

Decision 3161/2023 (IV. 6.) AB

on establishing the violation of the Fundamental Law by a provision of law

On the basis of a judicial initiative seeking the establishment of a violation of the Fundamental Law by legislation, the plenary session of the Constitutional Court has adopted the following

decision:

1. The Constitutional Court declares that the second sentence of section 34 (2) of the Act LIII of 1994 on Judicial Enforcement, in force until 1 December 2022, was contrary to the Fundamental Law.
2. The Constitutional Court establishes that the second sentence of section 34 (2) of the Act LIII of 1994 on Judicial Enforcement, in force until 1 December 2022, is not applicable in the case No. 0101-4.Vh.3999/2021 pending before the Central District Court of Pest and in the case No. 52.Pkf.635.575/2022 before the Budapest-Capital Regional Court as the court of second instance.

Reasoning

I

[1] 1 The Budapest-Capital Regional Court as the court of second instance (hereinafter: "petitioner") by its ruling No. 52.Pkf.635.575/2022/4 – staying the second instance proceedings pending before it under No. 52.Pkf.635.575/2022 and the enforcement proceedings pending under No. 0223.V.0148/2021 –, in accordance with Article 24 (2) (b) of the Fundamental Law and section 25 (1) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), turned to the Constitutional Court with a judicial initiative seeking a declaration that the second sentence of section 34 (2) of the Act LIII of 1994 on Judicial Enforcement (hereinafter: AJE) was in conflict with the Fundamental Law, and its annulment. It also sought an order precluding the application of the contested provision in the proceedings pending before the Central District Court of Pest under No. 0101-4.Vh.3999/2021 and before the Budapest-Capital Regional Court under No. 52.Pkf.635.575/2022.

[2] 2 The elements of the case underlying the petition, which are relevant for the purposes of the initiative are summarised as follows.

[3] Following an application by the applicant for enforcement submitted in 2017, the notary public issued an enforcement order against the debtor in 2020 for the debt. The acting bailiff seized the real property owned by the debtor and, on the basis of the tax and value certificate obtained, took action to establish the value – as inhabited and available for occupation – of the residential property owned by the debtor, which was subject to the enforcement. The debtor lodged an objection against the measure, contesting the valuation of the property, as inhabited, and requested the court's assessment of the value, and also applied for legal aid.

[4] The Central District Court of Pest (hereinafter: "court of first instance"), with its ruling No. 0101-4.Vh.3999 /2021/3, called upon the debtor – under penalty of refusal – to submit missing documents in the context of its application for legal aid and its objection to enforcement and informed him that, pursuant to section 34 (2) of the AJE, the costs incurred with the assistance of an expert must be paid in advance by the person who requested these measures, and legal aid and the right to fee deferral cannot be claimed for these expenses. In the light of the above, it called on the debtor to remedy – under penalty of refusal – the lack of an objection to the estimated value within 15 days of receipt of the ruling, by proving that he had deposited the sum of HUF 177 500 in advance of the expert's fees with the Financial Office of the Budapest-Capital Regional Court in the Judicial Deposit Account.

[5] The debtor has remedied the deficiencies in its application for legal aid, but has not complied with the requirement to deposit the advance expert's fees and the proof of that deposit. In his petition, he complained that the court had called for an advance on costs which it knew he did not have reserves to cover. In his view, section 34 (2) of the AJE is contrary to the Fundamental Law because it discriminates him against those who have capital reserves, while depriving him of a remedy on account of his financial situation. In view of this, he considered it necessary to initiate proceedings before the Constitutional Court.

[6] By the ruling No. 6, the court of first instance dismissed the debtor's objection to enforcement of its own motion under section 217 (5) of the AJE, its application for legal aid under section 85 (2) (a) of the Act III of 1952 on the Civil Procedure (hereinafter: "old ACP"), and by ruling No. 7, it dismissed the debtor's application for a stay of enforcement and for the institution of proceedings before the Constitutional Court.

[7] The debtor appealed against both rulings, primarily complaining of not initiating the Constitutional Court's proceedings. According to the petitioner, the second sentence of section 34 (2) of the AJE is exclusionary and discriminatory on the basis of financial situation.

