

Decision 20/2022 (X. 13.) AB

on establishing a constitutional requirement related to section 8 (2) of the Act CXC of 2011 on National Public Education

The Constitutional Court, sitting in plenary session, on the subject-matter of a judicial initiative to declare a law to be contrary to the Fundamental Law, with concurring reasoning by *Dr. Egon Dienes-Oehm*, Justice of the Constitutional Court, has adopted the following

decision:

1. In the course of applying section 8 (2) of the Act CXC of 2011 on National Public Education, it is a constitutional requirement arising from Article XVI (1) and (2) of the Fundamental Law that the exemption from attending kindergarten classes shall always apply to the given kindergarten year only. The request for exemption may be submitted for the first time or (in the case of a previous request for exemption) repeatedly by 15 April of the year in which the child reaches the age of five; the request for exemption may not be rejected without examination on the merits on formal grounds if the parent submits the request for exemption for the first time only by 15 April of the year when the child reaches the age of five.

2. The Constitutional Court rejects the petition aimed at the establishment of a conflict with the Fundamental Law and the annulment of the term "new" in the second sentence of section 8 (2) of the Act CXC of 2011 on National Public Education.

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

Reasoning

I

[1] 1 The judge of the Győr Regional Court (hereinafter: "petitioner") in the case No. 1.K.700 .638/2022 pending before him, in an administrative action for the modification of an administrative decision in an educational case, initiated, in addition to suspending

the proceedings, pursuant to section 25 (1) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), that the Constitutional Court should declare that the term "new" in the second sentence of section 8 (2) of the Act CXC of 2011 on National Public Education (hereinafter: ANPE) is in conflict with the Fundamental Law, and to order that the contested provision of the law be prohibited from being applied in an individual case.

[2] 1.1 The essence of the main case pending before the Győr Regional Court can be summarised as follows. The child of the plaintiff in the main case turned three on 11 March 2021, therefore the parents – in compliance with the provisions of section 8 (2) of the ANPE – enrolled the child in the local kindergarten for the 2021/2022 education year. Since the child could not be integrated into the kindergarten, on 13 April 2022 the plaintiff father applied to the Sopron District Office of the Győr-Moson-Sopron County Government Office (the defendant in the main proceedings, hereinafter referred to as the Government Office) for the child's exemption from attending kindergarten classes for the 2022/2023 education year. By the ruling No. GY-06/03/496-3/2022, the Government Office rejected the plaintiff's application. In its decision, the it referred to the second sentence of section 8 (2) of the ANPE, according to which, in the education year when the child reaches the age of four, the possibility of exemption can only be examined on the merits if a "new" application is submitted. Considering that the plaintiff applied for the first time for the exemption of his child from kindergarten education, i.e. he had not submitted such an application before, the Government Office interpreted the law as lacking an objective condition for the merits of the application, and therefore rejected it on the basis of section 46 (1) of the Act CL of 2016 on General Administrative Procedure.

[3] The plaintiff in the main proceedings brought an action with to the Győr Regional Court against the decision, in which it sought, firstly, the annulment of the Government Office's ruling and, secondly, the Constitutional Court's procedure to declare the term "new" in the second sentence of section 8 (2) of the ANPE to be contrary to the Fundamental Law. In its defence, the Government Office sought the dismissal of the plaintiff's statement of claim.

[4] 2 In his petition, the petitioner states that, according to the consistent case-law of the Constitutional Court, the most important constitutional limitation of the right to upbringing under Article XVI (2) of the Fundamental Law is the best interests of the child under Article XVI (1). The State's duty to protect institutions is only secondary to the right of the parent to upbringing and the right of the parent to upbringing can only be restricted on constitutional grounds. Such a constitutional ground may, for example, be the exclusion of the right to be exempted from kindergarten education in the pre-school year in order to protect the best interests of the child, in the interests of the child's socialisation, integration into society and preparation for school. Therefore, a

measure which excludes the possibility of exemption for the preceding years without a constitutional reason violates the parent's right to upbringing and does not ensure education in the best interests of the child.

