Unofficial translation![1]

Resolution 6/2015 (II.25.) of the Constitutional Court on the determination whether the term „lawfully" in Section 76(1) of Act II of 2007 on the conditions of Entry and Stay of Third-Country Nationals is contrary to the Fundamental Act and the annulment thereof

On a motion submitted by a judge for finding a piece of legislation contrary to the Fundamental Act, the full session of the Constitutional Court - with a parallel justification by constitutional judge *dr. Ágnes Czine,* and with dissenting opinions from constitutional judges *dr. István Balsai, dr. Egon Dienes-Oehm, dr. László Kiss, dr. Barnabás Lenkovics, dr. Miklós Lévay, dr. Péter Paczolay, dr. Béla Pokol, dr. László Salamon and dr. András Zs. Varga* - adopted the following

resolution:

1. The Constitutional Court finds that the phrase "lawfully", set out in Section 76(1) of Act II of 2007 on the Entry and Stay of Third-Country Nationals, is contrary to the Fundamental Act, and therefore annuls it with effect from 30 September 2015.

According to such annulment, Section 76(1) of said Act will remain in force with the following wording:

„76 (1) Proceedings for the recognition of statelessness are opened upon the submission of an application to the alien police authority for the recognition as stateless by a person staying in the territory of Hungary (hereinafter: "applicant"). The application may be presented orally or in writing."

2. The Constitutional Court rejects the motion for declaring a prohibition on application in general and in the individual case currently pending before the Administrative and Labour Law Court of Budapest under number 17.K.30.417/2014.

The Constitutional Court is promulgating this resolution in Magyar Közlöny (Hungarian Official Gazette)[2].

Justification

I.

[1] 1. The judge of the Administrative and Labour Law Court of Budapest submitted a motion based on Section 25(1) of Act CLI of 2011 on the Constitutional Court (hereinafter: CC Act) in a proceeding for the review of an administrative decision pending under number 17.K.30.417/2014. - and suspended the proceeding at the

[1] Translation: Afford Fordító- és Tolmácsiroda Kft., proofreading: UNHCR Hungary Unit

[2] Official Gazette (Magyar Közlöny) no. 22 of 2015 (25 February 2015)

same time - proposing that the condition “lawfully staying” in the territory of Hungary in Section 76(1) of Act II of 2007 on the conditions of Entry and Stay of Third-Country Nationals (hereinafter: Aliens Act) be declared as being in conflict with the Fundamental Act and its application be prohibited in general as well as in the proceeding in question.

[2] The judge’s motion and the attached documentation allows for determining that the plaintiff - born in Somalia to a Nigerian mother and a Somali father - arrived in Hungary illegally in 2002, and submitted an application for recognition as stateless person to the Office of Immigration and Nationality (hereinafter: “Office” or “defendant”) on 16 September 2010 for the first time. At that time, the plaintiff was in possession of a certificate entitling him to temporarily stay in Hungary pursuant to Section 30(1)h) of the Aliens Act (alien police procedure pending due to unlawful entry or stay) valid until 1 October 2010.

[3] On 18 November 2010, the Office rejected the plaintiff’s application for the recognition of statelessness status based on Sections 76(1) and 79(1) of the Aliens Act, partly because determining the status of statelessness was precluded by law in the absence of lawful stay, and partly with reference to the fact that, in the course of the procedure, the plaintiff was unable to prove his real identity due to his questionable credibility, so it could not be conclusively established that the plaintiff was not a national of any state.

[4] The Metropolitan Court affirmed the petition submitted by the plaintiff contesting that decision, and recognised the plaintiff as stateless in its judgement adopted on 2 February 2012 under number 24.K.36.132/2010/14.

[5] Based on an appeal from the Office, the Metropolitan Appeal Court changed the judgement of the court of first instance and rejected the plaintiff’s petition in its legally binding judgement adopted on 17 October 2012 under number 2.Kf.27.209/2012/10.

[6] Based on the plaintiff’s application for judicial review, the Curia upheld the legally binding judgement in its decision of 11 December 2013 under number Kfv.III.37.229/2013/7., noting that said judgement did not violate the law. At the same time, it stated that it saw no need for initiating the Constitutional Court’s procedure, because Section 78 of the Aliens Act contained an explicit reference to the fact that the Statelessness Convention had been included into national law at the proper place.

[7] The plaintiff submitted a new application for recognition as stateless - in possession of a certificate of temporary stay issued for him in accordance with Section 30(1)i) of the Aliens Act (“who has applied for stateless status, for the duration of the proceedings, if s/he does not have any form of authorisation to reside in the territory of Hungary”) with regard to the earlier proceedings initiated based on his application for recognition as stateless - claiming that in this way he satisfied the requirements of lawful stay.

[8] The Office first rejected the plaintiff’s repeat application without assessing the merits of the case, then - after finding it had misinformed the plaintiff about his right to remedy - withdrew its own decision and assessed the merits of the repeat application for recognition as stateless. In the course of the substantial examination - finding that the plaintiff had substantiated his statelessness pursuant to Section 79(1) of the Aliens Act -, the Office rejected the application by claiming that the plaintiff was subject to a valid expulsion order at the time of submitting his application and, therefore, did not satisfy the requirements set out in Section 76(1) of the Aliens Act because he was staying in the territory of Hungary unlawfully.

[9] In order to advance the plaintiff's case, the Hungarian Helsinki Committee and the Office of the United Nations High Commissioner for Refugees participate as interveners in the proceeding initiated on the basis of the plaintiff's request for judicial review, which forms the basis of the judge's motion. The interveners for the plaintiff have submitted their comments concerning - and in support of - the judge's motion to the Constitutional Court.

