



COMMISSIONER FOR HUMAN RIGHTS

Warsaw,

Adam Bodnar

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**The President of the First Section
European Court of Human Rights**

F-67075 Strasbourg Cedex

Tel: +33 (0)3 88 41 20 18

Fax : +33 (0)3 88 41 27 30

**Written comments
of the Commissioner for Human Rights
in the case *Jan Grzęda against Poland*
(Application no. 43572/18)**

1. Acting pursuant to Rule 44 (3) (a), (5) and (6) Rules of the European Court of Human Rights (ECtHR) and on the basis of the leave granted by the President of the First Section, the Commissioner for Human Rights (CHR) wishes to submit the written observations related to the present case.

I. General observations

2. The purpose of this intervention is to address the key legal issues arising from the *Jan Grzęda* case which is now pending before the ECtHR. To what extent States are obliged under the European Convention on Human Rights to respect the principles of independence and the resultant principle of irremovability with regard to judges-members of the body such as the National Council of the Judiciary (NCJ). The answer to this question will be important not only for the individual applicant, and also for other persons in a situation such as his, but due to nature of responsibility of the NCJ's judges-members and the constitutional role of the Council in maintaining judicial independence, the Court's ruling may have significant systemic consequences in Poland.

3. The case brought by the Applicant concerns the existence of the European protection of a right guaranteed by national law to serve the full term of office as an elected judge-member of the National Council of the Judiciary. The case is related not only to the individual Complainant, but to all 15 judges-members of the NCJ, whom the legislator in 2018 interrupted their mandate at the NCJ in the course of their four-year term of office guaranteed by the Constitution. Furthermore, it is also of

extremely high systemic importance for the functioning of the system of judiciary in Poland, the observance of the rule of law, the individual's right to effective judicial protection and the right to a fair trial.

4. The consequences of the legislative changes adopted by the Parliament are very serious. By premature termination of the term of office of NCJ judges-members and subsequent election of new members, the legislative and executive branches have granted themselves decisive influence over the appointment of a body designed to protect the independence of the judiciary from these very political authorities. This renders the NCJ's mission in fact unfeasible.

5. The Commissioner for Human Rights feels obliged to state that new Council has abandoned its constitutional role, does not protect the independence of courts, does not prevent politicians from exerting influence on the content of judicial decisions, does not protect judges from repressions undertaken against them, e.g. the initiation of disciplinary proceedings in connection with judges' judicial activity. These issues have been addressed by the Court of Justice of the European Union (CJEU) in a recent preliminary ruling of 19 November 2019 in the joined cases C-585/18, C-624/18 and C-625/18 *A.K. and Others*,¹ and eventually led the Supreme Court to rule on 5 December 2019 that the current National Council of the Judiciary is neither impartial nor independent of the legislative and executive powers.²

6. Having regard to the consequences of weakening the guarantee of judicial independence to the protection of Convention's rights and freedom, while believing that the respect for human rights should be secured in a practical and effective fashion, the Commissioner for Human Rights would like to invite the European Court of Human Rights to consider **granting protection under the Convention to judges-members of the NCJ for the entire term of office to which they were entitled at the time of their election.**

7. The Commissioner is aware that the usual arguments invoking the principle of irremovability of judges, if the principle is taken very strictly, may have been considered so far as not directly applicable to the participation of judges in a body such as a judicial council. The CHR would like therefore to submit a suggestion to adopt a similar approach and to grant judges-members of the National Council of the Judiciary **protection analogous to the protection offered to a judge against removal** (see Section IV). There are arguments in favour of this approach, which the CHR would like to present below, pointing out that in addressing positions like these of judges-members of the NCJ, the Court should pay attention to the general context and the purpose of the body meant to guarantee judicial independence at national level.

8. As an alternative, the Commissioner for Human Rights wishes to present the view that the Court should have recourse to the principles on the general **protection of civil servants' right of access to court recognized in the *Vilho Eskelinen and Others***³ ruling (as affirmed in the *Baka* case⁴) and afford this protection to judges-members of the NCJ. The CHR believes that the presumption of

¹ Judgment of CJEU of 19 November 2019, C-585/18, C-624/18 and C-625/18 *A.K. and others v. National Council of the Judiciary and the Supreme Court*, EU:C:2019:982 – case often referred to as the case on the independence of Disciplinary Chamber of the Supreme Court.

