EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

ENG - 2021/1

Application Form

About this application form

This form is a formal legal document and may affect your rights and obligations. Please follow the instructions given in the "Notes for filling in the application form". Make sure you fill in all the fields applicable to your situation and provide all relevant documents.

Warning: If your application is incomplete, it will not be accepted (see Rule 47 of the Rules of Court). Please note in particular that Rule 47 § 2 (a) requires that a concise statement of facts, complaints and information about compliance with the admissibility criteria MUST be on the relevant parts of the application form itself. The completed form should enable the Court to determine the nature and scope of the application without recourse to any other submissions.

Barcode label

If you have already received a sheet of barcode labels from the European Court of Human Rights, please place one barcode label in the box below.

Reference number

If you already have a reference number from the Court in relation to these complaints, please indicate it in the box below.

A. The applicant No. 1

A.1. Individual

This section refers to applicants who are individual persons only. If the applicant is an organisation, please go to section A.2.

1. Surname

2. First name(s)

3. Date of birth (e.g. 31/12/1960)
D D M M Y Y Y Y

4. Place of birth

5. Nationality

6. Address

7. Telephone (including international dialling code)

8. Email (if any)

9. Sex ◯ male ◯ female

A.2. Organisation

This section should only be filled in where the applicant is a company, NGO, association or other legal entity. In this case, please also fill in section D.1.

10. Name
Levegő Munkacsoport Országos Környezetvédő Egyesület (Clean Air Action Group - CAAG)

11. Identification number (if any)
01-02-0006775

12. Date of registration or incorporation (if any) e.g. 27 09 2012
0 1 0 9 1 9 9 5
D D M M Y Y Y Y

13. Activity
Environmental protection

14. Registered address
H-1085 Budapest, Üllői út 18. I//9/A.

15. Telephone (including international dialling code)
003614110509

16. Email
levego@levego.hu

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Reference number

If you already have a reference number from the Court in relation to these complaints, please indicate it in the box below.

A. The applicant No. 2

A.1. Individual

This section refers to applicants who are individual persons only. If the applicant is an organisation, please go to section A.2.

1. Surname
Lukács

2. First name(s)
András

3. Date of birth [redacted]
D D M M Y Y Y Y

4. Place of birth [redacted]

5. Nationality [redacted]

6. Address [redacted]

7. Telephone (including international dialling code) [redacted]

8. Email (if any) [redacted]

9. Sex (●) male ( ) female

A.2. Organisation

This section should only be filled in where the applicant is a company, NGO, association or other legal entity. In this case, please also fill in section D.1.

10. Name

11. Identification number (if any)

12. Date of registration or incorporation (if any)
D D M M Y Y Y Y e.g. 27/09/2012

13. Activity

14. Registered address

15. Telephone (including international dialling code)

16. Email

B. State(s) against which the application is directed

17. Tick the name(s) of the State(s) against which the application is directed.

- [ ] ALB - Albania
- [ ] AND - Andorra
- [ ] ARM - Armenia
- [ ] AUT - Austria
- [ ] AZE - Azerbaijan
- [ ] BEL - Belgium
- [ ] BGR - Bulgaria
- [ ] BIH - Bosnia and Herzegovina
- [ ] CHE - Switzerland
- [ ] CYP - Cyprus
- [ ] CZE - Czech Republic
- [ ] DEU - Germany
- [ ] DNK - Denmark
- [ ] ESP - Spain
- [ ] EST - Estonia
- [ ] FIN - Finland
- [ ] FRA - France
- [ ] GBR - United Kingdom
- [ ] GEO - Georgia
- [ ] GRC - Greece
- [ ] HRV - Croatia
- [x] HUN - Hungary
- [ ] IRL - Ireland
- [ ] ISL - Iceland
- [ ] ITA - Italy
- [ ] LIE - Liechtenstein
- [ ] LTU - Lithuania
- [ ] LUX - Luxembourg
- [ ] LVA - Latvia
- [ ] MCO - Monaco
- [ ] MDA - Republic of Moldova
- [ ] MKD - North Macedonia
- [ ] MLT - Malta
- [ ] MNE - Montenegro
- [ ] NLD - Netherlands
- [ ] NOR - Norway
- [ ] POL - Poland
- [ ] PRT - Portugal
- [ ] ROU - Romania
- [ ] RUS - Russian Federation
- [ ] SMR - San Marino
- [ ] SRB - Serbia
- [ ] SVK - Slovak Republic
- [ ] SVN - Slovenia
- [ ] SWE - Sweden
- [ ] TUR - Turkey
- [ ] UKR - Ukraine

D. Representative(s) of the applicant organisation

Where the applicant is an organisation, it must be represented before the Court by a person entitled to act on its behalf and in its name (e.g. a duly authorised director or official). The details of the representative must be set out in section D.1.

If the representative instructs a lawyer to plead on behalf of the organisation, both D.2 and D.3 must also be completed.

D.1. Organisation official

38. Capacity/relationship/function (please provide proof)

President

39. Surname

Lukács

40. First name(s)

András

41. Nationality

[redacted]

42. Address

[redacted]

43. Telephone (including international dialling code)

[redacted]

44. Fax

-

45. Email

[redacted]

D.2. Lawyer

46. Surname

Dr. Bendik

47. First name(s)

Gábor

48. Nationality

[redacted]

49. Address

[redacted]

50. Telephone (including international dialling code)

[redacted]

51. Fax

-

52. Email

[redacted]

D.3. Authority

The representative of the applicant organisation must authorise any lawyer to act on its behalf by signing the first box below; the lawyer must indicate his or her acceptance by signing the second box below.

I hereby authorise the person indicated in section D.2 above to represent the organisation in the proceedings before the European Court of Human Rights concerning the application lodged under Article 34 of the Convention.

53. Signature of organisation official

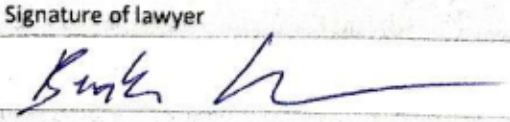
54. Date

1 0 0 7 2 0 2 1

D D M M Y Y Y Y e.g. 27/09/2015

I hereby agree to represent the organisation in the proceedings before the European Court of Human Rights concerning the application lodged under Article 34 of the Convention.

55. Signature of lawyer



56. Date

1 0 0 7 2 0 2 1

D D M M Y Y Y Y e.g. 27/09/2015

Electronic communication between the representative and the Court

57. Email address for eComms account (if the representative already uses eComms, please provide the existing eComms account email address)

bendik.gabor@levego.hu

By completing this field you agree to using the eComms system.

C. Representative(s) of the individual applicant

An individual applicant does not have to be represented by a lawyer at this stage. If the applicant is not represented please go to section E.

Where the application is lodged on behalf of an individual applicant by a non-lawyer (e.g. a relative, friend or guardian), the non-lawyer must fill in section C.1; if it is lodged by a lawyer, the lawyer must fill in section C.2. In both situations section C.3 must be completed.

C.1. Non-lawyer

18. Capacity/relationship/function

19. Surname

20. First name(s)

21. Nationality

22. Address

23. Telephone (including international dialling code)

24. Fax

25. Email

C.2. Lawyer

26. Surname
Dr. Bendik

27. First name(s)
Gábor

28. Nationality
[redacted]

29. Address
[redacted]

30. Telephone (including international dialling code)
[redacted]

31. Fax
-

32. Email
[redacted]

C.3. Authority

The applicant must authorise any representative to act on his or her behalf by signing the first box below; the designated representative must indicate his or her acceptance by signing the second box below.

I hereby authorise the person indicated above to represent me in the proceedings before the European Court of Human Rights concerning my application lodged under Article 34 of the Convention.

33. Signature of applicant

34. Date
1 0 0 7 2 0 2 1
D D M M Y Y Y Y e.g. 27/09/2015

I hereby agree to represent the applicant in the proceedings before the European Court of Human Rights concerning the application lodged under Article 34 of the Convention.

35. Signature of representative

36. Date
1 0 0 7 2 0 2 1
D D M M Y Y Y Y e.g. 27/09/2015

Electronic communication between the representative and the Court

37. Email address for eComms account (if the representative already uses eComms, please provide the existing eComms account email address)
bendik.gabor@levego.hu

By completing this field you agree to using the eComms system.

Subject matter of the application

All the information concerning the facts, complaints and compliance with the requirements of exhaustion of domestic remedies and the six-month time-limit laid down in Article 35 § 1 of the Convention must be set out in this part of the application form (sections E, F and G). It is not acceptable to leave these sections blank or simply to refer to attached sheets. See Rule 47 § 2 and the Practice Direction on the Institution of proceedings as well as the "Notes for filling in the application form".

E. Statement of the facts

58.

The case at hand focuses on the most fundamental aspect of human life: the right to breathe clean and healthy air. The applicants are an environmental NGO and a concerned citizen. They are based in Budapest and its surroundings and have engaged in legal battles for better air quality in Budapest for many years. Budapest is one of the most polluted capitals in the European Union ("EU") and the European Environmental Agency ("EEA", an EU agency) estimates that around 13,000 premature deaths each year can be attributed to air pollution in Hungary. The case concerns the lack of access to justice for NGOs and individuals seeking to improve air quality. The case is not about the quality of Air Quality Plans ("AQPs") or the effectiveness of adopted measures per se. It is about the lack of access to national courts to request the judicial review of AQPs which do not meet legal requirements. Lack of access to courts in turn results in a lack of effective remedies and violations of the right to respect for private and family life. The applicants therefore complain to the European Court of Human Rights ("ECtHR") under Articles 6, 8 and 13 of the European Convention of Human Rights ("the Convention").

1. Introduction and Summary

1.1. The World Health Organisation ("WHO") considers air pollution to be a major environmental risk to human health. There are an estimated 4.2 million premature deaths worldwide each year due to ambient air pollution (WHO Factsheet on ambient air quality and health, 2018). Likewise the EEA considers air pollution the biggest environmental health risk in Europe (see EEA report no. 9/2020 Air quality in Europe, page 11, 'Effects of air pollution'). According to data published by the EEA, 13,000 people die prematurely every year in Hungary as a result of air pollution (see EEA no. 9/2020 Air quality in Europe, page 108, table 10.1).

1.2. Air pollution is linked with chronic and serious diseases such as asthma, cardiovascular diseases and lung cancer (see attachments nos. 7 and 8). The adverse impacts of air pollution on quality of life in turn causes huge economic costs – in the form of increased medical expenses, reduced productivity (through lost working days), and reduced agricultural yields (see the European Commission Second Clean Air Outlook, 8 January 2021, point 4.4., page 12).

1.3. As early as 1979, European States came together in the United Nations Economic Commission for Europe ("UNECE") to develop a legal framework to control air pollution, which had been linked to acid rain and certain health problems. The Convention on Long-range Transboundary Air Pollution 1302 U.N.T.S. 217 ("LRTAP Convention") was the first multilateral agreement addressing transboundary air pollution at a broad regional level. Hungary ratified the LRTAP Convention in 1980.

1.4. EU law and implementing legislation in Hungary also prescribe strict air pollution limit values for the protection of human health (see the Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe ("Air Quality Directive" or "AQD"); Hungarian Government Decree no. 306/2010 (XII. 23.) on air protection ("the Government Decree on air protection"); Hungarian VM Decree 4/2011. (I. 14.) on air quality limit values and emission limit values of associated point sources of air pollution ("Decree on limit values"); and point 5 of the additional pages for more details). Although these limit values are legally binding, for a long time there have been exceedances in and around Budapest (see point 3 of the additional pages).

1.5. It is important to note that the limit values for several pollutants, such as fine particulate matter (PM2.5), are higher in the EU and Hungary than the safe levels recommended by scientists in the 2005 WHO Air Pollution Guidelines. Moreover, the WHO is currently reviewing these guidelines and is expected to recommend even stricter levels of air pollution in September 2021. It is therefore crucial to ensure compliance with the current legal limit values for air quality, which serve as a bare minimum for the protection of human health (see point 4 of the additional pages for health effects of air pollution).

