



COMMISSIONER FOR HUMAN RIGHTS

Warsaw, 20-03-2021

Adam Bodnar

VII.511.51.2019.PF

**Judge Robert Spano**  
**President**  
**European Court of Human Rights**  
**F-67075 Strasbourg Cedex**

**Written comments**  
**of the Commissioner for Human Rights of the Republic of Poland**  
**in the case of *Jan Grzęda against Poland***  
(Application no. 43572/18)

1. Pursuant to Rule 44(3)(a), (5) and (6) Rules of the European Court of Human Rights (**ECtHR**) and on the basis of the decision of the President of the Grand Chamber (ECHR-LE14.8bP3mod), the Commissioner for Human Rights (**CHR**) wishes to submit fresh observations related to the present case.

**I. General observations**

2. The Commissioner for Human Rights is a Constitution-based National Human Rights Institution. In full independence from other state bodies, the CHR upholds human rights and freedoms. It is in this capacity that the CHR addresses the European Court of Human Rights in the present case pending before the Grand Chamber.

3. During his term of office, since 2015, the CHR has been alarmed by the dismantling of domestic institutions designed to uphold the law and administer justice: the Constitutional Tribunal (**CT**), the National Council of the Judiciary (**NCJ**), the Supreme Court (**SC**) as well as ordinary courts. Judicial independence is under systemic threat in Poland, the national authorities intentionally exert unlawful pressure on the entirety of judicial structures and subject some judges to repression using disciplinary, administrative and criminal law measures.

4. In being critical of a number of legislative and institutional changes introduced in the Polish judicial system, the CHR has consistently presented opinions when legislative initiatives have been taken and has actively participated in the legislative process in Parliament. Concerns and recommendations of the Commissioner have been disregarded and threats leading to the undermining of the rule of law have been ignored. The analysis of the legal and factual background of changes introduced in Poland indicates the government's **intended strategy to take control of the process of appointing national judges**, and in consequence, to influence the content of court decisions. In this context, the *ex lege* termination of the previous NCJ judges-members' term of office formed part of the said strategy. The interruption of the mandate of previous judicial members in the NCJ was meant to enable such changes, which were then put into place.

5. The present case relates to two specific issues. First, it is about ensuring material and procedural protection of the individual applicant's right under national law to serve a full term of office as a lawfully elected judge-member of the NCJ. Second, the case is of a high systemic importance, in that the changes which affected the applicant and 14 other judges, involved (illegitimate) reconstitution and subsequent re-

composition of the NCJ, the body responsible for nominating persons to judicial positions and upholding judicial independence. The CHR will focus primarily on the latter perspective.

6. The right to an independent and impartial court established by law is one of the most fundamental human rights as it guarantees the exercise of all other rights and freedoms which individuals may claim before courts. In 2018, national authorities re-staffed the NCJ in an unconstitutional manner. This was deliberately done shortly before the initiation of the process of selecting more than forty new judges to the Supreme Court. In fact, it was expected that even more positions would soon become vacant in the SC following the retirement of judges of that Court who had reached the newly imposed retirement age limit of 65 years.<sup>1</sup>

7. The manifest intention was to introduce into the Supreme Court persons affiliated with the political authorities, who would later jurisprudentially meet their expectations. Bearing in mind that these changes concerned the top judicial body which exercises a supervisory role over all common courts in Poland, as a result – effective judicial review has been undermined in Poland. Hence, since then, the protection of individual rights is impaired in Poland.

8. The Commissioner considers that **the termination of the pending term of office of NCJ members was arbitrary and unconstitutional**. Likewise, the election of new NCJ's judicial members by the Sejm violated constitutional rules. Both these circumstances, when assessed in the light of the criteria established by the ECtHR in the *Ástráðsson* judgment, constituted manifest breaches of fundamental rules of the procedure for appointing judges which could not be effectively reviewed and remedied at the national level.<sup>2</sup> This results in: (a) a continuing and grave defect in the composition of the current NCJ that leads to constant challenging of its constitutionality and the legitimacy for it to issue judicial nominations; (b) questioning the judicial status of persons appointed by the President of the Republic following the NCJ act of nomination; and (c) raising doubts as to the validity of decisions taken by those judges.

9. The CHR recognises that in line with the Constitutional rule, **judicial members of the NCJ are entitled to the full-term to which they were entitled at the time of their election**. The Commissioner therefore invites the European Court of Human Rights to consider granting them adequate protection under the Convention.

10. The usual arguments invoking the principle of irremovability of judges, if the principle is taken very strictly, may have been considered so far as not directly applicable to the participation of judges in a body such as a judicial council. The CHR would therefore like to submit arguments in favour of adopting a similar approach in the specific Polish context and granting NCJ judges **protection analogous to the protection offered to a judge against removal** (see Section III.1). The protection is founded on the nature of the NCJ mission and its constitutional responsibilities as a guardian of judicial independence. For this reason, the status of the NCJ judges-members should be such as to guarantee that they are capable to fully accomplish the role entrusted to them by law.

