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Date: 07/03/2022

DH-DD(2022)286

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Meeting: 1428th meeting (March 2022) (DH)

Communication from an NGO (Hungarian Helsinki Committee) (24/02/2022) in the case of BAKA v. Hungary (Application No. 20261/12).

Information made available under Rules 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1428^e réunion (mars 2022) (DH)

Communication d'une ONG (Hungarian Helsinki Committee) (24/02/2022) relative à l'affaire BAKA c. Hongrie (requête n° 20261/12) **[anglais uniquement]**.

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



Budapest, 24 February 2022

Council of Europe
DGI – Directorate General of Human Rights and Rule of Law
Department for the Execution of Judgments of the European Court of Human Rights

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Subject: Addendum to communication from the Hungarian Helsinki Committee concerning the execution of the judgment of the European Court of Human Rights in the case of *Baka v. Hungary* (Application no. 20261/12)

Dear Madams and Sirs,

the **Hungarian Helsinki Committee** hereby respectfully submits the following addendum to the Rule 9 communication submitted on 28 January 2022 concerning ECHR's *Baka v. Hungary* judgment (Application no. 20261/12)¹ with brief remarks on the Hungarian Government's Revised Action Plan submitted on 21 February 2022.²

I. GENERAL OBSERVATIONS

I.1. Preliminary remarks regarding the timing and quality of the Action Plan

In Decision CM/Del/Dec(2021)1411/H46-16 of September 2021,³ the Deputies invited the Hungarian authorities to submit an updated action plan including information on all issues covered by the decision. The deadline for submitting the Revised Action Plan lapsed on 16 December 2021, without the Government complying with the decision. By the time the NGO's deadline for submitting a Rule 9 communication lapsed a month later, the Revised Action Plan was still not available. Finally, the Government of Hungary submitted a Revised Action Plan on 21 February 2022, more than one month after the NGO submission deadline expired. In addition to signalling a lack of commitment to the execution of the Court's judgments and reliable cooperation with the CM, this failure to respect the deadline set by the CM is also not conducive to the meaningful participation of civil society, as it prevents NGOs from being able to react to the Government's claims or provide additional explanation regarding certain issues discussed in the Action Plan. For this reason, such delays should be avoided in the future.

The remarkable delay cannot be justified anyhow with the work invested in the preparation the Revised Action Plan. The Government has practically repeated its former Action Plan submitted for the 1411th meeting

¹ [https://hudoc.exec.coe.int/eng?i=DH-DD\(2022\)158E](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)158E)

² [https://hudoc.exec.coe.int/eng?i=DH-DD\(2022\)218E](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)218E)

³ [https://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2021\)1411/H46-16E](https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2021)1411/H46-16E)

(September 2021) (DH).⁴ In reality, the Revised Action Plan has not been updated, in the sense that it does not cover the issues requested by the CM. The Government has simply copied its former Action Plan and discussed in more detail two points that have little relevance with respect to the execution of the Baka judgment and contain information already provided earlier, therefore cannot be deemed as new developments worth consideration. The two topics covered by the revision include

- (i) the legislative criteria for the impeachment of the President of the Kúria [see Annex I. of the Revised Action Plan]; this particular issue has already been explained in the Action Plan submitted for the 1411th meeting (September 2021) (DH) and the legislation has not been amended since, therefore, this is just a more detailed explanation of the same rules;
- (ii) detailed data concerning the salary increase of judges and prosecutors [see Annex II. of the Revised Action Plan]; this particular issue has already been communicated to the CM for the 1383rd meeting (29 September - 1 October 2020) (DH);⁵ the actual development is that the scheduled salary increase has been implemented.

None of the issues covered by the revision shall be deemed as relevant and/or novel from the point of view of the execution of the Baka judgment.

