Parliamentary Assembly
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COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Declassified*
AS/Jur (2023) 03
26 January 2023
ajdoc03 2023

Committee on Legal Affairs and Human Rights

The Implementation of judgments of the European Court of Human Rights – 11th report

Information note in preparation of a hearing in relation to Hungary

Rapporteur: Mr Constantinos EFSTATHIOU, Cyprus, Socialists, Democrats and Greens Group

1. Introduction

1. According to the Annual Report 2021 on the Execution of Judgments, Hungary has the 5th largest number of cases pending execution (265 cases) of Council of Europe member States.[1] Hungary was 4th in relation to numbers of cases closed during 2021 (66 cases). For 2022, these figures look to be improving with 216 cases pending execution and 109 cases having been closed during 2022 (of which 4 were leading cases). Hungary has the second largest number of unimplemented ECtHR judgments amongst EU member States. There also appears to be a problem with delayed payments of just satisfaction awarded by the Court.[2]

2. Key groups of cases relate to poor conditions of detention in prisons; inadequate processes for processing asylum seekers before returning them to Serbia; excessively lengthy and unlawful pre-trial detention; excessive length of civil, criminal and administrative proceedings and the lack of an effective remedy; independence of the judiciary; irreducibility of life sentences; and discrimination against Roma children in education.

3. The *Gubacsi* group relates to violations of the right to life and the right to be free from torture and inhuman or degrading treatment by security forces and could thus additionally be of particular interest to the Committee in light of its current work on a Report on systemic torture. Similarly, the *Szabo and Vissy* group concerns the inadequacy of secret surveillance legislation. Issues pertaining to the Pegasus scandal have arisen in relation to the examination of this group of cases, which could be of interest to the Committee in light of its current work on Pegasus spyware.

2. Potential areas of inquiry

- What progress has been made in implementing ECtHR judgments?
- What barriers exist to timely and effective implementation of ECtHR judgments?
- What are the domestic systems for coordinating the implementation of ECtHR judgments? How are those systems working and could they be improved?
- What systems exist to ensure accountability to Parliament for the implementation of ECtHR judgments, as well as the involvement of civil society in work on implementing ECtHR judgments? How are those systems working and could they be improved?

* Document declassified by the Committee on 25 January 2023.
[1] Annual Report 2021.
[2] On 4 January 2023, information relating to payment was outstanding or information was incomplete in 70 cases that were past the payment deadline.

- The payment of just satisfaction ought to be a practical administrative matter effected without delay. What can be done to address the issue of delayed payments of just satisfaction awarded by the Court?

3. Specific Judgments

3.1. Actions of security forces – inhuman and degrading treatment and violations of the right to life, a lack of effective investigations into such violations, and specific issues related to possible racist motives of assaults against Roma

4. The Gubacsi Group[3] relates to ill-treatment (between 2000 and 2016) by law enforcement officers during the applicants' arrest, transfer and detention, and the lack of effective investigations for such ill-treatment and violations of the right to life (substantial and/or procedural violations of Articles 2 and 3 ECHR).Individual measures in relation to many of these cases have become time-barred meaning that investigations, disciplinary proceedings and prosecutions are no longer feasible under domestic law. The general measures required include establishing an institutional culture of "zero tolerance" towards ill-treatment (this is contrasted with the practice of reinstating police officers who had been sentenced to suspended imprisonment); effective safeguards against ill-treatment (such as video-recording in interrogation rooms and through police body-cameras); adequate and systematic training; and effective investigations into police ill-treatment.

