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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: NGO communication under Rule 9(2) of the Rules of the Committee of Ministers 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,

Amnesty International Hungary and the **Hungarian Helsinki Committee** hereby respectfully submit their joint observations and recommendations under Rule 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"* regarding the execution of the judgment of the European Court of Human Rights in the **Baka v. Hungary case** (Application no. 20261/12, Judgment of 23 June 2016), in advance of the March 2022 DH meeting of the Ministers' Deputies on the execution of judgments.

Amnesty International Hungary (**AIHU**) is a membership-based, independent Hungarian civil society organization founded in 1990. AIHU is a member of the globe's largest human rights organization, Amnesty International, which has seven million supporters in more than 70 countries. AIHU carries out research, campaigns, advocacy, human rights education, and empowers and mobilizes local communities with a special focus on gender equality, rule of law and right to privacy to ensure that human rights are enjoyed by everyone in Hungary.

The **Hungarian Helsinki Committee** (**HHC**) is an independent human rights watchdog organisation, working towards defending the rule of law in Hungary. The HHC submitted (together with other Hungarian NGOs) a third-party intervention in the Baka v. Hungary case, and submitted several communications to the Committee of Ministers in relation to the non-execution of the judgment in the Baka v. Hungary case, since 2019, jointly with AIHU.

The present communication concerns the execution of the judgment in particular the implementation of the general measures indicated by the Committee of Ministers (CM) in its decision adopted in September 2021 (hereafter: **2021 CM Decision**).[1]

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

I. CONSISTENTLY DISMISSIVE APPROACH OF HUNGARIAN AUTHORITIES

The execution of the case of Baka v. Hungary has been on the agenda of the Committee of Ministers since 2017, without any meaningful progress. The dismissive approach taken by the Hungarian authorities throughout the years confirm the assumption that **the Hungarian authorities simply refuse to implement the judgment**. In its decision delivered in September 2021, the Committee of Ministers was left no choice but to repeat its decision delivered in 2020 and call again on the Hungarian authorities to take the general measures requested. Even though the CM urged several general measures to be taken, the Hungarian authorities remained reluctant to make any progress in the case. The non-implemented general measures included the following:

(1) **with respect to the established violation of Article 6** of the Convention, the CM reiterated the importance of *"procedural fairness in cases involving the removal of a judge from office"*, noted with concern *"the continuing absence of safeguards in connection with ad hominem constitutional-level measures terminating a judicial mandate"* and urged the authorities to submit information on *"measures adopted or planned with a view to guaranteeing that judicial mandates will not be terminated by ad hominem constitutional-level measures devoid of effective and adequate safeguards against abuse"*.

(2) **with respect to the established violation of Article 10** of the Convention, the CM reiterated the importance of *"effective and adequate safeguards against abuse when it comes to restrictions on judges' freedom of expression"* and recalled the undertaking of the authorities to evaluate the domestic legislation on the status of judges and the administration of courts and invited them to *"present the conclusions of their evaluation, including of the guarantees and safeguards protecting judges from undue interferences"*.

Although the CM invited the authorities to submit an updated action plan, including information on all the above issues, by 16 December 2021, at the latest, **the Hungarian authorities not only failed to draw up an updated action plan within the requested deadline, but also failed to take any measures at all to implement the above recommendations**. In the absence of a properly prepared action plan and as direct consequence of the non-implementation, **all concerns raised in the former NGO submissions[2] remain relevant**. At the same time, AIHU and the HHC find it necessary to supplement the former communications with information on the most recent developments that indicate **further deterioration of the independence and integrity of the judiciary both from the perspective of lack of respect for the right to the freedom of expression of judges and lack of safeguards against undue termination of judicial mandates**.

II. THE CHILLING EFFECT IS ENCODED IN THE CURRENT COURT SYSTEM

In all formerly submitted communications, AIHU and the HHC repeatedly claimed that **due to the prevailing legal and institutional structures, the chilling effect is encoded in the current court system**. Besides referring to our former communications, below we supplement our concerns with information on the most recent developments confirming that persisting legal concerns constantly uphold the possibility of the recurrence of similar violations within the judiciary.

2.1. An illustrative example

On 21 January 2022 news broke[3] that the **former president of the Hungarian Chamber of Bailiffs,**[4] **György Schadl wanted a Hungarian judge to be removed from the judiciary in 2021**. Schadl was arrested recently and is accused of corruption together with Pál Völner, the former Deputy Minister of Justice and governing party MP. According to the secret surveillance documents of the National Protective Service published in the news, in the summer of 2021, referring to his connections with Völner, Schadl approached the President of the National Office for the Judiciary (**NOJ President**) and talked with him about a judge (who also fulfilled a judicial

