

**Case C-487/19**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged**

26 June 2019

**Referring court:**

Sąd Najwyższy (Poland)

**Date of the decision to refer:**

21 May 2019

**Appellant:**

W.Ż.

**Intervening party:**

Prokurator Prokuratury Krajowej Bożena Górecka

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**Subject matter of the case in the main proceedings**

A question on a point of law raised by the Sąd Najwyższy (Supreme Court ('the SC'), Poland) to be resolved by the extended composition in proceedings concerning the exclusion of judges of the SC sitting in the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Chamber of Extraordinary Control and Public Affairs) in the appeal brought by W.Ż.

**Subject matter and legal basis of the request**

The interpretation of Articles 2, 6(1) and (3) and of the second subparagraph of Article 19(1) TEU, in conjunction with Article 47 of the Charter of Fundamental Rights and with Article 267 TFEU, with regard to the concept of 'an independent and impartial tribunal previously established by law'.

### Question referred

Should Articles 2, 6(1) and (3) and the second subparagraph of Article 19(1) [TEU], in conjunction with Article 47 [of the Charter of Fundamental Rights] and Article 267 [TFEU], be interpreted as meaning that a court composed of a single person who has been appointed to the position of judge in flagrant breach of the laws of a Member State applicable to judicial appointments – which breach included, in particular, the appointment of that person to the position of judge despite a prior appeal to the competent national court (the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland)) against the resolution of a national body (the Krajowa Rada Sądownictwa (National Council for the Judiciary, Poland)), which included a motion for the appointment of that person to the position of judge, notwithstanding the fact that the implementation of that resolution had been stayed in accordance with national law and that proceedings before the competent national court (Supreme Administrative Court) had not been concluded before the delivery of the appointment letter – is not an independent and impartial tribunal previously established by law within the meaning of EU law?

### Applicable provisions of EU law

Articles 2, 6(1) and (3) and the second subparagraph of Article 19(1) TEU, Article 47 of the Charter of Fundamental Rights and Article 267 TFEU.

### Applicable provisions of national law

Articles 7, 10, 45, 60, 77, 144, 175, 179 and 183 of the Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland).

Articles 43 and 44 of the Ustawa z dnia 12 maja 2011 r. o Krajowej Radzie Sądownictwa (Law of 12 May 2011 on the National Council for the Judiciary) in the wording in force as of 27 July 2018 introduced by the Ustawa z dnia 20 lipca 2018 r. o zmianie ustawy — Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law of 20 July 2018 amending the Law on the organisation of ordinary courts and certain other Laws) (*Journal of Laws* [Dz. U.] of 2018, item 1443).

Article 44 of the Law of 12 May 2011 on the National Council for the Judiciary in the wording in force as of 1 April 2019 which took into account the judgment of the Trybunał Konstytucyjny (Constitutional Court, Poland) of 25 March 2019 in Case K 12/18 (*Journal of Laws* [Dz. U.] of 2019, item 609).

Article 44 of the Law of 12 May 2011 on the National Council for the Judiciary in the wording in force as of 23 May 2019 introduced by the Ustawa z dnia 26 kwietnia 2019 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz ustawy — Prawo o ustroju sądów administracyjnych (Law of 26 April 2019

amending the Law on the National Council for the Judiciary and the Law on the organisation of administrative courts) (*Journal of Laws* [Dz. U.] of 2019, item 914).

Articles 3 and 4 of the Law of 26 April 2019 amending the Law on the National Council for the Judiciary and the Law on the organisation of administrative courts) (*Journal of Laws* [Dz. U.] of 2019, item 914).

Articles 26, 82, 86 and 87 of the Ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym (Law of 8 December 2017 on the Supreme Court) (*Journal of Laws* [Dz. U.] of 2018, item 5, as amended).

Article 22a of the Ustawa z dnia 27 lipca 2001 r. — Prawo o ustroju sądów powszechnych (Law of 27 July 2001 on the organisation of ordinary courts) (consolidated text: *Journal of Laws* [Dz. U.] of 2019, item 52, as amended).

Articles 49, 50, 365, 379, 388, 391, 398<sup>21</sup> and 401 of the Kodeks Postępowania Cywilnego (Code of Civil Procedure).

