Letter of motivation

Serving one's country as a judge on the European Court of Human Rights is the dream job of any human rights lawyer and I am no exception to this rule. This service is of elevated importance at times such as the present, when not only prisoners, pre-trial detainees, asylum seekers, racial minorities, the poor, and other vulnerable groups, but also a great variety of Hungarian citizens who would not in general be expected to be needing protection - including the former judge of this court - established churches, journalists and media outlets face challenges posed by profound legal reforms, a new approach to social and other public policies in the context of an institutional overhaul that, when combined, amounts to a systemic change-over akin to that experienced some 25 years ago, albeit perhaps less beneficial to all those covered by the European Convention on Human Rights and Fundamental Freedoms, the relevant pieces of EU law - uniquely the Charter of Fundamental Rights of the European Union - and international treaties governing human rights.

Democratic principles, first and foremost the rule of law, human dignity and equal treatment are therefore as, if not more relevant today as ever before. It is my firm belief that a person, such as myself, who gained entry to the legal profession shortly after the democratic change-over, was profoundly shaped by that process, dedicated her work to securing respect to its fundamental tenets and remained deeply incensed by the spirit of pluralist democracy is right for the job.

Perhaps the time has come to elect a female judge from this country, one who brings not only a doctrinal interest and knowledge - as her predecessors in the Strasbourg Court - but also possesses long standing practical experiences concerning the ins and outs of the Hungarian state authorities's approach and attitudes to citizens' rights and freedoms in fields covered by the Convention. For this reason, it is imperative for as many female candidates as possible to apply and have themselves measured in a fair and transparent process. The wonderful female judges who come from a background of legal activism to constitutional courts - such as Susanne Baer in Germany and Lovorka Kusan in Croatia - the Court of Justice of the EU - Sacha Prechal - and this court - particularly the previous Bulgarian judge, **Zdravka** Kalaydjieva, who prior to being elected practiced as a human rights lawyer in Bulgaria - serve as role models for me.

As a member of the virtual guild of human rights lawyers, I have idealised the ECtHR, referenced and critiqued its case law relating to the freedom from torture, inhuman and degrading treatment and punishment, detention, the right to private and family life, the right to education, freedom of speech and non-discrimination. In light of recent case law emerging under Article 8 - such as *Soares de Melo v Portugal, Garib v the Netherlands*, as well as the Roma and Traveller cases - I see further avenues opening up for interpretations to which I would be honored to contribute, including a more robust and principled application of the non-discrimination principle to cases dealing with racial minorities, people living with disabilities, the poor and women (single mothers) at a time characterized by severe austerity measures. While representing applicants, I have come to appreciate the power inherent in interim measures, which - in line with the ECtHR's doctrine on positive obligations - is an aspect that could perhaps be put to even more strategic use in order to curtail imminent rights violations beyond the scope of Articles 2 and 3. Being generally impressed by case law concerning these articles and the freedom of speech, I see room to improve judicial response to negative aspects, particularly those regarding harassment resulting from hate crimes/ speech.

A strength I can bring to the ECtHR stems from the analytical work performed for the European Commission as an independent expert on racial discrimination and my more recent endeavors at earning a 'proper' academic title at the European University Institute, where I am presently based. Given that except *Feryn* and the recent judgment in *CHEZ*, the Court of Justice of the EU has not had the opportunity to examine discrimination based on racial or ethnic origin in substance, the bulk of regional jurisprudence continues to emerge from the ECtHR - more specifically from the Roma rights cases (over 70 judgments) and few landmark judgments, such as *Timishev v Russia* and *Biao v Denmark*. I have gained insights not only into these judgments and the Court's non-discrimination jurisprudence, but also into their relevance through judicial borrowing in disputes

