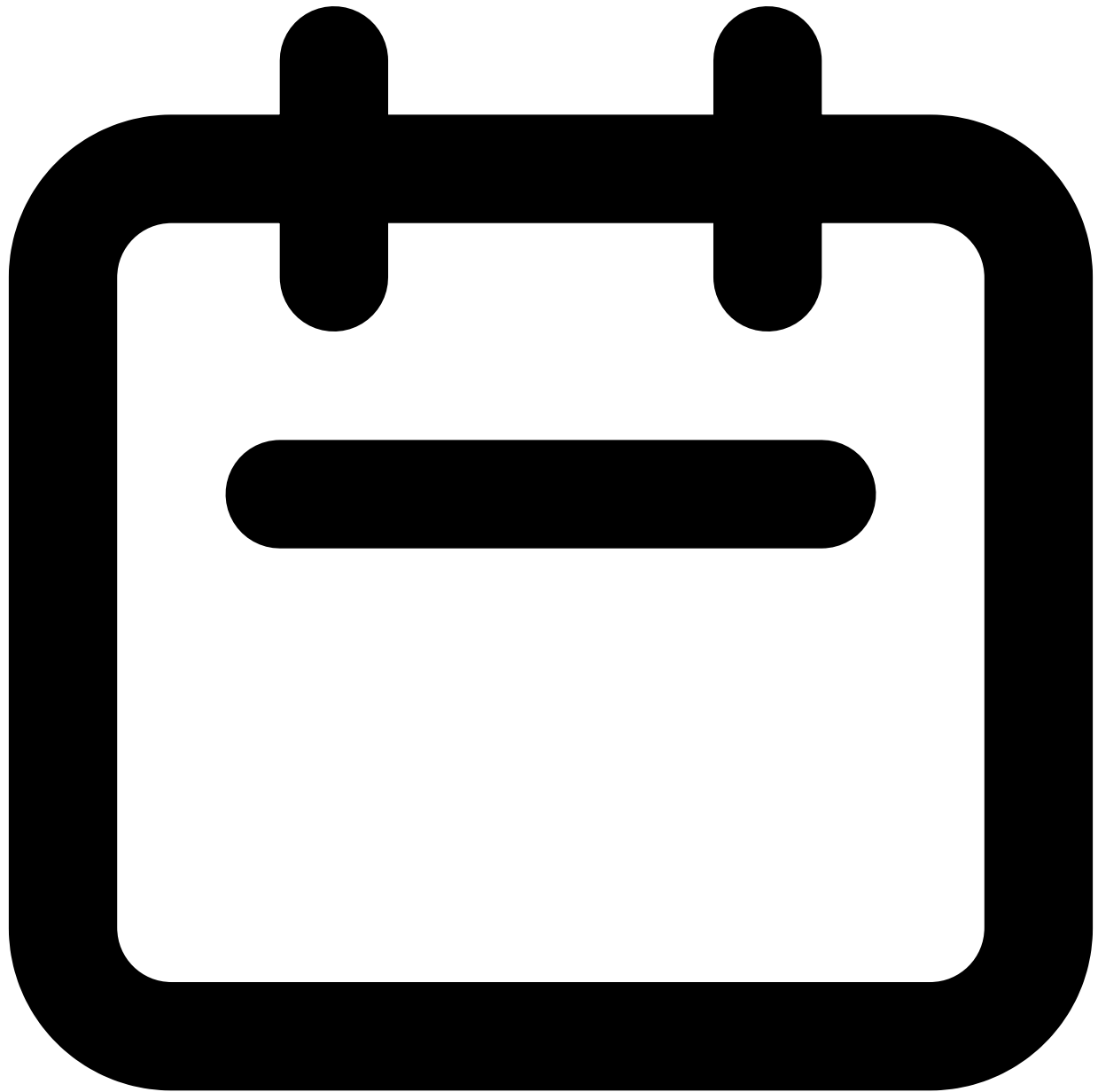


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The Polish Judicial Reforms under the Grand Chamber's Scrutiny: Much Fog About Nothing? A comment of Grzęda v. Poland



May 26, 2022

By Cecilia Rizcallah and Elisabeth David

On 15 March 2022, the Grand Chamber of the European Court of Human Rights (hereafter “the Court”) found Poland in violation of Article 6(1) (right to a fair trial) of the European Convention on Human Rights and Fundamental Freedoms (“ECHR”) in the case of [Grzęda v. Poland](#). There have been several judgments issued by the Chamber of the First section of the Court on the independence of the judiciary in Poland in relation to the various judicial reforms that have taken place (see [Xero Flor w Polsce sp. z o.o. v. Poland](#), discussed [here](#), [Broda and Bojara v. Poland](#), and [Reczkowicz v. Poland](#), discussed [here](#)). Nevertheless, while the Grand Chamber of the Court of Justice of the European Union has already examined several times the contested Polish judicial reforms (see, for instance, the case [Commission v. Poland](#)), *Grzęda* is the first judgment rendered in Strasbourg by the Grand Chamber.

In the present case, the Grand Chamber ruled that Mr Grzęda’s, at the time a judge at the Polish Supreme Court, removal from the National Council of the Judiciary (“NCJ”) before the end of his term and his inability to get a judicial review of that decision breached his right to access a court. In spite of its length (151 pages), this judgment does not bring that many new elements under the sun of the right to judicial independence. As stressed by judge Paul Lemmens in his concurring opinion, “what the present judgment adds to the existing case law on that issue is the explicit endorsement by the Grand Chamber. Nothing less, but also nothing more”. However, the complexity of some of the arguments developed in the judgment brings more fog to the jurisprudence of the European Court of Human Rights.

Three main legal points deserve some attention. The first one is of procedural nature and concerns the relinquishment of the case to the Grand Chamber. On a

more substantial note, the second interesting legal issue concerns the admissibility of the case with regard to Article 6 of the Convention. The question was whether the premature termination of the applicant's term of office as a judicial member of the NCJ, while he still remains a serving judge, fell within the ambit of Article 6(1) of the ECHR under its civil limb. Finally, the third legal point of attention concerns the merits of the case, and more precisely if similar procedural safeguards to those that apply to the dismissal of judges should also be available in the removal of a judicial member of the NCJ from his or her position. We will tackle these issues after recalling the factual background of the case.

