

## Legislation lowering retirement age to 60 for female judges in violation of Convention

In today's **Chamber judgment**<sup>1</sup> in the case of [Pajak and Others v. Poland](#) (applications nos. 25226/18, 25805/18, 8378/19 and 43949/19), the European Court of Human Rights held, by a majority (5 votes to 2), that there had been:

**a violation of Article 6 § 1 (right of access to a court)** of the European Convention on Human Rights in respect of all applicants, and

**a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private life)** in respect of the three applicants who had lodged complaints under those provisions.

The case concerned four judges who complained about legislative amendments that had lowered the retirement age for judges from 67 to 60 for women, and to 65 for men, and had made the continuation of a judge's duties after reaching retirement age conditional upon authorisation by the Minister of Justice and by the National Council of the Judiciary ("the NCJ").

The Court took the view that judges should enjoy protection from arbitrary decisions by the legislative and executive powers and that only oversight by an independent judicial body of the legality of a disputed measure was able to render such protection effective. In the present case, it found that the decisions taken in respect of each applicant by the Minister of Justice and by the NCJ had constituted arbitrary and unlawful interference, in the sphere of judicial independence and protection from removal from judicial office, on the part of the representative of executive authority and the body subordinated to that authority. It concluded that the applicants' right of access to a court had thereby been impaired in its very essence.

The Court also found that the legislation complained of had clearly introduced a difference in treatment, on the ground of sex, as to the mandatory retirement age for members of the same profession. It noted that the applicants' working life had ceased five years earlier than that of male judges in similar circumstances, and that their compulsory early retirement had had obvious negative repercussions on their careers and their prospects in terms of professional and personal development.

### Principal facts

The applicants, Lucyna Pajak, Marta Kuzak, Elżbieta Kabzińska and Danuta Jezierska, are Polish nationals who were born between 1953 and 1957 and live in Poland.

In 2017 and 2018 the Law of 12 July 2017 (amending the Ordinary Court Organisation Act – Law of 27 July 2001 "the Pusp Act" – and certain other laws), the Law of 16 November 2016 (amending the Social Insurance Fund Retirement and Pensions Act and certain other laws) and the Law of 12 April 2018 (further amending the Pusp Act) all entered into force.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).

As a result of the entry into force of these laws the retirement age for judges was lowered from 67 to 60 for women, and to 65 for men. This legislation also made the continuation of a judge's duties after reaching retirement age conditional upon authorisation by the Minister of Justice and by the NCJ.

At the relevant time, the applicants, who were judges, had all reached the age of 60. Wishing to continue in their posts as judges until the age of 70, they requested authorisation to do so from the Minister of Justice, but their requests were unsuccessful. One of them (Ms Kabzińska) also lodged a request with the NCJ, without success. In addition, Ms Jezierska challenged the Minister's decision before the Supreme Court, which declared her application inadmissible.

Before the Court, the applicants complained that no legal remedy had been available to them by which to challenge the refusal on the part of the Minister of Justice and the NCJ to authorise the continuation of their duties as judges after reaching retirement age. Three applicants (Ms Pająk, Ms Kuzak and Ms Jezierska) further alleged that the new legislation was incompatible with the principle of non-discrimination on grounds of sex and age.

## Complaints, procedure and composition of the Court

All the applicants relied on Article 6 (right of access to a court) of the Convention.

Ms Pająk, Ms Kuzak and Ms Jezierska also relied on Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private life) of the Convention.

The applications were lodged with the European Court of Human Rights between May 2018 and August 2019.

Judgment was given by a Chamber of seven judges, composed as follows:

Marko **Bošnjak** (Slovenia), *President*,  
Krzysztof **Wojtyczek** (Poland),  
Péter **Paczolay** (Hungary),  
Erik **Wennerström** (Sweden),  
Raffaele **Sabato** (Italy),  
Lorraine **Schembri Orland** (Malta),  
Ioannis **Ktistakis** (Greece),

and also Renata **Degener**, *Section Registrar*.

## Decision of the Court

### [Article 6 \(relied on by all applicants\)](#)

#### ***Applicability of the civil limb of Article 6 of the Convention***

The Court took the view that judges should enjoy protection from arbitrary decisions by the legislative and executive powers and that only oversight by an independent judicial body of the legality of a disputed measure was able to render such protection effective.

It clarified that access to a court was thus to be guaranteed, as a general principle, where the cessation of a judge's duties or premature termination of office without cessation of duties were at stake, whether for disciplinary reasons or as a result of the enactment of new rules.

It considered that the civil limb of Article 6 of the Convention was applicable to the present case and that the applicants had been entitled to have their cases heard by a "tribunal" within the meaning of that provision.

