

Case C-748/23 [Gekus]ⁱ

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:

6 December 2023

Referring court:

Sąd Najwyższy (Poland)

Date of the decision to refer:

20 October 2023

Appellant:

C. Limited

Respondent:

M. S.

Subject matter of the main proceedings

Action for payment – Incidental proceedings – Motion to examine whether a Supreme Court judge fulfils the requirements of independence and impartiality

Subject matter and legal basis of the reference

Second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights – Criteria for determining that the requirements of independence and impartiality have not been met – Composition of the adjudicating panel conducting the test to determine whether a Supreme Court judge is impartial

ⁱ This case has been given a fictitious name which does not correspond to the real names of either of the parties to the proceedings.

Questions referred for a preliminary ruling

1. Must the second subparagraph of Article 19(1) TEU, interpreted in light of Article 47 of the Charter of Fundamental Rights, be understood as meaning that the circumstances of a judicial appointment may in and of themselves indicate that a judge fails to meet the requirements of independence and impartiality if those circumstances result in a court being constituted in a manner that violates an individual's right to a tribunal or, alternatively, that the failure to meet those requirements is determined by the judge's passive acceptance (by continuing to give rulings) of irregularities in the procedure by which he or she was appointed, resulting in a court being constituted in a manner that violates an individual's right to a tribunal?
2. Must the second subparagraph of Article 19(1) TEU, interpreted in light of Article 47 of the Charter of Fundamental Rights, be understood as meaning that the test to determine whether a judge of the Sąd Najwyższy (Supreme Court, Poland) is impartial cannot be conducted by judges whose participation – due to the fact that they were appointed as Supreme Court judges on a proposal of the Krajowa Rada Sądownictwa (National Council of the Judiciary) constituted in accordance with the procedure set out in 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, Dziennik Ustaw (Journal of Laws) of 2018, item 3) – violates an individual's right to a tribunal?
3. If the second question is answered in the affirmative, must the second subparagraph of Article 19(1) TEU, interpreted in light of Article 47 of the Charter of Fundamental Rights, be interpreted as meaning that the Supreme Court is obliged not to include such judges in the panel conducting the impartiality test and, as a last resort, disapply the national provision providing for a panel of five judges in such cases, whereby the case should be heard by another panel provided for by national law which does not include such judges?

Provisions of European Union law relied on

Second subparagraph of Article 19(1) TEU

Article 47 of the Charter of Fundamental Rights

Provisions of national law relied on

Article 29 of the ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym (Law of 8 December 2017 on the Supreme Court, consolidated text: Journal of Laws of 2023 item 1093, as amended; 'the LSC')

Succinct presentation of the facts and procedure in the main proceedings

- 1 The dispute in the main case is between an Irish company and an Irish citizen. It concerns the obligations of the parties and liability for legal actions taken in the territory of Poland. The final judgment of the court of second instance in the present case is to be enforced in Ireland, but the respondent has asked the Irish court to refuse to recognise and enforce the judgment on the grounds that his right to a tribunal was violated on account of the fact that Judge JG, seconded by the Minister Sprawiedliwości (Minister of Justice), participated in hearing the case. The appellant filed an application for a test of impartiality and independence of the Supreme Court Judge JG.
- 2 The appellant relied on the following circumstances in order to demonstrate that the requirement of independence and impartiality had not been met. First, a proposal was made to the President of the Republic of Poland seeking that Judge JG be appointed to the office of a judge of the Supreme Court pursuant to a resolution of the KRS formed following the recent judicial reform. Second, Judge JG signed the declaration of the judges of the Izba Cywilna Sądu Najwyższego (civil division of the Supreme Court), according to which the judgment of the Court of Justice 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 does not concern judges of the civil division of the Supreme Court appointed to the office of judge on the basis of a resolution of the KRS in its new composition. Third, the appellant referred to the statement of the respondent M.S in the main proceedings, from which it is clear that the respondent, alleging infringement of his right to have his case heard by an impartial and independent tribunal established by law, seeks to obtain from the Irish courts a refusal to declare enforceable the Polish judgments issued in the main proceedings.
- 3 In order to examine the request for an impartiality test made by the appellant, a panel of five judges of the Supreme Court was selected. In closed session on 20 October 2023, the Supreme Court sitting as a single-member panel consisting of the reporting judge (who is also the president of the panel consisting of five judges) expressed doubts as to the admissibility of the request for the impartiality test (to be decided by a single-member panel) and as to the panel to examine that request on the merits, and raised the questions referred for a preliminary ruling set out in the operative part of this order for reference.