Factual background of the case

In January 2016, Mr Grzęda, who was at that time a judge of the Polish Supreme Administrative Court, was elected by the General Assembly of Judges of the Supreme Administrative Court as a member of the NCJ for a four-year term of office, supposed to last until 11 January 2020. In the context of the large-scale judicial reform undertaken in Poland, the parliament, or *Sejm*, adopted the Act Amending the Act on the NCJ ("the 2017 Amending Act") in December 2017. The 2017 Amending Act terminated the mandate of all 15 judges sitting on the NCJ and transferred the power to elect the fifteen judicial members of the NCJ to the *Sejm*. The legislators justified this step by invoking the need to implement the [judgment of the Constitutional Tribunal of 20 June 2017](#), which had ruled that the provisions setting out the rules for electing NCJ members appointed by the judiciary and introducing 'individual' terms of office for each elected member of the NCJ were unconstitutional.

Mr Grzęda complained about the fact that the 2017 Amending Act did not provide for any procedure, judicial or otherwise, to contest the premature termination of his term of office. Since the law did not provide the prematurely recalled members of the NCJ with any remedy against their dismissal, he turned to the Strasbourg Court, lodging an application in which he complained of a breach of Convention Article 6(1) (right to a fair trial) and Article 13 (right to an effective remedy). On 10 November 2020, the Chamber gave notice to the parties of its intention to relinquish jurisdiction to the Grand Chamber in accordance with Article 30 of the ECHR.

As repeated many times by the Court, and as emphasized by several intervening parties, the present dispute is taking place in an 'overall context of the various reforms undertaken by the Polish Government which have resulted in the weakening of judicial independence and adherence to rule-of-law standards' (§346). In this particular context, the Court referred to its judgments related to the reorganization of the Polish judicial system (these are the cases mentioned *supra* namely *Xero Flor, Broda and Bojara, Reczkowicz*), as well as the cases decided by the Court of Justice of the European Union (see namely [Judgment of 19 November 2019 in A.K. and Others](#) (*Independence of the Disciplinary Chamber of the Supreme Court*), and [Judgment of 2 March 2021. A.B. and Others](#) (*Appointment of judges to the Supreme Court – Actions*)).

Analysis

The relinquishment to the Grand Chamber

As underlined in our introduction a first, more procedural, a comment can be made in relation to the case's relinquishment in favour of the Grand Chamber of the Court. This point was also raised by Judge Wojtyczek in his dissenting opinion.

There are two ways in which a case can be brought in front of the Grand Chamber of the Court: either, by way of referral, by one of the parties, of a Chamber's judgment (article 43 of the ECHR) or by way of relinquishment by a Chamber. In relation to the latter, Article 30 of the ECHR – as in force at the moment of the introduction of the application – allows the Chamber to relinquish jurisdiction in favour of the Grand Chamber, 'unless one of the parties to the case objects' where a case pending before a Chamber raises a serious question affecting the interpretation of the ECHR or the Protocols thereto, or where the resolution of a question might have a result inconsistent with a judgment previously delivered by the Court. In this context, Rule 72, §4 of the Rules of Court provides that if a party objects to relinquishment, such an objection should be 'duly reasoned'.

In the present case, the Chamber proposed to relinquish jurisdiction to the Grand Chamber. As underlined by S. Talmon '[this decision may have been motivated by the fact that 27 other applications were pending before the Court relating to various aspects of the reform of the judicial system in Poland](#)'. The Polish Government objected this proposal. Nevertheless, the Chamber [decided](#) on 9 February 2021 that Poland's objection could not be considered 'duly reasoned' and that it was unable to accept the objection.

The Grand Chamber took note of the Chamber's decision to relinquish jurisdiction and of the rejection of the Government's objection to relinquishment. The Grand Chamber further noted that the Government had not challenged the Chamber's decision in the proceedings before it. Accordingly, the Grand Chamber took no position on the Chamber's decision to relinquish jurisdiction or the reasons underlying that decision and proceeded with the examination of the case (see §11).

One could have expected from the Grand Chamber to analyze the Chamber's decision and assess the reasoning underlying the decision to relinquish the case despite the Polish Government's objection. Indeed, it should be noted that the Polish Government provided certain reasons for its objection. Judge Wojtyczek stressed in that regard that they were 'no less extensive than those provided by other Governments opposing relinquishment'. He argued that the Grand Chamber should have verified whether the Chamber's decision to relinquish jurisdiction in favour of the Grand Chamber had been adopted in accordance with the ECHR and the Rules of Court and did not prejudice the further examination of the case.

If the position of the Court can raise questions in the case at hand, a principled position on this issue may no longer be of much interest, given the fact that Article 30 of the ECHR has indeed now been amended with the entry into force of [Protocol No. 15](#) to the ECHR on August 1st, 2021. Article 3 of this Protocol abolishes the parties' right to veto a Chamber's decision to relinquish the case to the Grand Chamber. This amendment was introduced [firstly](#), to improve the consistency of the case law, and secondly, to speed up the examination of important cases by removing a procedural obstacle. In its [decision](#) to refuse the objection, the Chamber took into consideration the fact that Poland's attitude could be regarded as amounting to an attempt to reconsider the legal choices which the country made voluntarily and unreservedly when signing the [Brighton Declaration](#) and ratifying Protocol No. 15.

The qualification of a right in the sense of Article 6 of the Convention

The second main legal issue concerns the admissibility of the present case, and, more particularly, the existence of a 'right' in the sense of Article 6 of the Convention. The Grand Chamber had the opportunity to clarify its principles established in [Vilho Eskelinen and Others v. Finland \[GC\]](#) and [Baka v. Hungary \[GC\]](#) concerning the applicability of Article 6(1) in cases where the dispute at domestic level concerns the lawfulness of a decision affecting the rights of a civil servant, or as in the present case, a judge (see §262). According to the *Eskelinen* test, a right can be considered 'civil', unless two conditions are fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must

be justified on objective grounds in the State's interest.

