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# 9 The *Baka* Case – The Unbearable Price of Individual Justice

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On May 27, 2014, a chamber of the European Court of Human Rights delivered its judgment in *Baka v. Hungary*,[1] the first case ever decided by the permanent Court[2] where it had to evaluate the compatibility of a Council of Europe member country's constitutional reform with some provisions of the European Human Rights Convention.[3] The Court found unanimously that the early termination of the applicant's, Mr. András Baka's mandate as President of the Hungarian Supreme Court and the National Council of Justice, undertaken in the midst of Hungarian Constitutional reform, violated Articles 6(1) and 10 of the European Convention on Human Rights.[4] In this judgment unfolds the fundamental conflict written into the international human rights protection system – whether the sovereign power of any country to pass constitutional legislation prevails *vis-a-vis* its international obligation to protect fundamental rights.[5] The judgment is also significant as the international judges adopted it towards one of 'their own' – Mr. Baka served for

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1 *Baka v. Hungary,* Appl. No. 20261/12, ECtHR judgment of May 27, 2014. The judgments and decisions of the European Court of Human Rights are available through www.echr.coe.int.

2 Protocol 11 to the European Human Rights Convention set up a single permanent Court, as of November 1, 1998, in place of the previous two-tier system of a Court and a Commission.

3 Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, ETS No. 5, 213 UNTS 222.

4 Art. 6(1) 1st sentence provides:
'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'
Art. 10 (1) provides:
'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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.'

5 For discussion about every country's right to self-determination and acceptable restrictions to its sovereignty *see*: A. Avbely, 'European Court of Justice and the Question of Value Choices: Fundamental Human Rights as an Exception to the Freedom of Movement of Goods', *Jean Monnet Working Paper* 6 (2004); Raul Narits, 'The Republic of Estonia Constitution on the Concept and Value of Law', VII *Juridica International* (2002), pp. 10-16.

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seventeen years (1991-2008) as a judge at the European Court of Human Rights in Strasbourg.[6]

Mr. András Baka was elected as President of the Supreme Court by the Parliament of Hungary on June 22, 2009, for a six-year term. In this capacity he was also President of the National Council of Justice, where his explicit statutory obligation was to express opinions on legislative initiatives that affected the entire judiciary. After the formation of the Fidesz-Hungarian Civil Union following the 2010 April parliamentary elections, a program of comprehensive constitutional reform in Hungary was launched.[7] This reform involved judicial matters such as annulling certain judicial decisions through legislation, reducing the mandatory retirement age of judges from seventy to sixty-two, as well as amending certain judicial procedures and making changes to the organization of the judicial system. The applicant was publicly and highly critical of these proposed changes, addressing together with the presidents of Hungarian regional courts a communiqué to the Hungarian and European public against the lowering of the mandatory retirement age of the judges and using for the first time in Hungarian judicial history the prerogative of the President of the Supreme Court to challenge before the Constitutional Court a legislative change – the applicant challenged the Attorney General's right to establish court competence – on grounds of unconstitutionality and violation of Hungary's international obligations. The Hungarian Government and Parliament proceeded with the legislative proposal nevertheless, finding the applicant's influence 'unfortunate'.[8]

Article 25(1) of the new Fundamental Law of Hungary changed the name of the Supreme Court to *Kúria* (hereinafter: Curia), which is the historical Hungarian name for the highest court. The Transitional Provisions of the Fundamental Law of Hungary Bill, adopted as a Cardinal Act which requires a two thirds majority, was adopted by the Parliament on December 30, 2011, and was published the following day. According to section 11(2), the mandates of the President of the Supreme Court and the President and members of the National Council of Justice were terminated with the coming into force of the Fundamental Law, which was the following day on January 1, 2012. Article 1 of the Transitional Provisions Bill separated the functions of the President of the former Supreme Court and National

6 The applicant was also elected by the General Assembly of the Network of the Presidents of the Supreme Judicial Courts of the European Union as its President for 2011-2013.

