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THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS IN HUNGARIAN JUDICIAL PRACTICE*

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The international system of norms protecting human rights is one of the most important accomplishments of modern international law because it has shaken the foundations of the institutional system based on unconditional respect for state sovereignty. The international human rights treaties motivate—and ultimately compel—states to eliminate deficiencies in their legal systems and to comprehensively ensure the protection and efficient enforcement of the protected rights.[1] The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) serves as the foundation for the most efficient regional legal protection mechanism. The Convention was signed by the members of the Council of Europe on 4th November 1950 and entered into force three years later. Many regard it as a *sui generis* document: it is in part an international agreement, since it creates obligations for the state parties, but at the same time it is also in part national law since the rights enshrined therein are—ideally—enforceable in the courts of member states, too.[2] This is the reason why in addition to the European Court of Human Rights (hereinafter: the Court)—which primarily serves to apply and interpret the Convention—, the national courts—due to the principle of subsidiarity—also play a crucial role in its implementation.

The Convention created a new kind of constitutional order:[3] the substance of the individual rights is continuously expanded and amended by the Court's case-law. This is precisely the feature that makes its application and enforcement in domestic law so difficult: the interpretation employed by the given national court must pay heed not only to the text of the Convention, but also to the case-law that provides its substance. The Strasbourg organs—the former Commission and the existing Court—place a great emphasis on a dynamic and continuously evolving legal interpretation that reflects social changes and thereby seeks a rapprochement of the member states' legal system. It is important to note, however, that the Court is not entitled to undertake an *in abstracto* examination of national laws, it is only authorised to assess whether in a given case the rights laid down in the Convention have been violated by the national authorities.[4] It has no explicit authorisation to annul judgments rendered by national courts or to call on member states to modify their laws.

The Convention's Article 1 obliges member states to secure the rights in the Convention to "everyone within their jurisdiction", and Article 13 expressly declares the right to an effective remedy: "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." The latter provision raises the question whether the rights laid down in the Convention can be applied to the legal relations between private individuals: it is under dispute in how far—if at all—a right enshrined in the Convention can be horizontally enforced in cases in which the state is not party to the legal dispute.[5] In construing Articles 2, 3, 6, 8 and 11, the Court has recognised the possibility of indirect *Drittwirkung* in several cases.[6] In such cases the state may also be found in violation if it failed to provide for the assertion of the rights laid down in the Convention in the context of legal relations between private individuals (this interpretation also appears to be supported by the obligation contained in Article 1 of the Convention).

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THE CONVENTION AND THE COURT'S CASE-LAW IN HUNGARIAN LAW

Pursuant to the Hungarian Constitution's Article 7(1), "[t]he legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law." Following the position of the Constitutional Court, the general rules of international law are part of Hungarian law even without a distinct transformation, and in this case the transformation is undertaken by the Constitution itself, whereas in the case of international treaties it is necessary to proclaim them in a law of appropriate rank. Article 7 further mandates the harmonisation of international law obligations and domestic law—including the Constitution.[7]

The Convention was transposed into Hungarian law by Act no. XXXI of 1993, whereby the Convention became a part of Hungarian domestic law. It follows from the Constitutional provisions discussed above, as well as from the Convention's Article 1, that the Hungarian judiciary not only may choose to apply the Convention, but must in fact do so.[8] By making the Convention part of the Hungarian legal system, the legislator made its contents binding for the state's institutions and organs as well. The direct application of the Convention differs from the assertion of other international treaties in domestic courts, in that the practice of the European Court of Human Rights also has to be considered in the process.[9] This obligation is laid down in Article 13 (1) of Act no. L of 2005 on the procedures concerning international treaties: "In construing the international treaty, the prior decisions of the body entrusted with the legal authority to settle disputes in connection with the given treaty must also be considered." Through the integration of this rule, the legislator essentially rendered indefensible the position—which the Hungarian courts had a predilection for—that the domestic judicial organs are only bound by decisions regarding Hungary. Before the adoption of the act on international treaties, there were no clear guidelines for judges as to the degree to which they had to consider Strasbourg case-law in rendering their own decisions, as strictly speaking the case-law cannot be regarded as statutory text or Hungarian precedent. The Hungarian Supreme Court correctly noted in 2003: "[T]he case-law of the European Court of Human Rights is directly applicable—and their application is indeed desirable—in domestic judicial practice."[10]

