COMMISSIONER FOR HUMAN RIGHTS

Adam Bodnar

Warsaw,

VII.510.143.2020.PF

Judge Ksenija Turković
President, First Section
European Court of Human Rights
F-67075 Strasbourg Cedex

Written comments
of the Commissioner for Human Rights
in the case of *Advance Pharma Sp. z o.o v. Poland*
(Application no. 1469/20)

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 leave granted by the President of the First Section, the Commissioner for Human Rights (**CHR**) wishes to submit the written observations related to the present case.

I. General observations and submissions

2. The case pending before the Court concerns the status of persons appointed in 2018 as judges to the Supreme Court's Civil Chamber. The doubts regarding these judges result from general, systemic defects of the appointment process as shaped in 2018, and therefore this case indirectly concerns the status of all judges appointed to the Supreme Court since then. The process was carried out following new legislation whose compliance with both the Polish Constitution and the European standards raised essential concerns. It was conducted in an irregular manner and ended up in arbitrary nominations which, in the light of the requirements of the right to a court, call into question both the lawfulness of Supreme Court appointments and the independence and impartiality of the new judges. As a consequence, the legal force of judicial decisions made by them alone or in multi-person benches is also at stake.

3. The ever more firmly established body of case-law of the European Court of Human Rights (esp. *Ástráðsson v. Iceland*)[1] and the Court of Justice of the European Union (see esp. *Simpson and HG*; *A.K. and others*)[2] reaffirm the European standard that the appointment procedure for judges must be carried out in strict observance of national rules and based on objective substantive conditions and fair procedural rules in order to ensure appointment of the most qualified candidates, both in terms of their professional (technical) competence and moral integrity.[3] This lay the foundation for the appointment process whose essence is to provide the judge with the legitimacy to resolve disputes in a democratic society, guarantee individuals access to justice, and inspire confidence in judicial decisions. The failure to appoint a judge in a lawful manner may also raise

[1] ECtHR judgment of 1.12.2020 *Guðmundur Andri Ástráðsson v. Iceland* [GC].
[2] CJEU judgment of 26.03.2020, C-542/18 RX-II and C-543/18 RX-II *Simpson and HG*; CJEU judgment of 19.11.2019, C-585, 624 and 625 *A.K. and others*.
[3] See i.a. *Ástráðsson* [GC], para. 220–222.

reasonable doubts about the judge's independence and impartiality. Without guaranteeing both components – the proper establishment as well as independence and impartiality – the right to a court becomes illusory, and likewise illusory becomes the protection of all individual rights enforced before a court.

4. The decisions of the Supreme Court are not subject to a subsequent review by a judicial body that could resolve doubts about their compliance with the ECHR and remedy any irregularities found. Thus the present case, likewise with the case of *Reczkowicz and Others v. Poland* (applications no. 43447/19, 49868/19, 57511/19), may impact the **status of judges and the decisions of the top judicial body which exercises a supervisory role over all common courts in Poland**. The cases are therefore essential, and may have far-reaching and long-standing consequences for guaranteeing the independence of the judiciary, maintenance of the separation of powers and the preservation of the rule of law in Poland.

5. The Commissioner for Human Rights was a third-party intervener in the *Ástráðsson* case. The CHR has also submitted written observations in the case of *Reczkowicz*. The views expressed in both *amici curiae* briefs remain relevant in the present case as well. Nevertheless, **the scope, nature and gravity of the defects in Polish judicial system are far more severe than the irregularities identified in the Icelandic case.** In Poland, an agenda of dismantling the independence of courts and judges has been put in place. It has been executed on a large scale, in a premeditated, systemic, and complex manner. It has eliminated genuine constitutional review of the law, compromised the independence of the National Council of the Judiciary, deprived the judicial nomination process of objectivity, and in consequence – introduced new persons to the Supreme Court in a manner that does not guarantee that they meet the requirements of the judge.

6. In the present intervention, the Commissioner for Human Rights would like to make the following main submissions:

7. ***First***, the persons nominated since 2018 to both the two newly created as well as the "old" chambers of the Supreme Court were not appointed in accordance with domestic law, but in its manifest and flagrant breach. The breaches pertained to fundamental rules of the judicial appointment procedure. Their gravity was further amplified by the deliberate nature of the infringements and the exclusion of effective remedies.