[5] According to the petition, under the current legislation, a parent may only apply for an exemption from kindergarten education for the fourth year of the child's life if he or she has previously submitted such an application, i.e. for the third year of the child's life. In the absence of an earlier application, for the fourth year of age, the legislation precludes, for objective and formal reasons, a substantive examination of whether it is in the best interests of the child to be exempted or to attend kindergarten education. The minister's reasoning attached to the amendment does not contain any justification for the introduction of the term "new" request, and it is therefore impossible, in the petitioner's view, to determine the constitutional grounds justifying such an amendment or the interest of the child limiting the possibility of submitting a request for exemption for the fourth year of age.

[6] The petitioner also pointed out that the wording of the provision previously held by the Constitutional Court to be appropriate provided for the possibility of exemption for the period before the pre-school year in general, without any formal restriction, if, for any reason, the best interests of the child are served by upbringing in the family. According to the petitioner, while it is not possible to dispense with a technical examination of whether the best interests of the child are served by the exemption, the current legislation precludes, for objective and formal reasons, any examination of the merits in the case of those facts.

[7] In the petitioner's view, the current legislation restricts, without any constitutional justification, the right of parents to upbringing guaranteed by Article XVI (2) of the Fundamental Law, without any objective, reasonable basis for doing so in the interests of the child's right under Article XVI (1).

[8] 3 Prior to adopting the decision of the Constitutional Court, the head of the ministry responsible for the drafting of the legislation, in agreement with the Ministry of Justice, consulted the Constitutional Court in accordance with the provisions of section 57 (1b) of the ACC, in which he explained that the challenged provision does not violate Article XVI (1) and (2) of the Fundamental Law, and that the annulment of the term "new" would result in the creation of a legal environment that would seriously violate the requirement of clarity of the norms and legal certainty.

[9] In the position, the minister states that the contested provision of the ANPE, which entered into force on 1 July 2021, meets the requirements of the Constitutional Court, since it created the possibility of submitting an application for exemption from the obligation to attend kindergarten in a particularly justified case by 31 August of the year in which the child reaches the age of five.

[10] In section 8 (2) of the ANPE, the term "new" refers to the law-maker's intention that it is not possible to request exemption from kindergarten education for two education years (i.e. for the child's 3 and 4 years of age) in a single application. Applications must be submitted annually in order to check whether there have been any changes since the previous application which make the exemption justified or not. According to the minister's reasoning attached to the relevant provision of the ANPE, "the amendment created the possibility of submitting an application for exemption from the obligation to attend kindergarten in a particularly justified case by 31 August of the year in which the child reaches the age of five." According to the minister, it can therefore be concluded that the term "new" is not used in the quoted reasoning and that, consequently, in the light of Article 28 of the Fundamental Law, the wording of the provision also implies that, if a parent has not submitted an application in the fourth year of the child's life but subsequently submits an application in the fifth year of the child's life, the term "new" shall be interpreted as meaning that the failure to submit an earlier application cannot be a ground for refusing the application.

[11] The minister also indicated in respect of the case that, in accordance with the principle of cooperation with the client and the principle of good faith, the authority cannot automatically use the instrument of refusal. According to Article 3(1) of the New York Convention on the Rights of the Child, "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." The decision-maker must therefore take a decision in the best interests of the child.

[12] The position states that, in addition to the above, it is a constitutional requirement that, when considering an application submitted in accordance with the law, the statement of the parent and the documentation submitted by the parent as an annex to the application cannot be disregarded, and that the body granting the exemption may refuse the application only if it can be established that refusal of the application is in the best interests of the child. The government office has a statutory duty to consider these factors, taking into account all the circumstances of the case. To exclude consideration of the above factors is not pragmatic and does not reflect the legislative intent.

