Op-Ed: "Saying Less is Sometimes More (even in Rule-of-Law Cases): *Grzęda v Poland*" by David Kosar and Mathieu Leloup

On 15 March the European Court of Human Rights issued its first Grand Chamber judgment on the rule of law crisis in Poland. In *Grzęda*, the Court had to rule whether the premature termination of the judicial members of the National Council of the Judiciary (NCJ), as a part of the wide-scale judicial reforms, complied with the Convention. More specifically, the question was whether Article 6(1) ECHR is applicable under its civil head to a dispute arising out of the premature termination of a judge's term of office as a judicial member of the NCJ, while he still remains a serving judge (§ 265). The Grand Chamber concluded, by sixteen votes to one, that the civil limb of Article 6(1) ECHR applies to the present dispute and that there was a violation of judge Grzęda's right of access to a court.

Even though we by and large agree with the outcome of the judgment, this Op-Ed will show below that the reasoning of the majority fails to meet the standards expected from the Grand Chamber. The majority's 120+ page-long opinion is both unnecessarily verbose and at the same time lacking sufficient reasoning on key aspects of the NCJ's overhaul. Beyond Polish judicial reforms, the majority failed to clarify the recurring issues concerning the applicability of Article 6(1) ECHR to those employed in a 'public service' and instead brought more confusion into both prongs of the *Eskelinen*-test.

A judge's right of access to a court revisited

Grzęda, was one of the 15 judicial members of the NCJ who had their mandate prematurely ended via the 2017 Amending Act. This controversial and widely criticized measure (f.e. here and here) was justified by the Polish government by the need to increase the efficiency of the administration of justice and make the election of NCJ members more democratic. The act terminated the mandate of the council's judicial members who had until then been appointed by judicial assemblies and decided that those members would from then on be appointed by the parliament.

The core issue of the case was whether Grzęda's rights under the Convention had been violated since he had not had any opportunity to challenge the termination of his mandate in the NCJ. As such, the case fit within the broader issue of the right of access to a court for judges. That topic has been particularly prevalent in the Court's most recent case law, as a consequence of the principles set out *Bilgen* and *Eminağaoğlu* (discussed here), and later applied in cases such as *Gumenyuk*, *Broda and Bojara* and to a certain extent also in *Loquifer*. This recent case law has not been particularly easy to understand and the Grand Chamber could thus have provided some welcome clarifications. However, as aptly mentioned by judge Lemmens in his concurring opinion, not only did the Court fail to seize that opportunity, it even adopted some confusing applications of established principles.

In essence, the case contained three questions: (1) whether Grzęda had a right; (2) if so, whether this right was of a civil nature; and (3) if that was the case, whether Article 6(1) ECHR had been violated. For each of these steps, the Grand Chamber left the beaten path and ignored or implicitly contradicted established case law.

As to the question of whether Grzęda could rely on a right, the Grand Chamber pointed out that Article 187(3) of the Polish Constitution provided for, and therefore protected, the four-year term of the elected members of the NCJ (§270). A little further in its reasoning, the Court explicitly mentions that, having regard to that provision, it was satisfied that there was an arguable right for a judge to serve the full term of office, save for the exhaustively enumerated statutory exceptions. In previous cases, such as *Broda and Bojara* and *Loquifer*, such a provision of domestic law establishing a specific mandate for a predetermined term indeed sufficed for the Court to find that there was an arguable right, clear and simple. Yet, in *Grzęda* the Court spends several pages rebutting every argument brought by the Polish government, and in so doing, it challenges the purported justification of the law, delving into the interpretation of the Polish Constitution given by the Constitutional Court (pointing out its illegitimate composition after the *Xero Flor* judgment) and by the Supreme Court. By doing so, the Court opened a can of worms concerning interpretation of domestic law (how can one persuasively determine what the Polish law says without referring to a single commentary on the Polish Constitution?), aptly exploited by judge Wojtyczek (see § 3.2 and § 4 of his dissenting opinion).

