of the law" (Reasoning [50]). The right to turn to court imposes on the State the obligation to provide a judicial channel for the adjudication of disputes [Decision 59/1993 (XI.29.) AB, ABH 1993, 353]. Moreover, according to the case-law of the Constitutional Court, the right to the judicial way, i.e. to have one's case judged by a court includes as an essential element the quality of the procedure: it is the reason behind turning to the court [Decision 35/2002 (VII. 19.) AB, ABH 2002, 199, 211]. The possibility to use the judicial way is not, in itself, a sufficient precondition for the fairness of the procedure, it is only considered to be granted if the court reacts on the merits of (decides about) the applications submitted in the action {Decision 26/2015. (VII. 21.) AB, Reasoning [62]}.

[23] The Decision 7/2013 (III. 1.) AB confirmed the previous case-law of the Constitutional Court, according to which "the formal granting of access to the judicial way does not, in itself, fulfil the realisation of procedural guarantees, as the guarantees

laid down in the constitutional regulation indeed serve the purpose of allowing the court to adopt a final decision on the merits by obeying these guarantees. The requirement of effective judicial legal protection thus shall form part of the right to a fair trial" (Reasoning [24]). Therefore, the right to judicial remedy, i.e. the right to turn to the court, implies, first of all, that the person concerned may initiate court proceedings if a right or obligation becomes contentious, and requires the court, after having established the facts, to compare the content of the claim and the applicable law and to give a reasoned decision on the merits of the case, with the need for finality, i.e. to provide effective judicial protection. The essential elements of the right of access to a court can therefore be summarised as follows: one aspect is (a) the right of access to a legitimate judicial forum, i.e. the right to initiate a legitimate judicial procedure, the next is (b) the right to a fair trial by a court on the rights and obligations at stake in the dispute and finally (c) the right to have the dispute decided by the court, with a need for finality, supported by a duly reasoned decision of the court.

[24] In the present case, the Constitutional Court found that, although the petitioners were able to bring their actions before the courts, initiating the administration of justice, and appeared at the hearing scheduled, but the courts had already refused to proceed their request for a decision on the dispute, for the reasons set out in the contested decisions, by rejecting, in essence neglecting it, i.e. the constitutional guarantee of effective judicial protection could not be enforced in the petitioners' cases, no substantive judicial decisions were made on the merits of their application, which were to be judged according to their content, after the courts had not even entered into a hearing, invoking the relevant provisions of the ACP.

[25] 3 Subsequently, the Constitutional Court examined whether the right of access to court requires the court to continue the proceedings in all circumstances and to make a decision on the merits on the basis of an initiative to that effect by the litigant, i.e. whether it follows from Article XXVIII (1) of the Fundamental Law that the courts have an unconditional and automatic, forcing obligation to perform the demand for the adjudication of the dispute, in other words, whether a decision by which the court rejects or refuses the request for the administration of justice by the party who brought the action should be classified as being contrary to the Fundamental Law in every case, without exception?

[26] In that context, the Constitutional Court, referring to the relevant rules of the various procedural codes, observes that, precisely in order to ensure the enforcement of rights, the establishment of obligations and the resolution of disputes in accordance with substantive law, and to promote the effectiveness, fairness and impartiality of the administration of justice, there are numerous factors affecting the effective exercise of the right of access to the courts, the relevant conduct of the litigants, both in and out of court, the existence of which the court must monitor and require the parties to

comply with from the beginning of the litigation process until its conclusion, and the absence or infringement of which must be subject to the application of appropriate legal consequences by the court, including the refusal to administer justice, as provided for in the procedural laws. These requirements and conditions, which are designed to initiate court proceedings in accordance with the law, to promote the effective administration of justice and to enable the court to reach a well-founded decision, form a complete system, which is often difficult to understand and complex, laid down in the various codes and their understanding, interpretation and compliance with such rules generally require the assistance of a legal professional for the members of the public seeking justice and who are not trained in the law. Such criteria, conditions, provisions affecting the right of access to court and providing a statutory framework for it include, for example, the requirement to pay procedural costs or a procedural fee, provisions relating to the enforceability of certain substantive claims within the statutory time limit, which are not regulated in a uniform manner in the various procedural codes, including rules on the limitation of actions, the exclusion of certain persons from the institution of legal proceedings, the provisions on the content and form of the application initiating court proceedings, the specific manner in which it is to be lodged, the formal and substantive conditions attached to certain legal remedies, i.e. the criteria for admissibility or acceptance by the court, and the statutory requirement of compulsory legal representation.

