Chapter 2

Challenges of Procedures Before the ECTHR From a State Agent's Point of View: Stocktaking of the Last 25 Years

The Functioning of the Representation of the Government before the European Court of Human Rights

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Abstract

The Chapter presents the functioning of the representation of the Government before the European Court of Human Rights. It presents the establishment of the Agency of the Government in 1994. In connection with the organisation and tasks of the Agency it shows all forms of the activity of the Agency, focusing the 'Strasbourg Proofing', the enforcement of judgments and the promotion of human rights. The Chapter presents the whole procedure of the European Court of Human Rights, from the beginning (submitting an application) to the final phase (enforcement of judgments). The procedure of submitting an Application to the Court is a crucial point in the proceedings before the Court. The biggest challenges of the last several years are also illustrated. In connection with the prison overcrowding almost 9,000 applications had been submitted by the applicants. The domestic remedy introduced by the authorities was found effective which met the criteria set out in the pilot judgment given in the case of Varga and Others v Hungary. The problem of length of proceedings is an ongoing challenge.In 2021, a new domestic compensatory remedy was also introduced for civil court proceedings (Act no. XCIV of 2021). The judgment of 30 March 2023 in the case of Szaxon v Hungary held, that Act no. XCIV of 2021 set out an effective

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remedy for protracted civil proceedings. The Chapter also gives a description about the Baka Case. The role of the Parliament in the implementation of ECtHR judgments which is a lesser-known aspect of the implemtation of the judgments is also part of the Chapter. The chapter intends to demonstrate the complexity of the activities of the Agency of the Government in the European Court of Human Rights proceedings.

Keywords: Agency of the Government before the European Court of Human Rights, prison overcrowding, length of proceedings, effective domestic remedy, implementation of ECtHR judgments, Strasbourg Proofing

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1. Introduction

Hungary ratified the European Convention on Human Rights (the Convention) on 5 November 1992.[1] The document was promulgated by Act XXXI of 1993 and so became part of Hungarian domestic law. This act was perhaps the most important step in the European integration process in the field of human rights. In this way, Hungary joined what was in practice the only effective complaints mechanism that allowed citizens to take their human rights grievances to an international legal body for a substantive decision. The importance of this step cannot be overstated. By this act, both Hungarian legislation and the application of Hungarian law underwent a decisive change. It must be said, however, that accession did not come to the Hungarian legal system unprepared. In 1990–91, the Ministry of Justice had already begun preliminary legal harmonisation work, during which the Ministry's staff, with the involvement of external experts, examined whether certain elements of Hungarian law were in line with the Convention and, if not, how and in what way domestic law should be changed. Once the amendments they identified had been made, the Hungarian legal system could be said to be in a mature state for accession to the Convention.

The Convention, which now has the 46 member states of the Council of Europe, entered into force in Hungary on 5 November 1992. The Convention established an international court in Strasbourg to judge violations of the rights it contains. The European Court of Human Rights (the Court) is an international body which, under certain conditions, may receive applications from persons claiming a violation of their rights under the Convention and its Protocols. These applications are made by citizens against the States which they accuse of having violated their human rights. If, on the basis of the information available to it, the Court considers that the application is admissible, it calls the Government of the State concerned to submit

1 European Convention on Human Rights as amended by Protocols Nos. 11 and 14 – Council of Europe Treaty Series, No. 5

observations on the existence of a violation. In its judgment at the end of the proceedings, it may order the State to pay compensation besides finding a violation or reject the application.

The Committee of Ministers of the Council of Europe regularly monitors a state's compliance with its obligation to remedy the violations identified in the Court's judgments, which may include not only compensation for human rights violations, but also possible legislative amendments or specific measures taken by public authorities.

2. Establishment of the Agency of the Government

The first application to the Court, sent for comments, was received by the Ministry of Justice on 1 December 1993, and at that time the practical necessity of establishing an Agency of the Government (Kormányképviselet) was raised. Therefore, the Government, by Government Decision 2004/1994 (I. 21.), ordered the establishment of the Agency of the Government within the framework of the Ministry of Justice.

According to point 1 of the Decision, the Agency of the Government organised in the Ministry of Justice represents the Government of the Republic of Hungary in proceedings before the European Commission of Human Rights[2] and the European Court of Human Rights. The Minister of Foreign Affairs had informed the Council of Europe of the above through diplomatic channels. Prior to its decision, the Government had assessed the professional and non-diplomatic nature of the representation, and therefore, unlike the practice in some European countries, the body was not set up in the Ministry of Foreign Affairs but in the Ministry of Justice. The Decision specifically states that the Agency of the Government operates under the authority of the Minister of Justice (point 2). It is a better solution, because the legal aspects of the management of a case are in focus.

Point 3 of the Decision contains an important safeguard rule, stating that the Minister of Finance is obliged to take action on the financial obligations of the Government (compensation and reimbursement of the applicant's legal costs) arising from the decisions of the Commission and the Court. The sums to be paid under this heading are to be paid on behalf of the Government from other sundry expenditures of the Ministry of Finance.

In order to enforce the decisions of the Court, the Decision specifically authorises the Agency of the Government, through the Minister for Justice, to take the initiative on:

– remedying the infringements found by the Court,

2 Under Protocol No. 11 to the Convention, which entered into force on 1 November 1998, the Commission has since ceased to exist.

– of the necessary legislative amendments, bringing the legislation into conformity with the Convention and developing appropriate law enforcement practices.

At the same time, the Decision took into account the fact that the Agency can only be effective if the various public bodies cooperate with the new organisation. Therefore, at the initiative of the Agency of the Government, Point 5 of the Decision stipulated that the competent ministers and the heads of the government agencies are obliged to cooperate with the Agency in the proceedings before the Commission and the Court in order to establish the facts and to promote the defence of the Government. At the same time, the Government also asked the president of the Supreme Court (Kúria) and the Attorney General to cooperate with the Agency of the Government. By the Decision the conditions for the Agency's activity were established.