### **Succinct presentation of the facts and procedure**

- 1 Pursuant to the decision of 27 August 2018, Judge W.Ż. was transferred from the division of the Sąd Okręgowy (Regional Court) in K., where he had sat until that date, to another division of that court pursuant to Article 22a(4b).1 of the Law of 27 July 2001 — Law on the organisation of ordinary courts. W.Ż. brought an appeal against that decision before the National Council for the Judiciary ('the NCJ'), which, by means of its resolution of 21 September 2018, discontinued the proceedings concerning his appeal against the decision of the President of the Regional Court (Case I NO 47/18). Subsequently, W.Ż. appealed against the NCJ resolution to the SC.
- 2 After lodging the appeal against the resolution of the NCJ, on 14 November 2018 W.Ż. submitted a petition for all judges of the SC sitting in the Chamber of Extraordinary Control and Public Affairs of the SC to be excluded from hearing his appeal. He argued that, given its systemic framework and the manner in which its members were elected by the NCJ, which had been established contrary to the Constitution, that Chamber could not examine the appeal impartially and independently in any composition that included its members.
- 3 The motion to appoint all the judges sitting in the Chamber of Extraordinary Control and Public Affairs who were included in the petition for exclusion was included in Resolution No 331/2018 of the NCJ of 28 August 2018 ('NCJ Resolution No 331/2018'). That resolution was appealed in its entirety before the Supreme Administrative Court ('the SAC') by other parties to the appointment proceedings in the case of whom the NCJ did not submit a motion to the Prezydent Rzeczypospolitej Polskiej (President of the Republic of Poland) to appoint them as judges of the SC.

- 4 In its decision of 27 September 2018, the SAC stayed the execution of NCJ Resolution No 331/2018.
- 5 Despite the fact that NCJ Resolution No 331/2018 had been appealed in its entirety and that its execution had been stayed by the SAC, and despite the fact that the proceedings before the SAC had not been concluded, on 10 October 2018, the President of the Republic of Poland handed letters of appointment as judges in the Chamber of Extraordinary Control and Public Affairs of the SC to the persons included in the petition for exclusion filed by W.Ż.
- 6 The proceedings before the SAC in cases concerning appeals against NCJ Resolution No 331/2018 were adjourned until the Court of Justice of the European Union ('the Court of Justice') had ruled on the questions referred to it for a preliminary ruling on the question whether the provisions of Article 44(1b) and Article 44(4) of the Law on the NCJ were compatible with EU law (Case C-824/18).
- 7 On 20 February 2019, the President of the Republic of Poland handed the letter of appointment as judge in the Chamber of Extraordinary Control and Public Affairs of the SC to A.S. The motion for the appointment of A.S. was included in NCJ Resolution No 331/2018, and therefore the appointment of A.S. also took place after NCJ Resolution No 331/2018 had been appealed in its entirety to the SAC and that court had stayed its execution, and although the proceedings before that court had not been concluded. In view of the fact that A.S. was appointed as a judge of the SC on 20 February 2019, that is, after the petition for exclusion had been filed by W.Ż. on 14 November 2018, A.S. was not included in that petition.
- 8 By letter of 5 March 2019, a public prosecutor from the National Public Prosecutor's Office intervened in the case concerning the appeal against the NCJ resolution on the discontinuance of appeal proceedings (Case I NO 47/18). The public prosecutor moved for the appeal lodged by W.Ż. against that NCJ resolution to be dismissed as inadmissible.
- 9 On 8 March 2019, shortly before the hearing in the Civil Chamber was scheduled to begin, the SC — the Chamber of Extraordinary Control and Public Affairs, composed of a single person (A.S.), without having at its disposal the I NO 47/18 case files, issued a decision in the case, dismissing the appeal lodged by W.Ż. as inadmissible. In that decision, the public prosecutor's position was accepted without permitting W.Ż. to submit any observations.
- 10 The SC bench which heard the petition for exclusion at the hearing on 20 March 2019 concluded that the issuing of the decision of 8 March 2019 in Case I NO 47/18 before the petition for exclusion could be examined breached Article 50(3)(2) of the Code of Civil Procedure, which prohibits the issuing of a decision terminating proceedings in a case where a petition for the exclusion of a judge has been submitted. Such a decision cannot be issued by any judge, even a judge not included in the petition for exclusion. The SC bench in question also

found that the hearing of the case and ruling thereon by a court which did not have at its disposal the case files and without allowing W.Ż. to become familiar with the prosecutor's position constituted a breach of the right to a fair and public hearing under Article 45(1) of the Constitution of the Republic of Poland, Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') and the second paragraph of Article 47 of the Charter of Fundamental Rights.