1.6. Under the AQD, the Air Quality Plan (AQP) is the primary legal tool to reduce illegal levels of air pollution caused by limit value exceedances. The First Applicant (the Clean Air Action Group, "the CAAG") has started legal proceedings for judicial review of the AQP for Budapest and its surroundings to ensure that it is effective and achieves the goal of improving air quality as soon as possible. Unfortunately, the First Applicant has been refused access to court. This amounts to an infringement of EU law, a breach of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention"), and a violation of the right to access to court under the Convention (see point 6.1. of the additional pages). The Second Applicant, as an individual, does not have access to an effective remedy to improve air quality in Hungary. He is president of the First Applicant and considers himself to have been represented by the legal actions undertaken by the First Applicant (see point 6.2. of the additional pages).

Statement of the facts (continued)

59.
1.7. The practice of blocking access to courts in air quality matters is a persistent problem in Central and Eastern Europe. The European Commission has started to address this problem by initiating infringement proceedings against Poland and Bulgaria under Article 258 of the Treaty on the Functioning of the European Union ("TFEU"), calling on both countries to remove barriers to access to justice for citizens and environmental organisations in relation to AQPs. When announcing the infringement package of 14 May 2020, the Commission stated that "[it] is urging Bulgaria and Poland to remove barriers to access to justice in relation to air quality plans. Neither of the two countries has ensured that natural or legal persons directly concerned by exceedances of the air pollution limits under Directive 2008/50/EC on ambient air quality and cleaner air for Europe, are allowed to bring an action before the national courts. Environmental organisations and natural or legal persons in these two Member States are currently not allowed to challenge the consistency of an air quality plan and to require public authorities to establish air quality plans as the Directive requires".
1.8. In a similar way, the applicants complain that the Hungarian legal order blocks access to justice for individuals and NGOs in air quality matters by preventing challenges to AQPs. This practice constitutes a violation of the right to access the court under Article 6 of the Convention (see alleged violation and point 7 of the additional pages) and a violation of the right to private and family life under Article 8 of the Convention (see alleged violation and point 8 of the additional pages). Additionally, the applicants are deprived of effective domestic remedies (see alleged violation and point 9 of the additional pages). The practice of blocking access to justice in air quality matters is also contrary to EU law and the Aarhus Convention.

2. The applicants
The First Applicant
2.1. The CAAG is an environmental association that was established in 1988 (registered in 1995) and is headquartered in Budapest. It has 108 members, including individuals and 44 local and national NGOs. The Second Applicant is also a member of the CAAG. According to its statutes, the CAAG works for the public interest in environmental matters in line with the Act LIII of 1995 on the general rules for the protection of the environment ("the Kvt. Act"). Section 1 of the Kvt. Act clarifies that: (a) the objectives of the Act are to develop a harmonious relationship between humans and their environment; and (b) the Act creates a framework for the assertion of constitutional rights to a healthy environment and the protection of human health. The CAAG also promotes the principle that the right to life and health is the most fundamental human right and the basis for the enforcement of all other human rights (see point 2.1 of the CAAG statutes as attached). Consequently, the CAAG does not only work to protect the environment, but also to protect the human right to live in a healthy environment – which includes the right to clean and healthy air. The CAAG represents the interests of its individual members as right holders.
2.2. The CAAG is also an environmental NGO and member of the public according to Article 2(4) of the Aarhus Convention. The First Applicant is one of the most high-profile Hungarian environmental NGOs which has primarily worked on air quality matters since its foundation. In recent years, the CAAG has contributed to the development and amendment of air pollution legislation, both in the planning process and in a number of related administrative procedures.

The Second Applicant
2.3. Mr András Lukács, born in Budapest on 17 December 1951, is president of the CAAG. He is a resident of Budaörs, a town located in the "air quality zone" of Budapest and its surroundings (zone HU0001). The Second Applicant has worked in Budapest since 1975, but relocated from Central Budapest to Budaörs in 1981 because he had a serious lung illness. His doctors recommended that he live in an area with better air quality. Despite moving out of Central Budapest to its outskirts, the applicant was not in fact benefitting from better air quality as the whole zone of Budapest and its surroundings has air quality that exceeds legal limit values (see point 3 of the additional pages). He is a citizen who has long been fighting for better air quality and has become an expert in the area. For this reason, the Second Applicant approved and supported legal action to challenge the 2016 Budapest AQP.
2.4. The Second Applicant is concerned by air pollution because it affects him and his family. For more than 40 years, he has been exposed to illegal levels of air pollution both at his home and work place. The Second Applicant regularly cycles 11 kilometres to his office, during which time he is exposed to air pollution from old cars and trucks (the average age of a car in Hungary is 14.7 years: see https://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_ode002b.html). The main air pollutant released from road traffic is Nitrogen dioxide (NO2). He and his family are also regularly affected by particulate matter pollution (PM10) released by domestic heating appliances, as well as highly toxic fumes emanating from the domestic burning of waste (a well-known and common problem in Hungary: see Waste campaign and Opinion poll on residential waste burning prepared by the CAAG). As a result, they have difficulty ventilating their homes, particularly in winter.

Statement of the facts (continued)

60.
2.5. The high levels of air pollution – particularly NO2 and PM10 pollution – have deteriorated the Second Applicant's health. Vulnerable groups like older people, children and those with pre-existing health conditions are more sensitive to the health impacts of air pollution. The Second Applicant falls into two of these categories: (a) he is now 70 years old; and (b) he used to suffer from a lung illness. The poor air quality also makes the Second Applicant worried about the health of his family members. He thinks constantly about the negative impact it has on their well-being.

The application is supplemented by 20 additional pages. A summary of the content of those additional pages is as follows:

3. Air pollution in Budapest and its surroundings and the 2016 Air Quality Plan (point 3, page 1 of the additional pages)
Currently, Budapest is one of the most polluted capitals in the EU and one of the pollution hot spots in Hungary. Its current AQP is inadequate and ineffective at improving air quality in the city. In February 2021, the Court of Justice of the European Union ("the CJEU") ruled, in Case C-637/18 Commission v Hungary, that Hungary is in violation of Articles 13 and 23 AQD.

4. Health impacts of air pollution (point 4, page 1-3 of the additional pages)
There is scientific consensus that poor air quality is detrimental to human health. It has been also confirmed by CJEU case law and the findings of UN Treaty Monitoring Bodies. The case at hand is about the protection of human health linked with the right to clean and healthy air as part of the rights to a healthy environment.

5. The Air Quality legal framework and the rights of NGOs and individuals to challenge Air Quality Plans (point 5, pages 3-7 of the additional pages)
The AQD establishes clear, precise and direct requirements concerning the standard of air quality (limit values) (art. 13 AQD). In order to achieve this air quality standard, the AQD provides for the adoption of AQPs (art. 23 AQD). CJEU case law confirms that, when air quality limit values are exceeded, NGOs and individuals can demand the adoption or amendment of AQPs (Case C-237/07 Janecek §§39-40 and Case C-404/13 ClientEarth, §§40-41). Preventing NGOs and individuals from doing so amounts to an arbitrary and manifestly unreasonable infringement of the AQD and CJEU case law. This in turn constitutes a violation of the right of access to courts. Advocate General Kokott in the opinion to case C-723/17 Craeynest, §33 stated "The rules on ambient air quality therefore put in concrete terms the Union's obligations to provide protection following from the fundamental right to life (...) Measures which may impair the effective application of Directive 2008/50 are thus comparable, in their significance, with (...) serious interference[s] with fundamental rights" (see 5.2. of additional pages).

6. Exhaustion of domestic remedies for the First and Second Applicant (point 6, pages 7-12 of the additional pages)
The First Applicant started proceedings to seek the amendment of the 2016 Budapest AQP. Their request was dismissed principally because the national authorities and courts do not consider AQPs as challengeable acts that are subject to judicial review. The legal standing of the CAAG was not questioned. The final decision was issued on 19 January 2021. There is no other remedy available in the national legal order that the First applicant could exhaust for the purpose of improving air quality.
The Second applicant does not have access to effective remedies at national level, thus he approved and supported the proceedings brought by the First Applicant as its president and member. The Second Applicant invokes cases: Gorraiz Lizarraga and Others v. Spain, 62543/00, (ECHR, 27 April 2004), [38-39]; Kósa v. Hungary (dec.), 53461/15 (ECHR, 21 November 2017), [56]; and Beizaras and Levickas v. Lithuania, 41288/15 (ECHR, 14 January 2020), [78-83]. In these cases, the ECtHR accepted that in certain situations the exhaustion of domestic remedies by NGOs amounts to the exhaustion of domestic remedies for individuals affected by the alleged violation. The legal proceedings that the CAAG exhausted on national level were identical in scope to what the Second Applicant would have complained of, if he could have, namely breaches of the law. It also corresponded exactly to the applicant's individual situation: (a) living in the air quality zone of Budapest and its surroundings; (b) being exposed to air pollution levels above legal limit values; and (c) demanding the review and amendment of the 2016 AQP in order to improve air quality as soon as possible.

The situation at the present case is of similarity with the one presented in case Sándor Varga and others v. Hungary, § 34, namely none of the elements of the case posse any issues of "constitutionality" or compatibility with the Fundamental Law (neither the court judgments or the provisions of the Akr. Act and Kvt. Act that were applied in the applicants' case). In such circumstances the constitutional complaint does not constitute an effective remedy. Possibly, legislation is needed as the applicants face lack of adequate legislative framework.

F. Statement of alleged violation(s) of the Convention and/or Protocols and relevant arguments

61. Article invoked	Explanation
Article 6 § 1	This case concerns a "civil right" as understood by Article 6 of the Convention. Fundamental right to clean and healthy air (embraced by the right to healthy environment) and access to justice to protect this right are civil rights under Article 6 of the Convention. They can be attributed to individuals and NGOs (First and Second Applicant). The right to a healthy environment, including right to clean and healthy air, and rights to physical health are protected in the Hungarian legal order thus there is no doubts that it is a civil right of the Second Applicant. The First Applicant is a membership organisation and represents the collective interests of its members, including the Second Applicant, but also acts on its own behalf. The right to clean and healthy air as a component of the right to a healthy environment is the First Applicant's civil right, along with right to information, public participation and access to justice as guaranteed by the Aarhus Convention. As stated in the recent ECtHR case Broda and Bojara v. Poland, 26691/18, (2021), §96, a civil right recognised by national legislation may be substantive, procedural, or a combination of the two. There is a direct link between the substantive environmental outcomes necessary to live in a healthy environment, among which is the improvement of air quality, and the procedural rights (access to information, public participation and access to justice) granted to members of the public. There is a genuine dispute in the present case concerning this civil right. (see Taşkın and Others v. Turkey, 46117/99, (2004), §133; Okyay and Others v. Turkey, 36220/97, (2005), §65, Gorraiz Lizarraga and Others v. Spain, 62543/00, (ECHR, 27 April 2004), §§38 and 45; and L'Erablière A.S.B.L. v. Belgium, 49230/07, (2009), §§21-30, Collectif national d'information et d'opposition à l'usine Melox – Collectif stop Melox et Mox v. France (dec.), 75218/01, (ECHR, 28 March 2006), §4; and Association Burestop 55 and Others v. France, 56176/18, (2021), §§50-61). The issue at stake is whether applicants enjoy access to justice to challenge the Air Quality Plan in order to protect health and well-being. The applicants are not challenging the principles or constitutionality of Hungarian administrative procedural law. Instead, they argue that the strict interpretation of the national rules on the legal form of the AQP, as a "management action", or lack of adequate legal framework deprived the applicants access to court by excluding AQP from judicial review. AQPs provide for measures and tools that aim to improve air quality. Without judicial review, members of the public – both citizens and environmental NGOs – cannot challenge inadequate actions to improve air quality in order to protect health and well-being. This amounts in barrier in access to court concerning civil rights. Further details please see point 7, page 12 of the additional pages.
Article 8	As the Court has found in its case law, an issue may arise under Article 8 of the Convention when an individual is directly affected by minimum level of pollution. This minimum threshold is relative and depends on all the circumstances of the case, such as the intensity and duration of the pollution/nuisances, the effects on an individual's physical or psychological state, and the individual's personal circumstances. Especially when legal limit values are exceeded Article 8 is applicable (Fadeyeva v. Russia, §87, Deés v. Hungary, 2345/06, §23). In Lopez Ostra v. Spain, §51 the ECtHR accepted that pollution may adversely affect private and family life, without seriously endangering health. The same was held in Jugheli and Others v. Georgia, 38342/05 (ECHR, 13 July 2017), §71. The Second Applicant has lived and worked in Budapest and its surroundings for his whole life. He is affected by air pollution every day of the year. He breathes in toxic NO2 pollution when he cycles to work and walks around the city. He inhales PM10 into his lungs, which are sensitive due to his previous illness, when at home and among houses that release fumes from domestic heating and waste burning. He is more vulnérable to all kinds of disease, but particularly cardiovascular disease and respiratory diseases.