² Judgment of the Supreme Court of 5 December 2019, case III PO 7/18.

³ Judgment of ECtHR of 19 April 2007, Appl. no. 63235/00, *Vilho Eskelinen and Others v. Finland*.

⁴ Judgment of ECtHR of 23 June 2016, Appl. no. 20261/12, *Baka v. Hungary*; see also judgment of ECtHR of 25 September 2018, Appl. no. 76639/11, *Denisov v. Ukraine*.

protection which, in view of Poland's failure to meet the *Eskelinen test*, supports extending protection to all individuals in a situation such as that of the Applicant (see Section V).

II. Systemic context of the present case

9. In its major document, the *Magna Carta of Judges*, the Consultative Council of European Judges (CCJE), an advisory body of the Council of Europe, provided an essential characteristics of a judicial council:

To ensure independence of judges, each state shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organization, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers. The Council for the Judiciary shall be accountable for its activities and decisions.⁵

10. Against the above background, it is in the objective interest of the State to preserve the independence of the courts and judges, which the NCJ is to uphold. Therefore, the NCJ itself must also enjoy the attribute of independence from the legislative and executive authorities. The established case law of both the ECtHR and the CJEU indicate that judicial independence is at the heart of the right to effective judicial protection and the right to fair trial as well as forms an integral part of the rule of law.

11. In the light of the above criteria the National Council of the Judiciary appears to be a flawed body. The NCJ was meant to be the institutional guarantor of the principle of separation of powers in relation to the judiciary. It is established directly by the 1997 Constitution of the Republic of Poland and entrusted with safeguarding the independence of courts, objectivity and impartiality of judges (see Art. 186 (1) Constitution). While all the powers (legislative, executive and judicial) are represented in the Council, the political power should not have a dominant position in it. The NCJ must hold an autonomous position among public authorities and remain independent from both legislative and executive bodies.

12. The Commissioner for Human Rights wishes to point out that although the present case examined by the European Court of Human Rights was brought on the basis of an individual complaint by a specific person alleging that he has been a victim of a violation of the Convention rights, it is an exemplification of a more general concern. First, the primary issue raised in the complaint concerns not only the individual applicant but all the judges-members of the NCJ whose mandate was prematurely terminated by the legislature.

13. Secondly, the case illustrates a very serious systemic problem in Poland. By *ex-lege* early termination of the term of office of NCJ judges-members and changing the procedure for electing their replacements, the political power took over the full control over the staffing of the NCJ.

14. The issues related to the present case concerning the permissibility of premature termination of the term of office of the NCJ judges-members, and therefore the lawfulness of the subsequent staffing of the NCJ, have a direct impact on the effective judicial protection of individual rights. If

⁵ *Magna Carta of Judges (fundamental principles) of 17–19 November 2010*, CM(2010)169-add2, para. 13

the NCJ is not a body meeting the European standard of independence (as already was stated by the Supreme Court in its judgment of 5 December 2019, see *infra* para.25), if the termination of the mandate of the Council's judges-member was unconstitutional and contrary to European standards, any action taken by the new Council could be called into question. This also applies to judicial nominations made by the President of the Republic on the basis of a proposal from the NCJ. As a consequence, judicial decisions made by such judges may be challenged as well.

III. Legislative changes resulting in the early termination of the term of office of the NCJ judges-members

15. To have a legitimate method of staffing the Council was seen as particularly important to enable the body to meet its crucial task. Eventually, most of the constitutional provisions on the NCJ are dedicated to this issue. The Council's membership is formed in three different ways: (a) there are *ex officio* members: the First President of the Supreme Court, the President of the Supreme Administrative Court, and the Minister of Justice; (b) one member is appointed: the representative of the President of the Republic; and (c) most members are elected: 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts; in addition to six Members of the Parliament, i.d. four elected by the Sejm and two by the Senate (see Art. 187 (1) Constitution).