[27] In the present case, such a requirement is the provision of the ACP that in the case of a party acting with a legal representative, the legal representative must also be present at the hearing, and the legal consequences of failure to do so are partly contained in the provision of the ACP [section 227 (3)], challenged by the petitioners, and partly its section 190. According to the first rule, a party shall be deemed to have failed to appear at the hearing even if the party appeared in person at the hearing but the legal representative did not appear despite having been duly summoned. The mere appearance of the party or of another authorised representative who is not a legal representative constitutes an ineffective procedural act under another rule of the ACP (section 74 of the ACP), therefore in such a case the party is deemed to have failed to appear and the consequences of the failure to appear shall apply. The consequences of the failure to appear at the first hearing are also specifically provided for in Chapter XII of the ACP, according to which the court shall terminate the proceedings of its own motion if either party fails to appear at the first hearing [Section 190 (1)]. It should be noted, however, that the (lay) party who appeared without legal representation may decide to request holding the hearing in spite of this provision, but must then take into account the possibilities of the proceedings which may be considered clearly disadvantageous for them, for example, the undoubtedly limited options for the amendment or modification of the submitted motions and statements. [Section 190 (2) of the ACP].

[28] Nevertheless, the regulation of the ACP challenged by the petitioners makes it undoubted: in the case of a party acting with a legal representative, the presence of a legal representative at the first hearing is expected and desirable, since, due to the introduction of the split litigation structure, the preparation of the case – i.e. the making and finalisation of the individual statements and motions – takes place at this stage, and the evidentiary procedure is carried out on the basis of the statements and motions thus recorded at the substantive, trial stage of the litigation. The personal presence of the parties and their legal representatives is presumably necessary precisely so that the opposing party can make substantive statements on the statements and motions made previously or made or amended at the first hearing, or so that the opposing party can change its statements at the first hearing, so that the absence of a legal representative does not lead to a delay, i.e. to the trial being extended.

[29] The Constitutional Court notes that the codes of procedure also contain rules, provisions, requirements and conditions relating to the initiation of court proceedings and the manner in which claims are to be brought, such as the time-limit for lodging the application, its form and content, and the personal presence of the parties and their legal representatives at the hearing, the compliance with which must be monitored by the court throughout the proceedings; the court shall check their existence and compliance with them and, in the event of non-compliance, must apply the legal consequences provided for by law, which, in extreme cases, may lead to the impossibility of enforcing a fundamental right guaranteed by fundamental law, in this case the right of access to a court, by terminating the proceedings, including the prevention or refusal of the administration of justice expected and requested. In this context, the Constitutional Court also points out, however, that since these provisions typically influence, affect or even exclude the actual exercise of a fundamental constitutional right, and in some cases they form a complex and difficult to understand system in procedural codes, sometimes allowing for multiple interpretations, the law-maker has made it the duty of the courts – in some cases by prescribing rules *expressis verbis* – to provide the parties with adequate information in order to facilitate and promote the proper enforcement of the law, in order to ensure the effective enforcement of their rights and, ultimately, the realistic exercise and enforcement of their fundamental constitutional rights.

[30] 4 Based on the documents at its disposal, the Constitutional Court found that the first instance courts did not inform the petitioners in their summoning rulings that, despite their personal presence, in the event of the absence of their legal representatives, the court would have to consider the hearing as a default on the part of the party, which would entail the application of the legal consequences of default, and that the absence of the legal representative could even lead to the termination of the proceedings. In comparison, the information provided by the courts has indicated

that the party must ensure that he is able to make a statement on matters of fact and evidence at the hearing, either in person or through his legal representative. The courts of second instance proceeding with the case upheld the rulings of the courts of first instance on terminating the proceedings, despite the petitioners' plea of failure to act by the court, and without taking into account their argument in that regard. The first sentence of section 133 (2) of the ACP, which does not allow for exceptions, on the content of the summons, however, clearly provides that "the addressee shall be warned in the summons of the consequences of his failure to appear and shall be provided with the necessary information in relation to his position in the proceedings".

