

Decision 2/2023. (II. 23.) AB

on establishing a violation of the Fundamental Law by an omission related to the regulation of the eligibility to disability allowance for persons with a permanent or final communication disability, who are unable to live independently or who need the permanent assistance of others

The plenary session of the Constitutional Court, in the subject of a constitutional complaint – with concurring reasoning by Justice *dr. Egon Dienes-Oehm* and with dissenting opinions by Justices *dr. Tünde Handó*, *dr. Imre Juhász* and *dr. Zoltán Márki* – adopted the following

decision:

1. The Constitutional Court, acting *ex officio*, found that the Parliament, in the course of carrying out legislation in line with Article XIX (1) of the Fundamental Law, had caused a violation of the Fundamental Law by omission, in the form of an infringement of Article XV (1), by failing to regulate the conditions of eligibility for disability allowance for persons with a permanent or final communication disability (speech impairment) who are unable to live independently or who need the permanent assistance of others. The Constitutional Court calls on the Parliament to comply with its legislative duty by 31 December 2023.

2. The Constitutional Court rejects the constitutional complaint aimed at establishing the violation of the Fundamental Law by, and the annulment of section 23 (1) (bb) of the Act XXVI of 1998 on the Rights and Equal Opportunities of Persons with Disabilities as well as section 1 (2) and Annex 1 (2b) of the Government Decree 141/2000. (VIII. 9.) on the Rules of the Qualification and the Review of Serious Disability and the Disbursement of Disability Allowance.

3. The Constitutional Court refuses the constitutional complaint aimed at establishing the lack of conformity with the Fundamental Law and annulling the judgement No. 8.K.700.864/2020/27 of the Debrecen Regional Court.

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

Reasoning

I

[1] 1 The petitioner, acting in person, filed a constitutional complaint pursuant to section 26 (1) and section 27 of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC). The petitioner, in his complaint pursuant to section 27 of the ACC, sought a declaration that the judgement No. 8.K.700.864/2020/27 of the Debrecen Regional Court was contrary to the Fundamental Law and asked for its annulment with effect to the decision No. T-BP-MCST-4798-4/2019 of the Budapest-Capital Government Office and the decision No. T-SZ-10-CST-58133-6/2019 of the Nyíregyháza District Office of Szabolcs-Szatmár-Bereg County Government Office. In his constitutional complaint pursuant to section 26 (1) of the ACC, the petitioner sought the establishment of the lack of conformity with the Fundamental Law and the annulment of section 23 (1) (bb) of the Act XXVI of 1998 on the Rights and Equal Opportunities of Persons with Disabilities (hereinafter: ARD) and section 1 (2) and Annex 1 (2b) of the Government Decree 141/2000. (VIII. 9.) on the Rules of the Qualification and the Review of Serious Disability and the Disbursement of Disability Allowance (hereinafter: "ARD implementing decree"), applied in his individual case.

[2] 1.1 According to the facts of the case on which the constitutional complaint is based, in April 2019 the petitioner suffered an ischemic stroke in the *cerebri media* area of the left artery, which resulted in the development of white encephalomyelitis in the left brain hemisphere. The condition of the petitioner, according to the Debrecen Regional Court, is a severe degree of expressive speech disorder, his cooperation is severely hampered, his thinking is formally called "word salad", i.e. a set of incoherent words, his thinking is limited in content to a few excessive evaluation of the same numbers, he is unable to lead an independent life, he needs supervision and guidance.

[3] 1.2 On 16 August 2019, the petitioner submitted an application for disability allowance with the Nyíregyháza District Office of the Szabolcs-Szatmár-Bereg County Government Office, which rejected the application by the decision No. T-Sz-10-CST-58133-6/2019 dated 20 September 2019, as the expert committee of the first instance authority concluded that the petitioner does not qualify for disability allowance under the ARD implementing decree, the petitioner is capable of independent living and does not lack the ability to self-service.

[4] 1.3 The Budapest-Capital Government Office, acting in the second instance on the petitioner's appeal, upheld the first instance decision by its decision No. T-BP-MCST-4798-4/2019 dated 21 January 2020.

In the course of the proceedings, the Government Office obtained the opinion No. HB/07-RESZO/0466-1/2019 of the Grade II Expert Committee of the Rehabilitation Expert Department of the Hajdú-Bihar County Government Office, according to which, the petitioner is not classified as a person with severe disability of mobility, is not capable of independent living, does not lack the ability of self service, and is not cumulatively disabled.