[8] The Budapest-Capital Regional Court, as the court of second instance, ruled under case No. 52.Pkf.637.612/2021/3 on the appeal against the ruling No. 7 of the court of first instance. In its ruling, it partially reversed the ruling of the court of first instance and initiated proceedings before the Constitutional Court for a declaration that the second sentence of section 34 (2) of the AJE was contrary to the Fundamental Law and for its annulment. It also initiated an order precluding the application of the provision of the law sought to be annulled in the proceedings pending before the Central District Court of Pest under No. 0101-4.Vh.3999/2021 and before the Budapest-Capital Regional Court under No. 52.Pkf.637.611/2021. It also decided to suspend the enforcement proceedings pending against the debtor, with effect in respect of the real property concerned, pending the outcome of the proceedings before the Constitutional Court. The Budapest-Capital Regional Court, as the court of second instance, ruled, under the case No. 52.Pkf.637.611/2021/3, on the appeal against the ruling No. 6 of the court of first instance. In its ruling, the Budapest-Capital Regional Court, as the court of second instance, stayed the proceedings at second instance until the end of the constitutional court proceedings initiated by its ruling No. 52.Pkf.637.612/2021/3.

[9] By its ruling No. 3409/2022 (X.21.) AB, the Constitutional Court refused the petition for a declaration that the second sentence of section 34 (2) of the AJE was contrary to the Fundamental Law and for the annulment of that provision of the law, and for a declaration that the provision sought to be annulled was inapplicable. In its reasoning, it pointed out that the judicial motion did not comply with the conditions laid down in section 25 (1) of the ACC. In the light of the decision of the Constitutional Court, the second instance court, by its ruling No. 7 ordered the continuation of the suspended second instance proceedings in the case No. 52.Pkf.637.611/2021, and registered the case under a new number (new number: 52.Pkf.635.575/2022).

[10] 3 The second instance court turned to the Constitutional Court following the above-mentioned background events. In its view, the second sentence of section 34 (2) of the AJE infringes several provisions of the Fundamental Law, including Article XV (1) to (2) and Article XXVIII (7).

[11] The petitioner submits that it must apply the contested provision in the case pending before it, given that the debtor has lodged an objection to the value estimate of the property assessed by the bailiff and that, under the relevant provisions of the law, the person lodging the objection is also required to advance the fees of the forensic expert to be appointed by the court to determine the value of the property by depositing the same; moreover, when lodging the objection, he must also prove that the deposit has been made, failing which the objection will be rejected *ex officio*. In the present case, the debtor submitted that he was not able to advance the expert's fee because of its income and financial circumstances, as evidenced by the documents

attached, and also applied for legal aid, the use of which is excluded for the relevant costs by the second sentence of section 34 (2) of the AJE, and the court of first instance therefore decided to reject the objection without examining it on the merits.

[12] According to the petition, the second sentence of section 34 (2) of the AJE, which is applicable in the present enforcement proceedings, clearly distinguishes according to their financial situation between the persons who wish to exercise the remedies provided for in the AJE against the value of the real property determined by the bailiff in the enforcement proceedings, that is to say, those who are entitled to raise an objection to enforcement. In that regard, the AJE does not guarantee the right to an effective and efficient remedy for all persons entitled in the context of a measure by the bailiff fixing the value of the property and fails to ensure equality before the law in the exercise of that right. According to the petitioner, section 217 (1) of the AJE provides for the possibility for a party or other interested party to lodge an objection to enforcement (as a remedy against the enforcement) against an act or failure to act of the bailiff which substantially infringes the rules of the enforcement procedure and the right or legitimate interest of the party lodging the objection to enforcement.