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3. Organisation and Tasks of the Agency of the Government

3.1. The Activity of the Agency

In proceedings before the Court, the Agent of the Government, who has the rank of Head of Department, is responsible for representational activity, among other duties. The preparation of the documents required by the Agency of the Government is carried out by the Human Rights Department of the Ministry of Justice (hereinafter referred to as the Agency of the Government) employing five lawyers, formerly a separate department within the Ministry of Justice. The activities of the Agency of the Government are linked to different stages of the procedure: it is responsible for drafting the observations necessary to represent the Government's position in cases before the Court, for preparing any friendly settlement, and for organising the implementation of the Court's decisions (translation, registration, publication of judgments and important decisions, action for paying compensation, reporting to the bodies of the CoE, informing other bodies, initiating any possible amendment of the law, etc.).

Another task is to represent Hungary in the CoE Human Rights Committee (CDDH) and its subcommittees and other working groups dealing with procedural and substantive issues related to the Convention, with the aim of asserting the Hungarian position in the further development of the Convention.

3.2. 'Strasbourg Proofing'

Upon request, the Agency of the Government gives its opinion on draft legislation that may affect human rights, so that the international requirements arising from the

development of the case law of the Court can also be implemented in domestic legislation (so-called 'Strasbourg-proofing'), and draws attention to new developments in case law that may require legislative amendments (e.g. the establishment of the institution of a court objection to prevent excessive length of proceedings).

The Agency of the Government gives its opinion on all draft legislation affecting human rights, drawing on the experience of the Court's case law. This task is particularly important because it provides those drafting with information on the human rights aspects of each proposal or draft legislation at the preparatory stage. Therefore, when it enters into force, the legislation should not contain provisions contrary to the Convention or its practice.

The role of the Agency of the Government also includes promoting consistency between domestic legislation and Strasbourg law interpretation. When examining this question, it is appropriate to start with basic cases, i.e. when the Court finds that a piece of domestic legislation is not in conformity with the European Convention on Human Rights and calls on the State concerned to take the necessary measures to bring its domestic law into line with international law. In such cases, it is up to the State to implement the necessary legislative amendments in accordance with the Court's 'order'. However, the jurisprudence of the Court is not only applicable to Hungary with regard to decisions in Hungarian cases. Here, the focus of the analysis is on the legislative monitoring of case law. It is the task of the Agency of the Government to study the vast body of law and draw the necessary conclusions. It is also the task of the Agent of the Government and staff to act, after continuous monitoring of the judgments, if they detect that an element of the Hungarian legal system is not in line with a judgment of the Strasbourg Court. In this case, the relevant authority must take the necessary measures to bring domestic legal standards into line with case law. There is a third type of case concerning the consistency of Strasbourg case law with domestic law that needs to be examined, and that is the issue of draft legislations under preparation. 'Strasbourg proofing' allows the Ministry's staff dealing with the matter to comment on draft legislation sent to them during its preparation and, if inconsistencies are already apparent at this stage, send the necessary signals to the competent authorities. This preventive function is more effective than taking the necessary measures to amend legislation already in force or to implement cases that have been lost.Proactive behaviour is always more effective than passive, sometimes backward, behaviour following unsuccessful cases.

The task is certainly far from easy, as all the circumstances of the Court's decision have to be taken into account. A good example in this regard is the case of Hirst v the United Kingdom[3], in which the European Court of Human Rights found that the British rule automatically depriving all convicted persons of their right to vote regardless of the length of their sentence or the offence was contrary to Article 3 of the First Additional Protocol to the Convention. Since Hungarian domestic law contained a similar solution to that of the United Kingdom, it seemed appropriate

3 Hirst v The United Kingdom (No. 2), Application no. 74025/01, judgment of 6 October 2005

for the Agency of the Government to draw the attention of the relevant law-drafting departments to the 'shortcomings' of Hungarian law. It is perhaps unfortunate to use the term 'legislative constraint' in this case, as this type of situation could be used in the case of a decision in a specific Hungarian case. However, it cannot be in the interest of either Hungary or committed human rights advocates that a decision condemning the Hungarian state should be taken in a case similar to a decision in the case of another country. Therefore, in order to avoid such situations, it is advisable to carry out preventive legislative amendment work. If the Hungarian State anticipates events, it spares itself from a possible unsuccessful position and its consequences. So, once again, it is worth emphasising the justification for proactive state behaviour, and the fact that it is in the interest of both the state and the citizen to avoid a possible unlawful situation.

3.3 Enforcement of Judgments

In implementing this task, all Hungarian-related judgments are translated and published on the website of the Government. The Agency of the Government also informs the competent ministries and other individuals concerned about the judgments by direct request. At the same time, individual or general measures are taken in the event of a conviction of the State. In the context of individual measures, the Agency of the Government initiates pardon procedures, proposes a lighter sentence, requests a retrial or a review, or takes care of paying compensation. In the context of general measures, it may, inter alia, propose legislation or issue case-law guidelines.

3.4. Promoting Human Rights

In order to ensure the effective enforcement of human rights, the Agency of the Government has prepared an information leaflet for clients acting as plaintiffs in proceedings entitled *How to apply to the European Court of Human Rights*. The increasing number of clients who turn to the Agency also receive verbal information on the human rights rules and the practice of the Court. The staff of the Agency of the Government give presentations at conferences and human rights events, prepare summaries, publish judgments in journals, where appropriate, publish analyses and studies, and pass on their experience in university teaching.

