

**Case C-43/22**

**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:**

18 January 2022

**Referring court:**

Sąd Najwyższy (Poland)

**Date of the decision to refer:**

22 December 2021

**Appellant:**

Prokurator Generalny

**Other parties to the proceedings:**

D.J., D[X]. J., Ł.J., S.J.

Wojewódzkie Pogotowie Ratunkowe w K.

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**Subject matter of the main proceedings**

Extraordinary appeal against a judgment awarding compensation for non-material damage caused by the death of a close person.

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

Compatibility with EU law of the secondment of a judge to a higher civil court for a fixed or indefinite period on the basis of criteria which have not been made public, with the possibility of terminating the secondment of that judge at any time and without stating reasons.

Article 267 TFEU

## Questions referred for a preliminary ruling

1. Must the second subparagraph of Article 19(1) and Article 5(1) to (3) of the Treaty on European Union, read in conjunction with Articles 47 and 51(1) of the Charter of Fundamental Rights, be interpreted as precluding national rules under which the Minister for Justice of a Member State may, on the basis of criteria which have not been made public, on the one hand, second a judge to a higher civil court with jurisdiction over matters of EU law for a fixed or indefinite period, and, on the other hand, terminate the secondment of that judge at any time by way of a decision which does not contain a statement of reasons?

2. If the answer to the first question is in the affirmative: must the second subparagraph of Article 19(1) and Article 5(1) to (3) of the Treaty on European Union, read in conjunction with Articles 47 and 51(1) of the Charter of Fundamental Rights, be interpreted as meaning that a national court seised of an appeal against a decision of a court which includes a judge seconded in the manner described in the first question is required to examine of its own motion whether that court is independent and impartial even if the case at issue does not involve a matter of EU law?

3. *If the answer to the second question is in the affirmative: must the second subparagraph of Article 19(1) and Article 5(1) to (3) of the Treaty on European Union, read in conjunction with Articles 47 and 51(1) of the Charter of Fundamental Rights, be interpreted as requiring a court of a Member State to set aside a final court decision whenever it is established that such a seconded judge participated in the examination of the case, and that the court which included the judge in question was not independent and impartial, by means of a legal remedy the purpose of which is to set aside final decisions, such as an extraordinary appeal, or does the determination of the effects of such an infringement come within the procedural autonomy of the Member State?*

### Provisions of EU law cited

Second subparagraph of Article 19(1) TEU, and Article 5(1) to (3) TEU

Articles 47 and 51(1) of the Charter of Fundamental Rights

### Provisions of national law cited

Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland) – Article 45, Article 178(1), Article 179;

Ustawa – Prawo o ustroju sądów powszechnych (Law on the System of Ordinary Courts, ‘the LSOC’) – Article 77;

Kodeks postępowania cywilnego (Code of Civil Procedure, 'the CCP') – Article 1, Article 379(4), Article 386(2), Article 398<sup>13</sup>, Article 398<sup>15</sup>, Article 398<sup>21</sup>;

Ustawa o Sądzie Najwyższym (Law on the Supreme Court) – Article 1(1)(b), Article 26(1), Article 89(1), Article 91(1), Article 95(1).

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

- 1 By judgment of 18 October 2017, the Sąd Apelacyjny (Court of Appeal) dismissed the appeals of both parties against the judgment of the Sąd Okręgowy (Regional Court) of 9 March 2016 awarding from the defendant, the Wojewódzkie Pogotowie Ratunkowe (Provincial Ambulance Service) in K., to each of the applicants (D.J., D[X]. J., Ł.J. and S.J.) the sum of PLN 100 000 together with statutory interest from 7 August 2013 until the date of payment as compensation for non-material damage caused by the death of a person close to them, I.J., that compensation being based on Article 446(4) of the Civil Code, read in conjunction with Articles 23 and 24 thereof.
- 2 The court which delivered the judgment included J.K. and J.N., judges of the Court of Appeal performing their judicial duties in the Court of Appeal, and A.P.-P., a district court judge, seconded from 1 November 2016 for an indefinite period to perform judicial duties in the Court of Appeal.
- 3 An extraordinary appeal against the judgment of the Court of Appeal was lodged by the Prokurator Generalny (Prosecutor General) pursuant to Article 89(1), read in conjunction with Article 115(1) and (1a), of the Law on the Sąd Najwyższy (Supreme Court), citing the need to ensure compliance with the principle of a democratic state operating under the rule of law and implementing the principles of social justice, and challenging the judgment in its entirety.
- 4 The Prosecutor General alleged that the contested judgment breached the principles and human and civil freedoms and rights laid down in the Constitution of the Republic of Poland: firstly, by holding that the amount of PLN 100 000 each was appropriate compensation for the applicants, despite the fact that the relationship between family members had been broken as a result of I.J.'s death following a wrongful act committed by an employee of the Provincial Ambulance Service in K. and the amounts awarded did not fulfil the compensatory function, and secondly, by failing to take into account the applicants' legal and factual situation as a consequence of the wrongful act committed by an employee of the Provincial Ambulance Service in K. and by failing to consider the possibility of awarding them compensation in the full amount claimed, that is to say, PLN 200 000 each. The Prosecutor General also alleged a flagrant breach of substantive law by reason of misinterpretation of the relevant provisions of the Civil Code, resulting in the assumption that the appropriate compensation due to the applicants was PLN 100 000 each, and that higher amounts would have been excessive.