[2] See: DH-DD(2020)686, 29 July 2020, https://helsinki.hu/wp-content/uploads/AIHU_HHC_Rule_9_Baka_v_Hungary_29072020.pdf and DH-DD(2021)773, 22 July 2021, https://helsinki.hu/wp-content/uploads/2021/07/AIHU-HHC_Rule_9_Baka_case_FINAL.pdf
[3] See: https://444.hu/tldr/2022/01/21/a-birot-rugjak-ki-mert-ez-verlazito
[4] Judicial officers are public officials charged with enforcing final and binding court judgements, in cooperation with the courts.

leadership role as a court group leader[5]) at the Central District Court of Pest. Schadl claimed that the judge had broken internal confidentiality rules and **demanded that the judge be removed from the judiciary**. Thereafter, the NOJ President allegedly connected him with the President of the Metropolitan Regional Court, Judge Péter Tatár-Kis who exercises the employers' rights over all Central District Court of Pest judges. Based on the secret surveillance transcripts, the court president and Schadl met on 9 June 2021 and the former told Schadl that "*he cannot fire the judge, but he can revoke their group leader assignment and he can make sure that the judge feels bad at their workplace*". The court president also promised to Schadl that he would request a formal investigation in the judge's case.[6]

Irrespective of the fact that the judge concerned was not removed from office, the mere fact that the NOJ President and the president of the biggest regional court in Hungary allegedly discussed the removal of a judge with an external actor severely and gravely undermines the perception of judicial independence in Hungary and **confirms the concerns regarding the *de iure* possibilities of administrative leaders** – and through them, even external actors – **to exert undue pressure on judges.**

Although at the moment no further information is available regarding the details of the abovementioned case, especially, on how the President of the Metropolitan Regional Court treated the case, and whether he actually took any measures to *"make sure that the judge feels bad at their workplace"*, in the following we compile some of the most relevant legislative and organisational problems that (i) may serve as tools in the hands of administrative leaders of the judiciary to unduly influence judges; (ii) are capable to **sustain and deepen the chilling effect on the right to freedom of expression of judges**; and (iii) have been actively used in the last year by court leaders.

2.2. Uncontrolled interferences with judicial mandates

A) Secondment of judges: a tool of disguised sanction or disguised promotion

The law provides the NOJ President, and in some cases, court presidents with full discretion in selecting seconded judges, prolonging and terminating their secondment. As a consequence, **the practice of the secondment of judges extends far beyond its legal objectives**. The process of secondment lacks meaningful control by judicial self-governing bodies. The legislation does not provide for guarantees against misuse, therefore secondment may be used as a disguised disciplinary sanction as well as a disguised promotion.

Judges may be seconded to another court even against their will, for a maximum period of one year within each three years,[7] in case it is necessary to reduce excessive workload at the receiving court. The legislation does not provide for clear criteria regarding what shall be deemed as excessive workload and how the judges to be seconded shall be selected. Decision on the secondment shall be taken by the NOJ President (except in case of secondments within the geographical sphere of competence of a regional court,[8] where the president of the regional court decides on the secondment). Judicial councils (i.e. the bodies of judicial self-government) shall be entitled to formulate a non-binding opinion on the secondment, but only in cases where the secondment takes place against the will of the judge concerned.[9]

In 2020, 471 judges were seconded amounting to **more than 16% of the total number of judges**.[10] The number of secondments were extremely high at the Kúria, where 43 secondments took place in 2020 as compared to

[5] At all courts, within colleges, groups may be formed to deal with certain types of cases within a field (e.g. court judgements' enforcement). A court group leader is a court leader heading such a group who organizes the professional work thereof. See: Act CLXII of 2011 on the Legal Status and Remuneration of Judges, Article 125

[6] The NOJ President acknowledged that he had spoken on the phone with Schadl on a number of occasions in 2021, but emphasised that these phone calls had not had any unlawful purpose or content. The President of the Metropolitan Court refused – through the court's press office – to respond to the journalist's questions on the basis that the court could not comment on an ongoing investigation.

[7] See: Act CLXII of 2011 on the Legal Status and Remuneration of Judges, Article 31 (3).

[8] Within the geographical sphere of the regional courts, secondments can take place between district courts as well as between the regional court and the district courts.

[9] See: Act CLXI of 2011 on the Organisation and Administration of Courts, Article 151 (1) a).

[10] Taking into account the total number of judges as reported by the NOJ President as of 31 December 2020. See: https://birosag.hu/beszamolok/az-orszagos-birosagi-hivatal-elnokenek-2020-evi-beszamoloja p. 28.

the total number of 113 judges at the Kúria.[11] Involuntary secondments were not reported most recently, nevertheless, it remains a lawful option based on the legislation, and even in the absence of the actual application of these rules, the mere possibility is capable of exerting pressure on judges. In case of voluntary secondments, the legislation does not exclude or limit anyhow the possibility to extend the term of secondment, therefore it can serve as a tool to circumvent an application proceeding for a particular judicial position. An illustrative example is the **extended secondment of a judge to the Kúria for almost three consecutive years** between 15 January 2019 and 31 December 2021.[12]

B) Uncontrolled power to remove a judge from administrative adjudication

The Hungarian judicial system distinguishes three particular sections of adjudication of ordinary courts: the civil, the criminal and the administrative section. Out of these three, **the administrative section** is particularly important from the perspective of the rule of law and the independence of the judiciary, because it **deals with legal disputes about decisions taken by state authorities, such as cases on public procurement, civil liberties rights (including electoral rights and freedom of assembly), tax decisions, complaints against police actions and asylum cases**. Therefore, the selection of judges dealing with administrative cases is of great importance from the perspective of an effective review of decisions by state authorities by an independent court.

