



Hungarian Helsinki Committee

**English translation of original application (statement of facts; statement of alleged violations of the Convention and of relevant arguments) in the case Magyar Helsinki Bizottság v. Hungary (Application no. 18030/11)**

**I. STATEMENT OF THE FACTS**

**1. The applicant's activities related to access to justice**

The Hungarian Helsinki Committee (HHC), represented by co-chair András Kristóf Kádár, is an association of special public benefit status, which monitors the enforcement in Hungary of human rights enshrined in international human rights instruments, and while informing the public about rights violations, provides legal defence to those who approach the organisation regarding rights violations falling under its mandate. The HHC strives to ensure that domestic legislation guarantee the consistent implementation of human rights norms; and promotes legal education and training in the field of its activities, both in Hungary and in the region. The HHC's two main areas of activities are protecting the rights of asylum seekers and foreigners in need of protection under international agreements, and monitoring the human rights performance of law enforcement agencies and the judicial system. It particularly focuses on the situation of detainees, and the effective enforcement of the right to defense and equality before the law.

The HHC has been striving for a long time to achieve that indigents receive quality legal aid, available also in practice and being financed by the state. In the course of its projects the organisation analysed and assessed the structural problems pertaining to legal aid and the system of ex officio defence counsels, and formed and is forming professional and legislative recommendations in order to solve these problems. From among the steps aimed at revealing structural problems and improving the situation the HHC's Model Legal Aid Board Program has to be highlighted (see: <http://helsinki.hu/en/model-legal-aid-board-program-2005-2007>), which was conducted between 2005 and 2007 and was aimed at developing and testing in practice a model providing solutions for the deficiencies related to the ex officio defence counsel system. (The study summarizing the experiences of the program, published in July 2007 and titled "Without Defense" is available here: [http://helsinki.hu/wp-content/uploads/Without\\_Defense.pdf](http://helsinki.hu/wp-content/uploads/Without_Defense.pdf).) One of the lessons learned from the project was that there is a need to develop a set of criteria aimed at assessing the quality of the defence counsels' work. In order to achieve this goal, in the framework of its project titled "The Right to Effective Defense and the Reform of the Ex Officio Appointment System" (see: <http://helsinki.hu/en/the-right-to-effective-defense-and-the-reform-of-the-ex-officio-appointment-system-2007-2009>), which was launched in 2008, the HHC assessed the professional standard of the work of ex officio and retained defence counsels through examining the case files of 150 closed criminal cases. In the framework of the project, the HHC – for example with the help of the bar associations and the Ministry of Justice and Law Enforcement – developed a questionnaire aimed at the assessment of the performance of defence counsels. The aim of the research was twofold: on the one hand, to test whether the questionnaire is an adequate tool for the assessment of the quality of

defence, and to prove that the problems flowing from the structural deficiencies revealed by the HHC earlier really exist. The research was concluded in February 2009; and for discussing its results and the country report on Hungary prepared in the framework of the project "Effective Defence in the European Union and Access to Justice", examining the legal aid system of certain European countries (see: <http://helsinki.hu/en/effective-defense-rights-in-the-eu-and-access-to-justice-investigating-and-promoting-best-practices-2008-2009>), the HHC organised a conference in April 2009. The results of assessing the court case files, the country report prepared in the framework of the project "Effective Defence in the European Union and Access to Justice", and the lessons learned at the conference are summarized by the following report: "In the Shadow of Suspicion. A Critical Account of Enforcing the Right to Effective Defence" (see: <http://helsinki.hu/wp-content/uploads/A-gyanu-arnyekaban-final.pdf>).

Along with its projects, the HHC carries out continuous advocacy activities aimed at the reform of the system of ex officio appointments, which are based on the research reports, recommendations and models developed in the course of its projects. For example, the organisation commented on more instances on the draft laws and concepts pertaining to legal aid (see: <http://helsinki.hu/jogszabaly-velemenyezes>), and in July 2010, upon the request of the Budapest Bar Association, carried out a research into the ethical codes for attorneys applied abroad, and formulated recommendations as to what the future ethical code of ex officio defence counsels, to be prepared by the Budapest Bar Association, should include.

## 2. The data request and its aim

The researches carried out by the HHC so far prove that the Hungarian system of ex officio defence does not operate adequately in its present form, and one of the cornerstones of the set of problems is that the investigation authority (so the police or the prosecutor's office) may choose a defence counsel from the list of defence counsels compiled by the competent bar association on a discretionary basis. This results that defendants do not trust the defence counsel chosen by the authorities, and data also confirm that at many police headquarters a large part of ex officio appointments are obtained by the same one or two attorneys or law offices, as a result of which the livelihood and practice of these attorneys is dependent on the authority making the appointments. All this endangers the independence of defence counsels and the effective protection of rights, and, in addition, the selection system operates on the basis of non-public and impenetrable considerations. The goal of the [HHC's] project "Steps Towards a Transparent Appointment System in Criminal Legal Aid", launched in 2009 (see: <http://helsinki.hu/en/steps-towards-a-transparent-appointment-system-in-criminal-legal-aid-2009-2011>) is the reform of the system of ex officio defence, and, more closely, the analysis of the system of appointments on a national level and to change the practice of ex officio appointments. The realization of the project is supported by the Trust for Civil Society in Central and Eastern Europe.