[13] It follows from the provisions of the AJE and the Decree of the Minister of Justice No. 39/2012 (VIII.27.) KIM on the amount of the advance of the expert's fee to be deposited together with the objection to enforcement aimed at determining the appraisal value of a real property by the court (hereinafter: "KIM Decree"), that in the case of an enforcement objection, the party or interested party lodging the enforcement objection – if he or she requests the determination of the appraisal value by the court – is also obliged to advance the costs incurred by the expert (the amount of which may range from HUF 20 000 to HUF 300 000 according to the KIM Decree), irrespective of the financial situation of the objecting party, i.e. whether or not the party is able to pay the amount of the expert fee advance to the designated account, since pursuant to the second sentence of section 34 (2) of the AJE, legal aid and the right to fee deferral may not be claimed in respect of these expenses. In this context, the petitioner also expressly emphasised that it is not only the debtor who may be in a financial situation which makes it impossible to advance the costs of the expert, since the value determined by the bailiff may also prejudice the rights or legitimate interests of the applicant for enforcement or of any other interested party. The petitioner argues that, by virtue of section 9 of the AJE, the civil procedure's system of legal aid is applicable, the purpose of which is precisely to create a safety net for the parties in the event that their financial situation prevents them from enforcing their claims. On the other hand, the second sentence of section 34 (2) of the AJE excludes legal aid and the right to fee deferral for the advance payment of expert fees, thus making it impossible for parties who are unable to advance costs to exercise their right to a legal remedy.

[14] In addition, the petitioner submits that the contested provision is also contrary to an international treaty: the Charter of Fundamental Rights of the European Union, in Title VI, among the rights relating to justice, lays down in Article 47 rules on the right to an effective remedy and to a fair trial, including the possibility of granting legal aid to those who do not have sufficient resources.

[15] According to the petitioner, the right to a remedy can be effective and efficient only if it is effectively granted to all persons entitled to it, irrespective of their financial situation and without any other discrimination, but that this requirement is not met in the case of the enforcement objection to the bailiff's measure determining the value of real property. The contested provision of the law, in the petitioner's view, makes a distinction on the basis of their financial situation between the persons entitled to legal remedies and deprives all those who are unable to advance the costs of the measure of the possibility of effective legal remedy, as they are not in fact entitled to redress any harm caused by the measure. This constitutes a breach of their rights guaranteed by the Fundamental Law, as a restriction of fundamental rights which, in the view of the court of second instance, is neither necessary nor proportionate.

II

[16] 1 The provisions of the Fundamental Law referred to are as follows:

"Article I (3) The rules relating to fundamental rights and obligations shall be laid down in an Act of Parliament. A fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right."

"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."

"Article XXVIII (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 AJE in force until 1 December 2022, which is the subject of the petition:

"Article 34 (2) The costs incurred by the assistance of the expert and the expert-appraiser and the costs incurred by the public announcement of the auction shall be paid in advance by the person who requested these measures. Legal aid and the right to fee deferral shall not be granted."

[18] 3 Provision of the AJE in force:

"Article 34 (2) The costs incurred by the assistance of the expert and the expert-appraiser and the costs incurred by the public announcement of the auction shall be paid in advance by the person who requested these measures."

III

[19] 1 First the Constitutional Court examined whether the judicial initiative complies with the criteria set forth in the ACC. According to section 25 (1) of the ACC, if a judge, in the course of the adjudication of a concrete case in progress, is bound to apply a law that he or she perceives to be contrary to the Fundamental Law, or which has already been declared to be contrary to the Fundamental Law by the Constitutional Court, the judge shall suspend the judicial proceedings and, in accordance with Article 24 (2) b) of the Fundamental Law, submit a petition to the Constitutional Court for declaring that the law or a provision thereof is contrary to the Fundamental Law, or for the exclusion of the application of the law being contrary to the Fundamental Law. In addition to the above, the judicial initiative motioning an individual norm control shall contain an explicit request according to section 52 (1) and (1b) of ACC.

[20] The Constitutional Court held that the staying of the second instance proceedings pending under No. 52.Pkf.635.575/2022 and the enforcement proceedings pending under case number 0223.V.0148/2021 had been granted, the court in the main proceedings must apply the contested provision and the petition seeks a declaration of an infringement of the Fundamental Law, including the legal sanction of annulment. {see for example the Decision 2/2018. (IV.6.) AB, Reasoning [11]}. The motion complies also with the requirements set in section 52 (1) and (1b) for an explicit request: the petitioner judge clearly states the grounds of the petition, the challenged provision of law and the provision of the Fundamental Law that is alleged to be violated. The application sets out the reasons why the contested provision of the law is contrary to Article XV (1) to (2) and Article XXVIII (7) of the Fundamental Law and expressly requests a declaration that the contested provision of the law is contrary to the Fundamental Law and a prohibition on its application {See for example: Ruling 3058/2015. (III.31.) AB, Reasoning [8] to [24], Decision 2/2016. (II.8.) AB, Reasoning [26] to [28], Decision 3166/2019. (VII.10.) AB, Reasoning [18] to [19]}.