11. If this proposal is not adhered to, the Commissioner would like to submit that the Court should instead apply the principles on the general **protection of the right of access to court of civil servants recognized in the case of *Vilho Eskelinen and Others***,<sup>3</sup> as confirmed in the *Baka* case,<sup>4</sup> and afford such protection to judges-members of the NCJ. The general presumption of protection, due to Poland's failure to meet the *Eskelinen test*, justifies extending the Convention's protection to all persons in a situation such as the complainant (see Section III.2).

## II. Formation and composition of the NCJ

### 1. Systemic role and constitutional mission of the NCJ

12. The Constitution of the Republic of Poland determines two essential functions of the National Council of the Judiciary, each requiring independence and objectivity of the body. First, the NCJ runs competitions for judicial positions and recommends individual nominations to the President of the Republic

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<sup>1</sup> See in this context CJEU judgment of 24.06.2019, C-619/18, *Commission v. Poland (Independence of the Supreme Court)*; CJEU judgment of 2.03.2021, C-824/18 *A.B. and Others v. National Council of the Judiciary*; para. 134.

<sup>2</sup> See ECtHR judgment of 1.12.2020, *Guðmundur Andri Ástráðsson v. Iceland*.

<sup>3</sup> ECtHR judgment of 19.04.2007, *Vilho Eskelinen and Others v. Finland*.

<sup>4</sup> ECtHR judgment of 23.06.2016, *Baka v. Hungary*; see also ECtHR judgment of 25.09.2018, *Denisov v. Ukraine*.

(Article 179 Constitution). Second, the Council shall preserve the independence of courts and judges; the Constitution has designated it as the guardian of their independence (Article 186(1) Constitution).

13. There is no entrenched rule of international law obliging States to create a judicial council, although, the demand for its establishment is firmly embedded within the legal area of the Council of Europe. While States Parties to the ECHR are not legally bound to establish a judicial council, however, if they do create one, they should provide that it can perform the role assigned to such a body. Since the primary task and mission of a judicial council is to ensure the independence of national judges, to pursue them, it must itself remain independent of the other branches of government: the legislative and the executive power.<sup>5</sup>

14. The CHR submits that **if the foundation of a judicial council is to have any meaning, the State should ensure that it is capable of fulfilling the very purpose of its existence.** For that reason, the council should be furnished with powers adequate to the role entrusted to it, and the status of the body as well as of its members should ensure that their mission can be accomplished. Consequently, it is essential that it consists of a substantial majority of judges elected by their peers,<sup>6</sup> and its functioning does not give rise to any reasonable doubts as to its legitimacy and independence. Accordingly, doubts should not arise with regard to the legitimacy, independence and impartiality of those nominated by the NCJ either.<sup>7</sup>

## 2. Constitutional principles on the election of NCJ judges-members

15. Since the very idea to set up a judicial council in Poland was proposed, a legitimate method of staffing the body was seen as particularly important to enable it to meet its crucial task. Indeed, most of the constitutional rules on the NCJ are dedicated to this issue. The NCJ's membership is formed in three different ways: (a) there are *ex officio* members: the First President of the Supreme Court, the President of the Supreme Administrative Court, and the Minister of Justice; (b) one member is appointed – a representative of the President of the Republic; and (c) most members are elected: 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts; in addition to six Members of the Parliament, i.e., four elected by the Sejm and two by the Senate (see Art. 187 (1) Constitution).

16. It follows from the above that all three branches – the legislative, the executive, and the judiciary – are represented in the NCJ. The composition of the Council thus reflects the constitutional principle of the separation and balance of powers, yet with a clear majority share of the judiciary (17 of 25 members are judges), and minority participation of the legislature and the executive. Until 2018, the 15 judges-members of the NCJ were elected by the judges themselves. This mechanism of staffing the NCJ was meant to guarantee the systemic and political independence of the Council from the other powers and was considered to be a basic premise for the NCJ's capacity to meet its crucial constitutional role.

17. The election of judges by their peers was established since the very creation of this body in 1989,<sup>8</sup> was maintained by the 1997 Constitution as well as the subsequent Acts on the National Council of the Judiciary of 2001<sup>9</sup> and 2011.<sup>10</sup> It was also supported in the case-law of the Constitutional Tribunal (see below, Section II.4.1) and accepted by doctrine as a legitimate method of staffing a judicial council.<sup>11</sup> The requirement that at least a half of the members of a judicial council be composed of judges who are elected by their peers has been embedded as a European standard.<sup>12</sup>

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<sup>5</sup> See i.a. Consultative Council of European Judges, *Magna Carta of Judges (fundamental principles) of 17–19 November 2010*, CM(2010)169-add2, para. 13.

<sup>6</sup> *Ibidem*, para. 13.

<sup>7</sup> Compare, CJEU judgment of 19.11.2019, C-585/18, C-524/18 and C-525/18 *A.K. and others*, paras. 138–139.

