The Curia
as review court

j u d g m e n t

Case number: Pfv.IV.21.274/2016/4.

Members of the panel:
Dr. Mátyás Mészáros, head of the panel
Dr. Katalin Böszörményiné Kovács, rapporteur judge
Dr. Zsuzsanna Kovács, judge
The claimant:
Hungarian Civil Liberties Union (1136 Budapest, Tátra u. 15/B., Hungary)
Representative of the claimant:
Dr. Tivadar Hüttl, attorney (1136 Budapest, Tátra u. 15/B. 1/1., Hungary)
The defendant:
Police Headquarters of Heves County (3300 Eger, Eszterházy tér 2., Hungary)
Representative of the Defendant:
Dr. Albin Péró, solicitor
Subject of the case:
declaration of violation of personal rights and establishing sanctions
Party submitting the application for review:
claimant
Name of appellant court and number of final judgment:
Regional Court of Appeal of Debrecen, Pf.I.20.006/2016/5.
Name of first instance court and number of judgment:
General Court of Eger, 12.P.20.065/2013/128.

Substantive part

The Curia overrules the final judgment in part, including the provision regarding procedural costs, and varies the first instance judgment in part. Instead of the provisions specified in the first instance judgment, the Curia establishes that the defendant committed harassment against the members of the Roma community in Gyöngyöspata by failing to take action against members of the Civil Guard Association for a Better Future, the Véderő and the Betyársereg between March 1, 2011 and May 1, 2011, which violated their right to equal treatment.

The Defendant is enjoined from committing similar violations of law.

The provisions of the first instance judgment regarding compensation are upheld.

The final judgment is upheld in all other aspects.

The Defendant is ordered to pay the claimant a total of HUF 100,000 (one hundred thousand Hungarian forints) of procedural costs for the first instance, the appeal and the review procedures.

There is no right to further review of this judgment.

R e a s o n s

Facts underlying the review

[1] Between March 1 and March 18, 2011, the Civil Guard Association for a Better Future (hereinafter: association) conducted continuous patrols in Gyöngyöspata. They alleged that they aimed to prevent future crimes against property and persons increasingly committed by the local Roma community. Members of the Véderő and Betyársereg associations also appeared in the town. On March 6, 2011, the association and the Movement for a Better Hungary party held a torchlight march "in the interests of the residents of Gyöngyöspata terrorized by the members of the local gypsy community making a living from crime." The event was acknowledged by the police force managed by the Defendant. On April 26, 2011, a mass fight broke out, which required police intervention. Between March 1 and November 30, 2011, the police carried out an increased number of identity checks and commenced more misdemeanor charges in the town.

The claim and the defendant's defense

[2] In its claim, the claimant sought a declaratory judgment under section 10 of Law CXXV of 2003 on equal treatment and promotion of equal opportunities (hereinafter, the Equal Treatment Act) confirming that the Defendant violated the right to equal treatment of the members of the local Roma community in Gyöngyöspata during the period between March 1 and May 1, 2011, as it failed to take action concerning the protection of public security, which constituted harassment against them. At the same time, it also sought a declaratory judgment that in its practice of conducting identity checks and bringing misdemeanor charges, the Defendant committed harassment against the members of the Roma community in Gyöngyöspata, in the Roma-inhabited part of Gyöngyöspata, thereby violating their right to equal treatment. Secondly, it sought a declaratory judgment that by failing to take action regarding the protection of public security against the radical groups present in Gyöngyöspata during the above period and also by its practice concerning identity checks and misdemeanor charges, the Defendant engaged in harassment against the members of the Roma community in Gyöngyöspata, in the Roma-inhabited part of Gyöngyöspata, thereby violating their right to equal treatment.

[3] In addition, it sought a declaratory judgment that the defendant, in violation of section 8 of the Equal Treatment Act, engaged in direct discrimination against the members of the Roma community in Gyöngyöspata with its practice concerning misdemeanor charges between May 1 and November 30, 2011, and engaged in harassment against the members of the Roma community in Gyöngyöspata with its abusive practice concerning misdemeanor charges,

thereby violating their right to equal treatment. Secondly, in this regard, it sought a declaratory judgment that the defendant engaged in direct discrimination against the members of the Roma community of Gyöngyöspata between May 1 and November 30, 2011 with its practice concerning identity checks and misdemeanor charges, thereby violating their right to equal treatment.

[4] The claimant sought an injunction barring the defendant from future violations of law. The claimant also sought an order requiring the defendant to prepare a strategy within six months of the judgment coming into force regarding the management by the police of the anti-gypsy events of radical organizations, and to brief the police department chiefs and the police stations under its supervision; moreover, to prepare a control mechanism in case the strategy needs to be deployed, and to send this strategy and control mechanism to the claimant within 15 days of approval thereof by the chiefs; moreover, to make this strategy available for its staff on its internal intranet, along with the reports on the facts established by the control mechanism, in case the strategy needs to be deployed.

In its claim, the claimant also sought an order requiring the defendant to brief chiefs of police departments and police stations under its supervision within 15 days of the judgment coming into force regarding their obligation to comply with the requirement of equal treatment in connection with bringing misdemeanor charges, emphasizing that profiling on ethnic grounds is a violation of fundamental rights. An order was also sought requiring the defendant to prepare a control mechanism to ensure that during the work of the subordinate police departments and police stations concerning misdemeanor charges, imposing fines and pressing charges, the requirement of equal treatment is maintained from an ethnic point of view, and to verify the same on an annual basis; moreover, to make the report compiled on the findings of the control mechanism available for its staff on its internal intranet, and to publish it on its website.

[5] In addition to all this, the claimant also sought a court order requiring the staff serving in Gyöngyöspata to participate in awareness and anti-discrimination presentations made by professionals of the Equal Treatment Authority for two days within one year of the judgment coming into force.

[6] The claimant also sought an order requiring the defendant to publish on its own website the provisions of this judgment establishing the violation of law, the injunction regarding the breach of law, and the further objective sanctions, and to inform the Hungarian News Agency about the provisions of this judgment within 15 days.