I.2. The Hungarian Government's failure to carry out and submit an evaluation regarding the domestic legislation on the status of judges and the administration of courts

At the CM's 1383rd meeting (29 September – 1 October 2020), the Hungarian authorities undertook to evaluate the domestic legislation on the status of judges and the administration of courts from the point of view of the "chilling effect" on the freedom of expression of judges. The CM noted this undertaking with interest, and invited the Hungarian authorities *"to present the conclusions of their evaluation, including of the guarantees and safeguards protecting judges from undue interferences, to enable a full assessment to be made by the Committee as to whether the concerns have been dispelled"*.⁶

However, the evaluation was not carried out, and therefore, one year later, at its 1411th meeting (14-16 September 2021) the CM had to recall the authorities' undertaking, and invite them again to present its conclusions, including with regard to the guarantees and safeguards protecting judges from undue interferences. However, it is clear from the submitted Action Plan, that no such evaluation has been carried out to date.

II. NEW DEVELOPMENTS REGARDING THE CHILLING EFFECT ON THE FREEDOM OF EXPRESSION OF JUDGES

II.1. The National Judicial Council's decision to refrain from delegating a judge to a discussion on judicial independence

*"Judges under Pressure"*⁷ is a documentary film about Igor Tuleya and other Polish judges put under pressure through suspension, disciplinary actions and other means by the Polish ruling party for standing up for the rule of law and judicial independence. The film was screened at the Budapest International Documentary Festival in January 2022. The National Judicial Council (NJC) was invited to send a representative to a discussion held after one of the screenings where Igor Tuleya was also supposed to participate in person. The invitation was discussed at the 5 January 2022 meeting of the NJC.

Initially there was willingness to send a representative, however, András Varga Zs, the President of the Kúria (who was elected by the Hungarian Parliament against the express objection of the NJC, but who is – in his

⁴ [https://hudoc.exec.coe.int/eng?i=DH-DD\(2021\)656E](https://hudoc.exec.coe.int/eng?i=DH-DD(2021)656E)

⁵ [https://hudoc.exec.coe.int/eng?i=DH-DD\(2020\)563E](https://hudoc.exec.coe.int/eng?i=DH-DD(2020)563E)

⁶ [https://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2020\)1383/H46-8E](https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2020)1383/H46-8E)

⁷ <https://www.idfa.nl/en/film/ffa59473-a174-4340-9668-8f07a64ba676/judges-under-pressure>.

capacity as the Kúria's President – ex officio a member of the NJC) and Róbert Répássy, the Secretary of State of the Minister of Justice (who is not a member of the NJC, but is invited to its meetings) argued that sending a representative to a discussion following a film about the undermining of the independence of the judiciary in Poland would be a "political activity". Therefore, a vote was taken, and with eight members against and seven abstaining, the NJC eventually decided not to send a representative to the discussion.⁸

II.2. Limitations of the NJC's access to the public

The lack of legal personality as a fundamental deficiency

The NJC does not have sufficient powers to perform its constitutional task of offsetting the very extensive administrative powers the Parliamentary-elected President of the National Office for the Judiciary (NOJ) has over the administration of the judiciary. This has been pointed out as a serious issue by several international organisations. By way of example, in its 2021 Rule of Law Report on Hungary, the European Commission concluded the following with regard to the relationship of the NOJ President and the NJC: "*The National Judicial Council continues to face challenges in counter-balancing the powers of the President of the National Office for the Judiciary as regards the management of the courts. As indicated in the 2020 Rule of Law Report, the National Judicial Council is facing a series of structural limitations that prevent it from exercising effective oversight regarding the actions of the NOJ President.*"⁹

One of the crucial issues in this regard is the NJC's lack of legal personality that prevents its efficient operations in several ways. In its Resolution 99/2018, the NJC listed all those changes to the law on the judiciary that would be needed to guarantee that the NJC could fulfil its constitutional role of counterbalancing the wide powers of the NOJ President. One issue in the Resolution is the lack of legal personality: "*the NJC does not have independent legal personality, it cannot independently dispose of its own finances, the NOJ would be obliged to guarantee the conditions of its operations, the President of which this body [the NOJ] would be entitled to supervise. In the absence of legal personality, the NJC cannot recruit anyone over whom it would exercise the employer's rights, and whom it can instruct, it does not have its own seat, it cannot conclude contracts, cannot independently decide over its own budget, and cannot operate its offices from either a technical or an administrative point of view. In order for the NJC to effectively perform its constitutional tasks, the legislature should provide it with legal personality and a greater degree of budgetary independence.*"

The NOJ controls the content of the official subpage of the NJC

One consequence of the lack of legal personality is that the NJC cannot conclude in its own name a contract for the operation and hosting of its own website, where it could communicate with both the judges and the public, nor can it edit its subpage on the website of the NOJ.