In the framework of the project the HHC – in cooperation with county bar associations and appointed police headquarters – alters the practice of appointments at three police organs as an experiment, so that the authorities will appoint attorneys at law selected randomly by the software to be developed in the framework of the project. The performance of ex officio defence counsels with regard to the cases launched in the three-month long test period and with regard to the cases closed with a final decision before that will be analyzed by staff members of the HHC with the help of a questionnaire, in order to assess whether altering the practice of ex officio appointments has any affect on the performance of ex officio defence counsels or not.

As a further element of the project the **HHC requested data from altogether 28 local police headquarters and county police headquarters, situated in seven Hungarian regions, concerning the names of defence counsels appointed and the number of cases in which each of them was appointed in 2008 in the police headquarters' area of jurisdiction.** The aim of the data request was to demonstrate and prove that it is a widespread practice that appointments are distributed disproportionately between the defence counsels who may be appointed, endangering the enforcement of the right of defendants to effective defence.

The applicant based its data request on Article 20 (1) of Act LXIII of 1992 on the Protection of Personal Data and the Public Nature of Public Interest Data (hereafter: Data Act 1992), according to which "[a]nyone may submit a request for public interest data orally, in writing or electronically". In its data request the HHC referred to its standpoint that the above data pertaining to the number of defence counsel appointments qualifies as public interest data ("közérdekű adat") under Article 2 Point 4. of the Data Act 1992, and, furthermore, in connection to that the name of defence counsels qualifies as public data of public interest ("közérdekből nyilvános adat") under Article 2 Point 5. and the second part of the first sentence of Article 19 (4) of the Data Act 1992.

*[The respective provisions of the Data Act 1992 are the following:*

*Article 2*

*4. Public interest data ("közérdekű adat"): any information or knowledge not constituting personal data, recorded in any manner or form, related to the activities of or managed by a body or person performing State or municipal tasks or other public duties specified under the law shall constitute public interest data, regardless of the manner of their management or of whether or not they constitute autonomous data or from part of a compilation;*

*5. Public data of public interest ("közérdekből nyilvános adat"): any data other than public interest data, whose disclosure or accessibility is prescribed by law in the interest of the public;*

*(...)*

*Article 19 (1) Bodies or persons performing State or municipal tasks or other public duties specified under the law (hereafter referred to collectively as "bodies") are obliged to promote and ensure the accurate and prompt informing of the general public concerning matters within its sphere of duties, in particular concerning the State and municipal budgets and their implementation, the management of state and municipal assets, the utilisation of public funds and contracts concluded to that end, and concerning the granting of special or exclusive rights to market operators, private organisations and private persons.*

*(...)*

*(4) Unless otherwise provided by law, the personal data of persons acting within the powers and competences of bodies defined in Section (1) and the personal data of other persons performing public duties shall, inasmuch as they are related to those powers, constitute public data of public interest. Access to such data shall be governed by those provisions of this Act which regulate access to public interest data.*

*(...)*

*Article 20 (1) Anyone may submit a request for public interest data orally, in writing or electronically.]*

17 police headquarters complied with the data request (without a lawsuit launched against them), while five further police headquarters disclosed the requested data after a lawsuit was launched against them. The HHC launched a lawsuit against the police headquarters which refused to disclose the data; the preceding courts delivered a final decision in all of the cases – except the one serving as the basis of the present application – in favour of the HHC, and obliged the police headquarters to disclose the data requested. [Launching a lawsuit was based on Article 21 (1) of the Data Act 1992, according to which "if its request for public interest data is not complied with, the claimant may turn to the court".]

The Debrecen Police Headquarters and the Hajdú-Bihar County Police Headquarters were also among the police headquarters refusing to disclose the data.

In line with the above, **in a letter dated 18 August 2009 the HHC turned to the Hajdú-Bihar County Police Headquarters with the request to provide information about the name of defence counsels appointed in its area of jurisdiction in 2008, and the number of appointments as divided by the attorneys at law. In its response dated 26 August 2009 the Hajdú-Bihar County Police Headquarters refused to disclose the data** with the reasoning that according to its standpoint, "the name of the defence counsels is not public interest data nor public data of public interest under Article 19 (4) of Act LXIII of 1992, since the defence counsel is not a member of a body performing State, municipal or public duties, thus his/her name is personal data, the forwarding of which is not possible under the law". Furthermore, the police headquarters referred to the following as a reason for [not] disclosing the data: "the investigation authority does not have a register about how many defence counsels were appointed and in what kind of cases, and collecting

these data – considering the high case number – would entail a disproportionate workload”.

**The data request of the HHC of identical content as the above, dated 18 August 2009, was rejected by the Debrecen Police Headquarters with a reasoning identical to that of the Hajdú-Bihar County Police Headquarters in a response dated 27 August 2009.**

**On 25 September 2009 the HHC brought an action** against both the Debrecen Police Headquarters and the Hajdú-Bihar County Police Headquarters, asking the court to oblige the police headquarters to disclose the data.

