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Warsaw, 18 December 2020

**Chair of the Advisory Panel of
Experts on Candidates for
Election as Judge to the European
Court of Human Rights**

Mr Paul Mahoney

Council of Europe

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Dear Mr Mahoney,

I. Introduction

The Helsinki Foundation for Human Rights, Polish Bar Council (*Naczelna Rada Adwokacka*) and the National Bar Association of Attorneys-at-Law (*Krajowa Izba Radców Prawnych*) (hereinafter jointly referred to as: 'Signatories') would like to draw the attention of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights 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. Signatories believe that the aforementioned issue must be highlighted especially now, as the Polish government has been invited to submit the list of three candidates by 8 March 2021, as the term of office of Judge Krzysztof Wojtyczek is due to expire on 31 October 2021.

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 2019 alone, 1834 applications were submitted to the ECtHR against Poland¹.

Signatories share the belief expressed by the Committee of Ministers of the Council of Europe 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. Signatories fully agree 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. Domestic regulations, and Signatories' initial postulates

Having considered all of the above, on 21 May 2020 Signatories published a joint letter to the Minister of Foreign Affairs, in which we expressed our concerns over the current domestic process of selection of candidates for the post of judge of the ECtHR². The legal basis of the aforementioned procedure is the ordinance issued by the Minister of Foreign Affairs on 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 Europejskiego Trybunału Praw Człowieka w Strasburgu*)³. Signatories pointed to some of the following as the most important shortcomings of the procedure:

- **there is a great risk of political influence over the national selection committee responsible for determining the list of three candidates as according to the ordinance establishing the committee, all of its members come from the executive power.** In our letter, the signatories highlighted that the Steering Committee for Human Rights (hereinafter: CDDH) stated that political influence (or the appearance thereof) over the national selection process is one of the most crucial issues of this matter⁴. We also noted that the Parliamentary Assembly of the Council of Europe had urged the governments of member states to set up

¹ Available at: https://www.echr.coe.int/Documents/Stats_analysis_2019_ENG.pdf

² Available at: https://www.hfhr.pl/wp-content/uploads/2020/05/20200521_115739.pdf

³ Available at: <https://www.gov.pl/web/dyplomacja/regulacje-prawne>

⁴ Report of the Steering Committee for Human Rights (CDDH), *Selection and election of judges of the European Court of Human Rights*, p. 14, available at:

<https://rm.coe.int/report-on-the-process-of-selection-and-election-of-judges-of-the-europ/1680770f9f>

‘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’⁵. Therefore, the signatories recommended that appropriate legislative actions should be taken by the government to ensure the committee’s apolitical nature, especially by safeguarding that the committee members are representatives of the executive, judiciary and NGOs, as well as legal professions. We understand that the Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the ECtHR do not consider procedures in which domestic selection committee consists solely of the members of the executive as automatically erroneous (e.g. Spain) and also that the discussed procedural issue has been present when Poland submitted the last list of candidates in 2012. However, Signatories strongly believe 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. 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.

- **the manner in which potential candidates are interviewed by the selection committee is not regulated with sufficient depth.** In our letter to the Ministry of Foreign Affairs, we highlighted that interviews should be based on a standardised format and that, in the past, the CDDH expressed reservations as to the quality of the interviews conducted by domestic entities – in particular to the insufficient duration of the interviews, the overly general scope of questions and failure to provide members of the abovementioned entities with detailed instructions on how to conduct the interview. The question of interviews is regulated by the Ministry of Foreign Affairs ordinance, however, it lacks sufficient details, which may lead to abuses and does not guarantee, that candidates would be interviewed in accordance with the principle of equal opportunity.
- **the domestic procedure, in its current form, does not guarantee gender – balanced composition of the selection committee.** In its current form, the Polish procedure envisages that the selection committee members are chosen solely on the basis of the position they occupy in the public administration. Therefore, we have notified the government that the abovementioned process does not guarantee

⁵ Parliamentary Assembly Resolution 1646(2009)

gender – balanced composition of the selection committee, despite the fact that the Parliamentary Assembly of the Council of Europe has invited ‘the governments of member states to ensure that the selection bodies/panels (and those advising on selection) are themselves as gender-balanced as possible’⁶. The procedure in force not only does not make any efforts to fulfil that requirement but also effects that the selection committee is composed of members with homogeneous work experience.