The novel issue raised in *Grzęda* is whether Article 6(1) under its civil limb applies to a dispute arising out of the premature termination of the applicant's term of office as a judicial member of the NCJ, while he still remains a serving judge (§265). Indeed, the present dispute doesn't concern the principal professional activity of the applicant as a judge, but the serving of his full term of office as an elected judicial member of the NCJ.

The Court considered that there was a genuine and serious dispute over a "right" under domestic law to serve a full term as a NCJ judicial member. If the response to this question was clear, the reasoning leading to it is less evident. The Court indeed used an unclear methodology to determine the content of domestic law and spent several pages delving into national case law, which was criticised by Judge Wojtyczek in his dissenting opinion.

Concerning the first condition of the *Eskelinen* test, the Court considered that 'this question can be left open, since in any event, for the reasons set out below, the second condition has not been met' (§294). Concerning the second condition of the test, the Court did not go into many details regarding the justification invoked by the Polish Government. As such, it stated that the condition wasn't met since the applicant's exclusion from access to a court was not justified on objective grounds in the State's interest. As observed by Judge Lemmens, the Court's response to the Government's argument is quite formal and it failed to explain what kind of 'exercise of State power' would be needed to justify excluding a public servant from access to a court. Instead, the Court devoted many paragraphs to the rule of law (§299) and to the special role of the judiciary and its independence (§§300-324). As pointed out by Judge Lemmens, the Court's reasoning led it far away from the 'mere' examination of whether the right invoked by the applicant is one of a civil nature. The present judgment therefore failed to seize this opportunity of clarifying the case-law.

The protection of members of national judicial councils

The third and final legal point of attention concerns the merits of the case. The Court started its assessment by emphasizing the importance of the NCJ's mandate to safeguard judicial independence and the close relation between the integrity of judicial appointments and the requirement of judicial independence (§345). In this context, the Court stressed that judicial independence should be understood in an inclusive manner. This implies that the principle should apply 'not only to judges' adjudicating role but also to other official judicial functions, such as membership in a judicial council' (§303). Therefore, the Court considered that similar procedural safeguards to those available in cases of dismissal or removal of judges should likewise be available where, as in the present case, a judicial member of the NCJ has been removed from his position. In practice, this means that a judicial remedy should be available to members of NCJs in case a dispute arises on their membership of such a judicial governance body. In assessing the possible justification for excluding access to a court with regard to membership of judicial governance bodies, the Court recalled the weakening of judicial independence in Poland brought about by successive reforms of the judiciary. Having regard to this context, the Court found that on account of the lack of judicial review in this case, the respondent State impaired the very essence of the applicant's right of access to a court, in violation of the ECHR. As the complaint under Article 13 was essentially the same as that under Article 6(1), the Court held that it was not necessary to examine it.

Conclusion

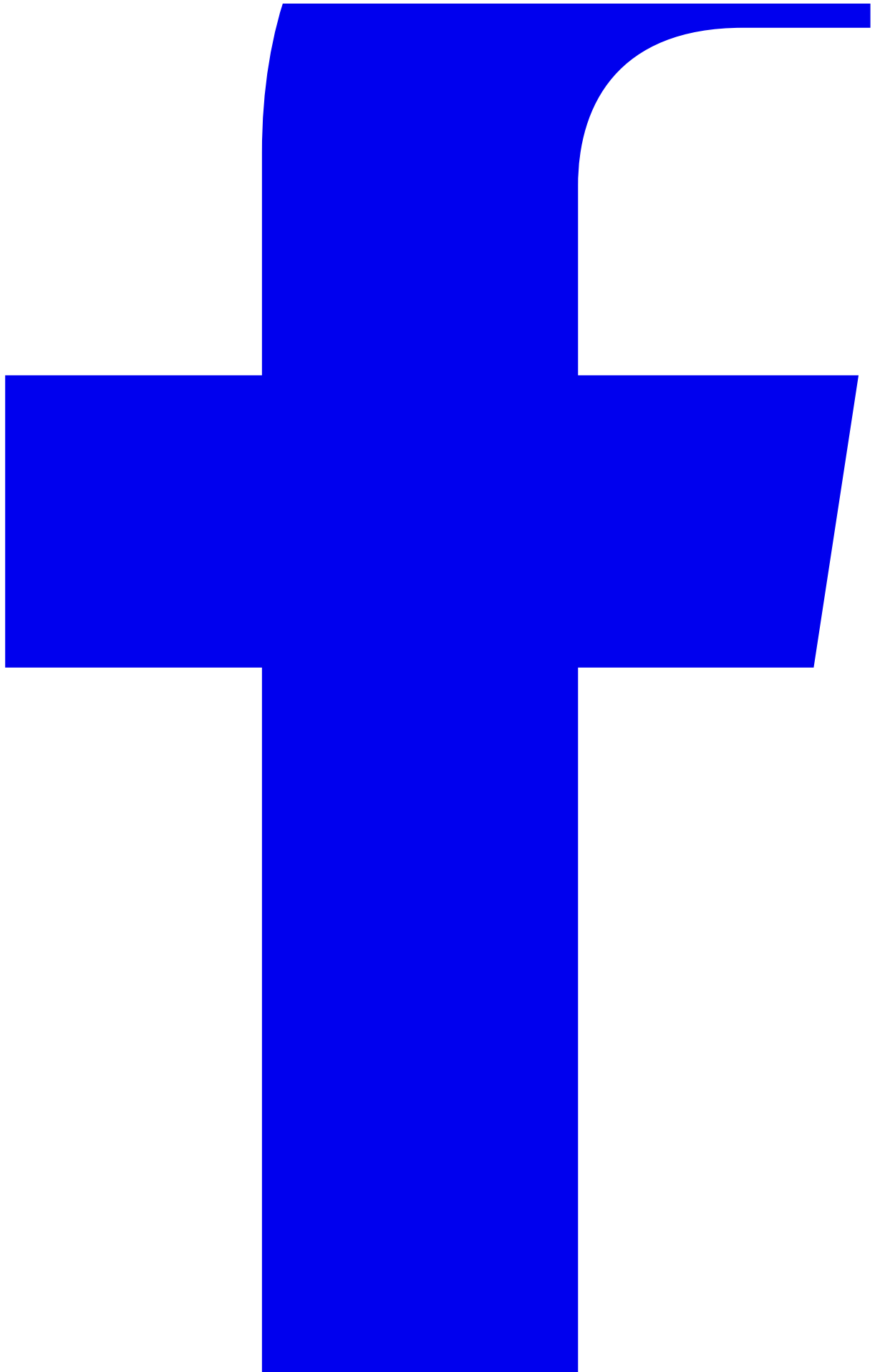
The context in which the present case is taking place definitely seems to have framed the Court's reasoning as well as the procedure followed.

