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**Committee on the Election of
Judges to the European Court of
Human Rights**

Parliamentary Assembly

Council of Europe

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I. Introduction

The Helsinki Foundation for Human Rights (hereinafter referred to as: 'Foundation' or 'HFHR') would like to draw the attention of the Committee on the Election of Judges to the European Court of Human Rights (hereinafter referred to as: 'Committee') to the issue of compatibility of the Polish national process of selection of the candidates for the position of judge of European Court of Human Rights (hereinafter referred to as: 'ECtHR' or 'the Court'), with the standards that have been set out by the Council of Europe. Group of organisations¹, the HFHR included, have submitted a similar letter to the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights at the previous stage of the procedure². The HFHR is aware that the Advisory Panel relays its conclusions to the Committee, nevertheless the Foundation decided to additionally address this letter to the

¹ The group consisted of the following organizations: the Helsinki Foundation for Human Rights, the Warsaw Bar Association of Advocates, the Polish Judges' Association "Iustitia", the Polish Society of Anti-Discrimination Law, the Federation for Women and Family Planning, the Citizens Network Watchdog Poland, the Advocates' Association "Defensor Iuris", the Professor Zbigniew Holda Association.

² Letter of 10 November 2021 is available at: <https://www.hfhr.pl/wp-content/uploads/2021/11/Pismo-do-panelu-do-adczege.pdf> (accessed: 15.12.2021).

Committee to provide it with information on the remaining shortcomings of the Polish national selection procedure. In addition, the HFHR would like to put forward important information regarding the Polish selection procedure that was provided by the Ministry of Foreign Affairs only after the aforementioned letter was submitted to the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights.

In March 2021³, the Helsinki Foundation for Human Rights, the Polish Bar Council and the National Bar Association of Attorneys-at-Law addressed a similar letter to the Committee after the first list of three candidates was submitted by the Polish Government. The Foundation is certain that the Committee is familiar with objections raised in that letter. However, the HFHR would like to specifically draw the Committee's attention to issues that still remain as of today and pose a problem to the Polish national process of selection of candidates for the position of Judge of the ECtHR.

The significance of effective ECtHR functioning for the entire European human rights system cannot be overstated. The international human rights protection system becomes even more valuable when the domestic judiciary is unable to offer adequate protection for citizens at all times, e.g. because its independence has been diminished by government action. It has been proven throughout years of ECtHR functioning that Polish citizens (among others) effectively assert their rights by bringing actions before the Court and do so willingly –in 2020 alone, 1628 applications were submitted to the ECtHR against Poland⁴.

The HFHR shares the Committee of Ministers' belief expressed in the Preamble of the Committee of Ministers' Guidelines on the selection of candidates for the post of judge at the ECtHR, adopted on 28 March 2012, that national procedures play a fundamental role in the entire process of electing ECtHR judges. Furthermore, the Foundation fully agrees that a correctly conducted selection of candidates at the national level means that any subsequent process will lead to the election of an appropriate and highly qualified candidate.

II. Events after the rejection of the Polish list of candidates

On 14 April 2021 the Committee recommended for the first list of candidates submitted by the Polish Government to be rejected in view of the national selection procedure not being

³ The letter was sent by the Helsinki Foundation for Human Rights, the Polish Bar Council and the National Bar Association of Attorneys-at-Law on 31 March 2021.

⁴ Available at: https://www.echr.coe.int/Documents/Stats_analysis_2020_ENG.pdf (accessed: 15.12.2021).

in line with the standards required by the Assembly and the Committee of Ministers. On 19 April 2021 Parliamentary Assembly rejected the list on the procedural grounds. Consequently, the Helsinki Foundation for Human Rights decided to once again address Polish Minister of Foreign Affairs. In the letter of 23 June 2021 the HFHR upheld all prior objections raised in the letter of 21 May 2020⁵ and highlighted in particular the need to:

- safeguard expert and apolitical character of the national selection committee (*Zespół ds. wyłonienia kandydatów na urząd sędziego Europejskiego Trybunału Praw Człowieka*), by ensuring *inter alia* that the committee members represents the executive, legislative, judiciary, legal professions and NGO's engaged in human rights protection;
- ensure gender-balanced composition of the selection committee;
- allow independent observers to monitor interviews conducted by the selection committee with potential candidates;
- ensure that three candidates selected by the committee will be publicly interviewed in the Polish Parliament.