It is not only the fulfilment of international obligations in good faith which necessitates that the judiciary consider the general conclusions following from the Court's case-law: though the Strasbourg Court is not a precedent court, it does consistently apply the fundamental principles established by its case-law, and if the state seeks to avoid a condemnation in cases whose facts are similar to each other, then it is inevitable to be aware of and apply the case-law, which defines the content of the individual rights. Satisfying the above naturally assumes that the national courts know the case-law and are capable of applying the expectations contained therein in the cases before them.

Ideally, the courts follow Strasbourg practice even in those cases when neither party invokes the Convention but the action refers to some right that is guaranteed—in addition to Hungarian law—by the Convention, too. As all the rights enshrined in the Convention are also part of Hungarian law—most of them are in the Constitution itself—this happens fairly often. Due to limited access to judgments, however, this study will only examine those cases in which either one of the parties or the proceeding courts invoked the Convention or the Court's case-law.

REFERENCES TO STRASBOURG IN HUNGARIAN JUDICIAL PRACTICE

The case-law of the European Court of Human Rights and the Convention do not play a significant role in Hungarian judicial practice. Based on the judgments accessible in public databases and on those received from the Supreme Court,[11] we can group references to them into four categories: 1) cases in which the proceeding court decided the legal dispute by applying the Convention; 2) personality right suits in which the court discusses those cases cited by the relevant Constitutional Court decisions; 3) cases in which either of the parties referred to Strasbourg documents; 4) cases in which the facts of the case contain elements related to the Strasbourg procedure or Court or in which the Convention came up in the context of procedural rights issues. The latter group of cases is not relevant in terms of this study, since in these cases the Convention and the Court's case-law did not influence the outcome, the Hungarian court did not have to decide on an issue connected to the interpretation or application of the Convention.[12] The cases discussed below are suitable for presenting the tendencies observable with regard to the application of Strasbourg

case-law. Due to the limited access to Court judgments the overview provided here is not comprehensive, but it certainly illustrates the difficulties that a party may face if she seeks to base her action on the European Convention of Human Rights or if she wishes to support her arguments with examples derived from case-law.

References with impact on the merits of the case

The cases that belong into this category are those in which the proceeding court—either out of its own volition or in response to a motion by one of the parties—substantially relies on the Convention or the jurisprudence of the European Court of Human Rights in its judgment.

An excellent example for this is a judgment by the Fejér County Court in a suit initiated on the grounds of damages caused by a court in the exercise of its judicial authority.[13] The plaintiff claimed that in espousing the execution of punishment imposed by an Italian court that had sentenced the plaintiff to loss of liberty, the respondent in the case, a Hungarian court, had determined the degree of security of imprisonment unlawfully, and since the plaintiff had served his sentence in a penitentiary rather than a prison, he was released on probation with four months delay, and the conditions of his detention had been more stringent as—among other things—his contact to the outside world had been more restricted. In his submission the plaintiff invoked the violation of Articles 6 and 13 of the Convention: in nine points he summarised the procedural law violations that in his view substantiate a breach of the Convention. The Fejér County Court rejected the plaintiff's action. In its judgment, the County Court touches on the violation of the rights secured by the Convention: "It is the position of the County Court that in adjudging whether in the given criminal proceeding the (…) rights of the petitioner were violated, it should be examined whether the petitioner was able to defend himself in the criminal proceeding, whether he was allowed to put questions and submit motions under the same conditions as the prosecution." Following a review of the proceeding complained of, the County Court concluded that the rights in the Convention had not been violated. Even though the County Court simplifies the guarantees in Article 6 as to encompass only the text of the Convention and fails to consider the further—implicit—rights and fundamental principles developed in the case-law, the judgment must nevertheless be regarded as positive. The County Court did not shy back from interpreting the Convention and it undertook a detailed assessment of the arguments raised in the action.

