

Rada Fundacji:
Danuta Przywara - Przewodnicząca
Henryka Bochniarz
Janusz Grzelak
Miroslaw 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

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TO:
The Secretary of the Committee of Ministers
Council of Europe
F-67075 Strasbourg Cedex
France

**COMMUNICATION FROM THE HELSINKI FOUNDATION FOR HUMAN RIGHTS
CONCERNING THE EXECUTION OF JUDGMENT IN THE CASE
GRZEȔA v. POLAND (APP. NO. 43572/18)**

To the attention of:

1. Mr Jan Sobczak

Plenipotentiary of the Minister of Foreign Affairs of the Republic of Poland for cases and procedures before the European Court of Human Rights

2. Mr Marcin Wiącek

The Commissioner for Citizens' Rights of the Republic of Poland

EXECUTIVE SUMMARY:

- On 15 March 2022 the European Court of Human Rights (Grand Chamber) issued judgment in the case of *GrzeȔa v. Poland* (application no. 43572/18). The case concerned premature termination of a term of office of judicial member of the National Council of Judiciary, in connection with the new act governing the rules of election of judicial members to this body. The ECtHR ruled that there was a violation of Article 6 ECHR (right to access to court) on the account of lack of judicial review of premature termination of mandate.

- The domestic authorities have not implemented the ECtHR's judgment. In particular, they did not change the mode of election of judicial members to the National Council of Judiciary. What is more, in 2022 – being aware of *Grzęda* judgment – the Sejm elected the NCJ members for the next term of office.
- It appears that the domestic authorities use the Constitutional Tribunal to evade their obligations to execute ECtHR's judgments. The Government in the process of execution of *Grzęda* judgment rely on the judgment of the Constitutional Tribunal (No. K 7/21), which held that judicial review of the composition of the NCJ in the light of standards derived from Article 6 ECHR is not compatible with the Constitution.
- It is reasonable to expect of Polish authorities that they refrain themselves from *ex lege* termination of mandates, in particular in respect of constitutional bodies of limited composition, unless such step is absolutely necessary to avoid serious violations of the rule of law and human rights.

RECOMMENDATIONS:

- The Helsinki Foundation of Human Rights respectfully recommends that the Committee continues its supervision of the execution of the ECtHR judgment in *Grzęda v. Poland*.
- The Parliament must amend the mode of election of judicial members of the National Council of Judiciary in order to remove doubts as to the impartiality and independence of this body. To avoid further violations of the right to a tribunal established by law resulting from unlawful judicial appointments, it would be advisable to terminate the term of office of the current NCJ members..
- All state authorities must accept that all final judgments of ECtHR have to be duly implemented and the legitimacy of such judgments cannot be called into question, in particular *via* motions to the Constitutional Tribunal.

I. Introduction

1. The Helsinki Foundation for Human Rights ('HFHR', 'the Foundation') with its seat in Warsaw respectfully submits this communication to the Committee of Ministers of the Council of Europe ('CoM') concerning the execution of the judgment issued by the Grand

Chamber of the European Court of Human Rights ('ECtHR', 'the Court') on 15 March 2022 in the case of *Grzęda v. Poland* (app. no. 43572/18).

2. The HFHR is a Polish non-governmental organisation established in 1989. Its principal objectives include the promotion of human rights, the rule of law, and the development of an open society in Poland and abroad. The HFHR actively disseminates human rights standards based on the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, 'ECHR') and works to ensure the proper execution of ECtHR judgments. One of the areas of the HFHR's activity is the protection of the rule of law. In this regard, the HFHR submitted, among others, *amicus curiae* opinion to the ECtHR in the case of *Grzęda v. Poland*, as well as *Advance Pharma sp. z o.o. v. Poland* (app. no. 1469/20), which concerned adjudication by persons appointed upon the recommendation of the unlawfully composed NCJ. Moreover, in October 2022 we submitted the opinion regarding the execution of judgment in *Reczkowicz v. Poland* (app. no. 43447/19) case which also concerned problems resulting from the reform of the method of election of NCJ members.