[7] In its counterclaim, the defendant sought the rejection of the claims made by the claimant.

The first instance and the appeal judgment

[8] The first instance court established that the defendant engaged in harassment against the members of the Roma community in Gyöngyöspata by failing to take action for the protection of public security against members of the Civil Guard Association for a Better Future, Véderő and Betyársereg in Gyöngyöspata between March 1, 2011 and May 1, 2011, thereby violating their right to equal treatment. The court established that the defendant's practice concerning identity checks and misdemeanor charges constituted discrimination against the members of the Roma community in Gyöngyöspata between May 1 and November 30, 2011, thereby violating their right to equal treatment. The court also ordered the defendant to publish the substantive part of the judgment on its own website within 15 days, and also inform the Hungarian News Agency about it within 15 days. The claim of the claimant was rejected in all other respects.

[9] The first instance court explained in its reasoning that in relation to the patrols of the civil guard conducted for over one week, the protest on March 6 and the clash on April 26 between a large group of the Roma community and the non-Roma people in the village, the defendant had not discharged its duty to protect the rights, and thereby committed harassment. The court did not accept the defense of the defendant that it had no statutory right to prevent uniformed patrol activity. By failing to bring criminal or misdemeanor charges ex officio, it maintained the gradually emerging environment that violated the equal human dignity of the local Roma community. The omissions concerning the authorization of the event on March 6, the lack of information in the decision, the failure to break up the event being held and the failure to bring criminal or misdemeanor charges against the participants were attributed to the defendant.
As regards the clash on April 26, 2011, the court explained that the earlier failures by the defendant to take action to protect public security in connection with the patrols and marches contributed to the emergence of an intimidating and offensive environment that led to serious clashes between members of Betyársereg and Véderő and the local Roma community.

[10] The first instance court did not uphold the claim regarding the defendant's practice concerning identity checks and misdemeanor charges during the initial period, as the hostile and intimidating environment was not maintained by the defendant's practice of identity checks and bringing of misdemeanor charges, but by breaching its duty to protect fundamental rights and failing to take action to protect public security.

[11] Harassment was not identified for the period between May 1 and November 30, 2011 due to the practice concerning misdemeanor charges, as this could not have influenced the sense of fear of the Roma community; this emerged independently from the aims and intentions of the defendant. At the same time, the court found that the police brought charges for 86 misdemeanors in the material period, and in 61 cases the person subject to the proceedings was of Roma origin. Of the 2,800 residents of Gyöngyöspata, 450 are of Roma ethnicity, so the practice regarding misdemeanor charges is seriously disproportionate. Based on the witness statements of Tibor Kiss and Sándor Szőke, the court established that non-Roma residents also committed offences on a number of occasions, but the policemen failed to act even though they were aware of the offences. It was not disputed that only Roma were subject to misdemeanor charges for pedestrian offences; such charges were not brought against non-Roma persons.

[12] The first instance court found that ordering the defendant to provide remedy was justified, as the events were also published in international newspapers. The court refused to grant an injunction, as the claimant thought it unlikely that the violation of personal rights would occur again. The court did not feel an order was justified concerning the strategy control mechanism, the briefing and the organization of trainings and presentations, as it was unlikely that the personal rights would be violated again. In addition, the court emphasized that the judgment in the case is a remedy in itself.

[13] Following the appeal of the litigants, the appeal court varied the first instance judgment in part, and completely rejected the claim of the claimant.

[14] The regional court of appeal emphasized that, based on the burden of proof established under subsections 19(1) and (2) of the Equal Treatment Act, in contrast with the general rules, the defendant had to prove it was not liable. Accordingly, the consideration must be given to the

fact that fear arose among the Roma residents of the town not due to the activity of the defendant, but because of the behavior of organizations registered by the court and operating lawfully. The court of appeal pointed out that in the exercise of public powers, the defendant may only use the tools allowed by law. In addition, the protection of local Roma residents arose in connection with fundamental rights, in particular, the right of association and the right of assembly, and these rights may only be restricted by the public authorities for specific purposes, using legitimate instruments, and to a necessary and proportional extent. The court of appeal agreed with the defendant that the fear was primarily caused by the belief that the members and the activities were identical to those of the previously disbanded Hungarian Guard. The statutory provisions in effect during the period did not expressly prevent public security protection activities conducted by a registered civil guard association without cooperation with the police and inciting fear in a protected community. The legislature established legal restrictions only afterwards, primarily because of the events in the town. The court of appeal referred to subsection 174/B(1) of Act IV of 1978 on the Criminal Code (hereinafter, the Criminal Code) and Law CLXV of 2011 on civil guard organizations and the rules on civil guard activities.

The appellate court stated that the facts of the case had not satisfied the elements specified in Section 152/B of Law LXIX of 1999 on offences regarding likeliness of confusion, as the uniform had not specifically borne the markings of the Hungarian Guard, so the suspicion of a misdemeanor could not be established.

As regards the march held on March 6, 2011, pursuant to the Right of Assembly Act, there were no circumstances under which the defendant could have banned the event. The reasoning of the decision set out sufficient information about exercising the right of assembly. According to the legal reasoning of the court of appeal, the statutory conditions specified in the Right of Assembly Act for breaking up the march were not satisfied.

As regards the mass brawl on April 26, 2011, the court explained that the defendant had had taken the measures provided by law, and it had no opportunity to prevent the actual incident, so it had not violated the personal rights of the local Roma community.

[15] In connection with the practice concerning misdemeanor charges and identity checks, the appellate court referred to the report of the Parliamentary Commissioner for national and ethnic minority rights dated December 2011, which stated that obtaining comprehensive information regarding the misdemeanor charges by the police was not been possible, as the only documents reviewed were those where the town clerk had been contacted to enforce fines not paid voluntarily (which is not the same as all the sanctioned offences), and he also thought that further investigation was necessary because the sample was relatively small. The available data has not satisfied the objectivity requirement, as this was only general information due to the lack of circumstances regarding the conduct to be assessed in misdemeanor proceedings compared to the conduct of the entire population, so it was not sufficient to establish a presumption of disadvantage suffered by the group. There was also no objective observation data for the full period that would have made it possible to assess the conduct of persons stopped for identity checks and persons who were not stopped for identity checks for no particular reason, which would have made it at least presumable that the defendant had engaged in a practice aimed at or resulting in the creation of an intimidating, hostile, degrading, humiliating or offensive environment.