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4. Submitting an Application to the Court

All Strasbourg proceedings start with the submission of the application to the Court. As regards the conditions of representation of complainants, it may be noted that the fact that legal representation is not compulsory contributes greatly to the

popularity of the Strasbourg system. Many people, due to their financial situation, do not use a lawyer when submitting an application. At the same time, there is also a significant demand from applicants for legal representation with expertise in international law. It can be observed that some lawyers specialised in this field are willing to assist citizens seeking redress for violations of their human rights. It can be also noted that there are lawyers who provide legal assistance to a large number of cases for the people who turn to the Court.

There are very important advantages of a Court procedure:

- the applications can be submitted in the applicant's native language,
- the legal representation is not obligatory (this is a good solution which makes the proceedings more democratic),
- the costs of the procedure are minimal (only the postal fee).

5. Procedure of the Agency of the Government

The role of the Agency of the Government begins when the Court sends the application for comments, setting a deadline. In its letter, it asks the questions to which it expects an answer. The staff first request the file(s) of the underlying case(s) from the courts and other authorities involved in the case about the content of the application. At this stage of the procedure, the courts and other authorities receive information on the Strasbourg case and have the option to make any comments they may have to the Agency of the Government. This option has been used by the courts in several cases. There is not much time to process the documents and make comments, as the Court gives 8–12 weeks to reply. The requesting and processing of documents and the preparation of any observations (in English and in Hungarian) need to be done during this time. If, for some reason, the deadline cannot be met, a 30-day extension can be requested once from the Court, which is usually granted. In cases concerning the length of proceedings and the length of detentions, the Court sets an amount which appears reasonable, on the basis of previous decisions, as the basis for a friendly settlement. If both parties accept the amount offered, the Court approves the settlement by decision. If not, the procedure continues, but the option of a friendly settlement remains open to the parties throughout.

The documents submitted by the parties during the procedure are forwarded by the Court to the other party, setting a time limit for the communication of observations. In the absence of a friendly settlement, the case 'waits' 1.5 years for a decision, which means that it takes 3–5 years from the date of the application to reach a judgment in a given case. It should be noted, however, that complaints concerning procedural delays and the length of detentions, which in the Court's practice are 'clone cases', are dealt with under a kind of fast-track procedure from the moment they are sent for comments. If a party asks for referral to the Grand Chamber against

the Chamber's judgment, the proceedings continue and, if the Grand Chamber accepts the case (because it considers that it raises important questions concerning the interpretation and application of the Convention), a final decision is taken after a further 1–2 years.

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6. Enforcement of Judgments in Hungarian cases

6.1. Background

When Hungary acceded to the Convention in 1992, the system of jurisdiction in Strasbourg was different from the current one. This task was originally entrusted to three institutions: the European Commission of Human Rights (the Commission), the European Court of Human Rights, and the Committee of Ministers of the Council of Europe (the Committee of Ministers), which is still composed of the foreign ministers of the Member States and their representatives.

Protocol No. 11 to the Convention, which entered into force on 1 November 1998, abolished the former structure of the Commission and the Court and replaced the two bodies by a single permanent Court. During the transitional period of one year, which lasted until 31 October 1999, the Commission continued its activities in cases which it had previously declared admissible. It was during this period that the Rekvényi and Dallos cases[4], which were among the first Hungarian judgments in which no violation of the Convention was finally found, were brought before the Court.

In the Rekvényi case the applicant, Mr László Rekvényi, was a police officer and the Secretary General of the Police Independent Trade Union. On 24 December 1993 Act no. 107 of 1993 on Certain Amendments to the Constitution was published in the Hungarian Official Gazette. This Act amended, inter alia, Article 40/B § 4 of the Constitution to the effect that, as from 1 January 1994, members of the armed forces, the police, and the security services were prohibited from joining any political party and from engaging in political activities. In a circular letter dated 28 January 1994, the Head of the National Police demanded, in view of the upcoming parliamentary elections, that policemen refrain from political activities. He referred to Article 40/B § 4 of the Constitution as amended by Act no. 107 of 1993. He further indicated that those who wished to pursue political activities would have to leave the police. In a second circular letter dated 16 February 1994, the Head of the National Police declared that no exemption could be given from the prohibition contained in Article 40/B § 4 of the Constitution. On 9 March 1994, the Police Independent Trade

4 Rekvényi v Hungary, application No. 25390/94, judgment of 20 May 1999; Dallos v Hungary, application No 29082/95, judgment of 1 March 2001.

Union filed a constitutional complaint with the Constitutional Court claiming that Article 40/B § 4 of the Constitution, as amended by Act no. 107 of 1993, infringed the constitutional rights of career members of the police, that it was contrary to the generally recognised rules of international law, and that it had been adopted by Parliament unconstitutionally. On 11 April 1994, the Constitutional Court dismissed the constitutional complaint, holding that it had no competence to annul a provision of the Constitution itself.

Relying on Articles 10, 11 and 14 of the European Convention of Human Rights, the applicant complained that the impugned constitutional provision had amounted to an unjustified interference with his rights to freedom of expression and association and was of a discriminatory nature.

The Court rejected the applicant's argument that the general constitutional ban on political activities by police officers failed to meet the requirement of foreseeability and that this was not rectified by any subsequent legislation including the 1994 Police Act. The Court was satisfied that the legal framework as a whole, including the contested constitutional prohibition and other legal rules partly permitting – occasionally subject to authorisation – and partly restricting the participation of police officers in certain kinds of political activities, was comprehensive enough to enable the applicant to regulate his conduct accordingly, if necessary after having sought advice beforehand from a superior or clarification of the law by means of a court judgment. In the light of these considerations, the Court found that the interference was 'prescribed by law' for the purposes of paragraph 2 of Article 10.