Statement of alleged violation(s) of the Convention and/or Protocols and relevant arguments (continued)

62. Article invoked	Explanation
	We should not normalise air pollution as an environmental hazard to be expected in the cities we live in, because this pollution adversely affects our health and well-being. Air pollution is not an inherent characteristic of the modern city. We are not destined to live in polluted and unhealthy cities. It is not only possible to improve air quality in cities by adopting effective measures, it is essential for our health and climate stability. For these reasons, the applicants invite the Court to accept that exceeding a legally binding minimum level of pollution is sufficient to declare that the situation attain the minimum level and falls under Article 8. Hungary has failed to introduce effective measures in its 2016 AQP for Budapest and its surroundings that could improve air quality and ensure compliance with national and EU law. On a top of this Hungary failed to ensure access to justice for those affected by air pollution with the goal to improve air quality. Thus, Hungary has not fulfilled its positive obligation under Article 8 of the Convention to provide protection to the Second Applicant's respect for private and family life. Further details please see point 8, page 17 of the additional pages.
Article 13 of the Convention in connection with Articles 6 and 8 of the Convention	The Hungarian courts' interpretation of national law has completely deprived the applicants of the ability to challenge the Air Quality Plan in question. This flies in the face of what EU law and the Aarhus Convention – both binding in Hungary – require. It is therefore particularly important for the Court to consider the applicants' complaints in the light of Article 13 of the Convention. In relation to the right of access to court, the applicants naturally have no remedy against the Hungarian courts' interpretation of domestic administrative law, which is not only manifestly contrary to the requirements of EU law and the Aarhus Convention but also block access to court under Article 6 of the Convention. In respect of Article 8, by finding that Air Quality Plans are "management" acts, and not challengeable decisions, the Hungarian courts have made it impossible for individuals and NGOs to secure an effective remedy. In Cordella and Others v. Italy, 54414/13, 54264/15, (2019), §176, the Court decided that there was a violation of Article 13 on the basis that that there were no domestic remedies that would allow the applicant to benefit from a clean-up of the polluted areas. In the case of Hatton and Others v. the United Kingdom [GC], 36022/97, (2003), §§137-142, the limited scope of review of the excessive noise caused by night flights resulted in a violation of Article 13 in light of Article 8. Such principles also apply in the case at hand. Further details please see point 9, page 20 of the additional pages.

G. Compliance with admisibility criteria laid down in Article 35 § 1 of the Convention

For each complaint, please confirm that you have used the available effective remedies in the country concerned, including appeals, and also indicate the date when the final decision at domestic level was delivered and received, to show that you have complied with the six-month time-limit.

63. Complaint	Information about remedies used and the date of the final decision
Article 6 Article 8 Article 13 in connection with Article 6 and 8	The final judgment was issued on 19 January 2021 by the Supreme Court (Kuria). Thus the applicants respect the 6 months time limit to file an application. The applicants exhausted the only available domestic remedy namely the administrative proceedings aiming at judicial review of the 2016 AQP for Budapest and its surroundings. The First Applicant started proceedings to seek the amendment of the 2016 Budapest AQP in 2018. Their request was dismissed principally because the national authorities and courts do not consider AQPs as challengeable acts that are subject to judicial review. This is contrary to the directly effective EU law, namely Air Quality Directive, article 23 and the CJEU case law (please see point 5.4. on page 4 of the additional pages). The legal standing of the CAAG was not questioned. The main issue was a legal character of the AQP and ability to challenge it before the court. Additionally, the Supreme Court failed to refer the preliminary question to the CJEU although the clear discrepancies in EU law interpretation arose. The final decision was issued on 19 January 2021. There is no other remedy available in the national legal order that the First applicant could exhaust for the purpose of improving air quality. (see point 6.1. of additional pages for more details) None of the elements of the case posse any issues of "constitutionality" or compatibility with the Fundamental Law (neither the court judgments or the provisions of the Akr. Act and Kvt. Act that were applied in the applicants' case). The situation at the present case is of similarity with the one presented in case Sándor Varga and others v. Hungary, § 34. In such circumstances the constitutional complaint does not constitute an effective remedy. Possible, legislation is needed as the applicants face lack of adequate legislative framework (see point 6.3. of additional pages for more details). The Second applicant does not have access to effective remedies at national level for the reasons elaborated in point 6.2. on pages 9-12 of additional pages (excessively strict definition of legal interest). For this reason, he approved and supported the proceedings brought by the First Applicant as its president and a member. The Second Applicant invokes cases: Gorraiz Lizarraga and Others v. Spain, 62543/00, (ECHR, 27 April 2004), [38-39]; Kósa v. Hungary (dec.), 53461/15 (ECHR, 21 November 2017), [56]; and Beizaras and Levickas v. Lithuania, 41288/15 (ECHR, 14 January 2020), [78-83]. In these cases, the ECtHR accepted that in certain situations the exhaustion of domestic remedies by NGOs amounts to the exhaustion of domestic remedies for individuals affected by the alleged violation. This is a case at hand. The legal proceedings that the CAAG exhausted on national level were identical in scope to what the Second Applicant would have complained of, if he could have, namely breaches of the law. It also corresponded exactly to the applicant's individual situation: (a) living in the air quality zone of Budapest and its surroundings; (b) being exposed to air pollution levels above legal limit values; and (c) demanding the review and amendment of the 2016 AQP in order to improve air quality as soon as possible. At any stage of the proceedings the public administration or courts informed the First Applicant about the existence of any possible national remedy that would enable to challenge Air Quality Plan with the intention to amend it and improve it in the process of judicial review. The applicants are not looking for any compensatory remedy.

- Please ensure that the information you include here does not exceed the space provided -

64. Is or was there an appeal or remedy available to you which you have not used? ○ Yes ◉ No

65. If you answered Yes above, please state which appeal or remedy you have not used and explain why not

H. Information concerning other international proceedings (if any)

66. Have you raised any of these complaints in another procedure of international investigation or settlement? ○ Yes ◉ No

67. If you answered Yes above, please give a concise summary of the procedure (complaints submitted, name of the international body and date and nature of any decisions given)

68. Do you (the applicant) currently have, or have you previously had, any other applications before the Court? ○ Yes ◉ No

69. If you answered Yes above, please write the relevant application number(s) in the box below

I. List of accompanying documents

You should enclose full and legible *copies* of all documents. No documents will be returned to you. It is thus in your interests to submit copies, not originals. You MUST:

- **arrange the documents in order by date and by set of proceedings;**
- **number the pages consecutively; and**
- **NOT staple, bind or tape the documents.**

70. In the box below, please list the documents in chronological order with a concise description. Indicate the page number at which each document may be found

1.	The Letter of 23 August 2018 , no. PE-06/KTF/10275-4/2018	p. 21-25
2.	The Decision of 25 September 2018, no. PE/KTFO/4102-2/2018	p. 26-27
3.	The First instance judgment 28 May 2020, no. 110.K.703.519/2020/4.	p. 28-42
4.	The Supreme Court decision of 19 January 2021 no. Kfv.IV.37.700/2020/5	p. 43-51
5.	C-637/18 Commission v. Hungary of 3 February 2021 concerning PM10 pollution, judgment in Hungarian	p. 52-75
6.	extract of the report of the Hungarian Meteorological Service about air pollution in Hungary	p. 76-87
7.	Health effects of various pollutants - Az egyes légszennyezők legfontosabb egészségkárosító hatásai	p. 88-90
8.	Infographic how air pollution affects human body A légszennyező anyagok komoly hatást gyakorolhatnak az emberi egészségre. A gyermekek és az idősek különösen sebezhetőek	p. 91-91
9.	the CAAG statutes (articles of association) and the Court registry confirming rules of representation	p. 92-102
10.	extract of the Court Registry of the Clean Air Action Group	p. 103-106
11.	The regional environmental authority letter of 7 June 2018, no. no. PE-06/KTF/10275-1/2018	p. 107-110
12.	The national environmental authority letter of 17 July 2018, no. PE/KTFO/2372-2/2018.	p. 111-114
13.	Additional fact description and legal arguments	p. 1-20
14.		p.
15.		p.
16.		p.
17.		p.
18.		p.
19.		p.
20.		p.
21.		p.
22.		p.
23.		p.
24.		p.
25.		p.

Any other comments

Do you have any other comments about your application?

71. Comments

Declaration and signature

I hereby declare that, to the best of my knowledge and belief, the information I have given in the present application form is correct.

72. Date

1	0	0	7	2	0	2	1
D	D	M	M	Y	Y	Y	Y

e.g. 27/09/2015

The applicant(s) or the applicant's representative(s) must sign in the box below.

73. Signature(s) ○ Applicant(s) ◉ Representative(s) - tick as appropriate

Confirmation of correspondent

If there is more than one applicant or more than one representative, please give the name and address of the one person with whom the Court will correspond. Where the applicant is represented, the Court will correspond only with the representative (lawyer or non-lawyer).

74. Name and address of ○ Applicant ◉ Representative - tick as appropriate

Dr. Bendik Gábor
H-1029 Budapest, Toldi Miklós u. 4.

The completed application form should be signed and sent by post to:

The Registrar
European Court of Human Rights
Council of Europe
67075 STRASBOURG CEDEX
FRANCE

893669e1-66ca-4653-b9e0-2de2561a694b

I. STATEMENT OF FACTS

3. Air pollution in Budapest and its surroundings and the 2016 Air Quality Plan

3.1. For the purpose of air quality monitoring, Hungary is divided into 10 zones and agglomerations (from HU0001 to HU0011). This case primarily concerns the zone/agglomeration of Budapest and its surroundings (HU0001) and partially some other territories (HU0010). Air quality in these zones has not improved significantly over the last 10 years. They are still characterised by high levels of concentration of PM10 and NO2 exceeding the annual and daily limit values established in law for the protection of human health. The main sources of pollution in Budapest are road traffic, domestic heating and waste burning.

3.2. The fact that legal limit values are exceeded in Hungary is not in dispute. It has been confirmed by the latest air quality report of the Hungarian Meteorological Service[1] (see attachment no. 6). In a recent judgment against Hungary,[2] the CJEU also confirmed that PM10 pollution in Budapest is a persistent problem (see attachment no. 5). The CJEU expressly stated that "*by systematically and persistently exceeding the daily limit value for concentrations of particulate matter PM10, first, from 1 January 2005 up to and including 2017, in the zone HU0001 – Budapest region (...), Hungary has failed to fulfil its obligation under the provisions of Article 13 of, in conjunction with Annex XI to, Directive 2008/50/EC (...) by failing to adopt as from 11 June 2010 appropriate measures to ensure compliance with the daily limit value for concentrations of particulate matter PM10 in those zones, Hungary has failed to fulfil its obligations under Article 23(1) of Directive 2008/50 (...) to ensure that the period of exceedance of the limit values is kept as short as possible*".