Application for review and counterclaim

[16] The claimant submitted an application for review of the final decision, sought to have it overturned, and asked for a new judgment upholding its claims in accordance with law.

[17] The claimant's position was that in relation to the claim concerning harassment, the judgment could be overturned based on the incomplete reasoning in the judgment. If the Curia found that the appellate decision should be overturned regarding certain parts of the claim, the claimant asked for a partial judgment on the other parts of the claim under subsection 213(2) of the Civil Procedure Act.

[18] The claimant sought a partial judgment that the duty to establish the presumption of direct discrimination had been met, or alternatively, regarding the further requests for declaratory judgments and the related requests for objective sanctions; while under subsection 155/A(2) of the Civil Procedure Act, it sought a preliminary ruling on the issue raised by the claimant regarding the special burden of proof arising in relation to the enforcement of equal treatment rights concerning the direct discrimination in connection with the interpretation of articles 8(1), 15 and 7(1) of Council Directive 2000/43/EC of June 29, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereinafter, the Race Equality Directive).
If the Curia, like the first instance court, also believed that an injunction should not be granted, the claimant also requested a preliminary decision on this issue as well.
If the Curia initiated the preliminary decision-making process on both issues, the claimant asked for a partial judgment on the requests for declaratory judgments.

[19] The claimant's legal position is that the final judgment violates fundamental rights, as it is contrary to subsections 2(1), 7(1), 8(1), 40/A(2), 54(1) and (2), 55(1), 70/A(1) and (2) of the Fundamental Law (Constitution). It complained that the appellate court failed to consider the duty of the police to protect fundamental rights arising from the precedent set by the judgment disbanding the Hungarian Guard Association for Protection of Traditions and Culture as upheld by the Supreme Court and approved by the European Court of Human Rights (hereinafter, the ECtHR), as well as from the rulings of the constitutional court and the jurisprudence of the ECtHR, which is the basis for the protection of fundamental rights of the members of a community intimidated due to their ethnicity.
In addition, the claimant contends that the final judgment is in breach of sections 10 and 19 of the Equal Treatment Act, the old Hungarian Civil Code, the International Convention on the Elimination of All Forms of Racial Discrimination concluded in New York on December 21, 1965 (hereinafter, the New York Convention) as promulgated by Decree law no. 8 of 1969, articles 1, 3, 5, 8, 14 and 17 of the Convention for the Protection of Human Rights and Fundamental Freedoms of Rome as promulgated by Act XXXI of 1993 (hereinafter, the ECHR), subsections 2 (1) as well as 13(1) and (2) of Law XXXIV of 1994 on the police (hereinafter, the Police Act), subsections 2(3) and 14(1) of Law II of 1989 on the right of assembly (hereinafter, the Right of Assembly Act), the preamble, section 2 and subsection 3(2) of Law LII of 2006 on the civil guard (hereinafter: Civil Guard Act).
The court interpreted the duty of the claimant to establish presumption in breach of sections 8 and 19 of the Equal Treatment Act and the Race Equality Directive, and in this regard, it also breached its duty to provide justification. The claimant also contended that the court of appeal had not considered the part of the claimant's appeal based on harassment in relation to the misdemeanor charges, and in this regard, it referred to subsections 3(2) as well as 253(1) and (3) of the Civil Procedure Act.
The facts established by the appellant court that the organizations participating in the events were operating lawfully is contrary to the evidence, as only the association was registered by the court, Betyársereg and Véderő were not. The civil action on the disbanding the association was no longer pending when the appellate judgment was rendered. The judgment is also erroneous in that police actions were taken during the event held in Gyöngyöspata on March

6. The finding that members of legal aid organizations present did not initiate criminal or misdemeanor proceedings is also contrary to the evidence, although it has no legal relevance in this case.

A layperson could make an association with the Hungarian Guard, partially because the founders and the leaders are the same, the members held the flag of the Guard, and the uniform was similar. However, even disregarding these facts, the members displayed militant behavior, and patrolled and marched through the town.

The defendant has not brought any misdemeanor charges against members of the association, and nobody was arrested due to the patrolling. During the two-month period, however, police action was taken against members of Betyársereg and Véderő on two occasions due to offences or crimes. Both the first instance and the appellant court agreed that the claimant successfully established the presumption in relation to this claim. During the period between March 1 and May 1, 2011, in relation to the right to freedom and security, the prohibition of inhuman treatment, equal human dignity as well as the right to the protection of privacy in connection therewith, the defendant breached its duty to protect the fundamental rights of the Roma people of Gyöngyöspata against the racially motivated intimidation of the paramilitary organizations that had been continuing for weeks. Due to the obligations specified in section 40/A (2) of the Fundamental Law (Constitution), as well as section 1 and subsection 2(1) of the Police Act, moreover, based on the jurisprudence of the ECtHR, the defendant has a positive duty to protect fundamental rights and institutions in relation to fundamental rights. The claimant's position is that by breaching these duties to protect fundamental rights, the defendant also violated the equal human dignity of Roma residents in Gyöngyöspata. This conduct maintained and increased the intimidating, hostile and humiliating environment in the town that emerged due to the presence of radical organizations, which constitutes harassment under section 10 of the Equal Treatment Act. The claimant also referred to the text of the judgment of the ECtHR in the case of *Vona v Hungary*.