[31] In the present case, it can be concluded that the rulings issued by the first instance courts summoning the petitioners to attend the hearing did not provide them with information on the rules and conditions of the hearing, which is contrary to the express provision of the ACP. Thus, the orders failed (*contra legem*) to draw the attention of the petitioners to the rules concerning their personal presence and that of their legal representatives, to the legal consequences of their absence, and the information that they provided was expressly ambiguous and misleading. At the same time, by ignoring all this, the courts decided to terminate the proceedings when the absence of the legal representatives was detected and these decisions were confirmed by the courts of appeal, thereby making it impossible for the petitioners to exercise their fundamental right of access to the courts.

[32] However, the Constitutional Court, in its assessment of the constitutional concerns raised by the constitutional complaints, had to take into account the fact that the requirement that the legal representative must appear in person at the first hearing of the case is closely linked to the practical exercise of the right of access to the courts, or, in the event of failure to do so, the termination of the proceedings, even in the event of court's ruling drawing the attention of the parties to the proceedings to that effect, does not arise from and cannot be inferred from the summoning ruling issued by the court, but – in terms of both the requirement of personal attendance and the consequences of failure to attend – they are laid down in the rules of the ACP itself, as described above, which have been promulgated and are accessible to all. On the other hand, in the assessment of constitutional complaints, at least as much weight is given to the fact that, in addition to the obligation of the courts to provide general information, the procedural code – in its above-mentioned provision – expressly and specifically requires the courts to provide information "on the consequences of failure to appear", as a warning, adapted to the seriousness of the expected legal consequences: the court may even decide to terminate the proceedings if the legal representative of the party with a legal representative fails to appear at the first hearing.

[33] In the light of the foregoing, the Constitutional Court considers that the fulfilment of the obligation to provide information imposed on the courts by the code of

procedure, the lawfulness, completeness and the statutorily prescribed content of the information provided are closely linked to and cannot be dissociated from the practical and effective exercise, in the context of civil proceedings, of certain fundamental rights guaranteed by the Fundamental Law, in particular the right to a fair trial or the right to legal remedy. The purpose, aim and specific reason for the provision of information, explaining and awareness-raising by the court required by law is precisely to facilitate and promote the enforcement and exercise of those fundamental constitutional rights in the manner and under the conditions laid down by the code of procedure. In other words, the provision of any misleading – erroneous, incorrect or incomplete – information by the courts or their failure to provide – expressly *contra legem* – information, warning may, under certain circumstances, prevent or render impossible the effective exercise and enforcement of certain fundamental rights guaranteed by the Fundamental Law.

[34] Also in close connection with the above, the Constitutional Court points out that there is a high degree of public confidence in the official communications and statements of the courts, assuming that they are correct and complete, i.e. the justice-seeking public has a right to trust them and has a reason to expect that they have received from the forum – which is competent, capable and legitimate to decide on the dispute – in all cases, information, advice or communication which is circumspect, based on knowledge of the law, being strictly in accordance with the law and complying with the law in all circumstances. It may of course happen that, as a result of an increased case load, administrative error or any other hindering circumstance, the participants in the procedure do not receive the information and explanation required by law or do not receive it exactly as required by law. However, once this fact has become clear to everyone, the party who has received inadequate information can generally expect that the error or omission will be corrected, in proportion to the seriousness of the error or omission and the extent of the prejudice it has caused. This principle and expectation is reinforced by the information notice prepared for the justice-seeking general public and posted on the website of the National Office for the Judiciary, which states that “any appealable decision shall always contain information on the manner of lodging an appeal. Always read the information carefully and respect the deadlines set out in the notice. Any misinformation or incorrect information should never be to the detriment of the party concerned.” (Website of the National Office for the Judiciary, Hungary's courts, Appeals and other legal remedies, section 2).