- 5 In response to the extraordinary appeal, the applicants requested that the appeal be allowed in its entirety and that the defendant be ordered to pay their costs. The defendant, in turn, requested that the appeal be dismissed as manifestly unfounded and that it be awarded the costs of the proceedings.

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

- 6 The need to submit to the Court of Justice the legal questions set out in the operative part of the present order stems from the fact that the court which delivered the contested judgment included a judge seconded pursuant to Article 77(1)(1) of the LSOC to perform judicial duties in a higher court for an indefinite period. That need has arisen following the judgment of the Court of Justice of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:931, paragraphs 72, 73, 81, 82, 83, 88 and 90 of which and its operative part are cited in the order for reference.
- 7 In particular, in that context, a doubt arises as to whether the conclusions of the judgment in Case C-748/19, which were drawn in the context of criminal proceedings, should also be applied to the situation of judges seconded under Article 77(1)(1) of the LSOC to adjudicate civil cases.
- 8 Since that judgment was delivered as a result of a reference for a preliminary ruling by a referring court adjudicating a criminal case, its conclusions cannot be directly applied to the situation of seconded judges adjudicating civil cases, if only because those conclusions were also formulated as a result of an examination of the compatibility of national legislation with Article 6(1) and (2) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. At the same time, apart from the obvious differences between criminal and civil proceedings, the doubt is caused by, *inter alia*, the fact that in civil proceedings the Minister Sprawiedliwości (Minister for Justice), who is at the same time the Prosecutor General, does not have authority over one of the parties to the trial (unlike in criminal proceedings, in which the Minister has authority over the public prosecutor).
- 9 In view of the foregoing, a doubt arises as to whether the judgment of the Court of Justice in Case C-748/19 may be applied to the situation of a judge seconded to perform judicial duties at a higher court with jurisdiction over civil cases involving EU law where the secondment is on the terms set out in Article 77(1)(1) of the LSOC, which provision does not require that the criteria determining the secondment be indicated or that they be made public. A similar question arises in view of the fact that, pursuant to Article 77(4) of the LSOC, the secondment of a judge seconded to perform judicial duties at a higher court with jurisdiction over civil cases involving EU law may, just as in the case of a seconded judge who adjudicates criminal cases subject to EU-law regulations, be terminated without

notice on the basis of a decision of the Minister for Justice which need not contain a statement of reasons.