From 1 April 2020, the specialized Administrative and Labour Courts (20 of them, one for each county) were dissolved, consequently, first instance administrative cases were channelled to eight designated regional courts and the first instance labour cases were channelled to the regional courts. Judges formerly dealing with administrative cases within these specialised courts were transferred to the ordinary court system by the force of the law.[13] However, the legislation did not guarantee that a judge formerly working as an administrative judge will continue to work in the same section after the transfer, but it fell within the discretionary power of the NOJ President to assign judges as administrative judges.

After 1 April 2020, in order to deal with administrative cases, judges shall be explicitly assigned as administrative judges within the ordinary court system.[14] **Assignments are granted based on the recommendation of court presidents, but the final decision is taken with full discretion of the NOJ President** (or the President of the Kúria with respect to judges serving at the Kúria).[15]

Although assigned judges shall consent to the assignment, **their assignment as administrative judges can be terminated by the NOJ President any time, even against the will of the assigned judge and without objective reasons or the obligation to justify the decision**.[16] **Neither the criteria nor the terms of an assignment or the termination thereof are set out by law.** Assignments have a substantial impact both on the status of the individual judge (determining his/her areas of work) and ongoing administrative cases (determining the composition of adjudicating panels). Therefore, **it is highly problematic that the right of both granting and withdrawing an assignment lies exclusively in the hands of administrative leaders** (the NOJ President or the President of the Kúria).

In 2020, the NOJ President assigned 193 judges to deal with administrative cases and withdrew the assignment of 4 administrative judges. In 2021 the NOJ President unilaterally terminated the assignment of several judges

[11] See: https://birosag.hu/beszamolok/az-orszagos-birosagi-hivatal-elnokenek-2020-evi-beszamoloja p. 17.
[12] See the relevant examples for subsequent extensions of secondment of a judge to the Kúria: first from 15 January 2019 to 31 December 2019 https://birosag.hu/sites/default/files/2019-01/10.e.pdf ; than from 1 January 2020 to 31 December 2020; https://birosag.hu/sites/default/files/2020-02/618.e.pdf; and finally from 1 January 2021 to 31 December 2021. https://birosag.hu/sites/default/files/2021-01/446.e.pdf altogether for an uninterrupted 3 years.
[13] Act CLXII of 2011 on the Legal Status and Remuneration of Judges Article 34 (2).
[14] Act CLXII of 2011 on the Legal Status and Remuneration of Judges Article 30.
[15] Act CLXII of 2011 on the Legal Status and Remuneration of Judges Article 30 (3).
[16] Act CLXII of 2011 on the Legal Status and Remuneration of Judges Article, Article 30 (7).

– including administrative chamber presidents – assigned to deal with administrative cases. **None of the decisions contained a proper justification, and all of them became effective within a couple of days**.[17]

C) Unlimited power to strike out a successful applicant by declaring the whole application proceeding unsuccessful without the possibility of a legal remedy

The NOJ President, and with respect to positions at the Kúria, the Kúria President, hold excessive powers in appointing judges and court presidents, including the **right to render any application procedure unsuccessful without the consent of any judicial body** [e.g. the National Judicial Council (**NJC**) or local judicial councils]. As recommended by the Venice Commission in 2012: "*the possibility for the President of the NJO [the Venice Commission's abbreviation for the National Office for the Judiciary] to declare the appointment procedure unsuccessful should be removed; the President of the NJO should be obliged to make a proposal for appointment of the candidate ranked first when the NJC disagrees with the change of ranking.*"[18] Despite repeated recommendations by the Venice Commission, the European Commission, the Council of the European Union, the Commissioner for Human Rights of the Council of Europe, the Council of Europe's GRECO group or the European Association of Judges and regardless of the fact that the abusive practice of the former NOJ President caused a constitutional crisis within the judiciary in 2018,[19] this right to declare *any* judicial application - including applications to judicial leadership positions[20] - without the consent of judicial self-governing bodies still exists.