The NJC has a subpage on the NOJ's website,¹⁰ however, this subpage is edited by the NOJ with full discretion as to what contents are uploaded. There have been several instances, when the NJC wished to have certain contents published, but the NOJ President, Mr György Senyei refused to do so on the basis that he was only willing to publish materials for which there was a normative basis (i.e. only when he had a legal obligation to publish content created by the NJC).

One of the most important materials that the NOJ President refused for a long time to make available on the official NOJ website was the records of the hearing at which the NJC formulated its opinion on the nomination of András Varga Zs. as the President of the Kúria. As described in our Rule 9 submission of July 2021,¹¹ Mr Varga was elected by the Parliament's ruling majority in spite of the NJC's opinion that he was not a suitable candidate because the circumstances of his selection were "*at odds with the constitutional requirement that requires the*

⁸ The records of the meeting are available at: <https://orszagosbiroitanacs.hu/2022-01-05/>.

⁹ https://ec.europa.eu/info/sites/default/files/2021_rplr_country_chapter_hungary_en.pdf, pp. 2-3.

¹⁰ <https://birosag.hu/obt>

¹¹ [https://hudoc.exec.coe.int/eng?i=DH-DD\(2021\)773E](https://hudoc.exec.coe.int/eng?i=DH-DD(2021)773E)

head of the judicial system be a person who is independent of the other branches of power and who appears impartial to an outside observer”, and because he “has never performed any judicial activity and has no courtroom experience, nor practical experience of litigation or court administration”. The hearing at which the NJC came to this conclusion was held on 9 October 2020, and the NJC asked Mr Senyei in vain to publish it on the NOJ website.

At the NJC’s 8 September 2021 session, i.e. almost a year after Mr Varga’s hearing took place, Mr Viktor Vadász, member of the NJC summarised the situation as follows: *“One of the most important decisions of the NJC in the past six years has been when it had to make the decision whether or not it supported the person nominated for the position of the Kúria’s President. It is a well-known fact that the NJC decided not to support dr. András Varga Zs.. Not one statement, not one piece of news or information has been published about this on birosag.hu [the website operated by the NOJ]. In contrast to this, of course, the fact that he was elected by Parliament was obviously covered [on the site]. In fact, the NOJ President can decide what he wishes to communicate about on this platform, and his problem is that he would not like us [the NJC] to appear on birosag.hu. The point of this whole thing is that the NJC should remain invisible, should keep quiet, and then we can say that there is peace all around. Well, I have to say: there is no peace, there is no cooperation, and I am very sorry about it, because we have done everything so that there would be.”¹²*

The NJC members requested the NOJ several times to allow them to edit the NJC’s subpage on the NOJ’s official website, and upload contents to the subpage, however, the NOJ refused the request, among others on the basis that in the absence of legal personality, the NJC was not allowed to act as the website’s managing editor.¹³

Eventually (following a demonstrative action by the NJC – see below), the records of Mr Varga’s hearing were made available on the NOJ’s official website about a year after the hearing had taken place,¹⁴ however, to this day, (i) the NJC does not have editorial rights over its own subpage within the NOJ’s official website; (ii) it is still the NOJ President’s prerogative to decide what content can be uploaded to the NJC subpage; and (iii) important contents are still not available on the subpage (e.g. the NJC’s press releases are not published on the subpage; instead of the full records of the NJC’s meetings, only the summaries are available there;¹⁵ and the NOJ refused to publish the NJC’s report to the European Commission’s delegation that was sent to Hungary in the framework of preparing the Commission’s 2021 Rule of Law Report¹⁶).