[35] 5 In this context, the Constitutional Court has already previously ruled in principle – in the context of a constitutional complaint based on a violation of the right to legal remedy, specifically on incorrect information provided by the authorities concerning the time limit for legal remedies and the court's failure to take this into account – that “any incorrect, irregular information shall not, however, in itself mean that either the

decision containing it or the decision reviewing it would result in an automatic violation of the right to legal remedy. However, in the course of the examination of the case before it, the Constitutional Court may conclude that incorrect information by a public authority concerning the time-limit for bringing an action is capable, after weighing the specific circumstances of the case, of giving rise to an infringement of the right to an effective remedy" {Decision 9/2017. (IV. 18.), Reasoning [27], hereinafter: CCDec}.

[36] The Constitutional Court then – taking into account and confirming the principle laid down in the ACP that incorrect, incomplete or erroneous information, instruction, warning, or failure to give proper information at the beginning or during the course of the proceedings, which is contrary to the provisions of the law, does not in itself automatically lead to the violation of the Fundamental Law by the judicial decision taken during the proceedings or, as in the present case, a judicial decision refusing to commence proceedings on the merits, but may, in a particular case and in the light of the specific circumstances of the case, give rise to a breach of a fundamental constitutional right of the party to the proceedings affected by the *contra legem* information – took into account the facts, aspects and circumstances which, on the basis of the assessment and consideration of those facts, made it possible to take a position on the question of the violation of the Fundamental Law by the judicial decisions taken in the present case, as alleged by the petitioners.

[37] In its consideration of the particular circumstances of the cases, the Constitutional Court first took into account the fact that at the time of the initiation of the proceedings, the last sentence of the statements of claim, drafted and submitted by the legal representatives of the petitioners, the bar counsels – "I request the court to hold all the hearings in my absence" – did not rule out the possibility that they would not be present in person at the first hearing, but conversely: they stated that they saw a legitimate possibility, free of any adverse consequences, of not appearing in person at the hearing, and informed the court accordingly. The courts were therefore aware, before issuing the summons, of the fact that the legal representatives considered that their absence from the first hearing would be without consequence under the relevant provision of the ACP.

[38] In close connection with this, the Constitutional Court points out that it is partly precisely in the light of the knowledge and in the case of such customary and widespread solutions, which have become common practice among legal representatives and which were effectively applied and used before the entry into force of the ACP, that the introduction of the provision of section 133 (2) the ACP may be considered of particular importance and significance as it provides that "the addressee shall be warned in the summons of the consequences of his failure to appear and shall be provided with the necessary information in relation to his position in the proceedings."

[39] The Constitutional Court therefore attached particular importance to the fact that the courts, in the summoning rulings, omitted to draw attention to the consequences of non-appearance, in a manner which was mandatory by law, without allowing any derogation, by specifically and precisely defining its content, in the knowledge that they were aware from the petitioners' applications that, according to their legal representatives, their attendance at the hearing was not mandatory under the general rule. In this context, the Constitutional Court also considers it important to note that the construction of the ACP having a split structure – the new element of which is the first hearing of the case, where, by its purpose and function, the personal presence of legal representatives is required and desirable for persons acting through legal representation, and their absence in any event has adverse consequences for the party or may even lead to the termination of the proceedings – was considered to be a completely new legal institution at the time when the cases were brought by the petitioners. This is why, in addition to the failure itself to comply with the provision of the law, the failure of the courts to draw attention to the absence of the legal representatives, the resulting omission and the possible discontinuance of the proceedings, and the failure to explain this provision, is of particular importance for the assessment of the constitutional complaints and the alleged violation of fundamental rights.

[40] In the Constitutional Court's view, it is precisely in such cases and matters – when only a few weeks or months elapse between the initiation of the administration of justice and the adoption of a comprehensive legal regulation with a content that has in some places radically changed in terms of its merits, since the new rules of the ACP introducing the legal institution of the first hearing of the lawsuit entered into force on 1 January 2018, while the petitioners' actions were filed with the courts of first instance on 13 February 2018 and 14 November 2018 – that it is of decisive importance for the courts of first instance to draw attention to and instruct the public on the conduct to be followed and expected, and on the consequences of failure to do so, in accordance with the new rules, which are significantly different from the previous ones. Furthermore, it is important that the courts hearing appeals should properly assess the failure to draw attention to the new rules provided for by the law and that the new rules have presumably not yet become so deeply ingrained in the practice of legal practitioners, and even less so in the practice of the lay public seeking justice, that it is to be expected that they should be automatically known and applied in full and without error.

