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26 January 2022

COMMUNICATION

under Rule 9.2 of the Rules of the Committee of Ministers regarding the supervision of the execution of judgments and terms of friendly settlements by the Hungarian Civil Liberties Union

CASE OF SZABÓ AND VISSY v. HUNGARY
(Application no. 37138/14)

I. INTRODUCTION

Case summary

On 12 January 2016, the European Court of Human Rights (ECtHR) issued its judgment in the case of Szabó and Vissy v. Hungary (application no. 37138/14). The Court unanimously held that Hungary had violated the applicants' right to respect for private and family life protected by Article 8 of the European Convention of Human Rights (ECHR). The judgment became final on 6 June 2016.

In the referred case, the Court found that the Hungarian legislation on secret surveillance measures, namely within the framework of intelligence gathering for national security governed by § 7/E (3) of the Police Act (as amended by Act no. CCVII of 2011), did not provide for safeguards sufficiently precise, effective and comprehensive on the ordering, execution and potential redressing of such measures. More precisely, the Court concluded that Hungary was reluctant to provide adequate legal guarantees for the protection of the right recognized in Article 8 of the ECHR as (1) „the scope of the measures could include virtually anyone", (2) „the ordering is taking place entirely within the realm of the executive and without an assessment of strict necessity", (3) „new technologies enable the Government to intercept masses of data easily concerning even persons outside the original range of operation", and (4) there are no „effective remedial measures, let alone judicial ones" (cf. § 89).

Our organisation

The Hungarian Civil Liberties Union (HCLU) is an independent watchdog organization protecting civil liberties in Hungary since 1994. Its Privacy Project aims to ensure that state intervention into the private life of citizens is limited to the strictly necessary extent. The HCLU has been active in strategic privacy rights litigation before the Hungarian courts. Our organization has represented clients before the European Court of Human Rights Court in several landmark cases concerning, mainly, the freedom of expression and the press, and also the right to respect for private life (see e.g. Ternovszky v. Hungary, appl. no. 67545/09). In recent years we have provided free legal assistance in many cases concerning secret surveillance. By doing so, we have gained considerable legal expertise regarding the protection and enforcement of citizens' privacy rights, which we are honored to share with the Committee of Ministers (CM) in the present Communication.

The interface between HCLU and the applicants

This communication is unique in its kind as both applicants happen to be members of the HCLU staff. One applicant, Mr. Máté Szabó, is the Director of Programs of the organization, while the other applicant, Ms. Beatrix Vissy is one of the legal experts working for our Privacy Project. Mr. Szabó joined HCLU in 2014, Ms. Vissy became a staff member in 2016. This fortunate coincidence allowed the communication to be drafted by the applicants.

Status of the execution

The case is under standard supervision. An initial action plan (DH-DD(2017)219) was received by the CM on 17 February 2017 and was discussed by the CM at its 1302nd meeting (5-7 December 2017). The most recent version of the action plan (DH-DD(2021)89), i.e. the subject of the present communication, was submitted on 20 January 2021.

II. EXECUTIVE SUMMARY

The author finds that:

- Half a decade has passed since the judgment was delivered but t**he Government has still not introduced any general measures to protect the fundamental right under Article 8** of the Convention against unjustified secret surveillance. Moreover, there is absolutely no sign of any ongoing legislative movement regarding the implementation of the judgment — except that the action plan declares so.
- The Government has **not provided any plausible explanation for the implementation delay**.
- **The governmental maintenance of the legislative status quo** by failing to comply with the Court's requirements **serves as a breeding ground for systematic abuses of secret intelligence means, as the Pegasus scandal has shown.**

- **Hungary has not complied with its obligations under Article 46 Paragraph 1 of the Convention** with respect to the Court's judgment in the Szabó and Vissy case.

For the reasons above, the authors respectfully recommend the Committee of Ministers to:

- **continue examining the execution** of the judgment in the Szabó and Vissy v. Hungary case **under the enhanced procedure**,

as well as to call on the Government of Hungary, among other measures, to introduce amendments to the legislation,

- **taking the power of authorisation for covert surveillance away from the Minister of Justice and placing it in the hands of an independent body, preferably the courts;**
- **specifying as precisely as possible** the conditions under which a permit for covert surveillance may be granted;
- **establishing the obligation of the national security services to subsequently notify citizens** of their previous surveillance.

