

Case C-646/23 [Lita] ¹**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:**

27 October 2023

Referring court:

Wojskowy Sąd Okręgowy w Warszawie (Poland)

Date of the decision to refer:

25 October 2023

Criminal proceedings against:

P. B.

Subject matter of the main proceedings

Criminal proceedings before the court of second instance against Private P. B., who was found guilty at first instance of committing a criminal offence under Article 278(1) of the Kodeks Karny (Criminal Code).

Subject matter and legal basis of the request

Compatibility with European Union law in light of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights, read in conjunction with the provisions of Directive (EU) 2016/343, of a provision of national law that provides for the retirement by operation of law of a judge hearing an appeal in a case subject to the provisions of that directive.

Questions referred for a preliminary ruling

- (1) Must the second subparagraph of Article 19(1) of the Treaty on European Union ('**TEU**') and Article 47 of the Charter of Fundamental Rights of the European Union ('**the Charter**'), read in conjunction

¹ This case has been given a fictitious name which does not correspond to the real names of either of the parties to the proceedings.

with the provisions 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 (**‘the directive’**) be interpreted as precluding a provision of national law such as Article 13 or Article 10 of the ustawa z dnia 28 lipca 2023 r. o zmianie ustawy – Kodeks cywilny oraz niektórych innych ustaw (Law of 28 July 2023 Amending the Civil Code and Certain Other Laws), which provides for the retirement by operation of law of a judge hearing an appeal in a case subject to the provisions of the directive, in a situation where: (i) the provision is structured in such a way as to apply to only one of all active judges; (ii) the provision does not apply to prosecutors in an analogous situation, even though prosecutors and judges in situations analogous to that of the judge hearing the appeal were treated in the same way under the previously applicable laws; (iii) the law in which that provision is included does not concern the organisation of courts, but a completely different matter, and its explanatory memorandum offers no explanation of the reasons for the introduction of the provision, does not indicate any compelling public interest that its introduction would serve, and does not justify the reasons why its introduction would be proportionate to those aims; and (iv) neither the provision concerned nor any other provision of national law provides for the possibility for a court or any other body to hear an appeal or any other legal remedy of a judge affected by that provision in order to verify the legitimacy of his or her retirement or the compatibility of the provision with higher-ranking provisions of national law or provisions of EU or international law?

- (2) Is it relevant to the answer to Question 1 that the judge to whom the aforementioned provision of national law applies had previously, because of his activities aimed at protecting the independence of courts and the independence of judges, been subject to repression by the executive, which attempted to retire him on the basis of previously applicable laws, and the aforementioned provision of national law was enacted due to the failure of those attempts? Is it relevant to the answer that, in the view of the referring court, the provision concerned does not serve any compelling public interest, but is repressive in nature?
- (3) Must the second sentence of Article 19(1) TFEU, Article 47 of the Charter, Articles 2 and 4(3) TEU and the principles of the primacy of Union law and effective judicial review, in light of the judgment of the Court of Justice of 13 March 2007 in *Unibet*, C-432/05, be interpreted as meaning that a court which includes the judge referred to in Questions 1 and 2 is entitled to suspend of its own motion the application of the provision of national law referred to in Question 1 that provides for his retirement and to continue to adjudicate in this and other cases pending a response from the Court of Justice, in so far

as that court considers it necessary for the case pending before it to be decided in accordance with the applicable provisions of Union law?

- (4) Must the provisions and principles referred to in Question 3 be interpreted as meaning that if the Court of Justice, taking into account the circumstances indicated in Question 2, answers Question 1 in the affirmative, the provision of national law referred to in Question 1 that provides for the judge's retirement cannot be applied and the judge shall not be retired unless there is another legal basis for his or her retirement?

Provisions of European Union law relied on

The second subparagraph of Article 19(1) of the Treaty on European Union;

Article 47 of the Charter of Fundamental Rights of the European Union;

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 (OJ 2016 L 65, p. 1).