3.3. Currently, Budapest is one of the most polluted capitals in the EU and one of the pollution hotspots in Hungary. NO2 pollution exceeded the annual limit value (40 µg/m3) in 2018 and 2019. The hourly NO2 limit value (100 µg/m3) was exceeded in Budapest 222 times in 2018 and 167 times in 2019, although the law allows for only 18 exceedances per year. The annual PM10 limit value was also exceeded in Budapest in 2018. The daily PM10 limit values was exceeded 91 times in 2018 and 53 times in 2019, although the law allows for only 35 exceedances per year.

4. Health effects of air pollution

4.1. As stated above, the WHO and the EEA both consider air pollution as a major environmental risk to human health. The ECtHR has also acknowledged the detrimental effect of air pollution to human health. In *Fadeyeva v. Russia*, 55723/00, (ECHR, 9 June 2005), §87 the ECtHR stated "*the Court observes that over a significant period of time the concentration of various toxic elements in the air near the applicant's home seriously exceeded the MPLs. The Russian legislation defines MPLs as safe concentrations of toxic elements. Consequently, where the MPLs are exceeded, the pollution becomes potentially harmful to the health and well-being of those exposed to it*". In *Jugheli*

1 2019. évi összesítő értékelés hazánk levegőminőségéről az automata mérőhálózat adatai alapján, http://levegominoseg.hu/Media/Default/Ertekeles/docs/2019_automata_ertekeles.pdf

2 C-637/18 Commission v. Hungary, 3 February 2021, PM10 pollution, ECLI:EU:C:2021:92, https://curia.europa.eu/juris/documents.jsf?num=C-637/18

and Others v. Georgia, 38342/05 (ECHR, 13 July 2017), §71 the ECtHR concluded: "*that even assuming that the air pollution did not cause any quantifiable harm to the applicants' health, it may have made them more vulnerable to various illnesses (...). Moreover, there can be no doubt that it adversely affected their quality of life at home (...).*"

4.2. The list of epidemiological studies on the health impacts of air pollution is extensive. While it is not possible to refer to all of them here, the applicants refer to the recent Special Issue of *Environment International*[3] that compiles a series of systematic reviews carried out in the process of updating the WHO Global Air Quality Guidelines. These reviews investigate the associations between a range of air pollutants and human health outcomes – including asthma, stroke, myocardial infarction/coronary events, chronic obstructive pulmonary disease, premature birth, pre-eclampsia, low infant birth weight and respiratory infections (such as bronchiolitis, bronchitis and pneumonia).

4.3. Air pollution that exceeds legal limit values is dangerous for human health and is often referred to as an invisible killer. A useful infographic shows how many human organs and functions are affected by ongoing exposure to air pollution (see attachment no 8). The science is clear and consistent on this issue. As established by the ECtHR in *Brincat and others v. Malta*, 60908/11, (ECHR, 2014), §105-106, States must be aware of the most recent and available science on the detrimental effects of pollutants on human health. When a State becomes aware of them, as Hungary has, it also has positive obligations to establish an adequate administrative and legal framework and to take practical steps to address the issue.

4.4. The health impacts of air pollution are real and dangerous. In December 2020, a London coroner issued a death certificate for a 9-year-old girl, Ella Roberta Adoo Kissi-Debrah, who died in 2013. The coroner concluded that the girl "*died of asthma contributed to by exposure to excessive air pollution*".[4] She had been exposed to levels of NO2 and PM2.5 in excess of WHO guidance and EU limit values, principally caused by traffic emissions, which had exacerbated her illness. Likewise, the Administrative Court in Bordeaux quashed an expulsion order against a Bangladeshi citizen because of the severe air pollution in Bangladesh. The French court decided that severe air pollution would aggravate his asthma which, when combined with the level of medical care available in Bangladesh, significantly increased his risk of death.[5]

4.5. The United Nations ("**UN**") Special Rapporteur on human rights and the environment, in his report on the right to breathe clean air,[6] stressed that "*the right to breathe clean air (...) is one of the vital elements of the right to a healthy and sustainable environment, along with access to clean water*

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3 https://www.sciencedirect.com/journal/environment-international/special-issue/10MTC4W8FXJ

4 Deputy Coroner Philip Barlow, Record of second inquest, [16 December 2020] <https://www.innersouthlondoncoroner.org.uk/news/2020/nov/inquest-touching-the-death-of-ella-roberta-adoo-kissi-debrah>

5 M.A. v. Le préfet de la Haute-Garonne (the Administrative Court of Appeal in Bordeaux), [18 December 2020], <https://www.dalloz.fr/documentation/Document?id=CAA_BORDEAUX_2020-12-18_20BX02193_dup#texte-integral>

6 The UN Special Rapporteur on human rights and the environment, Clean air and the right to a healthy and sustainable environment, (Report, 8 January 2019), A/HRC/40/55 <http://srenvironment.org/sites/default/files/Reports/2019/UN%20HRC%20Right%20to%20clean%20air.pdf>

(...), a safe climate, and healthy biodiversity and ecosystem".[7] Furthermore, the Special Rapporteur pointed out that poor air quality may lead to violations of a wide range of human rights, including the rights to life, to health and to an adequate standard of living. The UN Treaty Monitoring Bodies have also referred to the problem of air pollution in their Concluding Observations. In its Concluding Observations on the United Kingdom (2016)[8], Spain (2018)[9] and Austria (2020),[10] the UN Committee of the Rights of the Child expressed concerns about the high levels of air pollution in these countries and the impacts on children's right to health.

5. The air quality legal framework and the rights of NGOs and individuals to challenge Air Quality Plans

5.1. Strict limit values for NO2 and PM10

5.1.1. Because of the health risk posed by air pollution, the EU created a legal framework that aims to improve air quality in order to protect human health and the environment. This framework includes the Air Quality Directive.[11] Recital 30 AQD clarifies that "*This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.*" Article 1 AQD states that "*This Directive lays down measures aimed at (...) defining and establishing objectives for ambient air quality designed to avoid, prevent or reduce harmful effects on human health*".

5.1.2. In order to reach these objectives, the AQD establishes air pollution limit values and provides for the adoption of AQPs to ensure that there are measures in place to meet them. Article 13 AQD provides that: *"Member States shall ensure that, throughout their zones and agglomerations, levels of sulphur dioxide* [SO2], *PM_{10}, lead, and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI. In respect of nitrogen dioxide* [NO2] *and benzene, the limit values specified in Annex XI may not be exceeded from the dates specified therein."* Article 2, point 5, AQD defines limit values as *"a level fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained."* These requirements are clear, precise and unconditional, which can be invoked by individuals and NGOs against the State.

5.2. Air pollution limit values provide protection for fundamental rights

The CJEU has expressly recognised that the provisions of the Air Quality Directive are a direct expression of fundamental obligations of the Union under the Treaties and the EU Charter of Fundamental Rights. In Case C-723/17 *Craeynest*, §33, the CJEU stated: "*As the Advocate General*

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7 Para 17 of the The UN Special Rapporteur on human rights and the environment, Clean air and the right to a healthy and sustainable environment, (Report, 8 January 2019), A/HRC/40/55 <http://srenvironment.org/sites/default/files/Reports/2019/UN%20HRC%20Right%20to%20clean%20air.pdf>.

8 Committee on the Rights of the Child, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, no CRC/C/GBR/CO/5

9 Committee on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Spain, no CRC/C/ESP/CO/5-6

10 Committee on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Austria, CRC/C/AUT/CO/5-6

11 Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (Air Quality Directive or AQD).

pointed out, in essence, in point 53 of her Opinion, the rules laid down in Directive 2008/50 on ambient air quality put into concrete terms the EU's obligations concerning environmental protection and the protection of public health". Advocate General Kokott stated, in her opinion for the case, §53, that "*Directive 2008/50 is based on the assumption that exceedance of the limit values leads to a large number of premature deaths. (...)* ***The rules on ambient air quality therefore put in concrete terms the Union's obligations to provide protection following from the fundamental right to life*** *(...) Measures which may impair the effective application of Directive 2008/50 are thus comparable, in their significance, with (...)* ***serious interference[s] with fundamental rights***".

5.3. Air Quality Plan as a tool to improve air quality

5.3.1. When limit values are exceeded, the State has an obligation to draw up an AQP under Article 23 AQD. The aim of AQPs is to improve air quality in the shortest time possible. According to Article 23, point 1, AQD: "*Where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case, Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value (...) the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible. The air quality plans may additionally include specific measures aiming at the protection of sensitive population groups, including children.*"

5.3.2. In Case C-404/13 *ClientEarth*, §§40-41, the CJEU stated that: "*It follows, next, from the second subparagraph of Article 23(1) of Directive 2008/50 that where the limit values for nitrogen dioxide* (NO2) *are exceeded after the deadline laid down for their attainment, the Member State concerned is required to establish an air quality plan that meets certain requirements. Thus, that plan must set out appropriate measures so that the period during which the limit values are exceeded can be kept as short as possible and may also include specific measures aimed at protecting sensitive population groups, including children*".

5.4. Role of the public in relation to Air Quality Plans – legal standing and access to justice

5.4.1. Hungary's obligations regarding the role of the public (NGOs and individuals) in the process of drawing up and amending AQPs flow directly from both its membership of the EU and its ratification of the Aarhus Convention, a self-standing instrument of international law.

5.4.2. Within the EU, there is settled case law that both NGOs and individuals must have access to court to challenge AQPs based on the EU law doctrine of direct effect. According to this doctrine, provisions of EU law that are sufficiently precise and unconditional can be invoked by natural and legal persons before national courts (see Case 26/62 *Van Gend en Loos*). Article 19(1) of the Treaty on European Union also requires Member States to "*provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*". The CJEU has also held that it would be incompatible with the binding effect attributed to a directive by Article 288 TFEU to exclude, in principle, the possibility that the obligations which it imposes may be relied on by those concerned (Case C-243/15 *Slovak Bears II*, §44; and Case C-664/15 *Protect*, §34).

5.4.3. The CJEU confirmed that Article 23(1) AQD imposes a clear, precise and unconditional obligation on the Member States "*to establish an air quality plan that complies with certain requirements*" (Case C-404/13 *ClientEarth*, §53). In consequence, the CJEU has consistently considered Article 23(1) AQD to be a directly effective provision serving a public interest and recognised the right of directly concerned natural and legal persons to have access to a court to enforce this provision. In Case C-237/07 *Janecek*[12], (2008), §§39-40, the CJEU stated that "*(...)the natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts. (…) The fact that those persons may have other courses of action available to them –(...)– is irrelevant in that regard.*" The *Janecek* case confirmed the legal standing of individuals under the directive that was the predecessor of the AQD. That principle has now been confirmed in relation to the AQD in Case C-404/13 *ClientEarth*[13], (2014), §56. In case C-723/17 *Craeynest and others*,(2019), §34, the CJEU also reiterated that "*where the EU legislature has, by directive, imposed on Member States the obligation to pursue a particular course of action, the effectiveness of such action would be weakened if individuals were prevented from relying on it before their national courts.*" **These cases clearly confirm that both individuals and NGOs should have access to a court to demand the adoption of AQPs or challenge existing AQPs when the limit values of air pollution are exceeded.** As mentioned above, the European Commission has started infringement proceedings against Poland and Bulgaria, calling on both countries to remove barriers to access to justice for citizens and environmental organisations in relation to air quality plans.