[21] 2 During its proceedings, the Constitutional Court noted that the provision of the law challenged by the petitioner was amended by the law-maker with effect from 1 December 2022. Pursuant to section 38 of the Act LV of 2022 on Amending Certain Acts on Justice (hereinafter: "Amending Act"), the challenged provision of the law was changed – in accordance with the main rule of section 154 (1) of the Amending Act, with effect from the day following the promulgation of the Amending Act – and section 34 (2) of the AJE in force no longer contains the second sentence challenged in the present case, which the petitioner considered to be in conflict with the Fundamental Law. Accordingly, the provision of the AJE in force until 1 December 2022, which is the subject of the application, contained the following: "Article 34 (2) The costs incurred by the assistance of the expert and the expert-appraiser and the costs incurred by the public announcement of the auction shall be paid in advance by the person who requested these measures. Legal aid and the right to fee deferral shall not be granted." The provision of the AJE in force no longer contains the second sentence challenged by the petitioner.

[22] According to the reasoning attached to section 38 of the Amending Act, "in the course of the enforcement procedure, the bailiff shall determine the appraisal value. If a party disagrees with setting the appraisal value or requests the assistance of an expert for the valuation of the property, the costs incurred shall be advanced by the party who requested such measures. Under the amendment, legal aid and the right to fee deferral may be claimed on the basis of the applicable legislation."

[23] At the same time, section 41 (3) of the ACC allows the Constitutional Court to establish that a repealed provision of the law is contrary to the Fundamental Law in the event that the relevant provision of the law should still be applied in a specific case. In the case at issue, the law-maker has repealed the challenged provision, but, in the absence of a transitional provision for pending cases, the content of the provision at the time of the underlying proceedings must be taken into account and applied by the courts seised (similarly see: Decision 3195/2020. (VI.11.) AB, Reasoning [22]). In view of this, the Constitutional Court examined the merits of the second sentence of section 34 (2) of the AJE, which was in force before 1 December 2022.

IV

The judicial initiative is well-founded.

[25] 1 First of all, the Constitutional Court provided a brief overview of the provisions of the AJE on legal remedies and legal aid relevant to the case at hand, given that, according to the petitioner, the exclusion of legal aid and the right to fee deferral in relation to the advance payment of costs listed in section 34 (2) of the AJE results in a

violation of the right to legal remedy through discrimination based on financial situation.

[26] In the petitioner's view, as set out above, the second sentence of section 34 (2) of the AJE contains a prohibitive provision which infringes the right to equality before the law, the right to non-discrimination in the exercise of fundamental rights and the right to legal remedy, as laid down in the Fundamental Law, because it clearly distinguishes according to their financial situation between those entitled to raise an objection to the value appraisal of the property as determined by the bailiff, thereby it fails to guarantee to all entitled persons the right to an effective legal remedy and equality before the law.

[27] The Constitutional Court points out: according to section 5 of the AJE, in the course of judicial enforcement, state coercion shall be used to ensure that the debtor who is obliged to pay money or show another conduct perform his or her obligation. As indicated in the Minister's statement submitted in the case underlying the ruling 3409/2022 (X.21.) AB, enforcement proceedings are brought because of the debtor's failure to perform voluntarily. Part four of the AJE lays down the remedies available in enforcement proceedings: on the one hand it provides for the possibility to lodge an application for legal remedy in connection with ordering the enforcement and, on the other hand, for the legal remedies available in connection with the executing the enforcement. The institution of the objection to enforcement is governed by sections 217 to 218 of the AJE. Objection to enforcement is in essence the most widely available legal remedy, since according to section 217 (1) of the AJE, a party or other interested party may lodge an enforcement objection (hereinafter: "objection") with the court executing the enforcement against a measure of the bailiff or his failure to act (hereinafter collectively: "measure") which substantially infringes the rules of the enforcement procedure and the right or legitimate interest of the person lodging the enforcement objection. Section 217 (5) of the AJE states that if the objection is late, does not contain a certificate of the deposit of the expert fee specified in the Minister's decree, or is directed against a measure which is not manifestly in breach of law in substance, and if the objection submitted by the party is incomplete despite being called upon to make it complete, the court shall reject the objection *ex officio*. Pursuant to section 140 (7) of the AJE, if an objection to enforcement has been lodged within 15 days of the notification of the value appraisal, the value shall be determined by the court, if necessary with the assistance of an expert. When an enforcement objection to the value appraisal is lodged, the amount to cover the fees of the forensic expert, as determined in the Minister's decree, shall be deposited together with the lodging of the enforcement objection to the value appraisal by the court. Pursuant to section 2 of the KIM Decree, the amount of the expert's fee is to be paid into the escrow account of the financial office competent according to the seat of the court hearing the enforcement objection, in accordance with the rules on the deposit of the forensic