The second instance judgment in the very same case is surprising, however.[14] The Metropolitan Court of Appeal rejected the plaintiff's action, which referred to a violation of the Convention as one of the grounds for damages, with the following reasoning: "Pursuant to Article 13 and 41 of the Rome Convention, however, a domestic court is authorised and in fact obliged to adjudicate a legal violation on the basis of domestic law. The Convention is therefore not to be applied directly and may not serve as a legal basis for an action. The Court of Appeal further notes that the judgments of the Strasbourg Human Rights Court are not binding for the Hungarian courts, and hence the presentation referring to them is in error. In cases before Strasbourg Human Rights Court, the Hungarian State is the respondent party, judgments are rendered against it: in this form the judgments undeniably shape Hungarian law—as a result of legal harmonisation—, but Hungarian courts are not obliged or authorised to apply them directly."[15] The Court of Appeal's reasoning is problematic from several aspects. For one, what the Convention's Article 13 specifically requires is that member states provide effective legal remedies in case a right guaranteed by the Convention is violated: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority (…)." That is the proceeding court ought to have arrived at exactly the opposite conclusion that it actually came to. Article 41 is an irrelevant provision with regard to domestic laws and national courts. This article namely gives the Strasbourg Court the possibility to award just satisfaction to the applicant if the Convention was violated. What is especially distressing about this case is that the Court of Appeal's decision was crafted after the birth of the 2005 act on the procedures concerning international treaties and hence the Court was already legally obliged to consider all Strasbourg decisions regarding the Convention—and not only judgments pertaining to Hungary.

The judgments of the Supreme Court in which the court decided on the custody of children where the lower courts changed the originally approved arrangement on the basis of the religious views of one of the parents, are also exemplary with respect to the application of the Convention and the case-law. A judgment of 1998 also published in a BH (Collection of Judicial Decisions) deserves a more detailed analysis in this regard. The court of first in-

stance dissolved the parties' marriage in 1992 and also approved the agreement according to which the two underage children stayed in their mother's care. Three months after the legally effective agreement was concluded, the father requested a change to the children's placement, on the grounds that the respondent mother was a regular visitor of the Jehovah's Witnesses, a "baptised member" of the group, which in the father's view exerts a harmful effect on the children's development. The court of first instance placed both children with the plaintiff father. In the judgment, the court took a negative view of the fact that in the so-called blood question the respondent had failed to provide an unequivocal answer as to whether she would consent to her children receiving blood transfusion if necessary. The court of second instance annulled the judgment and instructed the court of first instance to undertake a new proceeding. In the renewed proceeding, the court accepted the parties' claim that certain reasons behind the dissolution of their marriage had been withheld during the divorce trial (drunk driving, disapproval of religious views, infidelity). It examined how the respondent's religious views and the differences of faith between the parents would affect the children, and based on an expert opinion it gave one of the children to the father because the child was closer to the father. The court of second instance upheld the ruling. In the review proceeding, the Supreme Court held that that the binding decision was in contravention of the law. The Supreme Court complained that the conditions laid down in Act IV of 1952 on marriage, family and custody (Csjt), which would make it possible to review the agreement within two years of its conclusion, did not apply. The plaintiff based his application for changing the agreement on one reason alone, the respondent's religious denomination. The Court emphasised that it violates not only the Constitution, but also Articles 8 and 14 of the European Convention on Human Rights if someone is treated differently on account of her worldview. (Though the Supreme Court did refer to the Hungarian Constitution's provision on freedom of religion, it failed to do the same with regard to the Convention). Citing the case-law, it asserted that the differences in worldview between the parents may affect neither parent adversely, they may not be weighed in favour or against either of them. Not even the expert opinion cast doubt on the mother's ability to raise a child and, moreover, the reasoning of the court of first instance, according to which the effects on the children of the differences between the two parents' child-rearing principles ought to be evaluated exclusively to the detriment of the respondent, is erroneous. At this point the Supreme Court referred to Article 5 of the Protocol No. 7 to the Convention, pursuant to which the rights and responsibilities of spouses towards each other and with regard to children born in wedlock are equal in the course of their marriage as well as following its dissolution. It may be expected from the parties, therefore, that they always proceed with the child's best interest in mind. The Supreme Court placed both children with their mother.[16]