As regards the legitimate aim of the contested restriction, the Court accepted that it was intended to depoliticise the police force and thereby to contribute to the consolidation and maintenance of pluralistic democracy in Hungary. The Court was convinced that members of the public were entitled to expect that in their dealings with the police they would be confronted with politically-neutral officers who are detached from the political fray. In the Court's view, the desire to ensure that the crucial role of the police in society is not compromised through the corrosion of the political neutrality of its officers is one that is compatible with democratic principles; this objective takes on a special historical significance in Hungary because of that country's experience of a totalitarian regime which relied to a great extent on its police's direct commitment to the ruling party. Accordingly, the Court concluded that the restriction in question pursued legitimate aims within the meaning of paragraph 2 of Article 10, namely the protection of national security and public safety, and the prevention of disorder.

Further, having recapitulated its case-law on the basic principles concerning Article 10, the Court went on to conclude that, in view of the particular history of some Contracting States, the national authorities of these States might, so as to ensure the consolidation and maintenance of democracy, consider it necessary to have constitutional safeguards to achieve the aim of the police force's political neutrality by restricting the freedom of police officers to engage in political activities. Having regard to the margin of appreciation left to the national authorities in this area, the

Court found that the relevant measures taken in Hungary – a country that, between 1949 and 1989, was ruled by one political party and where, within the police force, membership of that party was expected as a manifestation of the individual's commitment to the regime – could be seen as answering a 'pressing social need' in a democratic society. Moreover, an examination of the relevant laws showed that police officers had in fact remained entitled to undertake some activities enabling them to articulate their political opinions and preferences. Therefore, the Court concluded that the means employed to achieve the legitimate aims pursued had not been disproportionate. Accordingly, the impugned interference with the applicant's freedom of expression was not in violation of Article 10.

In the Dallos case the applicant alleged that criminal proceedings against him had been unfair, in breach of Article 6 of the Convention, in that – since he had been prosecuted for, and at first instance convicted of, embezzlement – the appeal court's reclassification of the offence as fraud had prevented him from exercising his defence rights properly.

The Court observed that the possibility of filing a petition for review was undisputedly available to the applicant (see Article 284/A § 1 (I) of the Code of Criminal Procedure, paragraph 26 above). Neither was it disputed that the review proceedings were capable of providing redress in respect of the applicant's complaints about shortcomings in the lower courts' procedure (see Article 291 §§ 1 and 3 of the Code of Criminal Procedure, paragraph 30 above).

As regards prospects of success, the Court observed that the Supreme Court in fact entertained the applicant's petition for review, held a review session and, in its decision, addressed the defence counsel's arguments in detail. In these circumstances, it cannot be said that the review as such did not offer the applicant any reasonable prospects of success. Having regard to these considerations, the Court concluded that the applicant's petition for review was an effective remedy in the circumstances. Its exhaustion was therefore necessary to meet the conditions laid down in former Article 26 of the Convention. Consequently, the applicant cannot be considered to have failed to observe the six-month time limit. The Government's preliminary objection must accordingly be dismissed.

The Court was, therefore, convinced that the applicant's rights to be informed in detail of the nature and cause of the accusation against him and to have adequate time and facilities for the preparation of his defence were not infringed. Therefore, Article 6 of the Convention was not violated.

6.2. Types of Decisions

The Permanent Court, which has been in operation since 1998, formally takes two types of decision: decisions and judgments. Both types are capable of bringing the procedure to a close.

The procedure up until the decision consists of two main stages: an examination of the admissibility of the application and a substantive examination. The Court first

decides on admissibility by means of a decision. It then examines the conditions of submission: whether the application was submitted by the victim of the violation, within the prescribed four-month time limit, after exhaustion of effective domestic remedies, in relation to the rights set out in the Convention, etc.

Decisions declaring the application inadmissible or removing it from the list (by friendly settlement or other reason, e.g. death) terminate the procedure without further substantive examination. They are not subject to appeal. Then the substantive examination of the application declared admissible is taken, at the end of the proceedings the Court notices its judgment.

The judgments containing substantive opinion may, according to their content, declare that the Contracting State has not violated the articles of the Convention complained of, or they may declare a violation of the Convention. Some of the latter judgments do not impose any further requirement on the State other than a declaration of violation, while others – and this is the majority – award compensation as just satisfaction, and may even, exceptionally, contain a provision for specific action to be taken.

6.3. Measures to Speed up the Procedure

The legal instrument of friendly settlement and its special case, the practice in cases of length of proceedings, which aims to speed up proceedings in Strasbourg, are different from the general procedure in part.

A friendly settlement can be initiated at both the stages of admissibility and substantive examination.[5] A decision striking the application due to a friendly settlement between the parties at the admissibility stage must include the relevant part of the agreement signed by the parties on the amount to be paid to the applicant, and the three-month payment deadline must start from the date of the decision. A friendly settlement is advantageous for both parties because the procedure is significantly shorter, the applicant receives the compensation sooner, and the decision is not based on the infringement but on the agreement of the parties. It can be said that friendly settlement is one of the most important legal instruments of the Convention, a form of mediation. Its aim is to 'prevent' a judgment and to speed up the procedure. The Court draws attention to this option as early as the first communication of the application. In the author's experience, it has the advantage of shortening the procedure. It saves time for both the applicant and the state, who can rest assured that they will not be convicted.

It is important to note that the technical management of the settlement is by the coordination of the Court (written requests, forwarding of claims). This means that it is not the Agency of the Government that negotiates directly with the applicant, and so misunderstandings can be avoided. The proposal for the amount of the settlement

5 Article 38 of the European Convention on Human Rights

is made by the applicant or the Court, to which the Agency always responds in substance. The amount to be paid is determined on the basis of previous decisions.

Recent experience has shown that the number of settlements is increasing, which is important for the Court as well, as its workload can be partly reduced. Therefore, in fact, there is a general expectation that governments should be prepared to settle in all appropriate cases. 429 friendly settlements were made in respect of Hungary in 2019, 263 in 2020, 221 in 2021, 170 in 2022, and 235 in 2023.