expert's fee as regulated in the decree on deposits with the court. When the enforcement objection is lodged, proof of payment shall be annexed to the enforcement objection. In the communication section of the payment order, the bailiff's file number, including the serial number of the bailiff's document stating the value appraisal, shall be indicated.

[28] According to the contested provision applicable in the underlying case, the costs incurred by the assistance of the expert and the expert-appraiser and the costs incurred by the public announcement of the auction shall be paid in advance by the person who requested these measures. Legal aid and the right to fee deferral shall not be granted.

[29] Section 94 (1) of the Act CXXX of 2016 on the Civil Procedure (hereinafter: ACP), which is applicable by virtue of section 9 of the AJE determines [or, prior to the entry into force of the ACP, section 84 (1) of the old ACP determined] the cost-allowances to which the party is entitled in the proceedings in order to enforce his or her rights; however, the applicability of that provision to the advance of costs listed in section 34 (2) of the AJE was actually excluded by the contested provision.

[30] 2 The Constitutional Court then briefly reviewed its case-law on discrimination. First of all, the Constitutional Court had to examine whether the alleged violation of the principle of non-discrimination as stated in the judicial initiative 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 any other status. According to the consistent case-law of the Constitutional Court, it shall adjudicate the motion alleging the violation of Article XV on the basis of Article XV (2) in the case of affecting fundamental rights and the alleged violation of the individual's protected characteristics and on the basis of Article XV (1) if other rights are affected. {See for example: Decision 30/2017. (VII.14.) AB, Reasoning [49]; Decision 3330/2022. (XI.21.) AB, Reasoning [36]}.

[31] In accordance with the consistent case-law of the Constitutional Court, the starting point for examining the constitutionality of discrimination is that "the prohibition of discrimination does not mean that all distinctions are prohibited, but that it expresses the expectation that the law must treat everyone as a person of equal dignity." {Decision 3024/2015. (II. 9.) AB, Reasoning [47]} An infringement of the Fundamental Law due to the violation of Article XV(1) of can be established if the legislation differentiates between subjects of the law belonging to the same – homogeneous – group (in comparable situations with each other) from the point of view of the regulation, and the differentiation cannot be justified: there is no reasonable, sufficiently serious constitutional justification for the different legislation, i.e. it is arbitrary {See for example: Decision 10/2015. (V.4.) AB, Reasoning [19]; Decision

23/2016. (XII.12.) AB, Reasoning [99]; Decision 3031/2019. (II.13.) AB, Reasoning [27]]. No discrimination shall be established when the law provides for different rules regarding a different scope of subjects {See Decision 42/2012. (XII.20.) AB, Reasoning [28]; from the recent case-law: Decision 3002/2019. (I.7.) AB, Reasoning [39]; Decision 9/2021. (III.17.) AB, Reasoning [182]}. From a constitutional law perspective, the distinction cannot be accepted 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]}.

[32] The Constitutional Court has also emphasised in several decisions that the prohibition under Article XV (2) of the Fundamental Law applies primarily to discrimination with regard to fundamental rights, but that it can be extended to the entire legal system, since “the discriminatory distinctions listed therein may occur not only in legislation falling within the scope of the protection of fundamental rights, but in any legislation. It can be reasonably assumed that the values of the Fundamental Law prohibit such discrimination even if it is not contained in the legislation regulating the subjects covered by the protection of fundamental rights.” {Decision 42/2012. (XII.20.) AB, Reasoning [42]}.