- 11 The SC also addressed the question of whether A.S., in view of the circumstances in which he was appointed, was in fact a judge of the SC. This is relevant to the assessment of whether the decision of 8 March 2019 in Case I NO 47/18 issued by the SC composed of a single person (A.S.) legally exists as a court ruling. The determination of that question is relevant to the outcome of the hearing of the petition for exclusion. If the ruling of 8 March 2019 in Case I NO 47/18 legally exists, the proceedings in the case concerning exclusion must be terminated (discontinued) as being devoid of purpose. However, if the ruling of 8 March 2019 in Case I NO 47/18 does not legally exist, the petition for exclusion must be heard.
- 12 In considering this matter, the SC, having serious doubts, presented the following legal question to a bench of seven judges of the SC: does a decision issued by a bench consisting of a single person exist in a legal sense in a case where that person was appointed as a judge of the SC despite the fact that the NCJ resolution including the motion to appoint that person had been appealed to the SAC, the execution of that resolution had been stayed and the proceedings before the SAC had not been concluded by the time at which the letter of appointment was delivered to that person?
- 13 In their examination of that legal question, the seven judges of the SC had doubts as to the interpretation of the provisions of EU law listed in the question referred for a preliminary ruling. Those doubts relate to whether a court which consists of a single person who has been appointed as a judge in flagrant breach of national laws relating to judicial appointments, including, in particular, through the appointment to the position of judge in the circumstances in which A.S. was appointed, can be regarded as an independent and impartial tribunal previously established by law within the meaning of EU law.

#### **Brief statement of and reasons for the request**

- 14 The resolution of the doubts in this case is important not only in relation to A.S., but also in relation to the other persons adjudicating in the Chamber of Extraordinary Control and Public Affairs, seven persons adjudicating in the Civil Chamber and one person adjudicating in the Disciplinary Chamber who were appointed as judges of the SC in the same circumstances as A.S. In addition, the ten other persons adjudicating in the Disciplinary Chamber were appointed by the President of the Republic of Poland even though the NCJ resolution including the



motion to appoint them had been the subject of an appeal to the SAC and the proceedings before that court had not been concluded prior to the delivery of their letters of appointment.

- 15 The reply of the Court of Justice is a prerequisite for the bench consisting of seven judges of the SC to rule on the legal question referred to it by the ordinary composition of the SC. If the Court of Justice should find that the SC, when issuing the decision to terminate the proceedings concerning the appeal of W.Ż. against the NCJ resolution (Case I NO 47/18), could not be regarded as an independent and impartial tribunal previously established by law, and thus one ensuring effective judicial protection in the fields covered by EU law within the meaning of the second subparagraph of Article 19(1) TEU, in conjunction with Article 47 of the Charter of Fundamental Rights and the third paragraph of Article 267 TFEU, it will affect the assessment under Polish law of the effects of a person being appointed as a judge of the SC in the circumstances in which A.S. was appointed. The consequence may be that the rulings issued by the SC composed exclusively of persons appointed in such circumstances are deemed to be legally non-existent since they will have been issued by a person or by persons who are not judges.
- 16 The referring court refers to the judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, C-64/16, paragraphs 33 to 37, and of 26 July 2018, *LM*, C-216/18 PPU, pointing out that the European Union is a union of law in which the responsibility for ensuring judicial review in the EU legal order is entrusted not only to the Court of Justice but also to national courts and tribunals. Member States must provide remedies that are sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. The referring court points out that the principle of effective judicial protection of individuals' rights under EU law, and the very existence of effective judicial review, is of the essence of the rule of law. Every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection. The referring court also points out that the factors to be taken into account in assessing whether a body is a 'court or tribunal' within the meaning of the second subparagraph of Article 19(1) TEU include whether that body is established by law and whether that body and the judges sitting therein are independent. In its view, this fully coincides with the requirements related to the concept of a 'court or tribunal' in the third paragraph of Article 267 TFEU and in the second paragraph of Article 47 of the Charter of Fundamental Rights in the context of the right to an effective remedy and to a fair trial and also corresponds to the standard of an independent and impartial tribunal established by law as referred to in Article 6(1) ECHR (see, in this connection, Article 52(3) and (7) of the Charter of Fundamental Rights and Article 6(3) TEU).
- 17 The referring court points out that the relationship between the present case and EU law is twofold. Firstly, the Chamber of Extraordinary Control and Public Affairs of the SC has jurisdiction in matters related to the interpretation and

