

**Rada Fundacji:**  
Danuta Przywara - *Przewodnicząca*  
Henryka Bochniarz  
Janusz Grzelak  
Mirosław Wyrzykowski  
Ireneusz Cezary Kamiński  
Hanna Machińska  
Witolda Ewa Osiatyńska  
Andrzej Rzepliński  
Wojciech Sadurski

**Zarząd Fundacji:**  
Prezes: Maciej Nowicki  
Wiceprezes: Piotr Kładoczny  
Sekretarz: Małgorzata Szuleka  
Skarbnik: Lenur Kerymov  
Członkini: Aleksandra Iwanowska

Warsaw, 20 March 2023

465/2023/PSP/EŚ

**The Committee of Ministers  
Council of Europe**  
67075 Strasbourg Cedex  
FRANCE

In this letter<sup>1</sup>, the Helsinki Foundation for Human Rights ('HFHR', 'The Foundation'), with its seat in Warsaw (Poland) would like to draw the attention of the addressees to the problem of lack of cooperation of the Polish authorities with the European Court of Human Rights ('ECtHR', 'the Court')<sup>2</sup>. In particular we would like to draw your attention to the jurisprudence of the Polish top-rank court aiming at by-passing the ECtHR binding decisions as well as unprecedented lack of political will to implement the ECtHR judgements.

#### **ECtHR jurisprudence concerning the rule of law crisis in Poland**

In recent years, the European Court of Human Rights has issued a number of rulings on the rule of law crisis in Poland. The first of these was the judgment in the *Xero Flor w Polsce sp. z o.o. v Poland* (7 May 2021, app. no. 4907/18). In the judgment the Court found violation of Article 6 of the Convention on the account that the constitutional complaint lodged by the applicant company was dismissed by the Constitutional Tribunal in a panel which involved one unlawfully elected person. The ECtHR held that flagrant

---

<sup>1</sup> This letter is one of three copies of the same letter, addressed to the Council of Europe bodies: the Committee of Ministers, the Secretary-General and the Parliamentary Assembly.

<sup>2</sup> The Foundation is a non-governmental organization established in 1989 in order to promote human rights and the rule of law as well as to contribute to the development of open society in Poland. The Foundation has been involved in various cases concerning the protection of the rule of law before ECtHR. We either submitted *amicus curiae* opinions or represented the applicant before the Court. We constantly observe the development of the rule of law crisis in Poland. Therefore, we are of the opinion that our perspective can be of benefit to the Council of Europe bodies.

breaches in the procedure of election of this person contributed to a violation of the right to a tribunal established by law. The Court has also found violations of the same right in several judgments concerning the adjudication of Supreme Court judges appointed at the request of the National Council of the Judiciary (hereinafter: "NCJ") after the 2017-2018 reform. This reform took away the judges' right to elect the fifteen judicial members of the NCJ and granted this competence to the Sejm. The reform was seen as unconstitutional as it damaged the independence of the NCJ. The unconstitutional model of the NCJ negatively affected the status of judges appointed upon its request. The ECtHR shared these allegations and in four cases<sup>3</sup> and found that there were gross violations of domestic law in the procedure for the appointment of the new judges of the Supreme Court. A violation of Article 6 of the ECHR was also found by the ECtHR in the cases of *Grzęda v. Poland*<sup>4</sup> and *Żurek v. Poland*<sup>5</sup>, which concerned the impermissible termination of the term of office of members of the NCJ under the said reform. Another judgment in which the Court addressed the crisis of the rule of law in Poland was *Broda and Bojara v. Poland*<sup>6</sup>. The ruling in question concerned the dismissal of vice-presidents of a court by the Minister of Justice, on the basis of an arbitrary, unjustified and unappealable decision. Similarly as in the abovementioned judgments, the ECtHR found a violation of Article 6 ECHR. The most recent judgment in which the ECtHR found a violation of the Convention in relation to the rule of law crisis in Poland is the judgment *Juszczyszyn v. Poland* in which the Court ruled that the suspension of an independent judge for taking actions to protect an individual's right to an independent and impartial court established by law violated Articles 6, 8 and 18 of the ECHR.

All of the aforementioned rulings are now final, but unfortunately they still remain unimplemented<sup>7</sup>. Three persons defectively elected as judges of the Constitutional Court continue to participate in the adjudication of cases by the Constitutional Court. Between 2017 and 2022, unlawfully elected persons were involved in the issuance of 85

---

<sup>3</sup> ECtHR, *Reczkowicz v. Poland*, 22 July 2021, app. no. 43447/19; ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, 8 November 2021, app. nos. 49868/19 and 57511/19; ECtHR, *Advance Pharma sp. z o.o. v. Poland*, 3 February 2022, app. no. 1469/20; ECtHR, *Juszczyszyn przeciwko Polsce*, 6 October 2022, app. no. 35599/20.

<sup>4</sup> ECtHR (Grand Chamber), *Grzęda v. Poland*, 15 March 2022, app. no. 43572/18.