[10] 2. According to the judge's motion, Article 1 of the United Nations Convention relating to the Status of Stateless Persons signed in New York on 28 September 1954, promulgated by Act II of 2002 (hereinafter "Statelessness Convention") - in respect of which no state may make any reservations under Article 38 thereof - does not specify lawful stay in the territory of the given state as a prerequisite for determining stateless status, in contrast with Section 76(1) of the Aliens Act. Based on Section 76(1) of the Aliens Act, however, stateless status shall be refused for a person qualifying as a stateless person under Article 1 of the Statelessness Convention if s/he stays in Hungary unlawfully for any reason; therefore, it needs to be seen whether the phrase "lawfully staying" in Section 76(1) of the Aliens Act is in contravention with the Statelessness Convention and thus is in contravention of Articles Q (2) and XV (2) of the Fundamental Act.

[11] A state's decision in the determination of statelessness is therefore purely declarative and not constitutive in effect; it only establishes the fact of statelessness but does not create it. A stateless person will be stateless even if they unlawfully enter or stay in a State Party's territory. The absence of travel documents is a common concomitant of statelessness, as a stateless person is not recognised by any state as its national. Consequently, the phrase "lawfully staying" in Section 76(1) deprives people qualifying as stateless under the Convention of the possibility of having their application for the determination of statelessness assessed on the merits in Hungary. In addition to violating Article Q) (2) of the Fundamental Act, the phrase contested by the judge's motion may be found to violate Article XV (2) of the Fundamental Act, since it introduces unjustified discrimination between stateless persons having travel documents accepted by Hungary and complying with the strict conditions for entry and stay, and stateless persons not having travel documents.

II.

[12] 1. Provisions of the Fundamental Act concerned by the judge's motion:

"Article Q (2) of the Fundamental Act Hungary shall ensure that Hungarian law is in conformity with international law in order to comply with its obligations under international law."

"Article XV(2) Hungary shall guarantee the fundamental rights to everyone without discrimination based on any ground such as race, colour, sex, disability, language, religion, political or any other opinion, ethnic or social origin, wealth, birth or any other circumstance whatsoever."

[13] 2. Provisions of the Aliens Act concerned by the judge's motion:

"76 (1) Proceedings for the recognition of statelessness are opened upon the submission of an application to the aliens policing authority for the recognition of

statelessness by a person lawfully staying in the territory of Hungary (hereinafter “applicant”). The application may be presented orally or in writing.”

[14] 3. Provisions of the Statelessness Convention concerned by the judge’s motion: “Article 1. Definition of a Stateless person

1. For the purpose of this Convention, the term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law.
2. This Convention shall not apply:
(i) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance;
(ii) To persons who are recognised by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country;
(iii) To persons with respect to whom there are serious reasons for considering that:
(a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;
(b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;
(c) They have been guilty of acts contrary to the purposes and principles of the United Nations.”

Article 38 Reservations
1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1) and 33 to 42 inclusive.
2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.”

III.

[15] The judge’s motion is partly well-founded.

[16] 1. Based on the authorisation granted in Article 24(2)b) of the Fundamental Act, the Constitutional Court reviews whether the legislation applicable in the individual case is harmonised with the Fundamental Act on a judge’s motion submitted according to Section 25(1) of the CC Act. In the case giving rise to the proceedings, both the plaintiff and the interveners for the plaintiff, as well as the defendant have explained their respective positions on the comparison of Section 76(1) of the Aliens Act against the Statelessness Convention - and, naturally, came to contrasting conclusions - and the Curia has also expressed its opinion - in an earlier procedure - on the lack of necessity to initiate the Constitutional Court procedure in respect of the contested provision of law. With regard to this, the Constitutional Court finds it necessary to underline that, on the one hand, issuing decision in the specific proceeding falls within the competence of the court before which the individual case is pending; on the other hand, in the course of its proceedings, the Constitutional Court has only considered the content of the judge’s motion, and considered the

other motions attached to the documentation of the proceeding and argumentation supporting the comments made directly to the Constitutional Court only to the extent that they were directly linked with the content of the judge's motion.

[17] 2. Considering the fact that, according to the motion, the contested legal provision primarily prevents proceedings with regard to stateless forced migrants who have been stateless from the outset and have never had any travel documents, the Constitutional Court found it necessary to assess certain interrelations between asylum and statelessness.

[18] The preamble to the Statelessness Convention and - in line with it - the UN High Commissioner for Refugees' Guidelines on Statelessness No. 2 of 5 April 2012 (hereinafter: "Guidelines") both state that the Statelessness Convention was adopted primarily to govern the treatment of stateless persons not considered to be refugees. Refugees - and, as the main rule, stateless persons - are covered by Law-Decree no. 15 of 1989 on the promulgation of the Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the Protocol of 31 January 1967 and Act LXXX of 2007 on asylum (hereinafter: "Asylum Act"). According to Section 6 of the Asylum Act, Hungary shall recognise as refugee a foreigner who complies with the requirements stipulated by Article XIV(3) of the Fundamental Act ("who are being persecuted or having a well-founded fear of persecution in their country of origin or in their country of habitual residence for reasons of race, nationality, membership of a particular social group, religion or political opinion, if they do not receive protection from their country of origin or from any other country"), while according to Section 12(1), Hungary shall grant subsidiary protection to a foreign national who does not satisfy the criteria of recognition as a refugee but there is a risk that, in the event of their return to their country of origin, they would be exposed to serious harm and are unable or unwilling, owing to their fear, to return to their country of origin. Finally, according to Section 19 of the Asylum Act, Hungary shall grant temporary protection to a foreigner who belongs to a group of displaced persons arriving in the territory of Hungary en masse and which group was recognised by the Council of the European Union or the Government as eligible for temporary protection as the persons belonging to the group were forced to leave their country due to an armed conflict, civil war or ethnic clashes or the general, systematic or gross violation of human rights, in particular, torture, cruel, inhuman or degrading treatment. Recognition of stateless status is based on the Aliens Act and on Government Decree no. 114/2007. (V. 24.) on the implementation of the Aliens Act (hereinafter: Implementing Decree), whereas the procedure for recognition as refugee or beneficiary of subsidiary protection is carried out on the basis of the Asylum Act. However, the difference between statuses and the procedures for establishing the different statuses does not mean that a foreigner may satisfy the set of criteria only for one or only for the other, just as they cannot be excluded not to satisfy either of the sets of criteria, or, to the contrary, to satisfy both sets. The Guidelines make proposals for resolving the procedural problems arising out of these parallel regimes. Though the Guidelines are not mandatory instruments of international law, the UNHCR is undisputedly the body most able to interpret issues of international law associated with the Statelessness Convention and to explore the related practice. This is substantiated by the fact that the UN General Assembly's resolution assigned general liability to the High Commissioner in respect of all stateless persons, including for the identification, prevention and reduction of statelessness and protection for stateless persons; on the other hand, in Section 81 of the Aliens Act,