application of EU law such as regulatory matters, including, in particular, matters related to the protection of competition and regulation of the power industry. In these matters, provisions of EU law or the provisions of national law which implement EU law often apply. Therefore, it is necessary to examine whether the Chamber of Extraordinary Control and Public Affairs of the SC, since it includes A.S. and other persons appointed in similar circumstances, meets the requirements arising from the second subparagraph of Article 19(1) TEU. Secondly, the contested ruling of 8 March 2019 was issued in a case concerning the status of a national court judge, namely W.Ż. Since W.Ż. is a judge of a national court, he must remain independent so that, in the application of EU law, that court also remains independent and satisfies the requirements arising from the second subparagraph of Article 19(1) TEU. In such a case, the requirements of the second paragraph of Article 47 of the Charter of Fundamental Rights must also be respected, with the result that it must be assessed whether the court seised of the case, *videlicet* the Chamber of Extraordinary Control and Public Affairs of the SC, may be considered an independent and impartial tribunal previously established by law within the meaning of that provision.

- 18 The referring court finds that in the appointment procedure by which A.S. was appointed as a judge of the SC there was a flagrant breach of Polish laws relating to judicial appointments. That breach consisted primarily in the fact that A.S. was appointed as a judge of the SC by the President of the Republic of Poland despite the fact that other parties to the appointment procedure had previously appealed to the SAC against NCJ Resolution No 331/2018, which included the motion to appoint him, and the proceedings before the SAC had not yet been concluded prior to the delivery of the letter of appointment to him.
- 19 Pursuant to Article 179 of the Constitution of the Republic of Poland, judges in Poland are appointed for an indefinite period by the President of the Republic of Poland on the motion of the NCJ. These two complementary bodies need to work together in chronological terms. The NCJ motion is merely an opinion, but gives rise to certain powers — only after it has been submitted to the President of the Republic of Poland does the President's competence to appoint the person included in the motion to the position of judge arise.
- 20 The motion to appoint a person as a judge submitted by the NCJ to the President of the Republic of Poland is preceded by appointment proceedings, which are regulated by legislation in compliance with the constitutional requirements. In order to ensure that the rights of candidates who participate in appointment proceedings are protected, including their right of access to the public service on equal terms (Article 60 of the Constitution of the Republic of Poland) and their right of access to a court in each individual case (Articles 45(1) and 77(2) of the Constitution), a judicial review of whether NCJ resolutions concerning motions to the President of the Republic of Poland for appointment to the position of judge comply with the law has been provided for (Article 44 of the Law on the NCJ). With respect to candidates applying to become SC judges, this review has been entrusted to the SAC.

- 21 The competence of the President of the Republic of Poland to appoint judges, on the condition that a motion has been previously received from the NCJ, is a presidential prerogative, and therefore the official act of the President of the Republic of Poland concerning the appointment of a judge does not require the countersignature of the Prezes Rady Ministrów (Prime Minister) in order to be valid. This arrangement does not strengthen the President of the Republic of Poland vis-à-vis the judiciary, but rather protects the judiciary against interference from the Rada Ministrów (Council of Ministers) as a centre of executive power other than the President of the Republic of Poland, including, in particular, the Prime Minister and the Minister Sprawiedliwości (Minister of Justice). The exercise by the President of the Republic of Poland of his prerogative to appoint judges must always be in accordance with the requirements concerning the operation of public authorities, and this prerogative must be exercised on the basis and within the limits of applicable laws and with respect for the powers of the judiciary.
- 22 The President of the Republic of Poland cannot appoint a party to the appointment proceedings to the position of judge not only where there has been no motion from the NCJ at all, but also where such a motion has been formulated but the legal existence of that motion contained in an NCJ resolution is suspended as a result of the lodging of an appeal against that resolution, which is consequently sent for judicial review. In a situation where, prior to the delivery of the letter appointing a person as a judge of the SC, the resolution containing the motion to appoint that person has been appealed before the SAC, the legal status of the resolution becomes dependent on that court's ruling. Where the appeal is allowed, it may subsequently be found that a prerequisite for the appointment of that judge is wanting. Therefore, until the proceedings before the SAC had been concluded, the President of the Republic of Poland could not use his prerogative to appoint a person as judge due to the absence of a stable basis on which the exercise of that prerogative rests.
- 23 The foregoing is not affected by the provisions governing the scope and timing of a resolution of the NCJ becoming final in the event that the resolution is not the subject of appeal by all parties to the appointment proceedings (Article 44(1b) of the Law on the NCJ) or by the provisions which determine the effect of a repeal of an appealed resolution not to present a motion for the appointment of a person as a judge of the SC (Article 44(4) of the Law on the NCJ). From the moment at which a resolution of the NCJ becomes the subject of an appeal, it is for the SAC alone to assess whether there are grounds for repealing the resolution and to what extent, within the limits of the appeal, it should be repealed. The SAC may use various interpretation methods in order to resolve doubts related to the interpretation of Articles 44(1b) and 44(4) of the Law on the NCJ, including an interpretation based on the Constitution and a conforming interpretation. These measures have been taken by the SAC, as evidenced by its decision to refer questions for a preliminary ruling which concern, in particular, the compliance of the regulations contained in Articles 44(1b) and 44(4) of the Law on the NCJ with the relevant provisions of EU law (Case C-824/18).