As to whether the right by *Grzęda* was civil, the Court referred to the standard two-step test set out in *Vilho Eskelinen*, namely whether the exclusion of access to a court was explicitly established by domestic legislation and whether this exclusion could be justified on objective grounds in the state's interest. So far, so good.

As to the first of those conditions, the Grand Chamber considered that it needed to be further developed, as it was not entirely apt in all situations. It held that the first *Eskelinen*-conditions must also be understood to be fulfilled where, even without an express provision to this effect, it has been clearly shown that domestic law excludes access to a court for the type of dispute concerned. Rather than explicit, the exclusion may thus also be of an implicit nature, where it stems from a systemic interpretation of the applicable legal framework or the whole body of legal regulation (§292). That is definitely an important nuance on years of established case law. However, the Grand Chamber then continues by saying that the application of the first *Eskelinen*-criterion can be left open in this case, since the second condition has in any event not been met. By shying away from this question, the Grand Chamber fails to provide any guidance on how to apply this new understanding in future cases. One would expect that the unification of case law on the first prong of the *Eskelinen* test was one of the reasons why this judgment was referred to the Grand Chamber in the first place. Moreover, by evading this issue the Court left the temporal aspects (which remedies are relevant – those available to the applicant before the 2017 Amending Act or those after it?) of the case in limbo and brushed aside, perhaps too cavalierly, an important element of the case (whether judges themselves could revoke the membership of judicial members of NJC).

The second *Eskelinen*-criterion allows the Contracting Parties to put forth two alternative justifications for the exclusion of public servants' access to a court: (a) the exercise of State power; or (b) a bond of trust and loyalty. The Polish Government, perhaps surprisingly, did not invoke the second justification, and thus the Court discussed only the 'exercise of State power' rationale. The Court eventually held that judicial members of judicial councils should enjoy similar protection as regards the tenure of judges, since judicial independence should be understood in an inclusive manner and apply not only to a judge in his or her adjudicating role, but also to other official functions that are closely connected with the judicial system (§303).

This was the key novel issue in the ECtHR's case law, and this finding was sufficient to conclude that the second *Eskelinen*-criterion was not fulfilled, since in the abovementioned case law on the right of access to a court for judges, the Court had already established that measures that threatened the status or autonomy of judges could not be considered to be in the state's interest. By making a link between the adjudicating role and other official functions of a judge, the same reasoning would seem to apply for the revocation of Grzęda's mandate as member of the NCJ as well. Instead of that route, the Court then spent many paragraphs reiterating international instruments, stressing the importance of judicial independence and explaining in detail the legislative reforms surrounding the NCJ, only to then – quite abruptly – come to the conclusion that the second criterion had not been met. It is not immediately apparent why all those considerations were necessary to conclude that the exclusion of access to a court was not justified by reasons in the state's interests, or that they even necessarily led to that conclusion. As pointed out by judge Lemmens, the reasoning here took the Court far away from the mere examination of whether the right invoked by Grzęda was a civil one.

Having come to the conclusion that Article 6(1) ECHR was applicable in its civil limb, the third and last step was to decide whether the right of access to a court was violated. In earlier cases, like *Bilgen*, *Eminağaoğlu* and *Gumenyuk*, the mere fact that no judicial appeal had been open to the applicant sufficed to find a violation. Yet again, the Court took extra steps and discussed at length the judicial reforms in Poland and stated that they led to a substantive weakening of judicial independence. At the same time, the Court did not address the elephant in the room – whether it requires from Contracting Parties to allow judges to challenge the legislation that affects them, by giving them access to a court empowered to review and invalidate such legislation. If this is the case, it not only overturns decades of established case law, but it will have huge repercussions for many European countries that do not have constitutional review at all, do not grant judges the privileged status to initiate abstract review of constitutionality, or do not have individual constitutional complaints to which abstract challenge to the legislation can be attached (and they are quite a few!).

All in all, the Court's reasoning in the *Grzęda* case is at times confusing and at some points simply unconvincing. Many of the issues that the Court seems to have struggled with in this case could have been solved much easier by relying on the earlier judgments that dealt with the topic of the right of access to a court for judges. Only time will tell whether the approach in *Grzęda* will become a new standard or whether the Court will gravitate back towards those older judgments.