the legislator provided the possibility for UNHCR's representative to participate in the proceedings for the determination of statelessness. Section 164 of the Implementing Decree obliges the Office to consider UNHCR's opinion in the course of the evidence procedure. Paragraphs 26 to 30 of the Guidelines set out detailed proposals for harmonising the procedures for determining refugee status and statelessness. Accordingly, if a person submits applications for stateless status as well as asylum application, it is important to assess both applications and to grant recognition for the applicant in both procedures, if reasonable. Although the Guidelines do not contain any legally binding provisions, they recommend that it is reasonable to conduct the refugee status determination procedure first, due to the confidentiality requirement concerning the applicant's identity, and suspend the procedure for recognition of statelessness for the duration of the refugee status determination procedure in the event of simultaneous applications. It should be noted that Section 42(1) of the Asylum Act explicitly provides that no Hungarian authority and/or court may contact the country of origin of the person seeking recognition, or a country in respect of which it may be presumed that it forwards information to the country of origin, or a person or organisation, in respect of whom or which it may be presumed that they persecuted or would persecute the person seeking recognition or would forward information to the persecutors of the person seeking recognition, if, as a result of such entry into contact, the persecutors would become aware of the fact that the person seeking recognition submitted an application for recognition or if, as a consequence of such entry into contact, the person seeking recognition or a member of their family were exposed to a physical threat or the liberty or security of the family members of the person seeking recognition living in their country of origin were exposed to a threat. It follows from the Guidelines cited and the legal provision binding on the Office that the refugee status determination procedure has primacy, even if this is not an absolute one. However, Section 160(1) of the Implementing Decree should be considered for the purposes of the procedure for determining statelessness; this Section sets out a procedural guarantee that where under the proceedings falling under the scope of the Aliens Act there is any possibility that a third-country national should be recongnized as stateless, the aliens policing authority shall inform the person in question concerning the possibility to request stateless status, about the procedures involved, and about the rights and obligations of under stateless status, and this shall be recorded in writing. In summary, therefore, refugee rights and statelessness - being completely different concepts of law - may be found to be subject to completely different substantive and procedural rules, which, however, may need to be applied in parallel in practice.

[19] 3. The Statelessness Convention - the provisions of which are applicable to Hungary as of 19 February 2002 - defines the meaning of "stateless person" in Article 1 paragraph 1 ("a person who is not considered as a national by any State under the operation of its law"), then goes on to enlist the reasons and conditions, the existence of which precludes the application of the Convention's provisions to the person concerned.

[20] Accordingly, the Statelessness Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance; to persons who are recognised by the competent authorities of the country in which they have taken residence as

having the rights and obligations which are attached to the possession of the nationality of that country; also, to persons with respect to whom there are serious reasons for considering that they have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes; have committed a serious non-political crime outside the country of their residence prior to their admission to that country; or have been guilty of acts contrary to the purposes and principles of the United Nations.

[21] On the other hand, the authentic Hungarian-language text of the Statelessness Convention promulgated by Act II of 2002 leaves no doubt that both the definition and the exhaustive list provided in paragraph 2 should be understood as meaning that there is no possibility to make any exceptions. It is also a fact that Hungary (at the time of accession and on the effective date the Republic of Hungary) made no reservations concerning Article 1 cited above, the possibility of which is excluded by Article 38. It should be noted that the provisions of Chapters II to V of the Statelessness Convention make certain rights (such as the right of association, regulated in Article 15; right to wage-earning employment, self-employment and liberal employment according to Articles 17 through 19; housing as per Article 21; public relief, labour legislation and social security regulated by Articles 23 and 24) conditional on lawful stay in the territory of the States Parties, but do not set this requirement for granting certain other rights (such as acquisition of movable and immovable property according to Article 13 or access to courts under Article 16). However, instead of weakening the linguistic interpretation of Article 1 as set out above, these provisions only go to strengthen it, as the wording makes it clear that the States Parties consciously set additional conditions in some cases, while they saw no reason to do so in others.

[22] Paragraph 17 of the Guidelines explicitly states: “Everyone in a State’s territory must have access to statelessness determination procedures.” There is no basis in the Convention for requiring that applicants for statelessness determination be lawfully within a State. Such a requirement is particularly inequitable given that lack of nationality denies many stateless persons the very documentation that is necessary to enter or reside in any State lawfully.”

[23] The judge’s motion is therefore right in pointing out that Section 76(1) of the Aliens Act narrows the meaning of Article 1 of the Statelessness Convention by providing that “proceedings for the recognition of statelessness are opened upon the submission of a request to the aliens policing authority for stateless status by a person lawfully staying in the territory of Hungary”. Essentially, the Statelessness Convention, except for “administrative assistance”, does not contain any provisions governing the procedure for determining statelessness, so the States Parties have the role and responsibility of determining such procedural aspects; however, by inserting the contested phrase in the Act, the legislator defined the concept of “stateless person” and - in respect of Hungary - stateless status in departure from the Statelessness Convention, rather than creating a procedural rule.