- 24 In the opinion of the referring court, in this case, there has been a twofold breach of Article 179 of the Constitution of the Republic of Poland. Firstly, the President of the Republic of Poland appointed A.S. in circumstances in which the legal status of NCJ Resolution No 331/2018, which included the motion for his appointment, was not permanent. The prerequisite — understood in functional terms — that a person can be appointed to the position of judge only upon a motion from the NCJ has not been fulfilled; such a motion must not only exist, but it must also have a permanent legal status which cannot be undermined. Secondly, the appointment was made on the assumption that NCJ Resolution No 331/2018 would not be repealed by the SAC. Such an appointment did not meet the requirement that judges must be appointed for an indefinite period because it was of a conditional nature. A possible repeal of the NCJ resolution as a result of its judicial review, resulting in the subsequent disappearance of the prerequisite for the appointment in the form of the motion from the NCJ, would also result in the appointment of the person in question to the position of judge subsequently becoming invalid; a separate question is whether this would take effect *ex tunc* or *ex nunc*.
- 25 Moreover, there has also been a breach of the principle of the separation and balancing of powers and of the principle of legality. Owing to the constitutional status of the SAC as a judicial body, the fact that it has been granted the statutory competence to review — in this case — the compliance of NCJ resolutions with the law, and given the need to respect the future outcome of proceedings before that court, the President of the Republic of Poland could not exercise his prerogative to appoint a person as a judge of the SC prior to the conclusion of the proceedings before that court. However, the President of the Republic of Poland exercised that prerogative before the SAC had ruled on the outcome of the appeal, without awaiting a judicial assessment of the objections brought against the resolution, although these were widely known and were very serious.
- 26 An essential factor in the case is also the fact that the President of the Republic of Poland appointed A.S. as a judge of the SC not merely despite the appeal against NCJ Resolution No 331/2018, which included the motion to appoint him, and the fact that the proceedings before the SAC had not been concluded by the date of his appointment, but also contrary to the previously issued decision of that court of 27 September 2018, in which the execution of that resolution had been stayed. The staying of the execution of the NCJ resolution was an additional factor preventing that resolution from being a valid motion to appoint a person to the position of judge. That decision was binding on the parties to the proceedings before the SAC, on that court and on other courts (including the SC) as well as on other State bodies (including the NCJ and the President of the Republic of Poland) and public authorities. Therefore, a final court ruling was manifestly ignored by the President of the Republic of Poland as well as by A.S., who accepted the letter of appointment notwithstanding the fact that the decision in question had been issued.