- 10 If the first question is answered in the affirmative, it will be necessary to determine the consequences of the provisions on secondment – within the scope stated above – being declared incompatible with EU law. The main question is whether a national court seised of an appeal against a decision of a court which included a seconded judge is required to examine of its own motion whether that court is independent and impartial even if the case at issue does not involve a matter of EU law.
- 11 The court judgment contested in the main proceedings was delivered in a case relating to financial compensation for non-material damage caused by the death of a close person, and proceedings to pursue such claims are not regulated by EU law. However, it should be borne in mind that the judgment of the Court of Justice in Case C-748/19 was delivered in the context of a case with an EU element in view of the applicability of Directive 2016/343. Therefore, that judgment of the Court of Justice cannot, in the opinion of the Sąd Najwyższy (Supreme Court), be applied directly to the situation of seconded judges who adjudicate cases that are not only of a different nature (civil proceedings), but are also not covered by the norms established under the European Union's legislative procedure.
- 12 If, in answering the first question, the Court of Justice were to hold that judges seconded under Article 77(1)(1) of the LSOC who adjudicate civil cases are not covered by guarantees of independence and impartiality, the question would arise as to what consequences this would have where a judgment in a civil case which does not come within the scope of EU law is being challenged. In such a case, a justified doubt arises, in particular, as to whether a national court seised of an appeal against a decision of a court which includes a judge seconded in the manner described above may be required to examine of its own motion whether that court is independent and impartial. Indeed, the principle of procedural autonomy of the Member States may lead to the conclusion that it is for national law to determine whether and to what extent that issue is to be examined by the appellate court, including, inter alia, whether a relevant plea must be raised by a party to the proceedings.
- 13 In addition, if the second question thus formulated is answered in the affirmative, a doubt arises as to whether it is permissible to set aside a judgment delivered with the participation of a judge seconded under Article 77(1)(1) of the LSOC by means of a legal remedy such as an extraordinary appeal. In that regard it becomes relevant, in particular, whether a national court hearing such an extraordinary appeal may be required to set aside a final judgment whenever it is established that such a seconded judge participated in the examination of the case and therefore, as the Court of Justice has found, the court that included such a judge was not independent and impartial.

- 14 An extraordinary appeal is an exceptional remedy which was designed on the basis of the assumption that it should serve to set aside court judgments which are fundamentally defective in the light of the principle of a democratic state operating under the rule of law and implementing the principles of social justice. The role of the constitutional review exercised by the Supreme Court in a specific case as a result of an extraordinary appeal being lodged is not to set aside all defective judgments, but only those that undermine the social contract that is the foundation of a democratic state operating under the rule of law and implementing the principles of social justice, and thus concern a specific relationship between the individual and public authorities or the dignity of the individual. Therefore, a breach which is found to undermine that principle must be sufficiently serious to warrant interference with the principle of *res judicata*. By making it possible to set aside a final judgment where this is found to be justified, the institution of extraordinary appeal is an exception to the constitutional principle of the stability of final court decisions. Therefore, the mere fact that a judgment has been delivered in gross infringement of the law does not yet justify setting it aside in order to ensure compliance with the principle of a democratic state operating under the rule of law, because in some specific circumstances priority should be given to the constitutional value of legal certainty, an inherent element of which is the protection of *res judicata*, which serves to protect the stability and finality of court decisions and the legal relationships which they establish.
- 15 The principle of the stability of final court decisions is also an important value within the legal order of the European Union. It is recognised that, given the importance of *res judicata*, stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the periods provided for in that connection can no longer be called into question. It follows that EU law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of EU law by the decision at issue (judgments of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269, paragraphs 46 and 47, and of 16 March 2006, *Kapferer*, C-234/04, EU:C:2006:178, paragraphs 20, 21 and 24).
- 16 At the same time, EU law is governed by the principle of effectiveness (*effet utile*), which requires the full application of that law in all Member States, as well as providing a guarantee for the procedural protection of the rights that individuals derive from that law. In the light of that principle, EU law should be applied of a court's own motion, without having to be invoked in a plea raised by a party.
- 17 A kind of complement to the principle of effectiveness is the concept of procedural autonomy of the Member States. That doctrine, which was traditionally articulated in the Court's judgments of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral*, 33/76, EU:C:1976:188, and *Comet*, 45/76, EU:C:1976:191, recognises that, in the absence of EU rules, it is for the domestic legal system to designate the courts having jurisdiction and to determine the procedural conditions

governing actions at law intended to ensure the protection of the rights which citizens of the Member States derive from the direct effect of EU law.

- 18 In view of the foregoing, a doubt arises as to whether the lodging of an extraordinary appeal against a final judgment in a civil case that is not a case involving EU law, which judgment was delivered with the participation of a judge seconded to perform judicial duties at a higher court pursuant to Article 77(1)(1) of the LSOC, should – if the Court of Justice finds, as it did in Case C-748/19, that such a judge is not covered by guarantees of independence and impartiality – necessarily result in that judgment being set aside. In that eventuality, it would primarily have to be clarified whether a national court hearing an extraordinary appeal must, of its own motion and in all circumstances, set aside the final judgment of a court that included such a seconded judge, or whether it is possible to determine the consequences of such a breach in accordance with national rules within the framework of the aforementioned procedural autonomy of the Member State.

WORKING DOCUMENT