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COUR EUROPÉENNE DES DROITS DE L'HOMME

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Grand Chamber to examine case concerning judicial reform in Poland

The Chamber of the European Court of Human Rights to which the case of **Grzęda v. Poland** (application no. 43572/18) was allocated has **relinquished jurisdiction in favour of the Grand Chamber of the Court**[1].

The *Grzęda v. Poland* case concerns a reform of the judiciary in Poland as a result of which the office of a Supreme Administrative Court judge elected to the National Council of the Judiciary was terminated before the end of his four-year term.

There are currently 27 applications pending before the Court which raise issues relating to various aspects of the reform of the judicial system in Poland under laws that entered into force in 2017 and 2018.

Grzęda v. Poland (application no. 43572/18)

Principal facts

The applicant, Jan Grzęda, is a Polish national who was born in 1956 and lives in Piła (Poland).

He is a judge of the Supreme Administrative Court, and in January 2016 was elected for a four-year term as a member of the National Council of the Judiciary (the NCJ), a constitutional organ which safeguards the independence of courts and judges.

However, his term of office as a member of the NCJ was ended prematurely in 2018, following the entry into force of new legislation in the context of wide-scale judicial reform. In particular, the Act Amending the Act on the NCJ of 2017 ("the 2017 Amending Act") provided that judicial members of the NCJ would no longer be elected by judges but by the Sejm (the lower house of Parliament), and that the newly elected members would immediately replace those elected under the previous legislation. Thus when the Sejm elected 15 judges as new members of the NCJ on 6 March 2018, the applicant's office was terminated. He did not receive any official prior notice.

Complaints

Relying on Article 6 § 1 (right of access to a court) of the European Convention on Human Rights, Mr Grzęda alleges that he was denied access to a court in order to contest the premature termination of his office. He also complains under Article 13 (right to an effective remedy) of the Convention that there was no procedure, judicial or otherwise, for him to contest the premature termination.

Procedure

The application was lodged with the European Court of Human Rights on 4 September 2018.

On 9 July 2019, the Polish Government was given notice[2] of the application, with questions from the Court.

[1] Under Article 30 of the European Convention of Human Rights "Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects. "

[2] In accordance with Rule 54 of the Rules of Court, a Chamber of seven judges may decide to bring to the attention of a Convention State's Government that an application against that State is pending before the Court (the so-called "communications procedure"). Further information about the procedure after a case is communicated to a Government can be found in the Rules of Court.

On 10 November 2020 the Chamber constituted to consider the case decided to give notice to the parties of its intention to relinquish jurisdiction in favour of the Grand Chamber in accordance with Article 30 of the Convention. On 9 December 2020 the Polish Government filed an objection to the Chamber's proposal to relinquish its jurisdiction in favour of the Grand Chamber (Article 30 of the Convention and Rule 72 § 4 of the Rules of Court).

On 9 February 2021 the Chamber decided, by a majority, that it was unable to accept the Polish Government's objection since it could not be considered valid under the terms of Article 30 of the Convention taken in conjunction with Rule 72 §§ 1 and 4 of the Rules of Court.

Letters giving reasons for the Chamber's decision have been sent to the parties.

Chamber's decision

The Chamber considered that in order for the Government's objection to be regarded as valid under the terms of Article 30 of the Convention, in conjunction with Rule 72 § 4, it must be satisfied that the Government provided reasons as to why the present case would not meet the criteria laid down in Article 30 and would not raise "a serious question affecting the interpretation of the Convention or the Protocols thereto" or that "the resolution of a question before the Chamber" would not "have a result inconsistent with a judgment previously delivered by the Court".

In that context, the Chamber observed that at the 2012 Brighton Conference, in the wake of the States Parties' unanimous decision to remove from the Convention their power of objection to relinquishment under the future amending Protocol No. 15, Poland – as one of the signatories of the Brighton Declaration – voluntarily and unreservedly agreed to a collective policy of refraining from objecting to relinquishment pending the Protocol's entry into force. Furthermore, Poland ratified Protocol No. 15 on 10 September 2015, thus manifesting in a legal form its undertaking that the States Parties to the proceedings before the Court should no longer object to relinquishment.

