Case C-455/23 [Garera] [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:

20 July 2023

Referring court:

Sąd Najwyższy (Poland)

Date of the decision to refer:

3 April 2023

Appellant on a point of law:

G.T.

Respondent on a point of law:

T. S.A.

Subject matter of the main proceedings

Appeal on a point of law lodged by G.T. against a judgment of the Sąd Apelacyjny w Katowicach (Court of Appeal, Katowice) dismissing an appeal concerning exemption from securing and executing bearer shares

Subject matter and legal basis of the request

The EU standard for designating national judges, without their consent, to adjudicate in an organisational unit of a national court other than the organisational unit in which they normally perform their duties. Status of a tribunal established by law. Working time of judges in the context of Article 6(b) of Directive 2003/88/EC.

Legal basis: Article 267 TFEU

[i] The present case has been given a fictitious name which does not correspond to the real name of any of the parties to the proceedings.

Questions referred for a preliminary ruling

1. Must the second subparagraph of Article 19(1) TEU, in the light of the interpretation given by the Court of Justice in its judgment in Case C-487/19 *W.Ż.*, be interpreted as meaning that designating a judge of the Sąd Najwyższy (Supreme Court), without his or her consent, to adjudicate temporarily in another chamber of the Sąd Najwyższy is, like transferring a judge of an ordinary court between two divisions of that ordinary court, in breach of the principle of the irremovability and independence of judges, where:

- the judge is designated to adjudicate in cases whose subject matter does not coincide with the substantive jurisdiction of the chamber to which the judge of the Sąd Najwyższy was appointed to adjudicate;

- the judge has no judicial remedy against the decision regarding that designation which meets the requirements laid down in paragraph 118 of the judgment in C-487/18 [(C-487/19)] *W.Ż.*;

- the order of the First President of the Sąd Najwyższy regarding the designation to adjudicate in another chamber and the order of the President who directs the work of the Civil Chamber of the Sąd Najwyższy regarding the allocation of specific cases have been issued by persons appointed to the position of judge of the Sąd Najwyższy in the same circumstances as in Case C-487/18 [(C-487/19)] *W.Ż.* and, in the light of previous case-law, judicial proceedings involving such persons are either invalid or infringe a party's right to a fair trial under Article 6 ECHR;

- designating a judge, without his or her consent, to adjudicate for a fixed period in a chamber of the Sąd Najwyższy other than that in which he or she performs his or her duties, while maintaining the obligation to adjudicate in his or her home chamber, has no basis in national law;

- designating a judge, without his or her consent, to adjudicate for a fixed period in a chamber of the Sąd Najwyższy other than that in which he or she performs his or her duties results in an infringement of Article 6(b) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299[, p. 9])?

2. Regardless of the answer to the first question, must the second subparagraph of Article 19(1) TEU be interpreted as meaning that a court in a formation constituted as a result of an order of the First President of the Sąd Najwyższy regarding designation to adjudicate in another chamber of the Sąd Najwyższy and an order of the President who directs the work of the Civil Chamber of the Sąd Najwyższy regarding allocation of specific cases, issued by persons appointed to the position of judge of the Sąd Najwyższy in the same circumstances as in Case C-487/18 [(C-487/19)] *W.Ż.*, does not constitute a tribunal 'established by law' where, according to previous case-law, judicial proceedings involving persons so

appointed are invalid or infringe a party's right to a fair trial under Article 6 ECHR?

3. In the event that the first question is answered in the affirmative or the second question is answered to the effect that a court thus established does not constitute a court or tribunal 'established by law', must the second subparagraph of Article 19(1) TEU and the principle of the primacy of EU law be interpreted as meaning that judges appointed to a formation of a court established in the manner described in Questions 1 and 2 may refuse to act in the case allocated to them (which includes refusing to adjudicate), regarding as non-existent the orders regarding designation to adjudicate in another chamber of the Sąd Najwyższy and allocation of specific cases, or are they to deliver their ruling, leaving it to the parties to decide whether to contest it on the grounds that it infringes a party's right to have a case heard by a tribunal which meets the requirements laid down in the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights?

