Submissions of the Commissioner for Human Rights
at the hearing in the case of *Grzęda v. Poland* (43572/18)
ECtHR, Grand Chamber, 19 May 2021

Representatives of the Commissioner for Human Rights at the hearing:

dr hab. Maciej Taborowski (Deputy Commissioner for Human Rights),
Mirosław Wróblewski (Director, Department of Constitutional, International and European Law),
dr Paweł Filipek (Chief Specialist, Department of Constitutional, International and European Law) – oral submissions

Plan
[Opening]
My first point refers to the need to ensure Council judge-members protection against (arbitrary) removal
Yet, this has happened. And this leads onto my second point: a judge-member of the Council has a right of access to a court to challenge the *ex lege* premature termination of his or her mandate (the *Eskelinen* test)
My third point concerns the defective, (partially) 'captured' Constitutional Tribunal
My fourth point addresses the consequences of changes made to the Council in 2018
In my concluding remarks, on behalf of the Commissioner for Human Rights, I wish to make three submissions:

[Opening]

Distinguished Members of the Court,

1. The Commissioner for Human Rights welcomes the Court's decision to **give priority** to applications concerning changes in the Polish judicial system and to consider them as **a matter of urgency**. Indeed, time is of the essence **to stop and reverse** unlawful changes in the judiciary, and bring the situation back into line with the rule-of-law standards of the Polish Constitution, the Convention, and the EU law.

2. Although this case is – *in concreto* – an individual application; it relates to issues of the highest systemic importance.

3. The changes in the National Council of the Judiciary (henceforth: the Council) that affected the applicant and the subsequent actions taken by domestic bodies – have undermined the separation of powers and credibility of judicial nomination procedure. They have impeded effectiveness of judicial review and weakened the protection of human rights.

4. When considering this case, the Court will necessarily be reflecting on judicial independence, a basic premise for the rule of law – from which "the whole Convention draws inspiration"[1] and which is "inherent in all the Articles of the Convention".[2]

5. I respectfully submit, on behalf of the Commissioner for Human Rights, **four specific points** for your consideration:

My first point refers to the need to ensure Council judge-members protection against (arbitrary) removal

6. The protection of Council judge-members should be derived, first – from their status as judges as such, – and, second – from the crucial function which the Constitution entrusts to the Council. This protection should be equivalent to the protection against removal offered to adjudicating judges. The **following elements should, we submit, be jointly taken into account**:

7. **(1)** The Council has been entrusted with the role of guaranteeing the independence of courts and judges. Hence, the status of this body and of its members must **ensure that it is capable of carrying out this mission**. This has been also articulated in the rulings of the Court of Justice of the European Union, in particular, in **(i)** the *A.K.* judgment, para. 138 et subseq;[3] **(ii)** the *Independence of the Supreme Court* judgment, para. 116,[4] and **(iii)** the suspension decision of the Disciplinary Chamber of the Supreme Court, para. 69 et subseq.[5]

8. **(2)** The Constitution requires that the majority of the Council members be judges – to ensure that **persons with attributes of independence have a decisive say in it**. For this reason, judges' independence should equally be guaranteed within the Council.

9. **(3)** The Council directly **influences the status of judges**. It nominates for judicial positions. It participates in judges' promotion, dismissal and early retirement. It is, therefore, essential that **there is no gap** in the protection of judicial independence at this juncture of the State's structure.

10. **(4)** The independence of judges must be **absolute**. It must not be interfered with under any circumstances.

11. **(5)** The independence of judges is also **indivisible**. Office holders should be protected in all situations of public activity to which they are **assigned as judges**.

---

[1] E.g. *Lekić v Slovenia* [GC], 6480/07, 11.12.2018, para. 94.
[2] *Rozkhov v. Russsia* (No 2), 38898/04, 31.01.2017, para 76.
[3] C-585/18, 624/18 and 625/18 *A.K. and others*, 19.11.2019.
[4] C-619/18 *Commission v. Poland*, 24.06.2019.
[5] C-791/19 R, *Commission v Poland*, 8.04.2020.

12. It cannot be assumed that before noon – while adjudicating – a judge is independent, while in the afternoon – when carrying out other public tasks, yet **also as a judge** – he or she may be subject to pressure or external influence. Were this to occur, participation of judges in the Council **would have no added value**, and the **basic premise upon which the notion of a judicial council is founded would be undermined**.

13. It is therefore clear that judge-members **should not have been removed in the first place**.

Yet, this has happened. And this leads onto my second point: a judge-member must have access to a court to challenge the *ex lege* premature termination of his or her mandate (the *Eskelinen* test)

14. Under national law, judicial members of the Council enjoy a constitutionally guaranteed right to serve a four-year term (Art. 187(3) Constitution). This four-year term can only be terminated on the grounds set out in the law at the time of their election.[6] The legislature cannot – during the ongoing term of office – introduce new grounds for premature interruption of tenure, which would result in retroactive annulment of the right to a full term, as indicated in the *Baka* judgment, para. 110.[7]

15. Yet, this is exactly what happened in Poland. The mandate of judge-members was terminated by a legislative amendment in 2018. It produced *ex lege* effect, and prevented them from having access to judicial review.