[33] According to the case-law of the Constitutional Court, negative discrimination between persons in breach of the Fundamental Law can only be established if a person or a group of people are discriminated against in comparison with other persons or a group in the same position. The distinction is in breach of the Fundamental Law if the legislation distinguishes between subjects of the law belonging to the same group (comparable to each other) without a constitutional justification; i.e. the distinction can only be made between right-holders and obliged parties in comparable situations. The Constitutional Court also pointed out that the violation of the Fundamental Law by the discrimination between persons or any other restriction concerning their rights other than fundamental ones may only be established if the injury is related to any fundamental right, and finally, to human dignity, and there is no reasonable ground for the distinction or the restriction, i.e. it is arbitrary {see for example: Decision 1/2018. (IV.6.) AB, Reasoning [14]}.

[34] The Constitutional Court has already set out the methods of analysis used to assess the constitutionality of discrimination in a number of previous decisions. Accordingly, “the Constitutional Court applies a standard to discrimination affecting fundamental constitutional rights – the necessity/proportionality test laid down in Article I (3) of the Fundamental Law – and a different standard when it examines the prohibition of discrimination in relation to rights other than fundamental rights. Here, the Constitutional Court will find discrimination contrary to the Fundamental Law if the discrimination has no objectively reasonable justification, i.e. it is arbitrary” {see:

Decision 10/2015. (VI. 4.) AB, Reasoning [20]). 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 financial situation). For a breach of Article XV (2) of the Fundamental Law to be established, it is 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]}. The Constitutional Court held that the petitioner claimed that the distinction based on financial situation was related to the right to legal remedy as a fundamental right guaranteed by the Fundamental Law, and that the judicial initiative could be examined under Article XV (2).

[35] 3 The Constitutional Court had to rule on the basis of the petition – in the light of its above-mentioned case-law – on the question whether the provision excluding the right to legal aid and the right to fee deferral regarding the advance payment of expert costs violates the principle of equal rights and the prohibition of discrimination enshrined in Article XV of the Fundamental Law, or whether it has created an indirect distinction according to financial situation which also precludes the effective enforcement of the right to legal remedy. In order to decide in the above question, it is necessary to specify who should be regarded as belonging to a homogeneous group for the purposes of the contested provision. In order to determine this, the Constitutional Court considered it necessary to provide an overview the relevant provisions of the law and, on this basis, concluded the following.

[36] As described in detail above, under section 34 (2) of the AJE, the costs incurred by the assistance of the expert and the expert-appraiser and the costs incurred by the public announcement of the auction shall be paid in advance by the person who requested these measures. Under the contested provision (i.e. the second sentence of section 34 (2) of the AJE), legal aid and the right to fee deferral were not available (before 1 December 2022) (contrary to the provisions of section 94 of the ACP applicable by virtue of section 9 of the AJE)

[37] Section 34 (2) of the AJE already contained, from the entry into force of the Act, a provision on the advance payment of costs for experts, etc. in a similar wording to that currently in force (with some minor drafting differences), but it did not contain a provision on excluding legal aid and the right to fee deferral. The sentence challenged by the judicial initiative was introduced into the AJE by section 40 (4) of the Act CXXX of 2017 amending certain Acts related to the entry into force of Act CXXX of 2016 on the Civil Procedure with effect from 1 January 2018 and, as already explained in Part III (Reasoning [19] et seq.), it was in force until 1 December 2022, together with the second

sentence challenged. The unofficial explanatory memorandum of the proposer of this amendment does not answer the question as to the reasoning behind the introduction of the contested sentence in section 34 (2) of the AJE, just as the final explanatory memorandum of the proposer of the amendment only states that, on the basis of the amendment, legal aid and the right to fee deferral may be claimed under the relevant legislation.

[38] According to the Constitutional Court, the contested second sentence of section 34 (2) of the AJE under examination seemed to apply equally to everyone in the enforcement proceedings without making a distinction as to who requested the assistance of an expert: whoever requested it, whether the applicant of the enforcement or the debtor, had to advance the fees of the expert etc. and could not benefit from legal aid or the right to fee deferral under the contested provision.