- 27 According to the referring court, each of these infringements in itself constituted a breach of the fundamental rules governing the judicial appointment procedure in Poland. Moreover, these infringements are only one amongst many elements indicating that the appointment of A.S. suffered from fundamental legal defects. Of separate importance in this respect are the infringements related to the appointment proceedings, which are not considered in the present case, but are currently the subject of questions referred previously to the Court of Justice by the SC (Cases C-585/18, C-624/18 and C-625/18).
- 28 The aforementioned infringements affect the fundamental constitutional principles of shaping the composition of the judiciary, but they are also intentional infringements, that is to say, they were perpetrated with the intention of nullifying the effects of the judicial review of NCJ Resolution No 331/2018 by the SAC. Firstly, A.S. was appointed as a judge of the SC even though the relevant resolution was the subject of an appeal and the objections raised against it were widely known. Secondly, the President of the Republic of Poland exercised his prerogative on the basis of an assumption expressed in case-law that an appointment to the position of judge made by the President of the Republic of Poland cannot be challenged in any manner, including before the courts. The exercise of that prerogative was intended to result in irreversible legal consequences in the form of an effective appointment to the position of judge, even if it were to turn out that the appointment proceedings suffered from legal defects. The argument that the appointment by the President of the Republic of Poland of a person to the position of judge pursuant to Article 179 of the Constitution cannot be challenged as it is the President's prerogative was clearly raised in public discourse in response to an attempt to assess the validity of appointments of judges of the SC in the circumstances in which A.S. was appointed, or in similar circumstances.
- 29 The infringements referred to in this case, being flagrant and intentional in nature, form an integral part of broader actions being taken in Poland to prevent the judicial review of NCJ resolutions on submitting to the President of the Republic of Poland motions to appoint persons as judges of the SC adopted after the entry into force of the Law on the SC, that is, after 3 April 2018.
- 30 Firstly, following the institution of proceedings concerning appointments to the SC under the new Law on the SC, an amendment was introduced to the Law on the NCJ. The amendment provided that a resolution concerning candidates to the position of judge of the SC which is not appealed by all parties to the appointment proceedings becomes final in the part concerning the decision to submit the motion for appointment to the position of judge of the SC and in the part concerning the decision not to submit the motion for appointment to the position of judge of the SC of those parties to the proceedings who did not lodge an appeal (Article 44(1b) of the Law on the NCJ). This constituted a departure from the general principle that a resolution of the NCJ becomes final if no appeal can be lodged against it and that, if not appealed by all parties to the appointment proceedings, it becomes final in the part concerning the decision not to submit the

motion for appointment to the position of judge of those parties to the proceedings who did not lodge an appeal (Article 43(1) and (2) of the Law on the NCJ). It was also stipulated that the sole effect of the SAC repealing the resolution not to submit the motion for appointment to the position of judge of the SC is the ability of the party to the appointment proceedings who appealed against that resolution to participate in subsequent appointment proceedings (Article 44(4) of the Law on the NCJ). These amendments, designed to make any appeals to the SAC against resolutions of the NCJ concerning candidates for judges of the SC ineffective in practice, were presented by their sponsor as an attempt to prevent the obstruction of appointment proceedings concerning appointments to the position of judge of the SC.

- 31 Secondly, in response to the SAC having expressed doubts as to the compatibility of the above regulations with EU law and having referred a question for a preliminary ruling to the Court of Justice (Case C-624/18) in this regard and, in addition, having stayed the execution of some of the contested resolutions of the NCJ, the NCJ — which is composed of judges appointed by the Sejm (lower house of the Polish Parliament) — and a group of ruling party senators challenged before the Constitutional Court ('the CC') the provisions of the Law on the NCJ concerning the election of judges to the NCJ and appeals to courts against NCJ resolutions on motions concerning appointments to the position of judge in general, including those provisions indicating that the SAC has jurisdiction in such matters. As a consequence of that challenge, on 25 March 2019, in Case K 12/18, the CC, composed exclusively of judges appointed by the current government, including a person appointed to the already occupied position of judge of the CC, ruled that the provisions of the Law on the NCJ providing for the election of judges to the NCJ by the Sejm are compatible with the Constitution of the Republic of Poland. However, Article 44(1a) of the Law on the NCJ, which provides for the jurisdiction of the SAC in cases relating to appeals against resolutions of the NCJ concerning candidates for the position of judge of the SC, was declared unconstitutional. The CC held that, as a result of Article 44(1a) of the Law on the NCJ having been found to be unconstitutional, all court proceedings (before the SAC) pending under that provision had to be discontinued.
- 32 Thirdly, as a result of further legislative amendments, as of 23 May 2019 the possibility of appealing against resolutions of the NCJ in individual cases concerning appointment to the position of judge of the SC was completely excluded. A transitional provision introduced by that amendment provides that proceedings involving appeals against resolutions of the NCJ in individual cases concerning appointment to the position of judge of the SC which were instituted and not concluded prior to the date of entry into force of the amendment are discontinued by operation of law. The purpose of this arrangement is to ensure that proceedings pending before the SAC concerning resolutions of the NCJ regarding the submission to the President of the Republic of Poland of motions to appoint a person to the position of judge of the SC, instituted following the entry into force of the Law on the SC (that is, after 3 April 2018), including the

proceedings concerning NCJ Resolution No 331/2018, are terminated without a judicial review of those resolutions being conducted.