[41] In reaching its decision, the Constitutional Court also considered that the rulings of the courts of first instance and of the courts delivering the final judgement not only restricted and violated the right of access to court, one of the rights of the right to a fair trial enshrined in Article XXVIII (1) of the Fundamental Law, and the possibility of

the effective exercise of this right, but also expressly excluded it for the petitioners by the legal consequence applied in the case, i.e. the termination of the proceedings. The courts of second instance – despite the fact that the petitioners in their appeal pleaded the failure to call attention as required by law – did not assess in their final decisions, failed to take into account the significance of the fact that as a result of the decision the petitioners were deprived of the exercise of their constitutional right.

[42] Finally, the Constitutional Court also took into account and assessed the fact that the petitioners, through their legal representative, had, according to their submissions in that regard, re-filed their action with the court, but that they could only submit their claim for payment of the wages only for a limited period of time, and therefore for a reduced amount, compared to their original claim due to the rules on the limitation of time for the enforcement of their claim. The petitioners were therefore not merely prejudiced in principle by the refusal, i.e. by the failure, of the courts to administer justice originally sought, but, as they were forced to move further and further away from the starting date of the limitation period, they could only bring a new action for an amount which, by the passage of time, would necessarily entail a material loss and disadvantage. The challenged judgements thus forced the applicants to bring a new action, which is now only limited in amount compared with the original action, and which clearly entails a financial loss for them, even in case of delivering judgements upholding their action in all other respects.

[43] 6 As set out above, on the basis of an account, assessment and consideration of the specific circumstances of the individual case according to point 5, the Constitutional Court found that the Gyula Administrative and Labour Court, by failing to issue a mandatory notice of the consequences of default, which is contrary to an express provision of the law, and then – despite the ambiguous and misleading content of the information provided – applying the legal consequences of default due to the absence of the legal representative, deprived the petitioners of the possibility of actually exercising their right to access court by its rulings terminating the proceedings in a manner contrary to the Fundamental Law. In the Constitutional Court's view, the Gyula General Court did not take into account the constitutional context and significance of the cases, as well as other specific, individual circumstances of the cases – including the failure to provide warning as required in the Act of Parliament – when considering the appeals submitted in the cases. In the Constitutional Court's view, the resulting violation of fundamental rights had a material impact on the courts' decisions denying the petitioners' requests for judicial services, therefore they caused a violation of Article XXVIII (1) of the Fundamental Law.

[44] As a legal consequence of the infringement of the Fundamental Law thus established, the Constitutional Court annulled the rulings of the Gyula Administrative

and Labour Court and the Gyula Regional Court listed in points 1 and 2 of the holdings of the decision.

IV

[45] 1 In their constitutional complaint, the petitioners also initiated the declaration that section 227 (3) of the ACP is in breach of the Fundamental Law and its annulment. In support of this, they submitted that the ground for termination of proceedings based on the failure of a representative to attend is not known in other codes of procedure and, in their view, the introduction and application of this ground for the termination of proceedings in the field of labour law is also unjustified. In their view, the rule of the ACP challenged by them is also contrary to similar provisions in other procedural laws, because those laws contain possibilities of excuse or remedy for absence, prior notification of the absence or other remedies for curing deficiencies. In their opinion, the termination of the proceedings based on the absence of the legal representative is not proportionate to the gravity of the omission, since while in the case of other deficiencies the rules provide for the possibility of remedying the deficiencies, the consequences of the absence cannot be excused or remedied under the challenged provision of the ACP. In their view, the practical application of the new rule creates disproportionate difficulties in the work of legal representatives.

[46] In accordance with its consistent case-law in this respect, the Constitutional Court has also examined the present constitutional complaint in accordance with the actual content of the application. In the Constitutional Court's view, the petitioners' application submitted under section 26 (1) of the ACC in fact seeks a declaration of an infringement of the Fundamental Law by the law-maker, in that they claim that the contested provision does not contain any rules on the possibility of excusing absence, prior notification of the absence or the possibility of making up any deficiencies.