<sup>8</sup> Law of 20.12.1989 on the National Council of the Judiciary, *Dziennik Ustaw* of 1989, No 73, item 435.

<sup>9</sup> Law of 12.05.2001 on the National Council of the Judiciary, *Dziennik Ustaw* of 2001, no. 100, item 1082.

<sup>10</sup> Law of 27.07.2011 on the National Council of the Judiciary, *Dziennik Ustaw* of 2011, no. 126, item 714.

<sup>11</sup> See i.a. K. Grajewski, *Krajowa Rada Sądownictwa w świetle przepisów ustawy z 8 grudnia 2017 r. – zagadnienia podstawowe*, *Krajowa Rada Sądownictwa* 1/2018, p. 19–20, and the literature cited there; P. Filipek, *The New National Council of the Judiciary and Its Impact on the Supreme Court in the Light of the Principle of Judicial Independence*, *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, Vol. XVI, 2018, p. 179.

<sup>12</sup> See the position of the Committee of Ministers of the Council of Europe: “Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.”, Recommendation of 17.11.2010 *on judges: independence, efficiency and responsibilities*, CM/Rec(2010)12, para. 27; see also *Magna Carta of Judges (fundamental principles) of the Consultative Council of European Judges of 17–19.11.2010*, CM(2010)169-add2, para. 13; European Network of Councils for the Judiciary, *Guide to the European Network of Councils for the Judiciary*, October 2018, p. 13;

### 3. Legislative changes adopted in 2017

#### 3.1. Premature termination of the term of office of the NCJ judges-members in 2018

18. The Act of 8 December 2017 amending the Act on the National Council of the Judiciary<sup>13</sup> forced a premature interruption of the four-year term of office of the NCJ judicial members. It was carried out in manifest breach of the Constitution guarantee of the full term in office (Article 187 (1) Constitution).

19. The explanatory memorandum to the draft legislative amendment did not substantiate the proportionality between the need for an early termination of the term of office of the NCJ judges and the objectives pursued by it. No explanation was *de facto* given for the measure adopted either by the executive which proposed the new legislation or by the legislature which passed it. **National authorities failed to identify any objective interest of the State which would require the interruption of the mandate of judges-members** and thus undermining the NCJ's independence.

20. The opposing objective was not indicated. In other word, the political power was unable to objectively justify early termination of all of the NCJ's judge-members' tenure. The measure should therefore be assessed as arbitrary. Moreover, it is in **the objective interest of the State to preserve the independence of the courts and judges, which the NCJ is to uphold**. Therefore, the NCJ itself should also meet the requirement of independence from the legislative and executive authorities. The established case law of both the ECtHR and the CJEU indicate that judicial independence is at the heart of the right to effective judicial protection and the right to a fair trial, an intrinsic and integral part of the rule of law.

21. In this context, the Polish government attempts to invoke the CT judgment in case K 5/17, in which the CT considered that judicial members of the NCJ should be elected for a joint, collective term of office, rather than individual terms. The Commissioner submits that this ruling is irrelevant. The position indicated there was a discretionary interpretation and was adopted by a flawed body in order to meet the expectations of the ruling majority (see Section II.4.2).

#### 3.2. Election of NCJ judges-members by the Sejm

22. The Act of 8 December 2017 introduced new regulations for the election of judicial members of the NCJ. The election of 15 judges, so far elected by their peers, was vested in the Sejm, and the actual election was carried out after the premature interruption of the term of office of the previous Council's members. Both were done in violation of constitutional rules, and the changes have had far-reaching implications.

23. The CHR's detailed analyses and critical assessment of the proposed regulations were repeatedly presented in numerous submissions to the executive and legislative bodies, yet they were not taken into account.<sup>14</sup> Ultimately, the legislature entrusted itself with the election of new judges-members to replace the previous ones, going beyond the powers expressly attributed to it in the Constitution.

24. The consequences of the legislative changes adopted by Parliament are very serious. By premature termination of the term of office of NCJ judges-members and subsequent election of new members, **the legislative and executive branches have granted themselves decisive influence, or indeed a monopoly, over the NCJ composition**, contrary to the principle of the separation and balancing of powers (Article 10 (1) Constitution). Currently, 23 of all 25 NCJ members are either elected or appointed by these two branches. Instead of members elected by the judiciary, the legislature has chosen persons who, in most instances, have a link to the Minister of Justice.<sup>15</sup> In fact, it was carried out what the Minister of Justice said in the Polish

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International Commission of Jurists, *The Tunis Declaration on Reinforcing the Rule of Law and Human Rights*, March 2019, para. 16.

<sup>13</sup> Act of 8.12.2017 amending the Law on the National Council of the Judiciary and certain other laws, *Dziennik Ustaw* of 2018, item 3.