[5] 1.4 The petitioner brought an action against the decision of the decision of second instance, in which (according to its content) it requested the annulment of the decision of second instance, with effect to the decision of first instance, and the ordering of the administrative body with competence and jurisdiction to initiate new proceedings. According to the statement of claim, the administrative procedure failed to clarify the facts, to assess all evidence, and the authorities failed to apply multiple provisions of the law relating to the status of disabled persons. The petitioner requested the court to initiate proceedings before the Constitutional Court either under section 25 or section 23 of the ACC.

[6] The Debrecen Regional Court dismissed the action in its judgement No. 8.K.700.864/2020/27. The court appointed a new expert in the case, as it concluded that the petitioner's actual condition, as experienced by the court, differed from the findings of the expert opinions obtained in the first and second instance proceedings. The expert appointed by the court concluded that the petitioner is not capable of independent living, does not lack the ability to self service, but does not comply with any of the severe disability categories under the ARD implementing decree. The Debrecen Regional Court therefore concluded that the decision of the second instance authority was not unlawful. In its judgement, the court rejected the motion to initiate proceedings before the Constitutional Court because "the court may not initiate an individual review procedure in respect of a breach of Fundamental Law by omission and a breach of an international treaty" (judgement of the Debrecen Court, Reasoning [85]). In its judgement, the regional court expressly referred to the Decision 1/2018 (IV.6.) AB of the Constitutional Court, in which the Constitutional Court had actually found in the context of the ARD and the ARD implementing decree an ex officio infringement of the Fundamental Law by legislative omission, while at the same time dismissing the judicial initiative.

[7] 2 The petitioner then submitted his constitutional complaint based on section 26 (1) and section 27 of the ACC. The petitioner, in his constitutional complaint pursuant to section 27 of the ACC, primarily sought a declaration that the judgement No. 8.K.700.864/2020/27 of the Debrecen Regional Court was contrary to the Fundamental Law and asked for its annulment with effect to the decision No. T-BP-MCST-4798-4/2019 of the Budapest-Capital Government Office and the decision No. T-SZ-10-CST-

58133-6/2019 of the Nyíregyháza District Office of Szabolcs-Szatmár-Bereg County Government Office. In his secondary constitutional complaint under section 26 (1) of the ACC, the petitioner sought the establishment of the violation of the Fundamental Law by and the annulment of section 23 (1) (bb) of the ARD and section 1 (2) and Annex 1 (2b) of the ARD implementing decree, applied in his individual case.

[8] 2.1 Pursuant to the constitutional complaint under section 27 of the ACC, the judgement of the Debrecen Regional Court infringes Articles II, XV, XIX (1), XXIV (1) and Article XXVIII (1) of the Fundamental Law.

[9] The petitioner alleges a violation of the right to a fair administrative procedure under Article XXIV (1) of the Fundamental Law because the procedure initiated by him was entirely formal, the authorities did not take into account the fact that the petitioner's disability was not actually mentioned among the provisions of the ARD and the ARD implementing decree, and confined themselves to establishing that the petitioner did not qualify as severely disabled within the meaning of the ARD and the ARD implementing decree. In that regard, the petitioner complains that the authorities did not assess his application according to its content. The failure to assess the petitioner's actual condition also resulted, according to the petition, in a breach of Article II of the Fundamental Law.

[10] The right to a fair trial under Article XXVIII (1) of the Fundamental Law was infringed because the Debrecen Regional Court did not give any substantive reasons for rejecting the petitioner's application, in particular in view of the fact that the authorities acting in the main proceedings did not assess the petitioner's application in accordance with its content. The petitioner also considers that the fact that the Debrecen Regional Court did not initiate proceedings before the Constitutional Court, although it could have done so, is a violation of the right to a fair trial. Due to fact that the petitioner repeatedly requested the Debrecen Regional Court to initiate the proceedings of the Constitutional Court (the rejection of which was justified by the court only in the judgement), the proceedings of the Debrecen Regional Court lasted much longer than the proceedings of the Constitutional Court would have lasted, the petitioner's right to fair procedure within a reasonable time was also violated.

[11] The complaint pursuant to section 27 of the ACC does not contain any justification regarding the alleged violation of Article XV and Article XIX (1) of the Constitution.

[12] 2.2 According to the petitioner's constitutional complaint pursuant to section 26 (1) of the ACC, section 23 (1) (bb) of the ARD and section 1 (2) and Annex 1 (2b) of the ARD implementing decree are contrary to Article XV (2) and (5) and Article XIX (1) of the Fundamental Law.

