

Decision 3243/2014 (X. 3.) AB

On the dismissal of a constitutional complaint

In the matter of a constitutional complaint, with the concurring reasonings by Justices *Dr. András Bragyova*, *Dr. Imre Juhász* and *Dr. László Salamon*, as well as the dissenting opinions by Justices *Dr. Miklós Lévay* and *Dr. Béla Pokol*, the Constitutional Court, sitting as the Full Court, rendered the following

decision:

The Constitutional Court hereby dismisses the constitutional complaint seeking a determination of unconstitutionality by non-conformity with the Fundamental Law and annulment of Judgement No 2.Mf.21.259/2013/4 of Debrecen Regional Court as well as Judgement No 6.M.603/2012/11 of Debrecen Administrative and Labour Court.

Reasoning

I

[1] 1. On 28 March 2014, the petitioner, through his legal representative, filed a constitutional complaint with the Constitutional Court.

[2] The petitioner lodged a constitutional complaint with the Constitutional Court pursuant to Section 27 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act").

[3] The petition sought a determination by the Constitutional Court that Judgement No 2.Mf.21.259/2013/4 of Debrecen Regional Court (hereinafter referred to as the "Regional Court") was unconstitutional by non-conformity with the Fundamental Law and the annulment of said Judgement with effect also extending to Judgement No 6.M.603/2012/11 of Debrecen Administrative and Labour Court (hereinafter referred to as the "Labour Court").

[4] The petitioner had founded the request on Article XII (1) of the Fundamental Law, whereby everyone shall have the right to free choice of employment and occupation, and Article XXVIII (2) of the Fundamental Law, whereby no one shall be held guilty until he has been found criminally liable by a final decision of a court of law.

[5] As regards the facts of the case underlying the complaint, the petitioner's employment was terminated by his employer, a regional electricity company, on 21 September 2012 with immediate effect.

[6] The unilateral legal statement was effected by the employer because it had learned from a police announcement that the petitioner, who was the head of the regional control department of the electricity company, had been arrested by the police officers of Hajdú-Bihar County Police Headquarters on 7 September 2012 on suspicion of having committed bribery in connection with the performance of his duties under the terms of his employment, with said criminal offence having been qualified as aggravated by commission in criminal association and on a commercial scale. On 21 September 2012, Debrecen Municipal Court ordered the petitioner's detention pending trial (pre-trial detention).

[7] Subsequently, the petitioner brought an action before the Labour Court seeking a finding that his dismissal with immediate effect had been unlawful. The Labour Court dismissed the action. In the grounds of its judgment, the Labour Court determined that, since the petitioner had been remanded in custody with a view to detention pending trial on reasonable suspicion of having committed a criminal offence with intent, he had been unable to fulfil his obligation to work under Section 52 (1) of Act I of 2012 on the Labour Code (hereinafter referred to as the "Labour Code") for reasons attributable to his own conduct, and that the termination of his employment with immediate effect by the employer in view of his material breach of duty had been lawful. The Labour Court also highlighted that the mere publication of the news on the police website, the seriousness and nature of the offence, that is to say, the fact that it was connected with the claimant's employment, clearly justified the employer's loss of confidence and, consequently, the termination of the contract with immediate effect, given that the employer had no possibility of verifying the merits or otherwise of the allegations. The Labour Court therefore also found the termination with immediate effect to be justified on the basis of Section 78 (1) (a) and (b) of the Labour Code.

[8] By a final judgment, the Regional Court hearing the petitioner's appeal upheld the decision of the Labour Court.

[9] 2. Subsequently, the petitioner applied to the Constitutional Court. In his constitutional complaint, the petitioner submitted that the fact that an employee is arrested on suspicion of having committed a criminal offence and is remanded in custody with a view to detention pending trial is a circumstance independent of him and his existing employment relationship which cannot justify termination with immediate effect, given that "reasonable suspicion is only a degree of probability."

[10] The petitioner contends that the termination of his employment relationship at a time when there was no final judicial decision establishing his guilt infringed the presumption of innocence enshrined in Article XXVIII (2) of the Fundamental Law and, in that context, he was deprived of exercising his right to freedom of choice of occupation, guaranteed by Article XII (1) of the Fundamental Law, namely the right to apply for employment with the employer following his pre-trial detention.

[11] The provisions of the Fundamental Law concerned by the petition read as follows:

"Article XII (1) Everyone shall have the right to choose his or her work, and employment freely and to engage in entrepreneurial activities. Everyone shall be obliged to contribute to the enrichment of the community through his or her work, in accordance with his or her abilities and potential."

"Article XXVIII (2) No one shall be considered guilty until his or her criminal liability has been established by the final and binding decision of a court."