16. All three powers (legislative, executive, and judicial) are thus represented in NCJ. The composition of the Council reflects the constitutional principle of the separation and balance of powers, yet with a clear majority share of the judiciary (17 of 25 members are judges), and minority participation of the legislature and the executive. Until 2018, the 15 judges-members of the NCJ were elected by the judges themselves. This mechanism of staffing the Council was meant to guarantee the systemic and political independence of the Council from the other powers and was considered to be a basic premise for NCJ's capacity to meet its crucial role as the constitutional guardian of judicial independence.

17. The election of judges by their peers was introduced from the very creation of this body in 1989,⁶ was maintained by the 1997 Constitution and the subsequent Acts on the National Council of the Judiciary of 2001⁷ and 2011.⁸ It was also supported by the case-law of the Constitutional Tribunal (see judgment of 18 July 2007, case K 25/07, para. III 4)⁹ and accepted in doctrine as a legitimate

⁶ Law of 20 December 1989 on the National Council of the Judiciary, Dz. U. 1989, No 73, item 435.

⁷ Law of 12 May 2001 on the National Council of the Judiciary, Dz.U. 2001, No 100, item 1082.

⁸ Law of 27 July 2011 on the National Council of the Judiciary, Dz.U. 2011, No 126, item 714.

⁹ A different view was expressed in the judgment of 20 June 2017 (K 5/17). Nonetheless, it should be borne in mind that the latter ruling was issued by the Constitutional Tribunal after the changes of 2015-2017 whose constitutionality is being questioned; the adjudicating panel was composed with the participation of unlawfully appointed persons (duplicate-judges); and the case was brought by the Prosecutor General (at the same time the Minister of Justice) during an acute political and legal dispute concerning the NCJ.

method of staffing a judicial council.¹⁰ The requirement that at least a half of members of a judicial council is composed of judges who are elected by their peers became a European standard.¹¹

18. In December 2017, the Parliament adopted a number of important legislative changes related to the National Council of the Judiciary.¹² The most controversial were the new rules on the composition of the NCJ which forced the premature termination of the four-year term of office of the hitherto judges-members and politicized the election of new members of the Council.

19. The explanatory memorandum to the draft legislative amendment did not demonstrate the proportionality between the need for an early termination of the term of office of the Council judges and the objectives pursued by it. In fact, no explanation was given for the measure adopted. The measure should therefore be assessed as arbitrary.

20. Indeed, neither the executive power who proposed the new legislation nor the legislative one which adopted it, indicated any objective interest of the State which would require the interruption of the mandate of judges-members and limitation, or even a complete denial of NCJ's independence, the body which – as was indicated above – is to guard judicial independence. The CHR claims that the opposing objective was not indicated as there was no such, the political power was unable to objectively justify early termination of judges' tenure. The Commissioner is referring here to the direct, close link between the activities of the NCJ and the independence of the judge, which is indeed absolute in nature, does not allow for exceptions, and the interference with it is not justifiable on any grounds.

21. The position of the Commissioner the Human Rights Commissioner on subsequent proposed legislative changes was repeatedly presented in numerous submissions to executive and legislative bodies, e.g. a letter to the Minister of Justice of 1 February 2017, letter to the Speaker of the Sejm of 12 April 2017, opinion presented to the Speaker of the Senate of 11 December 2017, opinions presented to the President of the Republic of 19 July 2017, 31 October 2017, 30 November 2017 and 19 December 2017. The detailed analyses of the proposed regulations as against the constitutional standards have been disregarded in the course of the legislative process.

22. Eventually, the legislature has entrusted itself with the election of new judges-members to replace the previous ones, going beyond the powers expressly attributed to it in the Constitution. Currently, the Parliament elects a total of 21 out of 25 members of the NCJ. Since an absolute majority of the votes in Parliament are held by the governing party, a single political party may, at its discretion, fill judicial posts at the NCJ and, through the NCJ, may further influence judges. The new appointment mechanism introduced the domination of political power over the judiciary, is

¹⁰ See *i.a.* K. Grajewski, *Krajowa Rada Sądownictwa w świetle przepisów ustawy z 8 grudnia 2017 r. – zagadnienia podstawowe*, Krajowa Rada Sądownictwa 1/2018, p. 19–20, and the literature cited there; P. Filipek, *The New National Council of the Judiciary and Its Impact on the Supreme Court in the Light of the Principle of Judicial Independence*, *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, Vol. XVI, 2018, p. 179.