[39] According to the case-law of the Constitutional Court, however, it is not only the different treatment of persons belonging to the same group which may constitute discrimination, but also the fact that persons in fact in different situations are treated in the same way. The prohibition of discrimination thus requires, on the one hand, that different persons be treated differently and, on the other, that identical persons be treated in the same way: "it follows from the requirement of equal treatment that like cases must be treated alike and different cases differently." {Decision 3073/2015. (IV.23.) AB, Reasoning [45]}. The Constitutional Court also found that »if the State establishes an identity between different situations – by ignoring the essential differences between them – in a way that results in unequal treatment, it results in prohibited discrimination between persons and is therefore unconstitutional« {Decision 12/2018. (VII.18.) AB, Reasoning [82]; Decision 20/2014. (VII.3.) AB, Reasoning [244]; Decision 3024/2015. (II.9.) AB, Reasoning [49]}.

[40] According to the Constitutional Court's case-law, the clause contained in Article XV (2) of the Fundamental Law also provides protection against hidden or indirect discrimination. In the case-law of the Constitutional Court, it is a violation of the prohibition of indirect discrimination if an apparently general and neutral provision of the law or rule ultimately results in the disqualification, exclusion or deprivation of an opportunity of persons in "other situations", who are often subject to adverse discrimination in society and are listed in the Fundamental Law or have a decisive similarity with them. As interpreted by the Constitutional Court, the prohibition of discrimination guaranteed under Article XV (2) of the Fundamental Law shall also be extended to all measures of public authority that seem to contain general and neutral provisions equally applicable to everybody, but their results or effects in fact impose further disadvantages on the group of the society having the characteristics listed in the Fundamental Law's rule {see: Decision 30/2017. (XI.14.) AB, Reasoning [64]; {Decision 3253/2019. (X.30.) AB, Reasoning [50]}.

[41] According to the facts of the case presented in Chapter I of the Reasoning (Reasoning [1] to [15]), in the case at hand, the debtor's objection to the value appraisal was rejected without an examination of the merits because he should have deposited the required advance of the expert's fee and to prove this; however, the debtor was unable to fulfil this obligation – precisely because of his poor financial situation – and at the same time, due to the second sentence of section 34 (2) of the AJE (in force until 1 December 2022, still applicable in the underlying case), he was not entitled to legal aid or to fee deferral.

[42] The Constitutional Court emphasises that, in the enforcement procedure, the law-maker should take account of the conflict between two conflicting interests, that is to say, it must have regard to the realisation of the interests of both the applicant of enforcement and the debtor. Accordingly, account must be taken of the fact that the applicant of enforcement wishes to collect the claim as soon as possible, which is contrary to the debtor's interests. However, the aspects of the efficiency of proceedings, such as the need to avoid delaying the proceedings and the realistic need to bring them to a conclusion, do not justify excluding legal aid and the right to fee deferral in respect of the advance payment of expert costs. The Constitutional Court also points out that the determination of the value of the real property is not indifferent to either party and that setting the amount too low may harm the interests not only of the debtor but also of the applicant of enforcement. If the amount is set too low, the purchase price of the real property may not cover the full amount of the debt, so the recovering of the claim of the applicant of enforcement may take a long time, or may not be recovered at all. As another consequence of this, the debtor is not the only one who may consider the appraisal value to be prejudicial, but the applicant of enforcement may also object to the appraisal value and, in this case, the costs must be advanced by him.

[43] In the case at hand, this means that by the second sentence of section 34 (2) of the AJE, which was in force before 1 December 2022, the law-maker excluded everyone without discrimination from the right to legal aid and fee deferral in the context of the advance payment of expert costs (and other costs not relevant in the underlying specific case).

[44] 4 In the present case, however, the identity (“homogeneity”) of the group is only apparent: indeed, the exclusion of the possibility of legal aid or the right of fee deferral precludes the (effective) right to legal remedy of those who are socially disadvantaged: the absence of advance payment of costs results in the rejection of the enforcement objection (related to, as the case may be, the value appraisal) without any examination of the merits, pursuant to section 217 (5) of the AJE.

[45] According to the Constitutional Court, there is indeed discrimination on the basis of financial situation, since the exclusionary provision, which applies equally to all,

affects differently those who are able to advance costs and those who are not. This discrimination is a direct consequence of the legislation. The discrimination at issue can be considered to be discrimination contrary to Article XV (2) because, according to Article XV (2), Hungary guarantees fundamental rights without discrimination on grounds of, among others, property status.