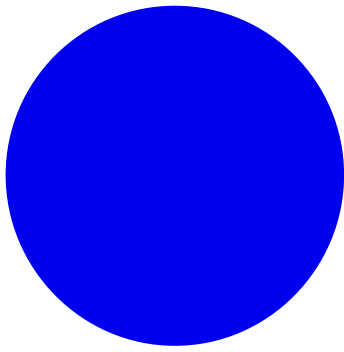
The judgment unsurprisingly confirms that similar procedural safeguards as in cases of judges' dismissal or removal should be available in cases of removal of judicial council members, thereby requiring those members to have a judicial remedy available. We can therefore see in it a clear sign sent by Strasbourg in favor of the systemic protection of judicial independence at national level. This is also demonstrated by the relinquishment of the case to the Grand Chamber showing the Court's desire to strengthen its stance on the Polish reforms.

Therefore, while *Grzęda* does not provide for any revolutionary element that will change the law on judicial independence for the future, nor does it in regard to the relinquishment procedure, given the modification of Article 30 of the Convention. Its significance may lie in the Grand Chamber's extensive analysis of the Polish situation and in the assessment of the reforms aimed at weakening the judiciary undertaken by the Polish legislature and executive.

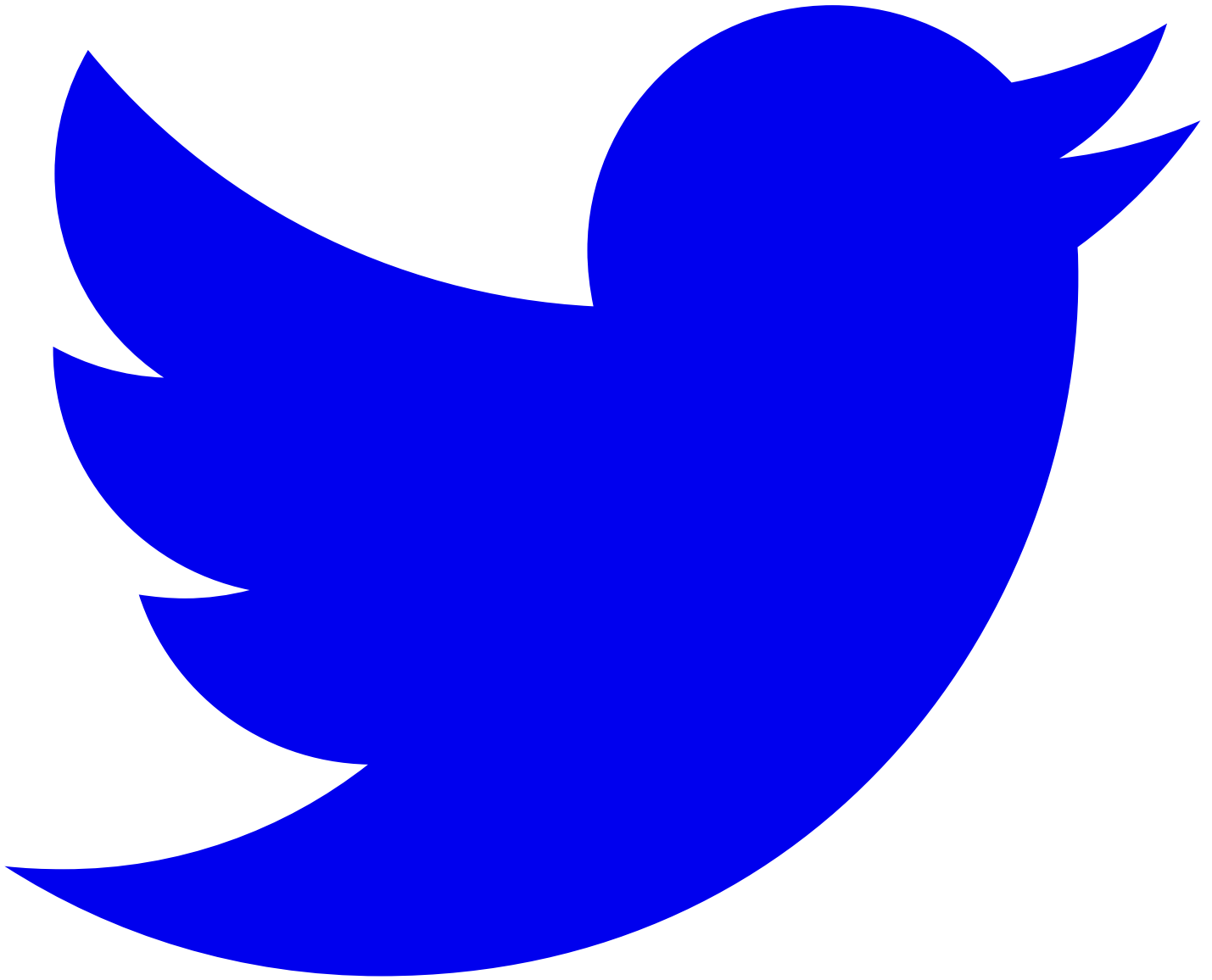
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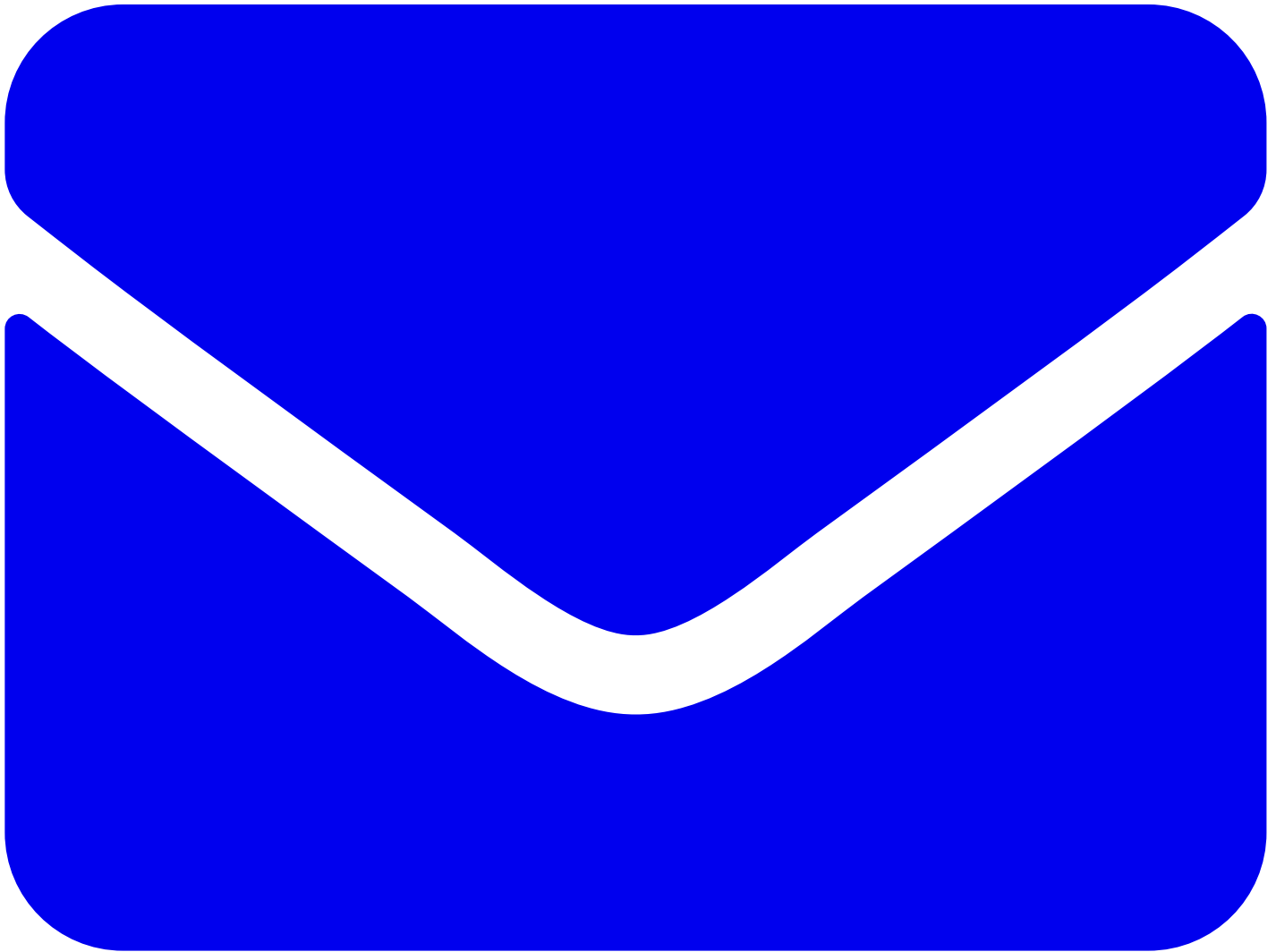