16. **This cannot be reconciled with your Court's case-law**, for example as indicated in para. 114 in the *Kövesi* case.[8]

My third point concerns the role of the defective, (partially) 'captured' Constitutional Tribunal

17. The government seeks to justify changes to the Council by invoking a ruling of the Constitutional Tribunal of 2017 (case K 5/17), confirmed in 2019 (case K 12/18). This argument should **be rejected and the rulings disregarded**.

18. The current Constitutional Tribunal **does not offer a genuine 'constitutional review' of the law**. Instead, it is used to legitimise action of national authorities which are in breach of the Constitution. It departs from previous rulings with no real justification.

---

[6] … such as death, resignation, retirement etc, Art. 14 (1) Act on National Council of the Judiciary.
[7] *Baka v. Hungary* [GC], 20261/12, 23.06.2016
[8] "[S]hould [a person's] office be terminated at an earlier stage against that person's consent by way of dismissal, specific reasons must be put forward, and he or she must have standing to apply for judicial review of that decision", *Kövesi v. Romania*, 3594/19, 5.05.2020.

19. Both rulings involved persons appointed in manifest violation of the Constitution, who were **unlawfully appointed** to positions that had not been vacant. This alone disqualifies these rulings.

20. Your Court has already held in *Xero Flor against Poland* (judgment of 7 May 2021) that participation of such a person in the adjudicating panel violated Article 6 of the Convention, since such a body **was not "established by law"** (see, notably, para. 290).

My fourth point addresses the consequences of changes made to the Council in 2018

21. The Constitution specifies that although the Council is composed of representatives of all three branches of government, the judiciary forms **a large majority** within it (17 out of 25 seats are for judges) and 15 judge-members are **elected by their peers**. This was confirmed by the Constitutional Tribunal in 2007 (case K 25/07).

22. The premature termination of the Council's term of office and the election of new judge-members, no longer by judges but, instead – by the Sejm – was a manifest breach of the Constitution. This is not only the Commissioner's assessment. It has been jurisprudentially confirmed by the Polish **Supreme Court**.[9] Indeed, the **Court of Justice of the European Union** in two consecutive judgments pointed to these changes as relevant circumstances assessing the Council's independence, see: *A.K.* judgment, para. 143, as confirmed in its *A.B.* judgment of 2 March 2021, para. 131. These conclusions were also shared by the **Supreme Administrative Court** in its recent rulings of 6 of May 2021.[10] The Court overturned the controversial resolution of 28 August 2018, in the part in which the 'new' Council recommended appointments to the Supreme Court (para. 7.6).

23. These changes in the Council's composition are widely considered unconstitutional. Yet these very changes gave the ruling majority capacity to reconstitute the Council's composition **at will**, so as to influence the judicial appointment procedure and granted – *de facto* – the ruling party **a discretionary power to appoint judges** in Poland.

24. As a consequence, the political majority has been able to **influence the content of judicial decisions in a part of the Polish judiciary**. The ultimate goal appears to be, first – to **exclude any genuine review** of the actions of the ruling majority, secondly – to **protect arbitrary decisions** of the government.

25. In the context of nominations to the Supreme Court, Advocate General Tanchev, one month ago, concluded in his Opinion that the act of appointment by the President of the Republic – following

[9] E.g. SC Resolution of 23.01.2020, para. 31.
[10] II GOK 2/18.

a defective procedure before the 'new' Council – **constituted a flagrant and deliberate breach of law** (C-487/19 *W.Ż.*, paras. 63 and 85).

26. Moreover, in a series of decisions of 15 July 2020, the Supreme Court itself characterised the new appointment practice of the Council and the President as:

> "a special 'transfer window' in the Polish legal system, when the appointments to serve in the Supreme Court were handed out in flagrant and manifest violation of the constitutional standard and in full awareness of all parties concerned".[11]

In my concluding remarks, on behalf of the Commissioner for Human Rights, I wish to make three short submissions:

27. ***First***, the proper functioning of the domestic justice system necessitates **independence and objectivity** of the Council. Crucial for the fulfillment of the Council's mission is the participation of independent judges, who must be guaranteed **adequate legal protection** in the exercise of their function within the body for the entire term of office for which they were elected.

28. ***Second***, the early termination – in 2018 – of the term of office of the then judicial members of the Council, was **an aberration** of this general principle.

29. The methodology already adopted by the Court of Justice of the European Union, namely: **(a)** the 'cumulative assessment' of all relevant circumstances: *A.K.* judgment, para. 152; and **(b)** the identification of the 'true aims' of the ruling majority: *A.B.* judgment, para. 138; *Idependence of the Supreme Court* judgment, para. 87 – reveal **the full picture**.

30. The changes in the Council in 2018 were, indeed, **part of a planned strategy to take control of the process of appointing judges** and, by so doing, influence the content of judicial decisions.

31. ***Third***, the said changes violated the Constitution and created a permanent state of unlawfulness, **undermining all acts of the Council**, including judicial nominations. Attempts to 'legitimise' the changes with rulings of the Constitutional Tribunal remain ineffective. The Tribunal rendered them in an unlawful composition, and indeed, the Tribunal itself has abdicated its function in upholding the Constitution.

I thank the members of the Court for their attention.

[11] SC referral decision of 15.07.2020 to CJEU, C-491/20. Similar conclusions appear in 6 other decisions.