<sup>5</sup> ECtHR, *Żurek v. Poland*, 16 June 2022, app. no. 39650/18.

<sup>6</sup> ECtHR, *Broda and Bojara v. Poland*, 29 June 2021, app. nos. 26691/18 and 27367/18.

<sup>7</sup> See: Committee of Ministers, decision of 8 December 2022, CM/Del/Dec(2022)1451/H46-24, [https://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2022\)1451/H46-24E](https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2022)1451/H46-24E); Committee of Ministers, decision of 8 December 2022, CM/Del/Dec(2022)1451/H46-25, [https://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2022\)1451/H46-25E](https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2022)1451/H46-25E).

judgements, and also participated in the issuance of 172 decisions to discontinue proceedings<sup>8</sup>. Likewise, the independence of the NCJ has not been restored - in May 2022 the Sejm elected a group of 15 judicial members for another term. There has also been no general verification of the status of defectively appointed judges who continue to participate in the consideration of cases. Although an amendment to the Act on the Supreme Court was passed in June 2022, which, among others, abolished the Disciplinary Chamber of that court and introduced the possibility of conducting a test of a judge's independence and impartiality, these solutions do not eliminate the basic source of the violation of the Convention, which is the lack of independence of the NCJ<sup>9</sup>. As for the case of *Broda and Bojara v. Poland*, although the provisions on the basis of which the applicants were dismissed are no longer in force, the current law also gives the Minister of Justice the power to dismiss the president and vice-president of a court without any judicial review<sup>10</sup>. Furthermore, in some cases, the Polish authorities have failed to implement the Court's judgments not only at the general level, but even at the individual level, as the Polish Government declined to pay the compensation granted by ECtHR to Mr Ozimek and Ms Dolińska-Ficek<sup>11</sup>.

### **Polish authorities' reaction to the ECtHR decisions**

Not only do the Polish authorities fail to implement ECHR judgments, but they even openly challenge them. On 27 July 2021, the Prosecutor General decided to submit a motion to the Constitutional Tribunal demanding i.a. to confirm incompatibility of Article 6 ECHR with the Constitution of the Republic of Poland so far as: (1) Article 6 ECHR covers the Constitutional Tribunal as the 'court' within the meaning Article 6 ECHR; (2) Article 6 ECHR empowers ECtHR to assess the legality of election of judges to the Constitutional Tribunal. On 24 November 2021, the Constitutional Tribunal issued a judgment (No. K 6/21) on incompatibility of Article 6 ECHR with the Constitution on these two grounds.

---

<sup>8</sup> See: Helsinki Foundation for Human Rights, Communication concerning the execution of the judgment in the case *Xero Flor w Polsce sp. z o.o. v. Poland*, 30 March 2022, [https://hudoc.exec.coe.int/eng?i=DH-DD\(2022\)411E](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)411E).

<sup>9</sup> See: Helsinki Foundation for Human Rights, Communication concerning the execution of the judgment in the case *Reczkowicz v. Poland*, 14 October 2022, [https://hudoc.exec.coe.int/eng?i=DH-DD\(2022\)1135E](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)1135E).

<sup>10</sup> See: Helsinki Foundation for Human Rights, Communication concerning the execution of the judgment in the case *Broda and Bojara v. Poland*, 17 October 2022, [https://hudoc.exec.coe.int/eng?i=DH-DD\(2022\)1139E](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)1139E).

<sup>11</sup> See: Communication from the applicants regarding the execution of the ECtHR judgment in the cases *Dolińska Ficek and Ozimek v. Poland*, 6 September 2022, [https://hudoc.exec.coe.int/eng?i=DH-DD\(2022\)943E](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)943E).

Few months later, on 10 March 2022, No. K 7/21, the Constitutional Tribunal (with unlawfully elected person serving as judge-rapporteur) ruled that Article 6 ECHR is incompatible with the Constitution of the Republic of Poland so far as Article 6 ECHR enables ECtHR or domestic courts: (1) to omit provisions of the Constitution, ordinary laws and judgments of the Constitutional Tribunal; (2) to independently create norms regarding nomination of domestic judges; (3) to check whether laws on judicial system and competence, as well as functioning and election of members to NCJ.<sup>12</sup>

The latest example of refusal to cooperate with ECtHR by the Polish authorities is provided by development of cases *Leszczyńska-Furtak v Poland* App no 39471/22, *Gregajtys v Poland* App no 39477/22 and *Piekarska-Drązek v Poland* App no 44068/22, communicated on 6 December 2022 and pending before the European Court of Human Rights. The applicants are three judges of Warsaw Court of Appeal, who adjudicated criminal cases for over 20 years. All three of them declined to sit in benches of Warsaw Court of Appeal with judges appointed on the motion of NCJ composed in 2018. Following this decline, they were transferred the Labour and Social Security Division of the said court. On 6 December 2022 ECtHR decided to indicate an interim measure and order that Poland 'should suspend the effects of the decision of transfer from the Criminal Division to the Labour and Social Security Division ... and ensure that no decision to transfer the applicants to another division of the Warsaw Court of Appeal against their will is taken until the final determination of the applicants' complaints by the Court'<sup>13</sup>. In the written statement dated 13 December 2022, Mr Piotr Schab, the president of the Warsaw Court of Appeal,<sup>14</sup> declared that 'interim measure of ECtHR is not binding. It was issued on the basis of the Rules of the Court, which do not form part of the European Convention on Human Rights. They were not ratified and there are internal document of ECtHR. It means that [interim measure] issued on the basis of Article 39 of the Rules of the Court is not covered by the effect mentioned in Article 46 of the Convention, which prescribes the