[20] The claimant contended that the Right of Assembly Act does not apply to patrolling, only the registered protest held on March 6, 2011 may be considered in view of the right of assembly. The claimant believed that the statement of the court of appeal was also mistaken in finding that the patrolling continuing for weeks was protected by the right of association, as the legal operation of the association was not subject to the claim. According to the application for review, the court should have compared the fundamental rights of the intimidated community with the fundamental rights of those patrolling, as conflicting rights, using the test of necessity and proportionality, and the weight of the conflicting fundamental rights should have been considered. The circumstances considered to be in breach of law in the judgment disbanding the Hungarian Guard were also present in the same way during the patrolling of the association in Gyöngyöspata for weeks. There was at least a suspicion that the "patrollers" committed the offence specified in section 152/B of the Offences Act, so the police should have commenced proceedings ex officio.

[21] Based on the evidence and the police reports, it is clear that the defendant failed to recognize the conflict, which contributed to the breach of its positive duty to protect fundamental rights. The first instance court correctly identified the fact by applying the test specified in subsection 206(1) of the Civil Procedure Act, but the court of appeal arbitrarily disregarded certain parts of it, made statements contradicting the evidence, and did not specify the grounds for its legal reasoning.

[22] The claimant contended that, under the Civil Guard Act, cooperation between the police and the civil guard should have been mandatory. The uniform of the association was misleading and did not comply with subsection 3(2) of the Civil Guard Act, while its activity clearly breached the purpose and spirit of the Act.

[23] The claimant complained that the court of appeal disregarded its reference to suspicion of a breach of peace by reason of persons engaging in intimidating patrols based on ethnicity.

[24] The claimant contends that the defendant failed to act at the march held on March 6, 2011 when it did not warn the organizer of the event regarding the potential breaking up of the event, it did not stop people from committing misdemeanors, and did not break up the event. These omissions constituted behavior violating human dignity, which contributed to the development of a clearly intimidating, hostile and degrading environment towards the local Roma people.

[25] In relation to the clash on April 26, 2011, the claimant complained that the court of appeal had not provided reasons for its decision contradicting that of the first instance court, and had not supported it with evidence.

[26] In relation to the claims submitted for harassment and direct discrimination due to the defendant's practice concerning misdemeanor charges, the appellant court seriously breached its duty in connection with the provision of reasons specified in section 221 of the Civil Procedure Act, and its interpretation of the claimant's duty to establish the presumption is contrary to the Race Equality Directive and the Equal Treatment Act.

[27] Having checked the events overall and in connection with the practice concerning misdemeanor charges, it is clear that persons subjected to the charges are impacted on an extraordinarily disproportionate basis due to ethnicity. This is also proven by the fact that the police illegitimately conduct profiling based on ethnicity, wrongfully choosing the persons subject to actions or charges. This is in breach of the provisions prohibiting discrimination, regardless of whether each of these actions were legitimate in and of themselves. The defendant successfully met its burden to establish the presumption, and the defendant admitted it for all claims. No misdemeanor proceedings were commenced against non-Roma persons for pedestrian or cycling offences, or in relation to public cleanliness. It can also be established from the data that the police took action against Roma people for relatively less serious offences, compared to non-Roma residents. The claimant also contended that the discrimination may happen collectively this way, as discrimination actually occurs before any action is taken, at the time the person is selected for the action.

[28] The claimant believes that the court of appeal made a serious procedural error, since it did not inform the claimant regarding the burden of proof, which it interpreted differently from the first instance court.

[29] The court of appeal seriously breached its duty to provide reasoning when it summarized the claims and made a decision in breach of sections 10 and 19 of the Equal Treatment Act. The reasons are in breach of the Equal Treatment Act, as the conditions specified in section 10 do not expressly include a group for the basis of comparison, which is one of the significant characteristics of harassment, as correctly specified in the first instance judgment. There is also no need to assess the conduct of persons who were not stopped to check their identity during the first period. Harassment is also against the law if its effect is to create a degrading environment, so the objective of the police is irrelevant.

[30] The data relating to misdemeanors for the first period, supplemented by the contents of the report on the subsequent investigation of the ombudsman and the information on the abusive practice of identity checks of Roma people, and also taking note of the multiple omissions regarding radicals, support a finding that the practice of the police in connection with on-the-spot actions were abusive overall, which may be interpreted as conduct violating human dignity which could sustain and amplify the intimidating, degrading and hostile environment generated towards Roma people by radicals.

[31] The court failed to separately consider the claim of harassment due to the practice concerning misdemeanor charges as alleged for the second period, and the reasoning stating that the duty

to establish the presumption had not been discharged was contrary to law.

[32] Apart from this statement, the claimant contended in relation to the claims for objective sanctions that the first instance court, in violation of the Race Equality Directive, erroneously found in connection with the objective sanctions based on subsections 84(1) b), c) and d) of the Civil Code that the claimant needed to meet the burden of proof according to the general rules specified by the Civil Procedure Act. There is a violation of Article 15 of the Race Equality Directive if the claimant is subject to a more onerous burden of proof for the additional objective sanctions based on a declaratory judgment than in case of a declaratory judgment concerning a violation of law. The claimant contended that the declaration of the breach of law and the publication thereof do not in themselves constitute an effective, proportionate and dissuasive sanction as prescribed by the Race Equality Directive. References were made to several decisions of the ECtHR. The claimant argues that the facts and circumstances of the claim underlying the violation of law confirm that there is a reasonable chance of subsequent violations of law. References were made to the fact that the Equal Treatment Authority agreed to hold anti-discrimination training.

[33] In its counterclaim in the review, the defendant sought to uphold the final judgment.

The decision and legal reasons of the Curia

[34] The application for review is granted in part.

[35] According to subsections 275(3) and (4) of the Civil Procedure Act, a final judgment may be overturned for a breach of procedural rules if it has a significant effect on the substantive ruling. Contrary to the the application for review, the court of appeal considered (on a summary basis) the claims submitted in relation to the practice regarding identity checks and misdemeanor charges as well as the appeal of the first instance judgment. The appellant court considered the available facts differently from the first instance court, which is not a different interpretation of the duty to establish the presumption and the burden of proof, so the final judgment is not in breach of subsection 3(3) of the Civil Procedure Act.
Accordingly, the procedural rules were not materially breached in the appeal procedure to an extent that would affect the substantive judgment of the case and thus provide a basis to repeat the proceedings.