5.4.4. The ability to challenge AQPs in court also derives from the Aarhus Convention. Hungary signed the Aarhus Convention on 18 December 1998 and ratified it on 3 July 2001 by Act LXXXI of 2001. The EU signed the Aarhus Convention on 25 June 1998 and ratified on 17 February 2005. Article 9(3) of the Aarhus Convention provides that members of the public should have access to "*administrative or judicial proceedings to challenge acts or omissions of individuals and public authorities that violate the provisions of national environmental law*". Under Article 9(4) of the Aarhus Convention, members of the public are "*one or more natural and legal persons, their associations, organisations or groups*".

5.4.5. The Committee on Compliance with the Convention ("**the ACCC**") has made a number of findings concerning standing under Article 9(3) of the Aarhus Convention that are of relevance to the issue of challenging AQPs before the national courts. The ACCC has confirmed that Article 9(3) provides a right to challenge "*any act or omission whatsoever*" and that this includes "*any act implementing any policy or any act under any law*", as long as it may contravene law relating to the environment.[14] This includes plans and programmes adopted by public authorities[15], such as AQPs, irrespective of the form they take under national law. **The AQPs are challengeable acts that must be amenable to judicial review.**

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12 The case was issued under the Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management that was predecessor of the Air Quality Directive 2008/50.

13 This case was issued under the Air Quality Directive 2008/50.

14 ACCC/C/2008/32 (European Union), Part II, ECE/MP.PP/C.1/2017/7, paras 98-99, emphasis added,

15 See for instance, ACCC/C/2005/11 (Belgium) or ACCC/C/2011/58 (Bulgaria), ECE/MP.PP/C.1/2013/4

5.4.6. Furthermore, while Article 9(3) of the Aarhus Convention applies to members of the public insofar as "*they meet the criteria, if any, laid down in its national law*", the ACCC has pointed out that such criteria must not be so strict that they effectively bar all or almost all environmental organisations or other members of the public from challenging acts or omissions that contravene national law related to the environment.[16] The CJEU has clarified that Article 9(3), "*read in conjunction with Article 47 of the Charter of Fundamental Rights* (right to effective remedy), *imposes on Member States an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law*" (Case C-664/15 *Protect*, §45). The CJEU has also clarified that this obligation applies in a way which ensures legal standing for both environmental NGOs and individuals (Case C-197/18 *Burgenland*, §§33-34). Hungarian courts must therefore grant effective judicial protection to the applicant's rights under the Air Quality Directive.

5.5. Hungarian national law on air pollution

5.5.1. The Air Quality Directive has been transposed into the Hungarian national law by the Government Decree on air protection[17] and the Decree on limit values.[18] The Government Decree on air protection sets the basic procedural rules for the adoption of AQPs at Sections 14-16. According to the Government Decree on air protection, the territorial environmental protection authority is responsible for preparing, revising and amending AQPs. However, as the Government Decree on air protection does not contain provisions that clarify the legal form of AQPs or regulate access to justice, general Hungarian administrative law applies.

5.5.2. The general administrative law, the Hungarian Act. CL of 2016 on the Code of General Administrative Procedure ("**the Ákr. Act**"), sets out the rules applicable to all administrative proceedings conducted by the Hungarian authorities. Under the Ákr. Act, the right of appeal is limited to those having the status of "clients". A client is a natural or legal person or other organisation whose right or legitimate interest is directly affected by the administrative matter. In its review judgment no. Kfv.II.39.231/2008/6., the Hungarian Supreme Court (*Kúria*) stated that the right and legitimate interest of a person is affected if he or she has a direct and obvious interest in the authority establishing a right (or obligation) and, if so, with the content of that right (or obligation). Based on this decision, Hungarian judicial practice provides for a very narrow interpretation of legal interest. Consequently, individuals, like the Second Applicant, can only act based on the Ákr. Act if the decision contains some specific provision concerning that individual (see for example case BH2001.44 of the Supreme Court).

5.5.3. Additionally, the general definition of client under the Ákr. Act is supplemented by specific rules according to which sectoral laws or governmental decrees may provide that certain individuals or organisations shall be regarded as clients automatically. An example of legislation for environmental matters is the Act LIII of 1995 on the general rules for the protection of the

16 Findings on communication ACCC/C/2008/31 (Germany) (ECE/MP.PP/C.1/2014/8), paras. 64 and 92; findings on communication ACCC/C/2010/48 (Austria) (ECE/MP/C.1/2012/4), para. 69-70; findings on communication ACCC/C/2010/50 (Czech Republic) (ECE/MP.PP/C.1/2012/11), para. 84; findings on communication ACCC/C/2011/58 (Bulgaria), (ECE/MP.PP/C.1/2013/4), para. 52.

17 Government Decree no. 306/2010 (XII. 23.) on air protection.

18 Hungarian VM Decree 4/2011. (I. 14.) VM on air quality limit values and emission limit values of associated point sources of air pollution.

environment ("**the Kvt. Act**"). The Kvt. Act provides for broad and almost automatic standing for environmental NGOs like the First Applicant. Section 98 (1) of the Kvt. Act entitles environmental NGOs to act as a client in environmental administrative procedures.[19] Section 99 confers further rights, including the right to initiate various procedures and litigation in environmental matters. Thus, notwithstanding the absence of any provisions in the Government Decree on air protection regarding access to justice to challenge the AQPs, the Kvt. Act appears capable of fulfilling Hungary's obligations arising from the Aarhus Convention and the CJEU case law on access to justice in air quality matters.

5.6. The 2016 Air Quality Plan for Budapest and its surroundings

5.6.1. Because of the severe air pollution in Budapest and its surroundings, the first AQP was adopted in 2004 by the competent regional environmental protection authority in accordance with Article 23 AQD and to Sections 14-17 of the Government Decree on air protection. A new AQP was prepared in 2008 and revisions took place in 2009, 2011, 2013, 2014, 2015 and 2016 in response to procedures initiated by the European Commission. The latest version of the AQP was prepared in 2016.

5.6.2. The 2016 AQP has a number of shortcomings that make it ineffective. The measures it contains are not sufficient to improve air quality as soon as possible to meet legal limit values. The AQP lacks concrete, effective and legally enforceable measures as well as related short deadlines. The AQP is also based on incomplete and inadequate data which is not integrated in accordance with legal requirements. The AQP overestimates transboundary air pollution impacts and does not adequately address certain domestic sources of air pollution like domestic heating and waste burning. In addition, it does not meet the minimum content requirements prescribed by Annex XV AQD and Annex 1 of the Governmental Decree on air protection. For these reasons, the CAAG started legal proceedings for the judicial review of the 2016 AQP (see point 6 below). **Although the case at hand is not about the quality of the AQP *per se*, it underscores the need of access to court to seek a judicial review of the AQP as required by EU law.**

6. Information about the exhaustion of domestic remedies and compliance with the time-limit set out in Article 35 §1

6.1. First Applicant – The CAAG

6.1.1. On 10 April 2018, the CAAG submitted a request to Érd District Office of the Pest County Government Office, Environmental Protection and Nature Conservation Department ("**the regional environmental protection authority**") to review and improve the 2016 AQP in order to meet legally binding limit values as soon as possible. The request was restated on 1 August 2018, following an official notification about the rules of electronic administration.

19 According to paragraph 2 (a), (c) and (d) of the same section, environmental NGOs have the right, inter alia, to contribute to the development of environmental programmes in their area of operation and to comment on draft state and municipal legislation relating to the environment.

6.1.2. The regional environmental protection authority replied by a letter (no. PE-06/KTF/10275-4/2018) dated 23 August 2018 (**the Letter of 23 August 2018**) (see attachment no 1). In this letter, the authority invoked the Ákr. Act and stated that the preparation and revision of the AQP is not subject to an administrative procedure which can be initiated by an NGO. The letter did not mention the Kvt. Act, but acknowledged that the CAAG could otherwise be considered as a member of the public concerned.

6.1.3. The CAAG lodged an appeal to the Environmental Protection and Nature Conservation Department of Pest County Government Office ("**the national environmental authority**") against the Letter of 23 August 2018. It argued that the regional environmental protection authority had rejected the CAAG's request to review and update the 2016 AQP and had thus issued an administrative decision. On 25 September 2018, the National environmental authority dismissed the administrative appeal by order no. PE/KTFO/4102-2/2018 ("**the Decision of 25 September 2018**") (see attachment no 2). The National environmental authority referred to Section 46(1) and Section 116(1) of the Ákr. Act, finding that the Letter of 23 August 2018 simply provided information on Sections 2-3 of the Ákr. Act and did not constitute an administrative decision which could be appealed. The national environmental authority rejected that the special status of environmental NGOs under the Kvt. Act applied to requests to revise AQPs. **The national environmental authority did not inform the CAAG of any other existing domestic remedy that would allow it to challenge the 2016 AQP and provide access to justice for the public affected by air pollution.**

6.1.4. On 25 October 2018, the CAAG filed a lawsuit against the Letter of 23 August 2018 and the Decision of 25 September 2018, stating that both constituted administrative decisions that in essence refused the CAAG's right to challenge the 2016 AQP. The CAAG requested: (1) the annulment of both decisions (23 August 2018 and 25 September 2018); and (2) a ruling encompassing judicial review of the 2016 AQP, providing guidelines for the first instance administrative authority on the legal requirements of national law and European case law. In respect of legal standing, the CAAG explained that the national authority should have adopted the AQP in the framework of an administrative procedure and therefore the letters of the authorities should have been considered as administrative decisions against which access to justice is clearly prescribed by Section 98(1) of the Kvt. Act. The application of the same rule and interpretation would have led to accepting the CAAG as a client capable of requesting adoption of AQP and amendments to the AQP. In the CAAG's view, the requests submitted on 10 April 2018 and 1 August 2018 should be considered requests to initiate an administrative procedure in relation to the AQP pursuant to Section 35(1) of the Ákr. Act. Accordingly, the Letter of 23 August 2018 should have been interpreted as a rejection of that request, in line with Section 80(1) of the Ákr. Act. Section 116(3)(c) of the Ákr. Act provides for an appeal against such a rejection. In addition, the authorities should be considered as "*users of the environment*" according to Section 99 of the Kvt. Act. **In essence, the CAAG argued that the failure to provide an opportunity to challenge the AQP violates the rights of the CAAG as an environmental NGO to access justice. The unclear procedural rules for the adoption of the AQP and the narrow interpretation by the authorities of the relevant laws also violate EU law on the right to challenge AQPs and the rights guaranteed by the Aarhus Convention.** The CAAG argued that arbitrariness and manifest errors of law rendered the Decision of 25 September 2018 to be unlawful.

6.1.5. On 28 May 2020, the Metropolitan Court delivered judgment no. 110.K.703.519/2020/4. dismissing the CAAG's action ("**the First instance judgment 28 May 2020**") (see attachment no 3). The Metropolitan Court considered the preparation of the AQP to be a "management task" which is not a subject to administrative proceedings. Consequently, the CAAG is not entitled to act as a client and submit a request for internal review or to challenge the Letter of 23 August 2018 and the Decision of 25 September 2018 in court. The judgment was final and no appeal could be lodged against it.

6.1.6. On 23 July 2020, the CAAG lodged a claim for judicial review of the judgement before the Supreme Court (*Kúria*), using the so-called "extraordinary remedy" available in domestic law. The CAAG claimed that the First instance judgment 28 May 2020 violated EU law and the Aarhus Convention on legal standing for environmental NGOs and access to justice in air quality matters. In addition, the CAAG requested the Supreme Court to ask a preliminary question to the CJEU under Article 267 TFEU in order to clarify the interpretation of the national rules for the purpose of implementation of the Air Quality Directive.

