A New Nail in the Coffin for the 2017 Polish Judicial Reform

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On 1 December the Grand Chamber of the ECtHR gave an important ruling that may have wide-reaching implications for the ongoing attempts to curb the rule of law backsliding in Poland and other countries (*Guðmundur Andri Ástráðsson v. Iceland*, Application no. 26374/18). The case addresses the appointment of judges, and the way this affects the status of a court as a "tribunal established by law" in the meaning of Article 6 of the ECHR. It puts in question the 2017 Polish Judicial Reform and whether decisions taken by Polish courts where judges appointed by the new politically controlled National Council for the Judiciary can be regarded as decisions by a "tribunal established by law". This would affect both the new disciplinary tribunal of the Supreme Court and the so-called "Muzzle Law" that prohibits Polish judges from questioning the legitimacy of a judge appointed by the Polish President.

The background

On 26 May 2016 Iceland introduced a new court of second instance in the Icelandic judicial system, namely the Court of Appeal (*Landsréttur*), thereby replacing the former two-tier system – consisting of District Courts and the Supreme Court – with a three-tier system.

Subsequently a call for applications was issued for the posts of fifteen judges at the Court of Appeal. Thirty-three were qualified applicants were assessed for the posts by an Evaluation Committee appointed according to Icelandic law. The Committee, an independent administrative body, is advisory vis-à-vis the Minister of Justice and the Minister can only appoint candidates who are considered by the Committee to be the most qualified for a given post. In order to appoint a candidate who had not been considered the most qualified by the Committee, the Minister of Justice must obtain the approval of Parliament.

The Committee found that all thirty-three candidates were legally qualified, but it proposed a list of fifteen candidates whom it deemed to be the most qualified. In a letter dated 29 May 2017, the Minister of Justice presented to the Speaker of Parliament her proposal of fifteen candidates for appointment. The proposal contained only eleven of the fifteen candidates whom the Evaluation Committee had found to be the most qualified for the post of judge at the Court of Appeal. The candidates ranked 7th, 11th, 12th and 14th4 in the Committee's evaluation table had been removed from the list, and replaced with four other candidates ranked 17th, 18th, 23rd and 30th. The proposal was accepted by a majority of the Parliament, voting along party lines, and confirmed by the President of Iceland.

On 23 March 2017 the applicant was convicted on the charges of driving without a valid driving license and driving under the influence of drugs. The appeal was transferred to the newly established Court of Appeal. The Court of Appeal notified the applicant and the prosecution of the date of the trial as well as the composition of the court that would be hearing the case. According to this letter, the Court would be composed of three judges, including A.E., who was one of four judges who had been proposed by the Minister of Justice for appointment to that court in breach of the procedural rules for appointment of judges. The applicant requested that A.E. withdraw from the case, on account of the irregularities in the procedure by which she, and the other three candidates in question, had been appointed as judges to the Court of Appeal. The Court of Appeal, with the participation of A.E., rejected the applicant's motion. This was upheld by the Supreme Court. The applicant complained to the ECtHR that his criminal conviction had been upheld by a "tribunal" which was not "established by law" and which was not independent and impartial, in violation of Article 6 § 1 of the Convention.

The findings of the ECtHR

The Court noted (in paragraph 226) that the process of appointment of judges may be open to undue interference, and found that it therefore calls for strict scrutiny; moreover, it is evident that breaches of the law regulating the judicial appointment process may render the participation of the relevant judge in the examination of a case "irregular", and (paragraph 227) that a judge appointed in contravention of the relevant rules may lack the legitimacy to serve as a judge. It went on to state: "Having regard to its fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law, the Court considers that the process of appointing judges necessarily constitutes an inherent element of the concept of ‚establishment' of a court or tribunal ‚by law', and an interpretation to the contrary would defy the purpose of the relevant requirement."

It recognized, however, that a finding that a court is not a "tribunal established by law" may, evidently, have considerable ramifications for the principles of legal certainty and irremovability of judges, principles which must be carefully observed having regard to the important purposes they serve. In order to do the necessary balancing, the court introduced three criteria that, taken cumulatively, should provide a solid basis to guide the Court – and ultimately the national courts – in the assessment as to whether the irregularities in a given judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law, and whether the balance between the competing principles has been struck fairly and proportionately by the relevant State authorities in the particular circumstances of a case.

The Court considered in the first place that there must, in principle, be a manifest breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable as such (paragraph 244). Secondly, the breach in question must be assessed in the light of the object and purpose of the requirement of a "tribunal established by law", namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and

the separation of powers (paragraph 246). Thirdly, the Court considered that the review conducted by national courts, if any, as to the legal consequences – in terms of an individual's Convention rights – of a breach of a domestic rule on judicial appointments plays a significant role in determining whether such breach amounted to a violation of the right to a "tribunal established by law", and thus forms part of the test itself (paragraph 248).

The Grand Chamber did not to review the judicial appointment system that is in place in Iceland. It pointed out that there are a variety of different systems in Europe for the selection and appointment of judges, rather than a single model that would apply to all countries. The Court reiterated in this connection that although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in its case-law, appointment of judges by the executive or the legislature is permissible under the Convention, provided that appointees are free from influence or pressure when carrying out their adjudicatory role.

It did, however, seize the opportunity to refine and clarify the meaning to be given to the concept of a "tribunal established by law", and to analyse its relationship with the other "institutional requirements" under Article 6 § 1, namely, those of independence and impartiality. The Court stressed that the absence of a manifest breach of the domestic rules on judicial appointments does not as such rule out the possibility of a violation of the right to a tribunal established by law. There may indeed be circumstances where a judicial appointment procedure that is seemingly in compliance with the relevant domestic rules nevertheless produces results that are incompatible with the object and purpose of that Convention right. In such circumstances, the Court must pursue its examination under the second and third limbs of the test set in order to determine whether the results of the application of the relevant domestic rules were compatible with the specific requirements of the right to a "tribunal established by law" within the meaning of the Convention (paragraph 245). It also underlined that Court will in principle defer to the national courts' interpretation and application of domestic law – unless their findings are arbitrary or manifestly unreasonable.

The Court found that all three elements of the test applied to the Icelandic case so that there had been a breach of the right to trail by a tribunal established by law in the case. To the argument of the Icelandic government that the Supreme Court had reached the conclusion that the right was not breached, after having examined all relevant matters concerning A.E.'s appointment and the applicant's right to be heard by a tribunal established by law, the Court noted (paragraph 281) that such examination was "not reflected in the judgment, and as such it remains unknown what that examination entailed and on what legal and factual grounds the Supreme Court reached the conclusion that it did."

The significance of the case

The significance of the judgement must be assessed on the background of the ongoing changes in the relationship between the judiciary and the legislative and

executive powers in notably Hungary and Poland. These changes also affect the system for the appointment of judges. For these reasons it is of particular importance that the Grand Chamber emphasizes that the national law can itself breach the ability of the judiciary to perform its duties free of undue interference, and that the acceptance of such rules by the national courts need not be decisive for the assessment under the convention if their findings are arbitrary or manifestly unreasonable, or unsubstantiated by the reasoning of the court.

It is also of significance that the rulings by judges appointed under irregular circumstances cannot be recognized as rulings by a tribunal established by law, even if there are no indications of this having influenced the proceedings or the outcome of the particular case. The implications of this for the recognitions of rulings by Polish courts may be far-reaching and may imply that many rulings by these courts no longer should be recognized by other European Courts as decisions by tribunals established by law. This could entail that it is a violation of the convention for authorities in other European states to cooperate with the judicial system in Poland in giving effect to such rulings, without allowing for a full hearing of the substance of the case in a national court.