7 The constitutional reform led to the adoption of the Fundamental Law of Hungary, which entered into force on January 1, 2012. This Fundamental Law succeeded the previous Hungarian Constitution of 1949. The international community has been predominantly critical of the new Fundamental Law – *see*, for example, the Opinion on the Fundamental Law of Hungary, adopted by the Venice Commission at the 87th Plenary Session – CDL-AD (2011)016, or the 6 November 2012 judgment of the European Court of Justice in Case C-286/12, noting that Hungary had failed its obligations under Council Directive 2000/78/EC by lowering the mandatory retirement age of judges, prosecutors and notaries.

8 The term 'unfortunate influence' by a member of the judiciary over the legislative process was used on March 08, 2011, press conference by Chairman of the Parliament's Constitutional Committee – *see Baka v. Hungary* judgment, Para. 12.

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Judicial Office, built on the reasoning that these two institutions have separate functions. Before this, on November 9, 2011, a new criterion was introduced into the law governing the election of the President of the *Curia* – a candidate had to have prior appointment for indeterminate duration with at least five years of judicial service.[9] Since Mr. Baka's service at the European Court of Human Rights did not meet the new criterion of 'indeterminate duration[10]' and he had not served in Hungary as a judge for five years, his candidacy was precluded. His mandate as the President of Hungarian highest court was thus terminated on January 01, 2012, which is three and a half years earlier than was anticipated at the time of his election to the position. There was strong international reaction from European institutions univocally criticizing Mr. Baka's removal from Presidency.[11]

Before the European Court of Human Rights, Mr. Baka argued, first, that he had been denied access to a tribunal to challenge the early dismissal as President of the Supreme Court. Since the dismissal was the result of constitutional level legislation, he was deprived of any possibility to seek judicial review, even by the Constitutional Court. In response, the Government stated that the termination of the post was justified on objective grounds in the State's interest. The applicant further argued that he had been dismissed as a result of the views expressed publicly in his official capacities on four issues of fundamental importance for the judiciary. In the Government's view the link between the criticisms pre-dating the termination of the mandate was not sufficiently proven. The constitutional change in the country also meant fundamental changes in Hungary's supreme judicial authority.

On the issue of denial of access to tribunal, the chamber applied the *Vilho Eskelinen* methodology for disputes between public servants and the state,[12] which was developed by the Court in mid 2000s replacing the functional approach.[13] According to this methodology two conditions need to co-exist to justify limitation of access to court. The first condition is that national law must expressly exclude access to court for a particular position and secondly, the exclusion must be justified on objective grounds in the State's

9 Organisation and Administration of the Court Act, Chapter VIII, Art. 32, passed by the Hungarian Parliament on November 9, 2011, and entering into force on December 2, 2011.

10 The judges at the European Court of Human Rights are appointed for a specific term.

11 For example, the EU Justice Commissioner Mrs. Viviane Reding wrote on December 12, 2011, a letter to the Vice Prime Minister Dr. Tibor Navracsics, raising the following question about the President of the Supreme Court in Para. 3 of the Appendix: '[…] how is it ensured that the ending of the mandate before the end of the regular term does not effectively put in question the independence of the judiciary' – Ref. Ares (2011) 1339212 – 12/12/2011. The EU Commission opened accelerated infringement proceedings against Hungary on the independence of the judiciary. During these proceedings the Commission also raised the question about the termination of Mr. Baka's mandate – *see* European Court of Justice Case C-286/12, available through the website of the CJEU www.curia.europa.eu.

12 *Vilho Eskelinen et al v. Finland*, Appl. No. 63235/00, ECtHR judgment (Grand Chamber) of April 19, 2007.

13 According to the functional criterion, the decisive question whether a public official was precluded from challenging the dismissal at the court was whether his/her position within the State hierarchy was sufficiently important or elevated to speak of a participation in wielding State power.

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interest.[14] It is for the Government to demonstrate that the exclusion of the right to court is justified. The Court was willing to accept that the national legislative framework denied the applicant the right to court, although this was not expressly written into the law. The Court does not specify, whether in its view the Fundamental Law is an appropriate document for inserting such a procedural matter. The chamber disagreed with the Government whether the exclusion of the right to court was justified. The Court noted:

> the Government have not adduced any arguments to show that the subject matter of the dispute, which related to the premature termination of the applicant's mandate as President of the Supreme Court, was linked to the exercise of State power in such a way that the exclusion of Article 6 guarantees was objectively justified. (paragraph 77)