[47] In this context, the Constitutional Court points out that, pursuant to paragraphs (1) and (2) of section 46 of the ACC, the Constitutional Court shall establish the infringement of the Fundamental Law caused by the law-maker's omission only *ex officio* in the exercise of its other powers, and the petitioners may not initiate proceedings in this regard. The Constitutional Court further notes that, as a result of its examination of the present case, it has not seen any reason or justification for examining of its own motion the possible existence of a legislative omission in relation to the provision of the law challenged by the petitioners.

[48] 2 Considering that the petitioners requested the Constitutional Court to declare the existence of an infringement of the Fundamental Law caused by a legislative omission in connection with the challenged legal norm, which is a power that the

Constitutional Court exercises only *ex officio*, pursuant to section 46 (1) of the ACC, the request of the petitioners to that effect was rejected by the Constitutional Court, pursuant to section 64 (a) and (b) of the ACC, partly due to the lack of the petitioners' entitlement to file such a motion and partly on the grounds of the lack of competence of the Constitutional Court to rule on motions containing such an initiative.

Budapest, 04 October 2022.

Dr. László Salamon head of panel,
Justice of the Constitutional Court

Dr. Egon Dienes-Oehm, Justice of the
Constitutional Court

Dr. Balázs Schanda, Justice of the
Constitutional Court

Dr. Ildikó Hörcherné dr. Marosi, Justice
of the Constitutional Court

Dr. László Salamon head of the panel,
Justice of the Constitutional Court on
behalf of rapporteur Justice *dr. Péter
Szalay* unable to sign

Concurring reasoning by Justice *dr. Ildikó Hörcherné dr. Marosi*

[49] I disagree with the reasoning of annulling the judicial decisions for the following reasons.

[50] 1 The panel based the annulment of the judicial decisions on the grounds that they violated the (partial) fundamental right of access to a court, resulting from Article XXVIII (1).

[51] The violation was caused by the fact that the courts terminated the proceedings without full information on the legal consequences, as the applicants' legal representatives had failed to appear at the hearing despite being duly summoned. The courts based their rulings on section 227 (3) of the ACP.

[52] The constitutional problem can be identified as a violation of the fundamental right to a fair trial and the fundamental right of access to a court extracted from it by way of interpretation. The former, as is rightly pointed out elsewhere in the decision, is linked to the quality of the proceedings as a whole. This fundamental right is enforced as the result of the Constitutional Court's assessment of whether it is upheld or infringed; the fundamental right is itself the result of an assessment. Consequently, it is either enforced in the course of the judicial procedure or it is not. It is an absolute right and cannot be limited.

[53] On the other hand, the (partial) right of access to the courts may be limited by the system of necessity/proportionality criteria laid down in Article I (3) of the Fundamental Law. Thus, if the law or a judicial interpretation limits the right of access to the courts, it must be examined whether the limitation exists and, if so, whether it is necessary and proportionate.

[54] The basis for establishing the existence of a restriction in breach of the Fundamental Law is therefore not that a possible *contra legem* judicial interpretation of the law is "aggravated" by the specific factual circumstances of a particular case.

[55] 2 In my opinion, in the specific case, there would have been no obstacle to the petitioner, through his legal representative, claiming his missing wages on the merits before the court. The obstacle was that, unlike in the past, the ACP, in certain cases, attaches fundamental importance to the first hearing of the case at which the presence of a legal representative is therefore indispensable. Since the ACP, as was known to the petitioner and his legal representative, does not allow the legal representative to excuse his absence from the first hearing in advance, it was not the court that prevented the merits of the claim from being asserted, but the fact that the legal representative of the plaintiff failed to attend the first hearing (an obstacle to the proceedings).

[56] Obviously, it is also necessary to assess the fact that the court summoned the applicant and its legal representative to the first hearing by using a misleading form concerning the default. In assessing this, the question that should have been addressed was whether, on the whole, a procedure in which the court did not fully comply with its duty to inform in relation to the failure of the legal representative to attend the first hearing (if such a statutory duty on the part of the court could be identified) remained fair, equitable and balanced. In this context, one could have come to the conclusion that misleading and incomplete information provided to the court would restrict the fundamental procedural right to a fair trial recognised in Article XXVIII (1), even if the legal representative could otherwise be expected to be familiar with the amended provisions of the ACP.

Budapest, 04 October 2022.

Dr. Ildikó Hörcherné dr. Marosi,
Justice of the Constitutional Court