

Poland, ECtHR, Final decision - Żurek vs. Poland, 39650/18

Member State

 Poland

Topic

freedom of expression

Sector

Freedom of Expression and Association

Deciding Court Original Language

ECtHR

Deciding Court English translation

ECtHR

Registration N

39650/18

Date Decision

16.06.2022, Final

ECLI (if available)

ECLI:CE:ECHR:2022:0616JUD003965018

National Follow Up Of (when relevant)

Not applicable

EU legal sources and CJEU jurisprudence

Not applicable

ECtHR Jurisprudence

Grzeda v. Poland ([GC], no. 43572/18, §§ 257-264, 15 March 2022), Vilho Eskelinen and Others v. Finland ([GC], no. 63235/00, ECHR 2007-II), Kudła v. Poland [GC], no. 30210/96, § 146, ECHR 2000-XI, and Baka; Wille v. Liechtenstein ([GC], no. 28396/95, ECHR 1999-VII); Kudeshkina v. Russia (no. 29492/05, 26 February 2009);

Subject Matter

Art 6 § 1 (civil) • Access to court • Lack of judicial review of premature termination ex lege, after legislative reform, of a serving regional court judge's mandate as member of the National Council of the Judiciary (NCJ) and its spokesperson • Findings in *Grzeda v. Poland* [GC] applied: Art 6 § 1 applicable and very essence of right of access to court impaired

Art 10 • Freedom of expression • Measures taken against the applicant by the authorities for public statements made in his professional capacity as NCJ spokesperson concerning legislative reforms affecting the judiciary • Impugned measures to be seen in context of successive Polish reforms resulting in the weakening of judicial independence and having regard to the sequence of events in their entirety • General right to freedom of expression of judges to address matters as to the functioning of the justice system might be transformed into a corresponding duty to speak out in defence of the rule of law and judicial independence when those fundamental values are threatened • Criticism in context of debate of great public interest, not containing attacks against the judiciary • Statements calling for high degree of protection • Accumulation of measures could be characterised as a strategy aimed at intimidating (or even silencing) the applicant • Impugned measures with chilling effect on judges' participation in public debate on legislative reforms affecting the judiciary and on its independence • Interference not "necessary in a democratic society"

Legal issue(s)

The applicant alleged that he had been denied access to a court to contest the premature and allegedly arbitrary termination of his term of office as a judicial member of the National Council of the Judiciary. He also complained of the measures taken by the authorities in connection with the views that he had expressed publicly in his professional capacity concerning legislative reforms affecting the judiciary. He relied on Article 6 § 1, Article 10 and Article 13 of the Convention.

Request for expedited/PPU procedures

Not applicable

Interim Relief

Not applicable

National Law Sources

Constitution of Poland, art. 178, law on NCJ, law on ordinary courts with amendments, The Act of 9 June 2006 on the Central Anti-corruption Bureau

Facts of the case

In 2001 the applicant joined the Polish Judges' Association *Iustitia*. For some time, he served on its board and acted as its spokesperson. Since 2010 the applicant has been a member of the Judges' Association *Themis*. On 15 March 2010 the applicant was elected by the Representatives of the General Assemblies of the Regional Court judges as a member of the National Council of the Judiciary (*Krajowa Rada Sędziów* – "the NCJ") for a four-year term. On 21 March 2010 he took up his duties in the NCJ. The NCJ is a constitutional organ tasked with safeguarding the independence of courts and judges (see Article 186 § 1 of the Constitution). One of its principal functions is to evaluate and nominate candidates for appointment to judicial office for every level and type of court. The candidates proposed by the NCJ are submitted to the President of the

Republic for appointment. The NCJ's composition is prescribed in Article 187 § 1 of the Constitution. On 2 March 2014 the applicant was again elected as a member of the NCJ for another four-year term. This term began on 21 March 2014 and was due to come to an end on 21 March 2018.

The applicant was appointed by the NCJ as its spokesperson. In this capacity, he frequently commented in the media on topical issues concerning the judiciary and participated in numerous debates on legal matters in various media. The applicant took an active part in legislative work and participated in meetings of parliamentary committees, mainly the Justice and Human Rights Committee of the Sejm (the lower house of the Polish Parliament). Starting in the autumn of 2015, after the parliamentary elections won by the Law and Justice party, public debate on matters concerning the functioning of the administration of justice intensified.