[13] As stated in the constitutional complaint, the challenged provisions of the ARD and the ARD implementing decree constitute unjustified discrimination, violating Article XV (2) and Article XIX (1) of the Fundamental Law, between persons claiming disability allowance on the basis of whether or not the person claiming the benefit has a hearing impairment in addition to a serious speech impairment, inability to communicate meaningfully. In this context, the petitioner also cites the finding of the Decision 3258/2019 (X.30.) AB that the law-maker cannot act arbitrarily when defining the category of severe disability, and that the exclusion of persons with speech impairment, otherwise mentioned in the ARD, from the eligibility for disability allowance, when the allowance is otherwise available to persons with speech impairment who also have a hearing impairment, results in arbitrary discrimination violating the Fundamental Law.

[14] According to the constitutional complaint, Annex 1 (2b) of the ARD implementing decree also violates Article XV (5) of the Fundamental Law, as it obliges the State to protect people with disabilities by special measures, and excluded people with speech impairment from this protection (when determining the conditions for eligibility for disability allowance) in such a way that no other form of assistance exists for them.

II

[15] 1 The provisions of the Fundamental Law affected by the petition:

"Article II Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception."

"Article XV (1) Everyone shall be equal before the law. Every human being shall have legal capacity.

(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.

[...]

(5) By means of separate measures, Hungary shall protect families, children, women, the elderly and those living with disabilities."

"Article XIX (1) Hungary shall strive to provide social security to all of its citizens. Every Hungarian citizen shall be entitled to assistance in the event of maternity, illness,

invalidity, disability, widowhood, orphanage and unemployment for reasons outside of his or her control, as provided for by an Act.”

“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.”

[16] 2 The provision of the ARD affected by the petition:

“Section 23 (1) Eligible person is a Hungarian citizen, a settled person or a person with immigrant status, and a person recognised by the Hungarian authorities as a refugee or stateless person, who is severely disabled person over the age of 18, living in Hungary at the time of applying for the allowance and who

[...]

(bb) has a hearing impairment and is unable to pronounce spoken speech clearly (hearing impaired),”

[17] 3 Provisions of the ARD implementing decree concerned by the petition:

“Section 1 (2) For the purposes of section 23 (1) (b) of the ARD, a person shall be deemed to be hearing impaired if he or she has a disability to the extent specified in item 2 of Annex 1.”

“Annex 1

2. A person shall be considered hearing impaired if his or her hearing threshold is above eighty dB at speech frequencies and, as a result, is unable to understand spoken speech even with the aid of an assistance device, provided that

[...]

(b) in addition to the hearing impairment, he or she is unable to pronounce spoken speech clearly. This is a serious and permanent impairment of oral expression which makes communication impossible and is manifested by a disturbance of expression or a lack of acoustic expression of speech.”

[18] As provided for in section 56 (1) of the ACC, the Constitutional Court first examined the existence of the statutory conditions for the admissibility of the constitutional complaint.

[19] 1 In accordance with section 30 (1) of the ACC, the constitutional complaint under section 26 (1) and section 27 of the ACC may be submitted within sixty days from the date of delivery of the challenged decision. The Constitutional Court has found that the petitioner's authorised representative received the judgement of the Debrecen Regional Court on 11 March 2021, and the constitutional complaint was respectively lodged in due time. The petitioner is considered both entitled and concerned, as he submitted his constitutional complaint in the context of his individual case. The petitioner exhausted the available legal remedies. The ARD and the ARD implementing decree can be regarded as legal provisions applied in the case giving rise to the constitutional complaint for the purposes of the admissibility of the complaint under section 26 (1) of the ACC.

[20] 2 The Constitutional Court first examined the admissibility of the petitioner's constitutional complaint under section 27 of the ACC against the judgement No. 8.K.700.864/2020/27 of the Debrecen Regional Court, and came to the following conclusions.

[21] 2.1 The Constitutional Court shall accept a constitutional complaint, if it contains an explicit request, provided that other conditions are met. Pursuant to section 52 (1b) item b of the ACC, an application shall be explicit if it states the essence of the violation of the right guaranteed by the Fundamental Law, and pursuant to item (e), the application should contain a clear statement of reasons as to why the challenged provision of the law or judicial decision is contrary to the provisions of the Fundamental Law. The Constitutional Court found that the petitioner's constitutional complaint under section 27 of the ACC does not contain any reasoning at all regarding the violation of Article XV and Article XIX (1) of the Fundamental Law, and regarding the violation of Article II it does not contain any constitutionally assessable reasoning, but only refers in general terms to the fact that the formal examination of the petitioner's application for disability allowance also resulted in the violation of the petitioner's right to human dignity. Therefore, regarding these elements, the constitutional complaint does not fulfil the requirements of an explicit request under section 52 (1b) (b) and (e) of the ACC.

