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Warsaw, 28 November 2019

1785/2019/PSP/MSZ

Ms Ksenija Turković
The European Court of Human Rights
President of the First Section
Section I
Council of Europe
67075 Strasbourg-Cedex
France

Ref. *Grzęda against Poland*

Application No. 43572/18

Pursuant to the letter of Mr Abel Campos, the Section Registrar of the First Section of the European Court of Human Rights (hereinafter also referred to as "ECtHR", "Court") dated 7 November 2019, granting leave to make written submission to the High Court by 29 November 2019, the Helsinki Foundation for Human Rights (hereinafter also referred to as "HFHR") with its seat in Warsaw, Poland, hereby respectfully presents its written comments on the case of Jan Grzęda against Poland (application no. 43572/18).

On behalf of the Helsinki Foundation for Human Rights,

Dr Piotr Kładoczny
Secretary of the Board
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Warsaw, 28 November 2019

Grzęda against Poland
Application no. 43572/18

WRITTEN COMMENTS
BY
THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

EXECUTIVE SUMMARY:

- The case of *Grzęda v. Poland* concerns termination of the applicant's term of office as a judge elected to the National Council of Judiciary – constitutional body in Poland main duty of which is to safeguard independence of courts and judges. The applicant argues that his dismissal without providing him access to court violated Article 6 § 1 and Article 13 of the Convention.
- Judges elected to the NCJ had an entitlement under Polish law to protection against removal from the NCJ. The law did not provide any possibility of premature termination of their terms of office. Moreover, the Constitutional Tribunal developed case law which established rules of protection of terms of office of constitutional bodies.
- Termination of the elected NCJ members term of office was done in the context of controversial reform of the NCJ aimed at implementation of the Constitutional Tribunal judgment. However, the said ruling was issued with participation of unlawfully elected judges and may raise serious controversies. What is more, the Tribunal did not rule that the term of office of elected judicial members of NCJ must be terminated.
- Termination of term of office of judges elected to the NCJ is inconsistent with the standards of the rule of law because it threatens the independence of this body what in turns may negatively affect independence of the whole judiciary.
- The necessity of protection of the independence of judiciary councils was noted by the Court of Justice of the European Union. In the recent judgment the CJEU developed criteria for the assessment of the independence of the NCJ and its impact on the independence of the judiciary. The fact that terms of office of previous members of the NCJ were terminated was one of such criteria.
- The constitutional complaint can no longer be considered as an effective domestic remedy because the Constitutional Tribunal, after extensive personal and legal changes, is unable to carry out its functions independently and efficiently. Nevertheless, even regardless of these circumstances, the constitutional complaint would not be able to effectively change legal situation of person dismissed from the NCJ.

I. INTRODUCTION

1. This third party intervention is submitted by the Helsinki Foundation for Human Rights, pursuant to the leave granted by the President of the Court on 7 November 2019.

2. Helsinki Foundation for Human Rights (hereinafter: "HFHR") 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 an open society in Poland and abroad. One of the

leading programs of the HFHR is the Strategic Litigation Program whose activities are aimed at enhancing human rights protection in Poland through, among others, participation in legal actions undertaken for the public interest such as representing parties and preparation of legal submissions to national and international courts and tribunals. The HFHR has an established practice as regards of submission of third party interventions to the European Court of Human Rights (hereinafter: "the Court") and in representing victims in proceedings before the Court. In the past we had submitted *amicus curiae* opinions not only in cases against Poland (e.g. *Kuchta i Mętel przeciwko Polsce*, app. no. 76813/16; *M.P. v. Poland*, app. no. 20416/13; *A.K. v. Poland*, application no. 904/18), but also those against other countries, which in our opinion, concerned legal problems important also from the perspective of protection of human rights in Poland (e.g. *Levada Centre against Russia*, app. no. 16094/17; *Baka v. Hungary*, app. no. 20261/12; *Big Brother Watch and Others v. United Kingdom*, app. no. 58170/13).

3. HFHR believes that the present case concerns problems of the utmost importance from the perspective of the protection of the right to court in Poland. The reform of the National Council of Judiciary (hereinafter: "NCJ") adopted in 2017 raised serious controversies among many judges and legal scholars and was criticized as inconsistent with the constitutional and international standards of judicial independence. It also led to submission of several preliminary references to the Court of Justice of the European Union by the Polish courts.