---

<sup>12</sup> Negative consequences of these judgments for Poland's compliance with the ECHR were the subject of the report of the Secretary General of the Council of Europe published on 9 November 2022 (<https://rm.coe.int/report-by-the-secretary-general-under-article-52-of-the-european-convention/1680a8eb59>).

<sup>13</sup> ECtHR, Press Release of 7 December 2022, No. 379 (2022).

<sup>14</sup> It is important to emphasise that Mr Schab is also Disciplinary Officer for Ordinary Court Judges, nominated by the Minister of Justice. His actions in disciplinary proceedings have revealed his allegiance to the executive power. In short passage of time, he was also nominated for the office of Warsaw Court of Appeal judge (the proceedings before NCJ in this respect were flawed), and, subsequently, its president. All these circumstances led the Supreme Court to the conclusion that Mr Schab does not guarantee the impartiality and independence (see judgment of the Supreme Court of 19 October 2022, No. II KS 32/21).

obligation to execute ECtHR judgments'<sup>15</sup>. Mr Schab relied also on the judgment of the Constitutional Tribunal of 10 March 2022, no. K 7/21<sup>16</sup> and he emphasised that 'the content of above-cited judgment, which according to the Constitution binds the President of Warsaw Court of Appeal, bars the possibility of execution of said interim measure, enforcement of which would result in a breach of Polish law'. Mr Piotr Schab noted also that he is not a party to the proceedings before ECtHR. Following this statement, the Polish Government informed ECtHR that interim measure will not be respected<sup>17</sup>.

The above-mentioned facts clearly reveal the pattern of action of Polish authorities, which avail themselves of the Constitutional Tribunal standings in order to evade the obligations stemming from the European Convention on Human Rights in respect of cooperation with bodies of the Council of Europe, in particular the European Court of Human Rights. Such actions are not only unjustified from the legal perspective but they also serve unacceptable ulterior purpose of weakening judicial independence in Poland<sup>18</sup>.

### Conclusions

The Foundation strongly deplores the approach of domestic authorities towards non-implementation of the Court's rulings. We would like to underline that the failure of the Polish authorities to implement the judgments of the Court leads to a significant weakening of the effectiveness of the domestic system of protection of the freedoms and rights guaranteed by the Convention. Individuals against whom the ECtHR has found a violation of the Convention are not sure whether the judgment issued in their case will be enforced or whether the authorities will consider it incompatible with the Polish Constitution. Moreover, the crisis in Poland may also negatively affect the effectiveness of the Court itself. The ECtHR recently reported that there are more than 300 pending proceedings before it regarding the crisis in the Polish judiciary. If the ECHR rulings are not enforced at the general level, there will be an increasing number of such cases, as there

---

<sup>15</sup> <https://waw.sa.gov.pl/download/oswiadczenie-prezesa-sa-w-warszawie-z-13.12.2022-r.-1671005515.pdf>.

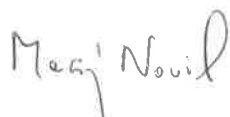
<sup>16</sup> It seems that the Constitutional Tribunal in its judgment No. K 7/21, at 196 suggested that interim measures are *ultra vires* actions, by saying that: 'the Constitutional Tribunal emphasises that this action is one of many activities, by use of which ECtHR attempts to extend its authority over states, acting *praeter* or even *contra* the Convention and creating new competences by means of jurisprudence or provisions of the Rules of the Court (see e.g. [self-]attribution to ECtHR a right to indicate interim measures under Rule 39...'.  
<sup>17</sup> ECHR, Press Release of 16 February 2023, No. 053 (2023).

<sup>18</sup> *Juszczyszyn v Poland* App no 35599/20 (ECtHR, 6 October 2022) para 322.

are a large number of people affected by court rulings issued in formations with faulty appointments. There are already more than 2,500 defectively appointed persons in Poland who issue thousands of rulings in individual cases every year. And every final judgment issued by unlawfully appointed judge may potentially lead to litigation before the ECtHR.

For these reasons, the HFHR encourages the Council of Europe bodies to use any instruments within their competence to address the situation in Poland. Without a firm response, the effectiveness of the human rights protection system established in the Convention could be compromised.

On behalf of the Helsinki Foundation for Human Rights



*Maciej Nowicki*

*Maciej Nowicki*

The President of the Board

Helsinki Foundation for Human Rights