[24] The justification of the Aliens Act states the following on the contested provision: “The procedure for determining statelessness is initiated at request, and there are no legal requirements as to the form of submitting such requests. In order to minimize the opportunity for abuse, it is not sufficient only to be subject to the personal scope of the 1954 Convention but lawful stay in the territory of Hungary is also an indispensable precondition for the initiation of the procedure. It can therefore be

excluded that migrants arriving illegally can apply for the determination of statelessness in bad faith right at the borders or after a period of unlawful stay in the country and after being caught by the alien police". The Act protects the applicant's right to fair procedure with suitable guarantees [...]."

[25] The legislator thus also makes it clear that, in order to prevent abuse and applications made in bad faith, it built in the absolute requirement of lawful stay in Hungary as a sort of a "check" among the procedural rules, according to which it is not sufficient only to be subject to the personal scope of the Statelessness Convention, but lawful stay in the territory of Hungary is also an indispensable condition.

[26] According to the defendant's decision contested in the proceeding, both the defendant and the plaintiff contacted the Embassy of the Federal Republic of Nigeria in Budapest several times in the course of the past ten years: however, it was unable to identify the plaintiff and therefore refused to issue a return document to his home country. According to information provided by the Ministry of Foreign Affairs to the defendant, it is not possible to seek administrative assistance at foreign missions in respect of Somalia; the region specified as the plaintiff's place of birth is inaccessible also for international organisations. The defendant contacted the Constitution Protection Office and the Counter Terrorism Centre concerning the application for stateless status, which communicated that there was no risk factor associated with granting the plaintiff's request from a national security perspective. On the basis of the above, the defendant found in its decision that the plaintiff had substantiated his statelessness pursuant to Section 79(1) of the Aliens Act. In essence, by doing so, the aliens policing authority in its decision has determined that the plaintiff was stateless; nevertheless, it rejected his request based on Section 76(1) of the Aliens Act.

[27] The Constitutional Court believes that the above confirms the motioning judge's opinion, according to which the provision in question – in fact of a substantive nature - serves to narrow the personal scope (ratione personae) of the Act.

[28] Furthermore, the fact that Section 78 of the Aliens Act - as well as its justification - refers to the consideration of the Statelessness Convention does not necessarily imply that the legislator has indeed fully complied with the obligations flowing from the Convention.

[29] Violation of an obligation assumed under an international treaty is contrary not only to Article Q)(2), but also to Article B)(1) of the Fundamental Act, ensuring the rule of law. Having regard to the fact that no legislation may contravene the Fundamental Act [Article T)(3) of the Fundamental Act], the Constitutional Court has to annul domestic legislation (legal provisions) that conflict with international law due to a violation of Article Q(2) and B)(1) of the Fundamental Act.

[30] Based on the above, the Constitutional Court established that Section 76(1) of the Aliens Act - by narrowing the interpretation of Article 1 of the Statelessness Convention - violates Article Q (2) of the Fundamental Act - also having regard to Article B)(1) of the Fundamental Act - according to which "in order to comply with its obligations under international law, Hungary shall ensure that Hungarian law is in conformity with international law."

[31] At the same time, the Constitutional Court stresses that neither Article 1(1) of the Statelessness Convention nor the provisions of Section 76(1) of the Aliens Act remaining in force after the annulment set out herein will legitimise the unlawful entry or stay of foreigners in the territory of Hungary. All the provisions remaining in force

mean is that, if so requested by a foreigner, the procedure for determining stateless status may not be refused in the absence of lawful stay.

[32] The judge's motion proposed that the phrase "lawfully staying" in Section 76(1) of the Aliens Act should be found to be in contravention of the Fundamental Act. In the Constitutional Court's position, however, given that the procedures pursuant to the Statelessness Convention are within the jurisdiction of the States Parties, the fact that the Aliens Act authorises only applicants staying in the territory of Hungary to submit applications for stateless status is a specifically procedural issue, so the annulment of the "lawfully" phrase can eliminate the conflict with the Fundamental Act. On the other hand, in the course of its proceedings, the Constitutional Court noted that partial annulment of the contested provision of Section 76(1) of the Aliens Act hereunder requires a review of the Aliens Act, particularly in respect of the provision of identity papers and travel documents to stateless persons, pursuant to Articles 27 and 28 of the Statelessness Convention, as well as a review of certain legislation also applicable to stateless persons in respect of the rights regulated in the Statelessness Convention, made conditional upon lawful stay. In the Constitutional Court's opinion, for the purposes of legal certainty, it is of fundamental importance to grant sufficient time for legislative actions concerning aliens policing procedures - that take both national interests and obligations to the European Union into account - and therefore decided to annul the contested legal provision *pro futuro* based on Article 45(4) of the CC Act. Having established a conflict with Article Q)(2) of the Fundamental Act, the Constitutional Court did not investigate the contested legal provision in the context of Article XV (2) of the Fundamental Act cited by the motioning judge.

[33] 5. In addition to finding a conflict with the Fundamental Act, the proceeding judge motioned for the exclusion of the contested provision in general as well, as in the specific case at hand. The Constitutional Court decided on annulling the contested legal provision *pro futuro* - for reasons of legal certainty - so the annulled provision shall be applicable until the date it is rendered ineffective. With regard to the above, the Constitutional Court refused to declare a prohibition on applying the provision in question in general, and specifically in the individual case in question, as requested in the judge's motion, pursuant to Section 45(4) of the CC Act, also in the interest of legal certainty.

[34] 6. The Constitutional Court ordered the publishing of this resolution in Magyar Közlöny (Official Gazette) pursuant to Section 44(1) of the CC Act.