<sup>14</sup> See a letter to the Minister of Justice of 1.02.2017, letter to the Speaker of the Sejm of 12.04.2017, opinion presented to the Speaker of the Senate of 11 December 2017, opinions presented to the President of the Republic of 19.07.2017, 31.10.2017, 30.11.2017 and 19.12.2017

<sup>15</sup> Out of the 15 elected members of the Council, as many as 9 were appointed by the Minister of Justice to the position of president or vice-president of the court in the preceding period, 9 were active in committees or teams of the Ministry, and 4 were employed by the Ministry, see: <https://oko.press/powiazania-z-ministrem-ziobra-ma-12-z-15-czlonkow-neo-krs-ujawniamy/> (access: 18.03.2021). The new members of the NCJ were therefore in a relationship of dependence or personal gratitude from the executive body.

Senate about the elections to the NCJ and what was recorded: “[w]e nominated such judges who, in our opinion, were ready to cooperate in the reform of the judiciary”.<sup>16</sup>

25. In consequence, the extrajudicial branches have gained **excessive influence over the performance of the NCJ’s tasks and the content of resolutions it adopts**. The NCJ has lost the ability to contribute to making the process of judicial nominations objective. At the same time, the appointment by political authorities of a body designed to protect the independence of the judiciary from these very political authorities – **renders the NCJ’s mission in fact unfeasible**.

#### 4. Jurisprudential positions of the Constitutional Tribunal

##### 4.1. Judgment of 18 July 2007 in case K 25/07

26. The interpretation that the Constitution establishes the principle of the election of judges to the NCJ by their peers was confirmed by the Constitutional Tribunal (CT). It acknowledged that the manner in which the composition of the NCJ was constitutionally designed guarantess the independence of the body. In 2007, in the case K 25/07, **the CT indicated that the Constitution clearly states that members of the NCJ shall be judges elected by judges**.<sup>17</sup>

##### 4.2. Rulings in cases K 5/17 and K 12/18 made by the CT following unconstitutional changes in its composition

27. A different view was then presented in the CT judgment of 20 June 2017 in which the Tribunal held that in itself the mere description, in the Constitution, specifying that the NCJ is a separate body is sufficient to guarantee its independence (case K 5/17).<sup>18</sup> This formalistic approach is manifestly insufficient to guarantee the NCJ’s genuine independence.

28. Moreover, in the case K 5/17, the CT found that the election of judges-members of the NCJ to individual term of office (e.g. as a result of filling a vacancy that occurred during the term) and not joint, is unconstitutional.<sup>19</sup> In the circumstances of that particular application considered by the CT, the legitimacy of such an assertion may be disputable and the interpretation of the Constitution adopted by the CT is not manifest. Yet, even if such a ruling were to emanate from a properly established constitutional court (see below), the following considerations still should be noted.

29. *First*, the Polish doctrine of constitutional law generally accepts that judgments of the CT establishing the unconstitutionality of a legal provision have a prospective effect. The loss of binding force by such a provision does not mean the annulment of the previously existing situation, and does not lead to the automatic extinguishing of previous legal consequences. For this reason, **the then term of office of the NCJ members did not have to be interrupted**. They could have completed their term, and the new rules compliant with the CT ruling would have been applicable as of the next election of judges-members of the NCJ.

30. *Second*, the case was brought to the CT by the Prosecutor General – at the same time the Minister of Justice, in the course of a fierce political and legal dispute concerning the NCJ. **The true aim of the application was to find a pretext to enable radical and indeed unconstitutional change** in the statutory rules on the composition and functioning of the NCJ.

31. *Third*, **there is no rational argument to question the independence and impartiality of the previous NCJ for the sole reason that judges-members were elected to individual rather than joint tenure**. The defect, if any, was technical in nature and concerned only the moment when the term of office of the judge-member began. It concerned neither moral integrity nor professional competence of the members of the NCJ. It did not undermine the independence of the NCJ from the legislative and executive powers; it did not increase their influence over the body. It had no impact on the performance of the functions by the NCJ. In consequence, it did not compromise the judicial nominations recommended by the then NCJ. This is a fundamentally different situation from that of the current NCJ.

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<sup>16</sup> See “Gazeta Wyborcza” of 15.01.2020, <https://wyborcza.pl/7,75398,25603501,mysmy-zglosili-ziobro-przypadkiem-zdradzil-co-jest-na-utajniowanych.html> (access: 18.03.2021).

<sup>17</sup> See CT judgment of 18.07.2007, case K 25/07, para. III.4.

<sup>18</sup> CT judgment of 20.06.2017, case K 5/17, para. III.2.2.5.

<sup>19</sup> Case K 5/17, para. III.4.2.4.

32. Most importantly, however, **the CT ruling in case K 5/17 should be disregarded by the ECtHR, or any other judicial body for that matter, for the following reasons.**

33. *Fourth*, the case was examined by the Tribunal's adjudicating panel whose composition included unauthorized persons, i.e. appointed to the positions previously lawfully taken (so called "duplicate-judges", *sędziowie-dublerzy*), as the Constitutional Tribunal itself stated in the judgments of 3 December 2015 (case K 34/15) and of 8 March 2016 (case K 47/15). Hence, the ruling was **issued by a body that does not meet the requirements of being "established by law"**.

34. *Fifth*, **the composition of the 5-judge panel to which the case was allocated was manipulated by the CT President while the case was pending.** Leon Kieres, a judge elected in 2012, was removed from the panel and replaced by Julia Przyłębska (the CT's President) herself. Similarly, in place of Henryk Cioch, the CT President indicated Grzegorz Jędrejek. No grounds were given for the replacement of panel members. The decision of the CT President was thus **entirely arbitrary and had no proper legal basis.**

35. The above enumerated failings disqualify the CT's ruling and deny it of any legal force. Accordingly, it should be considered either *sententia non existens* or a ruling invalid *ex lege*.

36. The same applies to another judgment of the Constitutional Tribunal, issued in the case K 12/18, which confirmed the finding of the case K 5/17. It is affected by the same deficiencies as the previous one. Case K 12/18 was brought by the NCJ itself and aimed at its own legitimisation. The NCJ's application of 22 November 2018 made to the Constitutional Tribunal was an illusory request to review the constitutionality of the Act of the NCJ. Its actual intention was to obtain confirmation of its own status and constitutionality of the legislative changes made with regard to the Council. The apparent nature of the application was acknowledged even by the Tribunal itself.<sup>20</sup>

37. The case was again decided with the participation of unauthorised persons. Furthermore, and again, they were manipulations in its composition: the judge-rapporteur, Jarosław Wyrembak, was removed from the panel and replaced by Julia Przyłębska at the very final stage of the examination of the case. This happened when he had presented, at the adjudicating panel's debate on the final ruling, the rapporteur's position that did not meet the expectations of the CT President and after he had declared a dissenting opinion to the majority ruling.<sup>21</sup> This time, the new judge-rapporteur presented a position appreciated by the CT President.

38. The circumstances described above indicate that there exist **an established pattern of legitimising one flawed authority by another flawed authority.** The procedure for the review of constitutionality does not – today – serve to protect the Constitution, but to preserve measures that deny it.

39. The Commissioner concludes that the current Constitutional Tribunal no longer fulfills the role assigned to it by the Constitution. It was the first institution to be affected by the unlawful changes in the years 2015–2016. Measures then taken deprived the CT of the nature of a constitutional court. The Constitutional Tribunal of today **does not guarantee a genuine control of the constitutionality of the law.** This assessment is also shared by the European Parliament.<sup>22</sup> and the European Commission.<sup>23</sup> Instead, the CT **has been used to legitimise actions that are inconsistent with the Constitution.** This is done by issuing rulings that are expected by those in power or even "ordered" as a result of appropriately constructed applications for a ruling.<sup>24</sup>

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<sup>20</sup> CT judgment of 25.03.2019, case K 12/18, para. III.1.

<sup>21</sup> These facts were presented in written by Jarosław Wyrembak to the Senate's Committee on Human Rights, Rule of Law and Petitions (3.12.2019). He made public his letters to the members of the CT, in which he described this situation as well as other irregularities in the CT, see: <http://monitorkonstytucyjny.eu/archiwa/11474> (access: 18.03.2021).

<sup>22</sup> European Parliament resolution of 17.09.2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM(2017)0835 – 2017/0360R(NLE)), para. 15.

<sup>23</sup> Reasoned Proposal of 20.12.2017 of the Commission in accordance with Article 7(1) TEU on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final, para. 90–109.

<sup>24</sup> See S. Biernat, *Trybunał Konstytucyjny wypowiada posłuszeństwo prawu Unii Europejskiej*, [w:] A. Bodnar, A. Płoszka (red.), *Wokół kryzysu praworządności, demokracji i praw człowieka. Księga jubileuszowa Profesora Mirosława Wyrzykowskiego*, Warszawa 2020, p. 820; M. Pyziak-Szafnicka, *Trybunał Konstytucyjny à rebours*, „Państwo i Prawo” 2020/5, p. 25 et subseq.

## 5. Judgments of the Court of Justice of the European Union

40. The problem of the manner of electing judges-members of the NCJ and its impact on the independence of this institution has become the subject of cases decided by the Court of Justice of the European Union (CJEU), and then accordingly reflected in rulings of the Polish Supreme Court.<sup>25</sup>

41. In the infringement case C-619/18 *Commission v. Poland*, launched on the basis of Article 258 TFEU, and related to the independence of the Polish Supreme Court, the CJEU ruled that doubt may be cast on the independence of judges-members of the NCJ having regard to the fact that they are no longer elected by their peers as previously but by the lower chamber of the Polish Parliament.<sup>26</sup> In this judgment the CJEU also found that, as a result of adopting legislation to lower the retirement age of SC judges, Poland had undermined their guarantees of irremovability and independence.