### **3. The court procedure**

#### *3.1. The first instance court procedure*

In its statement of claim the HHC stated that ex officio defence counsels perform a public duty in the interest of the public and from the money of the public, thus their data qualify as public data of public interest. Furthermore, the organisation claimed that when under Act XIX of 1998 on the Criminal Procedure (hereafter: CCP) it is obligatory to appoint a defence counsel, the act of appointment unequivocally qualifies as public duty; and claimed that the decisions pertaining to the appointment of defence counsels are in the possession of the respondents, and that the respondent police headquarters dispose over the data on the person of defence counsels and the number of appointments in a materialized format.

In its **counter-claim submitted as a respondent, dated 9 October 2009, the Hajdú-Bihar County Police Headquarters** upheld its standpoint that the names of the defence counsels are personal data, but they are not public data of public interest; and that defence counsels do not carry out their tasks under the scope of duties and competence of the police headquarters, and are not a member of the organisation. It also stated with regard to the data included in the request that they do not have a registry with such content in relation to criminal cases, so collecting the personal data pertaining to the defence counsels and grouping them according to the aspects required by the plaintiff would – considering the high case number – entail a disproportionate workload for them, reaching an unreasonable degree. In its **counter-claim submitted as a respondent, dated 9 October 2009, the Debrecen Police Headquarters** asked for the termination of the lawsuit against it, referring to the lack of its capacity to be the party to a lawsuit and not being an independent legal entity.

**The Debrecen City Court** merged the lawsuits initiated against the Debrecen Police Headquarters and the Hajdú-Bihar County Police Headquarters, and in its **decision 48.P.23.996/2009/5., dated 21 October 2009, obliged both respondents to disclose to the HHC within 60 days the data requested**, i.e. that “who did it appoint as a defence counsel – by name, in an identifiable way – in the year 2008, in its area of jurisdiction and in cases falling under its competence, and how many times each of the defence counsels were appointed”. [In its decision the Debrecen City Court also referred to the fact that even though the Debrecen Police Headquarters is not a legal entity, under Article 21 (4) of the Data Act 1992 it may be the party to a lawsuit as a data controller.]

At the hearing held in the framework of the procedure the respondents stated that if they would have to collect the data on the basis of case files, that would require the work of more persons for the period of several months, while if they would only print out the data recorded in the system of the “RoboCop” (the central database of the Police), that could entail an accuracy of roughly 80%. The HHC declared that if it would receive information of the latter nature, it would accept it. Subsequently, the respondents submitted that providing the data in the latter way would be feasible by involving more staff members within the 15-day deadline established by Article 21 (2) of the Data Act 1992, thus they do not uphold their reference to the disproportionate difficulty with regard to disclosing the data. Accordingly, the court had to decide only on the issue whether the data requested qualify as public data of public interest or not.

In its reasoning the first instance court stated that even though "the defence counsel does not qualify as a person performing public duty, and, furthermore, is not the employee or the agent of the respondents", "the public interest nature of defence shall be judged by taking into consideration the aim and role of the defence". In that regard, the court referred to Article 46 of the CCP, which establishes the cases when the participation of a defence counsel in the criminal procedure is obligatory, and to Article 48 of the CCP, which makes it the obligation of the investigation authority to appoint the defence counsel if the latter conditions prescribed by the law prevail, thus "it refers the duty to realize the constitutional fundamental right to defence also into the scope of duties of the investigation authority". The court reached the conclusion that "therefore, the measures taken in relation to obligatory defence qualify as such public interest activities the data related to which are in connection with an interest of outstanding importance from the viewpoint of the society, and not with expressing one's personality and the protection of equitable private interests". Thus in the view of the court, in the case of obligatory defence "the name of defence counsels, and with regard to the given defence counsels the number of appointments, do not entail such equitable information of private nature with regard to which it would be necessary to disclose the data only upon the approval [of the persons concerned]". Furthermore, the court stated that "the ex officio appointed defence counsel of course does not carry out the work of the investigation authority, but at the same time ensuring the obligatory defence is referred by the legislator into the scope of duties of the investigation authority in a given phase of the procedure, and the ex officio appointed defence counsel carries out an activity related to that". Finally, the court established that because of the public interest nature of the obligatory defence "the interest related to informing the society seems stronger than the incidental protection of privacy, which is not in danger anyway, since the role of the defence counsel is public as from the pressing of the charges". In its decision the Debrecen City Court "found that the name of ex officio appointed defence counsels, and in connection to that the number of cases in which the defence counsel was appointed, are public data of public interest, so the respondents, as data controllers, are obliged to disclose them".

### 3.2. Second instance court procedure

**The Debrecen Police Headquarters and the Hajdú-Bihar County Police Headquarters submitted an appeal dated 11 November 2009** against the decision of the Debrecen City Court. In their appeal the respondents submitted that they continue to uphold their standpoint that the names of defence counsels are not public interest data and are not public data of public interest, since a defence counsel is not a member of a body performing State, municipal or public duties, thus his/her name is a personal data, and the conditions under the law of forwarding it are not complied with. Furthermore, the respondents upheld their standpoint that they do not have an itemized registry about the names of ex officio appointed defence counsels regarding the year 2008, or the years before that, and they cannot be obliged to collect these data, since that would mean unreasonable workload.