The Supreme Court in an excellent decision referred to a judgment delivered against Hungary by the European Court of Human Rights in its decision in which the pre-trial detention of the defendant was altered into a prohibition to leave his place of residence.[17] The defendant was charged with misuse of narcotic drugs in 2006, and he was in detention on remand for half a year. The pre-trial detention was upheld by the county court until the judgment of the first instance court: the reasoning of the decision emphasised that there was risk of absconding (the police could take him into custody only after the arrest warrant against him had been issued) and in the light of the punishment prescribed for the act in question it was justified to deprive him of his liberty. The decision on the pre-trial detention was upheld with the same reasoning by the court of appeal as well. However, the Supreme Court found: "the prolonged detention is only justified if—despite of the presumption of innocence—the measure serves a strong public interest, which weighs more than the protection of individual freedom. But the risk of absconding has to be supported by facts relevant in the particular case." The gravity of the crime and the seriousness of the possible penalty—although are important facts in a given case—can not be solely relied on when extending pre-trial detention. The defendant lived under normal circumstances and the issuance of the warrant was necessary because of the omission of the authorities. When the defendant learnt about the warrant, he was immediately at the disposal of the investigating authority. Furthermore, it was very uncertain when the final decision would be delivered in the case since the date for the hearing was not set. The Supreme Court thus concluded that in the defendant's case the total deprivation of liberty was not justified. The decision of the Supreme Court is perfectly in line with the judgment of the European Court of Human Rights delivered in *Imre v Hungary*.[18]

The rules on disqualification were also examined in accordance with the Convention and Strasbourg case-law by a county court, which observed that the fact that the European Court of Human Rights had

reprimanded the city court that had handled the case on the grounds of the protraction of the proceeding was in itself sufficient to cast doubt on the impartiality of the court in question.[19] In its decision, the county court referred to a tenet derived from Strasbourg case-law, which posits that it is insufficient for a court to be veritably impartial, it must also maintain the appearance of impartiality. All circumstances that may give rise to doubts as to the impartiality of the court serve as grounds for disqualification. The court of appeal ultimately found the county court's decision unlawful on the grounds that it violated jurisdictional rules, but regardless: the case is still a good example illustrating that a Hungarian court, too, can interpret domestic legal regulations in compliance with the Convention.[20]

Personality rights suits: references to Strasbourg case-law by the courts

Even though the practice of the European Court of Human Rights provides clear guidance as to the acceptable limits on the freedom of expression, the case-law has hardly at all made its way into Hungarian judicial practice, though in many cases applying the standard established by Article 10 would make it avoidable that one of the parties ultimately turns to the Strasbourg organ for redress. The domestic courts are stuck in a mode in which they only reference Strasbourg cases that the Constitutional Court itself has cited. None of the examined cases contains a reference to a case that does not appear in the relevant Constitutional Court decision.

In 2007, the Budapest Metropolitan Court (hereinafter: Metropolitan Court) rendered a decision in a suit filed to have a correction published in a newspaper. The suit was initiated by a public figure, a politician and entrepreneur, on the cause of an article entitled "Private billions with state help?", which explored the assets of his companies as well as the circumstances of his enrichment.[21] The writing, which bore the subheading "Organised Overworld", continued in the inner pages of the newspaper. The article claimed that in spite of the fact that following his election the politician had vowed to stay away from the business sphere, through the help of a state enterprise and the relatives of the plaintiff offshore companies in Cyprus raked in billions of forints in profits. Moreover, the journalist observed a connection between the plaintiff's term as a minister in the government and the successful participation in a government subsidy programme of the company he had managed previously. Furthermore, the writing also shed light on numerous economic deals—which were shady according to the author. The plaintiff opined that the article in question presented him in a false light and hence turned to the newspaper with a request for a correction. As the respondent did not meet this request, the plaintiff filed a suit. The Metropolitan Court found that the action lacked foundation. In its opinion, it pointed out that the Constitutional Court decisions no. 30/1992. (V. 26.) and 36/1994. (VI. 24.) delimit the boundaries of the freedom of expression. In addition to alluding to the interpretation of the Convention in Constitutional Court decisions, the Metropolitan Court also touched upon the ECHR's more recent practice, though this reference can hardly be seen as the adoption of case-law: "It also follows from the most recent practice of the European Court of Human Rights that the international body devotes significant attention to the so-called 'watchdog' role of the press." The Metropolitan Court of Appeal upheld the ruling: its opinion only refers to the Constitution's Article 61 and does not even mention the substantial Strasbourg case-law regarding the right to criticise public persons.[22]