In November 2015 the government took a number of factual and legal measures in respect of the Constitutional Court. In December 2015 the Sejm elected three judges of the Constitutional Court (M.M., L.M. and H.C.) to seats that had been already filled (for a detailed account of the relevant facts, see *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, §§ 4-63, 7 May 2021). These measures were criticised by various legal bodies and institutions. The NCJ adopted opinions critically assessing successive bills on the Constitutional Court. The applicant, in his capacity as the NCJ's spokesperson, actively participated in the public debate regarding the Constitutional Court.

In January 2017 the Government announced plans for a large-scale judicial reform of the NCJ, the Supreme Court and the ordinary courts. The Minister of Justice explained that a comprehensive reform was needed in order to, inter alia, increase the efficiency of the administration of justice and make the election of NCJ members more democratic.

In the first half of 2017 a billboard campaign "Just courts" (*Sprawiedliwe sądy*), presenting examples of alleged unethical or illegal activities of several judges, was launched across the country. It turned out later that it was organised by a foundation controlled by the Government and financed from public funds. According to the applicant, this campaign was aimed at undermining trust in judges and preparing the public for the forthcoming changes in the functioning of the courts.

On 14 March 2017 the Government introduced in the Sejm a bill, drafted by the Ministry of Justice, to amend the Act of 12 May 2011 on the National Council of the Judiciary (*ustawa z 12 maja 2011 r. o Krajowej Radzie Sądownictwa*; "the 2011 Act on the NCJ"). The bill proposed that the judicial members of the NCJ would be elected by the Sejm instead of by judicial assemblies and that the term of office of the sitting judicial members would be terminated. Two further bills concerning the Supreme Court and the Organisation of Ordinary Courts were introduced by deputies from the majority.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

Taking account of the above-mentioned context and having regard to the sequence of events in their entirety, rather than as separate and distinct incidents, the Court considers that there is prima facie evidence of a causal link between the applicant's exercise of his freedom of expression and the impugned measures taken by the authorities in his case (see paragraph 208 above). To begin with, all those measures followed the applicant's successive statements. The audit began in November 2016, following a series of interviews given by the applicant and an article published in May-September 2016 in which he consistently and in strong terms referred to various perceived defects in the proposed reform of the NCJ and the judiciary (see paragraphs 41-43 above). The inspection of the applicant's work as a judge was initiated in April 2017, shortly after his further critical comments on the reform published on the NCJ's YouTube channel and in other media in January-March 2017 (see paragraphs 44-46 above). The two remaining measures, i.e. the dismissal from his position as spokesperson of the Cracow Regional Court in January 2018 and

the declassification of his financial declaration in June 2018 were also taken subsequently to his publicly expressed criticism of the Government's contemplated policies in respect of the judiciary. In the present case, the Court is assessing the situation of an applicant who was not only a judge, but also a member of a judicial council and its spokesperson. However, the Court would note that a similar approach would be applicable to any judge who exercises his freedom of expression – in conformity with the principles referred to in paragraph 219 above – with a view to defending the rule of law, judicial independence or other similar values falling within the debate on issues of general interest. When a judge makes such statements not only in his or her personal capacity, but also on behalf of a judicial council, judicial association or other representative body of the judiciary, the protection afforded to that judge will be heightened.

Furthermore, the general right to freedom of expression of judges to address matters concerning the functioning of the justice system may be transformed into a corresponding duty to speak out in defence of the rule of law and judicial independence when those fundamental values come under threat. This duty has been recognised, *inter alia*, by the CCJE (see paragraph 41 of its Opinion no. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, cited in paragraph 111 above), the UN Special Rapporteur on the independence of judges and lawyers (see paragraph 102 of his 2019 Report on freedom of expression, association and peaceful assembly of judges, cited in paragraph 103 above) and the General Assembly of the ENCJ (see paragraph (vii) of its 2013 Sofia Declaration, cited in paragraph 112 above).

Use of Judicial Interaction technique(s)

Not applicable

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

External horizontal interaction: The tribunal mentions the judgment of 5 October 2015 of the Inter-American Court of Human Rights in *López Lone et al. v. Honduras*,

Impact on Legislation / Policy

Not applicable

Notes on the national implementation of the preliminary ruling by the referring court

Not applicable

Did the national court quote case law of the CJEU/ECtHR (in particular cases not already referred to by the CJEU in its decision) or the Explanations?