6.1.7. On 19 January 2021, the Supreme Court found the request for a review unfounded in decision no. Kfv.IV.37.700/2020/5 ("**the Supreme Court decision of 19 January 2021**", see attachment no. 4). The decision is final and binding. In essence, the Supreme Court repeated the reasoning provided by the court of first instance. The Supreme Court decided that the right to access to justice is not unconditional and not unlimited: it depends on the rights the legislator confers on environmental NGOs. The Supreme Court did not explain what other remedies exist in the Hungarian national legal order for those concerned by air pollution and how the requirement to provide access to justice in air quality matters is fulfilled in Hungary. The Supreme Court offered an interpretation of the CJEU case law that appears on its face to contradict that case law. The Supreme Court stated that the *Janacek* case and the other CJEU cases concerning AQPs are "totally different" from the case at hand, because they concern "short term plans". On that basis, the Supreme Court rejected the request to send preliminary questions to the CJEU, deciding that such questions were not necessary in this case. The reasoning in the judgment on this point was very limited and did not address the arguments that the CJEU case law directly guarantees the public legal standing to demand the review of AQPs. The Supreme Court did not point out any other effective remedy for the First Applicant that was available on the national level to challenge AQPs and improve air quality.

6.1.8. There is no other remedy in the national Hungarian legal order that would allow the CAAG to improve the air quality through the adoption of effective measures. The CAAG is interested in improving air quality in Budapest and its surroundings and does not consider any compensatory remedy, if any exists, effective for this particular purpose. As the ECtHR stated in case *Cordella and Others v. Italy*, 54414/13, (2019), §176, it is important in environmental pollution matters that the remedy at stake offers a possibility to clean up a polluted environment.

6.2. The Second Applicant – Mr András Lukács

6.2.1. The Second Applicant is the president of the CAAG and a concerned citizen. He has worked in the area of air quality since 1988. He is aware of the air quality in Budapest and its surroundings and is worried about lack of improvement because poor air quality negatively impacts his life, the life of his family and that of the general population. The Second Applicant had intended to challenge the 2016 AQP as he considered it to be inadequate and non-compliant with the Air Quality Directive. However, as explained above, national rules render it impossible for individuals to challenge the AQP. In particular, the Ákr. Act requires the Second Applicant to show and prove a direct legal interest in order to fall under the definition of a "client" (see point 5.5 above). The way this law is interpreted by national courts creates a significant barrier to access to justice for individuals and makes it impossible for the Second Applicant to request judicial review of the 2016 AQP. Because Section 98(1) of the Kvt. Act awards client rights to environmental NGOs unconditionally, the Second Applicant, as president of the CAAG and advised by lawyers, decided that it would be the best if the action were taken by the CAAG only.

6.2.2. The importance of environmental NGOs has been recognised by the Aarhus Convention, which provides that NGOs promoting environmental protection "*shall be deemed to have an interest*" and must accordingly be given standing to challenge specific decisions that impact the environment[20] and other activities or omissions that violate environmental law.[21] These requirements have been clarified by the ACCC,[22] implemented in EU law[23] and reflected in the CJEU's case law.[24] However, awarding legal standing to NGOs under the Aarhus Convention does not amount to *actio popularis*.[25]

6.2.3 The Second Applicant refers to the ECtHR's case law **which accepts the exhaustion of domestic remedies by individuals in situation when the litigation has been carried out by the environmental NGO on behalf of these individuals**. In *Gorraiz Lizarraga and Others v. Spain*, 62543/00, (ECHR, 27 April 2004), §§ 38-39, the Court accepted that an NGO may exhaust domestic remedies on behalf of the individuals in situations concerning the environment when the state of environment affects or is related to the individual's rights. As stated above, the Second Applicant would find it far more difficult to access justice in Hungary as an individual and is president of the CAAG. In *Kósa v. Hungary* (dec.), 53461/15 (ECHR, 21 November 2017), §56, the ECtHR clearly stated that "*Since the national law specifically envisaged that legal avenue as a means of defending interests at stake the Court considers that, in principle, it would be conceivable to accept the public interest litigation as a form of exhausting domestic remedies, for the purposes of Article 35 §1 of the*

20 Article 9(2) in conjunction with article 2(5) Aarhus Convention.

21 Article 9(3) in conjunction with article 2(4) Aarhus Convention.

22 See the Aarhus Convention Implementation Guide, in particular Section on Access to Justice, pages 187-207 <https://www.unece.org/env/pp/implementation_guide.html>.

23 Access to justice right as understood by Aarhus Convention thus including NGOs is also reproduced in EU law in article 11(3) in conjunction with article 2(2)(e) of the EIA Directive; article 3(17) in conjunction with article 25(1) of Industrial Emissions Directive and article 23(b) in conjunction with article 3(18) of Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances [2012] OJ L 197/1 (Seveso III Directive).

24 See for instance, C-165 to C-167/09 Stichting Natuur en Milieu, C-240/09 Lesoochranárske zoskupenie, (Slovak Bears), C-404/13 ClientEarth, C-243/15 Lesoochranárske zoskupenie VLK (Slovak Bears II), C-664/15 Protect. See also the Commission Notice on Access to Justice in Environmental Matters,: <https://ec.europa.eu/environment/aarhus/pdf/notice_accesstojustice.pdf> , paras 37-43.

25 The Commission Notice on Access to Justice, note 115, para 72.

Convention." The ECtHR in the *Kosa* case underlined that this should apply in particular to vulnerable members of the public.

6.2.4. In the context of environmental pollution, individuals who are especially vulnerable to poor air quality, like the Second Applicant, are unlikely to be able to challenge AQPs on their own. In addition, to challenge AQPs one needs to possess specialist expertise and information about air quality and the effectiveness of the measures in place. It is extremely difficult for individuals alone to possess this knowledge, which puts individuals in a highly disadvantaged position when faced with the relevant public authorities. For this reason, the role of environmental NGOs, like the CAAG, is essential and they have a special role to play. They provide the necessary knowledge or scientific assessment required and they can carry on long and difficult legal battles like the case at hand. Environmental NGOs also give a voice to individuals affected by environmental pollution. This special role of environmental NGOs in environmental matters – comparable to the special role of NGOs in anti-discrimination matters, recognised in *Kósa* – should not be overlooked.

6.2.5. In the recent case of *Beizaras and Levickas v. Lithuania*, 41288/15 (ECHR, 14 January 2020), §§78-83, the ECtHR accepted that **in certain situations an NGO may represent individuals' interest and so exhaust domestic remedies on their behalf.** The Court recognised that in modern-day societies recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to the citizens whereby they can defend their particular interests effectively, especially when NGOs have been set up for this very purpose. Environmental NGOs (like anti-discrimination NGOs) have been recognised as a special type of NGOs. Their role in supporting citizens in their battles for the right to a healthy environment, including healthy air, was accepted and confirmed by the ECtHR in *Collectif stop Melox et Mox v. France* (dec.), 75218/01, (ECHR, 28 March 2006). In the case of *Vides Aizsardzības Klubs v. Latvia*, 57829/00, (ECHR, 27 May 2004), §42, the ECtHR underlined the special role of environmental NGOs as "watchdogs" for the protection of the environment in a democratic society.

6.2.5. Furthermore, the rule of exhaustion of domestic remedies exists to allow States to consider matters at domestic level before the case is put forward before an international body (an aspect of subsidiarity). It is based on the assumption, reflected in Article 13 of the Convention, that the domestic legal order will provide an effective remedy for violations of Convention rights. This rule is not meant to block access to justice before the ECtHR for individuals. It should be applied with some degree of flexibility and without excessive formalism. The rule of exhaustion is neither absolute nor capable of being applied automatically (see the ECtHR Admissibility Guide, non-exhaustion of domestic remedies, pages 25-27). **The First Applicant put the matter before all national courts and pleaded all relevant grounds of environmental and human health protection. It demonstrated the incompatibility of the interpretation of national law with the Air Quality Directive, CJEU case law and the Aarhus Convention. All of this was to no avail. The First Applicant acted on its own behalf but also represented the interest of the Second Applicant and the cumulative interest of the residents of Budapest and its surroundings. The legal proceedings that the First Applicant exhausted on the national level were of the exact scope that the Second Applicant would have brought himself. It corresponded exactly to the applicant's individual situation namely living in the air quality zone of Budapest and its**

surroundings, being exposed to the air pollution levels above the legal limit values and demanding review and amendments of the 2016 AQP in order to improve air quality as soon as possible.

6.2.6. Last but by no means least, the Second Applicant complains that there is no other domestic remedy at the national level that would allow him to improve air quality in order to protect his health and well-being. Only the AQP serves that purpose, under the relevant legislation. Blocking his ability to challenge the AQP is tantamount to blocking access to justice for all citizens absolutely.

6.3. The applicants are aware that the ECtHR has found that in some instances a constitutional complaint might be an effective remedy in Hungary. In recent case Sándor Varga and others v. Hungary, 39734/15, (2021), §§ 32 the ECtHR explained that the scope of the Constitutional Court's review in Hungary and noted that it carries out an examination if the grievance has occurred as a result of the application of a piece of legislation allegedly contrary to the Fundamental Law in court proceedings (section 26(1)) or if the grievance has occurred as a result of court rulings allegedly contrary to the Fundamental Law (section 27), and under section 26(2) of the Constitutional Court Act if the grievance has occurred directly as a result of the taking effect of a legal provision, provided the absence of any other remedies. The applicants submit that none of these situations apply in the case at hand. This is because the present case is not about the compatibility of the AQP, the Akr. Act or Kvt. Act with fundamental rights protected by the Hungarian Constitution. Instead, domestic courts ruled that AQPs are "management" matters and therefore not administrative decisions which can be challenged under administrative law. While this interpretation has denied the applicants of their rights, it is not contrary to the Findamental Law and it has done so in a way that is impervious to review by the Constitutional Court. The applicants cannot claim, under Section 41 of Act no. CLI of 2011 on the Constitutional Court, that a provision of law in force is in breach of the Fundamental Law. That would amount to asking the Constitutional Court to strike down Hungary's general law on administrative proceedings, which is unthinkable and which, in the abstract, is compatible with the Fundamental Law. Likewise, the applicants cannot ask the Constitutional Court to find, under Section 43 of Act no. CLI of 2011 on the Constitutional Court is contrary to the Fundamental Law, as the judgments of the Municipal Court and the Supreme Court concerned the characterisation in administrative law of AQPs. The situation at the present case is of similarity with the one presented in case *Sándor Varga and others v. Hungary*, (§ 34), namely none of the elements of the case do not posse any issues of "constitutionality" or compatibility with the Fundamental Law of either the court judgments or the provisions of the Akr. Act and Kvt. Act. In such circumstances the constitutional complaint does not constitute an effective remedy. It seems like the core of the application is an absence of adequate legal framework and for this constitutional complaint is not a remedy.

II. ALLEGED VIOLATIONS

7. Article 6 of the Convention

7.1. Admissibility – Fundamental right to clean and healthy air and access to justice to protect it as a civil right under Article 6 of the Convention that can be attributed to individuals and NGOs

7.1.1. Article 6 applies to "civil rights and obligations", which is an autonomous concept under the Convention. Article 6 §1 applies irrespective of the parties' status, the nature of the dispute, and the nature of the authority with jurisdiction in the matter (see guide for Article 6 of the Convention, page 6, point A.1). Article 6 has been applied to a variety of disputes which may have been classified in domestic law as public law disputes, which include disputes involving the right to a healthy environment (see recapitulation of the case law in recent case *Bilgen v. Turkey*, 1571/07, (ECHR 9 March 2021), §65; and guide on the case law of the ECtHR concerning environment, page 18, points 39-40, French version).

7.1.2. The ECtHR has already clarified that a right to a healthy environment recognised and protected by the national legal order constitutes a civil right within the meaning of the Convention: *Taşkın and Others v. Turkey*, 46117/99, (2004), §133; *Okyay and Others v. Turkey*, 36220/97, (2005), §65. Further, in *Zander v. Sweden*, 14282/88, (1993), §§24-25, the ECtHR recognised the existence of a civil right in relation to the right to access clean water.