4. The present written comments are divided into three sections. In the first one we analyse the question of protection of term of office of the members of the NCJ. The second part is focused on the analysis of the compliance of termination of term of office judges elected to the NCJ with the standards of the rule of law. In the last one we briefly address the question as to whether constitutional complaint to the Constitutional Tribunal may, in the current circumstances, be considered as an effective remedy.

II. STABILITY OF TENURE OF THE MEMBERS OF THE NCJ

5. In the HFHR opinion, judges elected to the NCJ had an entitlement under Polish law to protection against removal from the NCJ (*cf. Baka v. Hungary* [GC], 12 June 2016, app. no. 20261/12, §§ 109-111).

6. The NCJ is a constitutional body which main function is safeguarding the independence of courts and judges (Article 186 para. 1 of the Constitution). The most important task of the NCJ is participation in the process of judicial appointments – according to Article 179 judges are appointed "by the President of the Republic on the motion of the National Council of the Judiciary", what means that the President cannot appoint a person who was not indicated in the NCJ resolution.

7. Article 187 para. 1 of the Constitution provides that the NCJ is composed of 25 members: the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court, an individual appointed by the President, 4 members chosen by the Sejm from amongst its Deputies, 2 members chosen by the Senate from amongst its Senators and 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts. The composition of the NCJ reflects its character as a body based on cooperation between all three powers in the state[1].

8. The rules concerning permissibility of premature dismissal vary between different categories of members of the NCJ. Minister of Justice and the representative of the President are not protected against arbitrary dismissal. The former is a member of Council of Ministers,

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[1] M. Safjan, *O relacjach trzeciej władzy z władzą ustawodawczą i wykonawczą*, „Krajowa Rada Sądownictwa" 2009, no. 1, p. 19; W. Brzozowski, *Niezależność konstytucyjnego organu państwa i jej ochrona*, Warszawa 2016, p. 63; B. Naleziński, *Komentarz do art. 187 Konstytucji* [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, LEX/el.

obliged to implement Government's policy, and may be dismissed from his position of a minister (and consequently – member of the NCJ) by the Sejm via vote of no-confidence or by the President upon the request of the Prime Minister. The representative of the President may be dismissed by the President at any time[2].

9. On the other hand, status of the First President of the Supreme Court and the President of the Supreme Administrative Court is completely different. Their membership in the NCJ is inseparably linked with their position as presidents of each court. Therefore, as long as given person serves as the First President of the Supreme Court or the President of the Supreme Administrative Court, he/she must remain member of the NCJ. What is more, terms of office for both these positions are defined in the Constitution (Article 183 para. 3 and 185 – in both cases 6 years) and cannot be terminated prematurely.

10. Status of other members of the NCJ is more complicated. According to Article 187 para. 3 of the Constitution term of office of elected members of the NCJ (ie. 6 Members of Parliament and 15 judges) is 4 years. However, the Constitution does not provide explicitly whether elected member of the NCJ can be dismissed before expiration of his/her term of office. According to some commentators, such solution is not completely prohibited, provided that procedure for dismissal is regulated in a statute and that decision concerning dismissal is taken by the body which elected given member of the NCJ.[3] However, many legal scholars argue that Article 187 para. 3 of the Constitution protects elected members of the NCJ against arbitrary dismissal because otherwise the four-year period provided therein could not be considered as "term of office".[4] The controversies around this problem are reflected in the evolution of statutory acts regulating the organization of the NCJ. Two statutes which were in force between 1989 and 2011, allowed on dismissal of elected members of the NCJ by the body which elected them[5]. However, the currently in force Act on the National Council of Judiciary, adopted in 2011, clearly excludes such possibility. The drafters of the bill explained that the possibility of premature dismissal of elected members of the NCJ, provided in earlier statutes, was inconsistent with the Constitution[6].

