

Prague, 6th August 2021

Dear Honourable Member,

We are citizens of the Czech Republic, a Member State of the Council of Europe. We highly value the ideas that inspired the establishment of the Council of Europe. Therefore, within the meaning of Article 3 of the Statute of the Council of Europe (*Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.*), we formed, several years ago, “The Institute for Freedom and Democracy”. In our daily work for the Institute, we observe in full the motto of the Institute: “Freedom cannot be bought. Responsibility cannot be inherited. Democracy cannot be imposed.”

The past and this year were marked by a national selection procedure and transmission of a list of three candidates for the position of judge of the ECtHR. The whole procedure was closely monitored by our Institute, using publicly accessible sources. We are afraid that during the national selection procedure the Czech Republic committed a serious breach of Article 3 of the Statute of the Council of Europe read jointly with Article 8 of the Statute of the Council of Europe (*Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.*) for the following reasons:

- 1) Shortly before the selection procedure for candidates for the position of judge of the ECtHR commenced, the Government of the Czech Republic had rendered a Resolution (Government Resolution No. 648 of 15 June 2020) setting down the rules for the selection of candidates. Despite that the Czech Constitution allows the Government to bind by its resolutions only the public authorities within the framework of superiority and subordination, the Government decided that the selection of candidates was to be carried out by a committee composed as follows:

Minister of Justice,  
Minister of Foreign Affairs,  
Government *Agent* for representation of the *Czech Republic* before the *ECtHR*,  
President of the Constitutional Court,  
President of the Supreme Court,  
President of the Supreme Administrative Court,  
Public Human Rights Defender (Ombudsman),

Member appointed by the President of the Czech Bar Association,  
Member appointed by the Deans of the Law Faculties of public universities.

We are convinced that by this Resolution the Government of the Czech Republic either acted *ultra vires* or established a selection committee which some of its members joined on a voluntary basis. In no event can the selection committee established this way bear any legal responsibility for the selection of candidates for the position of judge of the ECtHR in the framework of the public administration.

Should we consider the Resolution as a legally binding act, the Government of the Czech Republic could bind by it only the Minister of Justice, the Minister of Foreign Affairs and the Government Agent for representation of the Czech Republic before the ECtHR, that is, subjects that form part of the public administration (the executive power).

If the Government intended to bind by the Resolution the President of the Constitutional Court, the President of the Supreme Court and the President of the Supreme Administrative Court, the representatives of the judiciary, and the Ombudsman, an independent public authority, then a flagrant breach of the system of separation of powers was committed, which is incompatible with the principles of the democratic rule of law state.

If the Government intended to bind by the Resolution a member appointed by the President of the Czech Bar Association and a member appointed by the Deans of the Law Faculties of public universities, then the Government interfered in the independence of advocacy and in academic freedom. Those members of the selection committee established by the Government do not and cannot perform public administration which is carried out by the Bar Association or by the Deans of public universities, as their participation in the selection committee is neither the exercise of a legal profession nor an academic activity in the framework of which the Bar Association or the Deans of public universities, respectively, perform a certain extent of state administration which is entrusted to them.

Should we consider the membership of the six members of the selection committee as purely voluntary, then the selection of candidates made by them cannot be regarded as a selection made by the High Contracting Party within the meaning of Article 22 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "Convention").

In any event, we consider the selection committee established by virtue of the Government Resolution as entirely unfit for selecting the candidates, as the committee was set up also in contradiction with the principles governing the selection of candidates for the position of judge of the ECtHR at national level, which are set out on the website of the Council of Europe: "selecting their three candidates, States should ensure that their national procedure is fair and transparent...".

We would like to conclude with respect to this point that for the selection committee to be established in line with the Czech legal order and international law, it would have to be established only by virtue of a constitutional act, especially since the Convention forms part of the constitutional order of the Czech Republic. However, the committee which selected the candidates was not established on the basis of a constitutional act.