III. GENERAL MEASURES

1) The total absence of legislative developments

Half a decade has not been enough for the Government to implement any legislative change for the protection of privacy rights against unjustified secret surveillance in the name of national security purposes. It is not just that the legislative process has not yet been completed, but that it is not even underway: **in the public sphere, there is absolutely no sign of any ongoing legislative movement regarding the judgment — except that the action plan declares so**.

In the year following the delivery of the judgment, the Government showed a clear willingness to change the existing legal framework. In October 2016, the Ministry of Interior entered into consultation with the National Authority For Data Protection and Freedom of Information (hereinafter: „NDPA" as national data protection authority) on the revision of the legal framework of intelligence gathering for national security.[1] Shortly afterward, **in August 2017, the same Ministry published a piece of draft legislation amending the conditions for secret surveillance on national security purposes,[2] but it has stalled at the Government's conciliation meetings and never reached the parliament.** Everything points to the fact that the draft has been taken off the Government's political agenda. Although the drafted amendments did not, in our view, fully meet the requirements of the judgment,[3] they would have added essential safeguards to the system of the protection of

[1] See https://www.naih.hu/files/NAIH-5776-2-2016-J-161024.pdf.
[2] Proposal No. BM/8652/2017, available in Hungarian at https://2015-2019.kormany.hu/hu/belugyminiszterium/hirek/sajtokozlemeny-20170818.
[3] Opinion of the HCLU on the Proposal No. BM/8652/2017, available in Hungarian at: https://tasz.hu/files/tasz/imce/2015/nbtv_velemeny.pdf.

citizens' privacy rights regarding secret intelligence, if adopted by the parliament. The drafted amendments (1) clarified the conditions under which the state could conduct covert surveillance, (2) involved the NDPA in the authorisation process, and (3) vested the NDPA with powers to investigate the legality of the secret intelligence gathering both upon request and ex officio, during and after the surveillance.

In summary, the execution of the judgment was clearly on the Government's agenda between 2016 and 2017. Since then there have been no legislative developments to report.

2) Questionable explanations for the delay of implementation

The Action Plan declares that the examination of the requirements stemming from the judgment in terms of legislative amendments is expected to take some time. As an explanation, it argues that „although the applicants only complained about the lack of judicial authorisation of secret surveillance for national security purposes, the Court's judgment has identified a wider range of problems of the relevant legislation while its findings concerning the applicants' original arguments remained ambiguous". It also adds that „the determination of some outstanding issues, not addressed by the Court in the Szabó and Vissy judgment, [...] are pending before the Court in other cases against Hungary." In brief, the explanation for the delay of legislative amendments refers to the complexity and uncertainty of the judicial findings as well as its shortcomings. Another reason given for the delay of the execution is that the Ministry of the Interior has been conducting a comparative study to examine the framework in which the other EU Member States allow secret surveillance for national security purposes.

In our reading, the judgment makes quite clear what factors play a role in assessing the proportionality of the intervention into the private sphere by secret intelligence means (cf. § 57). The Court's conclusion that the Hungarian legislation did not guarantee the proportionality of the intervention was mainly based on the following regulatory factors:

1) the overly broad personal scope of application of the legislation (cf. §§ 66-67),
2) the overly broad situational scope of application of the legislation (cf. §§ 71-73, 75),
3) the uncertain time frame of surveillance (cf. § 74),
4) the absence of independent – as a general rule, judicial – supervision of the authorisation and application of surveillance measures (cf. §§ 75-77),
5) the lack of an *a posteriori* control mechanism able to redress individual grievances caused by such measures and to control effectively the daily functioning of surveillance organs (cf. §§ 79-83),
6) the absence of an obligation to subsequently notify the persons affected by surveillance measures (cf. §§ 83-87).

Looking at the list above, the judgment undoubtedly outlined a complex map of problems regarding the Hungarian regulation of secret surveillance. However, the fact that the judgment allows us to list

the deficiencies of that regulation calls into question the argument that the government needs time to identify the requirements that follow from the judgment.