Unfortunately, most of the abovementioned postulates were ignored by the Polish Government. Issues arising from that fact will be discussed in the later part of this letter. However, at this point it should be noted how domestic procedure was changed by the ordinance issued by the Minister of Foreign Affairs on 7 July 2021⁶. On the basis of this ordinance, domestic procedure allows now independent observers to monitor interviews conducted by the selection committee with potential candidates. Every NGO engaged in human rights protection can elect one observer.

III. Issues still remaining

The national selection committee

In the HFHR's opinion, the biggest issue with the Polish national process of selection of the candidates for the position of Judge of the ECtHR is that the national selection committee

⁵ The letter available at: https://www.hfhr.pl/wp-content/uploads/2020/05/20200521_115739.pdf (accessed: 15.12.2021).

⁶ See <https://www.gov.pl/web/dyplomacja/regulacje-prawne> (accessed: 15.12.2021),

responsible for determining the list of three candidates is significantly vulnerable to political influence. Even though this problem was pointed out in all letters addressed to the Minister of Foreign Affairs and in letters addressed to the Advisory Panel and the Committee, Polish Government still refuses to change the composition of the selection committee in the recommended manner. Listed below are the current members of the abovementioned committee:

1. dr hab. Piotr Wawrzyk – Secretary of State in Ministry of Foreign Affairs – head of the committee;
2. dr hab. Paweł Sobczyk – appointed by the Minister of Justice;
3. dr Izabela Hasińska – local representative of Polish SME envoy (*pełnomocnik terenowy Rzecznika Małych i Średnich Przedsiębiorców*) – appointed by the Minister of Foreign Affairs;
4. Agnieszka Gracz – representative of the Centre for Supporting Initiatives for Life and Family Foundation (*Fundacja Centrum Wspierania Inicjatyw dla Życia i Rodziny*) – appointed by the Minister of Foreign Affairs;
5. dr hab. Przemysław Saganek – appointed by the President of the General Counsel to the Republic of Poland;
6. dr Krzysztof Szczucki – President of the Government Legislation Center – appointed by the Head of the Chancellery of the Prime Minister;
7. Jan Sobczak – Minister of Foreign Affairs’ representative for the ECtHR’s proceedings – appointed as the committee’s secretary (without right to vote).

In the HFHR’s opinion, the current selection committee is still burdened with similar flaws as mentioned in previous letters – all of its members are a part of, or appointed by, the Polish executive (or entities subordinate to the executive). First and foremost, it should be highlighted that the head of the selection committee – Mr Wawrzyk – is a member of the ruling Law and Justice (*Prawo i Sprawiedliwość*) party. Secondly, although undeniably some academics were selected to the committee, they were appointed in an unclear process⁷. Furthermore, it is worth pointing out that Ms Gracz represents an ultraconservative NGO, with ties to the TFP

⁷ When asked about the criteria according to which members of the selection committee were selected, the Ministry of Foreign Affairs provided a generic response by referring to the Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights of March 28 2012, section IV.1.

(Tradition, Family, Property) movement⁸. On Centre for Supporting Initiatives for Life and Family Foundation's website one can find out about their campaigns such as e.g. "Enough with homoaggression" („*Dość homoagresji*")⁹ where this organization appeals to President of Warsaw to withdraw his support for the "LGBT+ Declaration"¹⁰ or "Stop LGBT's legal offensive" („*Stop ofensywie prawnej LGBT*")¹¹ where the organization states that "EU wants to force Poland to recognize "rights" of LGBT persons" („*UE chce narzucić Polsce uznanie „praw" osób LGBT*")¹². In the Foundation's opinion it is particularly saddening, that a representative of such organization was appointed as a member of the selection committee responsible for determining the list of three candidates for election as Judge to the ECtHR.