8. ***Second,*** the circumstances, organization and the course of the appointment process to the Supreme Court also substantiate reasonable doubts as to the independence and impartiality of the persons appointed. These doubts are of a constant and irremovable nature.

9. ***Third***, there have been no effective legal remedies before domestic courts to determine the impact of defects in the appointment process on the establishment of judges and their independence and impartiality. Pre-existing measures have been either restricted or excluded *de iure* or *de facto*. The government have in fact arranged the procedure for the selection of judges in such a way as to, initially – ensure that nominations receive the persons who have their support, and then – legalize their choice by all means.

10. ***Fourth***, the intentionality, systemic nature and gravity of infringements in the nomination process to the Supreme Court result in the refusal to extend the guarantee of irremovability of judges to those persons and limit the application of the principle of legal certainty to decisions adopted by them. Fundamental defects of the appointment procedure must be corrected, while grave, deliberate breaches of law cannot be rewarded by the acceptance of the situation unlawfully created (*ex iniuria ius non oritur*).

11. In complaints about the lack of Convention standards in respect of judges and court benches deciding the applicants' cases, in particular in *Reczkowicz* and *Advance Pharma*, the examination by the ECtHR takes on factual and legal circumstances that have already occurred. The eventual rulings of the Court will be of an *ex post* nature. However, the Court's interpretation is also future-oriented and is meant to ensure the full effect of Convention guarantees and prevent future violations. Yet, the problems exposed in both cases, related to Article 6(1) ECHR, are of general nature and **result from systemic deficiencies brought about by the changes introduced in Poland**. Hence, a possible finding of violation in individual cases would be insufficient for the restoration of Convention protection, since these cases are only examples of more profound general problems. The existing irregularities will result in further breaches in similar cases and an influx of new complaints to the Court. For this reason, the Court should consider adopting **general measures that would bring a systemic remedy to the problem of access to justice in Poland**. The measures are particularly recommendable if the fundamental nature of the defects in the process of appointing Supreme Court judges were to result in denying protection to the irregular appointees in light of the principle of irremovability and in restricting the legal certainty of their decisions.

12. The passing of time and the nature of the issues raised in the cases pending before the Court, in light of the length of Strasbourg proceedings, make it increasingly difficult to bring the national situation back into line with Convention standards. At the same time, the national authorities seek to limit as much as they can the possibility of controlling their actions, including the review of the process of appointing judges and the verification of guarantees of the independence and impartiality of persons appointed in a flawed manner. This has been reached by cumulative legislative, disciplinary, administrative, judicial and also *de facto* activities. In this regard, it should be emphasized that the CJEU judgment in the case of *A.K. and others* has been deprived of a genuine significance in Poland, likewise the Supreme Court resolution of 23 January 2020 implementing the *A.K.* ruling in domestic procedural law.[4] The fear that similar efforts will be made to render the ECtHR's judgments ineffective is thus well-founded. Moreover, in view of the announced further changes to the judiciary, involving the restructuring of the Supreme Court and the common courts system, it may turn out impossible or very difficult to implement the rulings of both European Courts in cases involving the rule of law and judicial independence in Poland. The Strasbourg Court should be mindful of these considerations and reflect them in both **handling the rule of law cases promptly and wording judgments in a direct and self-executing manner**. This is important for national courts in order to assist them in upholding Convention protection today and in the near future, should the dismantling of guarantees of their independence continue. This would also be meaningful for safeguarding the full effect of Court's judgments, if need be, by using the mechanism provided for in Article 46(4) and (5) ECHR.

II. Requirements of the "court" under the Convention

1. The requirement of a court established by law

13. If a judge is not appointed in accordance with the law, there is no court properly established. Both the requirement of a court established by law and the requirement of an independent and impartial court are of **constitutive nature.** A body which does not meet any of them, cannot be regarded as a "court" (tribunal) under Article 6(1) ECHR, irrespective of the designation given to it by national law.