[36] Firstly, the Curia confirms that the claimant submitted a public interest claim as a civil society organization due to the violation of the right to equal treatment of the members of the Roma Community in Gyöngyöspata. It is not disputed that the claimant had the right to submit claims in the public interest under subsection 20(1) c) of the Equal Treatment Act.

[37] In its claim, the claimant sought a declaratory judgment that between March 1 and May 1, 2011, the defendant engaged in harassment by failing to take police action and with its practice concerning identity checks and misdemeanor charges, while between May 1 and November 30, the defendant committed direct discrimination and harassment with its practice concerning misdemeanor charges.
The following legal provisions are applicable to the judgment of the legal dispute.
According to article 54(1) of the Constitution in effect at the time of the events subject to the claim: in the Republic of Hungary, everyone has the inherent right to life and to human dignity, of which no one can be arbitrarily deprived. Under article 70/A(1) of the Constitution, the Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, color, gender, language, religion, political

or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever. In accordance with the provisions of the Constitution, section 76 of the Civil Code states that a breach of personal rights especially includes (without limitation) the breach of requirements concerning human dignity and equal treatment. The specific conditions regarding the breach of the equal treatment requirement as well as the rules regarding the exemption from the related burden of proof and from the breach of law are specified by the Equal Treatment Act. Subsection 7(1) of the Equal Treatment Act exhaustively lists the types of conduct that breach the equal treatment requirement. According to this provision, direct discrimination, indirect discrimination, harassment, illegitimate separation, victimization and orders to commit any of these acts breach the requirement of equal treatment. Subsection (2) contains the exemption reasons. Accordingly, unless otherwise specified by law, the equal treatment requirement is not breached by conduct, actions, conditions, omissions, orders or practices that restrict the fundamental right of the person subject to the disadvantage if it is unavoidable to uphold another fundamental right, as long as the restriction is suitable and proportionate to achieve such purpose (point a), and, in cases not falling under point a), if, based on an objective assessment, it has a reasonable purpose directly relevant to the legal relationship (point b). The burden of proof related to circumstances corresponding to exemption reasons or exclusion circumstances is specified by section 19 of the Equal Treatment Act. According to subsection (1) of this section, the party or group subject to a violation of their rights or the party entitled to enforce a public interest claim must establish the application of the presumption that the party or group subject to a violation suffered a disadvantage, or in the case of enforcing a public interest claim, that there is an imminent risk thereof; moreover, that the protected characteristics specified in section 8 actually applied to them at the time of the grievance, or the defendant believed that they were applicable thereto. Under subsection 19(2) of the Equal Treatment Act, if the presumption under subsection (1) is established, the burden of proof lies with the other party to prove that the requirement of equal treatment has been met or that it was not necessary in the relevant legal relationship.

The claimant's position is that the defendant failed to discharge its duty regarding the protection of public security between March 1 and May 1, 2011, thereby committing harassment. In order to consider this, the definition of harassment first had to be interpreted under the Equal Treatment Act. According to the definition specified in subsection 10(1) of the Equal Treatment Act, harassment is deemed to be sexual or other conduct violating human dignity in relation to the characteristics specified in section 8 for the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for an individual. This definition of harassment complies with the definitions specified in Article 2(3) of the Race Equality Directive and in article 2(3) of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. Based on the foregoing, one element of harassment under the definition is conduct violating the human dignity of the harassed person (or persons) based on their protected characteristics. Human dignity is violated when a person is subjected to treatment that is inappropriate with regard to their self-respect and the requirements of human contact, especially if they are humiliated as a human. Conduct is the way persons take a position regarding their environment or events in life or society, how they behave towards others, how they communicate towards others (Hungarian Concise Dictionary). The meaning of conduct includes the omission to meet a relevant obligation. Accordingly, harassment may be committed by an omission.

Another element of harassment is that the purpose or effect of the conduct violating human dignity is to develop an intimidating, hostile, degrading, humiliating or offensive environment. On the one hand, this means that the actual creation of such an environment is not a condition for harassment, it is sufficient if this was the purpose of such conduct. On the other hand, intentional conduct is not necessary, as the environment defined in the Equal Treatment Act may occur as an effect of such conduct.
Accordingly, the Curia needed to decide whether the defendant engaged in harassment under these provisions by its failure to take action. Under subsection 206(1) of the Civil Procedure Act, the court shall establish the facts by comparing the statements of the litigants and other data from the evidentiary hearing, and shall assess the evidence as a whole, and make a decision based on its findings. As the application for review submitted by the claimant in this case mainly challenged the considerations taken into account in the final judgment (apart from the interpretation of establishing the presumption) in relation to the rejected claims, the Curia had to examine whether the court of appeal made an error in the reasoning of the final judgment that provides grounds to overrule it.

It is not disputed in this regard that the claimant successfully established the presumption specified in subsections 19(1) a) and b) of the Equal Treatment Act, both in relation to belonging to an ethnic minority and the disadvantage caused to the members of the Roma community; this was also accepted by the defendant. Consequently, the defendant needed to prove as part of the framework available for exemption that it had complied with the requirement of equal treatment or, if appropriate, that did not need to comply therewith. The first instance court correctly ruled that in connection with the exemption, the defendant failed to meet its burden of proof in this regard.