Provisions of European Union law relied on

Article 19(1) TEU [and] Article 47 of the Charter of Fundamental Rights of the European Union

Judgment of the Court of Justice 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

Provisions of national law relied on

Constitution of the Republic of Poland of 2 April 1997: Articles 45 and 183

Ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym (Law of 8 December 2017 on the Supreme Court), consolidated text: Dz. U. of 2021, item 1904, as amended: Articles 1, 3, 15, 17, 29, 30, 31, 35 [and] 82

Ustawa z dnia 27 lipca 2001 r. – Prawo o ustroju sądów powszechnych (Law of 27 July 2001 on the system of ordinary courts), consolidated text: Dz. U. of 2023, item 217: Article 22a

Ustawa z dnia 26 czerwca 1974 r. – Kodeks pracy (Law of 26 June 1974 establishing the Labour Code): Article 140

Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego (Law of 17 November 1964 establishing the Code of Civil Procedure): Article 398^{20}

Succinct presentation of the facts and procedure in the main proceedings

1 By judgment of 4 December 2019, the Sąd Apelacyjny w Katowicach (Court of Appeal, Katowice) dismissed the appeal brought by G.T. against the judgment of the Sąd Okręgowy w Katowicach (Regional Court, Katowice) of 22 January 2019 dismissing his action against Huta […] S.A. in R. for exemption from securing and executing bearer shares of Huta […] S.A. in R. G.T.'s authorised representative brought an appeal on a point of law against the judgment of the Sąd Apelacyjny w Katowicach, contesting the judgment in its entirety and alleging infringement of certain provisions of the Civil Code through the misinterpretation thereof.

2 By order of 3 November 2020, the Sąd Najwyższy admitted the appeal on a point of law. By order of the President of the Sąd Najwyższy who directs the work of the Civil Chamber ('the President of the Civil Chamber of the Sąd Najwyższy') of 14 December 2020, it was assigned to Judge Karol Weitz and ultimately registered under file reference II CSKP 501/22.

3 By order No 25/2023 of the First President of the Sąd Najwyższy of 15 February 2023, Judge Bohdan Bieniek was designated to adjudicate in the Civil Chamber of the Sąd Najwyższy for a fixed period from 1 April to 30 June 2023, and the rules for allocating cases for each month of the period of designation were laid down at the same time. Pursuant to that order, on 2 March 2023 a judge of the Sąd Najwyższy, deputising for the President of the Civil Chamber of the Sąd Najwyższy, assigned Case II CSKP 501/22 to Judge Bohdan Bieniek. The date of the closed session was subsequently set by order of the President of the Second Division for 3 April 2023. The formation of the Sąd Najwyższy created on that date to hear the civil case II CSKP 501/22 consisted of two judges of the Labour and Social Insurance Chamber of the Sąd Najwyższy ('the Labour and Social Insurance Chamber') and – as the presiding judge – a judge who normally adjudicates in the Civil Chamber of the Sąd Najwyższy. The second member of the formation coming from the Labour and Social Insurance Chamber was designated to adjudicate in the same way as a judge-rapporteur.

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

4 The Sąd Najwyższy, sitting as a three-judge panel, is uncertain as to the interpretation of provisions of EU law, in particular as to whether the referring court, formed by orders of the First President of the Sąd Najwyższy and the President of the Civil Chamber of the Sąd Najwyższy, fulfils the criteria relating to a tribunal set out in the judgment 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], and that uncertainty is based on the following grounds.

5 First, the judges designated to adjudicate in another chamber of the Sąd Najwyższy have been deprived of the right to an effective remedy.

6 Second, the designation to adjudicate was effected without the consent of the transferred judges. This is in breach of the principle of the irremovability and independence of judges and interferes with the right to a fair trial, and thus the principle of effective judicial protection.

7 Third, the persons issuing the orders are in the same situation as the judges described in Case C-487/19 since they took up their positions in flagrant breach of the fundamental procedural rules governing the appointment of judges to the Sąd Najwyższy, which form an integral part of the organisation and functioning of the judicial system.

8 The referring court is also uncertain whether, in view of those alleged breaches, the judges designated to adjudicate may refrain from complying with those orders.