As a result of the appeal, **the Hajdú-Bihar County Court, as second instance court, altered the first instance decision with its decision 2.Pf.22.46/2009/4., issued on 23 February 2010, and rejected the claims of the HHC as a plaintiff.**

According to the second instance court, Article 19 (4) of the Data Act 1992 "regulates exclusively the disclosure of the personal data of persons acting within the powers and competences of bodies performing public duties, related to these persons' powers". According to the further parts of the reasoning, under Article 2 Point 5. public data of public interest is "any data other than public interest data, whose disclosure or accessibility is prescribed by law in the interest of the public", but "in the laws referred to by the plaintiff there is no provision which would qualify the activity of ex officio appointed defence counsel a public duty in terms of the application of the data protection law". (In its counter-appeal submitted as a plaintiff, the HHC referred to Article 57 of Act XX of 1949 on the Constitution of the Republic of Hungary and Articles 46 and 48 of the CCP; the second instance court came to the above conclusion on the basis of these provisions.) Furthermore, the Hajdú-Bihar County Court laid down that "the reimbursement of the ex officio appointed defence counsels' fee by the state cannot establish the public duty nature [of the ex officio appointed defence counsels' activities]"; and in the course of further interpreting the CCP it found that "the police's task is law enforcement, and in certain cases the appointment of the defence counsel; the activities of the defence counsel

differentiate from that both in person and in terms of tasks, since the defence counsel does not perform a State or municipal task defined by law, and the State has not delegated its above public duty to the defence counsel". In addition, the second instance court stated that Act XXXIV of 1994 on the Police does not create a legal ground for the claim of the HHC either.

### 3.3. Judicial review procedure

**The HHC submitted a request for judicial review on 26 April 2010 to the Supreme Court** against decision 2.Pf.22.46/2009/4. of the Hajdú-Bihar County Court, dated 23 February 2010, asking the Supreme Court to repeal the decision of the second instance court, and to reach a decision approving the statement of claim.

In the request for judicial review, the legal representative of the HHC explained that the proceeding court's statement saying that the ex officio appointed defence counsel is not a person performing public duties is unconstitutional. Based on Article 57 of Act XX of 1949 on the Constitution of the Republic of Hungary (hereafter: Constitution) the right to defence is a constitutional fundamental right, and guaranteeing that is the State's public duty throughout the whole criminal procedure. The defence counsel performs a public duty throughout the whole criminal procedure in order to guarantee a constitutional fundamental right, irrespective of whether he/she acts on the basis of an appointment or a retainer, and it is absolutely irrelevant from this aspect who finances his/her activities. In addition, it is also irrelevant how the subtasks related to performing this public duty are divided between the investigation authority and the defence counsel. In this regard the applicant referred to the case-law of the Constitutional Court of the Republic of Hungary, along with the Convention and the case-law of the European Court of Human Rights. Furthermore, the applicant submitted in the request for judicial review that the number of appointments – which appointments are made by the respondents' decisions – is a public interest data available to the respondents, which they produce and which come into being as a result of their activity; and that the disclosure of the data by the respondents would not mean a disproportionate burden for them, the latter not being disputed by the first instance decision either. The applicant argued that although the names of the ex officio defence counsels guaranteeing the right to defence and performing a so-called "other public duty specified under the law", and the number of appointments they attend to is personal data (since they may be linked to the defence counsels), but they qualify as public data of public interest. The legal representative of the HHC emphasized that the criteria "prescribed by law" as required by Article 2 Point 5. of Data Act 1992 is fulfilled by Article 19 (4) of Data Act 1992 itself when it sets out in a general manner that unless otherwise provided by law, every personal data of persons performing public duties shall, inasmuch as they are related to their duties, constitute public data of public interest. Thus, according to the request for judicial review, the second instance court was wrong when it failed to consider as public interest data the names of ex officio appointed defence counsels and the number of their appointments due to the lack of a separate legal provision which would define the activity of the defence counsel a public duty. The legal representative of the applicant stated the following: if it is verified that the activity of ex officio appointed defence counsels is a public duty, "than it is also certain that the name of ex officio appointed defence counsels and the number of the cases undertaken by them relate to their task, since maybe nothing is in a more direct connection with a given public duty than the fact as to who performs it and in what quantities".

In the request for judicial review the legal representative of the plaintiff submitted that the plaintiff's standpoint is also supported by the statement of the Hungarian Bar Association's president, submitted to the court in the course of the lawsuit earlier on; and also informed the Supreme Court that as of the date of submitting the request for judicial review, 18 police headquarters and five courts considered the data request made by the respondent as well-founded, the aim of the data request for that matter being the continuation of the scientific research aimed at improving the system of ex officio appointments, ongoing for years.

**In their counter-request submitted as respondents, dated 13 September 2010, the Debrecen Police Headquarters and the Hajdú-Bihar County Police Headquarters** asked the Supreme Court to uphold the second instance court decision, claiming that in their view the Hajdú-Bihar County Police Headquarters argued in its decision in a well-founded manner that the activities of the defence counsel differentiate both in person and in terms of tasks from the public duty of the

Police, defence counsels “not performing a State or municipal task defined by law, and the State has not delegated its public duty [to the defence counsels]”.