The reasoning of the Metropolitan Court in the personality right suit initiated on the cause of an article probing into the private life of a well-known actor is similar.[23] The plaintiff asked the Metropolitan Court to determine that his personality rights as manifested in the rights to reputation and inviolability of private life had been violated. Though the Metropolitan Court does explicitly invoke the Convention's Article 8 (the right to respect for private life), it fails to review the case-law concerning this right. Similarly to the aforementioned decision, it only integrates the contents of Constitutional Court decision no. 36/1994. (VI. 24.) into its opinion and does not lean on the practice of the European Court of Human Rights in interpreting the right to respect for private life. The Metropolitan Court granted the petition, forbade the respondents to engage in further violations of law and also obliged them to pay damages, among other things. The judgment meshes with the Strasbourg decision rendered in a similar case.[24] The Metropolitan Court of Appeal upheld the judgment: here, too, the opinion alluded only to the right enshrined in the Convention's Article 8 but failed to consider its interpretation by the Strasbourg Court.[25]

The decisions above were all submitted by the same judge at the Metropolitan Court (Árpád Pataki), who had also decided the personality right case initiated by a ministry and its minister concerning a statement on police brutality committed during the

riots of fall 2006.[26] The respondent claimed that the police was acting under political pressure as the police leaders had coordinated their actions with their political superiors in advance of the riots. The structure of the opinion in this case is similar to the decisions discussed above: it cites the relevant Constitutional Court decisions as well as the Strasbourg references contained in those opinions.[27]

These rather brief and superficial references might justifiably cause the researcher to turn despondent. If we take a look, however, at some personality right cases decided by other judges, in which the facts of the cases were similar[28] to the ones described above or in which the plaintiff specifically invoked the Convention's Article 8, we need to temper our critical view of Árpád Pataki: in many cases—though the application referred to the Convention—the proceeding court does not address the issue of the potential applicability of Strasbourg case-law beyond acknowledging the right laid down in the Convention.[29] The fact that the Strasbourg practice is part of the judgment—even if only as a passing reference—offers a glimmer of hope that at one point in the future all judges will review the relevant Court of Human Rights judgments before rendering their own decisions.

Consideration of case-law invoked by the parties

Those cases in which the plaintiff relied to a significant degree on the Convention or the Court's case-law in her action constitute a distinct category. This group of cases is worth mentioning because it illustrates that Hungarian lawyers are not nearly as averse to applying Strasbourg case-law as the domestic courts. Several cases are accessible in which one of the parties considered the Convention and the associated case-law relevant to her case and hence referred to it. Strasbourg case-law will naturally not always provide guidance to domestic court decisions, but national courts can nevertheless be expected not to rule out an application of the Convention without substantial examination. This category is distinct from the cases discussed the first group, in that here the domestic courts fail to provide a detailed analysis of the references that might serve to justify their decision to ultimately disregard them.

In one of the cases the plaintiff alleged a violation of his right to expression, as the classifieds newspaper published by the respondent refused[30] to print the following advertisement: "You too can take action against the blundering authorities and judicial decisions that violate your human rights! Send us a description of your case and a return envelope!" The final decision, which rejected the action, referred to the Constitution's Article 61, as well as to the Universal Declaration on Human Rights, but did not invoke the Convention, in spite of the fact that as opposed to the Declaration the Convention is binding. The plaintiff entered a petition for a review of the final decision, in which he sustained his original claim, that is that the publisher's proceeding violated—among other things—Article 10 of the Convention, promulgated by Act no. XXXI of 1993. The Hungarian Supreme Court did not find it necessary to undertake an examination of the proceedings' conformity with the Convention, it based its decision exclusively on the Constitution and the relevant provisions of the act on the freedom of press.