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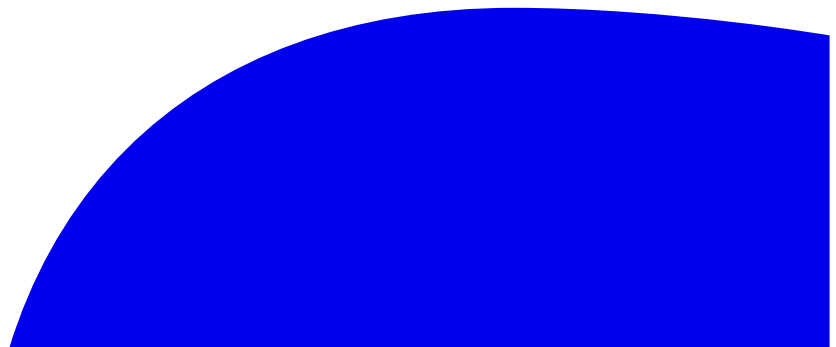
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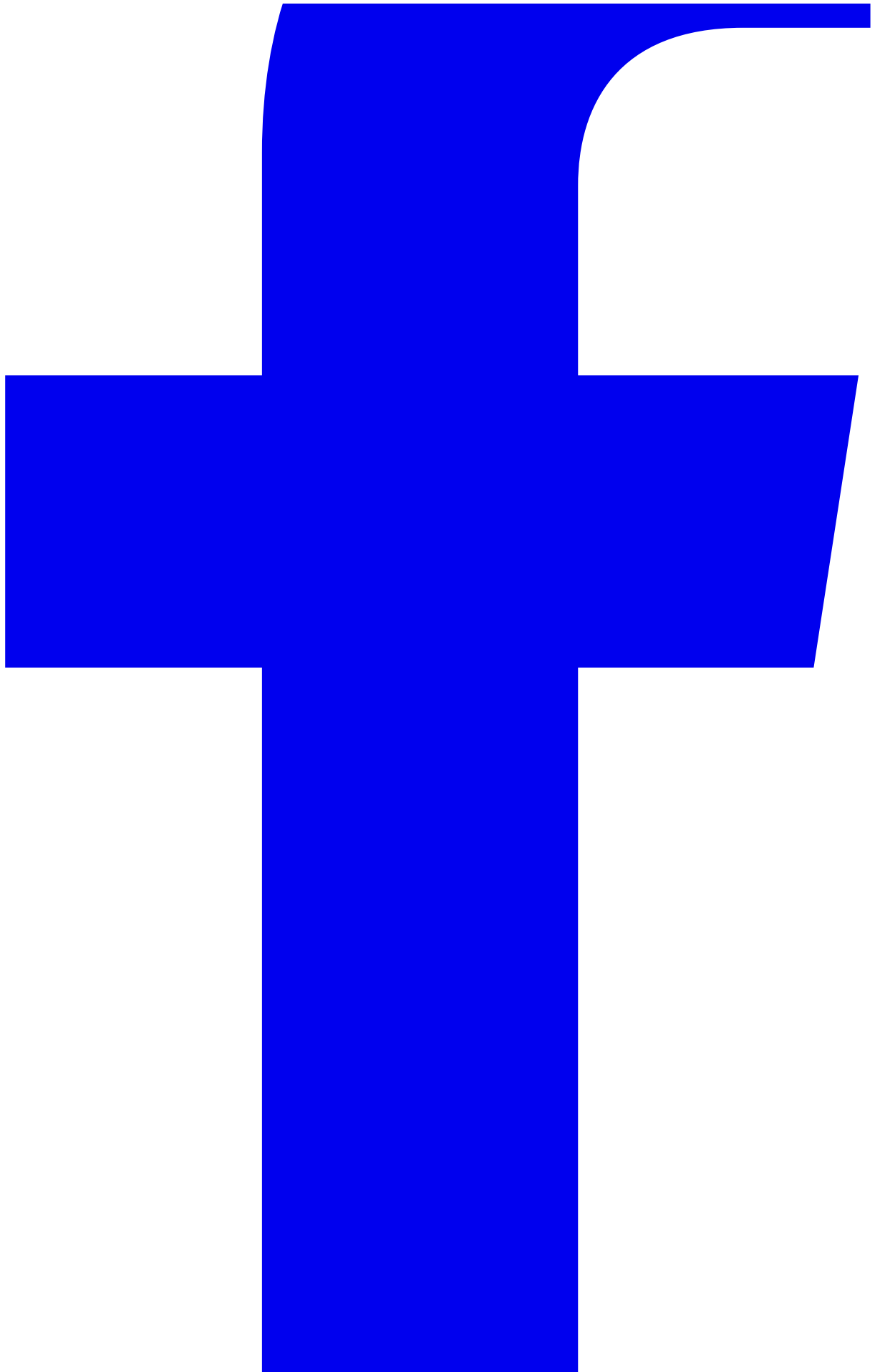
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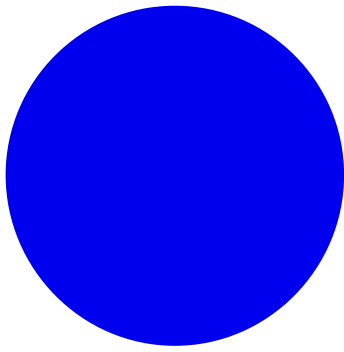