11. In the context of the present case it must be also underlined that although in the past the law allowed on dismissal of elected members of the NCJ by the body which elected them, until 2017 there has never been a situation in which all of the judicial members would be jointly dismissed *ex lege*, by virtue of statute adopted by the Parliament. The 1997 Constitution provided that "The term of office of constitutional organs of public power and the individuals composing them, whether elected or appointed before the coming into force of the Constitution, shall end with the completion of the period specified in provisions valid before the day on which the Constitution comes into force" (Article 238 para. 1). Similarly, the 2011 Act on the National Council of Judiciary explicitly provides that the terms of office of those members of the NCJ, who were elected on the basis of previous regulations, would be

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[2] Article 8 para. 1 of the Act of 12 May 2011 on the National Council of Judiciary (Journal of Laws of 2019, pos. 84 with further amendments).

[3] L. Garlicki, *Komentarz do art. 187 Konstytucji RP* [in:] L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. IV, Warszawa 2005, comment 8.

[4] W. Brzozowski, *Niezależność konstytucyjnego organu...*, pp. 190-191; K. Szczucki, *Komentarz do art. 187 Konstytucji* [in:] M. Safjan, L. Bosek, *Konstytucja RP. Komentarz*, vol. II, Warszawa 2016.

[5] See: Article 7 para. 1 point 2 of the Act of 29 December 1989 on the National Council of the Judiciary (Journal of Laws of 1989 No. 73, pos. 435 with further amendments) and Article 10 para. 1 point 3 of the Act of 27 July 2001 on the National Council of the Judiciary (Journal of Laws of 2001 No. 100, pos. 1082 with further amendments).

[6] Explanation to the Senate's draft Act on the National Council of Judiciary, Sejm (6-th term of office) print no. 3364, p. 7 (available at: http://orka.sejm.gov.pl/Druki6ka.nsf/0/D6EB1233E36F5A54C1257798002BF77A/$file/3364.pdf; last access: 25 November 2019).

respected.[7] What is more, when in 2007 the Parliament adopted a law which introduced new *incompatibilitatis* criterion to the Act on the National Council of Judiciary, applicable not only to newly elected members, but also to those who were elected before the new law entered into force, the Constitutional Tribunal ruled that it was inconsistent with the Constitution.[8] The law[9] provided that judges who hold the office president or vice-president of court could not be elected to the NCJ. Moreover, those members of the NCJ who were, at the moment of the entrance of the law into force, presidents of courts, had to decide, within one month since the entrance of the law into force, whether to resign from the membership in the NCJ. If they did not resign, they would be revoked from the position of a president (vice-president) of court. Although, unlike the regulation at stake in the present case, such provision did not provide unconditional *ex lege* expiration of terms of office of NCJ members, the Constitutional Tribunal held that it nevertheless violated the Constitution. According to the Tribunal, the respect for terms of office of elected members requires that the new duties or restrictions would not be imposed on them, unless it is justified by an important public interest. The Tribunal ruled that in the analysed case there were no extraordinary circumstances which could justify such solution and so the law was struck down.

12. It is also worth to mention the 2006 judgment of the Constitutional Tribunal in which the law providing *ex lege* termination of terms of office of members of the National Council of Radio Broadcasting and Television was declared as unconstitutional.[10] The Tribunal underlined that stability of tenure, which implies the prohibition of arbitrary dismissal before the end of term of office, is one of the most important guarantees of the independence of the body. For this reason, solutions that lead to the immediate expiry of the mandates of the members of the National Council, without any connection to the conditions for expiry of the mandates provided in the previously existing regulations and without the existence of special circumstances that would justify them, are unacceptable. It is also worth to note that in 2015 the Constitutional Tribunal ruled that *ex lege* dismissal of the President and the Vice-President of the Constitutional Tribunal from their office (without depriving them of the status of judges of the Tribunal) violated the Constitution, Article 6 para. 1 of the ECHR and Article 25 letter c taken in conjunction with Article 2 and Article 14 para. 1 of the International Covenant on Civil and Political Rights.[11] The Tribunal held that the mere introduction of term of office for these positions (previously, person could held the position of President or Vice-President of the Constitutional Tribunal as long as he/she serves as an active judge of the Constitutional Tribunal) does not justify such move. In the HFHR opinion, the standards developed by the Tribunal in both these rulings may be *per analogiam* applied to the members of the NCJ, at least those who were elected as representatives of the judiciary, especially taking into account that term of office of elected judicial members of the NCJ, unlike term of office of members of the National Council of Radio Broadcasting and Television, is regulated explicitly in the Constitution.