9 There is a provision in national law (Article 35(3) of the Law of 8 December 2017 on the Supreme Court; 'the Law on the Supreme Court') which allows the First President of the Sąd Najwyższy to designate a judge to adjudicate in another chamber. However, that provision allows for a judge to be so designated (without his or her consent) only to a specific case, set out in an order of the First President of the Sąd Najwyższy. That might be the case where the subject matter of a particular case coincides with the jurisdiction of two chambers of the Sąd Najwyższy or where, as a result of the recusal of all the judges of the Sąd Najwyższy in a particular chamber, it is necessary for the case to be heard by judges from another chamber of the Sąd Najwyższy. Another possibility provided for in Article 35(3) of the Law on the Supreme Court is to designate a judge to adjudicate for a fixed period in another chamber of the Sąd Najwyższy, but then the judge must adjudicate only in that 'new' chamber and not be required to adjudicate jointly in his or her new and home chambers of the Sąd Najwyższy with an increased caseload. Such a hybrid arrangement is precluded by Article 35(3) of the Law on the Supreme Court.

10 Designating a judge to adjudicate in another chamber without regard to the judge's substantive competence to adjudicate in a particular category of cases infringes the right to effective judicial protection and to a fair trial. A necessary condition for exercising both those rights is the judge having the knowledge and experience to guarantee proper consideration of the case. That condition is of particular importance in proceedings before the Sąd Najwyższy, whose decisions are then the reference point for the rulings of the lower courts. The dividing of the Sąd Najwyższy into chambers was carried out pursuant to Article 3 of the Law on the Supreme Court in accordance with the criterion of subject matter. Candidates for the position of judge of the Sąd Najwyższy also apply according to their specialisation. Therefore, judges with knowledge and professional experience corresponding to the jurisdiction of a given chamber should be assigned to that individual chamber. This is because cases are referred for consideration according to the order in which they are received and not when the judge-rapporteur or the adjudicating panel considers that the case has already been analysed to the point that it can be resolved. In the absence of an extensive support apparatus for

judges, it is necessary to have a thorough knowledge of the areas of law in which the judge normally adjudicates. Only then, in the case of unusual cases set in a complex context, is it possible to prepare the case properly for resolution.

11 At the same time, the judges designated to adjudicate in the present case are not afforded any legal protection. It follows from the interpretation of Article 35(3) of the Law on the Supreme Court that the legislature has failed to fulfil its obligation to comply with the EU standard, as can be seen from the judgment 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 118 of the judgment) in relation to judges of ordinary courts. Therefore, the intervention of the Court of Justice is necessary to determine whether or not action of that kind is in breach of the principle of the irremovability and independence of judges where the decision of the First President of the Sąd Najwyższy regarding the designation to adjudicate in another chamber of the Sąd Najwyższy, while simultaneously maintaining the workload in the home chamber, cannot be subject to judicial review. In the view of the referring court, Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights, which require Member States to establish remedies sufficient to ensure for individuals compliance with their rights and freedoms in the fields covered by Union law, are universal in nature, and judges of the Sąd Najwyższy are not excluded from their scope.

12 In contrast, it is clear from the position of the First President of the Sąd Najwyższy set out at the session of the Krajowa Rady Sądownictwa (National Council of the Judiciary) (‘the KRS’) on 17 March 2023 that a judge designated to adjudicate pursuant to Article 35(3) of the Law on the Supreme Court does not have a right of appeal. The First President of the Sąd Najwyższy considers that Article 35(3) of the Law on the Supreme Court is complete and does not permit the application *mutatis mutandis* of the Law of 27 July 2001 on the system of ordinary courts.

13 For the sake of accuracy, the Sąd Najwyższy notes that the KRS allows, by analogy, review of decisions of the First President of the Sąd Najwyższy regarding designations to adjudicate in another chamber. However, according to the case-law of the Court of Justice, the KRS is a body dependent on the political authorities in the country (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, and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Appeal)*, C-824/18, EU:C:2021:153), and, moreover, does not have the status of a tribunal.

14 Nor can the referring court exercise the option of having the constitutionality of Article 35(3) of the Law on the Supreme Court assessed in the present case, as the path of constitutional review is not open (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, paragraphs 33 and 34; judgment of the Sąd Najwyższy of 5 December 2019, III

PO 7/18; judgment of the [European Court of Human Rights] of 7 May 2021, Case 4907/18, *Xero Flor [v Polsce] sp. z o.o. v. Poland*).