**Applicants' right of access to a court**

The Court observed that the Court of Justice of the European Union (CJEU) had found, in its judgment of 5 November 2019<sup>2</sup>, that the ministerial decision whether or not to authorise judges to continue to carry out their duties beyond the new retirement age had not been subject to judicial review at the relevant time.

The Government submitted that the Minister of Justice's decision had been subject to review by the administrative courts and that the NCJ's decision to the same effect could have been challenged before the Supreme Court. However, the examples drawn from the case-law submitted by the Government did not support the conclusion that there had been a domestic practice in place at the relevant time that had afforded the applicants access to a court.

The combined effect of the legislation lowering the retirement age to 60 for female judges and the refusal on the part of the Minister of Justice and the NCJ, respectively, to authorise the applicants to continue performing their duties after reaching retirement age had therefore forced the latter into retirement between five and nine years earlier than anticipated. They had been purely and simply removed from the judiciary.

In the Court's view, the measures complained of had constituted interference with the applicants' judicial duties on the part of the Minister of Justice and the NCJ respectively. In addition, the applicants' compulsory retirement had failed to meet any of the fundamental requirements of procedural fairness: no reasons had been given for the ministerial decisions and the reasoning contained in the NCJ's decision concerning Ms Kabzińska had been brief and formulaic.

The Court took the view that, in a legal framework such as the one in the present case, where the power to decide on the length of judges' terms of office lay with the representative of the executive and with the NCJ, which was subordinated to the political authorities, the lack of any judicial review of such decisions could not be in the State's interest.

It considered that the national legal framework – as applied to the applicants – failed to protect them in any way from arbitrary termination of their duties as judges, and that the decision taken in respect of each applicant had constituted arbitrary and unlawful interference, in the sphere of judicial independence and protection against removal from judicial office, on the part of the representative of executive authority and the body subordinated to that authority.

Lastly, the Court held that, in the event of early termination of judges' duties, as unilaterally decided by the representative of the executive and the body subordinated to it, serious reasons should be given to justify an exceptional absence of judicial review. The Government had failed, however, to provide the Court with any such reasons.

Consequently, the respondent State had impaired the applicants' right of access to a tribunal in its very essence. **There had therefore been a violation of the right of access to a tribunal in respect of each applicant.**

**Article 14 taken in conjunction with Article 8 (relied on by Ms Pająk, Ms Kuzak and Ms Jezierska)**

The Court found that the legislation complained of had clearly introduced a difference in treatment, on the ground of sex, as to the mandatory retirement age for members of the same profession.

It observed that the applicants' profession had been intellectual in nature and pointed out that the biological differences between men and women and any potential considerations as to the role of

<sup>2</sup> Judgment of 5 November 2019 in the *European Commission v. Poland* case (Independence of ordinary courts) C-192/18, EU:C:2019:924.

women in society were immaterial to the aptitude of either sex to engage in professions of that nature.

It noted that the Government had produced no evidence capable of convincing the Court that female judges having reached the age of 60 in general, or the applicants in particular, were less able than male judges in a similar situation to discharge their professional duties properly.

In addition, the Court was especially concerned about the duty imposed on the aforementioned class of female judges to demonstrate, by means of a medical certificate, that they were still intellectually apt to sit as judges. It therefore considered that there had been a difference in treatment between persons in similar situations, on the ground of sex.

The Court further observed that the CJEU had found (in its judgment of 5 November 2019) that the relevant national legislation was contrary to European rules on equal treatment. It saw no reason to arrive at a different conclusion from that of CJEU, and noted that, despite the delivery of that judgment, the applicants' circumstances had not changed and, where they were concerned, the discrimination complained of remained firmly in place.

It also noted that the applicants' working life had ceased five years earlier than that of male judges in similar circumstances, and that their compulsory early retirement had had obvious negative repercussions on their careers and their prospects in terms of professional and personal development.

The Court found that the loss of earnings the applicants alleged to have sustained in relation to male judges had been made out. It considered that the discriminatory effect of the measures in question *vis-à-vis* the applicants had been aggravated by the lack of opportunity for them to find such employment in retirement as to enable them to attain satisfactory professional fulfilment. **There had therefore been a violation of Article 14 in conjunction with Article 8 in respect of Ms Pająk, Ms Kuzak and Ms Jezierska.**

#### Just satisfaction (Article 41)

The Court held that Poland was to pay Ms Pająk, Ms Kuzak and Ms Jezierska 26,000 euros (EUR) each, and Ms Kabzińska EUR 20,000, in respect of pecuniary and non-pecuniary damage. It further held that Poland was to pay Ms Pająk and Ms Kuzak EUR 600, jointly, in respect of costs and expenses.

#### Separate opinion

Judges Wojtyczek and Paczolay expressed a joint dissenting opinion. That opinion is annexed to the judgment.

*The judgment is available only in French.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.