On March 1, 2011, the association Védegylet and Betyársereg appeared in Gyöngyöspata due to an increasing number of offences and crimes attributed to the local Roma people, and started “patrolling.” There is no doubt that members of the association as well as the related Véderő and Betyársereg organizations present in the town wore a black, military-style uniform that was very similar to the uniform of the disbanded Hungarian Guard. Wearing the uniform *per se* did not provide grounds for action, however, alongside the only registered association, members of organizations such as Véderő and Betyársereg had been marching on the streets of a town for weeks in a manner likely to incite fear, in a uniform very similar to the uniform of the Hungarian Guard, and in a way that struck fear among the Roma people, so this clearly violated the fundamental rights and the human dignity of the local Roma residents. It clearly created a stressful environment full of conflicts that kept the Roma people under pressure, and the leaders of the local Roma community expressly requested the police to take action. The defendant acknowledged the patrolling. In this regard, the fact that the police ordered identity checks of the civil guards, including checks whether they possessed equipment particularly dangerous to public security, cannot be considered sufficient police action. The presumption that some of the Roma people living in the town had committed offences or crimes may not serve as grounds for certain organizations (especially unregistered ones) to march in the village in black, military-style uniforms engaging in law enforcement activity while acting in a threatening way towards all Roma residents of the town, keeping them in collective fear. These are the circumstances in which the protest was held on March 6. The association notified the police about the protest held on March 6, its purpose was defined as raising awareness of the recent violations of law committed by criminals within the Roma population in Gyöngyöspata. The right of assembly is a right to participate in politics and in public affairs. Association includes the right to participate in events as well as to form and express

opinions. The right of participation is the right of a person to participate in an event at their discretion. According to the rules specified in the Right of Assembly Act, the police may only acknowledge events constituting assemblies, unless there are reasons to prevent them. In this case, the event subject to the notice could not be banned under the provisions of the Right of Assembly Act. Subsection 8(1) of the Right of Assembly Act specifies the conditions under which an event for which notice is required may be banned. Accordingly, if an event for which notice is required poses a serious risk to the uninterrupted operation of public representation organizations or the courts, or if a different route cannot be provided for traffic, the police may, within 48 hours of receipt of the notice by the authority, ban the event to be held in the location or at the time specified in the notice. Since these conditions were not met in this case, the police had no right to ban the event, so it acted legitimately by acknowledging the notice.

As the Constitutional Court explained in its decisions number 55/2001 (November 29), 75/2008 (May 29) and 3/2013 (November 14), the right of assembly is part of the freedom of expression that provides for the joint, peaceful expression of opinion in relation to public affairs. According to Article 10 of ECHR, everyone has the right to freedom of expression, which includes the freedom to form an opinion, although these rights may be restricted. Article 18 of the International Covenant on Civil and Political Rights accepted at the 21st session of the General Assembly of the United Nations (hereinafter, the ICCPR), as promulgated by Decree-law no. 8 of 1976, makes a substantially equivalent provision that everyone shall have the right to freedom of thought, conscience and religion, and to the exercise thereof, although these rights may not be exercised without restriction. The exercise of these rights may be subject to limitations as prescribed by law, which are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. According to Article 2 of the New York Convention, each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; and that each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations.
The Constitutional Court explained in several of its judgments that the freedom of expression may not violate the freedoms and human dignity of others, and it may be exercised as long as it does not lead to discrimination, is not contrary to the freedom of conscience and religion, and does not violate the rights of national or ethnic minorities (Constitutional Court judgments number 14/2000 (May 12) and 30/1992 (May 26))

The Curia pointed out in its judgment number KfV.X.37.783/2009/6 disbanding the Hungarian Guard Association for Protection of Traditions and Culture that “the effect of statements and speeches expressed in an event could clearly be amplified or may be different depending on the population and the ethnic and racial composition of the town where they are made, on the form and turnout of the events and how the organizers can manage the emotions or anger arising as a result, or if they are actually able to manage them appropriately.”
The events that occurred should not have been assessed individually, but according to their overall effect. Accordingly, the Curia drew the conclusion that overall, due to their amplifying effect on each other, the above events violated the right of Roma residents to human dignity, security and freedom, and there had been a risk that they would lead to violence, which actually happened on April 26.

Constitutional protection applies only to events aiming to participate in discussions about public affairs. According to judgment number 4/2007 (February 13) of the Constitutional Court, events held under the right to assembly form an integral part of the value of democratic openness. The objective of events held under the right of assembly is to enable the citizens

exercising their right of association to form a collective opinion, to share their views with others and to express them collectively. This does not mean, however, that no restrictions may be imposed on the right of association. The most serious restriction is the preliminary banning of associations. Breaking up an event is a sanction-type restriction, which is primarily the duty of the organizers under the Right of Assembly Act [section 12 (1) of the Right of Assembly Act], and secondarily the duty of the police [section 14 (1) of the Right of Assembly Act]. Preliminary banning completely prevents the exercise of a fundamental right, while breaking up an event is a less serious type of restriction. "Accordingly, a reason to ban the event may subsequently become a reason to break up the event (due to the event violating the law), but this relationship may not be reversed. The reactive reasons for breaking up an event that may be used in response to violations of law during the event may not be converted automatically to a reason for banning the event in advance." [Constitutional Court judgment number 30/2015 (October 15)].

[38] Subsection 14(1) of the Right of Assembly Act provides for breaking up an event. Accordingly, if exercising the right of assembly is contrary to subsection 2(3), or if the participants are armed or equipped with weapons, or if an event requiring prior notice is held notwithstanding a banning order, the police shall break up the event. According to subsection 2(3), exercising the right of assembly may not include committing a crime or incitement to a crime, and it may not breach the rights or freedoms of others. Accordingly, if exercising the right to assembly breaches the rights or freedoms of others, the police are entitled to break up the event. The rights and freedoms of others require the ability to restrict the fundamental right.

The participants of the torchlight protest held on March 6 marched at a late hour and in a part of the town inhabited by the Roma people, and some of them wore black clothing, so the event clearly established circumstances satisfying the definition of "captive audience." According to decision number 95/2008 (July 3) of the Constitutional Court, a "captive audience" occurs when someone expresses radical views in a way that a person belonging to the aggrieved group must listen to it in an intimidated way, and such person is not able to avoid the communication. This type of communication is not covered by the freedom of expression, as no person has the right to force someone to listen to his own opinion. The residents living in the "Roma estates" were intimidated by the protest, they became the audience for the provocative and intimidating conduct and communication of the protesters. All these circumstances together, with their amplifying effect on each other, were likely to create an intimidating, hostile, degrading, humiliating or offensive environment in violation of the rights and human dignity of others. By considering these circumstances, the defendant should have broken up the protest under its duty to protect fundamental rights.