What is more, one should also note that only two female members are a part of the national selection committee, which means that the gender-balanced composition requirement has not been met.

In addition, some of the members of the selection committee do not possess appropriate knowledge of both of the Court's official languages which would allow them to assess answers provided by potential candidates in one of those languages during the interviews (more on that issue in a latter part of this letter).

The HFHR fully agrees with the Steering Committee for Human Rights' view that political influence (or the appearance thereof) over the national selection process is one of the most crucial issues of this matter¹³. Parliamentary Assembly of the Council of Europe similarly urged the governments of member states to set up 'appropriate national selection procedures to ensure that the authority and credibility of the Court are not put at risk by ad hoc and politicized processes in the nomination of candidates'¹⁴. The Foundation would like to reiterate that it understands that even the procedures in which domestic selection committee consists solely of the members of the executive are not considered as automatically erroneous. The HFHR is also

⁸ See e.g. <https://wiadomosci.onet.pl/tylko-w-onecie/ordo-iuris-popycha-rzad-do-wypowiedzenia-konwencji-antyprzemocowej-kulisy/g5eyyxw> or <https://wiadomosci.onet.pl/swiat/zalozyciele-ordo-iuris-finansuja-millionami-konserwatywna-krucjata-na-swiecie/fhh4rqw> (accessed: 04.11.2021).

⁹ See <https://czir.org/projekt/aktywisci-lgbt-sprofanowali-figure-chrystusa-zdecydowana-reakcja-centrum-zycia-i-rodziny/> (accessed: 15.12.2021).

¹⁰ Written and negotiated by the Love Does Not Exclude (*Miłość Nie Wyklucza*) Association's initiative, the Declaration guarantees the fulfilment of some of the basic needs of the LGBT+ community; see more at: <https://mnw.org.pl/en/>.

¹¹ See <https://czir.org/projekt/ue-chce-narzucic-polsce-uznanie-praw-osob-lgbt-centrum-zycia-i-rodziny-interweniuje-u-premiera/> (accessed: 15.12.2021).

¹² *Ibidem*.

¹³ Report of the Steering Committee for Human Rights (CDDH), *Selection and election of judges of the European Court of Human Rights*, 2017, p. 14, available at: <https://rm.coe.int/report-on-the-process-of-selection-and-election-of-judges-of-the-europ/1680770f9f> (accessed: 15.12.2021).

¹⁴ Parliamentary Assembly Resolution 1646(2009).

aware that the discussed procedural issue has been present when Poland submitted the list of candidates in 2012. However, the Foundation strongly believes that recent actions of the Polish government, and the dangers they pose to the rule of law in Poland, should be taken into consideration in that regard. In the HFHR's opinion the selection committee's current composition fails to ensure that the candidate selection process is effectuated in accordance with the Council of Europe's standards and guidelines. In particular, it fails to ensure that the choices of the candidates are made solely on the basis of merit and not politically motivated.

Transparency

One of the main objections raised against the national selection process in Poland was that the domestic procedure, in its current form, does not fulfil the requirement of sufficient transparency. Except the introduction of observers into the procedure, which was undoubtedly a positive step (more about the activity of the observers in the later part of this letter), no other formal guarantees were implemented in this regard.

However, it should be noted that the actual practice of the Ministry of Foreign Affairs has improved significantly in this area. Since the rejection of the Polish list in April 2021, the Ministry has been publishing extensive information about the procedure as well as events and decisions during different stages of the whole process¹⁵.