The **practice of rendering an application procedure unsuccessful has not come to a complete halt**.[21] In 2020, altogether 20 applications for leadership positions were invalidated by the new NOJ President; in 2021, he deemed altogether seven court leadership applications unsuccessful.[22] Although it is an improvement that these decisions contain a reasoning, it is a warning sign that at its session of 5 May 2021, the NJC pointed out a "*lack of unified criteria*" regarding the assessment of grounds for declaring an application procedure unsuccessful.[23]

[17] See for example the termination of the assignment as administrative judge of a chamber president of the Szekszárd Regional Court https://birosag.hu/sites/default/files/2021-05/104.e.pdf; termination of the assignment as administrative judge of the Miskolci Regional Court https://birosag.hu/sites/default/files/2021-05/102.e.pdf; termination of the assignment as administrative judge of the Metropolitan Court https://birosag.hu/sites/default/files/2021-07/122.e.pdf and https://birosag.hu/sites/default/files/2021-07/166.e.pdf and https://birosag.hu/sites/default/files/2021-10/167.e.pdf.

[18] See: European Commission for Democracy through Law (Venice Commission), Opinion on the Amendments to the Act on the Organisation and Administration of the Courts and the Act on the Legal Status and Remuneration of Judges by the Hungarian Parliament in December, CDL-AD(2012)001, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)001-e

[19] As was repeatedly recommended by the Council of Europe's Venice Commission, the European Commission, the Council of the European Union, the Commissioner for Human Rights of the Council of Europe, the Council of Europe's GRECO group or the European Association of Judges.

[20] According to the Act CLXI of 2011 on the Organisation and Administration of Courts, Article 130 (1) and (2), court leadership positions must be filled based on a public call for application (unless otherwise provided by law). The call for application shall be issued by the person holding the power to appoint the court leader (e.g. the NOJ President, the President of the Kúria or court presidents respectively).

[21] Act CLXI of 2011 on the Organisation and Administration of Courts, Article 128 (2): "*the NOJ President appoints the presidents and vice-presidents of regional courts and regional appeal courts, college leaders of the regional courts and of the regional appeal courts*."

[22] Reasons for invalidating court leadership applications by the NOJ President have included the following: (i) deficiencies with archiving case files (Resolution No. 27.E/2021. (II. 8.) of the NOJ President) where the reasoning admits that these deficiencies may not be substantial, but merely constitute a result of undue administration of the archiving activities; or (ii) no application filed (Resolution 8.E./2021. (I.20.) of the NOJ President and 306.E./2021. (XI.11.) of the NOJ President); or (iii) in case the applicant has not received the support of the judges' plenary meeting or the college meeting (Resolutions 169.E., 172.E., 185.E., 187.E. of the NOJ President).

[23] "*The NJC discussed the report of the NOJ President on the appointment of judges and judicial leaders (court presidents, vice-presidents etc.) in 2020 and formed the following opinion: (i) In the case of court leadership applications where the NOJ President did not accept any of the candidates (invalidated applications), the NJC raises concerns about the lack of unified criteria. (ii) The system of criteria as stipulated by the NOJ Regulation on Court Administration was not adequately applied. (iv) The NJC finds it worrisome that some of [the] justifications of the invalidating resolutions referred to facts which the candidate had no opportunity to comment on or challenge during the procedure and were based on data that was accessed [by the NOJ President] without the prior approval of the candidate. (v) The NJC also notes that the President of the NOJ failed to respect deadlines in some of the procedures. (vi) There were no other objections regarding the appointment practice of court leaders and no negative comments on the appointment of judges.*" Summary on the NJC meeting of 5 May 2021, p. 73-74., available at: https://orszagosbiroitanacs.hu/2021-05-05/

In February 2021, the Győr Court of Appeal[24] delivered a final and binding judgment in a lawsuit initiated by judge Csaba Vasvári, outspoken member of the NJC, who ranked first in two subsequent application procedures, but could not fill any of the applied positions because the NOJ President declared both procedures unsuccessful without any meaningful justification, but filled the very same positions with other judges through transfers and secondments. The judgment rendered the decisions of the NOJ President null and void and ordered the NOJ President to finish up the application proceedings. In March 2021, **the NOJ President challenged the final and binding decision** in the framework of an extraordinary review. The Kúria quashed the judgment **declaring in a precedential decision**[25] **that the judge affected shall not be entitled to raise claims against the NOJ President for declaring the application proceeding unsuccessful**. The judgment of the Kúria in practice means that **judicial remedy is excluded** against such decisions of the NOJ President (and the President of the Kúria, with respect to judicial positions at the Kúria).

D) The possibility to remove a probationary judge unlawfully

As a main rule, the first appointment of Hungarian judges shall last for a definite period of three years (probationary period).[26] Although judges serve as probationary judges, they are not limited anyhow in their decision-making as compared to judges appointed for an indefinite term. Before the lapse of their term, all probationary judges shall go through an evaluation proceeding aimed at establishing whether they are apt for an appointment for an indefinite period.[27] The evaluation proceeding is initiated by their court leaders and judges may qualify either as apt or inapt for their final appointment.