[22] 2.2 In the context of the alleged infringement of Article XXIV (1) and Article XXVIII (1) of the Fundamental Law, the constitutional complaint complies with regard to the requirement of an explicit request set out in section 52 (1b) of the ACC.

[23] 2.3 According to section 29 of the ACC, the constitutional complaint may be admitted if a concern of conflict with the Fundamental Law significantly affects the

judicial decision, or the case raises constitutional law issues of fundamental importance. These admissibility conditions are of an alternative nature; therefore, the Constitutional Court examines their existence separately {Decision 3/2013. (II. 14.) AB, Reasoning [30]}

[24] 2.3.1. In view of the case-law of the Constitutional Court in relation to the right to a fair procedure before public authorities and the right to a fair trial before a court, and in view of the content of the constitutional complaint under section 27 of the ACC, the constitutional complaint does not raise a question of fundamental constitutional significance in relation to Articles XXIV (1) and XXVIII (1) of the Fundamental Law.

[25] 2.3.2. The petitioner claims that his right to a fair procedure was violated because the competent authorities assessed his application for disability allowance formally and not on the basis of its actual content (the petitioner's actual condition). Taking into account that the petitioner himself claims in his constitutional complaint that the authorities examined and assessed his application as it was filed, and explained their decision in sufficient detail, and that the petitioner, even according to the him, was not entitled to disability allowance on the basis of his actual condition (due to the legislative environment of the petitioner's speech impairment), the Constitutional Court concluded that no concern of conflict with the Fundamental Law arose in relation to Article XXIV (1) of the Fundamental Law, affecting the merits of the judgement. In this context, the Constitutional Court also refers to the fact that the judgement of the Debrecen Regional Court expressly stated that the petitioner "requests the establishment of disability allowance with regard to his communication abilities" (Judgement of the Debrecen Regional Court, Reasoning [21]), and the court, in accordance with the provisions of the Act I of 2017 on the Code of Administrative Court Procedure, considers the party's statements not according to their formal designation, but according to their content, and judged them as such (Judgement of the Debrecen Regional Court, Reasoning [31]).

[26] 2.3.3. The petitioner claims that his right to a fair trial has been infringed, partly because of the lack of reasoning, partly because of not initiating the Constitutional Court's proceedings and partly because of the delay in the proceedings in this context.

[27] The Constitutional Court has consistently held that the constitutional requirement to state reasons, which is part of the right to a fair trial, implies that the court must give reasons for its decision in accordance with procedural law, but it does not follow from the obligation to state reasons that the court is under an obligation to rebut each of the observations put forward by the parties individually and, in particular, it is not necessary to present a system of arguments in sufficient depth to satisfy the subjective expectations of the applicants {see for example the Ruling 3459/2022. (X.28.) AB, Reasoning [19]}. In the present case, contrary to the petitioner's position, the Debrecen Regional Court in its judgement (with the appointment of an expert) clearly determined

the petitioner's actual condition, and by assessing this condition came to the conclusion that the petitioner was not entitled to disability allowance under the ARD and ARD implementing decree, and that the decision of second instance was not unlawful for the reason alleged by the petitioner. In its judgement, the Debrecen Regional Court, in great detail, fulfilling its obligation to state reasons under the Fundamental Law, also took a position on the question of why it did not initiate proceedings before the Constitutional Court. In any event, the possibility that the procedure may be protracted cannot be raised in relation to the possible speed of a Constitutional Court procedure which the trial court may have lawfully disregarded in compliance with procedural law, in relation to the actual duration of the administrative proceedings, since the reasonableness of the duration of a procedure may in any event be assessed in relation to the requirements of the Fundamental Law (and not in relation to the estimated duration of other, as the case may be, hypothetical procedures).

[28] Nevertheless, the Constitutional Court notes: where a judge hearing an individual case perceives the violation of the Fundamental Law or an international treaty by a law applicable in the case pending before the judge, in such a way that the obvious (but not exclusive) way of remedying the existing conflict with the Fundamental Law of international treaty would otherwise be to establish a legislative omission, it is desirable that the trial court should also fully examine the possibility whether the (mosaic-like, as the case may be) annulment of the provision of the law applicable to the individual case would be a suitable remedy for the infringement of the Fundamental Law or the international treaty, and not confine itself to formally rejecting the party's application. This is true even more so, because within the framework of the procedure under section 25 and section 32 of the ACC, the judge acting in an individual case may allege the violation of the Fundamental Law or an international treaty by a provision of the law applied in an individual case more broadly than the petitioner of a constitutional complaint procedure, and the judge acting in an individual case is not bound by the petition of the litigant party initiating the procedure of the Constitutional Court. Even if, in a given case, the correct means of resolving a legal situation violating the Fundamental Law or an international treaty is indeed the establishment of legislative omission, the Constitutional Court, acting of its own motion, may only establish a legislative omission if a petitioner has previously initiated proceedings before the Constitutional Court.