The essential arguments of the parties in the main proceedings

- 4 According to the appellant, in the event that the ruling by the Supreme Court, given with the participation of Judge JG, is unfavourable to the respondent, the respondent will continue to try to prevent the judgments of Polish courts from being enforced.

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

- 5 The legal issue raised in the question referred for a preliminary ruling, as well as the incidental proceedings in the main case, that is to say, the proceedings concerning the impartiality and independence test, have the character of an EU case. First, it is understood that the provisions governing test case proceedings have been the subject of negotiations between representatives of the Republic of Poland and representatives of the European Commission. It is therefore necessary for the Court of Justice to provide interpretive guidance to allow the Supreme Court to determine whether the effect of the actions taken by the Polish legislature is consistent with EU standards concerning the right to a tribunal. Secondly, that character is attested by the fact that the dispute in the main case is between an Irish company and an Irish citizen, and the judgment is also to be enforced in Ireland. However, that dispute concerns the obligations of the parties and liability for legal actions taken in the territory of the Republic of Poland. Thirdly, by order of 15 March 2023 (*Prezes Urzędu Ochrony Konkurencji i Konsumentów – President of the Office of Competition and Consumer Protection, C-326/23*) the Supreme Court has already referred a question for a preliminary ruling concerning the interpretation of EU law in a test case. However, the Supreme Court in its present composition clarifies that the question concerned was referred by a panel consisting of a single judge, at a similar stage of the test procedure as in the present case (a hearing on the possible rejection of the motion for the impartiality test), and that the composition of the Supreme Court panel referring the question was covered by the scope of application of the resolution of the combined Chambers of the Supreme Court – the Civil, Criminal, and Labour and Social Insurance Chambers – of 23 January 2020 ('the resolution of the three combined SC chambers').
- 6 The abovementioned resolution is the ruling of the national court referred to in the judgments of 12 May 2022, *W. J. (Change in the habitual residence of the maintenance creditor)*, C-644/20, EU:C:2022:371, and of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235. It follows from the operative part of that resolution that 'the judges constituting the referring court are not independent and impartial, and the court is not a tribunal previously established by law within the meaning of the second subparagraph of Article 19(1) TEU in light of the second paragraph of Article 47 of the Charter of Fundamental Rights'. The referring court points out that the effects of the resolution were not removed by the judgment of the Trybunał Konstytucyjny (Constitutional Court) of 20 April 2020, as has also been confirmed by the case-law of the Supreme Court, because the Constitutional Court is not competent to declare the rulings of the Supreme Court unconstitutional. Therefore, the view that the resolution of the three combined SC chambers is non-existent is incorrect.
- 7 The first question referred is relevant to the further examination of the appellant's motion for the impartiality test. The appellant considers that due to the circumstances of Judge JG's appointment to a judicial post in the Supreme Court, the impartiality and independence standard has not been met. Pursuant to

Article 29(10) of the LSC, a motion based on such grounds should be rejected. The answer given by the Court of Justice will determine whether the appellant's motion for the impartiality test is rejected or referred to a hearing on the merits. This depends on whether national laws that ostensibly seek to implement the judgments of the Court of Justice (and indirectly those of the European Court of Human Rights) should be interpreted consistently with EU law or disapplied. In fact, the provisions of the LSC that apply to the present case prevent the implementation of the Court's judgments in a manner that would meet the requirements of Article 19 TEU and Article 47 of the Charter of Fundamental Rights.

- 8 The referring court points out that a systemic problem with the impartiality and independence of judges emerged in the Polish legal system when the composition of the National Council of the Judiciary ('the NCJ') was changed, since its new composition made it dependent on the political authorities. Therefore, in the resolution of the three combined SC chambers, it was assumed that 'a judge appointed with the participation of [an NCJ] constituted and operating in a flawed manner does not enjoy the presumption of independence'.
- 9 The referring court notes that two lines of Supreme Court case-law have emerged in connection with the practical application of the impartiality test. According to the narrow interpretation of Article 29 of the LSC, a motion for an impartiality test must indicate (together with evidence) the circumstances surrounding the judge's appointment and his or her conduct after the appointment that would warrant the assumption that the standard of independence and impartiality had not been met as well as the impact of the failure to meet the standard of independence and impartiality on the outcome of the case in question, taking into account the nature of the case. According to that line of case-law, the purpose of the examination of a judge's independence and impartiality provided for in Article 25(5) et seq. of the LSC is not to enable challenges to the system of judicial appointments envisaged by the legislature, but rather to assess the individual circumstances surrounding the appointment of a particular judge and his or her conduct after the appointment, and that assessment is to be made in the context of a particular case.
- 10 The abovementioned line of case-law has been developed both by panels consisting of a single Supreme Court judge (judge-rapporteur) and by panels composed of persons appointed to the position of a Supreme Court judge who are covered by the resolution of the three combined SC chambers. There is a one difference between the rulings given by the above panels: the panels composed of Supreme Court judges treat impartiality test proceedings as superfluous, since even before the introduction of those proceedings into the Polish legal order, parties could demand that a judge be excluded on the basis of existing procedural rules if there was reasonable doubt as to his or her impartiality in the case in question (Article 49(1) of the Kodeks Postępowania Cywilnego – Code of Civil Procedure, Article 41(1) of the Kodeks Postępowania Karnego – Code of Criminal Procedure).

