

**Case C-103/24****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:**

7 February 2024

**Referring court:**

Sąd Najwyższy (Poland)

**Date of the decision to refer:**

11 January 2024

**Applicant:**

X.Y.

**Subject matter of the main proceedings**

Application of the defence counsel for a sąd rejonowy (district court) judge in a case to examine whether a judge of the Sąd Najwyższy (Supreme Court) assigned to the panel hearing a disciplinary case against an ordinary court judge fulfils the requirements of independence and impartiality.

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

Compatibility with EU law, in particular with the second subparagraph of Article 19(1) TEU, read in conjunction with the first and second paragraphs of Article 47 of the Charter of Fundamental Rights of the European Union, of the test of a judge's independence and impartiality as provided for in national law – questions raised under Article 267 TFEU.

**Questions referred for a preliminary ruling**

I. Must the second subparagraph of Article 19(1) of the Treaty on European Union, read in conjunction with Article 47 [first and second paragraphs] of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that:

(1) the national Supreme Court, in special proceedings initiated by a party by way of an application to examine whether a judge of the Supreme Court – assigned to the panel hearing a disciplinary case against an ordinary court judge – fulfils the requirements of independence and impartiality, is obliged to examine of its own motion whether the panel drawn by lot from among all judges of the Supreme Court is also a tribunal ‘previously established by law’;

(2) if the application to examine whether a judge of the Supreme Court fulfils the requirements of independence and impartiality is based on the plea that the judge in question was appointed to his or her position under a (fundamentally) flawed appointment procedure, then a panel of five judges drawn by lot from among all judges of the Supreme Court may not include Supreme Court judges who were appointed under the same flawed appointment procedure, since such a Supreme Court panel cannot be considered an independent and impartial tribunal previously established by law?

- if the answer to the question presented in point I(2) above is in the affirmative:

II. Is the irregular composition of the panel – in a case to examine whether a judge of the Supreme Court fulfils the requirements of independence and impartiality – affected, in the context of the second subparagraph of Article 19(1) of the Treaty on European Union and Article 47 of the Charter of Fundamental Rights of the European Union, by the fact that out of the five-judge panel only two judges were appointed to their positions of Supreme Court judges under a (fundamentally) flawed appointment procedure, that is to say, is it nevertheless possible to continue the proceedings and to give a ruling, since the issue of flawed appointment to the position of Supreme Court judge does not affect the majority of the judges in the selected panel?;

- if the answer to the question presented in point II is that where the five-judge panel required by national law includes two or even one improperly appointed Supreme Court judge, such a court is not a tribunal within the meaning of the second paragraph of Article 19(1) of the Treaty on European Union and Article 47 of the Charter of Fundamental Rights of the European Union, in so far as the appointment process is fundamentally flawed:

III. In order to safeguard the right of the parties to have their case heard within a reasonable time within the meaning of the second subparagraph of Article 19(1) of the Treaty on European Union and Article 47 of the Charter of Fundamental Rights of the European Union, is it permissible for an application to examine fulfilment of the requirements of independence and impartiality by a judge of the Supreme Court (appointed to hear a disciplinary case against an ordinary court judge) to be heard by a court consisting of a single judge (the judge-rapporteur), whose appointment to the position of Supreme Court judge is not flawed, as an application to exclude a judge of the Supreme Court under the general rules?

### **Provisions of European Union law relied on**

Treaty on European Union – Article 4(3), Article 6(1), second subparagraph of Article 19(1);

Treaty on the Functioning of the European Union – Article 2(1) and (2), Article 267;

Charter of Fundamental Rights, first and second paragraphs of Article 47.

### **Case-law of the Court of Justice**

Judgment of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, ‘the judgment in A.K.’;

Judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235;

Judgment of 21 December 2023, *Krajowa Rada Sądownictwa (Continued holding of a judicial office)*, C-718/21, EU:C:2023:1015;

Judgment of 1 July 2008, *Chronopost and La Poste/UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375;

Judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530;

Judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626;

Judgment of 22 May 2003, *Connect Austria*, C-462/99, EU:C:2003:297;

Judgment of 2 June 2005, *Koppensteiner*, C-15/04, EU:C:2005:345;

Judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798;

Judgment of 21 December 2023, *Krajowa Rada Sądownictwa (Continued holding of a judicial office)*, C-718/21, EU:C:2023:1015.

### **Case-law of the European Court of Human Rights**

Judgment of 22 July 2021, *Reczkowicz v. Poland*;

Judgment of 3 February 2022, Application No 1469/20, *Advance Pharma sp. z o.o. v. Poland*;

Judgment of 1 December 2020, Application No 26374/18, *G. Astradsson v. Iceland*;

Judgment of 21 June 2011, *Fruni v. Slovakia*;

Judgment of 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*;

Judgment of 7 May 2021, Application No 4907/18, *Xero Flor w Polsce sp. z o.o. v. Poland*;

Judgment of 8 November 2021, Applications Nos 49868/19 and 57511/19, *Dolińska-Ficek and Ozimek v. Poland*.