The Chamber was also mindful that the States Parties' position in respect of Protocol No. 15 had evolved since the Brighton Declaration from the initial consensus as to the policy and practice to be followed as regards relinquishment (in that context see also Article 31 § 3 of the Vienna Convention on the Law of Treaties), through their further consistent support for the reform foreseen under the Protocol as shown by their successive ratifications, up to the recent decision by the last remaining State Party to authorise its ratification.

The Chamber took note of the reasons given by the Polish Government in support of their objection.

In the Chamber's assessment, those reasons, in essence limited to reliance on the power of objection which was – and still is – formally available to the Government in accordance with as yet unamended Article 30, could be regarded as tantamount to an attempt to re-argue the legal policy choices that Poland had itself made voluntarily and unreservedly by signing the Brighton Declaration and ratifying Protocol No. 15. As regards the argument that by means of the present objection Poland would retain the opportunity to have the case heard at two levels of jurisdiction, the Chamber wished to emphasise that Article 43 of the Convention did not confer on the parties to Court proceedings an unfettered right to a two-tier examination of the case: a party may ask for a case to be referred to the Grand Chamber only in exceptional cases, such request being subject to review and acceptance by the panel of the Grand Chamber.

Lastly, the Chamber noted that the Government had not argued that the case was unsuitable for relinquishment or that it did not otherwise fulfil the criteria laid down in Article 30. On the contrary, the Government had admitted that the Court's ruling in the present case was of "great importance", might have consequences for other States Parties "in relation to national systems of justice", and might establish "new standards of the Court".

In view of the foregoing the Chamber concluded that the Government's objection could not be considered "duly reasoned". Accordingly, the Chamber, by a majority, was unable to accept the

objection as valid for the purposes of Article 30 of the Convention and Rule 72 §§ 1 and 4 of the Rules of Court. The Chamber therefore decided to relinquish jurisdiction in favour of the Grand Chamber.

Pending applications concerning the reform of the judiciary in Poland

Cases pending before the Court

There are currently 27 applications, mostly lodged in 2018-2021, which raise issues relating to various aspects of the reform of the judicial system in Poland under laws that entered into force in 2017-2018. In 17 cases notice was given to the Polish Government in 2019-2020.

Moreover the Court has decided that all current and future applications concerning complaints about various aspects of the reform of the judicial system in Poland should be given priority (Category I). In accordance with the Court's prioritisation policy, this level of priority is assigned to urgent cases.

The relevant applications generally involve complaints under Article 6 § 1 (independent and impartial tribunal established by law; access to a court; unfairness of procedures for demoting of judges and disciplinary proceedings against judges and prosecutors), Article 13 (lack of a remedy to raise Convention claims before a domestic body), Article 8 (right to respect for private and family life) and Article 10 (individually tailored disciplinary or other measures to silence judges criticising the reform of the judiciary).

The allegations raised in these cases may be grouped into the following categories:

- The Polish Constitutional Court not being regarded as a "tribunal established by law": alleged irregularity in the election of a judge of the Constitutional Court.
- Premature termination of office of members of the National Council of the Judiciary: see above *Grzęda v. Poland*.
- "Independent and impartial tribunal established by law": in respect of the procedure for judicial appointments involving the National Council of the Judiciary, these cases concern the Article 6 § 1 issue of whether a court, in particular the Supreme Court, composed of judges appointed following recommendation by (and with the involvement of) the new National Council of the Judiciary is an "independent and impartial tribunal established by law"; the independence and impartiality of three Chambers of the Supreme Court (the Disciplinary Chamber, the Chamber of Extraordinary Control and Public Affairs and the Civil Chamber) as well as of ordinary courts are being called into question.
- Premature dismissals: premature dismissal of the vice-presidents of a court by the Minister of Justice and the lack of judicial review thereof (Article 6 § 1).
- Various measures allegedly targeting judges criticising the reform of the Polish judiciary: disciplinary proceedings against judges related to their judicial acts and the exercise of freedom of expression (Articles 8, 10 and 13).
- Lack of a fair hearing and of an "independent and impartial tribunal established by law" in connection with decisions of the Disciplinary Chamber of the Supreme Court regarding the waiver of immunity in respect of judges and prosecutors.
- Lowering of the retirement age for ordinary court judges: change in the law with the result that judges have to retire earlier than previously expected and the lack of judicial review of the relevant decisions (Articles 6 § 1, 8, 14 and Article 1 of Protocol No. 1).

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.