Budapest, 23 February 2015

Dr. Péter Paczolay,
Chairman of the Constitutional Court

Dr. István Balsai,
Judge of the Constitutional Court

Dr. Ágnes Czine,
Judge of the Constitutional Court

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

Dr. Imre Juhász,
Judge-Rapporteur of the Constitutional Court

Dr. László Kiss,
Judge of the Constitutional Court

Dr. Barnabás Lenkovics,
Judge of the Constitutional Court

Dr. Miklós Lévay,
Judge of the Constitutional Court

Dr. Béla Pokol,
Judge of the Constitutional Court

Dr. László Salamon,
Judge of the Constitutional Court

Dr. Tamás Sulyok,
Judge of the Constitutional Court

Dr. Péter Szalay,
Judge of the Constitutional Court

Dr. Mária Szívós,
Judge of the Constitutional Court

Dr. András Zs. Varga,
Judge of the Constitutional Court

Parallel statement of reasons by Judge of the Constitutional Court *Dr. Ágnes Czine*

[35] When adopting the resolution on the judge's motion, I supported the majority position for the following reasons.

[36] I agree that UNHCR is undisputedly the body most able to interpret issues of international law associated with the Statelessness Convention and to explore the related practice. There are many international conventions - adopted under the auspices of the UN or the Council of Europe - in the interpretation of which Hungarian legislators have no concerns in relying on the positions of institutions set up by these conventions or closely associated with them, particularly if the interpretation is logical and in line with the spirit of the given convention.

[37] In addition, I believe it is desirable that Hungary responsibly fulfils its human rights or humanitarian obligations assumed under international conventions, from a constitutional perspective. I find the "lawfully" phrase included in Section 76(1) of the Aliens Act to be a kind of an escape route for the authorities, which is inappropriate from both the constitutionality aspect and with regard to international law.

[38] In the individual case at hand, I find the *pro futuro* annulment, adopted in order to ensure legal certainty, to be reasonable, considering that the plaintiff in the procedure that gave rise to the judge's motion will have the possibility to submit a new application after 30 September 2015.

Budapest, 23 February 2015

Dr. Ágnes Czine,
Judge of the Constitutional Court

Dissenting opinion by *Dr. Egon Dienes-Oehm*

[39] I disagree with paragraph 1 of the operative part of the resolution and the justification provided therein.

I.

[40] Paragraph 1 of the operative part of the resolution annuls the phrase "lawfully" included in Section 76(1) of the Aliens Act on the grounds of being contrary to the Fundamental Act. However, such conflict with the Fundamental Act is based only on

provisions, mostly on a violation of Article Q)(2) of the Fundamental Act, that can be seen as the basis of such conflicts on their own only in exceptional cases, if certain specified conditions are in place. The subject matter of the case is not a direct (first-degree) violation of the Fundamental Act or a violation of a specific fundamental right; rather, the judge's motion is in fact based on a conflict with an international treaty.

[41] It follows from this that, first of all, considering something that could qualify as being in conflict with an international treaty at most - provided the conditions for this are satisfied - to be unconstitutional is contestable from a legal perspective. The matter could evolve into an indirect (second-degree) violation of the Fundamental Act only if the conditions detailed in part II of my dissenting opinion were established, as a legal standard contrary to an international treaty is not necessarily unconstitutional *per se*.

[42] The material absence of a conflict with the Fundamental Act would have called for investigating the case in question only on the grounds of a conflict with an international treaty, because in the Hungarian legal system international conventions are not on the same level as the constitution, or in this case, the Fundamental Act, because the validity and applicability of such treaties is based on the Fundamental Act. In this context, it should be noted that international law itself is based on national sovereignty; recognition of the *ius cogens* rules of international law is conditional on the authorisations granted for them in the constitutions of the states concerned. [Cf. Article Q)(3) of the Fundamental Act].

II.

[43] Based on the above as a starting point, I wish to highlight the following, should the investigation of this case be aimed at determining a conflict with an international treaty.

[44] 1. In the case of multilateral intergovernmental international treaties, there is no doubt it is possible to determine a conflict with an international treaty and the application of general and particular legal consequences within the Constitutional Court's jurisdiction if the appropriate evidence exists and by a constitutional deduction, with the help of Article Q)(2) of the Fundamental Act in any given case. Given the function of the authority for protecting the national constitution, this issue arises primarily in connection with the European Convention on Human Rights, the court of which may adopt decisions binding on the States Parties in specific cases. However, even this obligation does not result in a formal coercion to legislate.

[45] In this context, I believe it is necessary to present my dissenting opinion attached to the Constitutional Court's resolution no. 32/2014.(XI.3.) AB here as well. "Being a State Party to the European Convention on Human Rights in itself does not mean and does not result in the transfer of sovereign powers. The state has to enforce the decisions of the European Court of Human Rights - set up to find remedies for the fundamental rights stipulated in the Convention - applicable solely to specific cases, if Hungary is a party bound by such decisions. However, such decisions and the judicial practice of the Court in similar cases do not result in any coercion of the competent Hungarian authorities to adopt formal legislation. Nevertheless, it is appropriate for the legislative and executive powers to follow the Court's practice. In this regard, I believe the Constitutional Court's duty is to warn the legislator to take the measures required for harmonising international law and Hungarian law, based on Article Q)(2) of the Fundamental Act, if necessary." I would like to add here that,

in a given case, such a warning may take place on the basis and as a result of a conflict with an international treaty - whether by identifying an independent constitutional requirement or as a finding made in the justification of a resolution rejecting a motion - subject to all the circumstances and the gravity of the case.

[46] 2. States Parties to a number of multilateral international treaties have set up internal mechanisms (with the help of supplementary implementation treaties of an administrative nature, procedures/protocols, etc.) by which they were more or less able to ensure the enforcement of provisions also in the case of a legal dispute, e.g. by subordination or by gaining recognition for the outcome of decisions made by internal decision-making fora (e.g. the panels under GATT). Typically, however, the "infringing states" have rather successfully managed to enforce their vital interests using the most diverse ways and means (such as by declarations or compromise agreements resulting in the establishment of ad hoc exceptions).