42. Subsequently, under the preliminary ruling procedure (Article 267 TFEU), the Luxembourg Court issued a seminal judgment in the case C-585/18, C-624/18 and C-625/18 *A.K. and Others*.<sup>27</sup> The Court indicated a number of factors relevant to verify whether the NCJ is independent of the legislative and executive authorities, including: (1) the reduction of ongoing four-year term in office NCJ members; (2) change in the manner of election to the benefit of the legislature leading the increase of appointments by political authorities; (3) irregularities in the process of appointing new members; as well as (4) the actual way in which the body exercises its constitutional responsibilities, and in particular, if it does so in a way which is capable of calling into question its independence in relation to the legislature and the executive (paras. 143–144).

43. The CJEU also indicated that the participation of a body such as the NCJ, in a process for the appointment of judges, may, in principle, contribute to making that process more objective. However, that is only the case provided that that body is itself sufficiently independent of the legislature and executive and of the authority to which it is required to deliver such an appointment proposal (paras. 137–138). Thus, the degree of independence enjoyed by the NCJ may become relevant when ascertaining whether the judges which it selects for appointment will be capable of meeting the requirements of independence and impartiality (para. 139).

44. These findings have recently been confirmed by the CJEU in ruling in the case C-824/18 *A.B and others* on the right to appeal against NCJ resolutions in the nomination process to the Supreme Court.<sup>28</sup> In addition, and indeed, for the first time the CJEU has openly stated that the independence of a body such as the NCJ from the legislature and executive is open to doubt (para. 130), pointing i.a., to the possible existence of special relationships between members of the NCJ and the Polish executive (para. 131).

45. In addition, in this CJEU judgment, the conclusion is clear, that by restricting and then excluding any possibility of appealing NCJ resolutions on Supreme Court appointments, the Polish legislature has acted with the specific intention of preventing any possibility of exercising judicial review of all appointments made to the SC on the basis NCJ resolutions since the establishment of it in its new composition (para. 138).

## 6. Judgments and resolutions of the Supreme Court

46. On the basis of the above CJEU guidelines made in *A.K.* ruling, the Polish Supreme Court made such an assessment for the first time in its judgment of 5 December 2019. The three-judge panel of the Supreme Court (Chamber of Labour and Social Security) held that **the National Council of the Judiciary is not an impartial and independent body** (case no. III PO 7/18). The same position was then corroborated in two subsequent rulings of 15 January 2020 by the same SC Chamber (cases no. III PO 8/18 and III PO 9/18) as well as by the joined chambers of the Supreme Court in the binding resolution of 23 January 2020 which implemented the *A.K.* ruling into Polish procedural law.<sup>29</sup>

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<sup>25</sup> SC judgments of 5.12.2019, case III PO 7/18, and 15.01.2020, cases III PO 8/18 and III PO 9/18.

<sup>26</sup> CJEU judgment of 24.06.2019, C-619/18, *Commission v. Poland*, para. 100.

<sup>27</sup> CJEU judgment of 19.11.2019, C-585/18, C-624/18 and C-625/18 *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*.

<sup>28</sup> CJEU judgment of 2.03.2021, C-824/18 *A.B. and Others v. National Council of the Judiciary*.

<sup>29</sup> See Resolution of 23.01.2020 of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, [http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1\\_20\\_English.pdf](http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf) (access: 18.03.2021).

47. Subsequently, the Polish national authorities have made intensive efforts to negate the effects of these Supreme Court rulings by taking legislative action (“Muzzle Law”),<sup>30</sup> passing contrary rulings by new chambers of the Supreme Court,<sup>31</sup> applying to the Constitutional Tribunal and obtaining its favourable stance (cases Kpt 1/20, U 2/20),<sup>32</sup> and increasing pressure on judges not to undertake the review indicated by the CJEU.

48. These actions confirm that the process of (a) the elimination of genuine constitutional review; (b) the early termination of the term of the NCJ and its new composition; (c) the appointments to the Supreme Court in a manner manifestly contrary to the law; (d) the changes to the common courts, and (e) the tightening of the disciplinary liability regime – was carefully planned as to the sequence and type of action to be taken.

49. In conclusion, the CHR submits that comprehensive changes in the Polish judicial system have led to **the exclusion of all safeguards designed to limit abusive or arbitrary action taken by the executive and/or legislative branches**. To put matters more bluntly: an alternative legal space has been created under which the ruling majority can enact unconstitutional laws, unlawfully appoint members of the Constitutional Tribunal, the National Council of the Judiciary, the Supreme Court, or discipline and prosecute at will those who articulate positions that do not meet its expectations.