- 11 However, there is also an entirely different line of Supreme Court case-law that has emerged in cases in which a panel of Supreme Court judges not covered by the resolution of the three combined SC chambers was drawn from among all Supreme Court judges. In those cases, judges covered by the resolution of the three combined SC chambers whom the motion for the impartiality test concerned were excluded from hearing the main case on the grounds that, pursuant to the resolution of the three combined SC chambers, a Supreme Court judge who was appointed upon a motion submitted by the NCJ in its new composition did not meet the minimum standard of impartiality.
- 12 In that line of case-law, the Supreme Court further clarified that the Constitutional Court judgments of 14 July 2021, 24 November 2021, and 10 March 2022 are not binding. Those judgments do not render the existing laws null and void, and therefore do not bind independent courts, in particular the Supreme Court. In addition, the abovementioned Constitutional Court judgments should be disregarded as incompatible with the principle of the primacy of EU law (judgment of the Court of Justice of 22 February 2022, *RS* (Effects of the decisions of a constitutional court), C-430/21, EU:C:2022:99, in particular paragraph 77).
- 13 In that regard, the Supreme Court also refers to the case-law of the European Court of Human Rights in its judgments of 22 July 2021 in *Reczkowicz v. Poland*, Application no 43447/19, ECHR:2021:0722; of 8 November 2021 in *Dolińska-Ficek and Ozimek v. Poland*, Applications nos 49868/19 and 57511/19, ECHR:2021:1108; and of 3 February 2022 in *Advance Pharma sp. z o.o. v. Poland*, Application no 1469/20. The Supreme Court believes that those judgments make it possible to claim that a Supreme Court judge appointed under the new procedure must be excluded from hearing a case, irrespective of the circumstances of the specific case.
- 14 The referring court points out that it follows from the case-law of the Court of Justice that when assessing whether an individual has been able to exercise his or her right to a tribunal, it is taken into account whether the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them (judgments: 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, paragraph 134; of 2 March 2021, *A. B. and Others* (Appointment of judges to the Supreme Court – Appeal), C-824/18, EU:C:2021:153, paragraph 123; of 15 July 2021, *Commission/Poland* (Disciplinary regime for judges), C-791/19, EU:C:2021:596, paragraph 98; 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, paragraph 148).

- 15 The referring court finds that the obligation to examine the circumstances surrounding a judicial appointment arises from the judgments of 1 July 2008, *Chronopost and La Poste v UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraphs 46 and 48, and of 26 March 2020, *Réexamen Simpson v Council and HG/Commission*, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 57. The obligation of every court to check whether, as composed, it ensures a fair trial, is also confirmed in the judgments of 24 March 2022, *Wagenknecht v Commission*, C-130/21 P, EU:C:2022:226, paragraph 15, and of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 206.
- 16 The referring court is of the opinion that Article 29(5) of the LSC can – and should – be interpreted in a manner that makes it possible to meet the ECHR and EU standards outlined above. Therefore, in the present case, the ‘circumstances surrounding the appointment’ of the judge in question mean that the procedure for the appointment of Judge JG to the position of a Supreme Court judge involved a flagrant breach of the law consisting in the NCJ in its new composition and the Prezydent Rzeczypospolitej Polskiej (President of the Republic of Poland) ‘wilfully and intentionally’ ignoring the order of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 27 September 2018 suspending the implementation of Resolution No 330/18 of 28 August 2018, and thus preventing that court from reviewing the legality of the resolution. The ‘circumstances related to the judge’s conduct after the appointment’, in turn, consist in the judge’s failure to evaluate the appointment procedure negatively (passive acceptance) despite the existence of the national, EU and international case-law presented above.
- 17 In those circumstances, the Supreme Court in its present composition believes it is necessary for the Court of Justice to clarify whether, in light of the EU standard of the right to a tribunal and to an effective judicial remedy, the circumstances of a judicial appointment must be excluded from the test of judicial impartiality and independence where it follows from the very circumstances of the judicial appointment that the participation of the person in question in hearing the case will violate the individual’s right to a tribunal within the meaning of Article 6(1) of the ECHR.
- 18 If Article 19 TEU and Article 47 of the Charter of Fundamental Rights must be interpreted as meaning that a flaw in a judicial appointment procedure is sufficient in and of itself to call into question that judge’s independence and impartiality in the given case (and in any other case), then it is necessary to ensure that the motion for the impartiality test is heard by an independent and impartial tribunal established by law. The panel randomly selected to hear the motion for the impartiality test in the present case consists of two judges of the Supreme Court and three judges covered by the resolution of the three combined SC chambers. One of the latter judges – Judge MS – has already been excluded from hearing another case after the same impartiality test procedure as in the present case was conducted (Supreme Court order of 19 October 2023) as a result of the