[47] In the case at hand, the justification of the resolution itself also admits that the Office of the United Nations High Commissioner for Refugees, supposed to interpret issues of international law, has no coercive legal measures available to it for enforcing its own position and interpretation on any State Party concerning the Statelessness Convention, whether in general or concerning a specific case. Supposing but not permitting (see section III of my dissenting opinion in this respect) that a conflict with an international treaty is established, I believe the Constitutional Court could have found an acceptable solution for this only on the basis of my position outlined in the previous paragraph in respect of the European Court of Human Rights. In that case, its application to the case at hand could have been as follows. Referring to the obligation to consider UNHCR Guidelines and the opinion of UNHCR, the resolution makes a reference to the practice of the bodies authorised under the Convention, and notifies the government - in the operative part, or, rather, in the justification while rejecting the motion - of the need to ensure the harmonisation desired under Article Q)(2) of the Fundamental Act, without finding a violation of the Fundamental Act, of course.

III.

[48] In the case at hand, there is reason to find that a conflict with an international convention has arisen, even in formal terms; Hungary does not violate any international convention by requiring that applicants in a procedure for determining statelessness stay in Hungary's territory lawfully prior to conducting the procedure.

[49] Article 1 of the Convention contains a substantive law provision on who can be considered as stateless and who is subject to the provisions of the Convention. Section 76(1) of the Aliens Act complies with this definition.

[50] The Convention does not regulate the procedure for submitting applications for the recognition of statelessness. In other words, States Parties have not agreed on this matter and gave no authorisation for harmonised regulation of the related issues in the multilateral Convention, but retained their total sovereignty in this respect. (It should be noted, however, that the negative definition set out in Article 1 (2) (iii) 6. of the Convention on those persons not subject to the Convention can be construed as stating that a stateless person should first be allowed to enter the country's territory in order to be covered by the Convention.) As such, Hungary was able to set the prerequisite of lawful stay in its territory in order to be able to submit an application,

pursuant to its sovereignty, with no international commitment for it to be construed otherwise.

Budapest, 23 February 2015

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

[51] I concur with paragraph III of the dissenting opinion.

Budapest, 23 February 2015

Dr. Barnabás Lenkovics,
Judge of the Constitutional Court

[52] I concur with the dissenting opinion, with the proviso that, with regard to Section 2.b) of the Aliens Act, it cannot be firmly stated that the Aliens Act narrows the personal scope of the Convention.

Budapest, 23 February 2015

Dr. András Zs. Varga,
Judge of the Constitutional Court

Dissenting opinion of *Dr. Miklós Lévay*

[53] I agree with pargraph 1 of the operative part but, in my opinion, the Constitutional Court should have declared a prohibition of application - in respect of the provision annulled *pro futuro* - in the specific case pending before the Administrative and Labour Law Court of Budapest under number 17.K.30.417/2014.

[54] The Constitutional Court proceeded on a judge's motion. This power of the Constitutional Court means a review of legal standards applicable to a specific, i.e. individual case.

[55] The CC Act contains no provisions on the legal consequences of specific reviews of legal standards aligned to special, individual legal protection awarded by judges, and therefore granting "individual constitutional protection", other than the provisions of Section 45(4). According to Section 45(4) of the CC Act, the Constitutional Court may determine the inapplicability of an annulled piece of legislation to individual cases in departure from the main rule (i.e. *ex nunc* annulment and *ex nunc* prohibition of application) if justified by the protection of the Fundamental Act, legal certainty or a particularly important interest of the party initiating the procedure.

[56] In my opinion, in the event of an annulment *pro futuro* declared in the procedure initiated by the judge's motion - given the specific norm control nature of this power - remedy for the impairment that occurred in the specific case at hand, i.e. declaring the annulled legislation to be inapplicable to the case, is not excluded if one of the conditions listed in Section 45(4) of the CC Act is in place. [The same legal consequence is set out in resolution no. 20/2013.(VII.19.)AB of the Constitutional Court.]

[57] In the case at hand, the "particularly important interests of the party initiating the procedure" are confirmed by the following.

[58] Paragraph III.3 ([26]) of the justification to the resolution mentions that “According to the defendant’s decision contested in the proceeding, both the defendant and the plaintiff have contacted the Embassy of the Federal Republic of Nigeria in Budapest several times in the course of the past ten years: however, it was unable to identify the plaintiff and therefore refused to issue a document for his return home. According to information provided by the Ministry of Foreign Affairs to the defendant, it is not possible to seek administrative assistance at foreign missions in respect of Somalia; the region specified as the plaintiff’s place of birth is inaccessible also for international organisations. The defendant contacted the Constitution Protection Office and the Counter Terrorism Centre concerning the application for stateless status, which communicated that there was no risk factor associated with granting the plaintiff’s request from a national security perspective. On the basis of the above, the defendant found in its decision that the plaintiff had substantiated his statelessness pursuant to the provisions of Section Article 79(1) of the Aliens Act. In essence, by doing so, the aliens policing authority has determined that the plaintiff was stateless; nevertheless, it rejected his request based on Section 76(1) of the Aliens Act.

[59] The party initiating the procedure therefore remains unable to access the procedure for determining stateless status, and therefore has to bear the detrimental consequences arising out of this. He has no identity papers or travel documents, his circumstances and situation infringe his dignity as a human being.

[60] In departure from the main rule set out in the CC Act, the Constitutional Court annulled the contested provision of the legislation *pro futuro*, thereby granting time for the legislator to draft new rules. However, future annulment does not mean that the Constitutional Court could not have decided to prohibit its application based on the particularly important interest of the person initiating the procedure, made obvious in this specific case, while observing the general interest of ensuring legal certainty. Due to the facts and circumstances described above, this would have called for finding that the annulled legal provision cannot be applied to the case in progress. Therefore, I do not support paragraph 2 of the operative part.

Budapest, 23 February 2015

Dr. Miklós Lévay,
Judge of the Constitutional Court

[61] I concur with the dissenting opinion.

Budapest, 23 February 2015

Dr. László Kiss,
Judge of the Constitutional Court

[62] I concur with the dissenting opinion.