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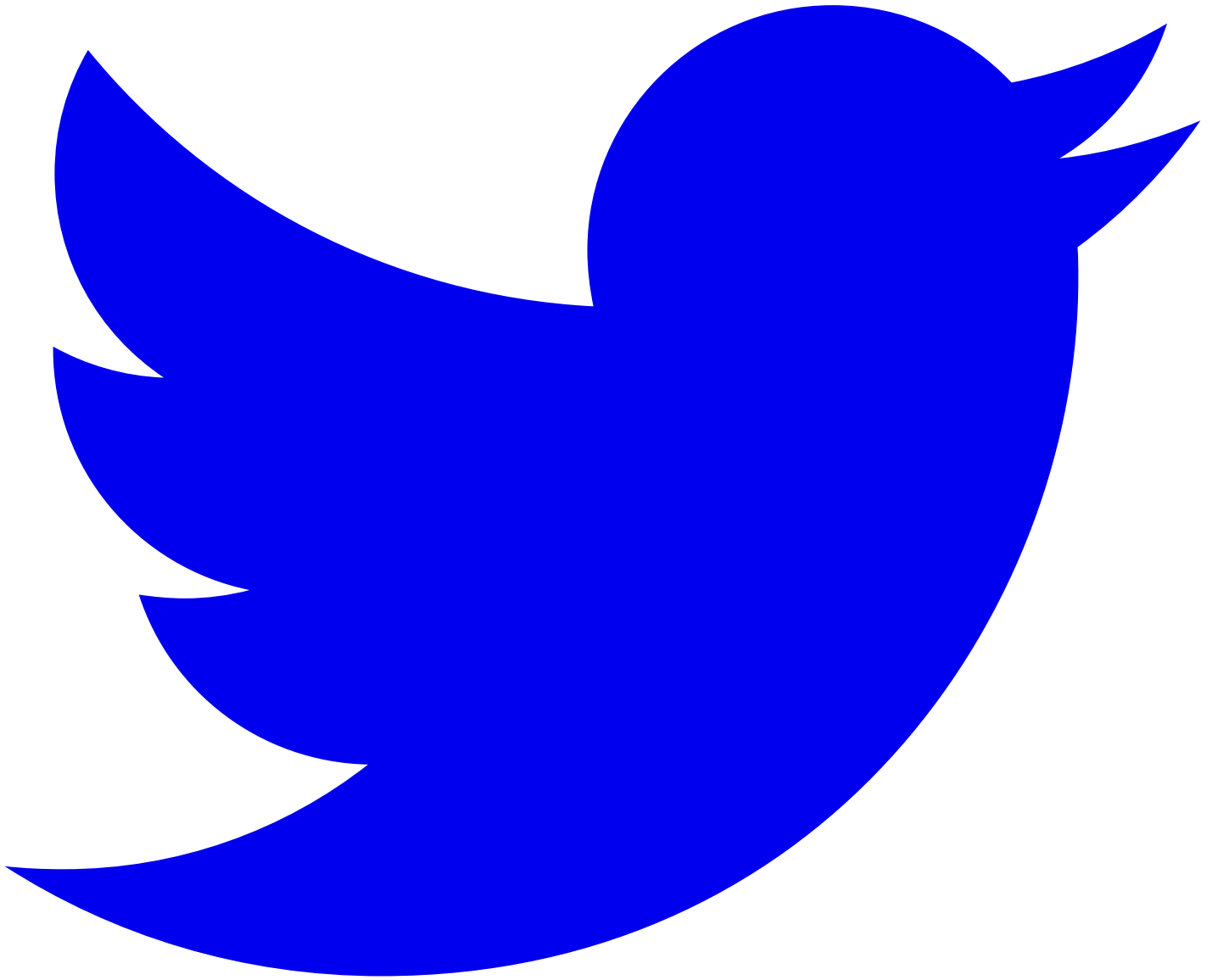