before the CJEU and national courts. I am of course aware of the difficulties the CJEU's opinion issued in regard the EU's accession to the ECHR have caused, but to my mind judicial cooperation remains an important exercise in order to ensure the highest level of protection to all individuals and entities falling under the scope of the ECHR and EU law. In countries, such as Hungary, which is not only a signatory to the Convention but is at the same time an EU member state, adjudicating matters of fundamental rights requires a profound knowledge of legal standards under both regimes - that do not always smoothly overlap - as well as their synergies with international human rights treaties. Moreover, as is evidenced by certain judgments of this Court - more recently in the French cases dealing with surrogacy - a true regional-comparative approach often facilitates the resolution of thorny legal issues. Historic-Legal analysis of common European concepts, such as national origin is also useful, as I have learnt when studying the definition of racial or ethnic origin under EU law. I have found that ethnic origin remains an alien legal concept in Europe, despite its transfer through Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination that ostensibly served as a basis of judicial interpretation in *Timishev* before this Court and *CHEZ* before the CJEU. Nonetheless, a closer analysis reveals that the latter may not be the case and that contrary to original intentions, ethnic origin - which is by the way not explicitly mentioned in Article 14 of the Convention - has so far functioned in a way that essentialised, rather than enriched the meaning of racial origin.

Access to this Court is facilitated by the right to individual petition, which is the cornerstone of the Strasbourg system as borne out for instance by a comparison between the number of cases relating to racial and religious discrimination adjudicated so far by the Strasbourg and Luxembourg Courts. I am aware of the long standing efforts to reform procedural rules partly in order to alleviate the caseload and partly to weed out manifestly ill-founded cases and accelerate the adjudication of repeat cases. Less is known about the reason to resist the modification of standing rules and a stricter approach to the already limited standing granted to collective claims by associated parties (cf. *Gorraiz Lizarraga v Spain* and the recent case launched by, into alia, the British Ghurka Welfare Society). In my experience, collective standing - similar to actio popularis before constitutional courts - can usefully facilitate a more sound normative framing of claims and a wider scope of protection in an economically more viable model of adjudication. The changes in Hungarian constitutional law to actio poplaris standing bear witness to the truth in this hypothesis.

Judicial activism, admired by many who study various aspects of the Strasbourg Court's jurisprudence, appears to me to be a form of a legal activism continuum that is not limited to certain members of the legal professions, nor even to the field of human rights. It requires self-discipline, principled judgment and reasoned interpretation, whether one engages in it as a lawyer arguing a claim or a judge deciding on its merits. Hard choices must be made by all involved, albeit at different junctions of the process. As a lawyer involved in difficult choices over litigation budget and case selection criteria, I am familiar with the professional and moral dilemmas judges and the Court itself face. As a human rights lawyer dedicated to developing and chiseling its interpretation, I have come to appreciate the ways in which the law necessarily contains many claims for justice. In collaboration with colleagues at the ECtHR, I would continue to strive for a clear explication of limitations inherent in the law, while ensuring that they remain as narrowly construed as possible.

It is in the context of legal activism and social consciousness that I gained first hand experience of the significance of Strasbourg case law. Judges in Budapest as a rule reference freedom of expression cases in order to align the application of criminal provisions on libel with Convention standards. Not only had my clients escaped private prosecution as a consequence of this practice, but I was also saved time, energy and reputation when Hír TV indicted me in relation to a statement I made in a documentary on the horrendous practices of racial exclusion in Gyöngyöspata (a target community of the Hungarian Guards whose dissolution was considered justified in *Vona v Hungary*) and their previous coverage thereof. In the parallel civil proceedings in which Hír TV claimed damages from the Hungarian Civil Liberties Union and myself for violating its reputation, the judge explained that the caution I took to remain within the remit of free speech led to the rejection of the claim.

The present Hungarian judge leaves a body of case law that renders it a difficult act to follow in his wake, even though the strategic use of the Convention by Hungarian NGOs appears to have become more chiseled over the years, which provides an important baseline for developing judicial interpretation. In collaboration with his colleagues, Professor Sajó has addressed contested issues in various cases, such as massive surveillance in *Szabó and Vissy*, intermediary liability for an alleged breach of free speech in *MTE and Index Zrt*, freedom of information in *Kenedi* and *TASZ* and home birth in *Ternovszky*. Other judgments, such as *Magyar Keresztény Mennonita Egyház and Others, Karácsony and Others* and *Baka* perhaps attracted more attention for reasons of the sheer quantum of just satisfaction awarded by the ECtHR and also because these cases reveal a more structural erosion of the rule of law in Hungary.