5. The related *Balázs* group[4] concerns violations of the prohibition of discrimination read in conjunction with the prohibition of inhuman or degrading treatment on account of the authorities' failure to carry out effective investigations into the question of possible racial motives behind the ill-treatment inflicted on the Roma applicants by law enforcement agents in their official capacity or off-duty (Article 14 read in conjunction with Article 3).[5]

3.2. Poor conditions of detention

6. The *Istvan Gabor Kovacs* Group[6] concerns inhuman and/or degrading treatment due to the applicants' poor conditions of detention, resulting mainly from a structural problem of overcrowding in Hungarian prisons (violations of Article 3), as well as a lack of effective preventive and compensatory remedies in respect of such conditions of detention (violations of Article 13 read in conjunction with Article 3). In view of the scale of the problem, the ECtHR delivered a pilot judgment in the 2015 *Varga* case, finding that the violations in this case and in previous cases resulted from a structural problem of overcrowding and poor material conditions of detention.

7. The Committee of Ministers' last detailed examination of the status of execution of this judgment took place in March 2021. The need for the following general measures was identified: (i) measures to solve the structural problem of prison overcrowding (which, according to the authorities has seen significant improvement given the use of alternatives to detention, and hitting targets for the maximum occupancy rates of prisons); (ii) material conditions of detention (which remained a concern); (iii) preventive and compensatory measures (the Hungarian authorities, having introduced an adequate compensatory mechanism in 2017, then suspended its use in 2020 – since then they have introduced another (albeit very similar) scheme, the efficiency of which will largely depend on its application in practice.

8. On 21 March 2022 the authorities submitted an updated action report (DH-DD(2022)338) in which the authorities consider that the general and individual measures have been addressed. However, it may be that there are further questions, in particular in relation to the working of the compensation mechanism, the steadily increasing prison occupancy rates and the reportedly scarce use of alternatives to detention.[7]

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[3] Gubacsi v Hungary – see here for status of implementation.
[4] Balazs v Hungary – see here for status of implementation.
[5] There is a related case of *R.B.* (no. 64602/12) which concerns inadequate investigations into allegations of racially motived abuse directed against the applicant of Roma origin in the context of anti-Roma rallies organised by different right-wing groups between 1 and 16 March 2011 in the predominantly Roma neighbourhood of Gyöngyöspata (Article 8 and Article 14 ECHR) – as well as the case of *Király and Dömötör* (no. 10851/13), where openly racist anti-Roma demonstration on 5 August 2012 in the municipality of Devecser, with sporadic acts of violence remained virtually without legal consequences and the applicants were not provided with the required protection of their right to psychological integrity (Article 8 and 14 ECHR).
[6] Istvan Gabor Kovacs v Hungary and Varga and others v Hungary see here for status of implementation.
[7] See the Hungarian Helsinki Committee's very recent Rule 9 submission (*DH-DD(2022)1384)*

3.3. Migration and Asylum (procedural requirements to assess risks of ill-treatment before return to Serbia and prohibition on the collective expulsion of aliens)

9. The *Ilias and Ahmed group*[8] concerns the authorities' failure to comply with their procedural obligation under Article 3 to assess the risks of ill-treatment before removing the two asylum-seeking applicants to Serbia in 2015. The Court found in particular that "there was an insufficient basis for the government's decision to establish a general presumption concerning Serbia as a safe third country", that "the expulsion decisions disregarded the authoritative findings of the UNHCR as to a real risk of denial of access to an effective asylum procedure in Serbia and summary removal from Serbia to North Macedonia and then to Greece, and that the authorities exacerbated the risks facing the applicants by inducing them to enter Serbia illegally instead of negotiating an orderly return".

10. The case of *Shahzad* concerns the asylum-seeking applicant's collective expulsion in 2016 following the application of the "apprehension and escort" measure introduced by the State Borders Act, authorising the police to remove foreign nationals staying illegally in Hungarian territory (initially within 8 km from the border with Serbia, but now anywhere in Hungary) to the external side of the border fence on the border with Serbia, without any efforts to identify the individual or to undertake an individual assessment (violation of Article 4 of Protocol No. 4). The case also concerns the lack of an effective remedy in respect of the applicant's removal (violation of Article 13). The EU has brought infringement proceedings in relation to the 'apprehension and escort' measures, which are currently back before the CJEU to consider the question of a fine for further non-implementation.