**In its decision Pfv.IV.20.901/2010/4., dated 15 September 2010, the Supreme Court upheld the final decision of the Hajdú-Bihar County Court.** The Supreme Court examined whether defence counsels qualify as other persons performing a public duty. The court elaborated that – in accordance with the recommendation of the Data Protection Commissioner [Ombudsperson] nr. 1234/H/2006. – according to its standpoint “it may be decided exclusively on the basis of the provisions of Data Act 1992 whether a given person qualifies as a person performing a public duty. Exclusively such persons qualify as persons performing public duty who have independent powers and competences – provided that they do not qualify as a body defined in Article 19 (1) of the Data Act 1992.” In the reasoning of its decision the Supreme Court acknowledges that guaranteeing the right to defence is the duty of the State. According to the reasoning, the latter is fulfilled by the court, the prosecutor’s office and the investigation authority by guaranteeing the right to present arguments for the defence and by appointing the defence counsel in the instances described in Articles 46 and 48 of the CCP; and “by that they fulfil the public duty they are entrusted with; thus performing the public duty is terminated by the appointment of the defence counsel. After the appointment, although it also serves a public purpose, the activity of the defence counsel is a private activity. The defence counsel cannot be considered an “other person performing public duty”, since the defence counsel does not have powers and competences specified under the law. The fact that the different procedural laws establish rights and obligations for the person performing the defence in the course of the criminal procedure obviously cannot be considered as the law specifying powers and competences. The CCP sets out obligations exclusively for the authorities in relation to guaranteeing the right to defence.” On the basis of the above arguments the Supreme Court came to the conclusion that the names of defence counsels and the number of their appointments per person is personal data, and even though the respondents qualify as data controllers with regard to these data, they cannot be obliged to disclose these personal data.

## **II. STATEMENT OF ALLEGED VIOLATIONS OF THE CONVENTION AND/OR PROTOCOLS AND OF RELEVANT ARGUMENTS**

In the view of the applicant Hungarian Helsinki Committee (HHC) the police headquarters and the proceeding courts violated the applicant’s rights under Article 10 of the Convention when the Debrecen Police Headquarters and the Hajdú-Bihar County Police Headquarters refused to disclose the name of defence counsels appointed in their area of jurisdiction and in the cases falling under their mandate in 2008, and the number of appointments as divided by the attorneys at law, and when the second instance court and the Supreme Court did not oblige the police headquarters to disclose the data.

The applicant submits that since according to the text of the Convention, “everyone” is entitled to the rights enshrined in Article 10, and based on the case-law of the Court, the HHC as a non-governmental organisation may claim the violation of its rights enshrined in Article 10.

### **1. The right to access to public interest data under Article 10 of the Convention**

According to Article 10 of the Convention, everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Although Article 10 of the Convention does not include any reference to the right to “seek” information, and the text of the Convention expressly uses only the words “receive” and “impart”, according to the case-law of the Court Article 10 also covers the right to seek information – this was first acknowledged by the Court in the *Dammann v. Switzerland* case (Application no.77551/01, Judgment of 25 April 2006). In connection with the *Társaság a Szabadságjogokért v. Hungary* case (Application no. 37374/05, Judgment of 14 April 2009, 35. §), the Court stated that its case-law has in the past years advanced towards a broader

interpretation of the notion of “freedom to receive information” and thereby towards the recognition of a right of access to [public] information. [see: *Sdružení Jihočeské Matky v. the Czech Republic* (dec.), no. 19101/03, 10 July 2006)], while in the *Társaság a Szabadságjogokért v. Hungary* case the Court acknowledged that Article 10 of the Convention protects the right of access to public interest data. On the basis of the above the applicant is on the view that the refusal to disclose the data requested and that the proceeding courts did not oblige the police headquarters to disclose the data, restricted the right of access to public interest data, and that the restriction concerns the right included in Article 10 of the Convention.

### *1.1. The obligations of the State regarding the access to public interest data*

The Court also stated earlier on among others in the *Guerra and Others v. Italy* case (Application no. 116/1996/735/932, Judgment of 19 February 1998, 53. §) that the freedom to receive information cannot be construed as imposing on the Member States of the Convention positive obligations to collect and disseminate information of their own motion [see also: *Roche v. the United Kingdom* (Application no. 32555/96, 19 October 2005, 172. §)]. The latter consideration established by the Court appears also in the case *Sdružení Jihočeské Matky v. the Czech Republic*, in which the Court emphasized that the data requested by the applicant non-governmental organisation were at the disposal of the authorities in the form of documents, thus there was no need for separate data collection in order to comply with the data request, and there was no need for creating new data either. In addition, in the *Sdružení Jihočeské Matky v. the Czech Republic* case the Court emphasized the circumstance that the applicant non-governmental organisation submitted a request to receive the data. According to the above judgment, when deciding upon the applicability of Article 10, thus whether the applicant expected the Member State to act proactively or not, it is relevant – if not of decisive importance – whether the applicant has submitted a data request or not. Thus, in terms of the applicability of Article 10 it is relevant whether the case concerns the refusal of a submitted data request, or the omission of the State to disseminate information of its own motion.