Members of the NJC had to create and finance a separate website

To bridge this gap, and to be able to communicate with the Hungarian judiciary and the public, the NJC members set up on 8 October 2018 a website from their own pockets¹⁷ (while they do not get extra remuneration for fulfilling their tasks related to their membership in the NJC). In the absence of legal personality, the NJC is not in charge of its own budget, which is implemented by the NOJ instead. Therefore, the NJC requested the NOJ President several times to finance the NJC’s own website (an annual cost of HUF 240,000, or EUR 670).

For years, the response to this was that since there is an official website (i.e. the subpage of the NOJ website that the NJC is not allowed to edit) through which the NJC can communicate those contents that have a normative basis, therefore, the NOJ did not wish to finance the maintenance of the NJC’s own website. As the NOJ’s Vice President put it at the NJC’s 5 May 2021 meeting: *“The maintenance of the website is not included in it [i.e. the budget of the NJC], primarily because the communication platform is at your disposal on the NOJ’s website as far as the normative content is concerned. [...] The NOJ President’s stance in this regard is that those contents that have a normative legal basis can be made available on the NOJ’s website, all the mandatory contents*

¹² The records can be downloaded from the NJC’s website at <https://orszagosbiroitanacs.hu/2021-09-08/>, p. 67.

¹³ See for instance the records of the NJC’s 2 June 2021 meeting, available at: <https://orszagosbiroitanacs.hu/2021-06-02/>, p. 47.

¹⁴ See at: <https://birosag.hu/obt/elozetes-velemenynyilvanitasi-jegyzoikonnyvek>

¹⁵ See at: <https://birosag.hu/obt/osszefoglalok>

¹⁶ See the records of the NJC’s 5 May 2021 meeting, available at: <https://orszagosbiroitanacs.hu/2021-05-05/>, p. 35.

¹⁷ See: <https://orszagosbiroitanacs.hu/>

are uploaded there. Other than that, the President thinks that the operation of a private webpage is not a cost, not a technical condition that the NOJ is supposed to provide.”¹⁸

The NOJ’s argument is obviously rather circular in its nature and highlights the impossible situation the absence of legal personality and of the possibility to implement its own budget puts the NJC. It places the NJC “at the mercy” of the NOJ President, over whom it would be supposed to exercise oversight. In the context of the website, this means that on the one hand, the NOJ President refuses to finance the NJC’s own website on the basis that they should use the NOJ’s website as the platform for their communications, on the other, he declines to provide them with the freedom to edit the NJC subpage within the official NOJ site and limits the contents that are made available on this subpage, thus obstructing the NJC’s free communication with both their peers and the public, and forcing the NJC members to finance this communication from their own pockets.

This amounts to a limitation of the dissemination of the NJC’s views among the judges, because even though the NJC can through its private website convey its messages to both the judges and the public, the kind of official acknowledgment that stems from a message’s availability on the NOJ’s official website is dependent on whether or not the NOJ President (the very person over whom the NJC should exercise oversight) allows the uploading of that particular message to the official website. This is obviously a limitation that is related to the freedom of expression of the most important self-governing body of the Hungarian judiciary and the judges it consists of.

Resolving the problem constituting the tip of the iceberg

Eventually, the judge members of the NJC launched an action of protest in September 2021: since due to reasons related to judicial integrity, they decided that it would not be possible for them to finance the NJC website through crowd funding, as a symbol of support, they asked the Hungarian judges to send them buttons via mail.¹⁹

In October 2021, the NOJ President finally agreed to amend the budget of the NJC in order to include the costs of maintaining the separate website operated by the NJC members.²⁰ Although this gesture has in practice eased the continued conflict around the financing of the separate website operated by the members of the NJC, the actual problem solved this way is just the tip of the iceberg considering the freedom of expression of judges in matters concerning the independence of the judiciary. The issue of financing the website was also resolved “at the mercy” of the NOJ President, as a result of a discretionary decision he finally took after a three-year long continued fight by the members of the NJC. None of the systemic problems leading to the actual restriction on freedom of expression (such as the lack of legal personality or the NJC’s lack of control over its own subpage on the official website of the judiciary) were resolved, thus the NJC continues to be to a great extent dependent on the NOJ President regarding its communications with the judiciary and the public.