Indeed, the judgment does not determine with high accuracy how the national regulation should be changed to bring it into line with Article 8 of the Convention. That is true for the authorisation process in particular. However, the lack of such conclusive, exact results in the judgment is a direct consequence above all of the margin of appreciation doctrine that gives the Contracting Parties a certain leeway in balancing between national interests and individual rights. In the judgment at issue, the Court underlined that „national authorities enjoy a certain margin of appreciation in choosing the means for achieving the legitimate aim of protecting national security" (§57). Consequently, **when the Government explains the delay of execution of the judgment by claiming that the judicial findings are ambiguous, it urges patience over the execution on the grounds of its own discretion (i.e. margin of appreciation)**. However, the leeway for the government to choose between possible legislative constructions can in no way explain why it does not commit itself to any of the acceptable ones but maintains the status quo which is declared to be contrary to the ECHR.

When the violation of a fundamental right stems from the total absence of a certain guarantee, such as the lack of independent control over the authorisation of secret surveillance of citizens in the Szabó and Vissy judgment, **any attempt to provide a greater degree of independence in the control mechanism is better than maintaining the status quo.**

The Government is allegedly struggling with the execution also because the Szabó and Vissy judgment did not address the question of whether the NDPA's powers of secret surveillance constitute a sufficient guarantee in light of Article 8 of the Convention. The Government awaits the answer to this question from the Court in other pending cases. We will evaluate below in detail the existing powers of the NDPA in light of the requirements of the judgment. However, it is worth noting here that at the time the case at issue was being adjudicated, the Government did not consider it important to invoke the powers of the NDPA among the available legal safeguards under Article 8 of the Convention. For clarification, the case Szabó and Vissy v. Hungary was launched in May 2014, while the NDPA started operating on 1 January 2012. The rules governing the powers of the NDPA concerning secret surveillance have not changed since its establishment. Yet, the Government's observations to the case on admissibility and the merits, submitted on 31 October 2014, did not mention a single word about the NDPA as a substantive guarantee of the right declared in Article 8. In other words, **in the Szabó and Vissy case, the government considered the NDPA's powers regarding secret surveillance so insignificant that it did not even refer to them in its defense, and now it expects that the judicial assessment of those powers in other ongoing cases will affect the enforcement of the judgment.**

3) The ineffectiveness of control mechanisms currently in place

The Action Plan details the existing legislation governing the powers of the Parliamentary Committee on National Security and the NDPA to monitor secret surveillance. The fact that the Action Plan does not contain any information beyond these powers suggests that the government intends to convince the Committee that the existing legal mechanisms, as a whole, are sufficient to meet the requirements of the judgment. **Based on our knowledge and practical experience, we are sure that this is not the case: the currently existing guarantees are inadequate to actually protect privacy rights**, for the following reasons:

a) Parliamentary control over the national security services

The national legislation on parliamentary control over secret surveillance has been already described (cf. § 17) and evaluated (cf. §§ 82-84) in the judgment concluding that the existing legal mechanisms are insufficient to provide adequate protection against the arbitrary restrictions of surveillance measures. It is therefore not clear what the government is trying to prove by repeating these rules.

It is worth recalling that the Court considered convincing evidence for the ineffectiveness of parliamentary control that **the committee had never judged individual cases in its supervisory role** (cf. § 84). According to our best knowledge, this situation has not changed since 2016.

Hence, the Committee powers related to secret surveillance do not qualify as remedial but oversight mechanisms having only general consequences not affecting concrete cases. However, the committee's inability to investigate in the Pegasus case demonstrated the weakness of this oversight role, as discussed in a separate section about the Pegasus case below.

b) The National Data Protection Authority (NDPA)

No doubt that particular legal requirements give the NDPA more independence from the executive than the Minister of Justice.[4] However, **the independence of the authority is relativised by the fact that the NDPA Head gains its position at the will of the Prime Minister.** Just like any minister of the government in Hungary, the President of the NDPA is appointed by the President of the Republic (head of state) on a proposal from the Prime Minister. Although the President of the Republic is independent from the executive in public law, he or she has no room for maneuver in the

[4] The legislation (the Act CXII of 2011 on the Right of Informational Self-Determination and Freedom of Information) declares that the NDPA is subject only to the law, that it cannot be instructed in its functions, and that it performs its duties separately from other bodies free from influence [Art. 38 (3)]. Under the legislation only a person who meets certain professional criteria can be appointed NDPA Head, who is appointed for 9 years [Art. 40 (1) and (3)]. The Head's independent status is also guaranteed by conflict of interest rules [Art. 40 (2)].