14. If the court is not established according to the will of the legislator, i.e. by an act adopted by the Parliament, it will lack the legitimacy required in a democratic society to resolve legal disputes.[5] In the light of the Strasbourg Court's case law, the requirement seeks to ensure that the judicial system is not dependent on the discretion of the executive.[6] This lays the foundation for public confidence in the judiciary.[7] The requirement includes the legislation providing for the establishment of judicial organs,[8] as well as their competence,[9] but also the process of appointing judges,[10] and the participation of judges in the examination of the case.[11] The process of appointing judges must be conducted in compliance with the applicable rules of national law in force at the material time, and these rules must be strictly observed.[12] At the same time, the substantive conditions and detailed procedural rules for the appointment must be such as not give rise to reasonable doubts with respect to the judges appointed.[13]

15. It is not every flaw in the process of appointing judges which will render the act of appointment ineffective. However, serious irregularities that may have affected the outcome of the appointment process, undermine the capacity of the appointed persons to fulfill the role entrusted by law to the judge. The Grand Chamber in the *Ástráðsson* ruling indicated the three-fold threshold test of **manifest breaches** of domestic law pertained to fundamental rules of the procedure for appointing judges which were not effectively

---

[4] SC Resolution of 23.01.2020 of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, BSA I-4110-1/20.
[5] See, ECtHR judgment of 28.11.2002, *Lavents v. Latvia*, para. 114; *Ástráðsson* [GC], para. 211.
[6] *Ástráðsson* [GC], para. 214, 226.
[7] *Ástráðsson* [GC], para. 222.
[8] ECtHR judgment of 5.10.2010, *DMD Group, A.S. v. Slovakia*, para. 59; *Ástráðsson* [GC], para. 212.
[9] *Lavents*, para. 114; *Ástráðsson* [GC], para. 212.
[10] *Ástráðsson* [GC], para. 220–227.
[11] ECtHR judgment of 20.10.2009, *Gorguiladzé v. Georgia*, para. 68; ECtHR ruling of 27.10.2009, *Pandjikidzé and others v. Geoargia*, para. 104; *Ástráðsson* [GC], para. 212; see also *Simpson and HG*, para. 73.
[12] ECtHR judgment of 9.07.2009, *Ilatovskiy v. Russia*, paras. 40-41.
[13] See ECJ judgment of 24.06.2019, C-619/18 *Commission v. Poland (Independence of the Supreme Court)*, para. 11; ECJ judgment of 19.11.2019, C-585, 624 and 625/18 *A.K. and others*, para. 121; *Simpson and HG*, para. 71.

reviewed and remedied by the domestic courts.[14] Such breaches undermine the purpose and effect of the appointment process, disqualify the judge and the court, and constitute a violation of Article 6(1) ECHR. An essentially equivalent formula has been adopted by the Court of Justice of the European Union in the *Simpson and HG* ruling (para. 75).

16. It is submitted that defects in the process of appointing judges should likewise be regarded as "**flagrant**" in the meaning of para. 244 of the *Ástráðsson* ruling, when purposely there has been no effective judicial remedies in the domestic system to formally declare a violation of the law in the appointment process. Therefore, such assessment should be made instead by the European Court of Human Rights itself. To acknowledge its competence to make an autonomous assessment in a given case, the Court should not only explore the relevant legal framework but also the practice of state authorities of circumventing or disregarding the law in force, or using extra-legal instruments of pressure to obtain the results they wish. In this context, it should be taken into account, in particular, that: (1) the Supreme Court decisions indicating relevant violations deliberately have not been honoured (see in particular the SC case law in implementation of the CJEU judgment in the *A.K.* case);[15] (2) the review to challenge the outcome of the appointment process has been arbitrarily limited or entirely excluded (see below section IV); (3) the national authorities intentionally disabled genuine constitutionality control of the law – even if the Constitutional Tribunal seemingly exists, its review is of an illusive nature and in fact has become a tool of legitimizing unconstitutional actions; and (4) judges who undertake an examination of the attributes of those appointed under the new procedure as of 2018 are subject to administrative measures and disciplinary proceedings, while some criminal proceedings have also been initiated.