II.3. The chilling effect through the personal experiences of a judge

Under Section 2.1. of our last Rule 9 submission,²¹ we described an “illustrative example” regarding the possibility to exert undue influence on judges. In the concrete case, according to investigation documents leaked to the media, the **former president of the Hungarian Chamber of Bailiffs, György Schadl wanted a Hungarian judge to be removed from the judiciary for reasons connected to her work performed as a judge** and for this purpose, in 2021 he met with the NOJ President and the President of the Metropolitan Court, Péter Tatár-Kis.

At the latest NJC meeting held on 2 February 2022, the NJC urged the NOJ President to take steps and initiate a disciplinary proceeding against Mr Tatár-Kis. As part of the discussion, Krisztina Izsai, the judge György Schadl

¹⁸ See the records of the NJC’s 5 May 2021 meeting, available at: <https://orszagosbiroitanacs.hu/2021-05-05/>, pp. 66-67.

¹⁹ See: <https://orszagosbiroitanacs.hu/harom-ev-utan-is-maguk-finanszirozzak-az-obt-tagjai-az-obt-honlap-fenntartasat/>

²⁰ See the records of the NJC’s 6 October 2021 meeting available at: <https://orszagosbiroitanacs.hu/2021-10-06/> p. 51.

²¹ [https://hudoc.exec.coe.int/eng/?i=DH-DD\(2022\)158E](https://hudoc.exec.coe.int/eng/?i=DH-DD(2022)158E)

wanted to have removed, came forward to share her experiences and feelings caused by Schadl's attempt to remove her.²² She told the NJC that *"I'm disturbed by the article [revealing the case], I'm constantly preoccupied with it, it makes me feel insecure and I can't concentrate on my work properly. I've never felt like this as a judge and as a court leader. [...] When I read the article, I was completely shocked. Until then, I thought my managers were satisfied with me."* She also said that following the meeting between Schadl and Tatár-Kis, *"some kind of an investigation was launched"* against her. Although she was not reproached in any way as a result of the investigation, and the procedure was closed without any adverse consequences for her, she was warned verbally. She also informed the NJC that the president of the district court where she works was not involved in the process and was not even aware that an investigation was conducted against her. Finally, she concluded with a personal statement: *"I am not feeling well and, even if I have not had any discomfort up to now, I am always upset by articles in the press. The feeling of discomfort is now with me."* The judge's personal statement is a harsh example of how the pressure put on judges can have a chilling effect on them, even making their work impossible.

II.4. The NJC voiced fears regarding the chilling effect of the Schadl case

In the above-mentioned Schadl-case, on 28 January 2022, the NOJ President initiated²³ a formal investigation procedure²⁴ on the handling of complaints at the Metropolitan Regional Court and all district courts under its territorial competence, including the handling of the specific complaint filed by Mr Schadl against judge Izsai in 2021. Nevertheless, the scope and the timeframe of the formal investigation procedure raises doubts as to the NOJ President's willingness to take all actions necessary to clarify the personal liability of Tatár-Kis in this case. It is concerning that the NOJ President ordered the formal investigation procedure to be carried out by 15 April 2022, while according to the laws, the NOJ President may only initiate a disciplinary proceeding within three months after being informed about the behaviour that may constitute a disciplinary violation.²⁵ Considering the fact that the article was published on 21 January 2022 and 15 April 2022 falls on Easter Holidays, the NOJ President will have two working days to initiate a personal disciplinary proceeding if on the basis of the formal investigation procedure he concludes that a disciplinary violation might have been committed.