Nevertheless, while monitoring the procedure, the Helsinki Foundation for Human Rights is still facing difficulties when trying to access data not published on the Ministry of Foreign Affairs' website. Not only responses to the Helsinki Foundation for Human Rights' access for public information requests were on several occasions provided after statutory, two-week deadline¹⁶ or/and answers were of evasive nature, but also there were some instances when the Ministry behaved in an unjustified manner, which could be considered *mala fide* – e.g.:

- The Helsinki Foundation for Human Rights was trying to obtain information on the project of the amendment to the Minister of Foreign Affairs' ordinance of 13 January 2012 (*Zarządzenie nr 1 Ministra Spraw Zagranicznych z dnia 13 stycznia 2012 r. w sprawie powołania Zespołu do wyłonienia kandydatów na urząd Sędziego*

¹⁵ See <https://www.gov.pl/web/dyplomacja/aktualnosci3> (accessed: 15.12.2021).

¹⁶ See the Act of 6 September 2001 on access to public information (*Ustawa z dnia 6 września 2001 r. o dostępie do informacji publicznej*), consolidated text: Journal of Laws of 2020, item 2176, as amended; available at: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20011121198/U/D20011198Lj.pdf>

Europejskiego Trybunału Praw Człowieka w Strasburgu) by sending access for public information request on 18 June 2021. Potentially the Helsinki Foundation for Human Rights wanted to be able to give its opinion on the project. The Ministry of Foreign Affairs responded on 7 July 2021 by not providing the project and justified it by informing that the project is still not final and as such it is not a public information. On 9 July 2021 the Minister of Foreign Affairs published the ordinance amending the ordinance of 13 January 2012. The said ordinance was issued on 7 July 2021, that is on the same day the Ministry informed the HFHR that the project of amendment is still not final.

- During the current domestic process, selection committee asked potential candidates whether they agree to their names being published. Despite, some of the candidates agreeing, the Ministry of Foreign Affairs did not publish any information in this regard. Independent observers found out about this fact during the interviews and upon enquiring were informed by the selection committee that they should make an access for public information request with regards to names of the candidates that had given the abovementioned consent. Eventually, in response to the access for public information request, the Ministry provided the names (prof. dr hab. Jacek Barcik, prof. dr hab. Ireneusz C. Kamiński, prof. dr hab. Marek Piechowiak, Judge dr hab. Piotr Przybysz, prof. dr hab. Arkadiusz Radwan, prof. dr hab. Aleksander Stępkowski, Judge Arkadiusz Ziarko) on 26 October 2021 – that is after the selection committee interviewed all of the potential candidates.

Observers and the manner in which interviews were conducted

As mentioned above, implementation of independent observers into the Polish selection procedure should be undoubtedly considered an improvement. According to § 6a of the Minister of Foreign Affairs' ordinance of 13 January 2012 (as amended by the ordinance of 2 October 2020 and the ordinance of 7 July 2021) NGOs engaged in protecting human rights can appoint one observer each to be present during the interviews. On this basis 15 entities, the HFHR included, applied to the Ministry of Foreign Affairs regarding the appointment of an observer. Initially there were some legal ambiguities regarding the restrictiveness of the confidentiality clauses observers had to sign, thus a group of 11 observers¹⁷ addressed a letter to the head of

¹⁷ Those observers represented following entities: the Helsinki Foundation for Human Rights, the Federation for Women and Family Planning, the National Bar Association of Attorneys-at-Law, the Polish Society of Anti-Discrimination Law, Human Rights Section of the Warsaw Bar Association of Advocates, the Citizens Network

the selection committee, in this regard¹⁸. Interviews were conducted by the selection committee on 20 and 21 October 2021. After the interviews, during which observers were unable to ask any questions, the same group of 11 observers addressed a letter to the Minister of Foreign Affairs in which they pointed out series of issues noticed during the observations¹⁹. Listed below are some of the most important comments reported by the observers:

- Observers were sitting in another room than the one interviews were conducted in. They could only watch a live transmission of the interviews, which hindered their ability to make detailed observations.
- Observers reported series of issues regarding the linguistic aspect of the interviews – e.g.:
 - During the interviews one question was supposed to be asked in English and one in French. Interviewees could answer in any of the Court’s official languages²⁰. However, observers witnessed a case in which one of the interviewees could not understand the question asked in one of the official languages, question was asked once again in the other official language and after this also did not help, selection committee provided some explanation in Polish. Observers noted that it is not possible to verify in such manner whether potential candidate meets appropriate language requirements (that is a proficiency in one of the official languages and at least a passive knowledge of the other)²¹.
 - On the basis of selection committee member’s behaviour, observers raised a question whether all of the abovementioned members possess at least a passive knowledge of both of the Court’s official languages.

Watchdog Poland, the Advocates’ Association “Defensor Iuris”, the Prof. Zbigniew Holda Association, the Association for Legal Intervention, the Polish Judges’ Association “Iustitia”, the Judges’ Association “Themis”.

¹⁸ The letter available at: https://www.lfhr.pl/wp-content/uploads/2021/10/2021_10_MSZ.pdf (accessed: 15.12.2021).

¹⁹ Whole letter available at: https://www.lfhr.pl/wp-content/uploads/2021/10/2021_10_MSZ_29102021.pdf?fbclid=IwAR2UY-NvC8jo00sA5wKCIXDcjdZmLzO1Ac8GFFH_29Xg7cL9Q7JLd11lok (accessed: 04.11.2021).

²⁰ See e.g. <https://www.gov.pl/web/dyplomacja/decyzje-podjete-na-pierwszym-posiedzeniu-zespolu-dswyлонienia-kandydatow-na-urzed-sedziego-etpc> (accessed: 04.11.2021).

²¹ See e.g. Report of the Steering Committee for Human Rights (CDDH), *Selection and election of judges of the European Court of Human Rights*, 2018, p. 28; available at: <https://rm.coe.int/selection-and-election-of-judges-of-the-european-court-of-human-rights/16807b915e> (accessed: 04.11.2021).

- Observers noted also that on 20 and on 21 October, members of the selection committee were asking different questions in foreign languages. Observers pointed out that questions' difficulty level undeniably varied and as talking in any language other than the mother tongue always poses an additional challenge (especially when talking about such complex matters) they concluded that this could result in interviews being conducted in unequal manner towards all of the potential candidates (because of the different difficulty level).
- During the interviews observers were unable to establish whether members of the selection committee were making any personal notes concerning answers given by the interviewees. They were also unable to establish whether members of the selection committee were provided with standardized evaluation sheets for every questions which would allow them to objectively assess every answer and base the final score achieved by a potential candidate on the sum of "points" collected by him/her.
- Observers pointed out a significant passiveness of the members of the selection committee during the interviews (e.g. no follow-up questions being asked, no reaction when interviewees' were giving answers irrelevant to posed questions) which, in their view, may have caused potential candidates' knowledge not being verified properly and thoroughly.
- Observers noted that, to their knowledge, interviews were not recorded, which would make checking the accuracy of the minutes *de facto* impossible.
- Observers questioned whether in one case, in which an interviewee connected with the selection committee via videoconference, the selection committee took up appropriate measures to ensure a formal fairness of this interview. Observers do not know whether the room, in which interviewee sat in, was checked beforehand (in case of someone else being in the room). Furthermore, observers pointed out that the interviewee had not been obliged to use a software which would prevent him/her from using a computer for any other purpose than the connection during the interview. Observers stated also that the quality of the video connection was so low, it was impossible to properly verify interviewee identity. In addition, the manner in which the interviewee was giving his/her answers raised observers' serious suspicions whether he/she was doing it fairly (e.g. clicking sounds prior to

answering, long pauses before an answer which may have been indicative of interviewee reading something, an answer in foreign language phrased in a way that has little to do with proper grammar but is similar to phrasing often provided by automatic translators). Observers pointed out that even such alarming behaviour did not elicit selection committee's reaction and the interviewee was allowed to present his/her answers until the time for the interview elapsed.