- 33 The circumstances described in paragraphs 31 and 32 above do not resolve the need for the Court of Justice to answer the question referred for a preliminary ruling in the present case. The question referred for a preliminary ruling concerns past events which caused the appointment of A.S. to the position of judge of the SC to be defective. The aforementioned ruling of the CC and the legislative amendments introduced do not in any way remove that defect *ex tunc*.
- 34 The finding that the appointment of A.S. was effected in flagrant breach of Polish law may, in the view of the referring court, justify the conclusion that the participation of such a person in the composition of a court precludes that court from being deemed established by law within the meaning of EU law. However, it is necessary for the Court of Justice to issue a ruling in this matter.
- 35 Strict compliance with the rules on judicial appointments affects the confidence of citizens and the public in the independence and impartiality of the courts (judgment of 23 January 2018, *FV v Council*, T-639/16 P, paragraph 75). In the view of the referring court, since the manner in which judges are appointed is subject to certain legal rules and the observance of those rules is of fundamental importance as regards guaranteeing the independence and impartiality of a court, any breach of those rules, in particular a flagrant breach thereof, results in those guarantees being seriously undermined. The referring court would like to raise two aspects of judicial independence (external and internal) in the light of the following Court of Justice judgments: of 19 September 2006, *Wilson*, C-506/04, paragraph 51; of 9 October 2014, *TDC*, C-222/13, paragraph 30; of 17 July 2014, *Torresi*, C-58/13 and C-59/13, paragraph 22; and of 6 October 2015, *Consorti Sanitari del Mareme*, C-203/14, paragraph 19.
- 36 In the view of the referring court, there are serious doubts as to whether a person appointed to the position of judge in flagrant breach of the laws applicable to judicial appointments can maintain his independence and impartiality. On the one hand, such a judge finds himself in a situation where his independence may be called into question by citizens, as evidenced by the petitions for exclusion already submitted for that reason, and he may also be subject to external interference from the body which perpetrated that breach when appointing him, or from another body cooperating with that body. Such a judge may be reliant on the actions of the bodies indicated, including those belonging to other branches of government (the executive or legislature), which are designed to prevent judicial review of breaches of the law perpetrated prior to his appointment. The opposite may also occur — such a judge may be exposed to actions by the bodies indicated which undermine his status as a judge. On the other hand, a judge appointed to his position in flagrant breach of the laws applicable to judicial appointments may not guarantee his impartiality, particularly where the validity of his appointment, due to the aforementioned breach, is challenged by a party to the dispute in a particular case which that judge is called upon to hear and determine. Not

accepting attempts to undermine the validity of his appointment, the judge may take action to prevent the party in question from making such attempts or to make such attempts ineffective.

- 37 It should be added here that although the CC in its current composition recognises that acts of the President of the Republic of Poland undertaken in the exercise of his prerogatives are not subject to judicial review, which may also be applied to the appointment of a person to the position of judge by the President of the Republic of Poland, the instrumentalisation of this body in its current form raises the question of whether it might not adopt a different position, should this prove necessary and useful. This obviously affects the assessment of the independence of persons appointed to the position of judge of the SC in the circumstances in which A.S. was appointed.
- 38 Under Polish law, there is no specific procedure or measure which would allow a party to challenge the validity of the appointment to the position of judge of a person included in a court bench, although it follows from applicable laws that the court must take into account of its own motion whether its composition is lawful (Article 379(4) of the Code of Civil Procedure), and where an unauthorised person was included in the composition of a court, this provides grounds for reopening proceedings which have been finally concluded (Article 401(1) of the Code of Civil Procedure). Given that — apart from the reopening of proceedings — SC rulings cannot be the subject of appeal, parties are trying to protect their right to have their cases heard by an independent and impartial court by submitting petitions to exclude persons appointed to the position of judge of the SC in circumstances entirely or partly identical to those of A.S. On the other hand, SC benches composed entirely of persons appointed in such circumstances are trying to prevent the parties from doing so. They are also trying permanently to prevent the submission of such petitions by referring questions to the CC in its current composition concerning the compatibility of Article 49 of the Code of Civil Procedure, which lays down the premises for excluding a judge upon the request of a party, with the Constitution, the Charter of Fundamental Rights or the ECHR.
- 39 In response to doubts as to their status, persons appointed to the position of judge of the SC in circumstances entirely or partly identical to those of A.S. are also taking other measures to prevent such challenges. An example here is the adoption by the full composition of the Izba Dyscyplinarna (Disciplinary Chamber) of the SC of the resolution of 10 April 2019 stating that the persons sitting in that Chamber were validly appointed to the position of judge of the SC and their inclusion in the composition of the court does not infringe the right of parties to a hearing by an independent and impartial tribunal established by law (Article 6(1) ECHR). That resolution was adopted in breach of the fundamental principle that a person cannot be a judge in her or his own case (*nemo iudex in sua causa*), as none of the persons adjudicating in the Disciplinary Chamber of the SC should have taken part in its adoption, since the legal matter directly concerned each of them, namely their status as judges.