11. This group has last been examined by the Committee of Ministers in September 2022 following Rule 9 communications from the Hungarian Helsinki Committee, the Commissioner for Human Rights and the Office of the UN High Commissioner for Refugees. The individual measures appear to be addressed. However, there are 'profound concerns' in relation to progress on general measures, and in particular the need for the authorities to reassess the legislative presumption of Serbia as a "safe third country", in line with the case-law of the Court and in light of significant concerns in this regard.

12. The Hungarian asylum system currently includes the "Embassy procedure" of requiring asylum seekers to request asylum through a lengthy waiting procedure at the Hungarian embassy in either Kiev or Belgrade, which has been widely criticised as being incompatible with Hungary's international obligations concerning refugees. Even though the impugned legislative presumption of Serbia as a "safe third country" does not seem to be applied in practice, effective access to an asylum procedure in Hungary is now hindered by the "Embassy Procedure". The Hungarian authorities have announced reforms of the asylum system which would ideally deal with the persisting problems (i.e. the required reassessment of the legislative presumption of Serbia as a "safe third country" and the introduction of a legislative regime that provides effective access to asylum), however, in practice legislative work does not seem to be underway.

13. There are also continued 'grave concerns' in relation to forced collective removals without following due process and safeguards. As regards the practical application of the Hungarian "apprehension and escort" measure under the State Borders Act, the Hungarian police reportedly carries out forced removals without orderly procedure on a daily basis and, according to testimonies also reported by the Council of Europe Commissioner for Human Rights, in some cases in an abusive and violent manner. In 2021, 72,787 people were forcefully removed to Serbia, almost three times more than in 2020. In 2022, until 2 August, 77,064 forced removals have taken place according to the statistical data published by the Hungarian police.

3.4. Detention and other rights: Whole life sentences

14. The Laszlo Magyar group[9] concerns violations of the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 ECHR) on account of the applicants' life sentences being considered to be irreducible, contrary to Article 3 ECHR. Under Hungarian law, life imprisonment can take two forms – a "whole life sentence" without the possibility of parole which is reserved for particularly serious offences or a "simple life sentence" which affords the possibility of the conditional release of the prisoner after having served between 25 to 40 years (as set by the sentencing judge). In relation to the upper limit of 40 years, in Bancsók and László Magyar (No. 2), the Court held that the lack of a review before the expiry of 40 years detention meant that the Court considered "that the applicants' life sentences cannot be regarded as reducible for the purposes of Article 3 of the Convention". In the case of Blonski the Court has similarly found a violation as

[8] Ilias and Ahmed v Hungary and see here for status of implementation.
[9] Laszlo Magyar v Hungary and see here for status of implementation.

concerns waiting periods of 30 and 35 years.[10] Further cases relating to "simple life sentences" of fewer years are currently pending before the ECtHR.

15. In terms of general measures, the Court indicated that a reform of the system of whole life sentences was required, so as to include a review that would consider whether detention is justified on legitimate penological grounds and would enable whole life prisoners to foresee, with some degree of precision, what they must do to be considered for release and under what conditions". The current legislative framework does not provide for "both a prospect of release and a possibility of review" from the imposition of the sentence, as required by the Court's case-law. Comprehensive legislative reform is therefore needed to reduce the waiting period for review ideally to 25 years and to ensure adequate procedural safeguards in the procedure.

3.5. Pre-trial detention – unlawful or excessively lengthy pre-trial detention

16. The *XY group*[11] concerns different violations of the applicants' right to liberty and security on account of (a) their unlawful detention (Article 5 § 1); (b) their unreasonably long pre-trial detention (Article 5 § 3); (c) the domestic courts failure to give sufficient reasons for their continued pre-trial detention (Article 5 § 3); (d) an infringement of the principle of "equality of arms" as they had no access to the relevant material of the investigation when challenging their detention (Article 5 § 4); and (e) the excessive length of the judicial review of their detention (Article 5 § 4).