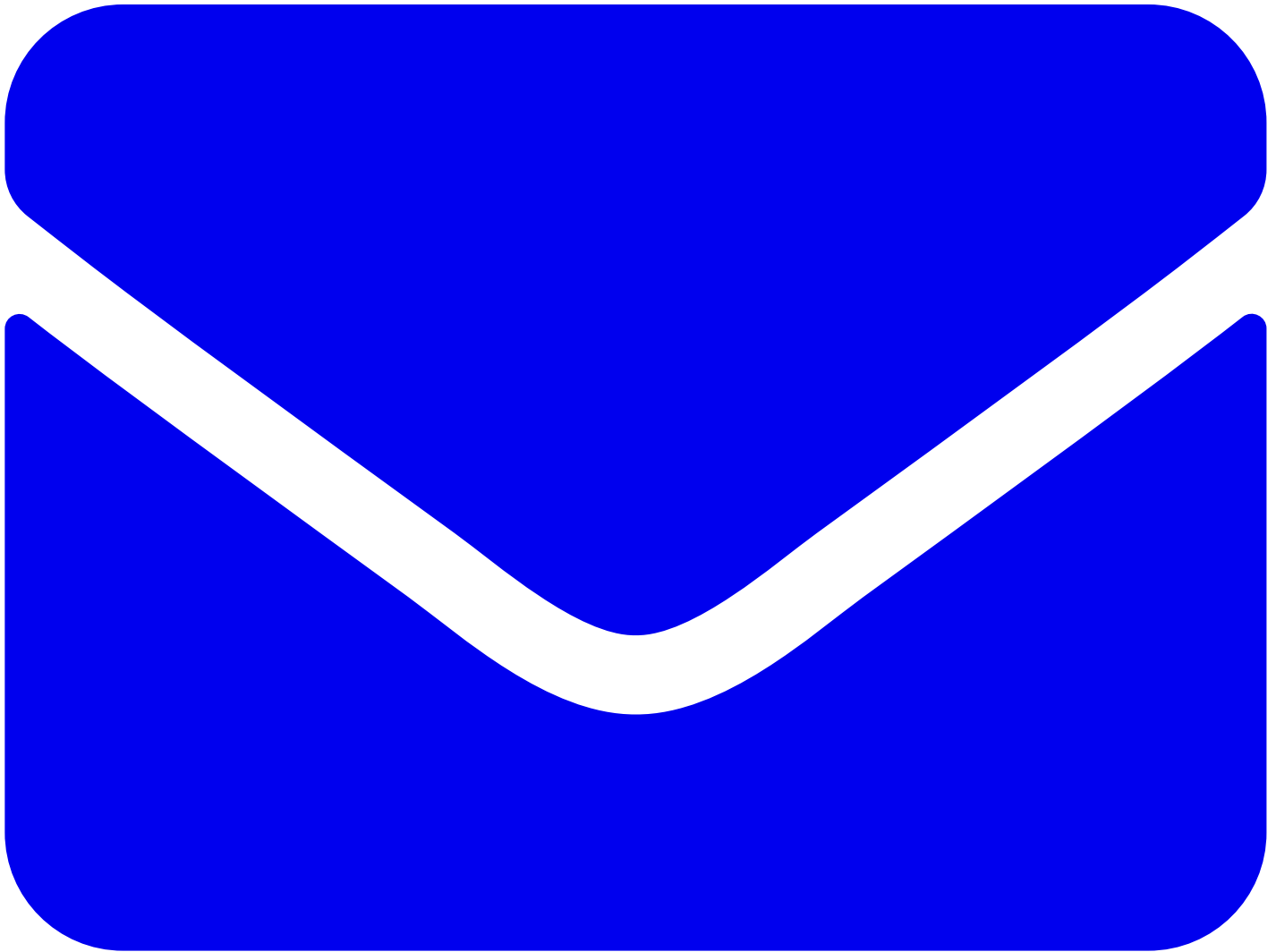
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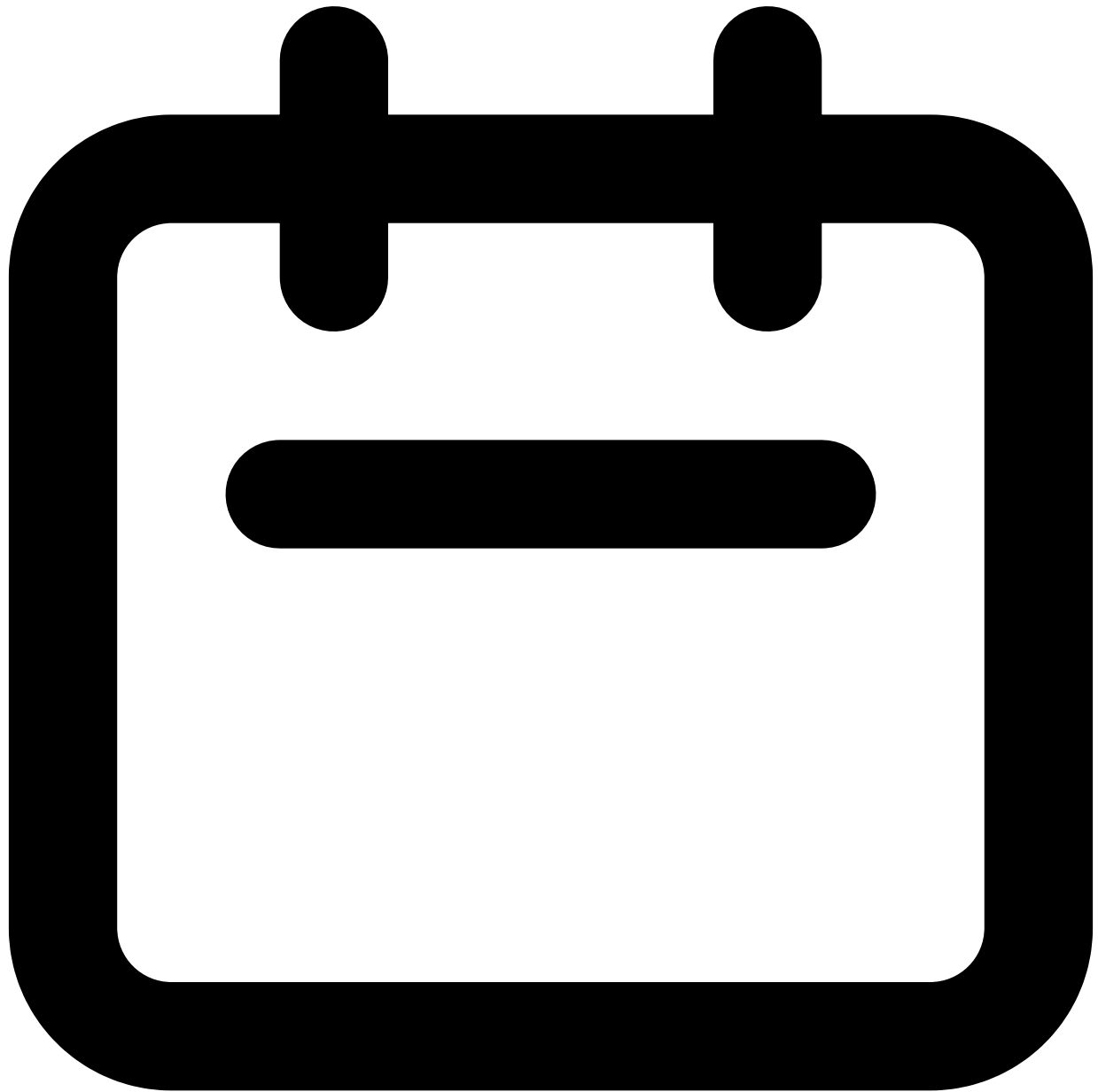
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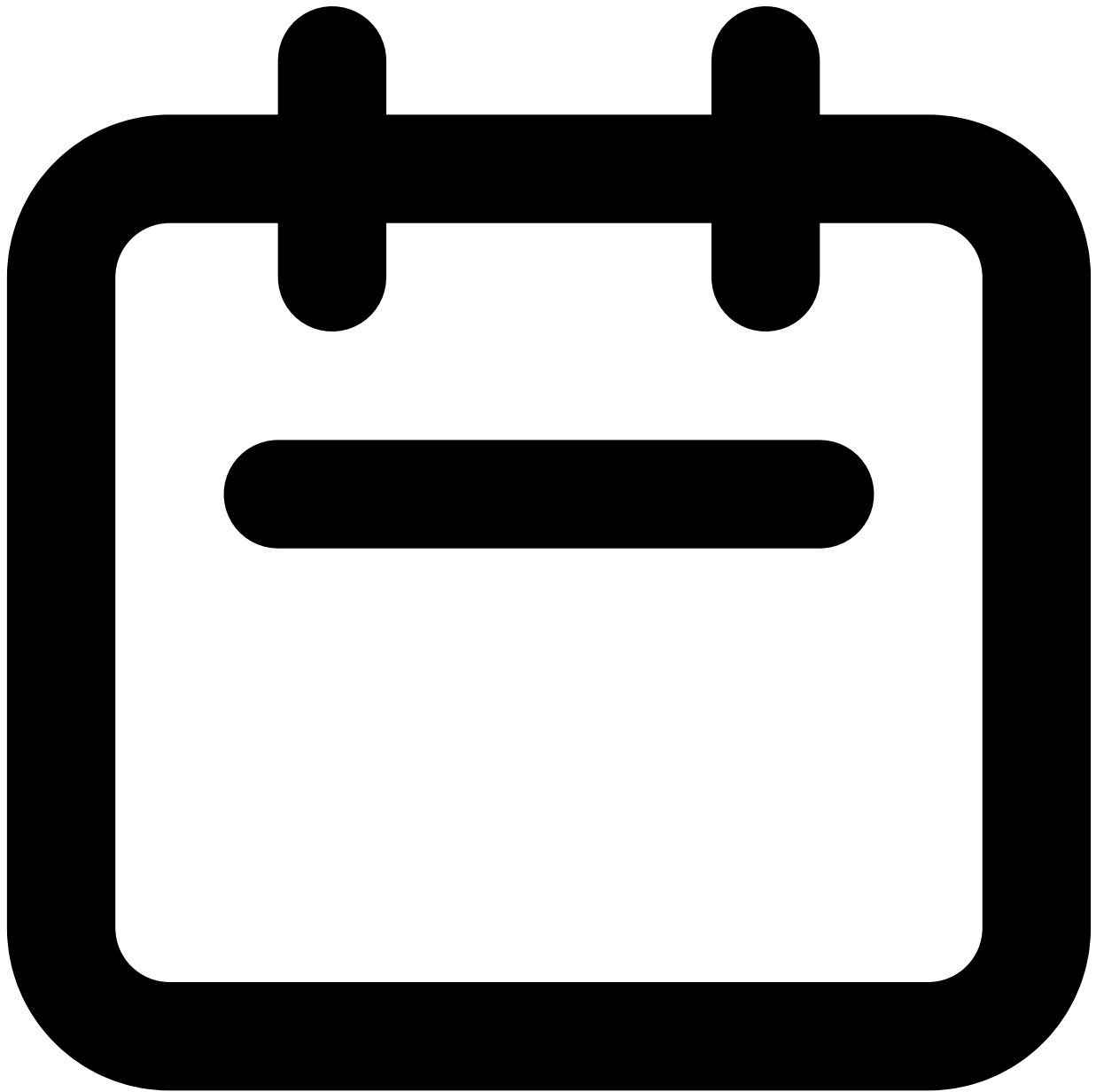


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Vilho Eskelinen and Others v. Finland [GC] was about civil servants and police employees. Based on the Vilho Eskelinen and Others v. Finland [GC] and Grzęda v. Poland [GC], can we conclude that procedural guarantees apply equally to non-judicial posts just as they do for judicial posts? The Grzęda judgment and your article stresses judicial independence, but is it really about judicial independence? If the person was not a judge, do you believe they would be less protected?

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