III. DISMISSAL OF JUDGES ELECTED TO THE NCJ AND THE RULE OF LAW

13. In *Baka v. Hungary* [GC] the Court underlined that "in order for national legislation excluding access to a court to have any effect under Article 6 § 1 in a particular case, it should be compatible with the rule of law" (§ 117). That is because the principle of the rule of law, although not mentioned explicitly in the text of the Convention, is nevertheless one of the foundations of the system of human rights protection established in the ECHR (*Zubac v. Croatia* [GC], 5 April 2018, app. no. 41060/12, § 123; *Guðmundur Andri Ástráðsson v. Iceland*,

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[7] Article 50 of the Act on the National Council of Judiciary.
[8] Judgment of the Constitutional Tribunal of 18 July 2007, ref. no. K 25/07.
[9] The Act of 16 March 2007 amending the Act on the National Council of Judiciary and certain other statutes (Journal of Laws of 2007 No. 73, pos. 484).
[10] Judgment of the Constitutional Tribunal of 23 March 2006, ref. no. K 4/06.
[11] Judgment of the Constitutional Tribunal of 9 December 2015, ref. no. K 35/15.

12 March 2019, app. no. 26374/18, § 97). In the HFHR opinion, deprivation of the NCJ members, whose term of office was terminated, of an access to court was fundamentally inconsistent with the principle of the rule of law.

14. The declared purpose of the law which terminated term of office of the applicant and other judges elected to the NCJ was implementation of the Constitutional Tribunal's judgment of 20 June 2017 (ref. no. K 5/17). The Tribunal ruled therein that the procedure of election of judicial members of the NCJ was unconstitutional because it differentiated electoral rights of various categories of judges. In particular, according to the Tribunal, the law discriminated judges of the lower courts as compared with those of the higher courts. In addition, the Constitutional Tribunal declared as unconstitutional statutory provisions according to which the term of office of elected judicial members of the NCJ had an individualized character. According to the Tribunal, the Constitution required introduction of a joint length of term of office. However, the judgment did not specify the manner of its implementation. In particular, the Tribunal held that the Constitution does not require that the judicial members of the NCJ are elected by the judiciary, but at the same time – it does not prohibit adoption of such solution provided that all judges are treated equally in the election process.

15. The discussed ruling may raise serious controversies, first because it was issued with participation of two unlawful elected judges[12], and second due to a highly questionable interpretation of the Constitution presented in it. Equally critical opinions may be formulated towards subsequent judgment in the case K 12/18[13] in which the Tribunal upheld the constitutionality of law reforming the NCJ.[14] In both of these cases the Tribunal seems to ignore the significance of the NCJ independence for the independence of the whole judiciary. In K 5/17 the Tribunal underlined that "the independence of courts and judges are not values given for themselves. They are also not a justification or reason to build a special position of the courts and judges. (...) By no means should the independence of the courts and judges be the basis for building abstract privileges for representatives of the judiciary". In K 12/18 the Tribunal held that the NCJ is not a part of the Polish constitutional traditions and moreover the existence of judiciary council is not a *conditio sine qua non* of contemporary democratic state ruled by law. It is however worth to note that in both rulings the Tribunal departed from its prior case-law in which it held that the Constitution requires that the judicial members of NCJ are elected by the judiciary[15]. Moreover, this manner of election was in force from the moment of establishment of the NCJ in 1989 until 2018, what was consistent with the character of the NCJ as a forum for cooperation between all three powers in the state. That is because in order to ensure that such cooperation takes place, the NCJ must be composed of persons who represent each power. If judges were elected to the NCJ by the Parliament or appointed by the President, they could not be considered as representatives of the judiciary but rather of the body which elected them. Also the Court, referring to the opinion of the Venice Commission, noted that the mere fact that only judges are eligible to be elected to some position does not render this position an organ of a judicial self-government if the election belongs to the competence of the Parliament (*Miracle Europe Kft v. Hungary*, 12 January 2016, app. no. 57774/13, § 61). When analysing the impact of the 2017-2018 reform on the NCJ independence it is also worth to note that on 17 September 2017 the European Network of Councils for the Judiciary (hereinafter: "ENCJ") decided to strip the NCJ of its voting rights and to exclude it from participation in ENCJ activities[16]. The ENCJ, explaining such a radical move, referred to the earlier paper of its Executive Board in which it was stated that due to "departure from the ENCJ standard that judges in a council should be elected by their peers"

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[12] Namely: M. Muszyński and L. Morawski.