The concerned judge may challenge the finding him/her inapt for a judicial position, but due to lack of sufficient guarantees in the legislation, her/his judicial mandate may terminate before the judicial review of the evaluation is completed. The systemic deficiency consists of several problematic elements. (i) First of all, it is in itself problematic that judges shall be appointed for an overly long probationary term.[28] (ii) Second, the evaluation process lacks effective guarantees against an abusive evaluation because (ii) the legislation does not expressly guarantee the right to a probationary judge to challenge the outcome of the evaluation proceeding;[29] (iii) the legislation does not provide for an interim measure to prevent the interruption of the tenure of a disqualified judge during the judicial review of the evaluation; and (iv) the legislation does not expressly guarantee the right to be reinstated as judge[30] even in case the outcome of the evaluation process is quashed as a result of the review.

In 2021, the high-profile case of Judge Gabriella Szabó clearly proved that **the legislation lacks sufficient guarantees against the unlawful removal of a judge from the judiciary**. Judge Szabó – who claims to be forced to leave the bench for political reasons[31] – was appointed as judge in 2018 for a definite period of three years. As

[24] See judgment Mf.V.30.054/2020/13/I. of the Győr Court of Appeal of 2 February 2021. The challenged final and binding judgement ordered that (i) the judge ranked first shall be transferred to the applied position, or (ii) the NOJ President shall seek the consent of the NJC if he/she wants to divert from the original ranking and appoint the judge who came in 2nd or 3rd in that ranking; or (iii) invalidate the call based on a detailed reasoning specifying the grounds for the invalidation.

[25] See judgment Mfv.10.049/2021/16. of the Kúria, sections [58]-[93].

[26] The legislation prescribes the first appointment to create a probationary tenure of three years. Act CLXII of 2011 on the Legal Status and Remuneration of Judges, Article 23 (1): "the judge's first appointment – with the exception included in subsection 2 – is valid for 3 years, in other cases is valid for an indefinite period of time".

[27] Act CLXII of 2011 on the Legal Status and Remuneration of Judges, Article 24 (2).

[28] The probationary period was already criticised by the Venice Commission in 2012: '*The problem is not so much that the evaluation during the time as court secretary and the probationary period would objectively exert pressure on the person concerned. However, the court secretary or probationary judge will be in a precarious situation for many years and – wishing to please superior judges who evaluate his or her performance – may behave in a different manner from a judge who has permanent tenure ("pre-emptive obedience").'* See: European Commission for Democracy through Law (Venice Commission), Opinion on the Amendments to the Act on the Organisation and Administration of the Courts and the Act on the Legal Status and Remuneration of Judges by the Hungarian Parliament in December, CDL-AD(2012)001,

[29] Act CLXII of 2011 on the Legal Status and Remuneration of Judges Article 79.

[30] Act CLXII of 2011 on the Legal Status and Remuneration of Judges Article 84.

[31] See: https://helsinki.hu/en/the-forcing-out-of-a-judge-and-meantime-a-threat-to-all-hungarian-judges/ The allegation that Judge Szabó was removed for political reasons shall be considered in the light of the fact that in former years all probationary judges qualified as suitable for an indefinite tenure. In 2019 all 53 probationary judges qualified as suitable https://birosag.hu/beszamolok/az-orszagos-birosagi-hivatal-elnokenek-2019-evi-beszamoloja p. 19.

a freshly appointed judge, Szabó referred a question to the Court of Justice of the European Union (**CJEU**) for a preliminary ruling because she considered that one of the provisions of the Hungarian law on asylum could conflict with EU law. The provision was a key element of Hungary's new approach to asylum seekers, allowing the Hungarian authorities to reject without substantive examination the asylum claims of all those who arrived to Hungary through Serbia. In its March 2020 judgment, the CJEU found the concerns raised by the preliminary question to be well-grounded. The CJEU decided that the provision in force since the summer of 2018, which allowed mass rejection of asylum applications without any substantive examination of individual cases, was contrary to EU law. This meant a serious legal blow to the Hungarian Government's asylum policy.

Judge Szabó was fiercely attacked by the pro-government media, and also claims that after the preliminary reference, she was immediately subject of harassments and discrimination also within the court, including a private warning from a former president of her court that with such decisions she "won't be prolonged for indefinite time".[32]

In 2021, a regular evaluation process was initiated as prescribed by law to establish whether Judge Szabó is apt for an appointment for an indefinite period. In March 2021, as a result of the evaluation process, she was disqualified. Even though she immediately challenged her evaluation before the service court,[33] **the legislation did not provide for an interim measure to prevent the interruption of her judicial career during the review of the evaluation**. As a result, her mandate ended on 30 June 2021, with the lapse of the definite term, before a final and binding judgment could have been delivered. In November 2021, the final and binding judgment[34] of **the Kúria declared that in the absence of a legal norm that would expressly allow this, Judge Szabó cannot challenge the evaluation serving as the ground for her disqualification.** According to the Kúria, Judge Szabó should seek remedy under the general rules of qualification, even though it is a matter of interpretation whether these actually grant her the possibility of being reinstated as a judge.