The Supreme Court was more circumspect in a suit involving the review of an administrative order issued in a construction case, in which the plaintiff complained decisions rendered in the framework of a municipal authority's proceeding relating to a request for a permit to build a wind power plant. The respondent's construction permit was approved by the town's mayoral office as well, and as no appeal was pending it became effective. A company that became involved, however, asked the Administrative Office to determine a lack of jurisdiction. Thereafter the Administrative Office instructed the notary public to hand over the case to the Regional Technical Safety Supervisory Authority of the Hungarian Trade Licensing Office. Based on Article 75 (1) (a) of the former Act on administrative proceedings, the Administrative Office—the respondent in the case—struck down the first instance decision. This was the decision that was impugned by the plaintiff who argued that a violation of law had taken place. The county court defeated the plaintiff's cause of action,[31] who in turn introduced a petition for reviewing the decision. The petition referred to a violation of rights acquired and exercised in good faith, specifically to the right to property enshrined in Article 1 of Protocol No. 1 of the Convention, as well as to the requirement of predictability derived therefrom. The Supreme Court did discuss the requirement of proper legal practice—without referring to the Convention—and held that the grounds for nullity laid down in Article 75 (1) (a) of the former Act on administrative proceedings do not recognise rights acquired in good faith and hence the requirement of predictability does not apply, either.[32]

In a suit initiated in response to a condemning decision submitted by the Hungarian Competition Authority (GVH) on the grounds of unfair market practices, the plaintiffs based their action on Articles 8

and 6 of the Convention. In the proceeding undertaken by the GVH, the Authority determined that the plaintiffs had engaged in preliminary consultations regarding the execution of the construction of three highway sections, as a result of which all enterprises involved won tenders. The consortium agreements hence precluded the uncertainties stemming from competition. The GVH's decision was based on direct and indirect evidence, which it had collected with judicial authorisation in the plaintiffs' offices. The documents, memoranda and personal notes seized during the search of the premises indicated that the plaintiffs had coordinated their market behaviour into the most minute detail. Several plaintiffs disputed the admissibility of the seized documents, as they had been obtained by the GVH in contravention of the Convention's Article 8. The Metropolitan Court, which proceeded as the court of first instance, held that a violation of Article 8 was inconceivable since "even the plaintiffs did not claim that the documents—or the process of their acquisition—had brought to light information concerning their private and family life, their residence or their correspondence".[33] Though the Court disputed even that an interference had taken place, it nevertheless examined the issue of curtailing rights in accordance with the Convention: it stated that there was a legal basis for curtailment—the relevant provisions of Act LVII of 1996 on the prohibition of unfair market practices and restriction of competition (hereinafter: Tptv.)—and that restriction had a legitimate aim as it had become necessary in the interest of the country's welfare. Unfortunately, the Court failed to address the third—and most important—test for restricting rights: it did not examine whether the limitation of rights was necessary in a democratic society. Another problem with the Court's reasoning is that it only examines the text of the Convention itself and fails to consider the case-law, which gives substance to the right laid down in Article 8. The European Court of Human Rights declared already back in 1992 that personal notes drafted in the context of work may enjoy the Convention's protection and, moreover, private life cannot be restricted to a private sphere that excludes professional life.[34] The Metropolitan Court of Appeal upheld the first instance decision: with regard to the alleged violation of Article 8, it noted that the Tptv. provides a basis for interfering with the autonomy of enterprises and hence all arguments to the contrary lack foundation.[35] The court failed to provide an explanation, however, it devoted a mere paragraph to the complaints regarding the Convention and it did not use this brief space to decide the merits of all these complaints.