[13] Judgment of the Constitutional Tribunal of 25 March 2019, ref. no. K 12/18.

[14] K 12/18 was issued with participation of one unlawfully elected judge (J. Piskorski).

[15] K 25/07.

[16] Information available at: https://www.encj.eu/node/495 (accessed on: 27 November 2019).

and other worrying circumstances (such as: non-transparent process of election of judicial members after the legislative changes, adoption of the law without proper consultations with the judiciary, shortening terms of office of previous members), the NCJ "is no longer the guardian of the independence of the judiciary in Poland. It seems instead to be an instrument of the executive."[17]

16. However, even regardless of the criticism towards the Tribunal's judgment in the case K 5/17, it must be emphasised that the Tribunal did not specify that its verdict results in expiration of terms of office of elected judicial members of the NCJ or that it obliges the Parliament to terminate such terms of office in statute. What is more, expiration of terms of office of bodies elected on the basis of provisions which were found to unconstitutional is not a usual consequence of the Tribunal's rulings. For example, in the abovementioned judgment concerning the National Council of Radio Broadcasting and Television the Tribunal ruled that although the provisions which terminated terms of office of previous members of the Council violated the Constitution, the legal effectiveness of such termination cannot be questioned. As a result, members elected on the seats vacated by the members dismissed by virtue of unconstitutional law, kept their offices.

17. Taking this into account, termination of the term of office of elected judicial members of the NCJ cannot be seen as a direct consequence of the judgment of the Constitutional Tribunal. That was also the position of the NCJ which, in the statement issued on 20 June 2017, underlined that: "In the light of Article 190 para. 4 of the Constitution of the Republic of Poland, today's ruling does not affect the validity of the election of current members of the NCJ (...)".[18] It is also impossible to argue that termination of term of office was strictly necessary to implement the Tribunal's judgment, because it was possible to introduce a joint length term of office for the NCJ members with the use of less onerous measures[19].

18. Therefore, the Parliament, while deciding whether to terminate term of office of elected members of the NCJ, should have taken into account the international and constitutional standards of the rule of law. Looking from that perspective, dismissal of elected judiciary members may negatively affect the independence of the NCJ what in turn may threaten the independence of the judiciary.

19. In this context it is worth to note that the Constitution does not explicitly state that the NCJ, as a collective body, shall be independent. According to the Polish legal scholars, lack of such express recognition of independence may be justified by the abovementioned "mixed composition" of the NCJ, which implies that various categories of members differ with regards

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[17] Position Paper of the Board of the ENCJ on the membership of the KRS of Poland, https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/News/ENCJ%20Board%20position%20paper%20on%20KRS%20Poland.pdf (accessed on: 27 November 2019).

[18] Statement of the NCJ's Presidium with regards to the judgment of the Constitutional Tribunal on the compliance with the Constitution of the Republic of Poland of the applicable model for the selection of members of the NCJ, http://www.krs.pl/pl/aktualnosci/d.2017.6/4841.stanowisko-prezydium-krajowej-rady-sadownictwa-z-20-czerwca-2017-r-w-zwiazku-z-wyrokiem-trybunalu-konstytucyjnego-w-sprawie-zgodnosci-z-konstytucja-rp-obowiazujacego-modelu-wyboru-czlonkow-krs (accessed on: 28 November 2019).