On the 2 February 2022 NJC meeting, the NJC urged²⁶ the NOJ President to take immediate and effective steps in order to protect the independence of the judiciary and initiate a personal disciplinary proceeding against Mr Tatár-Kis. The NJC voiced fears that without a proper investigation by an independent body (i.e. a service court, whose members are appointed by the NJC), *"the absence of consequences for the arbitrary behaviour of leaders can have a negative, chilling effect on the Hungarian judiciary, leading to fear of being stymied professionally and financially. This in turn poses a direct and real threat to the independent work of the judiciary, free from external influence."*²⁷

In his letter dated 4 February 2022,²⁸ the NOJ President refused to initiate a disciplinary proceeding claiming that *"in light of the information available a targeted administrative investigation shall be deemed as a necessary and momentarily sufficient tool to protect the independence and impartiality of the judiciary."* The NOJ President reminded the NJC that it falls within the exclusive competence of the NOJ President to initiate a disciplinary proceeding with respect to the court leaders appointed by the NOJ President and *"this power cannot be encroached upon by any other body."*

²² See the records of the NJC's 2 February 2022 meeting, available at: <https://orszagosbiroitanacs.hu/2022-02-02/>, pp. 22-23.

²³ <https://birosag.hu/sites/default/files/users/k%C3%B6zlem%C3%A9ny%20BT%2002.04.pdf>

²⁴ The legal basis for the investigation was Article 76 (6) b) of Act CLXI of 2011 on the Organisation and Administration of Courts.

²⁵ Article 110 (1) of Act CLXII of 2011 on the Legal Status and Remuneration of Judges.

²⁶ <https://orszagosbiroitanacs.hu/hatekony-azonnali-es-torvenyben-szabalyozott-fellepes-szukseges-a-fuggetlen-igazsagszolgaltatast-veszelyeztetendo-minden-jelenseg-ellen/>

²⁷ <https://orszagosbiroitanacs.hu/hatekony-azonnali-es-torvenyben-szabalyozott-fellepes-szukseges-a-fuggetlen-igazsagszolgaltatast-veszelyeztetendo-minden-jelenseg-ellen/>

²⁸ <https://birosag.hu/sites/default/files/users/k%C3%B6zlem%C3%A9ny%20BT%2002.04.pdf>

On 14 February 2022, the Hungarian Association of Judges (MABIE) issued a public statement²⁹ claiming that *"the judiciary was rather shocked by the fact that a judicial leader receives a 'request' from an external actor to assist in removing or stymieing a judge, and that the judicial leader reacted in a supportive manner."* The Association found it necessary that *"the administrative leaders of the judiciary make it clear towards the public and towards members of the judiciary that such behaviour shall not be tolerated within the judicial organisation and that all actions are taken and all possible tools are used in order to clarify the occurrences."*

By the date of submitting the present Addendum, the NOJ President has not initiated a disciplinary proceeding to enable the clarification of the personal liability of Mr Tatár-Kis before an independent judicial forum. Even though both the NJC and MABIE have urged actions to be taken by the NOJ President, according to the legislation, the NOJ President has full discretion with respect to initiating a disciplinary proceeding in the case, and judicial self-governing bodies have no meaningful control over the decision.

III. RECOMMENDATIONS

In light of the above, we maintain our former recommendations, amongst others that the NJC is provided with legal personality and greater budgetary autonomy in order to effectively carry out its tasks determined by the Fundamental Law of Hungary.

Furthermore, we recommend that the Committee of Ministers issue an interim resolution urging the Hungarian authorities to fulfil their obligations under the terms of Article 46, paragraph 1, of the Convention to abide by the final judgments of the European Court fully, effectively and promptly, and to take immediate measures to implement the general measures required to comply with the Court's judgment in the Baka v Hungary case.

Finally, we recommend that the Hungarian authorities acknowledge and disseminate information on the crucial standard expressed in the Baka judgment, that even though judges' freedom of expression can be limited in all cases where the authority and impartiality of the judiciary are likely to be called in question, issues concerning the functioning of the justice system and the separation of powers fall within the public interest and are of such importance that even if such an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter.

Sincerely yours,



András Kristóf Kádár
co-chair
Hungarian Helsinki Committee



²⁹ <https://www.mabie.hu/index.php/1632-a-mabie-orszagos-valasztmanyanak-kozlemenye-a-magyar-birosagi-vegrehajtoi-kar-elnoket-es-a-fovarosi-torvenyszek-elnoket-erinto-ugyrol>