The Court has recognised in its case-law the applicability of Article 10 to civil servants in general (see *Vogt v. Germany*, 26 September 1995, § 53, Series A no. 323, and *Guja v. Moldova* [GC], no. 14277/04, § 52, ECHR 2008), and members of the judiciary (see, among many others, *Wille*, cited above, §§ 41-42; *Harabin v. Slovakia* (dec.), no. 62584/00, ECHR 2004?VI (“*Harabin* (dec.), 2004”); and *Baka*, cited above, § 140). In cases concerning disciplinary proceedings against judges or their removal or appointment, the Court has had to ascertain first whether the measure complained of amounted to an interference with the exercise of the applicant's freedom of expression – in the form of a “formality, condition, restriction or penalty” – or whether the impugned measure merely affected the exercise of the right to hold a public post in the administration of justice, a right not secured in the Convention. In order to answer this question, the scope of the measure must be determined by putting it in the context of the facts of the case and of the relevant

legislation (see Wille, cited above, §§ 42-43; Harabin (dec.), 2004, cited above; Kayasu v. Turkey, nos. 64119/00 and 76292/01, §§ 77-79, 13 November 2008; Kudeshkina, cited above, § 79; Poyraz v. Turkey, no. 15966/06, §§ 55-57, 7 December 2010; Harabin v. Slovakia, no. 58688/11, 20 November 2012; Baka, cited above, § 140; and Miroslava Todorova v. Bulgaria, no. 40072/13, § 153, 19 October 2021); Where the Court has found that the measures complained of were exclusively or principally the result of the exercise by an applicant of his or her freedom of expression, it has taken the view that there was an interference with the right under Article 10 of the Convention (see Baka, cited above, § 151; Kayasu, cited above, § 80; Kudeshkina, cited above, §§ 79-80; and Cimperšek v. Slovenia, no. 58512/16, § 58, 30 June 2020). In cases where it has, by contrast, considered that the measures were mainly related to the applicant's capacity to perform his or her duties, it found that there had been no interference under Article 10 (see Harabin, judgment cited above, § 151; Köseoğlu v. Turkey (dec.), no. 24067/05, §§ 25-26, 10 April 2018; Simić v. Bosnia and Herzegovina (dec.), no. 75255/10, § 35, 15 November 2016; Harabin (dec.) 2004, cited above; and Miroslava Todorova, cited above, § 154); to that end the Court takes account of the reasons relied upon by the authorities to justify the measures in question (see, for example, Harabin (dec.), 2004, cited above; Kövesi v. Romania, no. 3594/19, §§ 184-187, 5 May 2020; and Goryaynova v. Ukraine, no. 41752/09, § 54, 8 October 2020) together with, if appropriate, any arguments submitted in the context of subsequent appeal proceedings (see Kudeshkina, cited above, § 79; Köseoğlu, cited above, § 25; and, mutatis mutandis, Nenkova-Lalova v. Bulgaria, no. 35745/05, § 51, 11 December 2012). It must nevertheless carry out an independent assessment of all the evidence, including any inferences to be drawn from the facts as a whole and from the parties' submissions (see Baka, cited above, § 143). It must in particular take account of the sequence of relevant events in their entirety, rather than as separate and distinct incidents (ibid., § 148; see also Kövesi, § 188 and Miroslava Todorova, § 155, both cited above).

[Did the national court quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports?](#)

The Court quoted: The Basic Principles on the Independence of the Judiciary; UN Special Rapporteur on the independence of judges and lawyers Report on freedom of expression, association and peaceful assembly of judges and prosecutors; Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, adopted on 17 November 2010; The report of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe of 6 January 2020 entitled "The functioning of democratic institutions in Poland" (doc. 15025); The report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe of 5 January 2021 entitled "Judges in Poland and in the Republic of Moldova must remain independent" (doc. 15204); The Commissioner for Human Rights, Ms Dunja Mijatović carried out a visit to Poland from 11 to 15 March 2019. The report from her visit, published on 28 June 2019; The Venice Commission, in its report on the Freedom of Expression of Judges, adopted at its 103rd Plenary Session (Venice, 19-20 June 2015, CDL-AD(2015)018; Opinion no. 3 of the CCJE on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality adopted on 19 November 2002; The Magna Carta of Judges (Fundamental Principles); The Sofia Declaration adopted by the General Assembly of the ENCJ on 7 June 2013.

[Did the national court take into account national case law on fundamental rights?](#)

NO

If the court that issued the preliminary reference is not a last instance court, and the “follow up” was appealed before a higher court, include the information

Not applicable

Was there a consensus among national courts on how to implement the CJEU's preliminary ruling; and were there divergences between the judiciary and other state powers regarding the implementation of the preliminary ruling?

Not applicable

Impact on national case law from the same Member State or other Member States

Not applicable

Connected national caselaw / templates

Not applicable

Other

Not applicable

(Link to) full text

[https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-217705%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-217705%22]})

Author

Jarosław Gwizdak, Institute for Law and Society (INPRIS)