On the issue of the infringement of the right to freedom of speech the Court had to evaluate, whether the applicant's mandate was terminated as a result of the reorganisation of the judiciary – as the Government suggested, or as a consequence of the views which the applicant had expressed publicly on legislative reforms affecting the judiciary. The Court attached importance to the fact that Mr. Baka's neither professional abilities nor behaviour were ever questioned. In this respect, the *Baka* case is different from the other two cases brought to the Court by presidents of national highest courts. In the *Harabin v. Slovakia*[15] case the Court established a violation of the right to court of the President of the Slovakian Supreme Court, when he complained against the disciplinary measure imposed as a result of his refusal to allow the Ministry of Finance to audit the court. In the *Olujić v. Croatia*[16] case the Court established violation of fair trial principles in a domestic case against the Chairman of the Croatian Supreme Court on charges of indecent behaviour. The Court in the *Baka* case noted the short duration of time when the position of the Parliamentary majority changed regarding the possibility of Mr. Baka to continue as the President of the Supreme Court. Three institutions – the Hungarian Helsinki Committee, the Hungarian Civil Liberties Union and the Eötvös Károly Institute – submitted opinions as third-party interveners. In their view, the 'case was part of a general pattern of weakening of the system of checks and balances that had taken place in the past three years in Hungary' (paragraph 85). Against this background, the Court concluded that,

> the sequence of events in their entirety corroborate the applicant's version of events, namely that the early termination of his mandate as President of the

14 *Vilho Eskelinen,* Para. 62.
15 *Harabin v. Slovakia,* Appl. No. 58688/11, ECtHR judgment of November 20, 2012.
16 *Olujić v. Croatia,* Appl. No. 22330/05, ECtHR judgment of February 2, 2009.

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> Supreme Court was not the result of a justified restructuring of the supreme judicial authority in Hungary, but in fact was set up on account of the views and criticisms that he had publicly expressed in his professional capacity on the legislative reforms concerned. (paragraph 96).

The chamber applied its established methodology for assessing the legitimacy of interference into the Convention's 'soft' rights – such as the right to privacy, freedom of thought and freedom of speech. According to this methodology the first issue is whether there was a sufficiently clear and foreseeable legal basis for the interference; next, whether the interference had a legitimate aim; and the last question concerns the necessity of the interference in a democratic society. Satisfied that the reply to the first two questions is positive, the chamber replied negatively to the third. The Court noted that the applicant had a duty to express views on the legislation affecting the judiciary, he did not exceed the limits of professionalism and the premature termination of his mandate had pecuniary consequences – the loss of income and other benefits. The fear of sanction for expressing the views in public about a matter of public importance will have a 'chilling effect' upon other judges. In conclusion, after a relatively short discussion of the circumstances, the Court reached a viewpoint that the early termination of the position worked to the detriment of the society as a whole, it was not proportionate and consequently there was no justification for the sanction (para 101).

The applicant claimed € 742,520 in pecuniary damage (including severance allowance and pension supplement for life), € 20,000 for moral damage and € 153,532 for legal expenses. The Court reserved a decision about the remedies, pending on the possible agreement between the parties.

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From the analytical perspective, the judgment raises three principal issues. The first concerns an international court's competence to rule on the compatibility of a national constitution and constitutional level legislation with the provisions of an international treaty. The analysis is based on the assumption that Mr. Baka's position was prematurely terminated as a result of constitutional level legislation – this is the main line of his own argumentation, which was accepted both by the respondent Government and the Court. Questioning that assumption leads to speculations and would not serve the purpose of analysing the Court's judgment. Is the European Court of Human Rights authorized to judge whether a constitutional level norm of any Member State contradicts the European Human Rights Convention? *Jörg Polakiewicz* has divided possible national approaches to the question of the Convention's position in domestic legal order into five categories, where the majority of Member States view the European Human Rights Convention as directly applicable law

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superior to domestic legislation but below the national Constitution.[17] Based on this concept, the Convention is either placed between the Hungarian Fundamental Law and the statutory laws, or it has the same rank as statutory laws. The Hungarian Fundamental Law does not expressly determine the position of international treaties in the domestic legal system. Since the Parliament needs to recognize the binding force of any international treaty[18] and such a treaty needs to be incorporated into Hungarian law,[19] in the event of conflict between the provisions of the Fundamental Law and the Convention, the national constitution prevails.

