

Decision 2012/B/1991

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of the petition aimed at the subsequent examination and annulment of the unconstitutionality of the legal rule, the Constitutional Court has adopted the following

Decision:

The Constitutional Court rejects the petition seeking the unconstitutionality of and the annulment of Section 19 of Decree of the Minister of Public Welfare No. 18/1998 (VI. 3.) on the necessary epidemiological measures for the prevention of communicable diseases and epidemics.

Reasoning

I.

The petitioner in his first petition sought the unconstitutionality and annulment of Section 30 Paragraphs 1 and 2 of Decree of the Minister of Health No. 15/1972 (VIII. 5.) on the implementation of the provisions on curative-preventive services of Act II of 1972 on Healthcare. According to his position an order requiring mandatory lung screening by statute is unconstitutional as it peremptorily restricts the inherent fundamental right to health, without constitutional mandate, and it is also formally unconstitutional as it restricts a fundamental right through a ministerial decree.

The provisions challenged in the petition were overruled by Section 42 Paragraph 2 point b of Decree of the Minister of Public Welfare No. 18/1998 (VI. 3.) (hereinafter: Decree). As the Decree regulates mandatory screening of epidemiological interest content wise distinctly from the previously challenged provisions, the Constitutional Court called the petitioner in a warrant to declare whether he sustains his petition in regard of the changed legal regulations.

The petitioner stated in his reply that he considers the regulations in force unconstitutional from two important aspects: on the one hand because it regulates a fundamental right in a decree and on the other hand because it determines a duty pertaining to a fundamental right. This, according to his opinion, is against Article 8 Paragraph 2 of the Constitution, according to which duties pertaining to fundamental rights shall be determined by statute. On the other hand according to Article 8 Paragraph 4 of the Constitution, the right to health, as a fundamental right, may be suspended or restricted during a national crisis, in a state of emergency or state of danger. According to the petitioner, this is in conflict with Section 19 of the Decree, which restricts the right to health and determines a duty pertaining to the right, even though Section 19 of the Decree does not have the competence to do so.

II.

1. Referred provisions of the Constitution:

“Article 8 Paragraph 2: In the Republic of Hungary rules pertaining to fundamental rights and duties shall be determined by statute, which, however, shall not limit the essential content of any fundamental right.”

“Article 8 Paragraph 4: During a state of national crisis, state of emergency or state of danger, the exercise of fundamental rights may be suspended or restricted, with the exception of the fundamental rights enshrined in §§ 54-56, § 57 subsections (2)-(4), § 60, §§ 66-69 and § 70/E.”

“Article 70/D Paragraph 1: Everyone living in the territory of the Republic of Hungary shall have the right to the highest possible level of physical and mental health.

Paragraph 2: The Republic of Hungary shall implement this right through the organization of labour safety, health care institutions, medical care, through securing the opportunities for regular physical activity, as well as through the protection of built and natural environment.”

2. The challenged provisions of the Decree by the petitioner:

“Screenings of epidemiological interest...

Section 19 Paragraph 1: To detect tuberculosis infections, and to avert the danger of contagion, the county based offices may order mandatory screening for a certain part of the population or certain age classes, provided that tuberculosis incidence exceeded 25/100,000 in the area in the previous year.

Paragraph 2: Populations of age 30 or more, who reside permanently in the area of the county institute which orders the screening may be obliged to undergo the screening that has been ordered based on Paragraph 1.

Paragraph 3: In addition to the provisions in Paragraph 2, municipal institutes may order screening of a certain community (e.g. inmate institutions, workplace collective, residence communities, penal institutions) in case there has been a new tuberculosis infection in the community.

Paragraph 4: The municipal institute initiates the screening at the county institute, based on the report of the dispensary institute covering the area concerned, or on the initiation of the director of the institute.

Paragraph 5: Those who have been screened within a year or are under treatment in a dispensary institute are not obliged to mandatory screening.

Paragraph 6 Provisions of Paragraph 5 cannot be applied in case the ordering of

the screening is based on a new tuberculosis infection in the community.

Paragraph 7: Those obliged to undergo screening have to be informed about the place and date of the screening. In case the person does not show up after being called repeatedly, the director of the dispensary institute informs the municipal institute.

Paragraph 8: The screening has to be performed with a chest x-ray. In case there is no lung screening clinic in the municipality where the screening has been ordered, the screening will be performed by the dispensary institute or the appointed health care provider, or by a mobile screening unit.

Paragraph 9: According to the provisions of Section 8 point e of Government Decree of 22/1992 (I. 28.) on defining administrative welfare tasks and competence of local government mayors and notaries, as well as of county and Budapest administration offices based on the request of the municipal institute, the notary ensures the organization of the administrative and technical duties connected to performing the lung-screening.

Paragraph 10: In case a health care provider diagnoses a patient with tuberculosis, it should inform the assigned dispensary institute within 48 hours. The dispensary institute should report all data monthly – without personal identification data - to the assigned municipal institute.

Paragraph 11: Annex 1 contains detailed measures regarding patients infected with tuberculosis.”

III.

The petition is unfounded.