In a specific area, to speed up the handling of cases of so-called 'length of proceedings', the Court has introduced the concept of not taking a separate decision on admissibility and so it decides on admissibility and on substantive questions together, and also encourages friendly settlements. By default, the parties first simply state whether they wish to conclude a friendly settlement agreement and the amount is determined in subsequent exchanges of correspondence. More recently, the Court has aimed to speed up the procedure further, in order to facilitate a friendly settlement, by attaching the draft declaration to the letter sent to the Government for its observations, in which it indicates the amount of compensation or costs which it considers fair on the basis of the facts available and, if the parties sign it, deletes the case from the list by decision.

The friendly settlement procedure is confidential, so there is no public information on whether, in the event of a failure to reach a friendly settlement, in some cases, the Court has awarded damages lower or higher than the amount not accepted by one of the parties. In any event, without prejudice to confidentiality, two factors may be mentioned which must be considered when assessing the reasonableness and justification of the amounts accepted by the Government for friendly settlements:

a) Friendly settlements can usually be reached in cases where the Strasbourg case law is clear and does not require further clarification in the circumstances of the case. In cases involving delays in proceedings and the length of detentions, this also means that it is clear to the Agency of the Government that there is no chance of reducing the extent of the State's liability or the likely amount of compensation by reference to the applicant's conduct or other factors. The increase in the number of friendly settlements is also due to the fact that the case law has become fully established in Hungarian procedural systems, and even if the judgments themselves are not always clear, it is now clear from a comparison of the Government's observations and the judgments themselves, which arguments the Government can successfully rely on and which arguments are (or would be) unnecessary to repeat, what conduct can be imputed to the applicants, what circumstances can excuse the authorities' delay, what procedural acts constitute substantive acts of litigation for the purposes of assessing inactive periods, etc.
b) It very often happens that at the time of the conclusion of a settlement agreement (or even at the time of the Strasbourg judgment), the protracted domestic proceedings complained of in the application are still ongoing and may not be concluded in the short term.

6.4. The Composition of Judgments in Hungarian cases

The number of judgments against Hungary has been increasing in recent years. 40 in 2019, 31 in 2020, 33 in 2021, 35 in 2022, and 37 in 2023. This is due to several reasons. Since the vast majority of cases are condemned because of the length of Hungarian judicial proceedings, as time goes on more and more lengthy litigation is liable to give rise to a breach of the Convention.[6] Another reason is that the Strasbourg procedure is becoming better known through the press, although it is commonly seen as just another forum for review, a fourth level of court, and is therefore wrongly referred to the Court.

The increase in the number of applications is not specific to Hungary. The Court has become a 'victim' of its own success by being the only international human rights forum at European level that can provide a truly effective remedy to those who have suffered harm and are unable to obtain adequate redress or assistance in their home country.

The vast majority of applications originate from Eastern Europe (Poland, Turkey, Romania, Ukraine). Compared to complaints from these countries, the number of Hungarian applications is significantly lower in proportion and the composition of the complaints is largely procedural in nature. The majority of the judgments condemning Hungary relate to violations of Article 6 of the Convention (the right to a fair trial within a reasonable time) due to the length of court proceedings.

The violation of human rights of a substantive nature, which accounts for a smaller proportion of cases, is also due in many cases to a failure to respect procedural requirements. Among these, it is worth mentioning a few Hungarian cases (Kmetty, Balogh, Barta)[7] relating to Article 3 (prohibition of torture, inhuman and degrading treatment), in which the applicant referred to Strasbourg on the grounds of ill-treatment by the police. When examining Article 3, the Court assesses, on the one hand, whether ill-treatment, cruel or degrading treatment or punishment has occurred and the extent of the suffering caused (the substantive aspect of the Article) and, on the other hand, whether the investigation of the case was thorough and effective (the procedural aspect of the Article). The Court found a breach of the substantive content only in the Balogh case, while in the other cases it found that the investigation of complaints of police ill-treatment was not sufficiently thorough and effective, i.e. that procedural requirements were breached.

6 In the first few years after the entry into force of the Convention, while the Commission was still practically in existence, it was often the case that no infringement was found because much of the otherwise lengthy judicial proceedings took place before the Convention entered into force.

7 Kmetty v Hungary, application No. 57967/00, judgment of 16 December 2003; Balogh v Hungary, application No. 47940/99, judgment of 20 July 2004; Barta v Hungary, application No. 26137/04, judgment of 10 April 2007.

6.5. Compensation Paid Not on the Basis of a Judgment

The obligation to pay compensation may be imposed by the Court not only in a judgment but also in a decision approving friendly settlement. For the sake of completeness, reference should also be made to the obligation to pay provided for in those decisions. This type of friendly settlement is essentially the subject of cases involving a breach of convention (Article 6(1)) due to delay in domestic judicial or administrative proceedings.

6.6. Enforcement of Judgments

The execution of judgments requires the Agency of the Government to take a variety of measures. The Court's decision usually includes:

a) an indication of a violation of an Article of the Convention or that no violation has occurred;
b) the definition of just satisfaction, which most often means the obligation to pay compensation for pecuniary and non-pecuniary damage and the reimbursement of costs;
c) a reference to the solution of a general problem in the legal system or to the adoption of a measure specifically related to the case.

6.6.1. Declaring a Breach of the Convention

The case law of the Court gives substance to each article of the Convention, and it is through these decisions that the limits of each right and the main principles governing its enforcement are outlined. In this context, the Agency of the Government has the task of making the content of the judgments known to as wide a professional and public audience as possible. Translating judgments, publishing them on the Government website and, in many cases, sending them directly to the bodies concerned are the measures taken by the Agency of the Government to raise awareness of the most important developments and trends in case-law.