No comprehensive international legal theory recognizes the power of an international court to intervene into national legislation of constitutional level, either by 'naming and shaming' or requesting a change of the constitutional norm. The international debate about the judicial activism of international courts in Europe – both the European Court of Human Rights and the Court of Justice of the European Union – demonstrates expansion of their powers through evolutive interpretation of international legal norms. The CJEU not only established principles not written into the Community legal order, but it has also expanded their meaning and scope without an express consent of the Member States.[20] It has been argued that the CJEU has fashioned its powers by internal evolution and has shaped a constitutional framework for a federal-type structure in Europe.[21] This is called an achievement of bold judicial creativity on behalf of the CJEU itself.[22] The ECtHR has assumed the right to pass pilot judgments by applying to its advantage Convention Articles 1[23] and 46[24] in conjunction, since starting from the adoption of the Convention no additional protocols were passed which would *expressis verbis* empower the ECtHR with

17 The other four possible approaches are: the Convention is directly applicable international law superior to the whole domestic legal order, the Convention as part of the Constitution, the Convention with the rank of statutory law, the Convention without formal internal legal validity. *See*: Jörg Polakiewicz, 'The Status of the Convention in National Law', in Robert Blackburn andJörg Polakiewicz (Eds.), *Fundamental Rights in Europe. The European Convention on Human Rights and its Member States, 1950-2000*, 2001, pp. 31, 37-46.

18 Hungarian Fundamental Law, Art. E (3): '[…] to recognize the binding force of an international treaty 2/3 of the Members of Parliament need to agree.'

19 Hungarian Fundamental Law, Art. P (3): 'Hungary shall accept generally recognized rules of international law. Other sources of international law shall be incorporated into Hungarian law upon their promulgation by laws.'

20 Michal Bobek, 'Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice', 45(6) *Common Market Law Review* (1613). However, the author also reminds the reader that the instrument of referrals to the Court signifies the autonomous functioning of the national courts (p. 1623), but this topic remains outside of this article.

21 H. Rasmussen, 'Between Self Restraint and Activism: A Judicial Policy for the European Court', 28 *European Law Review* (1988), p. 13.

22 Oreste Pollicino, Legal Reasoning of the Court of Justice in the Context of the Principle of Equality between Judicial Activism and Self-Restraint', 3 *German Law Journal* (2004), p. 284.

23 According to the Convention Art. 1 each Member State undertakes to guarantee to anyone under its jurisdiction the rights and freedoms provided in the Convention.

24 According to the Convention Art. 46 the Member States have the obligation to abide by the ECtHR judgments where they are a party.

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such authority. The ECtHR passes a pilot-judgment when it establishes a structural problem in the respondent state either in connection with the wording of a law or legal provision, their application in administrative or court practice or the absence of legal regulation.[25] This self-assumed authority is sometimes accompanied by concrete requirements to change laws or adopt new legal regulations, referred to as a structural change in the ECtHR jurisprudence.[26] A consequence of this judicial activism may be the increasing unwillingness of national courts or national governments to apply the Court's rulings.[27]

Faced with these realities the Court should have explained in detail the source of authority for its statements that the exclusion of the right to challenge in court the premature termination of the applicant's position (caused by a constitutional norm) was not objectively justified (paragraph 77) or that the applicant's removal represented a 'sanction' (paragraph 101). *A contrario* in judgments where the Court has introduced its competence to intervene into statutory legislation of a Member State, the legal reasoning is exemplary and convincing. Perhaps the most unexpected feature of the *Baka* judgment is that the Court remained silent on the question why it is competent to interfere in Hungary's constitutional legislation. The Court could have avoided calling a constitutional norm *per se* unjustified by applying a decisive, yet narrow, distinction: not to speak about the 'justification' of a constitutional norm, but the 'effects' of the constitutional norm upon the individual fundamental rights.

