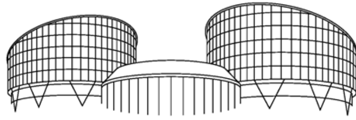

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Premature ending of mandate for a member of the Polish National Council of the Judiciary: violation of the Convention

In today's **Grand Chamber** judgment[1] in the case of Grzęda v. Poland (application no. 43572/18) the European Court of Human Rights held, by 16 votes to 1, that there had been:

a violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights.

Mr Grzęda is a judge. The case concerned his removal from the National Council of the Judiciary (NCJ) before his term had ended and his inability to get judicial review of that decision. His removal had taken place in the context of judicial reforms in Poland.

The Court found in particular that the lack of judicial review had breached Mr Grzęda's right access to a court. It held that the successive judicial reforms, including that of the NCJ that had affected Mr Grzęda, had been aimed at weakening judicial independence. That aim had been achieved by the judiciary's being exposed to interference by the executive and legislature.

This was the first time that the Grand Chamber of the Court had examined these issues.

There are approximately 93 pending applications before the Court concerning the reorganisation of the courts in Poland.

Principal facts

Background

In elections in 2015 the Law and Justice party took control of both the presidency and the *Sejm* (lower house of Parliament). The previous *Sejm* had elected five new judges to the Constitutional Court to fill three seats that were due to become vacant within that *Sejm*'s lifetime, and two that would become vacant soon after. The new President of Poland refused to swear those judges in. The new *Sejm* then revoked their election, instead electing a new set of five judges. They were sworn in immediately.

The Constitutional Court ruled on the matter, holding that each *Sejm* could only elect judges for vacancies that arose within its parliamentary term; ergo, the previous *Sejm* should have elected three judges, and the new *Sejm* two.

This election of judges to seats that had already been validly filled was the beginning of what has been widely described as the rule-of-law crisis in Poland.

In 2017 the Government passed three Acts with the aim of reforming the ordinary courts, the Supreme Court and the National Council of the Judiciary (NCJ). Among other things, these gave extra powers to the Prosecutor General (pursuant to a 2016 Law the post is held *ex officio* by the Minister for Justice) over the internal organisation of the courts and over the appointment and dismissal of the presidents and vice-presidents of the courts; transferred the power to elect judicial members of the NCJ from the judiciary to the *Sejm*; removed from office NCJ judicial members who had been elected under the previous system; altered the disciplinary liability of judges significantly; and created two new Supreme Court chambers, the Disciplinary Chamber and the Chamber of

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Extraordinary Review and Public Affairs, with members appointed by the President of the Republic following recommendations by the new NCJ.

The Court had already examined questions related to the reorganisation of the courts and the rule of law in Poland in several Chamber cases. Of particular note are:

Xero Flor w Polsce sp. z o.o. v. Poland (application no. 4907/18), in which the Court held that there had been a violation of Article 6 § 1 of the Convention (right to a fair trial) as regards the right to a "tribunal established by law" owing to the election of Constitutional Court judges to positions that had already been filled;

Broda and Bojara v. Poland (nos. 26691/18 and 27367/18), in which the Court found that the applicants had been deprived of the right of access to a court, in violation of Article 6 § 1, in relation to the Minister's decisions removing them from their posts of court vice-presidents before the expiry of their respective terms of office;

Reczkowicz v. Poland (no. 43447/19), in which the Court held that the Disciplinary Chamber of the Supreme Court was not a tribunal established by law, finding a violation of Article 6 § 1;

Dolińska-Ficek and Ozimek v. Poland (49868/19 and 57511/19), in which the Court found that the Chamber of Extraordinary Review and Public Affairs of the Supreme Court was also not a tribunal established by law; and

Advance Pharma SP. z o.o v. Poland (1469/20) (not final), in which the Court held that the formation of the Civil Chamber of the Supreme Court, which examined the applicant company's case was also not an independent and impartial tribunal established by law.

This was the first time that the Grand Chamber of the Court had examined these issues.

There are approximately 93 pending applications before the Court concerning the reorganisation of the Polish judiciary.

Mr Grzęda's case

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

He has been a judge since 1986. At the relevant time he was a member of the Gorzów Wielkopolski Regional Administrative Court. In 2016 he was elected to the NCJ for a four-year term.

Under the amending legislation adopted in 2017, his membership of the NCJ was cut short, ending when 15 new judges were elected to the NCJ by the *Sejm* on 6 March 2018. According to him, there was no avenue for contesting the loss of his seat.

Mr Grzęda remains a judge of the Supreme Administrative Court.