E) Non-transparent disciplinary proceedings

The **disciplinary cases of judges are decided by the first-instance and second-instance service courts, whose operation and decisions are not public according to the law,[35] and the service courts' decisions are not available even for the judges**. Therefore, it is difficult both for the judges and the public to assess the operation of the disciplinary proceedings in action. Related to this, in July 2021 the NJC proposed[36] to the NOJ President to initiate an amendment of the pertaining Act in order to ensure that the anonymised decisions of the service courts be published in the courts' internal IT system.[37]

F) Binding precedential decision of the Kúria declares as unlawful requests for a preliminary ruling to the CJEU in matters of independence of the judiciary

In 2021, the CJEU delivered its decision[38] in a case initiated by Judge Csaba Vasvári in connection with a criminal case he was hearing. Judge Vasvári referred three sets of questions to the CJEU on 11 July 2019, but two of the questions concerned judicial independence.[39] Upon the extraordinary appeal of the Prosecutor General Péter Polt, who is believed to be loyal to the Government,[40] the Kúria ruled on 10 September 2019 that the preliminary

In year 2020 all 109 probationary judges qualified as suitable https://birosag.hu/beszamolok/az-orszagos-birosagi-hivatal-elnokenek-2020-evi-beszamoloja p. 18.

[32] https://euobserver.com/democracy/152349

[33] Service courts comprise of judges appointed by the NJC from the judges recommended by their peers. These service courts deal amongst others with disciplinary proceedings against judges or with appeals against the results of an evaluation procedure. Act CLXII of 2011 on the Legal Status and Remuneration of Judges, Article 101.

[34] See: judgment Szfé9.2021/14. of the Kúria.

[35] "*Disciplinary proceedings and preliminary investigations shall be conducted in camera.*" Act CLXII of 2011 on the Legal Status and Remuneration of Judges, Article 119.

[36] NJC Resolution No. 63/2021 (VII. 7.).

[37] There is no information whether the NOJ President has indeed initiated such an amendment with the Ministry of Justice or not.

[38] Judgement *of 23 November 2021, C-564/19, EU:C:2021:949* see: https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210207en.pdf

[39] For more details see: https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-i/

[40] https://budapestbeacon.com/the-career-arc-of-peter-polt-hungarys-chief-prosecutor/

questions[41] violated Hungarian law. The Kúria ruled that the questions were irrelevant for the case at hand. *"As established* [by the Kúria]*, the court hearing the case has used the circumstance that the accused person is a foreign national with a foreign language as a basis to request a preliminary ruling and – unduly – as a pretext to criticise the constitutional system of the whole Hungarian judiciary, that, however, does not have any connection with the outcome of the case at hand. This is unlawful."* In its judgment delivered in 2021, the CJEU ruled that "*Article 267 TFEU must be interpreted as precluding*" the Kúria from such declaration and that "*the principle of the primacy of EU law requires that lower court to disregard such a decision of the national supreme court*".

However, **after the publication of the CJEU judgement, the Kúria issued a press release[42] declaring that the Kúria's precedential decision in the case of judge Vasvári "*is final and its legal interpretation is binding, therefore the Kúria maintains the position expressed in its previous communications*".** The declaration of the Kúria may not only be interpreted as a disregard of the CJEU ruling,[43] but is also concerning for its **chilling effect on lower tier courts**. The precedential judgment of the Kúria declares that questions regarding the independence of the sitting judge shall be deemed as not relevant and necessary for the resolution of the dispute in the main proceedings, and therefore shall be deemed as unlawful. In this sense, the Kúria's precedential judgment is capable of preventing requests for preliminary rulings that aim to challenge the major deficiencies of the judicial system of Hungary.

2.3. The possibility of an undue interference and retaliatory application of discretionary powers

The above listed examples – the full discretion of the NOJ President to assign and revoke the assignment of administrative judges, the unlimited discretion of judicial leaders with respect to secondment of judges, the possibility to apply an evaluation proceeding in an abusive manner, the non-transparent disciplinary proceedings and the reluctance of the Kúria to revoke its precedential judgment limiting judges in turning to the CJEU - **have relevance from the perspective of the execution of the Baka-case, because these enable exerting undue interference of judges and may also be applied as retaliatory measures against judges publicly voicing criticism in relation to the independence of the judiciary in Hungary** (as in the case of Csaba Vasvári).