[29] 2.3.4. In the light of all these aspects, the Constitutional Court concluded that the constitutional complaint under section 27 of the ACC does not raise any concern of an infringement of the Fundamental Law affecting the merits of the judicial decision, neither in connection with Article XXIV (1) nor Article XXVIII (1) of the Fundamental Law.

[30] 2.3 In view of the above, the Constitutional Court refused the constitutional complaint against the judgement of the Debrecen Regional Court No. 8.K.700.864/2020/27 on the basis of section 64 (d) of the ACC.

[31] 3 The Constitutional Court then examined the admissibility of the petitioner's constitutional complaint pursuant to section 26 (1) of the ACC, aimed at establishing the violation of the Fundamental Law by and the annulment of section 23 (1) (bb) of the ARD and section 1 (2) and Annex 1 (2b) of the ARD implementing decree.

[32] 3.1 According to the consistent case-law of the Constitutional Court, Article XV (5) of the Fundamental Law does not contain a right guaranteed by the Fundamental Law for the purposes of the adjudication of constitutional complaints, and, with regard to this element, the constitutional complaint therefore does not fulfil the statutory requirement laid down in section 26 (1) (a) of the ACC.

[33] 3.2 The element of the constitutional complaint pursuant to section 26 (1) of the ACC, which alleges a violation of Article XV (2) and Article XIX (1) of the Fundamental Law, fulfils the requirement of an explicit request.

[34] 3.3 In accordance with section 29 of the ACC, the Constitutional Court had to examine, also in the context of a constitutional complaint under section 26 (1) of the ACC, whether there is a concern of an infringement of the fundamental law that would have a material impact on the merits of a judicial decision, and whether the constitutional complaint raises a question of fundamental constitutional significance.

[35] In the Constitutional Court's view, it be established only on the basis of an examination of the merits whether Article XV and Article XIX (1) of the Fundamental Law are infringed by the provision of the ARD and the ARD implementing decree, which (irrespective of the actual condition of the disabled person) recognises entitlement to disability allowance in the case of a communication disability (speech impairment) only if the disabled person also has a hearing impairment, whereas it is possible to grant disability allowance to persons with a hearing impairment without a speech impairment being established. The Constitutional Court therefore reviewed the merits of the constitutional complaint under section 26 (1) of the ACC with the application of section 31 (6) of the Rules of Procedure, without a specific procedure of admitting the complaint.

IV

[36] The constitutional complaint is unfounded.

[37] 1 According to the constitutional complaint, the contested provisions of the ARD and the ARD implementing decree violate Article XV (2) and Article XIX (1) of the Fundamental Law by unjustifiably discriminating against persons with speech impairment in comparison with persons with other disabilities, in particular hearing impairment, by making it a condition for disability allowance for persons with speech impairment, that the person claiming support must have an additional (hearing) impairment in addition to his or her severe speech impairment, inability to communicate meaningfully, whereas hearing impaired people may be eligible for disability allowance even without a speech impairment [section 23 (1) (ba) of the ARD].

[38] 2 First of all, the Constitutional Court had to examine whether the alleged violation of the principle of non-discrimination as stated in the constitutional complaint fell within the scope of Article XV (1) or (2) of the Fundamental Law. According to Article XV (1) of the Fundamental Law, everyone shall be equal before the law, and under paragraph (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. In his constitutional complaint, the petitioner alleges a violation of Article XV (2) of the Fundamental Law on the grounds of discrimination on the basis of one of the life situations mentioned therein (namely disability). However, for a breach of Article XV (2) of the Fundamental Law to be established, it is only one of the conditions (and not the only one) that the discrimination must be in relation to a protected characteristic mentioned in the Fundamental Law; it is also a condition that the discrimination must be in relation to a fundamental right to which the applicant is entitled {see, for example, Decision 30/2017 (XI.14.) AB, Reasoning [49]; most recently, for example, Decision 3330/2022 (VII.21.) AB, Reasoning [36]}.