17. General measures are required to address these issues. In the last three years the Court has found similar violations against Hungary in 24 cases concerning more than 140 applicants and in many of these cases the pre-trial detention lasted for more than three years. This is therefore becoming an increasingly concerning and priority issue.

3.6. Excessive length of civil, criminal and administrative proceedings

18. The *Gazso group*[12] concerns the excessive length of judicial proceedings in civil, criminal and administrative matters, and the lack of an effective remedy in this respect (violations of Articles 6 § 1 and 13). The Committee of Ministers has been supervising cases concerning excessive length of judicial proceedings in Hungary since 2003. In view of the scale of the problem, in 2015 the European Court delivered a pilot judgment in *Gazsó*.

19. The Committee of Ministers' last detailed examination of the status of execution of this judgment took place on December 2021. Both the payment of just satisfaction and the individual measures are still pending in some cases in this group. In terms of general measures, new codes of civil, administrative and criminal procedure entered into force in 2018, all of which contain a number of amendments tackling the root causes of the problem of excessive length of judicial proceedings. Statistics since then indicate improvements in the length of proceedings. As concerns the lack of an effective remedy, on 15 June 2021, Parliament adopted Act No. XCIV of 2021 on the Enforcement of Pecuniary Satisfaction Relating to Protraction of Civil Contentious Proceedings which introduced a compensatory remedy for civil cases. However, no concrete plan has been provided regarding the establishment of compensatory remedies for administrative and criminal cases, except the announcement to prepare a legislative proposal for June 2023.

3.7. Independence of the judiciary – Freedom of expression and the right to a fair trial

20. The *Baka group*[13] concerns violations of the Convention on account of the undue and premature termination of the applicants' mandates as President (*Baka* case) and Vice-President (*Erményi* case) of the former Hungarian Supreme Court through *ad hominem* legislative measures adopted in the context of a major reform of the judiciary. The Court found violations of the right of access to court, freedom of expression, and the right to respect for private life (Articles 6, 8 and 10 of the Convention).

21. In the *Baka* case, the premature termination, via *ad hominem* legislative measures, of the applicant's term of office as of 1 January 2012 was found to have violated his right of access to a court as guaranteed by Article 6 § 1 because of the absence of judicial review given that the legislative act had a constitutional nature. The Court found that these measures had been prompted by the views and criticisms expressed by the applicant on issues of public interest (planned major reform of the judicial system) and had violated Article 10

[10] Blonski and Others v. Hungary. . In the case of *Vinter v UK* the Court set out that such reviews ought to take place after a person has served 25 years in prison.
[11] XY v Hungary and see here for status of implementation.
[12] Gazso v Hungary and see here for status of implementation.
[13] Baka v Hungary and see here for status of implementation.

as they had not pursued any legitimate aim linked to the judicial reform at issue, nor had the measures been necessary in a democratic society. The Court considered that the legislation had not been the object of any strict scrutiny and could hardly be reconciled with judicial independence and the irremovability of judges. The Court also found that the impugned measures had a "chilling effect", discouraging not only the applicant, but also "other judges and court presidents […] from participating in public debate on […] issues concerning the independence of the judiciary". In the *Erményi* case, the Court found, referring to its findings in the *Baka* case, a violation of Article 8 as the ad hominem legislation similar to that at issue in the *Baka* case but remaining of legislative rank, had also not pursued any legitimate aim linked to the reform.

22. The Committee of Ministers' last detailed examination of the status of execution of this judgment took place in March 2022 at which the Deputies adopted Interim Resolution CM/ResDH(2022)47. The general measures required include most importantly the introduction of an independent review of the termination of the mandate of the President of the Kúria (which, under current legislation, can be terminated by decision of Parliament). As concerns the chilling effect on the freedom of expression of Hungarian judges, despite some recent surveys by the Hungarian government, there are still some concerns about the freedom of expression of the judiciary in Hungary.