[13] 1 The provisions of the Fundamental Law affected by the petition:

"Article XVI (1) Every child shall have the right to the protection and care necessary for his or her proper physical, intellectual and moral development. Hungary shall protect the right of children to a self-identity corresponding to their sex at birth, and shall ensure an upbringing for them that is in accordance with the values based on the constitutional identity and Christian culture of our country."

"Article XVI (2) Parents shall have the right to choose the upbringing to be given to their children."

"Article XVI (3) Parents shall be obliged to take care of their minor children. This obligation shall include the provision of schooling for their children."

[14] 2 The provision of the ANPE affected by the petition:

"Section 8 (2) In the year in which the child reaches the age of three by 31 August, he or she shall attend kindergarten for at least four hours a day from the beginning of the education year. On the basis of a request submitted by the parent by 15 April of the year in question, the body designated by the Government's decree (hereinafter referred to as the body granting the exemption) may, by 31 August in the year in which the child reaches the age of four, in particularly justified case, by 31 August of the year in which the child reaches the age of five, on the basis of a new application, in the child's legitimate interests, exempt the child from attending kindergarten if the child's family circumstances or special situation so justify. If an expert is to be heard in the proceedings, only the head of the kindergarten or the district nurse and, in the case of a child undergoing long-term treatment, a specialist involved in general outpatient care pursuant to section 89 of the Act on Health Care or in general inpatient care pursuant to section 91 of the Act on Health Care may be appointed. In the case of a child in long-term care, the application may also be submitted after 15 April of the year in question. The duration of the procedure shall be fifty days."

III

[15] The judicial initiative is unfounded.

[16] 1 [14] Pursuant to section 25 of the ACC, on the basis of Article 24 (2) (b) of the Fundamental Law, a judge shall – in addition to suspending court proceedings – initiate with the Constitutional Court to declare a law or the provision of a law to be contrary to the Fundamental Law or to exclude the application of a law being contrary to the Fundamental Law, if in the course of the adjudication of an individual case pending before the judge, a law has to be applied which he or she finds to be contrary to the Fundamental Law or about which the Constitutional Court has already found to be

contrary to the Fundamental Law. The Constitutional Court has established that the petition submitted by the petitioner meets the requirements under section 25 and section 52 of the ACC. {c.p. Ruling 3058/2015. (III. 31.) AB, Reasoning [8] to [24], Decision 2/2016. (II. 8.) AB, Reasoning [26] to [28], Decision 3064/2016. (III. 22.) AB, Reasoning [8] to [13]}.

[17] The challenged provision of the law is applicable in the proceedings, the proceedings have been stayed, and the petitioner has initiated a declaration that the challenged provision of the law is contrary to the Fundamental Law, including the legal consequence of annulment, and the exclusion of its application. {for example, most recently: Decision 3191/2022. (IV 29.) AB, Reasoning [23]}.

[18] 2 The Constitutional Court examined the conformity of section 8 (2) of the ANPE in force before 1 July 2021 with the Fundamental Law in its Decision 9/2021 (III.17.) AB (hereinafter: "CCDec"). In the CCDec, the Constitutional Court held that the provision was contrary to the Fundamental Law because, in contrast with the previous legislation, the law-maker had made it possible to request exemption from kindergarten attendance only between the ages of three and four, whereas previously exemption could also be requested between the ages of four and five, before the school preparatory year.

[19] Section 8 (2) of the ANPE, currently in force, which is challenged in the petition, regulates the rules on participation in kindergarten activities from 1 July 2021, so that the body granting the exemption may, on the basis of the child's family circumstances or special situation, exempt the child from attending kindergarten education between the ages of three and four, on the basis of a request by the parent, taking into account the legitimate interests of the child. Between the ages of four and five, exemption may be granted on the basis of a new request in a particularly justified case.

