

Case C-160/23

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:

15 March 2023

Referring court:

Sąd Okręgowy w Warszawie (Poland)

Date of the decision to refer:

14 March 2023

Criminal proceedings against:

CG

Subject matter of the main proceedings

Proceedings for enforcement of a final criminal conviction

Subject matter and legal basis of the request

Interpretation of the second subparagraph of Article 19(1) TEU, Article 47 of the Charter of Fundamental Rights, and the principles of legal certainty, inviolability of final court judgments, proportionality and procedural autonomy in order to determine whether an enforceable judgment was given by a court which satisfies the requirements relating to establishment by law and independence and impartiality; Article 267 TFEU

Questions referred for a preliminary ruling

1. Must the second subparagraph of Article 19(1) of the Treaty on European Union (TEU), Article 47 of the Charter of Fundamental Rights, and the general principles of European Union law: the principles of legal certainty, inviolability of final court judgments, proportionality, and procedural autonomy, be interpreted as precluding any national legislation which prevents a court, in proceedings for enforcement of a final criminal conviction, from examining whether an enforceable judgment was given by a court which satisfies the requirements

relating to establishment by law and also independence and impartiality and, if it is established that those requirements have not been satisfied, in accordance with the previous case-law of the Court of Justice of the European Union, from drawing the necessary conclusions from that fact, inter alia disregarding the judgment thus given and discontinuing the enforcement proceedings?

2. If the answer to Question 1 is in the affirmative, is the carrying out of such an examination contingent on the initiative being taken by the convicted person or other authorised body or, in the light of the principles of European Union law referred to above, is the court required, in proceedings for enforcement of a final conviction, to carry out such an examination of its own motion?

Provisions of European law relied on

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

Charter of Fundamental Rights of the European Union, Article 6 and second paragraph of Article 47;

Provisions of national law relied on

Constitution of the Republic of Poland, Articles 42(3), Article 45(1);

Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny wykonawczy (Law of 6 June 1997 establishing the Criminal Enforcement Code) ('the Criminal Enforcement Code'), Articles 9(1) and (2), 13(1), and 15(1);

Ustawa z dnia 27 lipca 2011 r. – Prawo o ustroju sądów powszechnych (Law of 27 July 2011 on the system of ordinary courts), Article 42a(1) to (8);

Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego (Law of 6 June 1997 establishing the Code of Criminal Procedure ('the Code of Criminal Procedure'), Article 439(1)(2);

Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny (Law of 6 June 1997 establishing the Criminal Code) ('the Criminal Code'), Article 135(2)

Succinct presentation of the facts and procedure in the main proceedings

- 1 By judgment of the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) of 24 March 2022, CG was found guilty of having, in the period from 3 November 2019 to 30 March 2020, physically and mentally abused, with particular cruelty, the minor NK, born in 2019, and, in addition, caused disturbances at various time of day and night, during which she insulted the child using vulgar words commonly regarded as abusive. For that offence the Sąd Okręgowy sentenced her to four years' and two months' imprisonment. The Sąd Okręgowy also ordered the

convicted person to pay the victim PLN 30 000 by way of exemplary damages, imposed an order preventing her from approaching the victim for 10 years, and made the judgment public (with the exception of the victim's personal details). CG has been freed from prison for two years as the court of first instance (the Sąd Okręgowy w Warszawie) lifted her pre-trial detention on 22 January 2021.

- 2 After hearing the appeals lodged by the public prosecutor, the auxiliary prosecutor and the defence counsel, the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw) varied, by judgment of 30 December 2022, the judgment of the Sąd Okręgowy, increasing the CG's term of imprisonment to eight years.
- 3 Proceedings for enforcement of that criminal conviction are currently under way.
- 4 The judgment of the Sąd Apelacyjny w Warszawie was given in the following composition: JL, president, KS and MP (rapporteur), judges. Judge JL and judge KS were appointed to the position of judge at the Sąd Apelacyjny w Warszawie by decisions of the President of the Republic of Poland on 26 May 2020 and 18 March 2021 respectively, adopted on a proposal of the Krajowa Rada Sądownictwa (National Council of the Judiciary) in the composition established by 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).
- 5 MP, a judge at the Sąd Rejonowy dla Warszawy Mokotowa (District Court for Warsaw Mokotów), was, on the date of the judgment, seconded by the Minister for Justice to rule at the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw). He currently holds office as a judge at the Sąd Apelacyjny w Warszawie, to which he was appointed by decision of the President of the Republic of Poland on 13 January 2023, adopted on a proposal of the National Council of the Judiciary in the composition established by the Law of 8 December 2017 amending the Law on the National Council of the Judiciary and certain other laws.
- 6 The manner in which judge JL obtained his appointment as a judge at the Sąd Apelacyjny w Warszawie was the subject of in-depth consideration in four judgments of the Sąd Najwyższy. In all of those cases, the Sąd Najwyższy, after considering the appeals on a point of law lodged by the defence counsels, set aside the judgments under appeal given by the panel on which judge JL sat. In the grounds for its judgment of 14 December 2022, the Sąd Najwyższy, having established the relevant circumstances, found that the competition had been conducted without the opinion of the judicial community, judge JL was not up against any other candidate, and the failure by the assessment panel to interview candidates – contrary to the position of the National Council of the Judiciary – raised fundamental doubts. In addition, the Sąd Najwyższy analysed in detail the circumstances indicating that judge JL has particularly strong links with the executive. Inter alia, the Sąd Najwyższy pointed to circumstances such as the following:

- the appointment of JL by the Minister for Justice on 30 May 2018 to act as Disciplinary Officer for Ordinary Court Judges
 - the appointment of JL by order of the Minister for Justice of 10 September 2018 as a member of the panel on action of the Minister for Justice taken in disciplinary proceedings against judges and trainee judges
 - the secondment of JL by the Minister for Justice on 6 November 2018 to the post of judge at the Sąd Apelacyjny w Warszawie from 1 December 2018 to 31 May 2019,
 - the secondment of JL by the Minister for Justice on 17 April 2019 to the post of judge at the Sąd Apelacyjny w Warszawie as from 1 June 2019 for an indefinite period;
 - the issuing on 29 November 2019 by the President of the Republic of Poland of an order appointing judge JL to the post of judge at the Sąd Apelacyjny w Warszawie;
 - the appointment of judge JL by the Minister for Justice on 16 November 2020 to the post of President of the Sąd Okręgowy w Warszawie;
 - the appointment of judge JL by the Minister for Justice in June 2022 to the post of President of the Sąd Apelacyjny w Warszawie;
 - the receipt by JL in 2022 of an appointment from the President of the Republic of Poland to the post of Extraordinary Disciplinary Office for the Disciplinary Cases against Several Judges at the Sąd Najwyższy.
- 7 The Sąd Najwyższy noted that all those appointments of judge JL were discretionary in nature, which in the public perception is regarded as an expression of trust of public authority. The Sąd Najwyższy also noted the very short period in which they had been made and the importance and significance of the posts allocated.
- 8 The Sąd Najwyższy also noted the activity and conduct of the judge as the Disciplinary Officer for Ordinary Court Judges and president of the court, referring to cases commonly known from media coverage, and found that the actions carried out by the Disciplinary Officer and his deputies were consistent with the publicly declared expectations of the public authorities, mainly the Minister for Justice, regarding the initiation and conduct of disciplinary proceedings against judges for judicial activities based on the decisions of the European courts, including those aimed at establishing the composition of the court in accordance with the standards arising from Article 45 of the Constitution of the Republic of Poland, Article 6(1) of the ECHR, and Article 47 of the Charter of Fundamental Rights.

- 9 In its judgment of 19 October 2022, the Sąd Najwyższy dealt with a case in which the judgment of the Sąd Apelacyjny w Warszawie had been delivered by a panel composed of three judges, namely JL KS and MP, and thus by same persons as the panel of the Sąd Apelacyjny w Warszawie which delivered the judgment forming the basis of the referring court's questions to the Court of Justice. In the grounds for that judgment, the Sąd Najwyższy stated that, as a result of the amendments made to the Law of 8 December 2017 amending the Law on the National Council of the Judiciary, that body no longer fulfilled the features of a constitutional body, thus nullifying the presumption that persons appointed by the President of the Republic of Poland at the recommendation of the National Council of the Judiciary to the position of judge meet the criteria relating to independence and impartiality. The direct dependence on political power of the decisions taken in the judicial appointments procedure, justified the belief that those appointments could be determined by non-substantive considerations.
- 10 In the grounds for that judgment, the Sąd Najwyższy noted the nature of judge JL's activity in his role as Disciplinary Officer for Ordinary Court Judges. The Sąd Najwyższy cited a number of announcements from the Disciplinary Officer's official website reporting the institution of disciplinary proceedings against judges for actions taken in judgments to establish the court in accordance with the standards arising from Article 45 of the Polish Constitution, Article 6(1) of the ECHR and Article 47 of the Charter of Fundamental Rights. At least one of those disciplinary proceedings was instituted personally by the Deputy Disciplinary Officer, KS. In addition, the Sąd Najwyższy pointed out in this case that JL, acting in his capacity as President of the Sąd Apelacyjny w Warszawie, had prevented judges applying EU law from ruling.
- 11 The above findings led the Sąd Najwyższy to the unequivocal and firm conclusion that the participation of judge JL, appointed under a defective procedure, in the panel of the Sąd Apelacyjny w Warszawie did not meet the standard concerning the proper formation of a court on account of the failure to comply with the guarantees of impartiality and independence.
- 12 The circumstances raised by the Sąd Najwyższy affecting the assessment of the compliance by the Sąd Apelacyjny with the proper composition requirement is relation to judge JL also apply to judge KS. Judge KS was (like JL) a member of the panel on action of the Minister for Justice taken in disciplinary proceedings against judges and trainee judges. He was appointed by the Minister for Justice as Vice President of the Sąd Okręgowy w Warszawie immediately after JL took up the post of President of the Sąd Okręgowy w Warszawie. Also immediately after the appointment of judge JL to the post of President of the Sąd Apelacyjny w Warszawie, the Minister for Justice appointed judge KS to the post of Vice President of that court. In addition, and importantly, judge KS has been acting continuously as Deputy Disciplinary Officer for Ordinary Court Judges (and therefore the deputy of judge JL) since 2018. Thus, the close ties with the political authority concern not only judge JL, but also judge KS. With regard to judge MP, on the other hand, it should be pointed out that, since 2018, he has sat

continuously on the National Council of the Judiciary, to which 15 judges were appointed by politicians. Judge MP actively participates in the activities of the National Council of the Judiciary, undermining by his actions the independence of the courts and the independence of judges.

- 13 With the Sąd Apelacyjny thus established delivering its judgment on CG on 30 December 2022, the referring court felt obliged to refer questions to the Court of Justice for a preliminary ruling. In the view of the referring court, there are serious doubts as to whether it is possible, without prejudice to the right to a fair trial before an independent and impartial court with independent judges, to enforce judgments with such serious defects detrimental to the right to a fair trial under Article 45 of the Polish Constitution, Article 6(1) ECHR and Article 47 of the Charter of Fundamental Rights.

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

- 14 This reference for a preliminary ruling is necessary for the referring court to take further procedural decisions because, depending on the answer given, that court will either order the enforcement of the conviction or discontinue the enforcement proceedings pursuant to Article 15(1) of the Criminal Enforcement Code on the ground that a reason excluding those proceedings exists, namely the absence of a final conviction.
- 15 The referring court is aware that issues of criminal liability are not generally covered by European Union law, but the present case concerns the principle of effective judicial protection (which would be nullified if it were concluded that a Union citizen could be deprived of his or her liberty without a final judicial court judgment unless the ruling given in the case were adopted by a court which satisfies the requirements relating to a court established by law which is independent and impartial), and also fundamental rights, such as the right to liberty guaranteed by Article 6 of the Charter of Fundamental Rights.
- 16 In the view of the referring court, the participation of a judge thus appointed in giving a judgment means that the court in such a composition cannot be considered to be duly appointed, and therefore an absolute ground of appeal set out in Article 439(1)(2) of the Code of Criminal Procedure arises in this case. In this regard, the referring court refers to a number of judgments of the Court of Justice, the European Court of Human Rights and the Polish courts – the Sąd Najwyższy (Supreme Court), the Naczelny Sąd Administracyjny (Supreme Administrative Court), and the ordinary courts.
- 17 The referring court's uncertainty concerns specifically the possibility of examining compliance with the above requirements after criminal proceedings have ended and a formally final conviction has been passed, in particular where – as in the present case – none of the parties to the proceedings culminating in that conviction has claimed that the requirements relating to establishment by law, independence and impartiality have not been satisfied, and furthermore, that

compliance with those requirements was not examined in those proceedings. The question is therefore, in essence, whether that matter can be examined later, in particular in proceedings for the enforcement of the conviction.

- 18 The referring court considers that the view that such an examination should be allowed is supported by the fact that compliance with the above requirements is of a naturally primary and constitutional nature as regards the possibility of convicting someone before a court, that is to say that unless those requirements are satisfied the convicting authority is incapable of administering justice.
- 19 On the other hand, however, the referring court is aware that – since those issues have not been raised in the criminal proceedings and a formally final conviction has been passed – an examination of compliance with those requirements in enforcement proceedings may be precluded by other principles relevant for European Union law, such as the principles of legal certainty, the inviolability of final court judgments, proportionality, and procedural autonomy. This is particularly so since a judgment such as that in the present case operates within the legal order, in practical terms, as a formally final judgment, and there is no doubt that allowing an examination of compliance with those requirements in enforcement proceedings, and thus after it has formally become final, may result in the effects of that ‘finality’ being nullified.
- 20 Any discontinuation of enforcement proceedings should not mean impunity for the accused person. It is the duty of the judiciary to rule on the criminal responsibility of the accused person in proceedings which meet the criteria in question by means of a final judgment which – if the accused person is found guilty – can then be enforced.
- 21 The answer to the Question 2 is conditional on the Question 1 being answered in the affirmative.
- 22 The referring court is unsure whether it can and must examine whether the requirements of prior establishment by law, independence and impartiality in respect of the conviction being enforced can be carried out of its own motion, or whether it must refrain from doing so unless the convicted person him or herself takes the initiative in that regard.
- 23 If the latter is the case, the referring court is uncertain whether its duties as a court of the European Union also include informing the convicted person of the possibility of relying on a claim that the court which passed that conviction failed to comply with those requirements and setting him or her an appropriate period in that regard. Furthermore, the referring court is uncertain whether those obligations also include hearing the judge or judges who took part in the conviction in question and who may be concerned by the claim concerning failure to comply with those requirements.
- 24 The referring court requests that the reference for a preliminary ruling be dealt with under an expedited procedure pursuant to of Article 105(1) of the Rules of

Procedure of the Court of Justice. It bases its request on the fact that the case concerns the criminal liability of a person accused of a criminal offence, affects fundamental rights, and is of public interest (since it is in the public interest that persons who have committed offences be brought swiftly to justice).

WORKING DOCUMENT