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[41] The three questions for preliminary ruling were the following: *"(1) (a) Must Article 6(1) TEU and Article 5(2) of [Directive 2010/64] be interpreted as meaning that, in order to guarantee the right to a fair trial for accused persons who do not speak the language of the proceedings, a Member State must create a register of properly qualified independent translators and interpreters or – failing that – ensure by some other means that it is possible to review the quality of language interpretation in judicial proceedings?*
(b) If the previous question is answered in the affirmative and if, in the specific case, since the language interpretation is not of adequate quality, it is not possible to establish whether the accused person has been informed of the subject matter of the charge or indictment against him or her, must Article 6(1) TEU and Article 4(5) and [Article] 6(1) of [Directive 2012/13] be interpreted as meaning that, in those circumstances, the proceedings cannot continue in his or her absence?
(2) (a) Must the principle of judicial independence referred to in the second subparagraph of Article 19(1) TEU, Article 47 of the [Charter] and the case-law of the Court of Justice be interpreted as meaning that that principle is infringed where the [President of the NOJ], who is responsible for the central administration of the courts and who is appointed by the parliament, the only body to which he or she is accountable and which may remove him or her from office, fills the post of president of a court – a president who, inter alia, has powers in relation to organisation of the allocation of cases, commencement of disciplinary procedures against judges, and assessment of judges – by means of a direct temporary nomination, circumventing the applications procedure and constantly disregarding the opinion of the competent self-governance bodies of judges?
(b) If Question 2(a) is answered in the affirmative and if the court hearing the specific case has reasonable grounds to fear that that case is being unduly prejudiced as a result of the president's judicial and administrative activities, must the principle of judicial independence be interpreted as meaning that a fair trial is not guaranteed in that case?
(3) (a) Must the principle of judicial independence referred to in the second subparagraph of Article 19(1) TEU, Article 47 of the [Charter] and the case-law of the Court of Justice be interpreted as precluding a situation in which, since 1 September 2018 – unlike the practice followed in previous decades – Hungarian judges receive by law lower remuneration than prosecutors of the equivalent category who have the same grade and the same length of service, and in which, in view of the country's economic situation, judges' salaries are generally not commensurate with the importance of the functions they perform, particularly in the light of the practice of discretionary bonuses applied by holders of high level posts?
(b) If the previous question is answered in the affirmative, must the principle of judicial independence be interpreted as meaning that, in such circumstances, the right to a fair trial cannot be guaranteed?"
Judgement *of 23 November 2021, C-564/19, EU:C:2021:949* see: https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210207en.pdf para. 38.

[42] https://www.kuria-birosag.hu/hu/sajto/kuria-kozlemenye-az-europai-unio-birosaga-c-56419-szamu-ugyben-hozott-itelete-vonatkozasaban

[43] As a comparison, the European Commission referred Poland to the European Court of Justice https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1524 to challenge a Polish law preventing Polish courts from putting references for preliminary rulings on such questions to the Court of Justice.

III. RECOMMENDATIONS

3.1. Relevant former recommendations

Amnesty International Hungary and the Hungarian Helsinki Committee respectfully recommend the Committee of Ministers to **continue examining under enhanced procedure the execution and effective implementation of the judgment** in the *Baka v. Hungary* case and adopt a strong Interim Resolution condemning the lack of progress by the authorities on issues 4 and 5, as indicated in the Committee of Ministers Decision adopted at the 1411th meeting, 14-16 September 2021 (DH).

Due to the lack of non-implementation and the consistently dismissive approach of the Hungarian authorities, Amnesty International Hungary and the Hungarian Helsinki Committee uphold all their former recommendations and call on the Hungarian authorities as follows:

- **Address the issue of judicial independence holistically and comprehensively**.[44] In order to address the long-standing structural problems and to ensure the independence of the judiciary, **the laws on the judiciary should be amended to ensure compliance with international standards[45] and specific recommendations on the situation of the Hungarian judiciary by international bodies** including the Venice Commission,[46] the Council of Europe Commissioner for Human Rights,[47] and the Council of Europe Group of States against Corruption.[48]
- In order to be capable to execute the above task, the Government shall provide a thorough *de iure* analysis of the Hungarian legislation **identifying provisions capable of exerting a negative influence on judges**, taking into account the concerns raised by international stakeholders. Similarly, **effective protection of NJC's judge members shall be ensured against intimidation**, attacks on their reputation as well as retaliatory administrative and other measures.
- **In order to eliminate undue interference and retaliatory measures against judges voicing criticism in relation to the independence of the judiciary, the legislation shall be amended to**
  - **oblige the NOJ President to justify in detail all his/her decisions**. According to the currently effective legislation,[49] the NOJ President shall only provide reasons for his/her decisions *"to the extent necessary"* leaving it to the discretion of the NOJ President to decide whether and to what extent a given decision shall be reasoned.
  - **put an end to the NOJ President's unlimited powers regarding the appointment of judges and court leaders,** in a way that the law shall prescribe clear criteria for declaring an application proceeding unsuccessful and the consent of the NJC shall be required for the decision.
  - ensure that the **remuneration of judges is based on a general standard and rely on objective and transparent criteria** and phase out bonuses which include an element of discretion.

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[44] For a comprehensive list of recommendations in this regard, see: Amnesty International – Hungarian Helsinki Committee, *Recommendations aimed at restoring the independence of the judiciary in Hungary,* December 2019, https://www.helsinki.hu/wp-content/uploads/Hungary_rec_judiciary_AI-HHC_01122019.pdf, https://www.amnesty.hu/hu/news/2656/recommendations-aimed-at-restoring-the-independence-of-the-judiciary-in-hungary; Amnesty International, *Fearing the Unknown – How rising control is undermining judicial independence in Hungary*, 2020, https://www.amnesty.hu/data/file/4871-final_fearing-the-unknown_report_amnesty-hungary_e1.pdf?version=1415642342, pp. 10-12.