[39] The starting point of the petitioner's constitutional complaint is that he was not entitled to disability allowance under the provisions of the ARD and the ARD implementing decree. The second sentence of Article XIX (1) of the Fundamental Law stipulates that every Hungarian citizen is entitled to statutory assistance in the event of the life-situations listed in the Fundamental Law, including disability and invalidity. In two cases, Article XIX of the Fundamental Law provides for a right guaranteed by the Fundamental Law for the purposes of the adjudication of constitutional complaints: Article XIX (4) refers to the right to a state pension, the conditions for which are laid down by Act of Parliament, while the second sentence of Article XIX (1) provides that, in the event of certain special life-situations, statutory benefits are to be introduced or maintained as a subjective right. It follows from this that Article XIX of the Fundamental Law provides the constitutional background for the legislation applicable in the listed life-situations {first: Decision 28/2015. (IX.24.) AB, Reasoning [34]; most recently, similarly, for example: Decision 13/2022. (VI.2.) AB, Reasoning [24]}. It means, however,

that, even in the case of the existence of special life-situations specified in the Fundamental Law, citizens are only entitled to the statutorily defined level of benefits, the concrete form and the amount of which may be set by the law-maker in its free discretion {Decision 3217/2014. (IX.22.) AB, Reasoning [24]}. However, the law-maker has the freedom to regulate only within the framework of the Fundamental Law. {Decision 3230/2013. (XII. 21.) AB, Reasoning [3]} Taking into account that in the case of the petitioner's disability (speech impairment), the ARD and the ARD implementing decree do not provide for the possibility of awarding disability allowance, the Constitutional Court concluded that the petitioner's individual case was outside the scope of the statutory regulation based on Article XIX (1) of the Fundamental Law [in this sense, for example: the Decision 13/2022 (VI.2.) AB, where the Constitutional Court found discrimination between persons otherwise entitled to benefits for persons with reduced capacity for work, as regards the determination of the amount of the benefit].

[40] Given that the conditions for referring to Article XV (2) of the Fundamental Law are not fully met in the petitioner's individual case, the Constitutional Court assessed the constitutional complaint in the context of Article XV (1) of the Fundamental Law.

[41] 3 The Constitutional Court has already examined the constitutionality of certain provisions of the ARD and the ARD implementing decree [Decision 1/2018. (IV.6.) AB, Decision 3258/2019. (X.30.) AB, Decision 3030/2021. (II.2.) AB], in which decisions it has established in principle that the provisions of the ARD and the ARD implementing decree cannot be contrary to Article XIX (1) itself of the Fundamental Law, simply because they implement it {first: Decision 1/2018. (IV.6.) AB, Reasoning [20]; then similarly in: Decision 3030/2021. (II.2.) AB, Reasoning [12]}. The Constitutional Court considers this finding to be applicable the same way in the context of the provisions of the ARD and the ARD implementing decree challenged in the present constitutional complaint, and finds that section 23 (1) (bb) of the ARD and section 1 (2) as well as Annex 1 (2b) of the ARD implementing decree are not contrary to Article XIX (1) of the Fundamental Law for the reason stated in the petition.

[42] 4 The Constitutional Court, in its examination of the constitutionality of certain elements of the legal institution of disability allowance, has already held that the use of the term "disability" in the Fundamental Law without an adjective allows the law-maker a wide margin of discretion in setting the perspective from which it defines the specific legal concept of disability, still the law-maker may not choose a solution that is in complete contradiction – without exception and discretion – with the generally accepted meaning of the words used in the Fundamental Law {Decision 1/2018. (IV.6.) AB, Reasoning [18]}. The Constitutional Court has also already held that neither the Fundamental Law nor the international obligations assumed by Hungary (in particular the Convention on the Rights of Persons with Disabilities promulgated by the Act XCII of 2007) imply that the State is obliged to provide to all persons with disabilities the

disability allowance for persons with severe disabilities. However, in defining the category of severe disability, the law-maker should not act arbitrarily {Decision 1/2018. (IV.6.) AB, Reasoning [16], Decision 3258/2019. (X.30.) AB, Reasoning [37]}. In the light of these previous findings, which are also relevant for the assessment of the present constitutional complaint, the Constitutional Court had to assess, in the framework of the present constitutional complaint, whether Article XV (1) of the Fundamental Law is violated by the regulations in the ARD and the ARD implementing decree, entitling persons with a speech impairment to disability allowance only if they have an additional (hearing) impairment, whereas persons with a hearing impairment may be entitled to the same benefit even without a speech impairment.

[43] 5 According to the consistent case-law of the Constitutional Court, the violation of the prohibition of discrimination under Article XV (1) of the Fundamental Law can be established within a comparable scope (same group) of persons. Discrimination must therefore exist within a homogeneous group. No discrimination shall be established when the law provides for different rules regarding a different scope of subjects {see for the first time after the entry into force of the Fundamental Law: Decision 40/2012. (XII.20.) AB, Reasoning [28]; see in the subsequent case-law, for example: Decision 3534/2021. (XII.22.) AB, Reasoning [16]}. The Constitutional Court therefore had to rule first and foremost on the question of whether persons with speech impairment are in a comparable situation to other persons with disabilities, in particular hearing impairment, as regards their entitlement to disability allowance.