circumstances surrounding his appointment. Judges RS and RD, in turn, are excluded from hearing cases that do not involve impartiality tests if a party submits a motion for their exclusion and a panel composed of a Supreme Court judge not covered by the resolution of the three combined SC chambers is randomly selected to hear that motion. Thus, the panel of the Supreme Court in the present case, which is to hear the motion for the impartiality test, includes persons affected by the national court ruling referred to in the judgments in *W. J.* (Change of habitual residence of the maintenance creditor) and *Getin Noble Bank*.

- 19 Pursuant to Article 29(15) of the LSC, the Supreme Court hears motions for impartiality tests in closed session, sitting as a panel of five judges randomly selected ‘from among all the judges of the Supreme Court’. As a result, in cases concerning judges appointed to the Supreme Court upon motions submitted by the ‘new’ NCJ, the outcome of the impartiality test may be decided by other judges appointed on the basis of a resolution adopted by the NCJ in its new composition and in similar circumstances. It is for this reason, as indicated in the case-law of the Supreme Court, that the manner in which the panel hearing a motion for an impartiality test is formed demonstrates that the purpose of the *ustawa z 9 czerwca 2022 r. o zmianie ustawy o Sądzie Najwyższym oraz niektórych innych ustaw* (Law of 9 June 2022 amending the Law on the Supreme Court and certain other laws), and of the structure of the test procedure itself, was to deliberately introduce a solution that would nullify the principle of *nemo iudex in causa sua*.
- 20 The referring court recalls that, pursuant to the resolution of the three combined SC chambers, if a judge of the Supreme Court appointed on the basis of a resolution adopted by the NCJ in its new composition participates in hearing a case, the result is the invalidity of the proceedings (in civil proceedings) or the improper composition of the court (in criminal proceedings). However, that resolution is not respected by judges appointed to judicial posts upon motions submitted by the NCJ in its new composition. Those judges are not omitted from the panel selection procedure, nor do they, with very few exceptions, recuse themselves from hearing impartiality test cases.
- 21 Therefore, in the opinion of the Supreme Court, the test of judicial independence and impartiality provided for in Article 29(4) of the LSC does not fulfil the criteria necessary to secure the rights guaranteed to the appellant by acts that are higher ranking than statutes, including in particular Article 6(1) of the ECHR, and thus also Article 19(1) TEU, read in conjunction with Article 47 and Article 52(3) of the Charter of Fundamental Rights, in a situation in which the panel hearing the appellant’s appeal on a point of law includes a judge appointed to the Supreme Court upon a motion submitted by the NCJ in its new composition.
- 22 The referring court points out that the case-law of the European Court of Human Rights and the Supreme Court, as well as judgments given by the Court of Justice to date, are contested by adjudicating panels that include persons appointed as Supreme Court judges upon motions submitted by the NCJ in its new composition. It is necessary to obtain the Court of Justice’s answer as to the

interpretation of Article 19 TEU and Article 47 of the Charter of Fundamental Rights on the question of whether it is permissible for the national legislature to create judicial panels that violate the right to a tribunal within the meaning of Article 6 of the ECHR and issue invalid (under national law) judgments in an EU case. In the opinion of the referring court, it is impermissible that an EU case (such as an impartiality test case) can be decided by a court composed of persons appointed to judicial posts in circumstances which, in light of the judgment in *A. K. and Others*, allow a court that has no jurisdiction to consider that it does have jurisdiction when national law entrusts the hearing of a case (incidental proceedings) to a court that is not a tribunal within the meaning of Article 47 of the Charter of Fundamental Rights, and additionally, in light of the judgment in *W. Ž.*, those circumstances allow a national court's rulings to be disregarded. Moreover, according to the judgments of the European Court of Human Rights, the participation of such persons in the hearing of a case constitutes a violation of the individual's right to a tribunal, and thus to take a different view would imply that, contrary to Article 52(3) of the Charter of Fundamental Rights, the EU standard regarding that right is lower than the ECHR standard. Therefore, the principle of national procedural autonomy in determining the composition of national court panels competent to hear an EU case such as an impartiality test case should be limited on account of the principle of effectiveness.