In addition to all this, Véderő established a military training camp between April 22 and April 24, 2011, which was on a property close to the part of the town inhabited by Roma people, striking fear into the Roma residents living there, so the situation became more stressful. Finally, on April 26, violent acts were committed in these intense and strained circumstances.

In summary, the defendant acknowledged the patrolling of black-uniformed members of the organizations present in the town from March 1, 2011, it tolerated the torchlight march held on March 6 in the dark, at a late hour, in military-style uniforms. It failed to break up the event held on March 6 even though the statutory reasons specified in the Right of Assembly Act applied, and then the clash happened on April 26. Having considered these events with their cumulative effect, it can be established that, by its conduct and omission, the defendant contributed to the development and maintenance of the situation subject to the claim. Accordingly, the court of appeal was wrong to refuse the claim submitted for failing to take

action during the first period and requesting a declaration of harassment. In this regard, the first instance court correctly established a violation of law under section 10 of the Equal Treatment Act, the Curia only clarified the text.

[39] The claimant also contended that the defendant engaged in harassment against the Roma people with its practice regarding identity checks and misdemeanor charges during the first period, while it committed direct discrimination and harassment with its practice concerning misdemeanor charges during the period between May 1 and November 30, 2011.

In order to reach a decision regarding harassment, the information above had to be considered.

Section 8 of the Equal Treatment Act applies to direct discrimination. According to this provision, direct discrimination constitutes a situation that results in a person or group being treated less favorably due to their actual or assumed nationality [point (d)] than another person or group in a comparable situation is, was or would be treated.

In relation to these facts, the parties had to establish the application of the presumption and had to meet the burden of proof as explained above. Accordingly, the claimant had to establish the presumption that the identity checks and misdemeanor-related fines created an intimidating environment for the members of the Roma community (harassment), and in case of direct discrimination, the presumption to be applied was that they were subject to a disadvantage or there was a risk of disadvantage compared to a comparable group, due to their protected characteristics specified in section 8 of the Equal Treatment Act. Accordingly, comparison to a comparable group is not necessary to meet the statutory conditions for harassment. The grounds for the review submitted by claimant are incorrect in this regard, as the defendant's statement in relation to applying the presumption only covered the failure to take action, it did not extend to the practice of identity checks and misdemeanor charges.

The disadvantage claimed by the claimant was the subject of the claim overall, not individually at the level of each offence. The police had a duty to take action in case of perceived offences under section 13 of the Police Act. During these actions, the police always act in view of the relevant circumstances. The requirement of proportionality of police action is satisfied if it is necessary and sufficient to achieve the intended purpose. The police should not act mechanically based on legal provisions, relying on general aspects, but should instead adopt positions by considering the unique circumstances of the relevant case to decide whether actions are necessary, and if so, what kind of actions need to be taken. This decision should be made considering all circumstances and the conclusions drawn by applying the facts to legal standards. The claimant did not dispute that each misdemeanor-related fine was justified, but rather contended that the practice regarding identity checks and misdemeanor charges adopted in the case of non-Roma residents resulted in direct discrimination and harassment. It complained that charges were not always brought for every offence committed by non-Roma offenders.

It is a fact that only a fraction of the data is available on the identity checks and violations due to the destruction of documents since then. Accordingly, the data in the statements are not comprehensive, so objective conclusions cannot be drawn from them. In misdemeanor proceedings commenced on pressing charges, the ethnicity of the offenders is not known. The defendant does not keep a record and it is clear that it may not keep a record whether the particular misdemeanor proceedings were commenced against a Roma or non-Roma offender. The witness statements of the two witnesses called by the claimant are not suitable for establishing the presumption concerning the misdemeanors committed by non-Roma residents and the failure to commence proceedings, as these statements do not contain specific circumstances, persons, locations or times. Accordingly, the fact alleged by the claimant that Roma residents are overrepresented in misdemeanor proceedings compared to their proportion of the population, and the subject of misdemeanor proceedings commenced exclusively against them (less serious offences and offences committed as pedestrians) do not mean that

the actions of the defendant are in breach of the equal treatment requirement, so this may not form grounds for establishing a breach of law.

The data available for the claim reveals that the defendant checked the identity of members of the associations present in the town, and brought misdemeanor charges against them in appropriate cases. On April 22, the police brought charges for breach of peace on eight occasions due to the uniforms of persons arriving at the Véderő training camp, which were likely to incite fear.

There is no doubt that due to the events and on the request of the leaders of the Roma minority council, the police presence in the town was significantly increased, which clearly led to an increase in the number of identity checks and the number of offences discovered. The incident on April 26 also supports the fact that the increased police presence was justified.

Based on all the foregoing, it cannot be established that the defendant chose the persons subject to its actions according to their ethnicity, or that protected characteristics had any role in the misdemeanor charges. The conditions for harassment were not satisfied, as the claimant did not establish the application of the presumption that the identity checks and the bringing of misdemeanor charges were likely to be related to the characteristics specified in section 8 or that their purpose or effect was to develop an intimidating, hostile, degrading, humiliating or offensive environment. The claimant did not establish the application of the presumption that, due to their characteristics specified in section 8 of the Equal Treatment Act, the members of the Roma community had received less favorable treatment compared to other persons, that they had been subject to a disadvantage or that there had been a risk of disadvantage, since the claimant did not dispute the legality of the misdemeanor proceedings. Consequently, it cannot be established that in the material period, the police engaged in a discriminatory practice of identity checks and misdemeanor-related penalties based on ethnic grounds, so the statutory requirements are not present for either harassment or direct discrimination.

[40] In its claim, the claimant sought the objective sanctions specified in subsection 84(1) of the Civil Code. According to subsection 84(1) a) of the Civil Code, a person whose personal rights are violated may seek a court declaration of a violation of law depending on the circumstances of the case. In the case of a declaration of the violation of law regarding personal rights, the substantive part of the judgment must specify exactly what kind of violation of right happened and by what kind of conduct. The Supreme Court has explained in a number of decisions that a judgment satisfies the completeness requirements as prescribed by subsection 213(1) of the Civil Procedure Act if the actual text thereof expressly defines the conduct violating the personal right and the actual violation of law attributable to the defendant can be clearly established from the substantive part. (Pfv.IV.20.157/2001/5, Pf.IV.26.146/2000/7, Pf.IV.26.561/2001/7, Pfv.IV.21.613/2008/5, Pfv.IV.20.197/2009/4). It means that the violation of law must be described in the substantive part briefly, succinctly and beyond any doubt, and the claimed legal sanctions must be applied as necessary.