Budapest, 23 February 2015

Dr. Péter Paczolay,
Judge of the Constitutional Court

Dissenting opinion of *Dr. Béla Pokol*

[63] I am unable to support either the annulment set out in paragraph 1 of the operative part or the justification provided thereto. I would like to express my reservations concerning the majority resolution on two levels. First, I will try to demonstrate the problems with the argumentation in the resolution, then attempt a critical analysis of how immigration concerned by this case is treated by the resolution, in a narrower scope of analysis.

[64] 1. The problems with the argumentation in the resolution stem from the fact that, although the subject matter of the motion is the establishment of a conflict with an international treaty, it disregarded the analysis of special rules of the Fundamental Act required in cases of conflicts with international treaties (Article 24(2)f) and Article 24(3)c)), apart from mentioning Article Q) - a more generic declaration in the Act - and failed to involve Section 42 of the CC Act, which provides the specifics for these provisions. Due to a particular trait of the Hungarian Constitutional Court's judicial practice, which relies mostly on relevant prior resolutions in decisions made after interpreting a provision of the Fundamental Act, this ignoring of legislation also means that the resolution thereby implicitly annuls the provisions of the Fundamental Act specifying and describing the Constitutional Court's competence to investigate conflicts with international treaties, apart from Article Q). In summary of the differences between the former Constitution and the Fundamental Act, and the CC Act that provides the specifics for such work, the following should be highlighted.

[65] The main difference between the old and the current regulations is that while the old regulations required the Constitutional Court to annul or repeal legislation that contravened international treaties, just as when finding a piece of legislation to be unconstitutional, the new rules of the Fundamental Act changed this. Article 24(3) of the Fundamental Act requires the Constitutional Court to nullify provisions when setting out the legal consequences attached to each power of the Constitutional Court, once the Constitutional Court finds a conflict with the Fundamental Act; however, Article (3)c) stipulates annulment only as a possibility in the case of violation of an international treaty: "may, within its powers set out in Article (2)f), annul any legal regulation or any provision of a legal regulation which conflicts with an international treaty". Once this option is left open, Section 42 (1) and (2) of CC Act breaks this down into specifics by stating that if the Constitutional Court finds a conflict between a piece of legislation of a lower level than the legislation promulgating an international treaty, it has to annul that conflicting legislation - however, if it finds a conflict between a piece of legislation of the same or higher level in the hierarchy of legislation than the legislative act of promulgation, it may not annul the conflicting legislation and has to call upon the body drafting the legislation - the government or legislature - to take the measures necessary to eliminate the conflict. Let us look at the CC Act:

Section 42(1): " If the Constitutional Court declares that a legal regulation is contrary to an international treaty which, according to the Fundamental Act, shall not be in conflict with the legal regulation promulgating the international treaty, it shall – in whole or in part – annul the legal regulation that is contrary to the international treaty.

(2) If the Constitutional Court declares that a legal regulation is contrary to an international treaty with which, according to the Fundamental Act, the legal regulation promulgating the international treaty must not be in conflict, it shall – in consideration of the circumstances and by setting a time-limit – invite the

Government or the legislator to take the necessary measures to resolve the conflict within the time-limit set."

[66] In the old regulations, this distinction was present in the regulations of the CC Act then in force, but it was done by Sections 45(1) and 46(1) separating the path to annulment from inviting the legislator to take the necessary measures by requiring that legislation of the same or a lower level than the legal act promulgating an international treaty be annulled, and that the competent legislative body be invited to make the necessary modifications only if the conflicting legislation was of a higher level than the law promulgating the international treaty.

[67] In contrast, Section 42 (1) and (2) of the CC Act currently in force only refer to the hierarchy in the sources of law concerning the conflict; accordingly, a conflict existing regarding legislation at the same level does not necessarily mean that the conflicting legislation should be annulled. At the same level, *lex specialis* derogates the *lex generalis* provision, and later provisions derogate earlier provisions in the event of a conflict. In the case at hand, the Statelessness Convention was promulgated by a law, and the legal provision currently contested also refers to a provision of law, and arranges the conflict between the two provisions of law according to the principle of "the latter derogates the former", according to which it is precisely the contested provision of law that has primacy. This excludes the possibility for the Constitutional Court to nullify that legal provision, and the only option available under Section 42(2) of the CC Act is to "invite the Government or the legislator to take the necessary measures to resolve the conflict within the time-limit set". Allow me to label this provision a wise one, because the government, having a body of foreign policy experts, is better qualified to consider the necessary measures to be taken than the Constitutional Court.

[68] Therefore, in the case at hand - supposing but not accepting that the contested provision is indeed in conflict with the Statelessness Convention - all that the majority of Constitutional Court judges supporting this position could do is to invite the government to eliminate the conflict. The resolution was able to disregard this step only because it essentially ignored nearly all applicable provisions of the Fundamental Act and the CC Act that provides the specifics for the Law.

[69] In any case, with regard to this problem, I can only express my hope that this resolution will not prove to be a precedent in the future, due to the elementary errors in it. When investigating conflicts with an international treaty, the only way that a resolution can be a relevant precedent is if the Constitutional Court includes all the relevant provisions of the Fundamental Act mentioned above, as well as the provisions of the CC Act providing the specifics for it, and makes its decision by answering all the open issues of interpretation in a subsequent resolution. My dissenting opinion is expressed as a contribution to this future effort.

[70] 2. Looking beyond the more general issues of constitutionality and argumentation, focusing on the subject matter of the case at hand, i.e. immigration and, in relation to it, the issue of stateless immigrants, the resolution also gives rise to some criticism. I am unable to support the annulment in the operative section and the justification provided thereto because this annulment reduces the options for the people of Hungary (and through us, of Europe) for self-defence in respect of one of the most important issues in the fate of Hungary and Europe. Even today - and, looking at the demographic trends, particularly in the coming years and decades - the very existence of the shrinking communities of European peoples is threatened by the

millions of illegal immigrants from Africa and the consequences of this immigration. Out of the 26 declarations of the National Commitment and Belief of the Fundamental Act, most of the first ten lay the grounds for protecting the Hungarian state and Europe, and Article R) requires that the provisions of the Fundamental Act be interpreted on the basis of the National Commitment and Belief. In my opinion, this applies to the interpretation of Article Q), as well as the further provisions of the Fundamental Act and the CC Act providing the details of that regulation, and if these declarations are included in the examination of whether the contested legal provision narrows the scope of the Statelessness Convention, the contested legal provision should be found to be acceptable. Consequently, in my opinion, by including the fundamental problem indicated and the declarations made in the National Commitment and Belief, the only option would have been to adopt a resolution that rejects the judge's motion.