### **Provisions of national law relied on**

Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland) – Article 45(1);

Ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym (Law of 8 December 2017 on the Supreme Court) – Article 10(1), Article 29(4), (5), (6), (8), (9), (10), (15), (17), (18), (21) and (24), Article 22a(1), Article 26(2), (3) and (4), and Article 73(1);

Ustawa z dnia 27 lipca 2001 r. – Prawo o ustroju sądów powszechnych (Law of 27 July 2001 on the organisation of the ordinary courts) – Article 128;

Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego (Law of 6 June 1997 – Code of Criminal Procedure) – Article 30(1) and (2), Article 41(1), Article 42(1), and Article 534(1) and (2).

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 The Law of 9 June 2022, which took effect on 15 July 2022, further amended the Law of 8 December 2017 on the Supreme Court ('the Law on the Supreme Court'). It introduced the possibility for a concerned party or participant in Supreme Court proceedings to file an application to examine whether a particular judge assigned to a panel fulfils the requirements of independence and impartiality; Article 29(4) of the Law on the Supreme Court stipulates that the circumstances surrounding the appointment of a Supreme Court judge may not provide the sole basis for challenging a ruling given by a panel including that judge or for questioning his or her independence and impartiality. Pursuant to Article 29(5) of the Law on the Supreme Court, it is permissible to examine whether a judge of the Supreme Court fulfils the requirements of independence and impartiality, taking into account the circumstances surrounding his or her appointment and his or her conduct after being appointed, upon the application of an eligible party (that is to say, a party or a participant in Supreme Court proceedings), if, in the given case, this could result in a breach of the standard of independence or impartiality affecting the outcome of the case, taking into account the circumstances related to the eligible party and the nature of the case.

The Supreme Court hears the application in closed session, sitting as a panel of five judges drawn by lot from among all judges of the Supreme Court, after hearing the judge whom the application concerns, unless such hearing is impossible or very difficult. If the application is upheld, the Supreme Court excludes the judge from hearing the case. The exclusion of a judge from hearing a case cannot provide the basis for excluding that judge from other cases heard by a panel on which he or she sits. The order issued as a result of considering the application may be appealed against before the Supreme Court sitting as a panel of seven judges drawn by lot from among all judges of the Supreme Court.

- 2 The defence counsel for judge X.Y. of the Sąd Rejonowy (District Court) in P., in connection with the disciplinary proceedings initiated by the decision of the Deputy Disciplinary Officer at the District Court in P. dated 12 August 2020 and conducted by the Chamber of Professional Responsibility of the Supreme Court, filed an application to establish whether the conditions referred to in Article 29(5) of the Law on the Supreme Court had been fulfilled, and requested that the fulfilment by Supreme Court Judge K.B. of, *inter alia*, the requirements of independence and impartiality be examined and that he be excluded from hearing the disciplinary case involving Judge X.Y.
- 3 In the grounds for the application, it was indicated that Supreme Court Judge K.B. was appointed to serve as a judge of the Supreme Court by a decision of the Prezydent Rzeczypospolitej Polskiej (President of the Republic of Poland) dated 23 May 2022, on the basis of an earlier proposal for appointment contained in a resolution adopted by the Krajowa Rada Sądownictwa (National Council of the Judiciary, 'the KRS') constituted under the procedure set out in the provisions of the ustawa z dnia 8 grudnia 2017 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law of 8 December 2017 amending the law on the National Council of the Judiciary and certain other laws, 'the 8 December 2017 amendment'), and by a decision of the President of the Republic of Poland dated 17 September 2022 Judge K.B. was assigned to the Chamber of Professional Responsibility of the Supreme Court. The flawed composition of the KRS, which affects the regularity of the judicial appointment procedure, has been confirmed in a number of rulings by the Court of Justice of the European Union and by the Supreme Court.
- 4 The five-judge panel conducting the so-called 'independence test', which was drawn by lot, includes, among others, Judges C.W. and B.Z., who were also appointed to their positions of Supreme Court judges upon a proposal from the KRS constituted under the procedure stipulated in the 8 December 2017 amendment.

#### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 5 The present case differs from case Nos I ZB 73/22 (C-96/24) and I ZB 81/23 (C-112/24) in that no application has been filed to exclude Judges C.W. and B.Z.

from hearing the case, since in cases C-96/24 and C-112/24 such applications were dismissed, and they were dismissed by judges whose appointments were flawed due to the fact that they received recommendations from the KRS constituted under the procedure stipulated in the 8 December 2017 amendment. It therefore appears pointless to initiate incidental proceedings to exclude the improperly appointed judges.

- 6 In other respects, the reasoning is largely identical to that in the request for a preliminary ruling in Case C-96/24 or analogous to it.

WORKING DOCUMENT