- 40 The measures described in paragraphs 38 and 39 have been taken in the interest of those persons whose status as judges of the SC raises doubts and is under challenge. The purpose of these actions is to prevent the parties appearing before SC benches composed of those persons from subjecting to judicial review the status of those persons as SC judges, and thus from protecting their right to an independent and impartial tribunal established by law.
- 41 As far as the issue of independence and impartiality is concerned, particular attention should be paid to the circumstances in which the decision of 8 March 2019 in Case I NO 47/18 was issued. Those circumstances reflect the extent to which a person appointed to the position of judge of the SC in flagrant breach of the law applicable to judicial appointments attempted to terminate the proceedings which addressed the issue of the validity of appointments to the position of judge of the SC of other persons adjudicating in the Chamber of Extraordinary Control and Public Affairs in order to prevent that issue from being examined. Such actions raise further doubts as to whether a judge appointed under such circumstances can provide a guarantee of his independence and impartiality.
- 42 Pursuant to Article 105(1) of the Rules of Procedure of the Court of Justice, the referring court requests the application of an expedited preliminary ruling procedure.
- 43 Firstly, the significance of the answer to the question referred for a preliminary ruling goes beyond the circumstances of the case which the question directly concerns. Currently, there are 37 persons adjudicating cases in the SC who were appointed to the position of judge of the SC in flagrant breach of the Polish laws applicable to judicial appointments. In the case of 27 persons (19 persons adjudicating in the Chamber of Extraordinary Control and Public Affairs, 7 persons adjudicating in the Izba Cywilna (Civil Chamber) and 1 person adjudicating in the Disciplinary Chamber), the breach consists in their appointment despite a previous appeal to the SAC against NCJ resolutions which included the motions to appoint them, despite the execution of those resolutions being stayed and despite the fact that the proceedings before the SAC had not been concluded by the date on which letters of appointment were delivered. In the case of 10 persons adjudicating in the Disciplinary Chamber, the breach consists in their appointment despite a previous appeal to the SAC against the NCJ resolution which included the motion to appoint them and despite the fact that proceedings before the SAC had not been concluded by the date on which letters of appointment were delivered.
- 44 Secondly, the SC performs the most important jurisdictional roles in the Polish justice system as the court of last instance tasked with the exercise of judicial supervision over the activities of both ordinary courts and military courts. It also performs other functions laid down in legislation, including ruling on the validity of elections (to the Sejm and Senate, to the Presidency of the Republic of Poland and to the European Parliament). The latter matters come within the jurisdiction of the Chamber of Extraordinary Control and Public Affairs. This necessitates the

immediate resolution of the doubts expressed in the question referred for a preliminary ruling in order to avoid a systemic threat to civil liberties and rights in Poland or to determine that there is no such threat.

- 45 Thirdly, providing an answer to the question referred for a preliminary ruling as soon as possible is required in order to dispel the doubts concerning the functioning of the SC with the participation of the persons concerned. The participation of those persons in SC benches, assuming that those benches do not meet the standards of an independent and impartial tribunal previously established by law, results in a threat to the stability of SC rulings, which infringes the interests of citizens. It also jeopardises the ability of the SC to perform its systemic functions and undermines the foundations of the justice system in Poland. A judgment which finds that — despite the breaches which have been perpetrated — the SC benches whose compositions include the persons concerned do meet the standards of an independent and impartial tribunal previously established by law will eliminate this threat.

WORKING DOCUMENT