[12] The provisions of the Labour Code relevant to this case read as follows:

"Section 52 (1) Employees shall:

- (a) appear at the place and time specified by the employer, in a condition fit for work;
- (b) be at the employer's disposal in a condition fit for work during their working time for the purpose of performing work;
- (c) perform work in person, with the level of professional expertise and workmanship that can be reasonably expected, in accordance with the relevant regulations, requirements, instructions and customs;
- (d) perform work in such a way that demonstrates the trust vested in him for the job in question; and
- (e) cooperate with their co-workers."

"Section 78 (1) An employer or employee may terminate an employment relationship with immediate effect if the other party

- (a) wilfully or by gross negligence commits a grave violation of any substantive obligations arising from the employment relationship; or
- (b) otherwise engages in conduct that would render the employment relationship impossible."

III

[13] The content of the petition seeking a finding that the judicial decisions are unconstitutional by non-conformity with the Fundamental Law corresponds to the conditions laid down in Section 27 and Section 52 (1b) of the Constitutional Court Act.

[14] The complainant alleges a violation of his rights guaranteed by the Fundamental Law and the petition raises a constitutional law issue of fundamental importance requiring a substantive assessment.

[15] The Constitutional Court, without conducting the admissibility procedure, considered the complaint on the merits pursuant to Section 31 (6) of the Rules of Procedure.

IV

[16] The petition is unfounded.

[17] 1. The Constitutional Court, in its consideration of the infringement of the fundamental rights relied on in the petition, acted in accordance with the criteria set out in Decision 13/2013 (VI. 7.) AB regarding the applicability of the provisions of previous Constitutional Court decisions. Accordingly, in the specific case, the Court made a comparison of the provisions of the Fundamental Law and the constitutional provisions underlying the case and concluded that there was no impediment to the proper application of the relevant practice established in the past, given that both the right to the presumption of innocence and the right to free choice of employment and occupation were contained in the previous Constitution in a similar manner to the Fundamental Law.

[18] 2. The Constitutional Court first addressed the infringement of the right to the presumption of innocence as guaranteed by Article XXVIII (2) of the Fundamental Law. Pursuant to Article XXVIII (2) of the Fundamental Law, “[n]o one shall be considered guilty until his or her criminal liability has been established by the final and binding decision of a court.”

[19] 2.1 The presumption of innocence, as a guarantee of criminal justice and a principle of the rule of law, was elevated to constitutional status in 1989. The presumption of innocence, as interpreted by the Constitutional Court, is primarily intended to ensure that the person entitled to decide on criminal liability is impartial and unbiased and that the decision is based on well-founded evidence and does not undermine the prohibition of prejudice.

[20] At the same time, this guarantees that the person being prosecuted does not suffer the adverse legal consequences of a finding of liability without having his liability established.

[21] In several instances, the Constitutional Court has interpreted the presumption of innocence in a broad sense, explaining this by the general trend towards the application of the principle of presumption of innocence in an increasing number of domains in the context of the areas of life and legal relationships as protected by the State governed by the rule of law [see Decision 41/1991 (VII. 3.) AB (ABH 1991, 193, 195), Decision 57/1993 (X. 28.) AB (ABH 1993, 349, 350) and Decision 401/B/1992 AB (ABH 1994, 528, 532)].

[22] Decision 26/B/1998 AB summarised the above by holding that “[t]he presumption of innocence, as a fundamental principle elevated to constitutional status, is thus the protection which prevails, primarily as a matter to be decided in the criminal proceedings, with regard to the determination of guilt and the legal consequences associated with such determination. However, the case-law developed by the Constitutional Court has imposed a requirement on such legal consequences of guilt that they must be so closely connected, in terms of their content, with the finding of guilt as to justify the fact that the rules governing the legal consequence must be accorded the same level of constitutional protection as the rules governing the finding of guilt. [...]

Nevertheless, the practice of the Constitutional Court is also consistent in the sense that the constitutional protection deriving from the provision of Article 57 (2) of the Constitution cannot be extended indefinitely. Beyond the process of deciding on the question of liability, the presumption of innocence is primarily intended to prevent the impairment of rights which may be caused by legal disadvantages which are caused by the application of a lawful procedure in the absence of established liability and which are subsequently left without reparation.

It follows from the very nature of the presumption of innocence that [...] it does not apply universally as a general rule. [...] [T]he necessity therefore arises to ascertain, on a case-by-case basis, whether the legislation in question is connected to the constitutional principle of the presumption of innocence and, if so, whether it is so closely connected to the question of the establishment of liability as to justify constitutional protection in the same sphere as the latter" (ABH 1999, 647, 649 to 650).

[23] 2.2 In the present case, the Constitutional Court has considered whether the right to the presumption of innocence is infringed by a judicial interpretation of the law which allows the termination of an employee's employment with immediate effect where the termination is linked to the employee's suspicion of having committed a deliberate criminal offence and his being placed under pre-trial detention.