3. Although the standing of the Foundation to the large extent was presented in the above-mentioned opinion concerning the execution of judgment in *Reczkowicz* case¹, the HFHR finds it appropriate to reiterate some arguments. In spite of the fact that this opinion focuses on general aspect of the case, it cannot be overlooked that the Government failed to pay 30.000 EUR in respect of costs and expenses². In the case at hand it seems that general aspect of execution of judgments is more vital than the individual one, as it appears that it is not required from the state to reinstate Mr Grzęda to the position of the member of NCJ³. Therefore, the Foundation will mainly focus on the institutional aspect of the case.

II. Judgment of the European Court of Human Rights

4. In December 2017, the Polish Parliament adopted the Act Amending the Act on the National Council of Judiciary ('the 2017 Act'), which transferred power to elect 15 judicial

¹ [https://hudoc.exec.coe.int/eng?i=DH-DD\(2022\)1135E](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)1135E).

² As it stems from the communication from the representative of the applicant dated 9 August 2022 in [https://hudoc.exec.coe.int/eng?i=DH-DD\(2022\)854E](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)854E).

³ See 1355th meeting of CoM, 23-25 September 2019 (DH), No. H46-11, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680972d5a, where CoM held that individual execution of judgment in the case of *Baka v. Hungary*, which concerned premature termination of mandate of president of the Supreme Court, requires payment of compensation, but it is not expected of Hungary to reinstate Mr Baka to the position of the president of the Supreme Court.

members of the National Council of Judiciary ('NCJ') from assemblies of judges to the Sejm (*Grzęda*, § 20). Moreover, the mandate of NCJ members elected before the entry into force of this act (including Mr. Grzęda) was *ex lege* terminated, when new members of NCJ were elected in March 2018 (see § 52-54). Under Article 187(3) of the Constitution of the Republic of Poland the term of office of NCJ is 4 years. Mr. Grzęda was elected to NCJ in January 2016 (see § 31).

5. The Court held that Mr. Grzęda had a right to finish his 4-year term of office as NCJ member (see § 268-270, 282). There was a genuine and serious dispute over such right (§ 286). The Government relied on the judgment of the Constitutional Tribunal of 20 June 2017, K 5/17, where it had been held that election of judges to NCJ for separate (and not joint) term of office had not been in compliance with the Constitution. Moreover, some inequality between judges in terms of procedure of elections was identified. However, the ECtHR held that inclusion of Mr. Mariusz Muszyński and Mr. Lech Morawski in the bench of the Constitutional Tribunal calls into question the legitimacy of such judgment (§ 277, 315), given the ruling of the Court in the case *Xero Flor w Polsce sp. z o.o.* Moreover, the Constitutional Tribunal did not pay enough attention to the protection of judicial independence (§ 315). In any case, as the Court aptly noted, the implementation of the Constitutional Tribunal's ruling did not require to terminate mandate of NCJ members (§ 278).

6. Subsequently, the Court applied *Eskelinen* test, which is normally used to assess whether Article 6 ECHR can be applicable to cases concerning civil servants. As regards the first criterion, the right to court must be explicitly or at least implicitly excluded in certain types of disputes. The second criterion emphasises that this exclusion must be reasonably justified. In this respect, the Court held that the 2017 Act had been *ad hominem* legislation, and – as such – violating the rule of law standard (§ 299). Such removal from office was considered as a threat to independence of judges (§ 300), given the special role of judiciary and *mutatis mutandis* judicial councils in the democratic society (§ 301, 303). The effective functioning of NCJ is possible only when it is sufficiently independent from the executive and legislative powers (§ 304). It is recommended that at least half of members of judicial councils should be judges chosen by their peers (§ 305). Further on, ECtHR referred to the fact that the NCJ as composed in 2018 did not meet the requirement of sufficient independence from the executive and legislative power (§ 318-323). For these reasons, the second *Eskelinen* criterion was not met in the case of *Grzęda*.