The case underlying the present application fulfils all of the above requirements, and, consequently, Article 10 of the Convention is applicable in the case by all means. Firstly, the applicant did not expect the authorities to act proactively, but submitted a clear data request to the Debrecen Police Headquarters and the Hajdú-Bihar County Police Headquarters, containing a concrete question, which was however refused by them. In addition, it is clear that the data requested were at the disposal of the organs approached, in such a way that no further data collection would have been necessary to disclose them. This is on the one hand supported by the fact that the respondents admitted already at the first instance court hearing that disclosing the data from the “RoboCop” system would be feasible even within the 15-day deadline established by Article 21 (2) of the Data Act 1992. Secondly, it shall be highlighted that in the framework of the HHC’s project “Steps Towards a Transparent Appointment System in Criminal Legal Aid” finally altogether 22 police headquarters complied with the data request without being obliged to do so by a court, and the lawsuits initiated with the aim of acquiring the data ended with the disclosure of the data. It has to be added that many police headquarters disclosed the data to the applicant within the 15-day deadline, making apparent not only that the data are not only at the disposal of the police bodies and are processed by them, but also that complying with the data request does not require lengthy or large efforts, or efforts entailing disproportionate workload on behalf of the state authorities.

## **2. Interference with the right of access to public interest data**

### *2.1. Whether the interference was prescribed by law*

In the view of the applicant the authorities did not act in line with the respective legal provisions when they refused to disclose the data or failed to order their disclosure, thus the interference cannot be considered as prescribed by law. As the applicant elaborated on more times in the course of the lawsuit, according to its standpoint ex officio appointed defence counsels qualify as “other persons performing public duty” according to Article 19 (4) of the Data Act 1992, thus their personal data related to this duty/power is public data of public interest, the access to which is governed by the provisions of the Data Act 1992 regulating access to public interest data. In the view of the applicant,



the right to defence – in line with the international obligations of the Republic of Hungary – is a constitutional fundamental right on the basis of Article 57 of the Constitution, and guaranteeing that right is the public duty of the State throughout the whole criminal procedure. Thus the defence counsel – irrespective of the fact whether he/she acts on the basis of an appointment or a retainer – performs a public duty throughout the whole criminal procedure in order to guarantee a constitutional fundamental right, thus it qualifies as an “other person performing public duty”. This standpoint is supported by the fact that according to Article 137 Point 2. e) of Act IV of 1978 on the Criminal Code the defence counsel or the legal representative qualifies as a person performing public duty in the court procedure or in the procedures of other authorities; and that the fee of ex officio appointed defence counsels is covered by the central state budget.

It has to be highlighted furthermore that the ex officio appointed defence counsel does not become a person performing a public duty and providing defence does not become a public duty because of the framework defence counsels provide defence in. Thus, in terms of the public nature of their duty it is irrelevant how the defence is realized technically: the defence counsel performing his/her duty in the Hungarian ex officio appointment system performs a public duty just as a so-called “public defender”, who works as a public servant.

The case-law of the Court also supports the conclusion that the activities of the ex officio appointed defence counsel qualify as a public duty. In the *Artico v. Italy* case (Application no. 6694/74, Judgment of 13 May 1980) the Court laid down that the State does not fulfil its obligation enshrined in the Convention by the mere nomination [of the ex officio appointed defence counsel] – instead, the assistance provided by the ex officio appointed defence counsel shall be effective, his/her incidental omission or flawed acts may be attributable to the State, and the State shall intervene if it detects the latter. Even though in the *Kamasinski v. Austria* case (Application no. 9783/82, Judgment of 19/12/1989) the Court refined his standpoint, setting out that the State cannot be held responsible for every shortcoming on the part of the ex officio appointed defence counsel, it made it also clear that if the ex officio appointed defence counsel manifestly fails to carry out its task, or his/her failure is brought sufficiently to the attention of the authorities, the responsibility of the State can be established. In the *Czekalla v. Portugal* case (Application no. 38830/97, Judgment of 10/10/2002) for example the defence counsel who was appointed ex officio to provide representation to the applicant lodged the appeal against the decision convicting the applicant improperly, and the second instance Portuguese court dismissed the appeal without looking into its merits, so the Court established due to the omission of the ex officio appointed defence counsel that there had been a violation of Article 6 (3)(c) of the Convention and established the responsibility of the Portuguese state for that. The above cases also strengthen the view that the activities of the ex officio appointed defence counsel are in close connection with the responsibility of the State to ensure the right to effective defence. The decision of the Supreme Court issued in the present case is apparently in contradiction with the above approach.

According to the standpoint of the applicant, taking into account the arguments above and its arguments presented in the course of the proceedings before the domestic courts, the interference – i.e. that the proceeding authorities restricted the right of access to data even though they would not have had a possibility to do so under the Hungarian laws – does not qualify as being prescribed by law.

## *2.2. The aim of the interference*

According to Article 10 (2), the exercise of the freedoms enshrined in Article 10 (1), since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Both the argumentation of the police headquarters and that of the second instance court and the Supreme Court show that they considered the restriction of the right [of access to public data]

necessary in order to protect the personal data of the ex officio appointed defence counsels. Thus, in terms of the text of Article 10 (2) of the Convention, “the protection of the rights of others” – more precisely, the protection of the right to respect for one’s private life, guaranteed in Article 8 of the Convention – may be identified as the aim of the interference.