15 A separate issue is whether or not the order of the First President of the Sąd Najwyższy designating a judge to adjudicate in the Civil Chamber of the Sąd Najwyższy conflicts with the guarantee mechanism provided for in Article 6(b) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9). The Court of Justice has not yet ruled on that issue, although the first questions for a preliminary ruling concerning the working time of judges are already arising (for example, Case C-41/23).

16 In national law, the working time of a judge of the Sąd Najwyższy is determined by the extent of his or her tasks (as in the case of a judge of an ordinary court). In the national order, note should be taken of the resolution of the Sąd Najwyższy of 8 April 2009, II PZP 2/09, which points out the differences between the task-based working time governed by the Labour Code and the working time of judges defined by the extent of their tasks. The resolution stresses that the rules on the working time of judges do not implement the provisions of the directive as they do not introduce the right to rest, and in that respect, under Article 5 of the Labour Code, the provisions of that code should be applied. In accordance with Directive 2003/88, judges should also be provided with minimum guaranteed rest periods and their working time should not exceed 48 hours per week over a reference period. Since that resolution, the legislature has not modified the rules concerning the working time of a judge. Applying the formula of the specifically understood, task-based working time system (Article 140 of the Labour Code) to judges by analogy, it can and should be assumed that in a situation where a judge is to be entrusted with additional obligations, in an area of law in addition to his or her specialisation, there is a need for the employer (in this case the First President of the Sąd Najwyższy) to assess whether the new tasks imposed, while maintaining existing obligations, are at all feasible. In contrast, in the facts of the case, the judges of the Labour and Social Insurance Chamber had already been assigned tasks for the upcoming reference period and, once he or she has been designated to adjudicate in the Civil Chamber of the Sąd Najwyższy, such a judge has, on balance, one session more than the judges normally adjudicating in that chamber (four sessions a month as opposed to three sessions a month). The actual introduction of an additional session in the Civil Chamber of the Sąd Najwyższy, with no analysis of the circumstances concerning working time, therefore demonstrates that there has been a breach of the permissible standards contained in Directive 2003/88.

17 The referring court also points out that both the First President of the Sąd Najwyższy and the President of the Civil Chamber of the Sąd Najwyższy, whose orders formed the adjudicating panel in the present case, were appointed to the position of judge of the Sąd Najwyższy in the same circumstances as in the case in which the judgment 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, was given. The referring court also notes that on 23 September 2022 the Sąd Najwyższy issued an order (Case III CZP 43/22) referring to the Court of Justice the question whether Article 2, Article 6(1) and (3), and the second subparagraph of Article 19(1) of the Treaty on European Union, in conjunction with Article 47 of the Charter of Fundamental Rights and Article 267 of the Treaty on the Functioning of the European Union, are to be interpreted as meaning that an act determining the formation of a court, such as an order of the First President of the Sąd Najwyższy, does not produce legal effects where the formation of the court thus established is not an independent and impartial tribunal previously established by law within the meaning of European Union law, in particular on account of: [(a)] the involvement in its composition of persons appointed to the position of judge of the Sąd Najwyższy in a manner which is manifestly contrary to the provisions of national law concerning the appointment of judges, as established by final rulings of the highest national court, and those persons constitute a majority of the formation of the court; (b) the determination of the formation of the court in the manner set out above by the President of the Sąd Najwyższy appointed to the position of judge of the Sąd Najwyższy in the same circumstances and in breach of the rules concerning the appointment of a judge of the Sąd Najwyższy to the position of President of the Sąd Najwyższy. As at the date of the order for reference in the present case, that question had not yet been referred to the Court of Justice.

18 Referring to the grounds of the abovementioned question which has not been referred, the referring court points to the problematic nature of the selection of the First President of the Sąd Najwyższy and the President of the Civil Chamber of the Sąd Najwyższy.