### III. Protection of judicial members of the NCJ

#### 1. Analogous protection of NCJ’s judges-members against removal

50. The protection of the status of judges-members of the National Council of the Judiciary should be derived from their status as judges and the crucial function that the Constitution entrusts to the NCJ to protect judicial independence. A body made up largely of persons who do not themselves have the attributes it is intended to ensure, cannot effectively counteract possible threats to judicial independence. The concept of the analogous (equivalent) protection of NCJ judges-members against removal is based on the **cumulative recognition of the following elements**:

51. *First*, the NCJ has been constitutionally entrusted with the role of guaranteeing the independence of courts and judges. The status of that body and the status of its members must be such as **to ensure that it is able to carry out this mission**.

52. *Second*, by way of exercising its detailed competences, the NCJ **directly influences the status of judges**. The NCJ participates in the process of nomination and admission to the profession, promotion of judges and their transfer to a higher court, their dismissal and early retirement. It is essential to ensure that there is no gap in the protection of judges’ independence at this juncture of the State’s structure.

53. *Third*, **the independence of judges is absolute**. Judicial independence must not be interfered with by the State under any circumstances. There ought to be no instances in which a judge remains “dependent” i.e., reliant on the political authorities.

54. *Fourth*, **the independence of judges is indivisible**. Persons who hold the office of a judge should be protected in any situation of public activity to which they are assigned as judges under the law in force. In exercising the functions entrusted by law to a person as a judge, consistently, that person should be offered protection due to him/her, as a judge to the full extent when performing a public service.

55. *Fifth*, while in line with the minimum requirement, the majority of the members of a judicial council should be judges – this is to ensure **that persons with the attribute of independence have a decisive say in the Judicial Council**. Consequently, their independence should be equally guaranteed in the scope of their participation and activity within the Council.

56. The CHR does not claim that there is a single model for a judicial council, the arrangements in various countries may differ. However, in the Polish context, in light of the elements outlined above, the members of the National Council of the Judiciary should be afforded such protection.

57. In the Polish doctrine of constitutional law it is emphasized that the constitutional principle of judicial independence goes beyond the narrowly understood notion of adjudication. It includes the process of

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<sup>30</sup> Act of 20.12.2019 on amending the Law on the system of common courts, the Act on the Supreme Court and some other acts, *Dziennik Ustaw* of 2020, item 190.

<sup>31</sup> See i.a. resolution of the Chamber of Extraordinary Control and Public Affairs of 8.01.2020, case I NOZP 3/19.

<sup>32</sup> CT Decision of 21.04.2020, case Kpt 1/20; CT ruling of 20.04.2020, case U 2/20.



interpreting the law, managing the process of adjudication (e.g. setting the dates of hearings), and “it also applies to the activity of a judge carried out as a person of public trust, appointed as a member of non-judicial bodies”.<sup>33</sup> It is legitimate to assume that judges do also exercise their office when they perform other duties and competences entrusted to them, i.e. not as a private individual but as a public official.<sup>34</sup>

58. The requirement for a judicial council to be staffed in whole or at least for the most part by judges, is based on the assumption that **judges bring their integrity, their external and internal independence into the council**. If the activity of a judicial council and the actual ability to carry out its mission rely on the personal qualities of its judicial members and especially their status as judges, they should be afforded adequate guarantees also when they act in a body such as the judicial council.

59. The concept of indivisibility of the independence of the judge was at the heart of a landmark CJEU judgment in the case of *Associação Sindical dos Juizes Portugueses*, in which the Court in Luxembourg held that the EU protection of judicial independence extends to non-EU areas, it is sufficient that the judge may potentially rule on cases with an EU element.<sup>35</sup> The foundational idea behind the CJEU concept in the *Portuguese judges case* should, *mutatis mutandis*, be applied in the present context.

60. The CHR considers that the development of the concept of the indivisibility of judges’ independence inspires and substantiates the recognition that the **protection of judicial independence should cover all situations in which the person acts as a judge**, whether he or she is adjudicating or performing other public duties entrusted by law. Extending the guarantee of independence to the wider sphere of public activity of persons who act in their capacity as judges, prevents the risk that – figuratively speaking – on the same day, judges act in a split, irreconcilable position: a position of maintaining independence and the opposite position.<sup>36</sup>

## 2. Judicial protection of the “civil” right of judges-members of the National Council of the Judiciary to a full term of office (Eskelinen test)

61. As submitted above, the alternative to extending the guarantee of independence to the judges-members of the NCJ is to award them European protection in the form of the right to a court recognized by the ECtHR in the *Eskelinen* case-law. A preliminary issue in determining the rights of judges-members in this context is whether there is a right of an individual, under domestic law, to maintain his mandate until the end of the term of office.

62. Judicial members of the NCJ enjoy a Constitution-based right to a four-year term of office (Art. 187 (3) Constitution). The reasons for the early termination of the mandate of a judge-member are specified in the Act on the National Council of the Judiciary. They include usual causes, e.g.: death, resignation, certain cases of judicial promotion, expiration or termination of that person’s judicial service, retirement.<sup>37</sup> This is a strictly specific “enumerative” list; the mandate of a judge-member of the NCJ must not be interrupted for any other reason.