3.8. Secret surveillance and data retention

23. The *Szabo and Vissy group*[14] concerns the violation of the applicants' right to respect for private and family life and for correspondence on account of the Hungarian legislation on secret surveillance measures, on national security grounds under the Police Act, which did not provide for sufficient safeguards (Article 8). The Court underlined that "the scope of the measures could include virtually anyone, that the ordering is taking place entirely within the realm of the executive and without an assessment of strict necessity, that new technologies enable the Government to intercept masses of data easily concerning even persons outside the original range of operation" and that there were no "effective remedial measures, let alone judicial ones".

24. As concerns general measures, a comprehensive legislative reform is required. However, despite work on proposals from 2017, this work is apparently still ongoing and seemingly still in the early preparatory phase. The Hungarian Civil Liberties Union (HCLU) highlighted concerns about the independence of the National Authority for Data Protection and Freedom of Information and also referred to the example of the "Pegasus scandal", in which, in July 2021 an international consortium of investigative journalists reported that the Hungarian government may have misused a commercially available quasi-military spyware product called Pegasus to carry out surveillance on opposition figures, human rights activists, journalists and lawyers. Members of the Hungarian government have denied that the State had abused its surveillance power. The HCLU argued that the Pegasus case revealed in practice the shortcomings of the domestic legislation and control mechanisms in protecting privacy rights against the abuse of secret surveillance measures. The NDPA (National Authority for Data Protection and Freedom of Information) confirmed the use of the Pegasus spyware by the national security services and concluded that the authorisations under scrutiny were all in conformity with domestic law.

3.9. Discrimination against Roma children in schools

25. The *Horvath and Kiss group*[15] concerns the discriminatory misplacement and overrepresentation of Roma children in special schools for children with mental disabilities, due to their systematic misdiagnosis. In particular, the case concerns discrimination against the applicants (born in 1994 and 1992 respectively), who are of Roma origin, on account of their placement in a special school for children with mental disabilities in the 2000s during their primary education. The applicants' placement was based on tests designed to evaluate the school aptitude and mental abilities of pupils. According to the Court, these tests did not provide the necessary safeguards to avoid misdiagnosis and misplacement. It found that the schooling arrangements for Roma pupils with allegedly mild mental disability or learning disability did not take into account their special needs as members of a disadvantaged community. According to the Court, the relevant legislation, as applied in practice, lacked adequate safeguards and resulted in the overrepresentation and segregation of Roma children in special schools due to the systematic misdiagnosis of mental disability (violation of Article 2 of Protocol No. 1 read in conjunction with Article 14).

26. In terms of general measures, the Hungarian authorities have submitted information on measures taken concerning the testing tools used in the expert examination process to evaluate learning abilities of children, legislative amendments to ensure that this examination process is based on strict criteria combined with special safeguards, and an inclusive education policy for pupils with special educational needs (SEN).There

[14] Szabo and Vissy v Hungary and see here for status of implementation.
[15] Horvath and Kiss v Hungary and see here for status of implementation.

has been progress given the improved examination system, the increase in the number of children receiving integrated education when diagnosed with SEN and the social development programs in progress. In (geographically limited) statistical studies there has been improvement in numbers, although there are still more Roma children than non-Roma children being identified as having mental disability. The authorities consider that the improvement in numbers was a direct result of the measures implemented over the last decade. They further argued that even though the overrepresentation of Roma children has not disappeared completely, it is not any more a consequence of systematic misdiagnosis but rather of the socio-economically disadvantaged situation of these children.

27. In August 2021, the government adopted the new Hungarian National Social Inclusion Strategy 2030 ("2030 Strategy"), focussing on the Roma population. In September 2021, it adopted a second resolution on the practical implementation of the 2030 Strategy for the years of 2021-2024. Among other measures focusing on the education of children from disadvantaged family backgrounds, the resolution assigned concrete tasks to the minister responsible for education to enhance the integrated education of Roma children with special educational needs. Despite generally good progress, concerns persist at the effectiveness of any remedies to contest the findings of expert committees as to placements.