[24] The Constitutional Court was therefore required, using its previous practice, but acting under its new competence pursuant to Section 27 of the Constitutional Court Act, to decide whether the judicial interpretation of the law which decided the underlying labour dispute was connected with the constitutional principle of the presumption of innocence and, if so, whether it was so closely connected with the question of the establishment of liability as to justify, in the same light, the protection of a right guaranteed by the Fundamental Law.

[25] 2.3 The Regional Court seized of the matter concluded a labour dispute by a final decision. Both the Regional Court and the Labour Court found that the termination with immediate effect had been lawful.

[26] The employer had based the termination with immediate effect on two grounds.

[27] On the one hand, the petitioner had been placed in pre-trial detention on reasonable suspicion of having committed a criminal offence with intent, and had therefore deliberately created a situation whereby he was unable to fulfil his employment obligations arising from his employment relationship.

[28] On the other hand, the employer relied on the fact that the petitioner, as head of the control department, was responsible for helping to detect irregular or infringing electricity consumption and to enforce penalties for breach of contract against the persons responsible for such acts. In the light of the police suspicion and his remand in custody with a view to detention pending trial, the employer's confidence in the petitioner as a manager was undermined to such an extent that the employer could not be expected to continue to employ the petitioner in such circumstances.

[29] The courts hearing the case found that the termination was lawful because, on the one hand, the petitioner was remanded in custody with a view to detention pending trial on suspicion of having committed a criminal offence with intent, and therefore the breach of his employment obligation was a wilful and material breach of his employment relationship. On the other hand, the gravity and the nature of the offence of suspicion in itself, that is, the fact that the act was connected with the petitioner's employment, clearly justifies the employer's loss of confidence, given that the employer has no possibility of verifying the merits or otherwise of the suspicion. Thus, a manifest loss of confidence on the part of the employer also justifies termination with immediate effect.

[30] 2.4 The Constitutional Court, in assessing the interpretation of the law by the judiciary, found that it was not closely and directly linked to the establishment of criminal liability and thus to the principle of the presumption of innocence.

[31] The judicial interpretation of the law, without touching upon the issue of liability, was correct even in the absence of liability, and decided exclusively on matters of labour law. In assessing the labour law consequence, the Regional Court and the Labour Court considered the conduct of the petitioner as an employee. In doing so, they assessed the conduct of the petitioner, in connection with which the competent police decided to detain him and the competent court decided to place him in pre-trial detention, as a deliberate breach of the employee's obligation to be present and available as a fundamental obligation, and as a result of which the petitioner was unable to attend work. In so doing, they did not and did not need to consider the petitioner's criminal liability.

[32] Furthermore, in the court's interpretation of the law, it is the well-founded suspicion of the intentional commission of a criminal offence in connection with the performance of the functions of the position which also renders the termination with immediate effect lawful. The continued existence of the essential trust necessary for the maintenance of the employment relationship cannot be expected from an employer who becomes aware that his employee, in particular an employee in a managerial position, is being placed in custody or in pre-trial detention on reasonable suspicion of having committed a criminal offence, the avoidance of which is his main employment duty. Generally speaking, loss of confidence has a much wider scope and context than criminal liability, and loss of confidence is not directly linked to the establishment of liability, since loss of confidence is not a criminal concept linked to criminal responsibility. Loss of confidence is not a direct consequence of a conviction, just as the restoration of confidence does not follow from an acquittal.

[33] 2.5 In the present case, the Constitutional Court has also taken into account the case law of the European Court of Human Rights (hereinafter referred to as the "ECtHR") relating to Article 6 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, promulgated by Act XXXI of 1993 (hereinafter referred to as the "Convention").

[34] Pursuant to this provision of the Convention, "[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law." The ECtHR perceives the presumption of innocence primarily as a guarantee of criminal procedure, an element of a fair trial (proceedings). Nevertheless, the ECtHR recognises the presumption of innocence,

including the possibility of its violation outside the framework of ongoing criminal proceedings, and considers the principle to apply not only to the court seised but also to other authorities.

[35] Most recently, the ECtHR summarised its jurisprudence on the presumption of innocence in *Allen v United Kingdom*. It stated that the presumption of innocence is essentially viewed as a procedural guarantee in criminal proceedings. However, in keeping with the need to ensure that the right guaranteed by Article 6 (2) is practical and effective, the presumption of innocence also has another aspect. Its general aim, in this second aspect, is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged [Application No (25424/09), Judgement of 12 July 2013, paragraphs 93 and 94].

[36] The ECtHR has also held on several occasions, in relation to Article 6(2) of the Convention, that the principle of the presumption of innocence is infringed where a judicial decision or a statement by a public authority concerning a person charged with a criminal offence reflects the view that he is guilty before he has been found guilty pursuant to the provisions of the law. That being said, a distinction must be drawn between statements to the effect that the person concerned is guilty and statements which merely indicate the existence of a suspicion [summarised in *Garycki v Poland*, Application No (14348/02), Judgement of 6 February 2007, paragraphs 66 to 70].