Notwithstanding the absence of a clear basis for adjudicating on constitutional level norms, the second principal issue concerns the question whether the Court has applied consistently its case-law refined towards similar substantive and procedural violations in the past. The principal dilemma in the right to court doctrine has been who has the final say in identifying expressly those areas of public service, involving the exercise of the discretionary powers intrinsic to State sovereignty, where the interests of the individual must give way – whether it remains with the domain of the Member State or whether the Court has absolute power to decide whether the restriction was 'justified'.[28] International debate about the right to court doctrine in the Court's jurisprudence has been predominantly critical and has pointed to the Court's inconsistency towards such significant questions as whether access to court means that there should at least theoretically be available a court

25 For context *see*: Steven D. Roper and Lillian A. Barrie, *Judgments of the European Court of Human Rights: A Test Case for Enforcement and Managerial Theories of State Compliance*, Annual Meeting of the American Political Science Association, 4 September 2011, p. 1.

26 Laurence R. Heifer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Court of Human Rights Regime', 19(1) *European Journal of International Law* (2008), pp. 125-129.

27 Conference at the Maastricht faculty of law, 10-11 October 2011, background paper p. 1.

28 For discussion *see*: Chiméne I. Keitner, 'Jones v. the United Kingdom', 109(2) *American Journal of International Law* (2014), pp. 302-308.

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to which the individual concerned could apply[29] or what the concept exactly means that the right to court under European Human Rights Convention Article 6 (1) is *lex specialis* of Article 13,[30] which provides a right to an effective remedy. The Court views that in access to court matters the requirements of Article 13 are entirely absorbed by those of Article 6(1).[31] Regarding Article 13 the Court has developed a position that it does not 'go so far' as to provide a right to challenge a provision of a domestic legal norm on the ground that it is contrary to the Convention or to an equivalent domestic legal norm.[32] It therefore appears that the right to challenge a constitutional norm is *prima facie* excluded from the Court's jurisdiction *ratione materiae.* In the other words, the European Human Rights Convention does not go so far as to provide a remedy before a national authority to question a constitutional norm. A different position would have necessitated comprehensive analysis, silence on this matter is one of the weaknesses of the judgment.

To be sure, the Strasbourg Court has not shown to what domestic court the applicant could have, even theoretically, turned with the claim that the premature termination of his position as the Supreme Court President was unfounded. Interestingly, the Court avoided implementing two significant doctrines which should have preceded the conclusion that '… the Government have not adduced any arguments to show that the subject matter of the dispute, which related to the premature termination of the applicant's mandate …, was linked to the exercise of State power in such a way that the exclusion of Article 6 guarantees was objectively justified' (paragraph 77). The first is the idea that the domestic legislator is better placed to decide matters of reforms affecting the whole society,[33] and the second is the balancing exercise of competing rights. The Court signals that unelected judges of an international court have predominance over the nation's constitutional choices. The Court does not balance the applicant's – although problematic and theoretical – individual right to challenge in court the early termination of his position with the overwhelming public interest for passing constitutional reform. Overall, paraphrasing the *Vilho Eskelinen* judgment,[34] the *Baka* judgment in applying the right to court doctrine has led to anomalous results.

Another question regards the standard of proof for concluding that the applicant was 'sanctioned' for exercising his freedom of expression. The context of the case does not

29 Tom R. Hickman, 'The "Uncertain Shadow": Throwing Light on the Right to a Court Under Article 6(1) ECHR, *Public Law* (2004), pp. 122-145, 123.

30 Art. 13 provides: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

31 *Kamasinski v. Austria,* Series A 168, ECtHR judgment of December 19, 1989, Para. 110.

32 *See* for example: *Mitko Georgiev Harakchiev v. Bulgaria and Liudvik Slavov Tolumov v. Bulgaria,* Appl. Nos. 15018/11 and 61199/12, ECtHR decision on the admissibility of February 19, 2013, Para. 126.

33 *See* for example: *Deguara Caruana Gatto v. Malta*, Appl. No. 14796/11, ECtHR judgment of July 9, 2013, Para. 49.

34 *Vilho Eskelinen v. Finland*, Para. 51.