¹¹ See the position of the Committee of Ministers of the Council of Europe: “Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.”, Recommendation of 17 November 2010 *on judges: independence, efficiency and responsibilities*, CM/Rec(2010)12, para. 27; see also Magna Carta of Judges (fundamental principles) of the Consultative Council of European Judges of 17–19 November 2010, CM(2010)169-add2, para. 13; European Network of Councils for the Judiciary, *Guide to the European Network of Councils for the Judiciary*, October 2018, p. 13; International Commission of Jurists, *The Tunis Declaration on Reinforcing the Rule of Law and Human Rights*, March 2019, para. 16.

¹² Act of 8 December 2017 amending the Law on the National Council of the Judiciary and certain other laws (Dz. U. 2018, item 3). The Law entered into force on 17 January 2018.

incompatible with the separation of powers, threatens judicial independence and the effective protection of individual rights. Currently, the staffing of the National Judicial Council, the body guarding judicial independence, is decisively dependent on persons who themselves lack the attribute of independence, objectivity and impartiality, are guided by political considerations and party guidelines.

23. The politicized method of filling judicial posts at the NCJ introduced in early 2018 was challenged in the recent judgments of the Court of Justice of the European Union. In the infringement case (based on Art. 258 TFEU), C-619/18 *Commission against Poland*, the Court ruled that doubt may be cast on the independence of judges-members of the NCJ having regard that they no longer be elected by their peers as previously but by the lower chamber of the Polish Parliament.¹³

24. Under the preliminary ruling procedure (Art. 267 TFEU), in the judgment of 19 November 2019, C-585/18, C-624/18 and C-625/18 *A.K. and Others*,¹⁴ the CJEU made an important step and indicated the following factors relevant to assess the degree of independence of the NCJ from legislative and executive powers.

143. (...) among the factors pointed to by the referring court which it shall be incumbent on that court, as necessary, to establish, the following circumstances may be relevant for the purposes of such an overall assessment: first, the KRS, as newly composed, was formed by reducing the ongoing four-year term in office of the members of that body at that time; second, whereas the 15 members of the KRS elected among members of the judiciary were previously elected by their peers, those judges are now elected by a branch of the legislature among candidates capable of being proposed inter alia by groups of 2 000 citizens or 25 judges, such a reform leading to appointments bringing the number of members of the KRS directly originating from or elected by the political authorities to 23 of the 25 members of that body; third, the potential for irregularities which could adversely affect the process for the appointment of certain members of the newly formed KRS.

144. For the purposes of that overall assessment, the referring court is also justified in taking into account the way in which that body exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary and its various powers, in particular if it does so in a way which is capable of calling into question its independence in relation to the legislature and the executive.

25. On the basis of the above CJEU guidelines, the Polish Supreme Court made such an assessment for the first time in the judgment of 5 December 2019. The three-judge panel of the Supreme Court (Chamber of Labour and Social Security) held that the National Council of the Judiciary is not an impartial and independent body (case no. III PO 7/18).

IV. Analogous protection of NCJ's judges-members against removal

26. The protection of the status of judges-members of the National Council of the Judiciary should be derived from their status as judges and the crucial function the Council carries out to protect judicial independence. A council made up largely of people who themselves do not have the attributes

¹³ Judgment of CJEU of 24 June 2019, C-619/18, *European Commission v. Republic of Poland*, EU:C:2019:531, para. 100.

¹⁴ See *supra* note 1.

whose maintenance they are intended to ensure, could effectively counter possible threats to judicial independence.