### *2.3. Whether the interference was necessary in a democratic society*

Although the protection of the right to respect for one’s private life, enshrined in Article 8 of the Convention, may be accepted as the legitimate aim of restricting the access to public interest data, in the view of the applicant the interference realized in the present case does in no way comply with the last element of the test applied by the Court, as described below.

#### 2.3.1. Serving the public interest

It has to be emphasized that the aim of the HHC with the data requests was to demonstrate and prove that it is a widespread practice in the country that ex officio appointments are distributed disproportionately between the defence counsels who may be appointed, endangering the enforcement of the defendants’ right to effective defence. The HHC wanted to support with numbers based on its own data collection the presumption (established on the basis of previous research results) that at many police headquarters a large part of ex officio appointments are obtained by the same one or two attorneys or law offices, as a result of which the livelihood and practice of these attorney is dependent on the authority making the appointments. All this endangers the independence of defence counsels and the effective protection of rights, and, in addition, the selection system operates on the basis of non-public and impenetrable considerations. (As a matter of fact, the data analyzed show that the above presumption was correct, since in the case of a significant part of the police headquarters appointments were distributed in an extremely disproportionate way. At many police headquarters the same defence counsel was appointed in more than 50% of the cases, and there was even a police headquarters where the same defence counsel was appointed in 82% of the cases in the year 2008, thus, in 295 cases out of the 358.)

Through the data requests and the analysis of the data the HHC aimed on the one hand to raise the attention of the public to the structural problems in relation to the ex officio appointment system, and to carry out a dialogue with the decision-makers in order to achieve that they take steps to ensure the adequate operation of the system of ex officio appointments, serving also the enforcement of the right to effective defence, guaranteed also in the Convention. Thus, with a view to the above, making the data requested by the applicant public served a public affair, the public interest, and a matter being of interest to the public, i.e. to allow for a public, real and fact-based debate on the operation of the system of ex officio appointments, and that steps are taken to resolve the systemic problems, fostering in that way the enforcement of the right to effective defence, enshrined in Article 6 of the Convention.

#### 2.3.2. The applicant as a social watchdog

In relation to the *Társaság a Szabadságjogokért v. Hungary* case the Court stated that one of the functions of the press is the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists. The Court emphasized that it had repeatedly recognised civil society’s important contribution to the discussion of public affairs, and explained that since the purpose of the applicant *Társaság a Szabadságjogokért* is an informed public debate, and is involved as a non-governmental organisation in human rights litigation with objectives including the protection of freedom of information, it may therefore be characterised, like the press, as a social “watchdog”, thus shall be provided similar protection to that afforded to the press (27. §). Thus, according to the argumentation of the judgment, non-governmental organisations fulfil a similar function as the press when it exercises public control (i.e. acts as a public watchdog), thus acts as the guardian of democratic society [see for example: *Lingens v. Austria* (Application no. 9815/82, Judgment of 8 July 1986)].

Similarly to the above case, it may be established also in the case of the HHC that it performs social control with regard to access to justice and the right to effective defence, among others. The function

of the applicant being similar to that of the press is shown by the fact that according to section 2.3.1. of the present application it receives and imparts information being of interest to the public, and may influence and orient the public debate as an important civil expert of the field, as a source of information, and as an opinion-maker, thus it practically behaves as the media in the fields falling under its scope of activities. (We would like to refer here to applicant's wide-ranging activities aimed at enforcing access to justice and the right to effective defence, performed for many years – see Part II. 1. of the present application in this regard.) Because of all that the applicant fulfils the role of a "social watchdog" with regard to the right to effective defence, guaranteed also by Article 6 of the Convention, and facilitates that, as part of the right to freedom of expression enshrined in Article 10 of the Convention, the public may form an opinion on the matter, and that there is a possibility for a public debate, serving as a basis of a democratic society.

The fact that the operation of the system of ex officio appointments is of interest to the public, that there is a need for a public debate, and that the HHC fulfils a "social watchdog" function regarding the matter is also shown by the press appearances of the organisation's activities related to ex officio defence counsels. (See the attached list about the press appearances from the years 2009-2010.)

### 2.3.3. Information monopoly as a form of censorship

The role as a "social watchdog" also entails that the following test, emphasizing the similarity with the press, may also be applied in the present case with regard to access to information. In the *Társaság a Szabadságjogokért v. Hungary* case the Court stated that when the Constitutional Court refused to disclose the submission received by it to the *Társaság a Szabadságjogokért*, that essentially concerned an interference with the social control function – i.e. the function of a social watchdog – of the non-governmental organisation "by virtue of the censorial power of an information monopoly", rather than a denial of a general right of access to official documents (36. §). According to the standpoint of the Court, "the State's obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities" (36. §).