[45] Inter alia, the United Nation's Basic Principles on the Independence of the Judiciary, https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx and the Venice Commission's Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004, 6 March 2010

[46] European Commission for Democracy through Law (Venice Commission), *Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary,* CDL-AD(2012)020-e, 15 October 2012, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e

[47] Commissioner for Human Rights of the Council of Europe Dunja Mijatović, *Report Following her Visit to Hungary from 4 to 8 February 2019,* CommDH(2019)13, 21 May 2019

[48] Group of States against Corruption, *Fourth Evaluation Round – Corruption prevention in respect of members of parliament, judges and prosecutors. Interim Compliance Report – Hungary*, GrecoRC4(2018)16, https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/16809969483

[49] See: Act CLXI of 2011 on the Organisation and Administration of Courts, Article 77 (2).

- ensure that **if a judicial leader challenges their dismissal** by launching a lawsuit, and if the judge concerned is reinstated, legal guarantees ensure that the **judge may be reinstated to their former leadership position,** for example, by making sure that the position could only be filled temporarily. [50]

- **protect the integrity of the NJC's judge members** by taking effective measures to guarantee that they can exercise their statutory rights and obligations of safeguarding judicial independence through, among others, formulating and disseminating critical opinions on the administration and independence of the judiciary **without any undue interference**. Such legislative modifications shall at least include that the NJC is provided legal personality and greater budgetary autonomy in order to effectively carry out its tasks determined by the Fundamental Law of Hungary, and that the NJC have broader powers and tools to take the necessary measures if the NOJ President fails to carry out his/her statutory obligations and follows an unlawful practice despite the notice made by the NJC about the irregularities.

➢ **Hungarian authorities shall**

- **refrain from and condemn any public harassment, intimidation or retaliation against judges**, and communicate clearly that while criticism of jurisprudence as a part of a public debate is necessary in a pluralistic society, personal attacks against judges are unacceptable.

- **abstain from** any public critique, recommendation, suggestion or solicitation regarding court decisions that may constitute **direct or indirect influence** on pending court proceedings or otherwise undermine the independence of individual judges in their decision-making.

3.2. Further recommendations

In addition to the previously made recommendations, in light of the legislative deficiencies described above in the current submission, Amnesty International Hungary and the Hungarian Helsinki Committee recommend the Committee of Ministers to **call on the Hungarian authorities to amend the legislation with respect to the following matters:**

➢ **Eliminate the possibility of using secondment as a disguised sanction or a disguised promotion. For this purpose,**

- the power of the NOJ President to second judges to another court against their will shall be abolished;

- the term of secondment shall be maximised by law without the possibility of unlimited extension of the term of secondment;

- the legislation shall provide for a clear criteria regarding what shall be deemed as "excessive workload" and how the judges to be seconded shall be selected;

- all decisions of the NOJ President on seconding judges shall be reasoned in detail and judicial self-governing bodies shall have a right to consent to the decision in light of the reasoning.

➢ **Put an end to the NOJ President's unlimited power to grant and withdraw assignments to judges to be able to deal with administrative cases.** Judges adjudicating in the administrative section of the ordinary court system shall be selected under the same clear and transparent appointment procedure as judges adjudicating in the civil and criminal section.

➢ **Expressly grant legal remedy against the decision of the NOJ President** (or the President of the Kúria) on rendering application proceedings unsuccessful and prescribe

➢ **Provide guarantees against abusive application of evaluation proceedings even in case of probationary judges. The legislation shall**

- ensure that probationary judges can challenge the findings of the evaluation report;

[50] Act CLXII of 2011 on the Legal Status and Remuneration of Judges

- provide for an interim measure to prevent the interruption of the tenure of a disqualified judge during the judicial review of the evaluation;
- legislation shall expressly guarantee the right to be reinstated as judge in case the outcome of the evaluation process is quashed as a result of the review.

➢ **Guarantee the transparency of disciplinary proceedings** by at least publishing the judgements of the service courts in an anonymised way.

➢ **Eliminate the right of the Prosecutor General to contest the decision of a judge on referring questions to the CJEU regarding the independence of the judiciary** and allow derogation from the Kúria's precedential judgement declaring that preliminary questions concerning the Hungarian judiciary shall be deemed as unlawful.

Moreover, in the absence of the submission by the government of a revised action plan within the deadline indicated by the Committee of Ministers, our organisations would like to reserve the possibility of submitting comments to that submission as soon as possible, for appreciation by the Committee of Ministers prior to its March 2022 DH meeting.

Sincerely yours,

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Hungarian Helsinki Committee

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HUNGARIAN HELSINKI COMMITTEE

AMNESTY INTERNATIONAL