- **the domestic procedure, in its current form, does not fulfil the requirement of sufficient transparency.** The legally binding domestic process for selecting candidates for the post of judge of the ECtHR does not require the government to provide the public with any information about the procedure from the moment of the opening of the process – from the announcement of the call for the position, to the time the list of candidates submitted to Parliamentary Assembly is published. It means that the public has no detailed information about the manner and pace in which the procedure is being carried out. Signatories have informed the Polish government that considering the importance attached by the Council of Europe to the transparency requirement, current legislation cannot be deemed acceptable. In addition, signatories recommended that detailed information about particular phases of the procedure should be published on the Ministry of Foreign Affairs official website and that the government should ensure the participation of the parliament in the whole process by consulting the list of candidates with specialised parliamentary committees (consultation of that kind had taken place in 2010 – proposed candidates had voluntarily attended a session of the parliamentary legal committee and were interviewed by its members).

Listed above are only the most important problems of the Polish selection procedure of the candidates for the position of ECtHR judge, as recognized by Signatories alongside solutions we allowed ourselves to recommend to the government. The abovementioned letter addressed to the Minister of Foreign Affairs contained a larger number of diagnoses and appropriate solutions and recommendations.

⁶ *Ibidem*.

On 30 June 2020, the Ministry of Foreign Affairs issued a reply to the joint letter of Signatories⁷. The Ministry expressed its willingness to cooperate with Bars and NGOs (alongside other entities) in distributing the announcement of the open call for the post of ECtHR judge. It has also informed that it will reconsider the manner in which interviews with potential candidates are being conducted and will publish information about phases of the discussed procedure on the Ministry of Foreign Affairs' official website. Unfortunately, the Ministry dismissed most of the proposed recommendations, particularly those regarding composition of the selection committee and the transparency requirement (especially the call for the possibility of having independent observers present during the interviews). The Ministry informed that making any changes to the abovementioned procedure is impossible as the proceedings are already ongoing.

Furthermore, Signatories would like to highlight that on 20 November 2020, as invited by the Ministry of Foreign Affairs, Helsinki Foundation for Human Rights' representatives – dr Piotr Kłodoczny and advocate Marcin Wolny – met with two members of the national selection committee. Dr hab. Piotr Wawrzyk and Justyna Chrzanowska did not question the validity of the postulates raised by Signatories. However, they have stated that at this time it is too late to implement them. Signatories find this claim preposterous as the letter containing the postulates was sent to the Ministry in May and Ministry did introduce some changes to the national procedure on 2 October 2020, as well as published an open call for the candidates only on 9 October 2020 – that is over three months after Signatories' joint appeal.

III. Composition of the national selection committee

On 2 October 2020, despite prior announcements, the Minister has amended⁸ the Minister of Foreign Affairs' ordinance of 13 January 2012 by changing slightly the regulations concerning the composition of the national selection committee. 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 Konrad Marciniak – appointed by the Minister of Foreign Affairs;
4. Justyna Chrzanowska, attorney-at-law – appointed by the Minister of Foreign Affairs;

⁷ Available at:

<https://www.hfhr.pl/wp-content/uploads/2020/07/pismo-MSZ-z-30.06.2020-wybory-do-ETPC-3.pdf>

⁸ Available at: <https://www.gov.pl/web/dyplomacja/regulacje-prawne>

5. dr hab. Marcin Kałduński – appointed by the President of the General Counsel to the Republic of Poland;
6. Krzysztof Kubów – Secretary of State in the Chancellery of the Prime Minister – 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 Signatories’ opinion, the current composition is still burdened with similar flaws as mentioned in our joint letter – all of its members are a part of, or appointed by, the Polish executive. It should be underlined that although academics were selected to the committee, they were appointed directly by two ministries in an unclear process.. In addition, only one female member of the national selection committee means that the gender – balanced composition requirement has not been fulfilled. Moreover, the committee does not include any independent representatives of civil society or legislative. The importance of balanced composition requirement was lately reiterated in the Secretary General of the Assembly’s memorandum⁹.

IV. Access to the information regarding the procedure

One of the main issues of the Polish, domestic selection procedure, as identified by Signatories, is the lack of its sufficient transparency. This problem stems from the lack of appropriate procedural guarantees in that regard but was aggravated by some of the Ministry of Foreign Affairs’ actions.