Applying the above to the case underlying the present application it may be stated that both the Debrecen Police Headquarters and the Hajdú-Bihar County Police Headquarters appears as an information monopoly, since as state authorities and with regard to the cases in their areas of jurisdiction and falling under their competence they dispose over data being inaccessible to the applicant without their cooperation. From the fact that the Police as the concerned state authority do not disclose the information it disposes over, it flows on the basis of the judgment in the *Társaság a Szabadságjogokért v. Hungary* case that it essentially exercises a "censorial" power by the virtue of its information monopoly with regard to the given information.

### 2.3.4. The right to respect for private life

Whereas the protection of the right to respect for private life, guaranteed in Article 8 of the Convention, may be a legitimate aim of the interference, in the present case the restriction of access to public interest data is disproportionate as compared to the legitimate aim of protecting the right to respect for private life, thus the protection of personal data, eminently when considering the general purpose of the protection of personal data. Personal data shall be protected not in itself and not for itself: the aim of its protection is the protection of the private life, the private sphere, or the privacy of the person concerned. Thus, a distinction shall be made between the protection of the private sphere and that of personal data; and personal data shall not be protected in every case, but only if it is necessary for the purposes of the protection of privacy. The same approach appeared in the *Társaság a Szabadságjogokért v. Hungary* case when the Court stated that it "finds it quite implausible" that any reference to the private life of the Member of Parliament submitting a motion to the Constitutional Court, hence to a protected private sphere, could be discerned from his constitutional complaint itself (37. §), thus it separated the protection of personal data (the motion and its content) from the protection of private life.

According to the standpoint of the applicant, taking into account that the (ex officio appointed) defence counsel performs a public duty throughout the whole criminal procedure in order to

guarantee a constitutional fundamental right, and that the appointment of the defence counsel is carried out by the court, the prosecutor's office and the investigation authority – also as part of performing a public duty –, the name of ex officio defence counsels and the number of appointments per defence counsel cannot constitute such data in order to protect which the restriction of access to public interest data would be proportionate. The data in question does not concern the private life and private sphere of the ex officio appointed defence counsel, but pertain only to fulfilling a public duty, and they concern even in the latter regard only such data which are not connected at all to the work carried out by the defence counsel regarding the given case, the quality of the defence counsel's performance, or information falling under attorney-client privilege. All of these aspects strengthen the view that it is disproportionate to restrict access to data being of interest to the public and being inevitable for the public debate claiming the protection of the private life of ex officio appointed defence counsels.

Taking into consideration all of the above, it may be concluded that restricting access to public interest data out of consideration for the right to respect for private life does not comply with the requirement of proportionality.

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In the applicant's view, on the basis of the above it may be concluded that there is no such reason due to which the refusal to comply with the data request would have been necessary in a democratic society; and the operation of a democratic society and the materialization of social control would have been actually facilitated if the information requested would have been disclosed to the applicant. Even if we accept that restricting access to data was necessary in order to protect the private sphere of ex officio appointed defence counsels, on the basis of the arguments presented in section 2.3. of the present application it may be stated that the right to respect for private life of persons performing public duty cannot justify the withholding of information in matters being of interest to the public and being of public interest, and, through that, the restriction of freedom of expression as explained below. Accordingly, in the view of the applicant it can be concluded that there has been a violation of the right of access to public interest data, enshrined in Article 10 of the Convention.

### **3. The violation of freedom of research and the freedom to hold opinions**

Freedom of expression includes the freedom to hold opinions, which in the present case may be interpreted both in relation to the applicant and to the general public. With regard to the applicant, in the present case it is a fundamental precondition for it to hold an opinion to have access to the facts on the basis of which it can hold an opinion about the operation of the system of ex officio appointments. Thus, rejecting access to data impedes the realization of the freedom to hold opinions and freedom of expression. This interpretation is supported by the Court's judgment reached in the *Kenedi v. Hungary* case (Application no. 31475/05, Judgment of 26 May 2009), in which the Court stated that in the given case the access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant historian's right to freedom of expression (43. §). Based on the logic of the latter argumentation, it may be stated with regard to the case underlying the present application that the information pertaining to the name of ex officio appointed defence counsels and the appointments received by them per year are essential for the applicant to form a well-founded opinion regarding the issue, based on real research results. Hence, ensuring the freedom of research in the present case serves as a precondition of freedom of expression and the freedom to hold opinions. If we presume that the protection of the private life of ex officio appointed defence counsels is a legitimate aim for restricting the freedom of research and the freedom to hold opinions, than, based on the argumentation in section 2.3. of the present application, it shall be concluded also with regard to the freedom to hold opinions that its restriction is not necessary in a democratic society.

At this point we have to refer again to the fact that the applicant's freedom to hold opinions serves a public interest, and, taking into account its role as a "social watchdog", the protection of its right to hold opinions contributes to the general public's access to adequate information in matters being of interest to the public, so that the general public may form a well-founded opinion and may participate

in merit in the discussion of public affairs. Formulating it in another way: the "censorial power" exercised by hindering access to the data in question does not only restrict the applicant's freedom to hold opinions, but also the public's freedom to hold opinions, and there are certainly no arguments supporting the restriction's necessity in a democratic society.

In the view of the applicant, it may be concluded on the basis of the above that there has been a violation of its freedom to hold opinions and its freedom of research, being the precondition of the former, enshrined in Article 10 of the Convention.