27. The concept of the analogous (equivalent) protection of NCJ judges-members against removal is based on the **cumulative recognition of the following elements**:

- (1) The NCJ has been constitutionally entrusted with the role of guaranteeing the independence of courts and judges. The status of that body and the statutes of its members must be such as to ensure that it is able to carry out this mission;
- (2) Detailed competences of the NCJ directly influence the status of judges; the Council participates in the process of nomination and admission to the profession, promotion of judges and their transfer to a higher court, their dismissal and early retirement. It is essential to ensure that there is no gap in the protection of judges' independence at this juncture of State's structure;
- (3) The independence of judges is absolute; it must not be interfered with by the State under any circumstances;
- (4) The independence of judges is indivisible; persons who hold the office of a judge should be protected in any situation of public activity to which they are assigned as judges by the law in force;
- (5) In line with the European minimum requirement the majority of the members of a judicial council should be judges. This is to ensure that persons with the attribute of independence have a decisive say in the council. Consequently, their independence should be equally guaranteed in the scope of their participation and activity at the council.

28. In the Polish doctrine of constitutional law it is emphasized that the constitutional principle of judicial independence goes beyond the narrowly understood notion of adjudication, it includes the process of interpreting the law, managing the process of adjudication (e.g. setting the dates of hearings), but "it also applies to the activity of a judge carried out as a person of public trust, appointed as a member of non-judicial bodies".¹⁵ It is legitimate to assume that a judge also exercises his office when he performs other duties and competences entrusted to him, i.e. not as a private individual but as a public official¹⁶.

29. The European requirement for a judicial council to be staffed in whole or at least for the most part by judges is based on the assumption that they bring their integrity, their external and internal independence into the council. If the activity of a judicial council and the actual ability to carry out its mission rely on the personal qualities of its judges-members and especially their status as judges, they should be afforded adequate guarantees also when they operate in a body such as a judicial council.

30. The concept of indivisibility of the independence of the judge was at the heart of a landmark judgment of the Court of Justice of the European Union in the case of *Associação Sindical dos Juizes*

¹⁵ B. Naleziński, *Artykuł 178 Konstytucji*, [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, p. 535.

¹⁶ P. Wiliński, P. Karlik, *Artykuł 178 Konstytucji* [in:] M. Safjan, L. Bosek (eds.), *Konstytucja RP. Komentarz*, vol. II, Warszawa 2016, para. 47.

Portugueses, in which the CJEU held that the EU protection of judicial independence extends to non-EU areas, it is sufficient that the judge may potentially rule on cases with a Union element¹⁷.

31. The Commissioner for Human Rights considers that the development of the concept of the indivisibility of judges' independence substantiates the recognition that the protection of their independence should cover all situations in which a person acts as a judge, whether he is adjudicating or performing other public duties assigned to him by law. Extending the guarantee of independence to the further sphere of public activity of the individual person who acts in his capacity as a judge, prevents the threat that, at the same time – figuratively speaking: on the same day, the judge acts in a split position: a position of independence and the opposite position¹⁸.

V. Judicial protection of the “civil” right of judges-members of the National Council of the Judiciary to a full term of office (*Eskelinen* test)

32. As indicated above, the alternative to extending the guarantee of independence to the judges-members of the NCJ is to award them European protection in the form of the right to a court recognized by the ECtHR in the *Eskelinen* case-law. A preliminary issue in determining the rights of judges-members in this context is whether there is a right of an individual under domestic law to maintain his mandate until the end of the term of office.

33. Judges-members of the NCJ have the constitutional right to a four-year term of office (Art. 187 (3) Constitution). The reasons for the early termination of the mandate of a judge-member are specified in the Law on the National Council of the Judiciary.¹⁹ They include usual causes, e.g.: death, resignation, certain cases of judicial promotion, expiration or termination of that person's judicial service, retirement.²⁰ This is an enumerative list, the mandate of a judge-member of NCJ cannot be interrupted for any other reason.