7. It is worth indicating that the approach of the ECtHR in *Grzęda* was confirmed in Chamber judgment in the case of *Żurek v. Poland* (app. no. 39650/18, 16 June 2022, § 129-134).

III. Judgment of the Constitutional Tribunal of 10 March 2022, No. K 7/21

8. On 13 March 2023, the Polish Government submitted to the Committee of Ministers the information on measures related to the issue of the execution of judgments in the case of *Grzęda against Poland*⁴. In this communication, the Government mentioned the judgment of the Constitutional Tribunal of 10 March 2022, No. K 7/21. Although the Government wrote that implications of this judgment were under examination, there is no doubt that reliance of Polish authorities on judgments of the Constitutional Tribunal can impact the execution of *Grzęda* case.

9. The Constitutional Tribunal held that the Article 6(1) ECHR in so far as it authorises ECtHR or national courts to assess the conformity to the Constitution and the Convention of statutes concerning i.a. organisational structure, the scope of activity, *modus operandi*, and the mode of electing members of the National Council of Judiciary were inconsistent with Articles 188 and 190 of the Constitution of the Republic of Poland.

10. While there is no doubt that the ruling of the Constitutional Tribunal was rather a response to the group of cases commencing with *Reczkowicz*, as well as *Broda and Bojara* case, one cannot escape the impression that it can be used also as means not to execute *Grzęda* judgment. It appears that the ruling of the Constitutional Tribunal prescribes that only the Parliament is empowered to create laws on NCJ, and the Constitutional Tribunal is the sole body, which can assess its legality. It is worth mentioning that the Constitutional Tribunal in its judgment of 25 March 2019, No. K 12/18 held that the provision allowing election of judges by the Sejm was compliant with the Constitution of the Republic of Poland. Therefore, the only body, which is expected to remedy a situation, is the Polish Parliament (possibly acting on the motion of the Government). As it was mentioned above, no provisions in this respect have been enacted.

11. For the Foundation it is clear that the Government of Poland uses the Constitutional Tribunal to escape from the execution of ECtHR judgments. It can be also marked by the judgment of the Constitutional Tribunal of 24 November 2021, No. K 6/21, which can be

⁴ [https://hudoc.exec.coe.int/eng/?i=DH-DD\(2023\)317E](https://hudoc.exec.coe.int/eng/?i=DH-DD(2023)317E).

perceived as a justification for non-execution of *Xero Flor* judgment. It can be added that this conclusion is also valid in respect of ensuring compliance with the European Union law (see judgments of the Constitutional Tribunal: of 14 July 2021, No. P 7/20; of 7 October 2021, No. K 3/21).

12. This is an example of abusive constitutionalism and flagrant breach of the obligation stemming from Article 27 of the Vienna Convention on the Law of Treaties, which imposes an obligation to follow international law, and the provisions of national law (including constitutional law) cannot be invoked as a justification for non-compliance with the law of nations (see *Grzęda*, § 340).

IV. Current situation concerning the National Council of Judiciary

13. Even though the Polish authorities were aware of the *Grzęda* judgment, on 12 May 2022, the Sejm elected 15 judges to the National Council of Judiciary (Official Journal *Monitor Polski* of 2022, item 485) for the next term of office. The provisions on the basis of which the Sejm acted have remained unchanged since 2018.