7.1.3. The case at hand concerns the human right to air quality of a certain standard established by law in order to protect human health (see Air Quality Directive and the Government decree on air protection). The applicants refer to this right as a right to clean and healthy air. This right is a component of the right to a healthy environment and is protected by the Hungarian legal order. The UN Special Rapporteur on human rights and the environment has clarified that "*the right to breathe clean air [...] is one of the vital elements of the right to a healthy and sustainable environment*" (report to the UN General Assembly *Right to breathe clean* air (A/HRC/40/55, 8 January 2019).[26]

7.1.4. The Hungarian Constitution recognises the right to physical and mental health under Article XX of the Fundamental Law of Hungary, including by "ensuring the protection of the environment", and recognises a right to a healthy environment in Article XXI (1) of the Fundamental Law of Hungary: "*(1) Hungary recognises and gives effect to the right of all to a healthy environment*". This is also confirmed in the report prepared for the Human Rights Council by the UN Special Rapporteur on human rights and the environment, *Recognition of the Right to a Healthy Environment in Constitutions, Legislation and Treaties*, (Annual thematic report, 30 December 2019), A/HRC/43/53.

7.1.5. Hungarian national legislation also protects the fundamental right to healthy environment, including the right to clean and healthy air. The Hungarian constitutional right to a healthy environment has been made operational by Section 1 (2) of the Kvt. Act, which states that "*this Act creates an adequate framework for the enforcement of constitutional rights for a healthy environment and promotes ...[...] (b) The protection of human health and the quality of life*". In addition, the Government Decree on air protection, which transposes most of the Air Quality Directive into Hungarian law, provides strict rules on air quality limit values that cannot be breached. These rules were clearly adopted for the protection of human health, as stated by Advocate General Kokott in her opinion in Case C-723/17 *Craeynest*.

26 Report of the UN Special Rapporteur on human rights and the environment to the UN General Assembly, Right to breathe clean air A/HRC/40/55, 8 January 2019, paragraph 17, p.4, available at https://undocs.org/A/HRC/40/55.

7.1.6. This case concerns a serious and genuine dispute over access to justice in order to protect the civil right to clean and healthy air. The national court in Hungary and the ECtHR are being called upon to determine for the first time if the members of the public can challenge AQPs.

7.1.8. The Second Applicant's life, health and well-being is affected by the air pollution. He is constantly breathing polluted air that makes him more vulnerable to various diseases (see *Fadeyeva v. Russia*, 55723/00, (ECHR, 9 June 2005); and *Jugheli and Others v. Georgia*, 38342/05 (ECHR, 13 July 2017)). Health and well-being are closely linked with the physical and mental integrity of a person and the sphere of civil rights. In *Taşkın and Others v. Turkey*, the ECtHR confirmed that individuals can invoke the right to healthy environment as a civil right in order to protect their physical integrity when it is directly at stake because of the environmental pollution.

7.1.9. As to the First Applicant, the ECtHR has accepted that NGOs also qualify for protection under Article 6 §1 if they seek recognition of the specific rights and interests of their members (*Gorraiz Lizarraga and Others v. Spain*, 62543/00, (ECHR, 27 April 2004), §§38 and 45; and *L'Erablière A.S.B.L. v. Belgium*, 49230/07, (2009), §§21-30) or even of particular rights to which they have a claim as legal persons (such as procedural environmental rights, see *Collectif national d'information et d'opposition à l'usine Melox – Collectif stop Melox et Mox v. France* (dec.), 75218/01, (ECHR, 28 March 2006), §4; and *Association Burestop 55 and Others v. France*, 56176/18, (2021), §§50-61). *Melox* and *Association Burestop* are especially relevant as they concern the legal standing under Article 6 of an NGO that has a general purpose of protecting the environment. These NGOs could claim access to court and were recognised as civil rights holders based on the rights awarded to them in the Aarhus Convention, their status as members of public and their role in the society.

7.1.10. According to Article 1 of the Aarhus Convention, "[i]*n order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice*". Thus, the overarching goal of the Aarhus Convention is to guarantee procedural rights of the public, including NGOs, to protect the right to a healthy environment. In this way, **the Aarhus Convention recognises the direct link between the substantive environmental outcomes necessary to live in a healthy environment, among which is the improvement of air quality, and the procedural rights granted to members of the public.** The Aarhus Convention does not distinguish between individuals and environmental NGOs when it comes to recognising their role in the protection of the right to healthy environment. The reason for conferring rights on NGOs as members of the public in the Aarhus Convention is that NGOs represent not only the accumulated interests of their members, but also the interests defended by the NGO itself.

7.1.11. Hungarian legislation already recognises the special role of NGOs within the Kvt. Act and accepts the role of NGOs in protecting the right to a healthy environment (see point 5.5. and 7.1.4. above and objective of the Kvt. Act). EU law clearly provides NGOs with the right to demand adoption or amendment of AQPs (see point 5.4. above). Additionally, under the Aarhus Convention, the ACCC has found that States, like Hungary, cannot **introduce or maintain criteria for access to justice in national law so strict that they effectively bar members of the public, including**

NGOs, from challenging acts or omissions that contravene national law relating to the environment.[27] In the case at hand, both the First and the Second Applicants are excluded from challenging the AQPs because these are considered to be "management documents" that members of public cannot challenge. These are not permissible "criteria" for the purposes of Article 9(3) of the Aarhus Convention.

7.1.12. The First Applicant is a membership organisation and represents the collective interests of its members, including the Second Applicant, but also acts on its own behalf. **The right to clean and healthy air as a component of the right to a healthy environment is the First Applicant's civil right, along with right to information, public participation and access to justice as guaranteed by the Aarhus Convention.** As stated in the recent ECtHR case *Broda and Bojara v. Poland*, 26691/18, (2021), §96, a civil right recognised by national legislation may be substantive, procedural, or a combination of the two.

7.1.13. It is important to distinguish the case at hand with the case *Bursa Barosu Baskanligi and others v. Turkey*, 25680/05, (ECHR, 19 June 2018). In *Bursa Barosu Baskanligi and others v. Turkey*, the ECtHR declared the application inadmissible as incompatible *ratione personae* under Article 6 in respect of the Bursa Bar Association and the Association for the Protection of Nature. However, there are two key differences in the case at hand. First, the case at hand concerns clear and flagrant violations of the law, namely a failure to fully implement the Air Quality Directive and the Aarhus Convention within the Hungarian legal system. This issue was not established in the *Bursa* case. The case at hand also calls into question of the relationship between the EU and ECHR system, in the sense that when the EU confers rights to the public which fall within the scope of the Convention, and Member States do not guarantee these rights, the only recourse is to bring a case to the ECtHR, in lack of individual complaint before the CJEU. Secondly, the case at hand concerns the CAAG, an environmental NGO which has been active during the suite of national proceedings for the purpose of exhausting domestic remedies. By contrast, in the *Bursa* case, the Bar Association did not play a special role in society to protect the environment and represent the public concerned, while the Association for the Protection of Nature had not been sufficiently active during the national legal proceedings.

7.2. Merits

7.2.1. The right of access to a court is an inherent aspect of the safeguards enshrined in Article 6 of the Convention. Everyone has the right to have any claim relating to his "civil rights and obligations" brought before a court or tribunal (see *Kövesi v. Romania*, 3594/19, (ECHR, 5 May 2020), §145). The "right to a court" and the right of access to justice are not absolute. They may be subject to limitations. However, such limitations must not restrict or reduce access in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 §1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of

27 findings on communication ACCC/C/2008/31 (Germany) (ECE/MP.PP/C.1/2014/8), paras. 64 and 92; findings on communication ACCC/C/2010/48 (Austria) (ECE/MP/C.1/2012/4), para. 69-70; findings on communication ACCC/C/2010/50 (Czech Republic) (ECE/MP.PP/C.1/2012/11), para. 84; findings on communication ACCC/C/2011/58 (Bulgaria), (ECE/MP.PP/C.1/2013/4), para. 52.

proportionality between the means employed and the aim sought to be achieved (see *Baka v. Hungary*, 20261/12, (ECHR, 27 May 2014), §73).

7.2.2. Excessive formalism may create the barrier in access to court. Excessive formalism refers to particularly strict interpretations of procedural rules that may deprive applicants of their right of access to a court. For example, in *Maširević v. Serbia*, 30671/08 (ECHR, 11 February 2014), the ECtHR decided that a rule requiring representation by a qualified lawyer in proceedings before the Court of Cassation was not contrary to Article 6 of the Convention in and of itself. However, when the national court dismissed the cassation appeal lodged by a lawyer on his own behalf, on the basis that he was not represented by a qualified lawyer, there was a violation of Article 6 of the Convention because the rule did not serve the aim of legal certainty or the proper administration of justice (§§50-51). Moreover, in *Kövesi v. Romania*, 3594/19, (ECHR, 5 May 2020), the ECtHR decided that limited judicial review of the presidential decree to remove the chief prosecutor from office amounted to a barrier to access to court because the applicant could not challenge the essence of the presidential decree related to her removal (§§153-154). In other words, a national law that provided that some administrative acts are outside the scope of judicial review was not compatible with the requirement of Article 6 to provide access to court.

7.2.4. This situation is similar to the case at hand. The applicants are not challenging the principles of Hungarian administrative procedural law. Instead, they argue that the strict interpretation of the national rules on the legal form of the AQP, as a "management action", deprived the applicants access to court by excluding it from judicial review. AQPs provide for measures and tools that aim to improve air quality. Without judicial review, members of the public – both citizens and environmental NGOs – cannot challenge inadequate actions to improve air quality in order to protect their health.

7.2.5. Furthermore, since the case concerns matters of EU law, the CAAG asked the Supreme Court to refer preliminary questions to the CJEU and clarify the issue of standing to demand review of AQPs. The First Applicant highlighted to the Supreme Court the incompatibility of national practice with CJEU jurisprudence in the *Janecek, ClientEarth* and *Craeynest* cases (see point 5.4. above). This request to refer preliminary questions was refused and no sufficient justification was provided, amounting to a violation of the right to a fair hearing. This situation differs from *Somorjai v. Hungary*, 60934/13, (2018), §§56-63, for the following reasons: (1) in the case at hand, the Supreme Court was confronted with the issue for the first time; (2) the applicant clearly included the request to refer the preliminary question and did not withdraw it; and (3) the incompatibility of Hungarian practice with EU law is flagrant and confirmed by CJEU case law as well as the European Commission's initiation of infringement proceedings in identical circumstances involving Poland and Bulgaria. The ECtHR has clarified in its case law that when the matter before a national court against which there is no right of appeal requires clarification from the CJEU, and the national court has refused to ask a preliminary question, it should provide a sufficient explanation of the reasons (see *Sanofi Pasteur v. France*, application no. 25137/16), (ECHR, 13 February 2020), §§68-81). This is in line with Article 267 TFEU: "*Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court*".

7.2.6 The applicants highlight that they have been left without any possibility of redress by the Hungarian domestic legal system. EU law is clear and provides that persons like the applicants have the right to seek improvements in air quality by challenging AQPs. The applicants observe similar cases being successfully taken by members of the public in other European countries, such as Germany, France and Belgium. Yet, while Budapest remains one of the cities with the worst air quality in Europe, members of the public are unable to take such effective legal action.