34. Therefore, under national law, a judge-member of the NCJ, following his election to this position by the Parliament, is entitled to a full, four-year term of office, unless the conditions provided for in the law in force at the time of his election, are met and justify the termination of his mandate. The new legislation may not retroactively annul the right to a full, uninterrupted tenure resulting from the provisions in force at the time of the election.²¹

35. It is worth pointing out that the issue of the legitimacy of interrupting the term of office of the body that is to have the attribute of independence was dealt with by the CJEU. In the judgment of 8 April 2014, C-288/12 *Commission v. Hungary*, which *mutatis mutandis* may be useful for the purposes of the present case, it declared it to be in violation with the EU law.

54. If it were permissible for every Member State to compel a supervisory authority to vacate office before serving its full term, in contravention of the rules and safeguards established in that regard by the legislation applicable, the threat of such premature termination to which that

¹⁷ Judgment of CJEU of 27 February 2018, C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, EU:C:2018:117, para. 40.

¹⁸ P. Wiliński, P. Karlik, *op. cit.*, para. 49.

¹⁹ See *supra* note 8.

²⁰ Art. 14 (1) Law on NCJ.

²¹ See *Baka v. Hungary*, paras. 100, 107, 110. See also *mutatis mutandis* the clear position taken by the CJEU: C-619/18, *Commission v. Poland*, *supra* note 13, para. 76; judgment of CJEU of 5 November 2019, C-192/18, *European Commission v. Republic of Poland*, EU:C:2019:924, para. 113.

authority would be exposed throughout its term of office could lead it to enter into a form of prior compliance with the political authority, which is incompatible with the requirement of independence (see, to that effect, *Commission v Austria* EU:C:2012:631, paragraph 51). That is true even where the premature termination of the term served comes about as a result of the restructuring or changing of the institutional model, which must be organised in such a way as to meet the requirement of independence laid down in the applicable legislation.²²

36. The question, whether the right to serve the full term of office as a judge-member of the NCJ falls indeed within the scope of “civil rights” in the meaning of Art. 6 (1) ECHR requires an answer on the basis of the *Eskelinen* test.

37. The Commissioner for Human Rights wishes to point out that the termination of the NCJ's mandate of judges-members resulted from a change introduced by a legislative act which shortened the constitutional four-year tenure. This was effective *ex lege* and did not require the adoption of any individual act that would determine the expiry of the mandate of the judge-member. In consequence there was no decision, administrative or judicial, that could be appealed against. Therefore, the law did not explicitly prohibit challenging the early termination of the mandate, but the mechanism adopted by the Parliament in practice made any judicial redress unavailable.

VI. The reversal of the effects of the interruption of the term of office could only be achieved through another legislative amendment, over which judges-members of the NCJ had no say, or as a result of a ruling of the Constitutional Tribunal declaring the legislative provisions leading to the interruption of the term of office to be unconstitutional. Individual (*in concreto*) constitutional review could not be initiated by judges-members of the NCJ, as the prerequisite for lodging a constitutional complaint is the exhaustion of court proceedings. Since judges could not initiate any court proceedings in Poland in cases of terminating their mandate, they were equally not entitled to bring a case before the Constitutional Tribunal. In addition, the CHR wishes to point out that the current body acting as the Constitutional Tribunal, in the opinion of the Commissioner, operating in violation of the Constitution of the Republic of Poland, has been wrongfully staffed. For this reason, the Commissioner, for whom the Constitutional Tribunal was formerly a key partner in ensuring that human rights are respected in Poland, argues that it is no longer an effective institutional protector of fundamental rights.

VII. Conclusions

38. The Commissioner for Human Rights submits that, having regard to the constitutional role of the National Council of Judiciary, the need to create for the NCJ judges-members an environment that enables them to carry out the assigned mission, and their effects for the degree of human rights protection at national level, the European Court of Human Rights should explicitly admit for judges-members the guarantees of independence, including the protection against removal, analogous to those afforded to the judges when they perform judicial functions.

39. Notwithstanding the above, the CHR also considers that judges-members of the NCJ are entitled to the protection of their right of access to court granted in accordance with the *Eskelinen* standard.

²² Judgment CJEU of 8 April 2014, C-288/12, *European Commission v. Republic of Hungary*, EU:C:2014:237, para. 54.

40. It is the firm conviction of the Commissioner that the present case offers the European Court of Human Rights an opportunity to enhance the standard of justice free from political impact.