However, Professor Sajó has done far more than building reliable and constant interpretive frames in relation to Articles 3, 5, 8, 10 and 11, including prisoners' rights, real life sentence, detention of asylum seekers - more recently of a gay Iranian asylum seekers in *OM*. In his dissenting opinions appended to *Feret v Belgium* and the chamber judgment in *Biao* (with other judges) he formulated doctrinally sound frames for future adjudication and provided inspiration for generations of human rights lawyers to come.

At the beginning of the opening of the 2016 judicial year, as a guest blogger on an influential blog dealing with the ECtHR, Paul Harvey from the registry discussed trends and challenges awaiting the Strasbourg Court. He reminded readers that both the Strasbourg Court and its national counterparts are aware that they 'confront large-scale violation of human rights'. In Strasbourg, even following the introduction of stricter admissibility rules and practice, the pending caseload is over 64,000 cases, with many repeat cases in the pipeline that reflect the failure of various states parties to remedy structural issues - including length of trial, but also prison overcrowding. Some of the challenges are specific to certain regions, such as those arising from security concerns involving Russia and Turkey (Kurdish issues) or not yet as relevant in the Hungarian context as elsewhere, such as the cross-border element of family life and the contested relationship between Article 6(3) and 6(1) concerning criminal law. In any event, the lacking equality of arms between prosecution and defense in pre-trial phase is a striking feature of Hungarian criminal law, which in my view deserves attention from any incoming judge. As to issues raised by surrogacy, statutory law cannot thwart the obvious liberalization of social norms in favor of surrogacy, whereas the related status issues (children's birth certificates for instance, such as in a leading French case) must simply be resolved.

Other issues are more general in nature and in my view will have repercussions on future Hungarian applications coming to judgment. An important challenge concerns the 'ethical reach of Article 3', which is a non-derogable right with an ever lowering threshold - particularly in comparison to early cases from Hungary, where even the administration of a cancerous liquid designed to show traces of blood strictly on object was applied to Roma suspects in a murder investigation (the so called Benzidine case) and was found to fall below the threshold. The issue of personal scope is a significant point of contestation however, particularly when it would lead to *non-refoulement*. More relevant in the Hungarian context is perhaps the fact that the Strasbourg Court has been widely criticized for not properly interpreting hate crimes in the context of the non-discrimination principle - based on race or sex, where jurisprudence has dwindled, albeit not in relation to disability. More importantly, Convention jurisprudence has been found to be limited to finding violations under the so called procedural branch of Article 3, almost never a substantive violation. In other words, as a rule applicants are left without the recognition of the hate element of the crime, which to me appears problematic.

I share the view of commentators who point to the 'infinite' nature of Article 8, which in my opinion shall continue to respond to challenges that arise from specific regional or national contexts - such as the curtailment of home birth in the Central and Eastern European region, whereas home birth is the rule in various other contracting states. Private and family life needs to be construed as a pluralistic concept that can effectively accommodate claims made by a wide array of social groups. For instance, in the realities of women and other groups vulnerable to discrimination 'private' and

family may play a more central or simply different role from what is traditionally understood - perspectives whose consideration or lack thereof has been a site of heated academic discussions in recent years. Clearly, many of the austerity related claims will also fall under Article 8, parallel to the right to property in Article 1 Protocol 1 - which has already given rise to an application from Hungary relating to the removal of disability pensions.

The Strasbourg Court's approach to Article 8 and 10 in that it increasingly provides analytical frames for balancing competing rights and interests is a useful tool in engaging national courts in an on-going dialogue and ensuring compliance with Convention standards. This in turn can diminish the number of applications from countries who traditionally tend to comply, but cannot stop repeat applications from those that show less willingness of cooperation or prevent cases that are the subject of the most heated political and moral debates from finding their way to the ECtHR. Regrettably, recent developments from this country caution against being overly optimistic, However, applicants, human rights organizations and the international public have in increasing numbers placed their trust in the ECtHR to counterbalance illiberal developments in Hungary and elsewhere in Europe. Being realistic about the limitations inherent in the office of the Hungarian judge and the Court itself, I believe I can make just that tiny difference that provides hope for those who still believe in informed debate and reasoned opinion, and for those who recognize the significance of the symbolic value of judgments.

Lilla Farkas