[20] According to the petition (and the argument of the Government Office as defendant in the main proceedings), under the current legislation, a parent may only apply for the exemption of his or her child from kindergarten education for the fourth year of the child's life if he or she has submitted an application earlier, i.e. for the third year of the child's life. In the absence of such an application, for the fourth year of age, the legislation precludes, for objective and formal reasons, a substantive examination of whether it is in the best interests of the child to be exempted or to attend kindergarten education. In the petitioner's view, the legislation in force restricts, without any constitutional justification, the parent's right to upbringing without any reasonable basis for doing so.

[21] 3 On the basis of the petition, the Constitutional Court had to examine whether section 8 (2) of the ANPE – in particular with regard to the term "new" in the text of the law – is in accordance with Article XVI (1) and (2) of the Fundamental Law, i.e. whether

it sufficiently takes into account the best interests of the child and does not unnecessarily restrict the parents' right to upbringing, in light of the interpretation of the law put forward by the petitioner (and the Government Office acting as the respondent in the main proceedings).

[22] Article XVI of the Fundamental Law is the constitutional basis for the protection of children. Article XVI paragraph (1) declares the right of the child to the protection and care necessary for his or her proper physical, mental and moral development, paragraph (2) gives parents the right to choose the education to be given to their child, and paragraph (3) imposes on parents the duty to care for their minor child, which includes the duty to educate the child. Article XVI (1), (2) and (3) of the Fundamental Law form a coherent unit, with the best interests of the child at its centre, in accordance with Article XVI (1). Every child has the right to such protection and care as is necessary for his or her proper physical, mental and moral development, which is the primary responsibility of parents under Article XVI (2). "The parents' right to upbringing is limited in two ways: on the one hand, parents do not enjoy unlimited freedom in selecting the education to be given to their children, and the Fundamental Law protects and supports only those decisions in the context of education which are in the best interests of the child, i.e. the content of the parental rights under Article XVI (2) is limited by the best interests of the child under Article XVI (1). On the other hand, the parents' right to upbringing is limited by the duty of care under Article XVI (3), which includes the obligation to have the child educated" (CCDec, Reasoning [66]). Thus the fundamental right to protection and care of children guaranteed by Article XVI (1) of the Fundamental Law has a special structure and is multipolar: the child is the beneficiary, while the primary duty-bearer is the family (the parents), and the secondary duty-bearer is the State, in a complementary and in certain cases a substitute role.

[23] The content of the right of parents to upbringing was defined by the Constitutional Court in its Decision 995/B/1990 AB as the "parents themselves decide how they choose the institution, method and means of education of their children in accordance with their traditions, family customs, social situation, religious and moral convictions and financial means. No outside authority, no person outside the family, may interfere in this" (ABH 1993, 515, 527). Thus, while the Fundamental Law itself establishes the parents' right to upbringing, it also recognises that there is not only one right way of educating a child, but that the parent must choose, with due regard to the child, between several equally right methods of education. The general and absolute limit to this freedom of choice is, however, the obligation to have the child educated, in which respect the Fundamental Law does not provide parents with a choice in the case of children of compulsory school age, i.e. children who have reached the statutory age limit and are fit for school" (CCDec, Reasoning [66] to [67]).

[24] The Constitutional Court also laid down that if “the parent considers the upbringing of the child as his or her primary life calling and wishes the child to be brought up entirely within the family during the first period of his or her development, the parent’s right to do so can only be restricted on strong constitutional grounds” (CCDec, Reasoning [88]). “The legal basis for State intervention is the enforcement of the child's constitutional right to protection and care, and this can only take place under his or her specific personal circumstances, in matters affecting him or her individually and personally (and not in a general way). The general provisions of the law must therefore always provide for the possibility of individual consideration, i.e. of individual decisions being taken in the best interests of the child, with the exception of manifestly exceptional cases such as the last year of kindergarten education, which prepares the child for school education. When assessing the proportionality of state intervention, taking into account the person and individual circumstances of the child is essential to enforce fundamental rights and the values of the Fundamental Law” (CCDec, Reasoning [89]).