It was also the plaintiff who referred to Strasbourg practice in a personality right case in which an honorary consul delegated to Hungary complained that the Hungarian Ministry of Foreign Affairs (MFA)—the respondent in the case—had violated his personality right in a *note verbale* addressed to the foreign ministry of the consul's country. In the note the MFA explained that a criminal proceeding was pending against the plaintiff and that the ministry had been advised of numerous other violations of law, as a result of which the MFA regarded the plaintiff as unworthy of his appointment, and correspondingly the Hungarian side would no longer recognise him as an honorary consul. The plaintiff argued that the contents of the note violated his personality rights. The Metropolitan Court rejected the claim.[36] In his appeal, the honorary consul invoked the presumption of innocence and emphasised that the presumption "also requires that the representatives of the state and the employees of the organs of public power do not make statements that imply or assert the guilt of an accused before the proceeding court has rendered a decision on the merits of the case." His view was that for an outside observer it would clearly emerge from the *note verbale* that the state presumes his guilt. The Metropolitan Court of Appeal responded in substance to the arguments raised in the appeal. The Court stressed that a presumption of guilt certainly did not apply here, since the note merely conveys the fact that a criminal proceeding is ongoing, and the plaintiff's action cannot even be evaluated from the perspective of an outside observer, since the object of the dispute was a note relayed between two ministries, which is not a public document.[37]

CONCLUSION

The decisions discussed here also show that applying the Convention is not always problematic for Hungarian courts: if either of the parties invokes Strasbourg case-law, the proceeding court may adequately reflect on the cited provisions and cases, though we cannot always speak of a substantial examination in these cases. In most instances the judges exclude Strasbourg case-law in a matter of a few lines, often arguing that it cannot be considered relevant in the given case. It cannot be claimed that the practice of the European Court of Human Rights is applicable in all cases pertaining to human rights, but the fact that the courts often do not even make an effort to seek out potential connecting points is problematic indeed.

At the same time the cases discussed above shed light on the deficiencies of Hungarian judicial practice: even though the courts often refer to rights safeguarded by the Convention or to the practice of the European Court of Human Rights, this generally exerts little influence on the their decision. There may be several reasons behind the disregard of Strasbourg practice. Of course it is true that in a portion of the cases the parties' reasoning is not well-grounded, and in such cases the Hungarian courts cannot be expected to dismiss an application with a lengthy discussion of relevant case-law. We also see numerous cases, however, in which a consideration of the Convention and the resultant legal practice would be necessary. In such cases the position that Hungarian law enjoys primacy is difficult to defend. It appears that a Hungarian judge rarely initiates the inclusion of Strasbourg case-law into her decisions. Since only a fraction of the case-law is available in Hungarian, the hope for change in this area is slim as long as only decisions regarding our home country are translated into Hungarian. Nevertheless, the most important judgments are already available in Hungarian. Thus even though not the entire Strasbourg case-law is available, the decisions that constitute its foundations are already accessible. There are also signs of rejection on the part of the courts: we find several judgments that expressly deny the possibility of applying the Convention. Ultimately, change can only be achieved through a transformation of this attitude.