First of all, despite access for public information request, Helsinki Foundation for Human Rights (hereinafter: HFHR) did not receive any information as to the competences that were taken into account, while inviting members of the selection committee. Additionally, during the meeting on 20 November 2020, HFHR’s representatives had been informed that it will not be possible for HFHR’s observers to be present during the interviews conducted by the national selection committee with persons that had applied for the post of the ECtHR’s judge (HFHR made an application in that regard on 3 November 2020) as the current regulations require those proceedings to be confidential.

⁹ Memorandum prepared by the Secretary General of the Assembly, *Procedure for the election of judges to the European Court of Human Rights*, 4 December 2020, available at: <http://www.assembly.coe.int/LifeRay/CDH/Pdf/ProcedureElectionJudges-EN.pdf>

It is also worth noting that same submission made by Polish MPs during control visit on 20 November 2020 had been denied as well. It should be underlined that mentioned MPs – Andrzej Szejna and Krzysztof Śmiszek are also members of the Polish delegation to the Parliamentary Assembly of the Council of Europe – body directly responsible for the election of the future judge. Furthermore, on 4 December 2020, Kamila Gasiuk – Pihowicz and Andrzej Jan Szejna (similarly to the case mentioned above, both being MPs as well as members of the Polish delegation to the Parliamentary Assembly of the Council of Europe) had intervened in the Ministry of Foreign Affairs and on the basis of the domestic regulation regarding access to public information¹⁰ requested *inter alia*:

- scans of all the protocols from all of the meetings of the national selection committee, including all annexes (in anonymized version if required);
- information whether the list of three candidates and two reserved candidates was agreed upon via agreeing a common position or via vote;
- information whether the abovementioned list has been submitted to the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights and the date on which it has taken place or will take place;
- names of the abovementioned three candidates and two reserved candidates.

Furthermore, on that day the abovementioned MPs verbally requested to gain the access to the protocols, in particular the protocol from the national selection committee meeting of 2 December 2020 (on the day when the voting was held), on the basis of the powers granted to them as members of Polish parliament¹¹ but their request was denied by the Ministry.

On the same day, the HFHR made a similar access to information request. On 16 December 2020 the Ministry of Foreign Affairs responded to this request by informing HFHR that:

- amongst the three candidates, selected on 2 December 2020 by the domestic body, are representatives of both sexes;
- the list of three selected candidates was submitted to the Advisory Panel on 8 December 2020;
- the three selected candidates were informed about that decision on 3 December 2020, by letter;

¹⁰ Ustawa z dnia 6 września 2001 r. o dostępie do informacji publicznej (Dz. U. z 2020 r. poz. 2176), available at: <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20011121198/U/D20011198Lj.pdf>

¹¹ Ustawa z dnia 9 maja 1996 r. o wykonywaniu mandatu posła i senatora (Dz. U. z 2018 r. poz. 1799), available at: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19960730350/U/D19960350Lj.pdf>

- the two reserve candidates were selected but those persons were not informed about that decision – the Ministry of Foreign Affairs stated that it will do so, only in case of Advisory Panel deeming any of the three candidatures presented on the list submitted to the Panel unacceptable;
- the list of three candidates submitted to the Advisory Panel was agreed upon via agreeing a common position by the members of the selection committee.

In addition, the Ministry submitted to HFHR anonymized copy of the protocol from the national selection committee meeting of 2 December 2020, signed by all of the national selection committee members, as well as: i) attendance list from selection committee meetings of 1 and 2 December 2020, ii) final list of questions for the candidates; iii) anonymized copy of the letters sent to the candidates that did qualify and to those that did not; iv) anonymized request of one of the candidates to attend the interview via videoconference call; v) anonymized version of one of the candidate's statement in which s/he withdrawn his/her candidature due to suspected COVID – 19 infection.

Signatories would like to underline, that considering that the Ministry of Foreign affairs eventually have submitted abovementioned documents, in particular the protocol from the selection committee meeting of 2 December 2020, it is difficult to understand why the verbal request to gain the access to the protocols, made on 4 December 2020 by Polish MPs on the basis of the powers granted to them as members of Polish parliament, was denied.