[25] In its examination of the necessity of kindergarten education (i.e. the proportionality of the restriction of the parent's right to upbringing), the Constitutional Court advocated in the CCDec the necessity of kindergarten education in order to safeguard the rights of the child under Article XVI (1) of the Fundamental Law, even if it may restrict the right of a parent to choose the upbringing of his or her child. The Constitutional Court explained that although in the vast majority of cases kindergarten education serves the best interests of children also between the ages of 4 and 5, there may be individual life situations at this age that justify upbringing in the family environment. However, the exemption may be granted only by taking due account to the child's state of health, family circumstances, abilities, his or her special situation, i.e. the best interests of the child. However, the CCDec also held, with regard to the last year of kindergarten education, that the State is entitled (but even then not obliged) to enact legislation that does not allow an exception (exemption) from compulsory kindergarten education, which makes it compulsory for all children to attend kindergarten education since the Constitutional Court recognised the provision of preparation for school studies as an exceptional reason which, even in the case of a complete exclusion of the possibility of exemption, constituted a proportionate restriction of the parents' right to upbringing (CCDec, Reasoning [94]).

[26] According to the consistent case-law of the Constitutional Court, in the light of the cited findings of the CCDec, a regulation whose only possible interpretation would be that the law-maker would completely exclude the exemption from kindergarten for children between the ages of four and five years in the case of children whose parents have not submitted an exemption request to the competent authority for the period between the ages of three and four years would result in a violation of Article XVI. The

Constitutional Court therefore had to examine whether the interpretation referred to by the petitioner (and, in the grounds for its decision, by the respondent Government Office) of the contested provision of the law was in fact the only possible interpretation.

[27] 4 According to the position taken by the minister responsible for the drafting of the ANPE, the current text of the norm meets the requirements set by the Constitutional Court. In section 8 (2) of the ANPE, the term "new" merely refers to the fact that it is not possible to request exemption from kindergarten education for two school years (i.e. for the child's 3 and 4 years of age) in a single application. Applications must be submitted annually in order to check whether there have been any changes since the previous application which make the exemption justified or not, and this interpretation is also backed by the minister's reasoning related to the relevant paragraph. According to the position taken, this necessarily implies that, if a parent has not submitted an application in the fourth year of the child's life but subsequently submits an application in the fifth year of the child's life, the term "new" shall be interpreted as meaning that the failure to submit an earlier application cannot be a ground for refusing the application. The minister also underlines that, in accordance with the principle of cooperation with the client and the principle of good faith, the authority cannot automatically use the instrument of refusal. The decision-maker must take the decision in the best interests of the child. The body granting the exemption may reject the application only if it can be established, taking into account the documents submitted, that it is in the best interests of the child to reject the application. The government office has a statutory duty to consider these factors, taking into account all the circumstances of the case. Therefore, in the minister's view, to exclude consideration of the above factors is not pragmatic and does not reflect the legislative intent.

[28] 5 According to Article 28 of the Fundamental Law, in the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. The Constitutional Court has consistently held that existing law should be spared as much as possible. The Constitutional Court avoids annulling a law or a legislative provision or calling on the law-maker to enact legislation within the time limit set by the Constitutional Court if the constitutionality of the legal order and legal certainty can be ensured without such action. In such a case, the Constitutional Court uses constitutional requirements to determine the range of interpretations in general in the case of which the law is in conformity with the Constitution.

[29] In the present case, the law-maker's intention was clearly to provide for a broad possibility of exemption, and the law-maker drafted the contested provision in compliance with the requirements of the Constitutional Court as laid down in the CCDec. However, the grammatical interpretation of the statutory provision does indeed

allow for an interpretation of section 8 (2) of the ANPE to the effect that a parent is no longer entitled to initiate the exemption from kindergarten education of a child over the age of four for the first time, but may only be granted exemption on the basis of a "new", i.e. second application. This interpretation (which otherwise complies with the requirements of grammatical interpretation) was followed by the Government Office acting as the respondent in the main proceedings, and this possible interpretation was also followed by the petitioner on the basis of the relevant provision of the ANPE. The best interests of the child are, however, taken into account by a regulation which allows for the exemption from kindergarten from one education year to the other on the basis of a parent's request, taking into account changes in the circumstances of the child and his or her family, in accordance with the interpretation as also formulated by the minister.