Complaints, procedure and composition of the Court

Relying on Articles 6 § 1 (right to a fair trial) and 13 (right to an effective remedy), the applicant complained of having been denied access to a court as there had been no possibility of challenging the termination of his membership of the NCJ, and of a lack of an effective remedy in that regard.

The application was lodged with the European Court of Human Rights on 4 September 2018. On 9 February 2021 the Chamber relinquished jurisdiction in favour of the Grand Chamber. A Grand Chamber hearing was held on 19 May 2021.

The following third parties were granted leave to intervene in the proceedings: the Governments of Denmark and the Netherlands, the Commissioner for Human Rights of the Republic of Poland, the Judges for Judges Foundation (the Netherlands) jointly with Professor L. Pech, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Mr D. García-Sayán, Amnesty International and the International Commission of Jurists jointly, the European Network of Councils

for the Judiciary, the Helsinki Foundation for Human Rights (Warsaw) and the Polish Judges' Association Iustitia.

The Commissioner for Human Rights of the Republic of Poland was granted leave to participate in the hearing before the Grand Chamber.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Robert **Spano** (Iceland), *President*,
Jon Fridrik **Kjølbro** (Denmark),
Síofra **O'Leary** (Ireland),
Yonko **Grozev** (Bulgaria),
Paul **Lemmens** (Belgium),
Krzysztof **Wojtyczek** (Poland),
Valeriu **Griţco** (Moldova),
Egidijus **Kūris** (Lithuania),
Carlo **Ranzoni** (Liechtenstein),
Alena **Poláčková** (Slovakia),
Georgios A. **Serghides** (Cyprus),
Lətif **Hüseynov** (Azerbaijan),
Gilberto **Felici** (San Marino),
Darian **Pavli** (Albania),
Erik **Wennerström** (Sweden),
Raffaele **Sabato** (Italy),
Saadet **Yüksel** (Turkey),

and also Abel **Campos**, *Deputy Registrar.*

Decision of the Court

Article 6

The parties disagreed over whether the applicant could be said to have had a "right" to serve his four-year term on the NCJ. The Court adjudged that a "right" to serve a full term was indeed arguable under domestic law, referring to the Constitution, the constitutional case-law and the relevant supporting legislation.

The Court next ruled that that this "right" attracted the protection of Article 6 as the exclusion of access to a court had not been proven to have been objectively justified (the second condition of the Eskelinen test), and that only oversight by a judicial body was able to guarantee to judges the essential protection from arbitrariness on the part of the legislature or the executive.

The Court emphasised that the fundamental principle of rule of law was inherent in all the Articles of the Convention. Arbitrariness ran counter to the rule of law and could not be tolerated even in respect of procedural rights. It also stressed that it was not engaging in constitutional interpretation, only in interpretation of the Convention as applicable in this situation.

Concerning the merits of the case, the Court stressed the importance of the NCJ's mandate to safeguard judicial independence and the link between the integrity of judicial appointments and the requirement of judicial independence. It considered that similar procedural safeguards to those that apply to the dismissal of judges should also be available in the removal of a judicial member of the NCJ from his or her position.

The Government maintained that the lack of access to a court had not been the result of the contested reforms. They argued that there had never been any possibility for a member of the NCJ

to challenge the termination of their term of office. Yet the Court noted that the Government did not actually seek to justify the absence of judicial review in such circumstances.

The Court emphasised that it was fully aware of the context of the case – the weakening of judicial independence and adherence to rule-of-law standards brought about by Government reforms. In particular, successive judicial reforms had been aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, the remodelling of the NCJ and the setting up of new chambers of the Supreme Court, while extending the Minister of Justice's control over the courts and increasing his role in matters of judicial discipline. It referred to its judgments related to the reorganisation of the Polish judicial system (listed above), as well as the cases decided by the Court of Justice of the European Union and the relevant rulings of the Supreme Court and Supreme Administrative Court of Poland. It held that as a result of these successive reforms, the judiciary had been exposed to interference by the executive and legislature and its independence had been substantially weakened. The applicant's case was one example of this general trend.

Overall, the Court found that the lack of judicial review in the case impaired the applicant's right of access to a court, in violation of the Convention.

Other articles

As the complaint under Article 13 was essentially the same as that under Article 6 § 1, the Court held that it was not necessary to examine it.

Just satisfaction (Article 41)

The Court considered that the finding of a violation was sufficient just satisfaction for any non-pecuniary damage sustained by the applicant. It awarded 30,000 euros in respect of costs and expenses.

Separate opinions

Judge Lemmens expressed a concurring opinion. Judges Serghides and Felici expressed a joint partly dissenting opinion. Judges Wojtyczek expressed a dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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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.