appointment process. That means he is obliged to appoint the Prime Minister's nominee, with certain extreme exceptions.[5]

We recall that the judgment also considers that, concerning a non-judicial authoriser, it is necessary to examine whether the authorisation process involves "an official qualified for judicial office" (cf. § 85). **Based on the current legislation in place, the NDPA Head cannot be demonstrated to be a person who necessarily holds judicial office, and therefore does not qualify for the judicial requirements.**

The Action Plan seriously questions whether the government has gone deeper into examining the NDPA's ability to curb covert surveillance abuses since it contains erroneous statements about the NDPA's powers. Such an error is the reference to legal grounds for the NDPA's action that can only be interpreted in the context of the General Data Protection Regulation (GDPR), whereas the provisions of the GDPR do not apply to data processing for national security purposes at all.[6]

A more serious shortcoming of the information in the Action Plan is that **the government failed to mention the limitations to the control powers of the NDPA related to covert intelligence**. The only information provided by the government is that the authority shall have access to all the data which allow the identification of persons using devices and methods for secret information gathering or covert devices if it is necessary to carry out its tasks.[7] What we do not know from the text, however, is that **the law also determines what information the authority does not have access to during its investigation, and this is no small list.**

The relevant legislation stipulates that the NDPA shall not, in the course of its investigations concerning national security services, have access to

> (a) the register for the identification of individuals cooperating with the national security services;
> (b) any document containing technical data on the operation and functioning of the instruments and methods used by the national security services for the collection of classified information or which makes it possible to identify the persons using them;
> (c) files relating to cryptography and coding;
> (d) security documents relating to objects and personnel of the national security services;
> (e) documents relating to security document protection and technological control;
> (f) any document the disclosure of which would enable the information source to be; and
> (g) any document the disclosure of which would prejudice the obligations of the national security services vis-à-vis foreign partner services.[8]

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[5] The President of the Republic is allowed to refuse the appointment „if the conditions required by the law are not met or if he or she has well-founded reasons to conclude that it would lead to a serious disorder in the democratic functioning of the state organisation" [Art. 9 (6) of the Fundamental Law of Hungary].

[6] See the last page of the Action Plan.

[7] Ibid.

[8] Art. 71 (3) of the Act CXII of 2011 on the Right of Informational Self-Determination and Freedom of Information in accordance with Art. 23 (2) and (7) of the Act CXI of 2011 on the Commissioner for Fundamental Rights.

The NDPA shall also not, in the course of its investigations concerning the police (including Anti-Terrorism Task Force "TEK"), have access to

(a) any document relating to cooperation between national security services and the police and containing the information specified in the list above;

(b) documents that allows the identification of individuals who are cooperating with the police in secret, unless the breach of rights occurred to the cooperator and he or she requested the investigation;

(c) documents containing technical and operational details of the functioning and operation of the equipment and methods used by the police to gather covert information or to use covert means or which allow the identification of the persons using them.[9]

If the NDPA considers it necessary to inspect the documents listed above to investigate the case, it may request the responsible minister to examine them. The minister in charge shall carry out or cause to be carried out the examination required by the NDPA and shall inform the NDPA Head of the result of the examination within a period to be fixed by the NDPA Head. The time limit may not be less than thirty days.[10]

It is important to point out that t**he above confidentiality rules prohibit access to documents (files) and not only data.** Consequently, if a document contains even a single piece of information that the authority shall not know, the whole document will be withheld from it, not only the data.

The above information shows that **certain aspects of secret intelligence can be monitored by the NDPA only to the extent that the responsible members of the government** (the Minister of the Interior and the Minister for Foreign Affairs) **allow it to do so**. The government should not expect much from a set-up in which the controller authority is subordinated to the controlled body as the latter can decide what to show the former from its activities.

As long as the legislation does not require intelligence agencies to subsequently notify data subjects of their previous surveillance, the NDPA's powers to redress individual rights violations cannot be considered as existing guarantees of privacy. Indeed, if a citizen wishes to bring proceedings, either before the NDPA or before a court, he or she must provide some evidence of his or her involvement. With a few extreme exceptions (failure of an operation, leak of classified materials), this can be done by the data subject only if he or she has the right to be subsequently notified about the surveillance.