14. 11 members of NCJ of the previous term were re-elected (that is Ms. Katarzyna Chmura, Mr. Dariusz Drajewicz, Mr. Grzegorz Furmankiewicz, Mr. Marek Jaskulski, Ms. Joanna Kołodziej-Michałowicz, Ms. Ewa Łapińska, Mr. Zbigniew Łupina, Mr. Maciej Nawacki, Ms. Dagmara Pawełczyk-Woicka, Mr. Rafał Puchalski, Mr. Paweł Styrna) and 4 others elected for the first time (Ms. Anna Dalkowska, Ms. Irena Bochniak, Ms. Krystyna Morawa-Fryźlewicz, Mr. Stanisław Zdun). Ms. Dagmara Pawełczyk-Woicka was elected President of the Council. It is worth reminding that in cases of *Reczkowicz*, *Dolińska-Ficek and Ozimek* and *Advance Pharma* the fact that most of judges elected in 2018 were closely associated with the executive and legislative power was considered a fact contributing to the lack of independence of NCJ.

V. Recommendations of the HFHR

15. In the opinion of the Foundation, the *Grzęda* judgment has not been duly executed by the Polish authorities. Therefore, HFHR recommends that the procedure before the Committee of Ministers should continue. The Committee could address the following issues.

Lack of access to court

16. The reason of violation of the Convention in the case at hand is the fact that *ex lege* termination of the applicant's mandate in the NCJ was not subject to any judicial review. However, in the HFHR opinion, it might be difficult to expect of Polish authorities to provide judicial review of *ex lege* termination of mandate. It is unclear whether such judicial review could be only compensatory, or in such proceedings the domestic court should be empowered to restore a mandate of such person, notwithstanding the fact that other individual has been elected to the same seat. In the opinion of HFHR, the emphasis should be put on the obligation of domestic authorities not to create laws which *ex lege* terminate mandates of members of constitutional bodies. Therefore, it would be appropriate to require from the Polish authorities that they oblige themselves to refrain from enacting such laws, unless this is absolutely necessary to avoid serious violations of the rule of law and human rights.

Restoration of the independence of NCJ

17. In the HFHR opinion, the Parliament must change the act regulating the election of judges to NCJ in order to ensure that judicial members of NCJ are elected to this body by their peers. This would also allow to avoid doubts regarding allegiance of such judges with the legislature or executive. We would like to underline that there are no legal obstacles to adopting such reform. Even leaving aside the controversies around the Constitutional Tribunal judgement of 20 June 2017, K 5/17, it is possible for the national legislator to reconcile the requirements stemming from this ruling (that is, election for the joint term of office, as well as rectification of flaws identified in the election procedure) with the possibility of election of NCJ members by assemblies of judges. The Constitutional Tribunal itself held that both systems are permissible under the Constitution of Poland.

Termination of mandates of members of NCJ elected with violation of law

18. HFHR believes that the term of office of members elected in a procedure inconsistent with the constitutional and international standards should be terminated. Even though such recommendation may seem to be in conflict with our general remark regarding necessity to refrain from *ex lege* termination of mandates of independent bodies, in our opinion the only way to avoid further violations of Article 6 is to put an end as soon as possible to the continuous existence of NCJ lacking independence from the executive and

the legislative. Termination of term of office of the current judicial members of NCJ would not violate the Article 6 of the Convention. Current members must have been aware that their election was burdened with manifest violation of law and so they are not in the same situation as lawful members whose term of office was terminated in 2018. Moreover, unlike in the case of *Grzęda v. Poland*, termination of term of office of current members would not damage the principle of judicial independence – quite contrary, it would contribute to restoration of the standards of judicial independence. Finally, as already mentioned, the HFHR does not see any less restrictive measures which could ensure that the state of systemic inconsistency with the ECHR is immediately put to an end.

Refraining from questioning the legal force of the Court's judgments

19. Finally, all state authorities must accept that all final judgments of ECtHR have to be duly implemented. The legitimacy of such judgments cannot be called into question, in particular by initiating proceedings before the Constitutional Tribunal in respect of compliance of ECHR with the Constitution.

On behalf of the Helsinki Foundation for Human Rights

Dr Piotr Kładoczny
Vice-President of the Board