[44] Disability is a condition, and the institution of disability allowance is intended to compensate for disadvantages arising from the disability (and not from the origin of the disability). This is supported by section 22 of the ARD and its legislative justification. According to section 22 of the ARD, disability allowance is a monthly cash benefit for a severely disabled person to promote equal opportunities, the purpose of which is to provide the severely disabled person with financial assistance to help him or her alleviate the social disadvantages resulting from his or her severely disabled status. According to the reasoning of the ARD, "disability allowance is a legitimation of the simple principle that the additional costs incurred by a disabled person solely because of his or her disability should be compensated by State measures."

[45] However, not all persons with disabilities are entitled to disability allowance: only severely disabled persons are entitled to it under section 23 of the ARD if they have a permanent or final disability and are unable to live independently or require the constant assistance of others. Severe disability (like disability) is a condition. Section 2 (2) of the ARD implementing decree also defines the condition when a person with a disability is not capable of independent living for the purposes of disability allowance.

[46] The Constitutional Court therefore holds that, for the purposes of assessing the conditions for entitlement to disability allowance, all disabled persons whose disability is permanent or final, whose condition (whatever its origin) is severe, if they are unable to live independently or if they need the constant assistance of others, are in a comparable situation. In this context, the Constitutional Court also points out that the Commissioner for Fundamental Rights has already stated in his report in case AJB-3639/2016 that “the impairment of speech as a result of a stroke places the person concerned at a social disadvantage similar to that of a hearing or visual impairment.” The comparable situation in the present case necessarily refers to the condition of the disabled person (and not to the identity of the conditions for entitlement to disability allowance).

[47] 6 Violation of Article XV (1) of the Fundamental Law can be established if the legislation differentiates between subjects of the law in comparable situations without a reasonable justification for doing so according to an objective assessment, i.e. it is arbitrary {Decision 9/2016. (IV.6.) AB, Reasoning [22]}. The Constitutional Court therefore had to assess whether the legislation at issue arbitrarily discriminates between persons with speech impairments who are severely disabled according to their condition and persons with other disabilities as regards their entitlement to disability allowance.

[48] Severe disability is a severe physical, mental, intellectual or sensory impairment, the assessment of which is a medical matter which does not fall within the jurisdiction of the Constitutional Court {Decision 1/2018. (IV.6.) AB, Reasoning [19]}. However, it is a question falling in the remit of the Constitutional Court whether the legislation allows (similarly to other persons with severe disabilities) persons having severe speech impairment (without other impairment) to be awarded disability allowance at all, when other persons with a single disability may (at least in principle) be entitled to disability allowance even if they have only one disability.

[49] According to section 23 of the ARD, severely disabled persons may be visually impaired [section 23 (1) (a)], hearing impaired [section 23 (1) (b)], mentally disabled [section 23 (1) (c)], disabled persons with a pervasive developmental disability [section 23 (1) (d)], persons with mobility impairment [section 23 (1) (e)], persons with multiple disabilities [section 23 (1) (f) and (g)] or persons with chromosomal defects [section 23 (1) (h)]. Therefore, under section 23 of the ARD, people with speech impairments are not entitled to disability allowance on the basis of this disability (regardless of their condition). This is the case despite the fact that the category of speech impairment is acknowledged and legally evaluated in the ARD and the ARD implementing decree itself. According to section 4 (a) of the ARD, a disabled person is a person who has a permanent or final sensory, communication, physical, intellectual or psychosocial impairment (or any accumulation of such impairments), which, in interaction with

environmental, social and other significant barriers, limits and hinders effective and equal participation in society. However, section 23 (1) (bb) of the ARD contested in the petitioner's petition provides for the entitlement to disability allowance for persons with communication disabilities (the speech impaired) only if the speech impairment is also combined with a hearing impairment. In accordance with Annex 1 (2b) of the ARD implementing decree, being unable to pronounce spoken speech clearly means "a serious and permanent impairment of oral expression which makes communication impossible and is manifested by a disturbance of expression or a lack of acoustic expression of speech". Accordingly, people with speech impairments (who are unable to perform intelligible pronunciation of spoken language as defined in the ARD implementing decree) can only qualify for disability allowance if they also have an additional (and only a specifically defined) disability, namely hearing impairment, and then they shall qualify for the benefit in respect of their hearing disability (as a hearing impaired person) rather than in respect of their speech impairment.