- 23 The purpose of the third question referred is to provide another instrument to protect of the rule of law by adding an obligation to ensure that the composition of a national court meets EU standards regarding the right to a tribunal. Indeed, it cannot be ruled out that, given the past practice of those in charge of the Supreme Court since May 2020, which includes preventing the implementation of preliminary rulings of the Court of Justice, adjudicating panels in impartiality test cases will continue to include persons covered by the resolution of the three combined SC chambers.
- 24 In the minimum variant, that instrument could consist in an obligation to use existing national procedural rules to remove from the adjudicating panel persons (judges) whose participation in the hearing of the case will result in a violation of the individual's right to a tribunal, and then to fill the panel with persons whose participation in the hearing of the case will not raise any doubts regarding that right. In the maximum variant, which should be applied if national procedural rules cannot be used, the proposed remedy is to have the case heard by a judicial panel not explicitly provided for in domestic law, but one which guarantees the individual's right to an impartial and independent tribunal (by disapplying the provisions of national law which provide for a panel of five judges, and applying in their place other provisions of national law which provide that in the absence of special regulations, the Supreme Court sits in a single-judge formation).
- 25 The referring court notes that in those circumstances, in order to constitute the court, it is possible to apply the measures for excluding a judge provided for in national procedural rules. The use of those measures requires a broad interpretation of the grounds for exclusion – an interpretation that is consistent

with the ECHR or with EU law. In the case-law of the Supreme Court, such an interpretation is adopted by panels that include Supreme Court judges not covered by the resolution of the three combined SC chambers.

- 26 Finally, in the opinion of the referring court, when assessing whether doubts concerning a judge's impartiality are reasonable, all circumstances that might affect the judge's conduct should be taken into account. Those circumstances should be evaluated in terms of whether, from the point of view of the average citizen, the objective conditions for perceiving that judge as impartial and independent, and the court which includes that judge as an independent court, have been met. The judge's attitude towards the changes being introduced in the judiciary is also relevant here. First of all, it is recognised that such motions for exclusion are legitimate, since a 'new judge' sitting on a panel conducting an impartiality test would be forced to take a position on an issue that directly affects him or her too, as it is related to the appointment procedure. Consequently, the participation of such judges in hearing a motion for exclusion could cause both the parties and the general public to believe that the court is not impartial.
- 27 As a result, the hearing of such test cases depends on the composition of the Supreme Court panel. If a motion to exclude a judge from hearing a test case is heard by a Supreme Court judge, anyone appointed as a Supreme Court judge who is covered by the resolution of the three combined SC chambers is excluded from hearing that test case. Motions by Supreme Court judges who recuse themselves from hearing a test case are also accepted when persons covered by the resolution of the three combined SC chambers are in a majority on the Supreme Court panel hearing the test case. On the other hand, when a person covered by the resolution of the three combined SC chambers is randomly selected to hear a motion to exclude a judge from hearing a test case, such a motion is disregarded both when it is submitted by a judge of the Supreme Court on the basis of an interpretation of national procedures that is consistent with EU law and with the ECHR, and when it is submitted directly by a party. One can also point to rulings in which motions by Supreme Court judges recusing themselves from hearing a test case are disregarded as inadmissible under law.
- 28 In this situation, in test cases heard by the Supreme Court, there is only piecemeal enforcement of the judgments of the Court of Justice in cases concerning the rule of law – a kind of 'à la carte' enforcement that creates a double standard in terms of the right to a tribunal. Consequently, there is a need to obtain a direct answer from the Court of Justice on the interpretation of EU law in the context of test cases and to resolve the question of whether the effectiveness of Article 19 TEU and Article 47 of the Charter of Fundamental Rights requires – where persons covered by the resolution of the three combined SC chambers fail to recuse themselves, where motions for the exclusion of such persons submitted by either the parties or Supreme Court judges are not granted, and where the practice of randomly selecting adjudicating panels to hear test cases does not change – that the national court be empowered to disapply national provisions requiring test cases to be heard by a panel of five judges as contrary to EU law.