[9] Art. 71 (3) of the Act CXII of 2011 on the Right of Informational Self-Determination and Freedom of Information in accordance with Art. 23 (3) and (7) of the Act CXI of 2011 on the Commissioner for Fundamental Rights.

[10] Art. 71 (3) of the Act CXII of 2011 on the Right of Informational Self-Determination and Freedom of Information in accordance with Art. 23 (7) of the Act CXI of 2011 on the Commissioner for Fundamental Rights.

4) Lessons of the Pegasus scandal

As the judgment focuses on the lack of guarantees for protecting privacy, and the government relies on the existing ones in its implementation, lessons of the Pegasus case presented below are particularly valuable for the supervisors of the implementation since it reveals in practice what we can expect from the national legislation currently in place to protect privacy rights against surveillance abuse.

In July 2021, Hungarian society was shocked by the news that Hungary was among the countries where journalists, lawyers, and activists had been monitored using Pegasus spy software. The fact-finding article of the non-profit journalism Direkt36,[11] the Hungarian member of the so-called „Pegasus Project",[12] revealed that the phones of more than 300 Hungarian nationals were identified as possible targets for spying with the software. The list included journalists, attorneys at law, human rights activists, opposition politicians, influential citizens with oppositional views, former heads of the secret services etc. By testing mobile phones, experts from Amnesty International were able to confirm in several cases that the software had indeed been installed on the phone of the owner of the listed phone number. While the investigation did not conclusively reveal who had bought and then deployed the spyware against the targeted individuals, many signs suggest that the spying took place under the direction of the Hungarian government. So far, members of the government consistently denied that the state had abused its surveillance power.

In our view, **the scandal has revealed what happens when adequate legal safeguards for protecting citizens' private life do not counterbalance the possibility of covert surveillance for national security purposes.** In other words, the inclusion of Hungary on the list of countries involved in the scandal closely relates to the lack of guarantees highlighted in the judgment of Szabó and Vissy case. **The Pegasus case must therefore act as a catalyst for urging the execution of the judgment by the CM.**

HCLU provides legal assistance to several individuals monitored using Pegasus software. Our ambition is to find any legal way that allows privacy rights enforcement in an individual case concerning possible abuse of the secret services. It is too early to report any information about these cases, but recent experiences gained in similar cases suggest little chance of success. It is not premature, however, to draw conclusions about the oversight powers of the Parliament's responsible

[11] Available in English at https://www.direkt36.hu/en/leleplezodott-egy-durva-izraeli-kemfegyver-az-orban-kormany-kritikusait-es-magyar-ujsagirokat-is-celba-vettek-vele/.

[12] The Pegasus Project is a ground-breaking collaboration by more than 80 journalists from 17 media organizations in 10 countries coordinated by Forbidden Stories, a Paris-based media non-profit, with the technical support of Amnesty International conducting cutting-edge forensic tests on mobile phones to identify traces of the spyware. For more information see https://www.amnesty.org/en/latest/news/2021/07/the-pegasus-project/.

committee and the NDPA to examine the lawfulness of secret intelligence in an abstract way, i.e. independent of individual cases.

If there had been expectations that the Parliament's National Security Committee, a political body *par excellence*, could effectively investigate potential abuses of intelligence assets, the Pegasus case completely undermined them. In July 2021, right after the case turned out, the opposition chair of the committee urgently summoned the committee to question the Ministry of the Interior. The minister and all the opposition MPs attended the session, but MPs of the governing party stayed away, saying the allegations were „baseless" and „served only political agitation".[13] As a result, the committee was not quorate and could not make any progress on the case.[14]

On 20 September 2021, the committee finally met, this time with the participation of the governing party MPs. The meeting lasted up to two hours, but produced no meaningful results. As materials of the sitting became classified for 50 years, and thus the minutes are not available to the public,[15] we know as much about the meeting as the committee's chairman shared with the press. According to his statement,[16] opposition party MPs called for a fact-finding inquiry in the Pegasus case, but the governing party members refused their motion. Adopting the motion would have been crucial for the investigation of the case, as it would have allowed members access to the relevant documents of the case held by the national security services. Consequently, MPs of the governing party have successfully prevented the committee from investigating the merits of the Pegasus case. Although the committee members were allowed to question the minister at the meeting, his answers allegedly did not even reveal whether the state had purchased the spy software. The Minister of Justice holding the power to authorise secret surveillance measures was also invited to the meeting but did not even attend.