Provisions of national law relied on

Articles 10 and 13 of the ustawa z dnia 28 lipca 2023 r. o zmianie ustawy – Kodeks cywilny oraz niektórych innych ustaw (Law of 28 April 2023 Amending the Civil Code and Certain Other Laws, Dziennik Ustaw (Journal of Laws) of 2023, item 1615);

- Pursuant to Article 10, ‘In the ustawa z dnia 11 marca 2022 r. o obronie Ojczyzny (Law of 11 March 2022 on the Defence of the Homeland, Dziennik Ustaw (Journal of Laws) of 2022, item 2305, and of 2023, items 347 and 641), Article 233 shall read: “In the event that a prosecutor for military affairs who is a professional soldier is discharged from professional military service, he or she shall remain in his or her position as a prosecutor in a given organisational unit of the prosecutor’s office irrespective of the number of prosecutorial positions in that unit”’.
- Pursuant to Article 13, ‘A military court judge discharged from professional military service who remains in the position of judge on the effective date of this law shall retire on that date. [...]’. Pursuant to Article 14 of the amending Law, the effective date of both provisions is 15 November 2023.

Articles 175(1), 176 (2), 179 and 180 of the Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland);

Articles 22(1), 23(1), 35(1), 70(1) and 70(2) of the ustawa z 21 sierpnia 1996 r. – Prawo o ustroju sądów wojskowych (Law of 21 August 1996 on the Organisation of Military Courts, ‘the LOMC’);

Articles 200(6), 226(3), 229(2) and 233 of the ustawa z 11 marca 2022 roku o obronie Ojczyzny (Law of 11 March 2022 on the Defence of the Homeland);

- Pursuant to Article 233, ‘In the event that a military court judge or a prosecutor for military affairs who is a professional soldier is discharged from professional military service, he or she shall remain in his or her position as a judge or prosecutor in the respective organisational unit of the court or of the prosecutor’s office irrespective of the number of positions in those units. [...]’.

Articles 70(1), 70(2), 71(2), 71(3), 73(1) and 73(3) 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);

Article 439(1) of the ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego (Law of 6 June 1997 – Code of Criminal Procedure);

Article 104(1) of the ustawa z dnia 24 sierpnia 2001 r. – Kodeks postępowania w sprawach o wykroczenia (Law of 24 August 2001 – Code of Procedure in Cases Involving Petty Offences).

Succinct presentation of the facts and procedure in the main proceedings

- 1 The Wojskowy Sąd Garnizonowy w Warszawie (Garrison Military Court in Warsaw) delivered a judgment finding Private P. B. guilty of committing a criminal offence under Article 278(1) of the Criminal Code. The judgment was appealed by Private P. B., who argued that a punitive measure consisting in the publication of the judgment had been wrongly imposed and requested that the judgment be amended and that that part of the judgment be annulled. At the appeal hearing before the Wojskowy Sąd Okręgowy w Warszawie (Regional Military Court in Warsaw) Private P. B. additionally requested that the judgment be annulled in its entirety and the proceedings conditionally discontinued.
- 2 A judge who is to be retired on 15 November 2023 pursuant to Article 13 of the Law of 28 July 2023 Amending the Civil Code and Certain Other Laws, without the right of appeal and without implementing regulations, was appointed to hear the appeal as a single judge. Articles 10 and 13 of that Law apply to one person only and were enacted by a majority of deputies in the lower chamber of Parliament (the Sejm), while the upper chamber of Parliament (the Senate) and the relevant Senate committee adopted a negative position.
- 3 The judge in question was appointed to the office of judge of the Regional Military Court in Warsaw on 29 January 2013. In July 2017, he was declared unfit for military service on health grounds, but capable of serving as a judge. For that

reason, he applied to the then Krajowa Rada Sądownictwa (National Council of the Judiciary, ‘the NCJ’) for a transfer to a judicial post in an ordinary court. The NCJ asked the Prezydent Rzeczypospolitej (President of the Republic of Poland) to appoint (transfer) the judge to an equivalent post in an ordinary court. Four and a half years later, the President, by decision of 27 December 2021, declined to appoint the judge, and also declined to state the reasons for his decision. In December 2019, the Minister Sprawiedliwości (Minister of Justice) submitted a request to the current NCJ that the judge be retired; the NCJ, however, refused to retire the judge on the grounds that the judge, although unfit for military service, was capable of serving as a judge. Following the President’s decision, in January 2022, the Minister Obrony Narodowej (Minister of National Defence) submitted a similar request to the new NCJ. On 12 June 2023, the new NCJ refused to retire the judge, citing the entry into force on 24 April 2022 of Article 233 of the Law on the Defence of the Homeland. Pursuant to that provision, upon the request of the Minister of National Defence, the judge was discharged from professional military service and remained a judge of the Regional Military Court in Warsaw. As of March 2023, the judge resumed hearing cases.

- 4 On 28 July 2023, the Sejm adopted the Law Amending the Civil Code and Certain Other Laws, pursuant to which, inter alia, the provision on judges was removed from Article 233 of the Law on the Defence of the Homeland (while the provision on prosecutors was retained); the amending Law also introduced Article 13 on the retirement of a military court judge who has been discharged from professional military service.

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

- 5 As a court within the meaning of EU law, the referring court is subject to the requirements of the principle of effective judicial protection, since it can rule on matters concerning the application or interpretation of EU law. The associated guarantees of a court established by law include not only the basis for the legal existence of the court, but also requirements concerning the composition of the court and individual judges. The court must remain independent and impartial, which in turn must be secured by appropriate guarantees including, in particular, the protection of a judge’s active service, retirement, and irremovability. The referring court relies in that regard on the case-law arising from the following judgments: of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117); of 11 July 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:615); and of 5 November 2019, *Commission v Poland (Independence of ordinary courts)* (C-192/18, EU:C:2019:924). Additionally, the referring court recalls that Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings also applies to the main proceedings in a criminal case.

- 6 The referring court is composed of a single judge who was discharged from professional military service due to being declared permanently unfit for military service, but capable of performing the duties of a judge. With respect to that judge, statutory provisions were first amended to allow him to be discharged from professional military service without being retired, and subsequently a statutory arrangement was introduced whereby he was retired by operation of law precisely because of his discharge from military service. In practice, the statutory amendments introduced only apply to that one judge sitting on the referring court (a so-called *ad hominem* law). For this reason, in the Polish media, the amendments have been referred to as ‘*lex Raczkowski*’.
- 7 Accordingly, as a result of those amendments, the referring court has doubts as to whether it still satisfies the criteria of an ‘independent and impartial court previously established by law’. It is objectively necessary for the referring court to receive answers to the questions referred as it must decide whether it can continue to hear the case in the main proceedings in its current composition.
- 8 The referring court has doubts as to whether the situation described in Question 1 may or does affect compliance with the requirements of effective judicial protection, including the right to an independent and impartial court established by law, given that the principle of the irremovability of judges has an obvious impact on the principle of the independence of courts and judges. The above principles are not the privileges of courts and judges, but are there to guarantee the right of citizens to a fair trial.
- 9 In the circumstances of the case at hand, the legislature first enacted a law pursuant to which the judge sitting on the court in the main proceedings would remain in his position as a military court judge in the event of his discharge from professional military service, and subsequently, without any compelling public interest, amended the wording of Article 233 of that law, removing from it the guarantee of that judge’s continued active service, while maintaining the same guarantee for prosecutors in a similar situation. At the same time, without any justification for such a significant change, an amendment concerning this matter was introduced in a law concerning another matter, and thus in flagrant violation of the constitutional principles of good legislation. Consequently, a new arbitrary statutory arrangement was introduced, contrary to Article 180(3) of the Constitution of the Republic of Poland, pursuant to which a judge is retired by operation of law if he or she is no longer in military service. Where the composition of a court can be arbitrarily changed, restricted or retired by violating or in any way altering the rules laid down in both national and EU law, the ability of that court to carry out the tasks set forth in Directive (EU) 2016/343 must be called into question.
- 10 For those reasons, the questions referred in the present case focus on the status of the referring court and the threat to the principles of the presumption of innocence, independence, impartiality, and the right to a fair trial. The fact that it is possible to manipulate the wording of a legal provision in such a way as to alter the rules

governing a judge's service and to shorten his or her length of office, such that it is de facto possible to remove a judge from active service at any time, undoubtedly has or may have an impact on the judge's independence and impartiality, and thus on the fairness of the criminal proceedings being conducted and the observance of the principle of the presumption of innocence.