[50] In the Constitutional Court's view, the automatic and total exclusion from disability allowance of persons with a speech impairment alone, who are in a situation comparable to that of other severely disabled persons, cannot reasonably be justified and the legislative solution chosen therefore constitutes arbitrary discrimination. Given that the purpose of disability allowance is to mitigate the social disadvantages resulting from a severely disabled condition (and the law-maker itself has defined that purpose as such), and the institution of communication disability is recognised as a disability in the ARD itself and it even accepts communication disability (speech impairment) as a factor constituting a severe disability in the case of a link with other disabilities, then the complete and automatic exclusion of persons with speech impairments from entitlement to disability allowance is cannot be constitutionally justified.

[51] 7 However, the Constitutional Court also found that the annulment of the challenged provisions of the ARD and the ARD implementing decree would not make disability allowance available to the petitioner, but it would lower the conditions for eligibility for the disability allowance for persons with hearing impairment, breaking the limit that the law-maker had set when determined the conditions for eligibility for disability allowance in relation to the severity of the disabled status. The rules governing the entitlement of persons with a hearing impairment to disability allowance cannot in themselves be regarded as unconstitutional, in the light of the Constitutional Court's earlier findings on the constitutional requirements relating to the category of severe disability, which are referred to in the present decision.

[52] Accordingly, the Constitutional Court concluded that, although the legislation at issue is indeed inconsistent with the Fundamental Law as regards the legal status of persons with speech impairments and their entitlement to disability allowance, the inconsistency is due their incompleteness rather than to the fact that the legislation is

not in conformity with the provisions of the ARD and the ARD implementing decree {In the context of the provisions of the ARD and the ARD implementing decree, similarly: Decision 1/2018. (IV.6.) AB, Reasoning [23]; most recently, similarly: Decision 17/2021. (V.13.) AB, Reasoning [55]}.

[53] The Fundamental Law provides for an eligibility to support in case of “disability”. As explicitly laid down in section 4 (a) of the ARD, this includes communication impairment as well if it severely limits or hinders effective participation in society, equally with others. There is no reason why persons with such a disability should automatically, without any possibility of an actual assessment of their condition, be completely excluded from entitlement to disability allowance, even though there is currently (due to the defects of the ARD and the ARD implementing decree) no form of benefit available for such persons, which is incompatible with Article XIX (1) of the Fundamental Law {similarly: Decision 1/2018. (IV.6.) AB, Reasoning [23]}. This lack of the regulation results in discrimination under Article XV (1) of the Fundamental Law between people living with disabilities who have a similar serious condition and are therefore in a comparable situation in relation to their condition.

[54] Section 46 (1) of the ACC empowers the Constitutional Court – if, in the course of proceedings in the exercise of its powers it finds that the legislator has failed to act in violation of the Fundamental Law – to call upon the body which has failed to act to perform its duty, setting a deadline. Pursuant to section 46 (2) (c) of the ACC, it is considered a failure to fulfil the legislative task if the essential content of the legal regulation derivable from the Fundamental Law is incomplete.

[55] In the light of the above, the Constitutional Court, acting *ex officio*, finds that there is an infringement of the Fundamental Law by omission of the law-maker due to its failure to regulate, in accordance with Article XIX (1) of the Fundamental Law, the conditions of eligibility for disability allowance for persons with a permanent or final communication disability (speech impairment) who are unable to live independently or who need the permanent assistance of others. The Constitutional Court calls on the Parliament to comply with its legislative duty by 31 December 2023.

[56] In view of the fact that the Constitutional Court considers that, in the context of the challenged provisions of the ARD and the ARD implementing decree, conformity with the Fundamental Law can be achieved by establishing the law-maker’s omission and addressing a call upon the law-maker, the Constitutional Court rejected the constitutional complaint under section 26 (1) of the Constitutional Act as set out in the holdings of the decision.

[57] 8 Based on the second sentence of section 44 (1) of the ACC, the Constitutional Court has ordered the publication of its decision in the Hungarian Official Gazette.

Budapest, 14 February 2023.

Dr. Tamás Sulyok,
President of the Constitutional Court

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

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

Dr. Tünde Handó, Justice of the
Constitutional Court

Dr. Attila Horváth, 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 *dr. Imre Juhász* unable to sign

Dr. Miklós Juhász, Justice of the
Constitutional Court

Dr. Zoltán Márki, Justice of the
Constitutional Court

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

Dr. László Salamon, Justice of the
Constitutional Court

Dr. Balázs Schanda, Justice of the
Constitutional Court

Dr. Marcel Szabó rapporteur, Justice of
the Constitutional Court

Dr. Péter Szalay Justice of the
Constitutional Court

Dr. Mária Szívós, Justice of the
Constitutional Court