6.6.2. Just Satisfaction

The Court notifies the parties when the decision becomes final. The decision becomes final when three months have elapsed since it was given and no party has asked for referral to the Court's Grand Chamber of 17 judges, which, exceptionally, deals only with specific cases on points of principle and of interpretation of the Convention. In cases in which the Court has well-established case law, the Grand Chamber does not accept applications against a judgment of the Chamber of the Court.

The measure contained in the final decision is implemented by the Agency of the Government. In doing so, it asks the applicant to provide the bank account number

or, failing that, the address to which the Ministry of Justice can make the payment, in a signed letter, for payment of the amount of just satisfaction awarded to them. The payment must be made within the time limit (three months) set by the Court's decision from the date on which the decision becomes final.

When the Agency of the Government receives the decision, it translates the judgment, asks for the applicant's bank account number, and sends the necessary documents to the paying department, which makes the payment within the time limit and sends the proof of payment to the Agency of the Government, which informs the Committee of Ministers of the Council of Europe of the implementation. The payment of the compensation and the other measures taken is subject to verification by the Committee of Ministers at least every six months. Detailed information on the status of specific cases and the measures taken are provided and the Committee of Ministers keeps the case on its agenda until a satisfactory reply has been received on its settlement.

One of most complex and difficult activities of the Agency is to organise the payment of just satisfactions and to contact hundreds and thousands of applicants and lawyers.

6.6.3. Other Measures

Among the obligations to take specific measures resulting from the judgments, it should be highlighted that in the information provided to the Committee of Ministers, the Agency of the Government regularly reports on circumstances such as whether the underlying case or trial has been completed or is pending, and whether the applicant is in detention or has been released. The National Office of Judiciary provides assistance in this respect.

The judgments may also contain provisions on the release of the detained person or on the remedying of a legal system problem. However, the Court has not yet imposed such obligations on Hungary.

The Agency of the Government not only has the judgments translated and published in various forms, but also gives presentations and provides training on them at events and conferences on request, and in continuous cooperation with the National Office for the Judiciary (Országos Bírósági Hivatal) investigates the reasons for delays in court proceedings and reports on the necessary measures, the documents received, and the shortcomings encountered.

7. The biggest Challenges of the Last Several Years

7.1. Prison Overcrowding

On 10 March 2015, the Court delivered a pilot judgment in the case of Varga and Others v Hungary resulting mainly from a detected structural problem of widespread overcrowding in Hungarian detention facilities.[8] The Court concluded that the limited personal space available to all six detainees in the case, aggravated by the lack of privacy when using the lavatory, inadequate sleeping arrangements, insect infestation, poor ventilation and restrictions on showers or time spent away from their cells, had amounted to degrading treatment as per Article 3 of the Convention. The Court also found that the domestic remedies available in the Hungarian legal system to complain about detention conditions, although accessible, were ineffective in practice and as a result also established the violation of Article 3 in conjunction with Article 13 of the Convention.

Therefore, the Court held that the Hungarian authorities should produce a timeframe, within six months of the date of the judgment becoming final, for putting in place an effective remedy or combination of remedies, both preventive and compensatory, to guarantee genuinely effective redress for violations of the European Convention originating in prison overcrowding.

In order to present a full picture of the subject, the Government noted that previously the Court had already found violations of Article 3 on account of similar conditions and had underlined the seriousness of the problem and the need for the authorities to 'react rapidly in order to secure appropriate conditions of detention for detainees' (István Gábor Kovács group of cases).[9]

The necessity to remove the prison conditions defined by the Court's decision as inhuman or degrading in violation of Article 3 of the Convention had been acknowledged by the Government. Accordingly, the Government presented both the individual and general measures already executed and those to be executed in the near future in compliance with the expectations arising from the judgment and at the same time wished to express its goal of considering further legislative actions in the near future to remedy the problems identified.

As regards overcrowding in prisons, a series of action plans and reports were submitted by the Government to the Committee of Ministers on the wide range of general measures aimed at decreasing the number of prisoners while increasing the

8 Varga and others v Hungary, Application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, judgment of 10 March 2015

9 List of applications concerned: Varga and Others v Hungary (Appl. No. 14097/12, final on 10/06/2015), István Gábor Kovács v Hungary (Appl. No. 15707/10, final on 17/04/2012), Engel v Hungary (Appl. No. 46857/06, final on 20/08/2010), Csüllög v Hungary (Appl. No. 30042/08, final on 07/09/2011), Juhász and Others v Hungary (Appl. No. 6467/13, final on 07/01/2016), Magyar and Others v Hungary (Appl. No. 16599/12, final on 07/01/2016)

capacity of prison facilities, thereby reducing overcrowding in prisons. Effective domestic remedies of both preventive and compensatory nature were also introduced to deal with complaints concerning prison conditions at national level.

In 2018 the number of prison places grew by 1.6%, whereas the number of inmates decreased by 3.7%. As a cumulative result of these measures the average prison occupancy rate decreased by 7 % compared to the previous year. On 31 December 2018, the prison occupancy level was 113%. In order to reduce the number of inmates in prisons, the applicability of the 'reintegration custody' introduced in 2015 has been gradually broadened in the light of its practical results. Reintegration custody allows prisoners to spend the last six to twelve months of their sentence at home, using a specially designed electronic locating device. In this way, the prisoners can be given assistance in establishing the conditions required by civic life, thereby developing their family and micro-social relations, their ability to reintegrate into the labour market, and their competence at personally taking care of aspects their life. Furthermore, recourse to pre-trial detention is gradually decreasing as the application of alternative measures, such as house arrest, was facilitated by more flexible rules and the development of the technical conditions. The entry into force of the new Code of Criminal proceedings in July 2018 also significantly reduced the number of persons in pre-trial detention. On 4 March 2019, 2676 persons were in 'pre-trial' detention, which was about 50 % less than in 2014.