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allow reaching a definite conclusion that at the heart of the applicant's complaint lied a different grievance – the exclusion from being nominated by the President of Hungary and subsequently elected by the Parliament as the President of the *Curia.* The reason for choosing the right to court complaint must have been the understanding that there is no such 'civil right' as the right to be nominated and elected into a position entailing the exercise of state sovereignty. In the author's view, the *Baka* case in the freedom of speech aspect is close to the cases which the Court has decided previously on the matter of abuse of power on behalf of the respondent government under Convention Article 18.[35] In these cases, the Court was called upon to establish whether there was some 'hidden agenda' as opposed to the reasons which the authorities have stated. In the Court's jurisprudence the abuse of power has been established rarely, since the Court applies a very exacting standard of proof.[36] Given that Article 26 of the Hungarian Fundamental Law does not specifically exclude the interpretation that as of January 1, 2012 the new *Curia* will also have a new President, the burden of proof was upon the applicant to demonstrate some improper motive.[37] The Court has contrasted the inconsistent statements of the Hungarian public officials (initially assuring the European authorities that the constitutional reform will not become an instrument to terminate Mr. Baka's position prematurely and then adopting legal norms effectively prohibiting the applicant to stand for re-appointment) with the univocal criticism of the international community towards the applicant's professional fate. Like in the *Tymoshenko v. Ukraine* case where the Court established abuse of power on the basis of the opinions of national and international observers, non-governmental organizations, and media outlines, diplomatic circles and individual public figures,[38] the Court in the *Baka* case judicially endorses the view of the international, especially the EU community. Disagreement with this approach comes close to disagreeing that the opinions of international actors cumulatively are a source of international law, representing generally recognized legal values. The next question then is whether this approach has provided individual justice to Mr. Baka, which is also our third principal analytical issue.

The *Baka* judgment belongs into a specific category within the European Court of Human Rights case-law where the Court has generously applied certain individual measures which appear inconsistent with the Court's *modus operandi.* There is a handful of judgments where the Court obligates the respondent government to apply direct individual measure, without explaining the source of authority to divert from the concepts of the declarative nature of the judgments and leaving the discretion about the execution of the judgment

35 Art. 18 provides: 'The restrictions permitted under Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.'

36 *Tymoshenko v. Ukraine,* Appl. No. 49872/11, ECtHR judgment of April 30, 2013, Para. 295.

37 *See* for context: *Khodorkovskiy and Lebedev v. Russia*, Appl. Nos. 11082/06 and 13772/05, ECtHR judgment of July 25, 2013, Para. 903.

38 *Tymoshenko v. Ukraine*, Para. 296.

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to the domestic authorities. For example, in *Assanidze v. Georgia*,[39] a case brought by the former mayor of Batumi the Court introduced for the first time a formulation, that (paragraph 202): 'by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it.'[40]

The Court gave the directive to the respondent government to secure the applicant's release at the earliest possible date. In the case *Aleksenyan v. Russia*[41] the applicant was the former head of the legal department of oil company Yukos and the Court obligated the Government to release him immediately from detention due to AIDS. In the case *Fatullayev v. Azerbaijan*,[42] brought to the Court by the founder and chief editor of two newspapers with wide circulation, the Court likewise obligated the Government to release the applicant immediately. In 2013 the Court gave a directive for a specific individual measure in the case *Oleksandr Volkov v. Ukraine*.[43] The Court held that Ukraine needs to secure the applicant's reinstatement in the post of the judge of the Supreme Court at the earliest possible date.[44]

In the absence of alternative explanations, it is the applicants' personal status that has led the Court in very rare instances to apply discriminatively a measure meant for the few and 'chosen'. In the *Baka* case the individual measure lies in renouncing its previous case-law which would have led to declaring the application inadmissible. In the author's view evaluating Hungary's constitutional legislation with instruments meant for below-constitutional level legal norms was a mistake. This approach is not conceptually defendable and although it has provided individual justice for Mr. Baka, it may not serve the purpose of strengthening human rights protection system in Europe. Perhaps the price of individual justice was unbearably high.

39 *Assanidze v. Georgia,* Appl. No. 71503/01, ECtHR judgment (Grand Chamber) April 8, 2004.
40 *Ibid.,* Para. 202.
41 *Aleksenyan v. Russia,* Appl. No. 46468/06, ECtHR judgment of December 22, 2008.
42 *Fatullayev v. Azerbaijan,* Appl. No. 40984/07, ECtHR judgment of April 22, 2010.
43 *Olekjsandr Volkov v. Ukraine,* Appl. No. 21722/11, ECtHR judgment of January 9, 2013.
44 *Ibid.*, Para. 208 and resolutive part Para. 9.