Information acquired subsequent to the submission of the letter to the Advisory Panel

The Ministry of Foreign Affairs provided information on some of the topics raised by the observers while replying to the HFHR's access for public information request of 26 October 2021²². It should be noted that this information was provided by the Ministry after statutory, two-week deadline and after the group of organisations including the Foundation submitted the letter to the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights.

The Ministry of Foreign Affairs admitted that only four²³ of the selection committee members possess knowledge of French language sufficient to assess answers provided during the interviews in that language. The Ministry claimed that, having considered that all selection committee members possess sufficient proficiency in English, the selection committee – as a whole – is qualified to carry out both substantive and linguistic assessment. The HFHR disagrees with that view. On the basis of the Minister of Foreign Affairs' ordinance of 13 January 2012 (as amended by the ordinance of 2 October 2020 and the ordinance of 7 July 2021), especially § 2 of the Attachment no. 2 to the ordinance, one must conclude that each member of the selection committee (apart of the committee's secretary) have an individual right to vote in a process of selecting the candidates²⁴. Having considered the above, the HFHR believes that such decision should be made by a member of the selection committee based on an individual assessment of a potential candidate – assessment of potential candidate's qualifications and answers provided during the interview. In the Foundation's opinion, member of the selection committee must be able to make such assessment without the need to rely on other selection committee members. Unfortunately, this was not the case during the interviews conducted on 20 and 21 October 2021 as due to their insufficient qualifications some of the selection committee members were unable to assess answers provided in French on their own.

²² The Ministry of Foreign Affairs replied via an email on 10 November 2021.

²³ While two of them are proficient in French.

²⁴ This is not contradicted by the fact that the committee can also select candidates by consensus.

While recognizing the standards established thus far by the Parliamentary Assembly and the Committee of Ministers of the Council of Europe, the HFHR believes that, as a logical consequence of the responsibilities the members of the selection committee are supposed to fulfil (*inter alia* carrying out substantive and linguistic assessment of answers provided during interviews), they should possess at least a passive knowledge of both of the Court's official languages.

On the other hand, the Ministry of Foreign Affairs informed the Foundation that the Ministry provided the selection committee members with standardized evaluation sheets²⁵ (as an auxiliary tool) as well as with relevant legal acts, short summary regarding minimal requirements for the candidates for the position of Judge of the ECtHR, short summary regarding minimal requirements for the position of Judge of the Polish Supreme Court, Constitutional Tribunal or Supreme Administrative Court and a commentary on the Article 21 of the Convention and the concept of the "high moral character".

IV. Conclusions

After taking adequate steps domestically, the HFHR has once again decided to address the Committee. The HFHR continually believes that it is absolutely vital that the Judges of the ECtHR are of high moral character and either possess the qualifications required for appointment to high judicial office or are jurisconsults of recognised competence, as stated in European Convention on Human Rights.

After a year and a half since the first letter on this matter was sent to the Minister of Foreign Affairs some improvements in the way the described process is effectuated are definitely visible. However, the HFHR must reiterate that unfortunately the biggest issue still remains – the national selection committee responsible for determining the list of three candidates, and as a result the domestic procedure as a whole, is significantly vulnerable to political influence. In the Foundation's opinion, as long as this problem is not properly addressed, it will be hard to carry out the domestic selection procedure in a manner compatible with the standards set out by the Council of Europe.

²⁵ The Ministry of Foreign Affairs sent a blank evaluation sheet as an attachment to the reply of 10 November 2021.

The Helsinki Foundation for Human Rights sincerely hopes that the Committee will find this letter helpful in its works.

On behalf of the Board of the Helsinki Foundation for Human Rights,



Piotr Kłodoczyński, Ph.D.

Piotr Kłodoczyński
Vice-president of the Board