- 2) It was also the Government Agent for representation of the Czech Republic before ECtHR who was appointed a member of the selection committee by virtue of the Government Resolution. We consider this fact as a violation of the right to a fair trial, within the meaning of Article 6 of the Convention, for all prospective applicants who will claim before the ECtHR that the Czech Republic violated the Convention. In our opinion, a person who continuously represents a High Contracting Party - the Czech Republic in proceedings before the ECtHR, where the Czech Republic is one of the parties to the dispute, cannot be involved in the selection of candidates for the position of judge of the ECtHR. Such a person cannot literally “choose” his/her future judge.
- 3) The Presidents of the Constitutional Court, the Supreme Court and the Supreme Administrative Court were also appointed as members of the selection committee by virtue of the Government Resolution. We consider this fact as a violation of the right to a fair trial, within the meaning of Article 6 of the Convention, for all prospective applicants who will claim before the ECtHR that the Czech Republic violated the Convention. We are of the opinion that persons who manage the highest courts in the Czech Republic against whose decisions the applications before the ECtHR are directed cannot be involved in the selection of the future judge of the ECtHR. Those persons cannot literally “select” the future judge who will almost always review decisions of the courts managed by them.
- 4) On 2 October 2020 a private internet portal “Česká justice” [Czech Justice] published an article entitled “Seven candidates want the post of the judge of the European Court for Human Rights” according to which a total of seven candidates applied for the position of judge of the ECtHR in the selection procedure that was publicly announced by the Ministry of Justice. However, the Ministry of Justice never officially published the names of all seven candidates who registered in the selection procedure. The names of some of the candidates began to emerge gradually in the media, either through unofficial channels or the candidates themselves made their candidacy public. In total, the names of as many as five candidates eventually appeared in the media. Nonetheless, the names of two candidates were never publicly disclosed, and never during the selection procedure was a detailed explanation provided as to why and for what particular reasons those candidates, unknown to the public, were excluded from the selection procedure by the selection committee. Similarly, it is not publicly known whether those candidates were men or women, what legal profession they practised, etc. We are convinced that the selection procedure conducted by the Ministry of Justice was contrary to the principles governing the selection of candidates for the

position of judge of the ECtHR at national level, which are set out on the website of the Council of Europe: “When selecting their three candidates, States should ensure that their national procedure is fair and transparent...”.

- 5) We learned from an article published on 14 November 2020 on the private internet portal “Česká justice” entitled “Candidates for the ECtHR judge? Pavel Simon, Kateřina Šimáčková and Tomáš Langášek succeeded”, that these three candidates had been chosen by the selection committee, and that as regards the other candidates the selection committee named Mr Pavel Zeman as the first substitute and Mr Jiří Kmec as the second substitute. The aforementioned internet portal, and generally also other media, identified the candidates named in the above article as winners of the selection procedure. These three candidates began to give interviews to the media which treated them as winners of the selection procedure and each of them as a potential future judge of the ECtHR who would replace the serving Czech judge of the ECtHR, Mr. Aleš Pejchal. However, at that time the Government of the Czech Republic did not approve the candidates selected by the selection committee as a list of three candidates nominated by the High Contracting Party within the meaning of Article 22 of the Convention. We are therefore afraid that the Czech Republic allowed for a situation to appear which contradicts the principles governing the selection of candidates for the position of judge of the ECtHR at national level, which are set out on the website of the Council of Europe: “When selecting their three candidates, States should ensure that their national procedure is fair and transparent...”.
- 6) All three candidates chosen by the selection committee are judges. Mrs Kateřina Šimáčková is a judge of the Constitutional Court, Mr Pavel Simon is a judge of the Supreme Court and Mr Tomáš Langášek is a judge of the Supreme Administrative Court. The other candidates known to us are not judges. Mr Pavel Zeman holds the post of a public prosecutor and Mr Jiří Kmec works as an attorney-at-law. The professions and names of the other two candidates have been withheld from us. We believe that the selection of the three judges should not have been decided by their immediate superiors, i.e. the President of the Constitutional Court (we learned only later from the media that he was represented in the selection procedure by the Vice-President of the Constitutional Court), the President of the Supreme Court and the President of the Supreme Administrative Court. Even if the selection committee was set up in accordance with the legal order of the Czech Republic, i.e. by virtue of a constitutional act, there would always exist an irrefutable objection of objective bias of persons (members of the selection committee) who hold the position of direct superiors vis-a-vis the candidates. In our opinion, the Presidents (and the Vice-President) of the above-mentioned Courts were under the obligation to exclude themselves from the decision-making of the selection committee.
- 7) An article published on 22 June 2021 on the private internet portal “Česká justice” under the title “Government interference in the selection of the ECtHR judge may lead to international disgrace, warns the Ministry” contained a plethora of rather shocking facts, which we will analyse one by one. First and foremost, the headline of the article as such is *de facto* scandalous. The headline refers to “Government interference in the