[19] For example, Professor M. Matczak correctly argued that: "In this respect, it would be sufficient to introduce appropriate transitional provisions allowing current members of the NCJ to hold their positions until the end of tterm of office of the member who was elected at the latest. Certainly, the statutory extension of the term of office of the members of the NCJ beyond the constitutionally determined four years due to extraordinary circumstances would be more in line with the Constitution than the shortening of the constitutionally protected term." (M. Matczak, *Legal opinion on the constitutionality of the presidential bill on the National Council of Judiciary*, 22 November 2017, available at: http://orka.sejm.gov.pl/rexdomk8.nsf/0/E72F4EFF1B4CDF06C12581DA003FD73B/%24File/i2363-17A.rtf).

to their level of independence.[20] Nevertheless, 68% of all the members of the NCJ are judges, who are covered by strong constitutional guarantees of independence such as irremovability or untransferability. As the Constitutional Tribunal correctly noted in one of its judgments, the position of judges as members of the NCJ "de facto determines the independence of this constitutional body and the effectiveness of the Council's work".[21]

20. Moreover, the necessity to respect the independence of the NCJ is further justified by the constitutional function of this body and its significance for safeguarding of the judicial independence and the rule of law. As already mentioned, the NCJ plays an important role in the process of judicial appointments – the President cannot appoint a person who was not indicated in the resolution of the NCJ. It is worth to note that these constitutional rules are applicable not only to the appointment to the first judicial position but also to appointment of an already serving judge to a position in a higher court. Therefore, if the NCJ was not independent, but controlled by politicians, whole professional career of the judge would depend on the will of political or politicized bodies. The NCJ has also other important competences with regards to the judiciary, such as: adopting a set of principles of professional ethics for judges and assessors, expressing opinions in cases concerning dismissal of courts' presidents (vice-presidents) or electing disciplinary counsels. All these powers might be used by a politicized body to a detriment of judicial independence.

21. The role of safeguarding the independence of judiciary councils was noted, among others, by the Committee of Ministers of the Council of Europe. In the recommendation CM/Rec(2010)12[22] it stated that "Councils for the judiciary are independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system" (para. 26). In order to ensure such independence, the Committee of Ministers recommended that "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" (para. 27). The independent judiciary council may play an important role in particular in the process of judicial appointment and promotions. According to the Committee of Ministers, "The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers" (para. 46). If a power to appoint a judge belongs to the head of state, the independent authority should make recommendations or express opinions which should be followed in practice (para. 52).

22. Also the Court noted relevance of judiciary councils as a guarantee of judicial independence. According to its established case-law, manner of appointment of judges is one of criteria used to assess independence of courts in the light of the standards stemming from Article 6. However, according to the Court, "appointment of judges by the executive or the legislature is permissible, provided the appointees are free from influence or pressure when carrying out their adjudicatory role" (*Flux v. Moldova [no. 2]*, 3 July 2007, app. no. 31001/03, § 27). Although this statement may suggest, that the manner of appointment is not as important as the existence of guarantees of independence applicable after the appointment (ie. protection against arbitrary removal), in some cases the Court took into account the role of an independent judiciary council. For instance, in *Oleksandr Volkov v. Ukraine* (9 January 2013, app. no. 21722/11) and *Denisov v. Ukraine* [GC] (25 September 2018, app. no. 76639/11) the Court ruled that the Ukrainian High Administrative Court was not

[20] W. Brzozowski, *Niezależność konstytucyjnego organu...*, pp. 62-65.

[21] Constitutional Tribunal, judgment of 18 July 2007, ref. no. K 25/07.

[22] Recommendation CM/Rec(2010)12 of the Committee of Ministers of Council of Europe to member states on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010.

independent and impartial in the proceedings concerning the review of decisions issued by the High Council of Justice. The reason for that was the High Council of Justice, which was not an independent and objective body, but was biased and affected with systemic deficiencies, had "extensive powers with respect to the careers of judges (appointment, disciplining and dismissal)" (*Oleksandr Volkov v. Ukraine*, § 130; *Denisov v. Ukraine* [GC], § 79). It is also worth to note the case of *Thiam v. France* (18 October 2018, app. no. 80018/12) in which the Court dealt with the applicant's allegation that the criminal court which convicted him was not independent because its judges were appointed by President Sarkozy, who was at the same time party to the criminal proceedings at stake. The Court rejected these claims, taking into account, among others, that the act of appointment by the President was merely a formality because in practice the head of state was bound by the recommendation of the judiciary council (National Legal Service Commission) and what is more his decision could be appealed against before the *Conseil d'Etat* (§§ 81-83). The Court underlined that "the collegial exercise of the CSM's power of «proposal» and «binding approval» constitutes, in the Court's opinion, an essential safeguard against the risk of pressure on judges by the executive" (§ 82).