Translated by Gábor Győri

NOTES

1. Louis Henkin, Gerald L Neuman, Diane F Orentlicher, David W Leebron, *Human Rights* (Foundation Press, New York 1999) 302.
2. See for example: Andrew Z Drzemczewski, *European Human Rights Convention in Domestic Law. A Comparative Study* (Clarendon Press, Oxford 1985) 23.
3. Mireille Delmas-Marty, *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* (Martinus Nijhoff Publishers, Dordrecht 1992) 288.
4. For a detailed discussion see: Bárd Károly, *Fairness in Criminal Proceedings. Article Six of the European Human Rights Convention in a Comparative Perspective* (Magyar Hivatalos Közlönykiadó, Budapest 2008) 15–16.
5. For a detailed discussion see: P van Dijk, GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer Law International, The Hague 1998) 21–23.
6. For a review of the cases see: Andrew Clapham, '*The "Drittwirkung" of the Convention*' in R St J Macdonald, F Matscher, H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers, Dordrecht 1993) 163–206.
7. Constitutional Court decision no. 53/1993. (X. 13.).
8. According to Tamás Bán, this is also supported by articles 26 and 27 of the Vienna Convention on the Law of Treaties. For further details see Bán Tamás, *Vigyázó szemünket Strasbourgra vessük* [Let us turn our watchful eyes to Strasbourg] in Halmai Gábor (ed), *Sajtószabadság és személyiségi jogok* [Freedom of the press and personality rights] (INDOK, Budapest 1998) 45–46.
9. Bán (n 8).
10. Judgment no. Bvf.I.2.254/2003/5 of the Supreme Court. A similar statement is contained in the Supreme Court's Decision no. Bvf.I.80/2004/6.: "to follow the jurisprudence of the European Court of Human Rights (Strasbourg) is the obligation of both the first and second instance courts, and the Supreme Court."
11. The research reviewed those judgments which are available—with the names of the parties removed—on the internet portal of the Hungarian judiciary, as well as in the BH form from the CompLex legal database. Furthermore, the 71 judgments were provided by the Supreme Court in response to the questions raised in the research permit.
12. The parties frequently raised for example in motions for reference to the European Court of Justice issues related to the interpretation of the European Convention for Human Rights. See for instance cases published in BH [Judicial Decisions]: EBH 2007.1626 and EBH 2005.1320.
13. Judgment no. 7.P.22.679/2005/36 of the Fejér County Court.
14. Judgment no. 5.Pf.20.961/2007/6 of the Metropolitan Court of Appeal.
15. The Metropolitan Court perceives the role of the Convention in the domestic legal system similarly. Acting as a first instance court in a personality right case the court argued: "the European Convention for Human Rights can be [enforced] only within the constitutional procedural framework of a given country. The international law treaties do not give rise to an interpretation independently from the domestic law." Cited in judgment no. Pfv.V.20.607/2007/9 of the Supreme Court.
16. BH 1998.132. Further relevant judgments: Judgment no. Pfv.II.21.446/2000/3 and no. Pfv.II.23.613/1996 of the Supreme Court.
17. Decision no. Bkf.I.172/2007/2. of the Supreme Court.

18. *Imre v Hungary* (53129/99), judgment of 2 December 2003.
19. BH 2005. 243.
20. Naturally there are instances of the correct application of the Convention and the case-law also outside of the cases discussed here. See for example: BH 2001.230, BH 2001.567, BH 2002.178, or judgment no. P.20.702/2006/15 of the Győr-Moson-Sopron County Court.
21. Judgment no. 19.P.21.536/2007./4 of the Metropolitan Court.
22. Judgment no. 2.Pf.20.844/2007/5 of the Metropolitan Court of Appeal.
23. Judgment no. 19.P.20.306/2006./13 of the Metropolitan Court.
24. See for example: *Von Hannover v Germany* (59320/00), Reports of Judgments and Decisions 2004-VI.
25. Judgment no. 2.Pf.20.755/2007/8 of the Metropolitan Court of Appeal.
26. Judgment no. 19.P.21.294/2007./4 of the Metropolitan Court.
27. The judgment rejecting the petition was upheld by the Metropolitan Court of Appeal, which proceeded in the second instance. The court merely specified the sum of the court costs borne by the state (7.Pf.21.159/2007/2.).
28. See for example: Judgment no. 22.P.633.206/2004/20 of the Metropolitan Court and judgment no. 2.Pf.20.998/2006/3 of the Metropolitan Court of Appeal, which ruled on the appeal.
29. See for example judgment no. 21.P.630.971/2004/16 of the Metropolitan Court or judgment no. 2.Pf.20.998/2006/3 of the Metropolitan Court of Appeal.
30. See: Judgment no. Pfv. IV. 20.838/1997 of the Supreme Court (published: EBH1999.93).
31. Judgment no. K.20.299/2006/5 of the Vas County Court.
32. Judgment no. Kfv.II.39.047/2007/7 of the Supreme Court.
33. See judgment no. 2.K.33.024/2004/46 of the Metropolitan Court.
34. See for example: *Niemietz v Germany* (13710/88), A251-B.
35. Judgment no. 2.Kf.27.360/2006/29 of the Metropolitan Court of Appeal.
36. Judgment no. 19.P.23.110/2006/9. of the Metropolitan Court.
37. Judgment no. 2.Pf.20.791/2007/6 of the Metropolitan Court of Appeal.