[37] Furthermore, in *Tripon v. Romania*, where, as in the present case, the applicant in pre-trial detention was dismissed by his employer, the ECtHR held that the dismissal was based solely on the objective factor that the employee had failed to fulfil his work obligations over a prolonged period. The Court also noted that during the labour dispute, none of the officials (the State representative, the judge, etc.) had made any comment on his guilt before he was actually convicted. The ECtHR ruled that termination of employment under national law did not result in a violation of the right to the presumption of innocence. In doing so, the Court also assessed that, under national law, the applicant could bring a claim for damages against the State for legal error, that is, for an unjustified restriction of his liberty. The ECtHR also found no evidence of a violation of the other Convention rights invoked and therefore did not admit the application. [Application No (27062/04), Judgement of 7 February 2012]

[38] 2.6 In the light of the above, the Constitutional Court concluded that the right to the presumption of innocence was not infringed by the interpretation of the law by the judges in the present case and therefore dismissed the part of the constitutional complaint alleging a violation of Article XXVIII (2) of the Fundamental Law.

[39] The Constitutional Court, in accordance with the practice of the ECtHR, also took into account in deciding the present case that under Article IV (4) of the Fundamental Law, a person whose freedom has been unjustly or unlawfully restricted is entitled to compensation for the damage suffered. The petitioner therefore has the opportunity to bring an action for damages against the State for the wrongful decision (pre-trial detention).

[40] 3. The Constitutional Court subsequently considered whether the interpretation of the law by the courts, which had established the lawfulness of the termination of the employment

contract with immediate effect, had infringed the petitioner's right to the free choice of employment and occupation under Article XII (1) of the Fundamental Law.

[41] The petitioner submits that the Regional Court deprived him of the right to the free choice of occupation as guaranteed by Article XII (1) of the Fundamental Law, namely the right to apply for employment with an employer following his pre-trial detention.

[42] The Constitutional Court has already stated in its Decision 21/1994 (IV. 16.) AB that the right to work, similarly to the right to enterprise, does not confer a subjective right to engage in a specific occupation. (ABH 1994, 117, 120) Decision 327/B/1992 AB pointed out that the fundamental right enshrined "in Article 70/B(1) of the former Constitution, which by its very nature is only granted to natural persons, includes the freedom to choose and exercise any work, profession or occupation. [...] However, the fundamental right to the free choice of employment and occupation does not entail a subjective right to pursue a particular occupation or to engage in a particular activity." (ABH 1995, 604, 609) In other words, no one "has an absolute right to pursue a particular occupation or an occupation in the form of his choice" (Decision 328/B/2003 AB, ABH 2005, 1434, 1441.). This practice was reaffirmed by the Constitutional Court after the entry into force of the Fundamental Law in Decision 3380/2012 (XII. 30.) AB and Decision 3134/2013 (VII. 2.) AB [ABH 2012, 783, 789.; as well as Decision 3134/2013 (VII. 2.) AB, ABH 2013, 1918, 1922].

[43] And in Decision 1008/B/2010 AB, the Constitutional Court, in considering the unconstitutionality of certain parts of Act XLIII of 2010 on Central State Administration Bodies and the Legal Status of Members of the Government and State Secretaries, stated that "the right to work as a subjective right cannot be interpreted as meaning that anyone has a subjective right to occupy a specific managerial position" (ABH 2011, 2180, 2191). In the context of the present case, and taking into account its previous practice, the Constitutional Court points out that the right to the free choice of employment and occupation as provided for in Article XII (2) of the Fundamental Law cannot be interpreted as meaning that anyone has the right to occupy a specific post, such as the right to work, following his pre-trial detention, for the same employer as the one who lawfully terminated his employment relationship. The constitutional right to the free choice of employment and occupation is not undermined by a judicial interpretation of the law which establishes the lawfulness of the immediate termination of a specific employment relationship where the employee is remanded in custody with a view to detention pending trial on suspicion of having committed a deliberate criminal offence in connection with his or her employment.

[44] The contested decisions did not prevent the petitioner from exercising his right to the free choice of employment and occupation following his pre-trial detention, taking into account the characteristics of the particular life situation (the constraints imposed by the additional coercive measures applied in order to ensure the successful conduct of the criminal proceedings) and in accordance with his qualifications, training and professional experience.

[45] In the light of the foregoing, the Constitutional Court also dismissed the petition brought on the ground of infringement of Article XII (1) of the Fundamental Law.

Budapest, 23 September 2014

Dr. Péter Paczolay sgd., Chief Justice of the Constitutional Court

Dr. Elemér Balogh sgd., Justice of the
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Dr. István Balsai sgd., Justice of the
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