23. Moreover, in the HFHR opinion, the Court, dealing with the present application, should take note also of the recent judgment of the Court of Justice of the European Union in the case concerning preliminary reference of the Polish Supreme Court concerning independence of the NCJ and the Disciplinary Chamber of the Supreme Court[23]. The EU standards may be of some assistance while interpreting of the Convention taking into account that "the Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties" (*Demir and Baykara v. Turkey* [GC], 12 November 2008, app. no. 34503/97, § 67). What is more, the Court applies a presumption that the EU law provides an equivalent level of human rights protection as the ECHR (see e.g. *Avotiņš v. Latvia* [GC], 23 May 2016, app. no. 17502/07, § 105). In the past the Court referred to standards developed by the Court of Justice of the EU and other EU courts also in the context of interpretation of Article 6 of ECHR (see e.g. *Baka v. Hungary* [GC], § 107; *Guðmundur Andri Ástráðsson v. Iceland*, § 102).

24. In the judgment of 19 November 2019 the CJEU ruled that the court does not constitute an independent and impartial tribunal within the meaning of the EU law if "the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law" (§ 171). One of the crucial factors in this context is the manner of appointment of judges and the role of an independent judiciary council in this process. The CJEU emphasised that the mere fact that judges are appointed by the President does not violate the principle of judicial provided that "the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges" (§§ 133-134). Participation of a judiciary council in the process of judicial appointments may contribute to making that process more objective by limiting discretionary powers of the President (§ 137). However,

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[23] Judgment of the Court of Justice of the European Union of 19 November 2019 in joined cases *A.K. and Others*, ref. no. C-585/18, C-624/18 and C-625/18.

that function may be realized only if judicial council "is itself sufficiently independent of the legislature and executive and of the authority to which it is required to deliver such an appointment proposal" (§ 138). Therefore, according to the CJEU, the degree of independence of the NCJ in Poland may be a relevant factor for the assessment of independence of judges appointed with its participation.

25. The CJEU pointed out several circumstances which may be important for the purposes of assessment of the NCJ independence. Among them were the new manner of election of 15 judicial members, potential irregularities in the process of election of some of the members, the way in which the NCJ carries out its constitutional duty to ensure the independence of the judiciary, the scope of the judicial review of the NCJ decisions, and, what is particularly important, the fact that the NCJ "as newly composed, was formed by reducing the ongoing four-year term in office of the members of that body at that time" (§ 143).

26. Therefore the CJEU noted the negative impact of the termination of the terms of office of previous elected judicial members of the NCJ on the independence of the whole NCJ. Moreover, it clearly underlined that lack of independence of the NCJ and its subordination to the legislature or the executive may negatively affect the independence of judges.

27. Taking all of these circumstances into account, *ex lege* termination of terms of office of elected judicial members of the NCJ without providing them access to court must be considered as inconsistent with the standards of the rule of law. At the same time, HFHR does not exclude that in some extraordinary circumstances termination of terms office of elected judicial members of the NCJ could be justified. Such situation may arise if termination would be objectively necessary in order to restore the independence of the NCJ and prevent its further functioning in a composition which threatens the judicial independence. In order to avoid any abuse in this regard, such a necessity should be a consequence of a judgment of an independent and impartial domestic or international court.[24] However, in the present case there were no such circumstances. Neither the Constitutional Tribunal's ruling[25] nor any other legal or factual circumstances suggest that the NCJ in its previous composition was unable to carry out its duties independently and impartially.

IV. CONSTITUTIONAL COMPLAINT AS AN EFFECTIVE REMEDY

28. In the HFHR opinion, the constitutional complaint mechanism can no longer be considered as an effective domestic remedy.

29. In the decision in the case of *Szott-Medyńska v. Poland* (9 October 2003, app. no. 47414/99) the Court held that the constitutional complaint "can be recognised as an effective remedy, within the meaning of the Convention, only where: 1) the individual decision, which allegedly violated the Convention, had been adopted in direct application of an unconstitutional provision of national legislation; and 2) procedural regulations applicable for revision of such type of individual decisions provide for the reopening of the case or quashing the final decision upon the judgement of the Constitutional Court in which unconstitutionality had been found". Therefore, if, in the context of a given case, constitutional complaint cannot lead to reopening of the proceedings or prevent or remedy the irreversible harm suffered by the applicant, it would not have to be exhausted before submitting application to the Court (*cf. Solska and Rybicka v. Poland*, 20 September 2018, app. nos.