The Supreme Court pointed out in its decision number BH2006.289 that the correlation and unity of the substantive part and the reasoning as well as the overall enforceability of the substantive part and its reasoning are present if the substantive part contains the decision that the reasoning of the judgment refers to, and the reasoning concerns a provision that the substantive part of the judgment contains. The decision in the substantive part and its reasoning complement each other in the judgment. The judgment may not set out reasons for a

decision that the substantive part does not contain, and a decision may not be made unless the court provides reasons for it. A judgment complies with the above statutory requirements if its substantive part contains the decision on the claim beyond any doubt and with distinct, clear, understandable wording, so it also complies with the requirement of enforceability.

According to the provisions prescribed by subsections 218(2) and (3) of the Civil Procedure Act, the court must set out the substantive part of its judgment in writing before it is announced, and the announcement of the judgment means reading the substantive part and briefly detailing the reasons. Based on the above, the substantive part of the judgment contains the decision made on the claim (counterclaim). This judgment provision must highlight the extent to which the court upholds the claims, and in case of rejected claims, it must expressly state the rejection of the claim.

[41] According to judgment number Kfv.1.35.009/2008 of the Supreme Court, the text of the announced judgment and the judgment sent to the parties must be identical, it may be changed only pursuant to the provisions set out in the Civil Procedure Act (KGD2010.20). Once the judgment is announced, the court is bound thereby, and the court is only entitled to change it in the cases specified by law (sections 224, 225 and 227 of the Civil Procedure Act). Since the substantive part of the announced judgment contains the decision made on the merits of the case, the requirement of uniformity applies to its substantive part.

The substantive part of the judgment of the Curia as announced orally is identical to the judgment set out in writing, and it expressly contains the conduct that the Curia found to be in violation of the law, in contrast to the contents of the first instance decision, partly with clarified wording. It unambiguously states that the Curia established a violation of law only in relation to the claim submitted for the failure of the police to take action. Apart from this, the final judgment (rejecting the claim) was upheld under subsection 275(3) of the Civil Procedure Act, so the claim was not considered justified on this basis.

[42] In its claim, the claimant had sufficient grounds to complain that no injunction was issued as an objective sanction. According to subsection 84(1) b) of the Civil Code, a person whose personal rights are violated may request the court, depending on the circumstances of the case, to issue an injunction to order the defendant to stop violating the law and to order the defendant not to violate the law in the future. This sanction is an objective sanction of the violation of personal rights, which the person whose rights were violated is entitled to demand, depending on the circumstances of the case. As the Supreme Court pointed out in its decisions number Pfv.IV.21.778/2007/5 and PfV.IV.21.237/2008/4, an injunction regarding further violations of law may only be refused if, based on the circumstances of the case and the nature of the violation of law, another violation of law is effectively impossible even in theory. As it is not impossible in this case, the Curia issued an injunction in relation to the violation of law established above, ordering the defendant not to violate the law in the future.

[43] Under subsection 84(1)c) of the Civil Code, the first instance court was correct to order the defendant to provide a remedy in relation to the established violation of law, so the Curia upheld this provision of the judgment.

[44] At the same time, a claim may only be submitted for a method to resolve the situation in violation of law if this method can be enforced in proceedings commenced in relation to the established violation of law and for a violation of personal rights, and if it does not exceed the jurisdiction of the court dealing with the civil claim. The objective sanctions specified in subsections 84(1)a)–d) of the Civil Code may only be applied depending on the circumstances

of the case and within their limitations. As the Supreme Court explained in a number of its decisions made in similar cases, under subsection 84(1)d) of the Civil Code, enforceable specific performance orders may only be adopted for realistic and achievable claims clearly specifying the particular method to remedy the violation of law that may be enforced under proceedings concerning personal rights (Pfv.IV.21.568/2010/5, Pfv.IV.20.037/2011/4). Accordingly, in a civil claim for the protection of a person under civil law, the order requested by the claimant regarding the preparation of a strategy and control mechanism, the publication of a report in this regard and participation in anti-discrimination presentations are clearly disallowed.

[45] In relation to the application for a preliminary ruling, the Curia did not deem the claimant's claim justified, as there was no reasonable doubt regarding the interpretation of EU law, and accordingly, no reason to apply for a preliminary ruling (Cilfit case, no. C-283/81).

[46] According to the above, the Curia overruled the final judgment in part according to subsection 275(4) of the Civil Procedure Act, partially changed the first instance judgment regarding the declaration of the violation of law and issuing the injunction by applying subsection 253(2) of the Civil Procedure Act, and upheld the provision ordering the remedy. The final judgment was upheld in all other respects under subsection 275(3) of the Civil Procedure Act.

Legal provisions and jurisprudence applied

[47] Sections 76 and 84 of the Civil Code, article 70/A of the Constitution, sections 8, 10 and 19 of Law CXXV of 2003

Closing provisions

[48] Under subsection 81(1) of the Civil Procedure Act and subsections 3(3) and (5) of regulation 32/2003 (August 22) of the Minister of Justice, the Curia ordered the defendant to pay the claimant's costs regarding the first instance, the appeal and the review procedures.

[49] According to section 14 of regulation 6/1986 (June 26) of the Minister of Justice, the unpaid procedural costs of the claim, the appeal and review procedures are borne by the State.

[50] Under subsection 274(1) of the Civil Procedure Act, the Curia considered the claimant's review application at a hearing, as requested by the claimant.

Budapest, Hungary, February 8, 2017

Dr. Mátyás Mészáros, signed, head of the panel, Dr. Katalin Böszörményiné Kovács, signed, rapporteur judge, Dr. Zsuzsanna Kovács, signed, judge

Certified copy:
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