19 Under Article 15 of the Law on the Supreme Court, the selection of candidates for the position of President of the Sąd Najwyższy is to be carried out by the General Assembly of judges of the competent chamber (‘the General Assembly’). The General Assembly is a body of the Sąd Najwyższy and is to be composed of all the judges of which the chamber is composed. On 29 June 2021, the General Assembly of judges of the Civil Chamber of the Sąd Najwyższy, convened for the purpose of selecting candidates for the position of President of the Civil Chamber of the Sąd Najwyższy, adopted – by a majority of votes – a resolution to postpone the proceedings of the General Assembly pending conclusion of the proceedings before the Court of Justice in the cases relating to an action brought by the European Commission against Poland (C-791/19) and in the preliminary ruling cases C-487/19 and C-508/19. When the term of office of the President of the Civil Chamber of the Sąd Najwyższy expired on 31 August 2021, the President of the Republic of Poland entrusted the management of the Civil Chamber [of the Sąd Najwyższy] to the First President of the Sąd Najwyższy. This resulted in a de facto merger of the functions of the First President of the Sąd Najwyższy and those of the President of the Civil Chamber of the Sąd Najwyższy, which is not provided for in the Law on the Supreme Court. The power of the President of the Republic of Poland to entrust to a person the performance of the duties of the President of the Sąd Najwyższy, provided for in Article 13a of the Law on the

Supreme Court, in conjunction with Article 15 thereof, constitutes a breach of the constitutional principle of the separation and independence of the judiciary from the executive (Article 173 of the Constitution of the Republic of Poland). The provisions of the Constitution governing the scope of the competence of the President of the Republic of Poland do not lay down for the President of the Republic of Poland, as an executive body, the power to decide independently on the uptake by certain judges of functions allowing them to exercise the powers of the bodies of the Sąd Najwyższy.

20 Despite the protest of the majority of the members of the General Assembly, a General Assembly was convened for 7 September 2021 by the First President of the Sąd Najwyższy, as the person designated by the President of the Republic of Poland, for the purpose of selecting candidates for the position of President of the Civil Chamber of the Sąd Najwyższy. A motion to adjourn the session of the General Assembly was not put to a vote. Judges appointed to the position of judge of the Sąd Najwyższy prior to 2018 then refused to participate, resulting in the absence of a quorum and the participation of only newly appointed judges in the selection of candidates for the position of President of the Civil Chamber of the Sąd Najwyższy. The absence of a quorum was remedied by the First President of the Sąd Najwyższy transferring two persons to adjudicate in the Civil Chamber of the Sąd Najwyższy who had previously been appointed to the position of judge in the Chamber of Extraordinary Control and Public Affairs, [as well as] one person who had previously been appointed to the Disciplinary Chamber.

21 The selection of candidates for the position of President of the Civil Chamber of the Sąd Najwyższy was therefore carried out contrary to the position of the majority of the judges constituting the Civil Chamber of the Sąd Najwyższy and in breach of the rules defining the functioning of the General Assembly, which is a body of the Sąd Najwyższy.

22 The question therefore arises as to whether, from the point of view of compliance with the requirement under EU law relating to the independence of courts and judges, orders regarding designation to adjudicate in another chamber of the Sąd Najwyższy and allocation of specific civil cases in which the appointed judges do not normally adjudicate and with regard to which their competence to perform jurisprudential endeavours has not been verified, adopted by persons whose status is identical to that in [Case] C-487/19 and who, in addition, have been selected in a flawed procedure, ultimately leads to a formation of a court being constituted in breach of the parties' right to a fair trial, as evidenced not only by the formation of that court, but also by a series of acts of a material and technical nature (issuing of orders regarding: the allocation of the case to be resolved, the change of judge-rapporteur, and the designation of the formation to hear the case).

23 Therefore, the answer, in the view of the referring court, also requires an interpretation of EU law (second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights) as to whether judges appointed to a formation of a court may refuse – in view of the principle of the primacy of

EU law and the case-law of the Court of Justice and the [European Court of Human Rights] – to take up and carry out activities in the cases allocated to them, regarding as non-existent orders requiring them to work in another chamber of the Sąd Najwyższy without their consent; or whether, despite the failings and infringements of cardinal rights already mentioned, they must adjudicate, thus ceding de facto to the parties the decision on whether to challenge that ruling as a ruling given by a tribunal in a formation constituted in breach of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights.