

Case C-422/23 [Daka] 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:

10 July 2023

Referring court:

Sąd Najwyższy (Poland)

Date of the decision to refer:

3 April 2023

Appellant:

T.B.

Other parties to the proceedings:

C.B.

D.B.

Subject matter of the main proceedings

Division of common assets and division of legacy

Subject matter and legal basis of the request

Article 267 TFEU – Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union – No legal remedy against a decision to appoint a judge, without his or her consent, to sit for a fixed period per year in another chamber having jurisdiction to hear a different type of case – Whether a court whose composition includes a judge who has not had the opportunity to appeal the appointment is an independent and impartial tribunal previously established by law

ⁱ This case has been given a fictitious name that does not correspond to the names of any of the parties to the proceedings.

Questions referred for a preliminary ruling

(1) In a situation in which national law provides that a judge of the court ruling at final instance (a Supreme Court judge) may, by a discretionary decision of the President of that Court (First President of the Supreme Court), be appointed, without his or her consent, to sit for a fixed period per year in another chamber of that Court having jurisdiction to hear cases the nature of which differs from those with which that judge has hitherto dealt, instead of in a chamber of that Court in which, in accordance with his or her training and areas of competence, he or she normally sits, should the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), be interpreted as requiring that such a judge should, for the purpose of protecting his or her independence and autonomy, have an effective remedy against that decision before an independent and impartial tribunal in a procedure which satisfies the requirements of Articles 47 and 48 of the Charter?

(2) Should [the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter] be construed as meaning that a court of final instance of a Member State (Supreme Court), whose collegial three-member composition includes two judges who, without their consent, have been appointed by the President of that Court to sit on that Court away from their home chamber and to sit in a chamber competent for hearing the case in question, and who have not previously had the opportunity to challenge their appointment before an impartial and independent tribunal in a procedure which satisfies the requirements of Articles 47 and 48 of the Charter, is not an independent, impartial tribunal previously established by law and giving individuals effective access to justice in areas covered by EU law?

Provisions of EU law cited

The second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights; Article 48 of the Charter of Fundamental Rights.

Provisions of national law cited

Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland): Article 186(1);

Law of 8 December 2017 relating to the Supreme Court ('the Law on the Supreme Court'): Articles 3, 10(1), 23, 24, 25, 26(1), 27a and 35;

Decree of the President of the Republic of Poland of 14 July 2022 concerning the Rules of Procedure of the Supreme Court: Article 80(12);

Law on the organisation of the ordinary courts of 27 July 2001: Article 22a.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The appeal on a point of law examined by the Sąd Najwyższy (Supreme Court) was brought by the party to the proceedings, T.B., against the order issued by the Sąd Okręgowy w Poznaniu (Regional Court, Poznan) on 9 September 2019 in a case brought by C.B., with the participation of T.B. and D.B., on the division of property held in common and partition of a legacy.
- 2 By an order of 2 March 2023, a three-judge panel of the Civil Chamber of the Supreme Court was appointed to hear this appeal, two of whom (Supreme Court Judge B.B. and Supreme Court Judge M.P.) were judges of the Supreme Court who worked in the Supreme Court's Chamber of Labour and Social Security, with jurisdiction over cases which were the diametrical opposite of the subject matter of the present case and of the subject matter of cases falling within the jurisdiction of the Izba Cywilna (Civil Chamber).
- 3 The judge acting as First President of the Supreme Court, by unanimous orders (No 25/2023 and No 28/2023) of 15 February 2023 temporarily appointed Supreme Court Judges B.B. and M.P. to sit in the Civil Chamber of the Supreme Court from 1 April 2023 to 30 June 2023. This appointment was made without the agreement of the judges and without consulting them. After this appointment to the Civil Chamber, Supreme Court Judges B.B. and M.P. were not relieved of their obligation to exercise (to the usual extent) their judicial functions in the Chamber in which they had their usual place of work.
- 4 The main basis for that appointment is to be found in Article 35(3) of the Law on the Supreme Court, which states that a (Supreme Court) judge may be appointed to sit on a particular case in another chamber and, with the judge's agreement, for a specified time in another chamber, by the First President of the Supreme Court. A judge may be appointed to a different chamber without his or her agreement only for a maximum of 6 months in a year. Once the period for appointing the judge to another chamber has expired, the judge should continue to sit on the cases assigned to him or her in that chamber until their completion.
- 5 Article 35(3) of the Law on the Supreme Court does not state explicitly that a decision to assign a judge to a different chamber requires justification. The orders assigning Supreme Court Judges B.B. and M.P. to sit in the Civil Chamber do not state any reasons. Media reports state that they were dictated by the desire to bolster the staff of the Civil Chamber to reduce the backlog of cases pending there. The referring court considers that this reason is all the more misguided, as the backlog of cases in the Civil Chamber was primarily the result of the so-called judicial reforms implemented in Poland in recent years. In the view of the referring court, the proper way to reduce the backlog in the Civil Chamber would not be to appoint judges holding posts in other chambers of the Supreme Court and who do not ordinarily sit on cases that are within the Civil Chamber's remit, but rather to appoint judges through a properly and constitutionally sound

application issued by the Krajowa Rada Sądownictwa (National Council of the Judiciary; ‘the NCJ’).

- 6 In the view of the referring court, the fact that both the composition order and the order to appoint Supreme Court Judges B.B. and M.P. to sit on the Civil Chamber of the Supreme Court were issued by persons appointed to the Supreme Court under the same circumstances as in Case C-487/19, *W. Ż.*, is highly relevant to the case, and, in the light of the case-law to date, court proceedings involving such persons are either invalid or breach the party’s right to a fair hearing as defined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Furthermore, the resolution of the NCJ, by which the President of Poland was presented with the applications to appoint those persons to the post of Supreme Court judge, had been legally annulled within the relevant scope by the judgment of 6 May 2021 in Case II GOK 2/18 by the Naczelny Sąd Administracyjny (Supreme Administrative Court). As a result, on 2 September 2021, the full composition of the Civil Chamber of the Supreme Court issued an order to lodge a request for a preliminary ruling before the Court of Justice on the impact of these annulments and flaws in the procedures for nominating such judges of the Supreme Court. The Court of Justice has not yet given a ruling in Case C-658/22, which was opened in response to that order.
- 7 In practice, the decision to appoint a judge to sit in a different chamber of the Supreme Court is essentially a discretionary decision. Neither the Law on the Supreme Court nor any other legislative provision makes explicit provision for judicial review of such a decision. The fact that some judges appointed to sit in the Civil Chamber attempted to challenge the orders appointing them before the NCJ does nothing to change this assessment. First, the NCJ is not a court or a judicial authority within any meaning of those words. Second, as the case-law of the Polish Supreme Court, the Court of Justice and the European Court of Human Rights has made clear, the NCJ, as established under the procedure set out in accordance with the Law of 8 December 2017 amending the Law on the National Council of the Judiciary and certain other laws, is not an independent and impartial body.

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

- 8 The doubts raised by the referring court boil down to, firstly, the question whether, in a situation in which national law allows a judge of the Supreme Court holding his or her office in one of the chambers of the court to be assigned without his or her agreement to sit in another chamber of the court with jurisdiction for different types of cases, the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, is to be interpreted as meaning that a judge appointed to sit in a different Supreme Court chamber should, in order to preserve his or her independence and autonomy, have an effective legal remedy before an independent and impartial tribunal in proceedings which meet the

requirements of Articles 47 and 48 of the Charter, against the decision to appoint him or her.

- 9 Secondly, these doubts relate to the question of whether a national court of final instance (the Supreme Court), whose three-judge panel includes two judges appointed, without their consent, to sit on that panel by the First President of the Supreme Court, and moved from their regular chamber to a chamber competent to hear the case, without being given the opportunity to appeal against the decision before an impartial and independent tribunal in a procedure meeting the requirements of Articles 47 and 48 of the Charter, constitutes an independent, impartial tribunal previously established by law and providing effective legal protection to individuals in areas covered by EU law.
- 10 If the Court of Justice finds that a judge, appointed to sit in a chamber other than the chamber in which he or she regularly sits, should have the right to an effective legal remedy against such a decision before an independent and impartial tribunal in proceedings meeting the requirements of Articles 47 and 48 of the Charter, and that a three-judge panel of the Supreme Court which includes two judges who, without their consent, have been appointed to another chamber without first being given the opportunity to appeal against these conditions, is not an independent, impartial tribunal previously established by law and providing effective legal protection to individuals in areas covered by EU law within the meaning of the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, an appeal heard in that composition would be inadmissible, and the President of the Supreme Court in charge of the Civil Chamber would be obliged to change its composition.
- 11 The present case is linked to EU law in two respects. Firstly, the Civil Chamber of the Supreme Court is responsible for cases concerning questions of the interpretation and application of EU law. It is therefore necessary to examine whether the Civil Chamber or its panels composed of judges appointed, by order of the First President of the Supreme Court, to sit in that chamber and other chambers of the same court, fulfil the requirements of the second subparagraph of Article 19(1) TEU, which would have repercussions for all cases heard by such panels in the Civil Chamber. Secondly, the orders of the First President of the Supreme Court relate to judges of that court who usually exercise their functions in the Chamber of Labour and Social Security, which hears cases considering issues relating to the interpretation and implementation of EU law, and where it needs to be examined whether the provisions of national law and the ability, used, in this case, to appoint them without ensuring for those judges the right to appeal against the decision before an impartial and independent tribunal in procedures which meet the requirements of Articles 47 and 48 of the Charter, infringes their independence and impartiality.
- 12 By way of analogy, the referring court cites the judgment of the Court of Justice of 6 October 2021, *W. Ż.* (Izba Kontroli Nadzwyczajnej i Spraw Publicznych Sądu Najwyższego – Powołanie) (Chamber of Extraordinary Control and Public Affairs

of the Supreme Court – Appointment) (C-487/19, EU:C:2021:798). It points out that, while the appointment of a judge of the Supreme Court without his or her agreement to sit for a specified time in another chamber does not officially constitute a transfer of the judge to another court or another division of the same court, its consequences are, nevertheless, just as far-reaching and almost as severe as those of such a transfer. This assessment is reinforced by the fact that a judge transferred from his or her home chamber to sit in another chamber of the Supreme Court, on the one hand has to handle the full extent of cases in his or her home chamber, while on the other having to hear cases in the chamber to which he or she has been assigned. Moreover, judges in this situation are suddenly faced with cases whose nature differs completely from those they have dealt with previously and for which they are normally prepared and competent. Such assignment is therefore a significant obstacle to a judge's performance of his or her duties, and the risk of the judge being so assigned may be used as a means of exerting pressure on the judge, and thus as a disciplinary measure which would influence the direction of his or her judicial decision-making.

- 13 The referring court points out that the allocation of cases, based on their substance, among individual chambers of the Supreme Court is not a merely formal and random matter, but is fundamentally based on the fact that the State judicial system provides a foundation for different types of cases requiring different qualifications and varying professional training. When judges apply for a position at the Supreme Court, they specify the chamber in which they would like to work, and during the nomination procedure their qualifications are verified to ensure that they will handle cases which are within the competence of that chamber. It is therefore also important that, in accordance with the necessary standard of a right to a tribunal, individuals can also be certain that, at the last instance of the national courts (the Supreme Court), their cases will be heard by a court composed exclusively of judges having the appropriate professional qualifications and having training to hear the type of case in question, rather than by a court composed of judges some of whom normally deal with different types of cases.