The system of domestic remedies was improved by Act no. CX of 2016 amending the Act on the enforcement of punishments. A new complaint mechanism was introduced as a preventive legal remedy. The prison governor has to examine and determine complaints about the conditions of detention within 15 days. In the case that relocation is impossible within the framework of the Occupancy Level Balancing Programme, mainly because of the overriding interests of the prisoner concerning their right to family life, the head of the institution is legally obliged to take other specific measures to improve the complainant's situation.

This new compensation procedure was introduced as of 1 January 2017. Prisoners are entitled to compensation for the grievances caused by overcrowding and any other placement conditions violating the prohibition of torture or cruel, inhuman or degrading treatment, in particular unseparated toilets, lack of proper ventilation or lighting or heating, and disinsectisation. Compensation is granted at a daily tariff for the number of days spent in placement conditions violating fundamental rights. Compensation claims can be submitted within six months from the termination of the placement conditions violating fundamental rights, provided that the inmate has filed a preventive complaint. Inmates can also claim additional damages under the rules of civil law governing infringement of personal rights.

Applications already registered by the Court could also be re-filed before the domestic authorities thereby easing the workload of the Court which, in the case of Domján v Hungary[10] subsequently found that the newly introduced legal institutions

10 Domján v Hungary, Application No. 5433/17, decision of 23 November 2023

are able to guarantee genuine redress. Accordingly, they are considered to be effective remedies and they meet the criteria set out in the pilot judgment given in the case of Varga and Others v Hungary. At that time almost 9,000 applications had been submitted by the applicants.

In the light of the experience concerning the application of this domestic remedy, the applicable rules were reviewed in 2020. The legislative amendments strengthening the rights of the victims of the crimes committed by the detainees obtaining compensation for overcrowding (improving the victims' chances of obtaining compensation from the perpetrators) were adopted by Parliament on 16 December 2020.

7.2. Length of Proceedings

This group of cases concerns the excessive length of civil and criminal proceedings and the lack of an effective remedy in this respect (violations of Articles 6 § 1 and 13).

In the case of Barta and Drajkó v Hungary (Appl. No. 35729/12, judgment of 17/12/2013), the Court identified, under Article 46, the length of criminal proceedings in Hungary to be a systemic problem and ruled that "[t]o prevent future violations of the right to a trial within a reasonable time, the respondent State should take all appropriate steps, preferably by amending the existing range of legal remedies or creating new ones, to secure genuinely effective redress for violations similar to the present one."

In the case of Gazsó v Hungary[11] the Court noted the Government's Action Plan and welcomed the Government's commitment to deal with this issue and encouraged them to continue these efforts. The Court ruled that Hungary must introduce, without delay, and at the latest by 16 October 2016, a remedy or a combination of remedies in the national legal system in order to bring it into line with the requirements of the Convention.

As regards the length of proceedings, legislative efforts in recent years have focused on the prevention of excessive length of the proceedings and a series of new codes of procedure were adopted.

A new Code of Civil Procedure (Act No. CXXX of 2016) entered into force on 1 January 2018. It is expected to accelerate civil proceedings by introducing a double-phase procedure before first-instance courts in which the trial (oral) phase is preceded by a preparatory (written) phase aimed at clarifying the scope of the case and fixing the claims of the parties. Contrary to the former rules of procedure which allowed parties to modify their claims up until the closing of the hearing stage, under the new rules the action cannot be modified and new claims cannot be raised after the first hearing or a relevant order of the court, unless it is justified by exceptional circumstances. Failure by the respondent to submit reaction to the plaintiff's

11 Gazsó v Hungary Appl. No. 48322/12, judgment of 16 July 2015

claims properly may result in a default judgment. The parties' duty of facilitating the proceedings is also emphasised as a principle, and representation by legal counsel is required in all cases other than before the District Courts. The rules of evidence are also more elaborate, with special emphasis on expert opinions, leaving more room for the initiative of the parties in mandating forensic experts without a need for appointment by the court. At the appeal stage, the reasons for quashing first instance judgments are more limited, and the reformatory power of the appeal court is strengthened. In cases where the pecuniary value of the action does not exceed HUF 5 million, the right to file a petition for review to the Kúria is also restricted.

Administrative proceedings are no longer covered by the Code of Civil proceedings. The Code of Administrative Proceedings (Act No. I of 2017) entered into force on 1 January 2018. The most important provisions that are expected to contribute to the timely conclusion of administrative proceedings are the ones relating to default judgments in cases when the administrative authorities fail to observe time limits for their decisions.

A new Code of Criminal Proceedings (Act No. XC of 2017) entered into force on 1 July 2018. As was expected, the enhanced rights of the defence in the course of the investigation contributes to the expediency and effectiveness of the proceedings. After an initial stage of information gathering (quasi 'pre-arrest investigation'), the defence has access to the case file as from the first questioning as a suspect. At the trial phase, a preparatory hearing is held to fix the scope of the case and, in order to prevent prolonging tactics, a new motion for evidence can thereafter be submitted only in exceptional circumstances. There is more room for holding trials in absentia or hearings without the presence of the defendants. At the appeal stage, the reformatory power of the appeal court is strengthened.

In 2021, a new domestic compensatory remedy was also introduced for civil court proceedings that last in excess of the time limits that are objectively presumed to be reasonable. The issue of effectiveness of this compensatory remedy is currently being examined by the Court in the cases before it. The judgment of the Court in the case of Szaxon v Hungary held, on 30 March 2023, that Act no. XCIV of 2021 set out an effective remedy for protracted civil proceedings.[12]

In total, according to the HUDOC Execution database, Hungary has 216 pending cases, which is fewer than one year ago (265) or two years ago (276). Among these there are 71 friendly settlement cases, 43 leading cases, and 105 repetitive cases. The high number of friendly settlement cases shows that Hungary's attitude towards settlement is very positive, as it can reduce the backlog of the Court.