[46] However, as a result of the contested provision, persons in a worse financial situation, who are unable to advance the costs of any expert's fees or are able to do so only at disproportionate expense, are unable to avail themselves of the possibility of challenging enforcement, which thereby results in discrimination on grounds of financial situation as regards access to an effective remedy.

[47] According to Article I (3) of the Fundamental Law, a fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right. This system of necessity-proportionality criteria constitutes the constitutional test for the restriction of fundamental rights, on the basis of which it was necessary in the present case to examine whether a fundamental right or constitutional value could be identified which justifies the restriction in the contested provision.

[48] In this context, the Constitutional Court has found the following. The law-maker indeed designed the system of legal aid with a view to opening up access to justice and various forms of legal redress for those who are otherwise in a financially more difficult situation. The purpose of legal aid as an instrument of the law promoting the realisation of equal opportunities, and essentially manifested in Article XV (4) of the Fundamental Law, is to ensure that an unfavourable financial situation does not become an obstacle to the enforcement of rights and that those in a socially disadvantaged situation are not prevented from pursuing their claims through the courts. Accordingly, legal aid is in fact a means of positive discrimination: to ensure the fundamental constitutional right of access to justice by ensuring that the State advances, and in some cases bears, the costs of proceedings instead of the party unable to cover them because of his personal, income or financial circumstances. On the one hand, the legal aid scheme entitles the parties, based on the court's decision, to legal aid on the basis of the personal, income and financial circumstances, and on the other hand, in the case of legal relationships of major importance, the law-maker itself grants *ex lege* benefit for the procedure in question, having regard to the subject-matter of the proceedings.

[49] According to the Constitutional Court, the contested provision does not appear to preclude the parties from lodging an objection to enforcement; formally, it is possible to lodge an objection. However, without the advance payment of costs or proof of payment into an escrow account, the objection is rejected without any examination of

the merits, which is essentially a complete obstacle to a real and effective remedy. In this context, no other fundamental right or constitutional value can be identified that could justify a restriction of fundamental rights. In the Constitutional Court's view, the necessity of such an exclusion of the right to legal aid and the right to fee deferral in the present case cannot be justified under Article I (3) of the Fundamental Law, on the contrary, it is an obstacle to the exercise of the right to legal remedy.

[50] In view of the above, the Constitutional Court held that the second sentence of section 34 (2) of the AJE in force between 1 January 2018 and 1 December 2022, was contrary to the Fundamental Law.

Taking into account section 45 (2) of the ACC, the Constitutional Court has declared a prohibition of application of the text contrary to the Fundamental Law in the case pending before the Central District Court of Pest under number 0101-4.Vh.3999/2021 and before the Budapest-Capital Regional Court as the court of second instance under number 52.Pkf.635.575/2022. The contested provision is to be applied in the proceedings, following a declaration that the second sentence of section 34 (2) of the AJE is contrary to the Fundamental Law, with the following text: "The costs incurred by the assistance of the expert and the expert-appraiser and the costs incurred by the public announcement of the auction shall be paid in advance by the person who requested these measures."

[51] 5 The petitioner also claimed that the contested provision was contrary to Article XXVIII (7) of the Fundamental Law and that the contested provision was contrary to an international treaty.

[52] Given that the Constitutional Court had found a violation of Article XV (2) of the Fundamental Law in the case, it was not necessary – in accordance with its established practice – to examine the constitutionality of the second sentence of section 34 (2) of the AJE in connection with the other provisions of the Fundamental Law which were alleged to be violated.

Budapest, 21 March 2023.

Dr. Tamás Sulyok,
President of the Constitutional Court

Dr. Ágnes Czine, Justice of the
Constitutional Court

Dr. Attila Horváth, Justice of the
Constitutional Court

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

Dr. Tamás Sulyok, President of the
Constitutional Court on behalf of
Justice *dr. Ildikó Hörcherné dr. Marosi*
unable to sign

Dr. Tünde Handó, Justice of the
Constitutional Court

Dr. Imre Juhász, Justice of the
Constitutional Court

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. Marcel Szabó, Justice of the
Constitutional Court

Dr. Péter Szalay, Justice of the
Constitutional Court

Dr. Mária Szívós rapporteur, Justice of
the Constitutional Court

Dr. László Salamon, Justice of the
Constitutional Court

Dr. Balázs Schanda, Justice of the
Constitutional Court