2. The requirements of judicial independence and impartiality

17. The two tests of a court under Article 6(1) ECHR may operate autonomously, although they may also be closely related. In particular, in the context of cases involving Supreme Court judges appointed since 2018, serious defects in the appointment process preclude judges from being regarded as established by law, and likewise raise reasonable doubts about their independence and impartiality. Failure to meet any of the tests denies judges the legitimacy to adjudicate. Whilst in principle, a finding that a judge has not been properly established should alone suffice to constitute a violation of Article 6, the CHR wishes to address equally the issue of the independence and impartiality of Supreme Court judges appointed under the new procedure.

18. In determining whether a body can be considered to be "independent", the Strasbourg Court has regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.[16] The latter serves to inspire the confidence in the courts of the public and the parties to the proceedings.[17] In the context of the present case, the court (judge) must be independent of any external, extrajudicial influence, esp. from the executive, but also from the legislator, i.e. the Parliament.[18] While the requirement of "impartiality" embraces both the subjective aspect – the court must be free of personal prejudice or bias, and the objective aspect – the court must offer sufficient guarantees to exclude any legitimate doubt in this respect.[19] In the context of the present case the existence of objective guarantees are of particular relevance.

19. Objectively justified, legitimate reasons to fear that a particular court lacks independence or impartiality, preclude considering the authority as meeting the Convention standards.[20] The threshold of a reasonable doubt is therefore sufficient to establish a breach of Article 6(1) ECHR. For this purpose, it is not necessary to prove the factual lack of independence or impartiality of the judge or court. To find a violation of the Convention, the Court may rely on a systemic analysis of the national law and its actual implementation, and does not need to review the conduct of the individual judge in a specific case.

---

[14] *Ástráðsson* [GC], para. 244 et subseq.
[15] Judgment of 5.12.2019, case III PO 7/18; judgments of 15.01.2020, case III PO 8/18 and III PO 9/18; Resolution of 23.01.2020, BSA I-4110-1/20.
[16] ECtHR judgment of 28.06.1984, *Campbell & Fell v. UK*, para. 78
[17] See ECtHR judgment of 21.06.2011, *Fruni v. Slovakia*, para 141; *Ástráðsson* [GC], para. 233.
[18] ECtHR decision of 18.05.1999, *Ninn Hansen v. Denmark*, p. 20.
[19] ECtHR judgment of 25.02.1997, *Findlay v. UK*, para. 73.
[20] See *Fruni v. Slovakia*, para 141.

III. Irregularities in the process of appointing Supreme Court judges as of 2018

20. The deficiencies in the appointment of Supreme Court judges as of 2018 are due to (a) unconstitutional legislative amendments; (b) the staffing of the National Judicial Council (**NCJ**) with persons *de facto* chosen by the government; and (c) the sham nature of the candidate selection process.

1. Circumstances of the establishment, staffing and operation of the National Council of the Judiciary

21. The constitutional role of the NCJ in the process of appointing SC judges is defined by two essential tasks: (i) submitting motions to the President of the Republic for appointments to judicial posts (Article 179 Constitution), and (ii) upholding the independence of courts and judges (Article 186(1) Constitution). The establishment, staffing and operation of the Council should therefore ensure that it is capable of fulfilling its role. The following considerations are essential to assess, if the NCJ meets the necessary requirements, so that its nominees can be then accepted as legitimate judges: (a) the procedure and nature of legislative changes with respect to NCJ; (b) the course of the election of the new members of the Council; and additionally (c) further activities of the NCJ since it was re-staffed; the latter permitting to assess whether it demonstrates objective appearance of independence.

22. *First*, the Act of 8 December 2017 amending the Act on the National Council of the Judiciary introduced new rules for the election of judicial members of the Council. **The election of 15 judges, so far elected by their peers, was entrusted to the Sejm, contrary to the constitutional rule** (Article 187 (1) Constitution), according to which the Sejm elects only four members of the Council from among the members of the Sejm. The interpretation that there is a constitutional principle of the election of judges to the NCJ by their peers was confirmed by the Constitutional Tribunal (CT) in 2007, when it held that the Constitution clearly states that members of the NCJ shall be judges elected by judges.[21]

23. As a result of the change, the legislature and executive branches granted themselves almost a monopoly over the formation of the Council, **contrary to the constitutional principle of the separation and balancing of powers** (Article 10 (1) Constitution). At present, 23 of all 25 members of the Council are appointed by these extrajudicial branches. They have thus gained **excessive influence over the nomination process**, and the NCJ lost the capacity to contribute to making the nomination process more objective.