63. Therefore, **under national law, a judge-member of the NCJ, following his or her election to this position, is entitled to a full, four-year term in office, unless the conditions provided for in the law in force at the time of the election, are met and justify the termination of the mandate**. New legislation may not retroactively annul the right to a full, uninterrupted tenure resulting from the provisions in force at the time of the election.<sup>38</sup> It is worth pointing out that the issue of the legitimacy of interrupting the term of office of the body that is to have the attribute of independence, even if it is not a judicial authority, was dealt with by the CJEU. In the case *C-288/12 Commission v. Hungary*, the Luxembourg Court declared such an interruption to be in violation of EU law.<sup>39</sup> That finding may be deemed of relevance, *mutatis mutandis*, in the present case.

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<sup>33</sup> B. Naleziński, *Artykuł 178 Konstytucji*, [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, p. 535.

<sup>34</sup> P. Wiliński, P. Karlik, *Artykuł 178 Konstytucji* [in:] M. Safjan, L. Bosek (eds.), *Konstytucja RP. Komentarz*, vol. II, Warszawa 2016, para. 47.

<sup>35</sup> CJEU judgment of 27.02.2018, C-64/16 *Associação Sindical dos Juizes Portugueses*, para. 40.

<sup>36</sup> See also P. Wiliński, P. Karlik, *op. cit.*, para. 49.

<sup>37</sup> Art. 14 (1) Act on NCJ.

<sup>38</sup> See *Baka*, paras. 100, 107 and 110; see also *mutatis mutandis* a clear position adopted by the ECJ: C-619/18, *Commission v. Poland*, para. 76; ECJ judgment 5.11.2019, C-192/18, *Commission v. Poland*, para.113.

<sup>39</sup> ECJ judgment 8.04.2014, C-288/12, *Commission v. Hungary*, para. 54.

64. The question, whether the right to serve the full term of office as a judge-member of the NCJ falls indeed within the scope of “civil rights” within the meaning of Art. 6(1) ECHR and which requires an answer on the basis of the *Eskelinen* test.

65. The Commissioner for Human Rights wishes to point out that the termination of the NCJ's mandate of judges-members resulted from a change introduced by a legislative act which shortened a constitutionally guaranteed four-year term in office. This was effective *ex lege* and did not require the adoption of any individual act that would determine the expiry of the mandate of the judge-member. In consequence, there was no decision, administrative or judicial, that could be appealed against. Therefore, the law did not explicitly prohibit challenging the early termination of the mandate, but the mechanism adopted by Parliament in practice made any form of judicial redress unavailable.

66. The reversal of the effects of the interruption of the term of office could only be achieved through another legislative amendment, over which judges-members of the NCJ had no say, or as a result of a ruling of the Constitutional Tribunal declaring the legislative provisions leading to the interruption of the term of office to be unconstitutional. Individual (*in concreto*) constitutional review could not be initiated by judges-members of the NCJ, as the prerequisite for lodging a constitutional complaint is the exhaustion of court proceedings. Since judges could not initiate any court proceedings in Poland in cases of the alleged unconstitutional termination of their mandate, they were equally not entitled to bring a case before the Constitutional Tribunal. In addition, the CHR wishes to refer to the points made above regarding the illusory nature of the constitutionality control with respect to the current composition and functioning of the Constitutional Tribunal (see Section II.4.2.).

#### IV. Conclusions

67. The Commissioner for Human Rights submits that **the current National Council of the Judiciary is a flawed body, lacking independence and objectivity**. The NCJ was meant to be the institutional guarantor of the principle of separation of powers in relation *to the judiciary* and entrusted with safeguarding judicial independence. While the legislative, executive and judicial branches are represented in the NCJ, the political power was not meant to gain a dominant position in it, making the NCJ tasks unachievable.

68. An analysis of NCJ's functioning after it was re-staffed in 2018 provides an important insight into its current situation.<sup>40</sup> In the view of the Commissioner, the NCJ no longer fulfills its constitutional role of the guardian of judicial independence. It does not intervene in cases of judges against whom politically motivated disciplinary, administrative or eventually criminal measures are applied. Despite having prerogatives in the legislative process to do so, the Council does not address threats to judicial independence resulting from changes in domestic legislation.

69. **The participation of the new NJC in the judicial nomination procedure undermines the nomination effect and deprives those appointed of the necessary legitimacy to resolve legal disputes.** The Council poses a heavy burden on the Polish justice system and judicial independence. The starting point for the current decline were, first, the interruption of the term of office of NCJ judicial members, and second, the fundamental change in the election mode of NCJ members. **Implemented in a manifest violation of the Polish Constitution and European standards, these illegitimate manoeuvres fundamentally changed the nature of the NCJ, deprived it of its independence and objectivity, subordinated to political expectations, and disabled genuine fulfillment of functions inherent to a judicial council.**

Adam Bodnar  
Commissioner for Human Rights  
/- digitally signed /

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<sup>40</sup> See *A.K. and others*, para. 144.