Budapest, 23 February 2015

Dr. Béla Pokol,
Judge of the Constitutional Court

[71] I concur with paragraph 2 of the dissenting opinion, with the proviso that rather than reducing the options for self-defence, annulment extends the self-imposed restriction of sovereignty by the Convention without sufficient grounds.

Budapest, 23 February 2015

Dr. András Zs. Varga,
Judge of the Constitutional Court

Dissenting opinion of *Dr. László Salamon*

[72] I disagree with paragraph 1 of the operative section of the resolution.

[73] 1. In my opinion, the contested provision cannot be found to be in conflict with an international treaty, but the theoretical problem lies in finding the contested provision to be in conflict with the Fundamental Act. In my opinion, a conflict between the legislation and an international treaty does not result in a violation of Article Q)(2) of the Fundamental Act. Article Q)(2) of the Fundamental Act sets out a state goal. Hungary assumes an obligation to ensure conformity between international law and Hungarian law. The state fulfils this obligation in various ways. This goal is served by the provisions of Article Q)(3), and the development of an institutional mechanism capable of creating that conformity. The constitutional basis for this institutional mechanism was also created by the Fundamental Act, in Article 24(2)*f)*, based on which the legislator regulates the procedure for proposing investigations of conflicts with international treaties in detail in Section 32 of the CC Act. The CC Act specifically provides for the circumstances when a piece of legislation can be found to be in conflict with an international treaty (Section 42 of the CC Act). Accordingly: " (1) If the Constitutional Court declares that a legal regulation is contrary to an international treaty which, according to the Fundamental Act, shall not be in conflict with the legal regulation promulgating the international treaty, it shall – in whole or in part – annul or repeal the legal regulation that is contrary to the international treaty. (2) If the Constitutional Court declares that a legal regulation is contrary to an

international treaty with which, according to the Fundamental Act, the legal regulation promulgating the international treaty must not be in conflict, it shall – in consideration of the circumstances and by setting a time-limit – invite the Government or the law-maker to take the necessary measures to resolve the conflict within the time-limit set."

[74] Hungary has satisfied its obligations arising out of the state goal set out in Article Q)(2) of the Fundamental Act by adopting the provisions of the Fundamental Act mentioned above and the implementing act provisions in full. A violation of Article Q)(2) could be raised if the state had failed to ensure investigation of the conflict of legislation with international treaties by omitting to create the possibilities mentioned above, and had failed to set up the institution for the procedure to eliminate any collision of law.

[75] 2. It also follows from the above that investigations of the conflict of law with international treaties is, strictly speaking, not a function of protecting the Fundamental Law.

[76] Had the legislation that violated an international treaty also violated the Fundamental Act, it would be unnecessary to provide for the investigation of conflicts between legislation and international treaties in Article 24(2)*f)* of the Fundamental Act; the Constitutional Court would be able to provide for the annulment of a piece of legislation that is contrary to the Fundamental Act without powers established on the basis of Article 24(2)*f)* of the Fundamental Act, as a result of a procedure initiated on the basis of an *ex post* control [Article 24(2)e)], a judge's motion [Article 24(2)b)] or a constitutional complaint [Article 24(2)*c)*, all references to the Fundamental Act].

[77] By providing separate provisions for the investigation of a conflict between international treaties and legislation in addition to the concepts of *ex post* control, judge's motions and constitutional complaints - in which cases it sets the requirement that the contested legislation should be contrary to the Fundamental Act - separately, without any reference to being contrary to the Fundamental Act, the drafter of the Fundamental Act made a distinction between a conflict with the Fundamental Act and with an international treaty, thereby removing the concept of the latter from the former.

[78] 3. The fact that the legal consequences are not the same for conflicts with the Fundamental Act and for conflicts between legislation and international treaties in itself confirms that the conflict between legislation and international treaties and a conflict with the Fundamental Act are two different things. In the case of a conflict with the Fundamental Act, the legislation has to be repealed [Article 24(3)a) of the Fundamental Act], while the repeal or annulment of legislation is just one option available in the event of a conflict between legislation and an international treaty, in addition to which it provides for the application of other legal consequences included in implementing act. Ultimately, the legal consequences of conflict with an international treaty are detailed in Section 42 of the CC Act, in which regulations are provided for a situation when legislation (or legal provisions) in conflict with an international treaty is not repealed or annulled.

[79] Therefore, if a conflict of a piece of legislation with an international treaty were considered to be contrary to the Fundamental Act with regard to Article Q)(2) of the Fundamental Act, the Constitutional Court could never investigate the rank of the legal act promulgating the international treaty and the legislation that is in conflict with the international treaty in the hierarchy of legislation, and the provisions of Section 42 of the CC Act could never be applicable.

[80] As a consequence of the above, in my opinion, the systemic and logical analysis of the Fundamental Act and the implementing act on the Constitutional Court clearly preclude an interpretation that led to the finding of a violation of Article Q)(2) of the Fundamental Act in the case at hand.

[81] 4. I also disagree that Article B)(1) of the Fundamental Act is violated in this case. The resolution failed to provide the reasons for this, and the judge's motion also makes no reference to this.

Budapest, 23 February 2015

Dr. László Salamon,
Judge of the Constitutional Court

[82] I concur with the dissenting opinion. Budapest, 23 February 2015

Dr. István Balsai,
Judge of the Constitutional Court