7.3. The Baka Case

The Baka case concerned the premature termination of the mandate of the President of the Supreme Court in the context of the reform of the judiciary in 2012.

12 Szaxon v Hungary, Application No. 54421/21, decision of 30 March 2023

The ECHR found violation of Article 6 of the Convention because Mr Baka did not have access to a court to dispute the reasons for his dismissal from his position as a court executive (whereas his position as a judge at the supreme judicial forum, the Kúria, was not affected).[13]

The Court also inferred from the chain of events that Mr Baka's mandate had been terminated in violation of his freedom of expression (Article 10) on account of his criticism of the legislative measures concerning the judiciary, whereas in fact Mr Baka had become ineligible for re-election as President of the Kúria due to a legislative provision proposed by a judicial association, as he had not had five years domestic judicial service.

It should be mentioned that in accordance with the Committee of Ministers' former decision, no further individual measures are necessary.

There are some issues of execution which have been unresolved for years. The implementation of these judgments is hindered either by the complexity of the issues raised by them or by the ambiguities of the judgments concerned, resulting in disagreements as to their correct interpretation and, consequently, as to the general measures that are necessary for their implementation.

The Agency has stated that the measure was strictly related to a one-time constitutional reform of the judiciary and no such further measures have been envisaged. The impugned measures resulted from the adoption of the Fundamental Law of Hungary, which ended an interim period characterised by the suspension of the historical constitution, the tyrannical rule based on the communist constitution of 1949 deemed invalid by the Fundamental Law, and a subsequent transitional constitutional order.

At the meeting of the Committee of Ministers in 2021, the Hungarian Minister of Justice clearly stated that Hungary would fully abide by the Convention requirements as set out in the Baka and Erményi judgments, so that no similar violations of the Convention would occur in the future. The measures which were found to be in violation of the Convention were taken in the context of a one-time constitutional reform and no similar measures were planned in the future.

In March 2022, the Committee of Ministers adopted Interim Resolution CM/ResDH(2022)47. The document underlined that the declaration made by the Hungarian Minister of Justice at its ordinary meeting must be interpreted to the effect that Hungary will fully abide by the Convention requirements as set out in the Baka and Erményi judgments, so that no similar violations of the Convention will occur in the future.

As regards the 'chilling effect' of the violation of Mr Baka's rights under Article 10, the Government first noted that it is difficult to see how any judge would be prevented from expressing their opinion by their fear that the mandate of the President of the Kúria might be terminated without judicial review, when such judicial review is available to them as judges. Furthermore, the Government pointed out that the

13 Baka v Hungary, Application No. 20261/12, Grand Chamber judgment of 23 June of 2016

existence of the 'chilling effect' is effectively disproved by the heated debates within the judiciary as it was presented by the earlier NGO submissions. The Government also pointed out that no complaints had been brought before the Court by judges concerning the allegations submitted by the reports feeding the concerns of the Committee of Ministers.

The National Assembly adopted the act on 3 May 2023. Act X of 2023 amending, with regard to the Hungarian Recovery and Resilience Plan, certain Acts governing justice (hereinafter referred to as the 'Act') was promulgated on 10 May 2023. It is hoped that the adoption of the act will put an end to the debates on the independence of the Hungarian judicial system, not only within the European Union but also within the Council of Europe

8. The role of the Parliament in the Implementation of ECtHR judgments

By Parliamentary Decision No. 23/2007. (III.20), the Parliament of Hungary asked the Minister of Justice to inform the committee dealing with cases concerning the constitutionality and the committee dealing with human rights once a year about the implementation of the judgments of the European Court of Human Rights (hereinafter referred to as the 'Court') by the national authorities and about the activities of the Agency of the Government before the Court.

In accordance with the aforementioned decision, the Minister of Justice submitted reports on all relevant aspects of the judgments of the Court, including statistics and case descriptions annually since 2007 which were adopted by the competent parliamentary committees after a session of debate at which the Members of Parliament could raise their questions.

The systems are working. The relationship and the communication between the Human Rights Department and the Department for Execution of Judgments of the ECHR is very good and cooperative.

9. Evaluation of the Activities of the Agency of the Government

Proceedings in Hungarian cases before the Strasbourg Court are a multi-directional, complex task. Generally speaking, the implementation of the Court's rulings is always accurate and timely.

It is difficult to assess the activity of the Agency of the Government on the basis of single judgments. This is particularly true of the judgments handed down in recent years in length of proceedings cases, which contain a rather concise statement of reasons by the Court and similarly summarise the Government's position. It is therefore only in the light of all the Strasbourg judgments that the activities of the Agency of the Government can be properly assessed, taking into account the most recent judgments and the decisions declaring certain applications inadmissible. The scope for manoeuvre of the Agency of the Government in preparing its defence is determined by the circumstances of the particular case, Hungarian law and Strasbourg case law taken together.

The Government representation is also greatly influenced by the fact that the Court has recently been rather terse in its judgments in length of procedure cases. It must be recognised, however, that an international judicial forum cannot be expected, either because of its subsidiary role or because of its overburden, to give the same elaborate judgments in a mass of cases which are as irrelevant to the interpretation of the Convention (not to the enforcement of individual rights) as it does in cases which are important for the development of case law. In view of all the above, besides the measures taken in individual cases, the Agency constantly defends the sovereignty of the state and draws attention to the need to respect the requirements of the Convention in both legislation and the application of the law, in order to ensure the effective enjoyment of human rights.

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