It must be pointed out as well that the Ministry of Foreign Affairs did take up some additional measures to make the national procedure more transparent. Responding to the application submitted by HFHR on 16 November 2020, the Ministry sent HFHR a work schedule of the national selection committee. What is more, in past two months, the Ministry has been publishing some information concerning the national selection procedure¹², e.g.:

- the number of persons that had applied for the post of the ECtHR's judge;
- personal details of national selection committee's members;
- after the national selection committee's first meeting on 12 November 2020, the Ministry had published detailed information on the actions taken up by the committee during the meeting (e.g. analysing whether the potential candidates have fulfilled formal requirements, setting the date of the interviews for 1 – 2 December 2020, announcing the framework of the interviews);

¹² Available at: <https://www.gov.pl/web/dyplomacja/aktualnosci3>

- after the national selection committee's second meeting on 1 – 2 December 2020, the Ministry had published detailed information on the actions taken up by the committee during the meeting (e.g. informing that three candidatures had been withdrawn before the meeting by the candidates themselves, producing the list of three candidates and two reserve candidates) as well as the exact contents of four questions, identical for all the candidates, that they had been asked.

Moreover, although HFHR's application for the full list of the potential candidates to be published was denied, the Ministry invited the candidates to voluntarily reveal their participation in the competition. Three out of 17 candidates voluntarily revealed their participation in the proceedings: prof. Michał Balcerzak, prof. Ireneusz C. Kamiński and prof. Tomasz Koncewicz – all of them being well – established and known legal experts, recognized as such by the Polish legal community.

However, even having considered all of the above, Signatories still believe that the Polish procedure of the selection of the candidates for the post of the ECtHR's judge still raises legitimate concerns regarding its transparency. Signatories were pleased to see that the Ministry took certain steps to address the issue, however the proceedings remained inaccessible for the public during its most crucial phases. It should be noted that independent observers' inability to attend the interviews means that it is impossible to thoroughly verify whether the information provided by the Ministry, concerning the manner in which the interviews were carried out, was factual, in particular whether the interviews with all of the candidates were conducted in fair and equal fashion. In Signatories' opinion, such measures were justified due to the current degradation of the rule of law in Poland in order to ensure lack of any illicit political influence in the process.

V. Final concerns over the procedure

After taking adequate steps domestically, Signatories have decided to address this letter to the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights. In our opinion it is of particular significance 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 it was stated in European Convention on Human Rights, at the best of times. Signatories have no doubts that the described procedure will be assessed with great care upon submitting list of

candidates by Poland. In Signatories' opinion, following issues deserve to be examined with special attention:

- the composition of the national selection committee making this body significantly vulnerable to political influence, which is Signatories' particular concern;
- the composition of the national selection committee did not fulfil gender – balance requirement, neither did it include any independent representatives of civil society;
- the refusal of access of independent observers, of course in a manner that would ensure adequate levels of confidentiality, to the domestic procedure, which in Signatories' opinion was required, given the current unique political situation in Poland.

In addition, it is worth noting, that similar concerns regarding the transparency of the whole Polish selection procedure, as well as the composition of the domestic selection committee, were also voiced by the Polish Ombudsman¹³.

Signatories sincerely hope that the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights will find this letter helpful in realizing its goals. Moreover, Signatories would like to express their readiness to cooperate with the Panel in matters related to the process of selection of the candidates for the position of judge of the European Court of Human Rights.

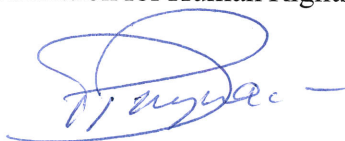
Respectfully,

Chair of the National Bar
Council of Attorneys-at-Law



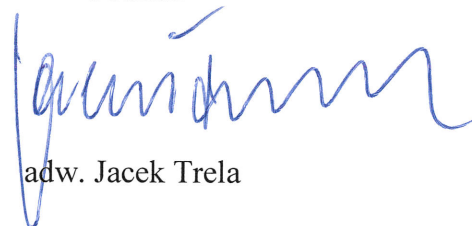
r.pr. Włodzimierz Chróścik

Chair of the Helsinki
Foundation for Human Rights



Danuta Przywara

Chair of the Polish Bar
Council



adw. Jacek Trela

¹³ Available at:

<https://www.rpo.gov.pl/pl/content/rpo-wybor-sedziego-etpc-z-polski-powinien-byc-transparentny>