1. According to the Constitutional Court the unconstitutionality of the Decree cannot be challenged on the basis that its provisions regulate the fundamental right to the highest attainable physical and mental health as determined by Article 70/D of the Constitution, thus conflicting with Article 8 Paragraph 2 of the Constitution, according to which rules pertaining to fundamental rights and duties shall be determined by statute. The Constitutional Court has called to attention the fact in its several decisions – first in Constitutional Court Decision 64/1991 (XII.17.) – that fundamental rights are not in every aspect subjects of legislation, “... not all types of connections with fundamental rights require regulations at the level of statutes. The content and substantial guarantees of a fundamental right can only be determined by statute. Furthermore, a statute is necessary for the direct and significant restriction of a fundamental right. In case of indirect or distance coherence, the level of a decree is sufficient. If that were not the case, everything should be determined by statute.” (Constitutional Court Decision 260/1991)

The reasoning of the petitioner that the Decree regulates a fundamental right is not well founded. Section 56 Paragraph 1 of Act CLIV of 1997 on Healthcare (hereinafter AHC) names the prevention and control of communicable diseases and epidemics, and the increase in human resistance to communicable diseases as the main objective of epidemiological activity. To implement this objective, Section 2 authorizes the health authority to mandate individuals or legal entities and organizations to abide or perform measures determined by the law.

According to Section 59 Paragraph 1 of AHC the objective of screening for epidemiological considerations is to detect the presence of infectious diseases in an early phase, to track down their sources, and to avert the danger of contagion. According to Paragraph 2 the Minister of Health shall determine in a decree the infectious diseases for which the health authority may order mandatory screening of the entire population, specific population groups, the residents of a specific area, people at a workplace, members of a family, or other communities, persons arriving from other countries, and persons in contact with one or more infected persons.

Based on this mandate, the Minister of Welfare issued the Decree, Section 19 of which determines the conditions under which mandatory screening may be ordered to detect cases of tuberculosis in an early phase.

1. The Constitutional Court during the examination of substantive unconstitutionality of the challenged provisions stated that the reference of the petitioner to the Constitution is wrong. The challenged provision namely does not contain any restriction of fundamental right in Article 70/D of the Constitution. However, it is evident that mandatory lung screening – under the presence of certain conditions – is the restriction of the individual's right to self-determination and the right connected to the integrity of the body – as the so-called special fundamental right of a person, derived from the general fundamental right of a person connected to human dignity. Consequently the unconstitutionality of the challenged provisions should not be examined in connection with Article 70/D of the Constitution but in connection with human dignity mentioned in Article 54 Paragraph 1. Accordingly, the Constitutional Court examined the constitutionality of the challenged provisions of the Decree in respect of Article 54 Paragraph 1 of the Constitution.

According to Article 54 Paragraph 1 of the Constitution of the Republic of Hungary everyone shall have the inherent right to life and human dignity, of which no one can be arbitrarily deprived. In its Constitutional Court Decision 8/1990 (IV.23.) (Official Gazette of the Constitutional Court (OGCC) 42, 44-45/1990) and then in Decision 57/1991 (XI. 8.) the Constitutional Court explained that it considers the “the right to human dignity” as a phrasing of the so-called “general right of a person”. It pointed out that modern constitutions and the practice of constitutional court name the general personal right with its different aspects: e.g. the right to free development of personality, the right to freedom of self-determination, general freedom to act, or the right to privacy. General personal right is a “basic right” that is such a residuary fundamental right that serves to protect the autonomy of the individual, in case none of the appraised fundamental rights are applicable to the given state of affairs. According to the Constitutional

Court the right to self-identity and self-determination are included in the general personal right. (OGCC 272, 279/1991)

According to the practice of the Constitutional Court the right to human dignity is absolute and cannot be restricted as only a determinant of human status, with the right to life as a whole. (Constitutional Court Decision 64/1991 (XII. 17.) OGCC 308, 312/1991) However, certain subsidiary right deducted from its basic right nature (such as the right to self-determination or the right to personal physical integrity) are, similar to other fundamental rights, and can be restricted according to Article 8 Paragraph 2 of the Constitution. (Constitutional Court Decision 75/1995 (XII. 21.) OGCC 376, 383/1995)

As the Constitutional Court already explained in its Decision 36/2000 (X. 27.), “the consent and the refusal related to interventions which becomes necessary in the course of medical care may not be separated from the exercise of personal rights.” (OGCC 353, 360/October 2000) Hence the constitutionality question is whether the restriction of the individual’s right to self-determination and the right to physical integrity stated in the Decree is necessary and proportionate with the objective.

According to the judgment of the Constitutional Court the reason for the restriction is epidemiological public interest: to detect the presence of infectious diseases in an early phase, to track down their sources, and to avert the danger of contagion. Contrary to the opinion of the petitioner the provisions in the Decree do not violate the right to health of those mandated to undergo lung screening, but they restrict their right to self-determination in the interest of a constitutional objective. The screening, with reference to the epidemiological public interest, allows – with a minimal radiation - a non-invasive and very mild intervention.

Furthermore, the challenged provisions of the Decree obligate the performance of mandatory screening if there is an increased prevalence of tuberculosis in a certain community. At the same time to avoid unnecessary radiation load, according to Section 19 Paragraph 5 of the Decree one can dispense with the examination, in case the person has been screened within the year and has not been diagnosed with tuberculosis.

According to the judgment of the Constitutional Court, the challenged provisions of the Decree mean necessary and proportionate restriction of the individual’s right to self-determination and right to physical integrity. Hence the Constitutional Court rejects the petition seeking the unconstitutionality of and to annul Section 19 of the Decree.

Budapest, May 8, 2011

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