selection of the ECtHR judge”, i.e. the public is given the impression that it is not the Government which select candidates for the ECtHR judge and that the Government should not interfere in the selection of such candidates. But Article 22 of the Convention speaks explicitly and exclusively about the High Contracting Party, i.e. the Government. Obviously, if the above allegations represented the opinion of the author of the article only, no responsibility of the Minister of Justice would come into play. However, the author of the article quotes from the updated and completed material of the Ministry of Justice intended for the Government. Given this, there are two possibilities for consideration: the Ministry of Justice either failed to prevent the leak of its materials prepared for the Government prior to their consideration by the Government, or the Ministry of Justice itself provided those materials to the press. The quote reads: “Under these circumstances, any Government interference in the selection of candidates, performed on the basis of a pre-determined established procedure, would constitute a real risk that the list of candidates would be rejected by the Parliamentary Assembly, which would bring about considerably adverse consequences at international level.” In other words, the Ministry of Justice, in an utterly unprecedented way, exerts pressure, with the participation of the public, on the Government to approve the selection made by the selection committee, claiming that otherwise an international scandal will allegedly break out. Irrespective of whether the Government, as the only public administration body responsible for the selection of candidates, is content with the selection made. Moreover, the materials of the Ministry of Justice refer to an “established procedure” to be applied during the selection despite the fact that the rules for the selection of candidates laid down by the Government immediately before the selection procedure was announced were, of course, observed for the first time in history. We are convinced that the Ministry of Justice exerted an utterly inadmissible *de facto* pressure on other members of the Government. In other words, the Ministry of Justice created a situation that contradicted the principles governing the selection of candidates for the position of judge of the ECtHR at national level, which are set out on the website of the Council of Europe: “When selecting their three candidates, States should ensure that their national procedure is fair and transparent...”.

- 8) We learned for the first time from the article referred to in point seven hereinabove that the selection made by the selection committee was submitted by the Czech Ambassador for consideration to the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights. The Advisory Panel could assess the three candidates chosen by the selection committee only on the basis of the curricula vitae submitted, i.e. only from the formal point of view. We suppose that the Advisory Panel was utterly unaware that they were presented names of three candidates who had not been approved by the Government at that time and whom the Government was hesitant to approve. Since there was no Czech expert on the Panel, the Panel could formally assess the Czech rules on the selection of candidates only in translation. In no case the Panel was able to assess whether the selection committee was formed in accordance with the Czech legal order, as the Panel was unfamiliar with the Czech law. Nevertheless, we were utterly shocked to learn that, even though all

consultations between the Government and the Advisory Panel are treated as confidential, the article concerned quoted the results of these consultations. At the very least, the Ministry of Justice allowed confidential information to be disclosed, and, besides that, the Ministry of Justice used such information in a rather demagogic way to increase pressure on the Government and to create an impression for the public that there was a threat of an international scandal. In so doing, the Ministry of Justice itself manifestly violated the fundamental principles of international law, and diplomacy in particular. A quote from the article: “The list of candidates was submitted to the Advisory Panel of the Committee of Ministers, including the translation of the rules. The Panel had no objections to the three candidates or to the rules on the selection procedure.” We are convinced that in selecting the candidates for the ECtHR judge the Ministry of Justice flagrantly violated the fundamental principles of international law, and thereby acted in contradiction with the principles governing the selection of candidates for the position of judge of the ECtHR at national level, which are set out on the website of the Council of Europe: “When selecting their three candidates, States should ensure that their national procedure is fair and transparent...”

- 9) The article mentioned in point seven hereinabove publicly disclosed, for the first time, the names of the members of the selection committee. On behalf of the Bar Association, the selection procedure was attended by the Vice-President of the Bar Association, Mrs Monika Novotná, an attorney-at-law specialized in financial law. On no account can she be considered an expert in the protection of human rights and fundamental freedoms. Regarding the Deans of the Law Faculties of public universities, the selection procedure was attended by the Dean of the Faculty of Law of Charles University in Prague, Mr Jan Kuklík, who is a legal historian and, therefore, cannot be deemed an expert in the protection of human rights and fundamental freedoms. In the points hereinabove, we described in detail our objections to the selection committee membership of all three Presidents of the Czech highest courts, be it for the reason of a breach of the right to a fair trial in relation to future applicants before the ECtHR, or for the reason of the Presidents’ objective bias in relation to the three selected candidates - judges. Furthermore, from the point of view of breaching the right to a fair trial in relation to future applicants before the ECtHR, there is one completely unsuitable person for being a member of the selection committee - the Government Agent for representation of the Czech Republic before the ECtHR.

This nine-member selection committee should have been, primarily, a committee of experts. As stated above, six members of the committee appear, for various reasons, as entirely unsuitable for membership in this intended expert commission. Remain the Ministry of Justice and the Ministry of Foreign Affairs who are purely political figures, and who, as a matter of fact, cannot guarantee an independent expert selection. The last person who sat on the selection committee was the Ombudsman. His membership can certainly be accepted, at the very least in terms of expertise. But it is only one member. Moreover, we have learned through an informal channel that the

Ombudsman raised serious objections to the majority opinion in the committee and that he did not favour any of the candidates who were finally chosen by the committee.