Judicial governance before the Strasbourg Court

Irrespective of the above considerations, the *Grzęda* case shows again that important questions of judicial governance are increasingly being brought before the Strasbourg and Luxembourg Courts. It is here that the judgment's main value can arguably be found. All throughout the judgment, the Court indicates how important it believes judicial councils to be for safeguarding and maintaining judicial independence, given their often far-reaching competences in issues like judicial appointment or judicial discipline. While it makes clear that the Convention does not require Contracting Parties to establish a judicial council, where they do, they must ensure its independence. In what can only be considered a thinly veiled remark about Poland, it concluded that, while states are free to adopt a judicial council as a means of ensuring independence, what they cannot do is instrumentalise it so as to undermine that independence.

This more general importance on the independence of judicial councils can be welcomed. In this respect, the extension of the procedural safeguard of a right of access to a court from judges to judicial members of judicial councils is a natural development. Yet, in this regard it is noticeable that the Court takes pains in limiting its reasoning to the judicial members and one can wonder if the same would hold true for non-judicial members. And if not, how can it be justified? Is it acceptable to have two classes of judicial council members? The even more intriguing question is what 'other official functions' of a judge, beyond their membership in a judicial council, require the same degree of protection as the adjudicative role? The position of a court president? Anything else? Extrajudicial activities of judges vary wildly across Europe and many of them have come under heavy criticism recently.

On a more conceptual level, the Court will sooner or later realize that judicial councils should be independent not only from the executive and the legislature as it repeatedly stressed, but also from the judiciary. The Polish scenario is only one of the many possible ways how to capture a judicial council. Experiences from other countries tell us that a judicial council can also be captured from within by problematic judges (like the Slovak judicial council), or deeply entangled in judicial corruption and nepotism (for instance in Ukraine; the Court itself touched up on it in the Grand Chamber's *Denisov* judgment). In fact, the concept of judicial councils composed of majority of judges has been increasingly questioned not only by governments with potentially sinister intentions, but also in good faith by civil society in several transitional democracies (see e.g. ANTAC Recommendations and Lessons learnt from judicial governance in transitioning democracies). The recent scholarship on fourth branch institutions (see works of Mark Tushnet and Tarun Khaitan) and reconceptualization of judicial councils as fourth branch institutions seems to be the most promising way how to limit politicization of as well as corporativism in judicial councils. The takeaway lessons from the recent roundtable of the Venice Commission are already moving into this direction. The Court will most likely need to adapt its principles too.

Finally, the Court should be aware that its judgment has not only *ex post* effects, concerning the Polish use and abuse of its judicial council and those countries that already adopted a judicial council model, but also *ex ante* policy effects for those countries that are considering introducing a judicial council. If the Court stipulates too stringent criteria concerning judicial councils, the latter countries will be better off to stick to their current model of judicial governance, even if it is suboptimal. One in fact wonders how the Court wants to transplant the *Grzęda* principles into the Minister of Justice model of judicial governance.

Leading by example

The *Grzęda* judgment shows once again that, sometimes, even easy cases make bad law. Overall, the case was not particularly difficult. The main novelty was the question whether judges should receive similar protection for their position in a judicial council as for their normal adjudicating role, a hurdle that the Court took without (m)any difficulties. When placed within the grand scheme of the judicial reforms in Poland, this case also had a very narrow scope. In this regard, one can wonder why precisely this case was relinquished to the Grand Chamber, as also questioned by judge Wojtyczek.

Because of this, it is unfortunate that the Court has used this particular case to so actively and broadly denounce the Polish judicial reforms in their entirety. By making the case about more than it was – and in doing so delving into the specifics of Polish constitutional law and the

jurisprudence of the Constitutional Tribunal – the Court unnecessarily ventured into particularly contentious territory, diluting the clarity of its own legal reasoning. Yet, part of the legitimacy of the Strasbourg and Luxembourg Courts in dealing with the rule-of-law crisis stems from the persuasion of their arguments and the focus of their legal reasoning. We may and should expect more from the Strasbourg Court in this regard, in particular its Grand Chamber.

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