Three weeks after the Pegasus case hit the press, the NDPA also decided to launch an ex-officio investigation. The reasoning for the three-week wait was that the NDPA Head spent his summer holiday in July and was not in a position to deal with the case.[17] **Now, five months after the investigation started, which by the way, has only 90 days to be closed, nothing is known about its outcome.** In response to a journalist's question, the NDPA Head said that "basically everything is ready," that they have done "lots of investigation," and that they are waiting for Amnesty

[13] The Fidesz faction's statement to ATV news on 25 July, see https://www.atv.hu/belfold/20210725/fidesz-a-baloldal-politikai-hangulatkeltesbol-hivta-ossze-a-nemzetbiztonsagi-bizottsagot.
[14] See the minutes of the meeting available at https://www.parlament.hu/documents/static/biz41/bizjkv41/NBB/2107261.pdf.
[15] Cf. https://www.parlament.hu/web/nemzetbiztonsagi-bizottsag/a-bizottsag-ulesei.
[16] See https://444.hu/2021/09/20/2050-ig-titkositottak-mi-hangzott-el-pegasus-ugyben-a-nemzetbiztonsagi-bizottsag-ulesen.
[17] See https://hang.hu/belfold/az-adatvedelmi-hatosag-elnoke-szabadsagon-van-majd-ket-het-mulva-dont-arrol-indit-e-vizsgalatot-128211.

International Hungary (hereinafter: "**AI Hungary**") to provide the authority with a list of all the 300 Hungarian telephone numbers, but AI does not cooperate with the authority.[18]

One could say that it is difficult to understand why the NDPA needs all the listed phone numbers to close its ex officio investigation at a given time — especially as separate proceedings can be opened at any time upon individual request. What is even more confusing is that NDPA refuses to accept the response according to which AI Hungary cannot release the list requested because they do not have it and have never had it. AI Hungary reported that it has already written three letters to clarify the situation, but the NDPA is still demanding the list, saying that "it has learned from the press" that the list is held by AI Hungary. Eventually, NDPA turned to Amnesty International's London headquarters and is currently awaiting their response.[19]

This is the explanation why now, several months after one of the biggest international spy scandals of the decade hit the press, **the NDPA website gives 0 results for the search term "Pegasus"**.[20] As if the case does not exist in the eyes of the authority.

The experiences gained so far in the Pegasus case show, in our view, that it is futile to expect the NDPA to provide adequate protection for privacy against intelligence abuses.

IV. CONCLUSIONS AND RECOMMENDATIONS

In conclusion we assess that Hungary has not complied with its obligations under Article 46 Paragraph 1 of the Convention with respect to the Szabó and Vissy judgment.

As stated in the judgment, *"the risk that a system of secret surveillance set up to protect national security may undermine or even destroy democracy under the cloak of defending it, the Court must be satisfied that there are adequate and effective guarantees against abuse."* Given the systematic nature and severity of the threat to democracy, for the reasons presented above, the HCLU respectfully recommend the Committee of Ministers to:

> **Continue examining the execution of the judgment** in the Szabó and Vissy v. Hungary case under the enhanced procedure,

as well as to call on the Government of Hungary to:

- Demonstrate progress in implementing measures;
- Introduce amendments to the legislation,

[18] See https://hvg.hu/itthon/20220107_Peterfalvi_ujabb_hatarideje_nehany_het_mulva_kesz_a_Pegasusjelentes.
[19] https://hvg.hu/itthon/20220107_Peterfalvi_ujabb_hatarideje_nehany_het_mulva_kesz_a_Pegasusjelentes.
[20] https://naih.hu/.

- **taking the power of authorisation away from the Minister of Justice and placing it in the hands of an independent body, preferably the courts;**
- **specifying as precisely as possible** the conditions under which a permit for covert surveillance may be granted;
- **establishing the obligation of the national security services to subsequently notify citizens** of their previous surveillance to provide them the possibility to launch individual cases to redress potential violations of their rights;

- Include **civil society** in planning the general measures for the implementation of this judgment.

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