[30] The Government Office and the court in the present case have interpreted section 8 (2) of the ANPE solely on the basis of a grammatical interpretation. However, it is possible to interpret legislative texts not only on the basis of grammar but also on the basis of other methods. In the present case, a teleological interpretation of the provision in accordance with the law-maker's intention leads to the conclusion, beyond any doubt, that exemption from kindergarten education cannot be objectively excluded for children between the ages of four and five years in the case of whom the parents have not previously requested the exemption from kindergarten attendance. Therefore, according to the Constitutional Court, the violation of fundamental rights suffered by the plaintiff in the present case can be satisfactorily remedied by establishing the unconstitutionality of the interpretation of the law, and thus – in order to protect the law in force – there is no need to annul the term "new" of section 8 (2) of the ANPE. The Constitutional Court, therefore, rejected the initiative as set forth in the holdings of the decision.

[31] 6 Section 46 (3) of the ACC authorises the Constitutional Court to specify in a decision, in the procedure carried out in the course of exercising its competences, the constitutional requirements – that result from the Fundamental Law and enforce the provisions of the Fundamental Law – the application of the law reviewed, and applicable in the judicial procedure, has to comply with. In this case, the Constitutional Court found that the mere grammatical interpretation of the contested provision of the ANPE does indeed allow for an interpretation of section 8 (2) of the ANPE that is contrary to the best interests of the child and thus ultimately contrary to the Fundamental Law. In the present case, the legislative purpose, which can be established by a teleological interpretation in accordance with the Fundamental Law, cannot be considered to be recognizable beyond doubt, since neither the Government Office (i.e. the State body) acting as respondent in the main proceedings nor the petitioner himself recognised it, and therefore the legal uncertainty surrounding the possibility of

submitting an application for exemption and the length of the proceedings are in themselves capable of jeopardising the best interests of the child.

[32] The Constitutional Court held with due account to the above, acting on the basis of section 46 (3) of the ACC, that in applying section 8 (2) of the ANPE, it is a constitutional requirement arising from Article XVI (1) and (2) of the Fundamental Law that the exemption from attending kindergarten education shall always apply to the given kindergarten year only. The request for exemption may be submitted for the first time or (in the case of a previous request for exemption) repeatedly by 15 April of the year in which the child reaches the age of five; and the request for exemption may not be rejected without examination on the merits on formal grounds if the parent submits the request for exemption for the first time only by 15 April of the year when the child reaches the age of five.

[33] 7 The Constitutional Court ordered the publication of the decision in the Hungarian Official Gazette on the basis of the second sentence of section 44 (1) of the ACC to ensure that children's rights are fully protected.

Budapest, 27 September 2022.

Dr. Tamás Sulyok,

President of the Constitutional Court

Dr. Ágnes Czine, Justice of the
Constitutional Court

Dr. Miklós Juhász, Justice of the
Constitutional Court

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

Dr. Zoltán Márki, Justice of the
Constitutional Court

Dr. Tünde Handó, Justice of the
Constitutional Court

Dr. Tamás Sulyok, President of the
Constitutional Court on behalf of
Justice *dr. Béla Pokol* unable to sign

Dr. Tamás Sulyok, President of the
Constitutional Court on behalf of
Justice *dr. Attila Horváth* unable to
sign

Dr. László Salamon, Justice of the
Constitutional Court

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

Dr. Tamás Sulyok, President of the
Constitutional Court on behalf of
Justice rapporteur *dr. Marcel Szabó*
unable to sign

Dr. Tamás Sulyok, President of the
Constitutional Court on behalf of
Justice *dr. Imre Juhász* unable to sign

Dr. Péter Szalay Justice of the
Constitutional Court

Dr. Mária Szívós, Justice of the
Constitutional Court