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[24] Such situation could be considered as an "extraordinary constitutionally justified circumstance", which, in the light of the K 25/07 (see above), could justify an exception to the principle of the stability of tenure.

[25] It is worth to note that in K 5/17 the Constitutional Tribunal ruled that the provisions under review violated Article 187 para. 1 point 2, para. 3 and para. 4 (rules concerning election of members of the NCJ and their term of office) and Article 32 (right to equal treatment) of the Constitution, but refused to assess compatibility of challenged provisions with Article 178 para. 1 of the Constitution (judicial independence). Therefore, it would not be justified to argue that in the light of this judgment previous rules concerning term of office of judicial members of the NCJ or their method of election threatened judicial independence.

30491/17 and 31083/17, §§ 66-72). With regards to the present case, it must be noted that even favourable judgment of the Constitutional Tribunal would not allow dismissed members to be reinstated to the NCJ. Their terms of office were terminated *ex officio*, by the virtue of the statute adopted by the Parliament. There were no separate legal proceedings which could have been reopened.

30. What is more, in the judgment K 12/18 the Constitutional Tribunal ruled that the reform of the NCJ was consistent with the Constitution (see above). Although the Tribunal did not examine the constitutionality of termination of terms of office of judges elected to the NCJ, the reasoning presented in the ruling suggests that it is highly unlikely that the Constitutional Tribunal would question constitutionality of such solution.

31. However, in the HFHR opinion, the most important factor, which has to be taken into account when analysing the effectiveness of constitutional complaint, is the impact of the rule of law crisis in Poland on the efficiency and independence of the Constitutional Tribunal. The controversies around legality of election by the Parliament of three judges on the seats already occupied by judges correctly elected by the Parliament of previous term of office were widely discussed in the English-language literature[26]. These circumstances are not irrelevant from the perspective of the ECHR. First of all, when analysing the admissibility of the application, "the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicants" (*Kurić and Others v. Slovenia*, 26 June 2012, app. no. 26828/06, § 286). Moreover, the Constitutional Tribunal, adjudicating with participation of unlawfully elected judges or in improperly allocated benches, may contribute to violation of Article 6 § 1 of the Convention, insofar as it guarantees the right to have one's case heard by the "tribunal established law" (*cf. Shaykhatarov and Others v. Russia*, 15 January 2019, app. nos. 47737/10, §§ 39-41; *Chim and Przywieczerski v. Poland*, 12 April 2018, app. nos. 36661/07 and 38433/07, §§ 135-142). Therefore, in the HFHR opinion Article 35 § 1 of ECHR cannot be interpreted as imposing requirement to exhaust domestic remedy which involve submitting complaint to body which does not satisfy the condition of "being established by law" provided in Article 6 § 1 of ECHR.

V. CONCLUSIONS

32. In the HFHR opinion the judges elected to the NCJ had an entitlement under Polish law to protection against removal from his position as an elected member of the NCJ. Neither the Act on the National Council of Judiciary in the version applicable at the moment of election of the applicant, nor the Constitution, allowed on dismissal of judge elected to the NCJ before expiration of his/her office (4 years). Moreover, termination of term of office was inconsistent with the international standards of the rule of law. Such a conclusion is justified in particular by the fact that the NCJ plays an important role in the process of judicial appointments and so any undue interferences with its independence threaten also the independence of the judiciary. While analysis whether dismissal of the applicant without providing him with access to court is consistent with Article 6 the Court should also take into account the recent judgment of the CJEU in which the circumstances in which the current personal composition of the NCJ was established were one of the factors relevant from the perspective of assessing of independence of this body and its impact on the independence of judges.

The amicus curiae opinion was drafted by Dr. Marcin Szwed, lawyer in the Strategic Litigation Program of the Helsinki Foundation for Human Rights.

[26] See in particular: *W. Sadurski*, "Poland's Constitutional Breakdown", Oxford 2019, pp. 58-96.