- 11 The referring court points out that it is also impossible for the Trybunał Konstytucyjny (Constitutional Court) to review the legality of the contested provisions, since the relevant case-law of the Constitutional Court was developed at a time when it was no longer a body providing effective judicial protection, and the panels delivering those judgments included persons who were not competent to adjudicate.
- 12 Until the enactment of Article 233 of the Law on the Defence of the Homeland, the applicable laws provided that a military court judge could not be discharged from professional military service prior to the termination of his or her service relationship by operation of law or prior to his or her removal from office or retirement (Article 35(1) of the LOMC). A judge could be retired if he or she was unfit for military service, unless he or she applied for a transfer to an ordinary court (Article 35(4) of the LOMC). Therefore, he or she could not be retired regardless of the President's refusal to appoint or transfer him or her to an ordinary court.
- 13 The circumstances in which the provisions contained in Article 233 of the Law on the Defence of the Homeland were enacted are not known, but their introduction undoubtedly filled a legal gap regarding the distinction between unfitness for military service and unfitness to serve as a judge under Article 180(3) of the Constitution of the Republic of Poland.
- 14 Once the executive – the Minister of Justice – became aware that the judge hearing the case at hand would benefit from those provisions, his return to hearing cases was delayed for 10 months. This was undoubtedly related to the efforts to remove that judge from the judiciary on account of his activities as deputy chair of the former NCJ, especially in the years 2014–2018, his participation in cases related to violations of the Constitution by those in power, his activities in defence of judicial and court independence, and the permission he gave to journalists to inspect the non-confidential file of a case involving a government minister. As a result, the judge was harassed both by the authorities and the pro-government media.
- 15 In the view of the referring court, the provision on retirement applies solely to the judge hearing the case in the main proceedings, directly violates the principle of the irremovability of judges, does not serve any compelling public interest, and is purely repressive in nature. Indeed, the principle of the irremovability of judges should be understood to mean that the legislature or the executive cannot decide arbitrarily whether a judge may continue to hear cases. Retirement must be linked

to the inability to serve as a judge, and those regulations should be subject to judicial review.

- 16 The referring court considers that, if Questions 1 and 2 are answered in the affirmative, measures should be taken to safeguard the proper functioning of the court in order to ensure the proper implementation of Directive (EU) 2016/343. In the view of the referring court, the contested provisions deprive the judge of his active status in violation of all rules and also deprive him of his right to an effective remedy. In light of the foregoing, no implementing measures declaring the judge to be retired should be adopted on the basis of those provisions. The referring court considers itself obliged – in accordance with the *Simmenthal* rule – to disapply national provisions which are incompatible with EU law. In light of the case-law arising from the judgments 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); of 18 May 2021, *Asociația ‘Forumul Judecătorilor din România’ and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393); of 5 June 2023, *Commission v Poland (Independence and Private Life of Judges)* (C-204/21, EU:C:2023:442); and of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163), the referring court relies on the direct effect of the second subparagraph of Article 19(1) TEU and its obligation to ensure the full effect of that provision by disapplying any national legislation contrary to it. The referring court also sees the source of that obligation in the principle of sincere cooperation enshrined in Article 4(3) TEU.
- 17 The suspension by the referring court of the application of the provisions indicated above allows the judge to perform his judicial duties within the national court, and until the case before the Court is resolved, there is no legal possibility of retiring him. The referring court seeks a protective measure that will directly guarantee that the judge can exercise his rights under EU law and also guarantee effective judicial protection for the parties to the criminal proceedings by ensuring that the case is heard by an independent court composed of independent judges.
- 18 The referring court also requests that the case be decided under an expedited procedure. This request is justified by the fact that the reference concerns a fundamental element of the right to effective judicial protection, namely the right to an independent and impartial court previously established by law and guided by the principle of the presumption of innocence. The referring court considers the request to be legitimate due to the importance of the answers to the questions referred for that court’s ability to exercise its jurisdiction lawfully and in accordance with the principle of legal certainty with the involvement of a judge who is being removed from office by the legislature and the executive in breach of the principle of the irremovability of judges and the independence of courts.