We conclude that the composition of the selection committee which should guarantee an independent expert selection of suitable candidates was in contradiction with the principles governing the selection of candidates for the position of judge of the ECtHR at national level, which are set out on the website of the Council of Europe: “When selecting their three candidates, States should ensure that their national procedure is fair and transparent...”.

- 10) The Government of the Czech Republic approved a list of three candidates as late as 12 July 2021, although the meeting of the selection committee was closed on 13 November 2020. Accordingly, the approval of the list was preceded by the full eight months during which the Government met and adjourned its meetings, the media pressure was exerted on the Government members by the Ministry of Justice and the Ministry of Justice disclosed confidential information. We are deeply convinced that the selection of candidates was unfair and untransparent and that it did not match the importance of the post of the ECtHR judge.
- 11) Furthermore, we are deeply convinced that the selection of at least two of the three candidates was not proper, and these candidates do not meet the conditions laid down in Article 21(1) of the Convention.

In 2000-2001, Mrs Kateřina Šimáčková, as an attorney-at-law, represented the Senate of the Parliament of the Czech Republic as a petitioner in the case of a petition the purpose of which was to repeal certain provisions of the Electoral Act (including, *inter alia*, Section 49(1)(b), (c), (d) and (3)(b), (c), (d) of the Electoral Act). The Constitutional Court in its judgment dated 24 January 2001 (File No. Pl. ÚS 42/2000) did not grant this petition to repeal Section 49 of the Electoral Act.

Another petition to repeal the provisions of the Electoral Act concerned was heard again approximately twenty years later and it was granted by a judgment of the Constitutional Court dated 2 February 2021 (File No. Pl. ÚS 44/17). Mrs. Kateřina Šimáčková acted in the same matters twice - first as a legal counsel (attorney-at-law) of the petitioner - the Senate of the Parliament of the Czech Republic, and subsequently as a judge of the Plenary of the Constitutional Court which ruled on another petition filed by the Senate of the Parliament of the Czech Republic. We are deeply convinced that Mrs. Kateřina Šimáčková should have excluded herself from the decision-making in this case on the grounds of a conflict of interest.

Therefore, we believe that with respect to Mrs. Kateřina Šimáčková there are reasonable doubts as to whether she meets indeed the requirements for the performance of the post of the ECtHR judge within the meaning of Article 21 of the

Convention, especially as regards the requirement to be a person of a “high moral character.”

According to a report issued by ČTK [Czech Press Agency], Mr. Tomáš Langášek, as judge of the Supreme Administrative Court, publicly stated in relation to the repeal of a part of the Electoral Act by the Plenary of the Constitutional Court, *inter alia*, the following: “It is therefore untrue that the elections cannot be held if the Parliament fails to act; I believe such allegations are misguided. Electoral bodies function and will function. District electoral committees will count every single vote”. According to the same source, Mr. Langášek publicly stated that were the elections held under an incomplete law, the Supreme Administrative Court would provide an interpretation of the incomplete law that would respect the principle of proportional representation.

Such a statement can be considered as being blatantly in contradiction with the very foundations of the democratic rule of law state, especially with the principle of separation of powers. Furthermore, we are of the opinion that Mr. Tomáš Langášek has failed to respect international law, especially the “Code of Good Practice in Electoral Matters” (adopted by the Venice Commission at its 52nd Session, 18-19 October 2002).

We therefore believe that in relation to Mr. Tomáš Langášek there are reasonable doubts as to whether he meets indeed the requirements for the performance of the post of the ECtHR judge within the meaning of Article 21 of the Convention, both as regards the requirement to be a person of a “high moral character” and the requirement to be truly a “renowned lawyer”.

For all the reasons mentioned above, we respectfully request you, Honourable Member, to second the rejection of the list of three candidates nominated by the High Contracting Party – the Czech Republic. Our proposal is presented in the interest of citizens of the Czech Republic, in the interest of freedom and in the interest of democracy.

Institute for Freedom and Democracy

  
Jana Bobošíková

  
Hana Lipovská

In Prague, on.....

6th August 2017



# ISDe

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zapsáno v rejstříku u Městského soudu v Praze, odd. U, vložka č. 846, IČO08709637

Ředitel kanceláře ISDe: JUDr. Václav Musílek, tel. 606 739 605