8. Article 8 of the Convention

8.1. Admissibility – minimum level of severity

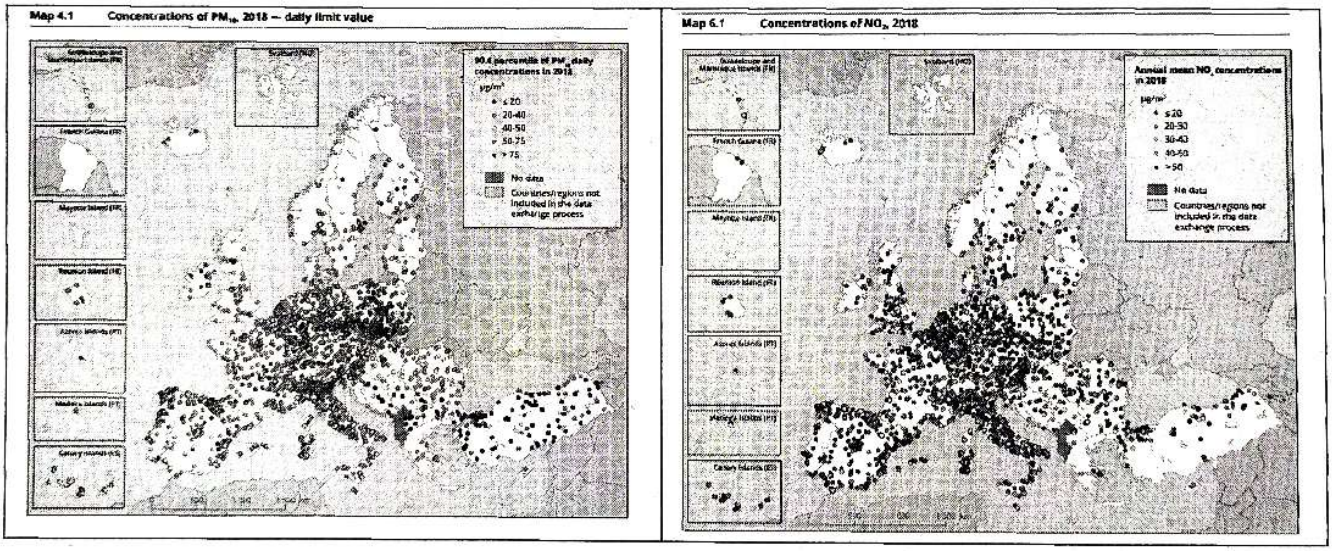
8.1.1. The ECtHR summarised its jurisprudence on the applicability of Article 8 of the Convention in the context of environmental pollution in the recent decision *Çiçek and Others v. Turkey* (dec.), 44837/07 (ECHR, 4 February 2020). From the summary of the cases and given examples, the Court clarified that, although the Convention does not explicitly provide a right to a clean and quite environment or to the protection of nature, an issue may arise under Article 8 of the Convention when an individual is directly affected by pollution (see *Çiçek and Others v. Turkey*, §22; *Fadeyeva v. Russia*, 55723/00, (ECHR, 9 June 2005), §68; *Hatton and others v. the United Kingdom*, 36022/97 [GC] (ECHR, 8 July 2003), §96). The effect of pollution on an individual must reach a minimum threshold. This minimum threshold is relative and depends on all the circumstances of the case, such as the intensity and duration of the pollution/nuisances, the effects on an individual's physical or psychological state, and the individual's personal circumstances (see for example Grimkovskaya v. Ukraine, 38182/03, judgement 21 July 2011, §58). In *Fadeyeva v. Russia*, 55723/00, (ECHR, 9 June 2005), §69, the ECtHR stated that the general context of pollution should also be taken into account and there is no arguable claim under Article 8 if the detriment complained of is negligible in comparison to the environmental hazards inherent to life in every modern city.

8.1.2. The case at hand brings all of the above issues into sharp focus and raises an important question of the acceptable levels of pollution in modern cities. The Second Applicant is a resident of a city in the Central and Eastern part of the EU. He has lived and worked in Budapest and its surroundings for his whole life. He is affected by air pollution every day of the year. He breathes in toxic NO2 pollution when he cycles to work and walks around the city. He inhales PM10 into his lungs, which are sensitive due to his previous illness, when at home and among houses that release fumes from domestic heating and waste burning. He is more vulnerable to all kinds of disease, but particularly cardiovascular disease and respiratory diseases.

8.1.3. As clearly stated in *Fadeyeva v. Russia*, §87, which concerned air pollution from a steel plant, air pollution becomes potentially harmful to the health and well-being of those exposed to when legal limit values are exceeded. In *Lopez Ostra v. Spain*, §51, which concerned waste disposal from a plant, the ECtHR also accepted that pollution may prevent individuals from enjoying their homes in such a way as to adversely affect their private and family life, even without seriously endangering their health. The same was held in *Jugheli and Others v. Georgia*, 38342/05 (ECHR, 13 July 2017), §71. In the specific context of air pollution from road traffic, the ECtHR has stated that "*soot and*

respirable dust particles can have a serious detrimental effect on health, in particular in densely populated areas with heavy traffic" and accepted that Article 8 is applicable (*Greenpeace and others v. Germany* (dec.), 18215/06, (12 May 2009); see also *Grimkovskaya v. Ukraine*, 38182/03, (2011), §62; *Deés v. Hungary*, 2345/06, (9 November 2011), §23, when noise exceeded the statutory level).

8.1.4. The above cases demonstrate that we should not normalise air pollution as an environmental hazard to be expected in the cities we live in, because this pollution adversely affects our health and well-being. When determining the standard level of pollution in the modern city, and whether the pollution in Budapest attain minimum level required by Article 8, the applicants invite the Court to consider the data on air pollution published by the EEA each year (EEA Report No 9/2020, Air Quality in Europe). From this report, it is clear that the air pollution in various European cities is not consistent and that it is possible to obtain good air quality in cities. A combination of effective measures can decrease harmful air pollution and bring it closer to the levels that pose smaller risks to health. The two maps below show pollution from PM10 and NO2. Green dots indicate lower levels of pollution and red dots indicate higher level of pollution. The PM10 map shows that cities in Western Europe have less PM10 pollution than cities in Central and Eastern Europe. The NO2 map shows a more equal distribution of NO2 pollution between Western Europe and Central and Eastern Europe, but some cities have much better air quality than the others.



Some cities on the maps are shown as less polluted and others as more polluted. This is because air pollution is not an inherent and normalised characteristic of the modern city. We are not destined to live in polluted and unhealthy cities. It is not only possible to improve air quality in cities by adopting effective measures, it is essential for our health and climate stability. For these reasons, the applicants invite the Court to accept that exceeding a legally binding minimum level of pollution is sufficient to declare that the situation attain the minimum level and falls under Article 8. The fact that the Second Applicant is living in a zone where air pollution exceeds legal limit values established by national and EU law on a regular basis and for a long period of time is not acceptable.

8.2. Merits

8.2.1. Air pollution at levels exceeding legal limit values create an interference with the Second Applicant's rights protected by Article 8 of the Convention. Article 8 applies in cases where the pollution is directly caused by the State or where the State responsibility arises from a failure to regulate private activities (*Jugheli v Georgia*, §73). When pollution is a result of cumulative activities undertaken by private individuals and public entities because there are multiple sources, as in the case at hand, the State has a positive obligation to address this situation by implementing an effective legislative and administrative framework that ensures the effective protection of rights protected by Article 8 of the Convention. The State also has a positive duty to take reasonable and appropriate measures to secure an applicant's rights under Article 8 of the Convention (*López Ostra*, §51; *Di Sarno and Others v. Italy*, no. 30765/08, (10 January 2012), §96).

8.2.2. Furthermore, in *Brincat and Others v. Malta* (cited above), which concerned health damage suffered by individuals as a result of prolonged exposure to asbestos, the Court ruled that the State is under an obligation to be aware of the harmful effects of pollution. The Court took into account the "*hundreds of articles or other publications concerning the subject at issue published from 1930 onwards*"[28] in concluding that the State was aware of the harmful effects of asbestos pollution at least from the early 1970s, and should have acted upon that knowledge as soon as possible.[29] In the Second Applicant's view, the situation is comparable to his case. The Hungarian State has been aware of the harmful effects of air pollution for many years and is aware how important it is to improve air quality for the protection of human health. In its case law, the ECtHR has recognised that knowledge about the harmful effects of air pollution stems from sources including domestic legal provisions (determining unsafe levels of pollution), environmental studies commissioned by authorities, and relevant reports, statements or studies produced by private entities. In the case at hand, various sources clearly confirm that air pollution levels in Budapest are detrimental to human health, including scientific research on the issue, reports of the EEA and the domestic and EU legal framework concerning air pollution.

8.2.3. Although the State has introduced binding limit values for air pollution in order to protect human health, it is important to recognise that these limit values are less strict than current scientific advice concerning health effects of air pollution (see point 1.3. of the application). As a result, the existing Hungarian and EU legal limit values need to be considered as the bare minimum to protect human health. In this context the State has a positive obligation to establish effective legislative, administrative and in some instances practical frameworks to ensure respect for private and family life. Despite this, Hungary has failed to introduce effective measures in its AQP that could improve air quality and ensure compliance with national and EU law. Moreover, when the First Applicant was trying to challenge the 2016 AQP in order to contribute to its improvement, access to justice for the public was blocked. Consequently, the State failed to ensure also the procedural aspect of protection under Article 8, namely the ability to challenge the authorities' decisions in an effective way (see *Dubetska and others v. Ukraine*, 30499/03, (2011), §143).

28 Brincat and Others v. Malta, note 52, [106].
29 Brincat and Others v. Malta, note 52, [110].

8.2.4. It is also worth noting the Court's case law to the effect that when a State breaches EU law, and the matter falls within the ambit of Article 8, there is a violation of that article by virtue of the fact that the State has not acted "in accordance with the law" (*Aristimuño Mendizaba v. France*, 51431/99, 17 January 2006, §79). In this case, Hungary has been in continuous violation of the Air Quality Directive since it joined the EU and has not taken the steps EU law requires to remedy the situation.

8.2.5. For all these reasons, it should be concluded that Hungary has not fulfilled its positive obligation under Article 8 of the Convention to provide protection to the Second Applicant's respect for private and family life. There is therefore a violation of Article 8 of the Convention.

9. Article 13 of the Convention in connection with Article 6 and 8 of the Convention

9.1. The right to an effective remedy is linked with the obligation to exhaust domestic remedies and the subsidiarity principle of the Convention system. Affected individuals and NGOs must seek redress for the violation of their rights on the national level, but only if there are effective remedies in place. The case at hand is an example of how blocking access to justice violates the applicants' rights in this regard.

9.2. States have a certain margin of appreciation to design and provide remedies, but these remedies should be available in practice and not only in theory. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Rather the remedy must be capable of directly remedying the impugned state of affairs and must offer reasonable prospects of success (*Vučković and Others v. Serbia* (preliminary objections) [GC], 17153/11, (2014), §74). Excessively restrictive requirements may render the remedy ineffective (see guide to Article 13, page 15, point 31).

9.3. The Hungarian system does not meet this requirement. Contrary to the requirements of EU law and the Aarhus Convention, the present case is a clear illustration of how the Hungarian system is not providing any remedy for members of the public (individuals and NGOs) to improve air quality. The applicants are unable to challenge the inadequate 2016 AQP for two reasons: (1) the need to prove an individual legal interest makes it impossible for individuals such as the Second Applicant to challenge AQPs and thereby obtain a remedy; and (2) the authorities and national courts do not consider an AQP to a challengeable act and consequently the First Applicant was refused the ability to demand a review of the 2016 AQP. This situation makes it impossible in practice to undertake any legal actions to improve air quality and condemns the applicants to live in a highly polluted city without any means of redress, affecting their Convention rights.

9.4. In *Cordella and Others v. Italy*, 54414/13, 54264/15, (2019), §176, the Court decided that there was a violation of Article 13 on the basis that that there were no domestic remedies that would allow the applicant to benefit from a clean-up of the polluted areas. In the case of *Hatton and Others v. the United Kingdom* [GC], 36022/97, (2003), §§137-142, the limited scope of review of the excessive noise caused by night flights resulted in a violation of Article 13 in light of Article 8. Such principles also apply in the case at hand.

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LUKÁCS ANDRÁS

DR. BENDIK GÁBOR