24. *Second*, with the same amendment, the legislature also decided to **prematurely terminate the four-year term of the then judicial members** of the Council, thus violating another constitutional rule (Article 187 (3) Constitution). These issues are also examined by the ECtHR in the pending cases: *Grzęda v. Poland* (43572/18), and *Żurek v. Poland* (39650/18).

25. *Third*, the election of new Council members, held in spring 2018, was boycotted by the vast majority of Polish judges, thereby expressing a firm opposition to the unconstitutional changes introduced. As a result, out of a total number of about 10 thousand Polish judges, only 18 candidates applied for 15 positions. This defeated the objective of the representativeness of the Council's composition which was provided by legislative and executive bodies as a reason to adopt the changes.

26. *Fourth*, the new composition of the NCJ consists of **persons related to the executive**, and esp. to the Minister of Justice. It embraces judges previously delegated to the Ministry of Justice, or those appointed by the Minister as presidents of courts in the period preceding the election.[22] These new members were then in a relationship of professional dependency or personal gratitude to the government.

27. *Fifth*, the new composition of the National Council of the Judiciary was formed even contrary to the rules adopted on 8 December 2017. Judge Maciej Nawacki was elected to the Council by the Sejm despite

---

[21] See CT judgment of 18.07.2007, case K 25/07, para. III.4. A different view was presented in the judgment of the CT of 20.06.2017. (case K 5/17). It should be borne in mind, however, that this ruling was issued by the CT after the unconstitutional changes had been introduced in it since Autumn 2015. They lead to the *de facto* elimination in Poland of a genuine constitutional review of the law. In that case, the CT adjudicating panel was composed i.a. by persons appointed to positions previously lawfully taken (so called "duplicate-judges"; *sędziowie-dublerzy*). Furthermore, the case was brought to the CT by the Prosecutor General who, at the same time, is the Minister of Justice; and the case was decided in the course of a fierce political and legal dispute concerning the NCJ.

[22] Out of the 15 elected members of the Council, as many as 10 were submitted by persons related to the Ministry, 9 were appointed by the Minister of Justice as court's President or Vice-President in the preceding period, 9 were active in committees or teams of the Ministry, and 4 were directly employed by the Ministry.

the failure to meet the formal condition of submitting candidacy to the NCJ, i.e. obtaining the minimum number of 25 judges' signatures or signatures of 2 thousand citizens.[23] Hence, his participation in the adoption of resolutions of a collegial body undermines the legal force of them all.

28. *Sixth*, the analysis of NCJ's activities after it was re-staffed in 2018 necessitates the conclusion that **the Council no longer fulfils the constitutional role of the guardian of judicial independence**. The NCJ does not intervene in cases of judges against whom politically motivated disciplinary or criminal proceedings are initiated or administrative measures applied. Despite having prerogatives in the legislative process to do so, the Council does not address the threats to judicial independence resulting from changes in domestic legislation. A telling example is the adoption of "Muzzle Law".[24] A number of institutions, incl. the Human Rights Commissioner, the Supreme Court, the Venice Commission, and the ODIHR, presented very critical comments on the draft law, whereas the NCJ reacted favourably to it. The NCJ stated that the Act serves the implementation of the principle of the separation of powers, does not infringe on the principle of independence of the judiciary, and is aimed at protecting the legal security of citizens and their trust in the state.[25] The NCJ also praised the changes in the disciplinary regime for judges.[26]

29. The NCJ undertakes measures aimed at its own legitimization. The Council's application of 22 November 2018 submitted to the Constitutional Tribunal (case K 12/18) was an illusive request to review the constitutionality of the Act of the NCJ. Its true aim was to obtain confirmation of its own status and constitutionality of the legislative changes made with regard to the Council.[27]

30. The nomination practice of the new NCJ raises serious doubts as well. Recommendations for judicial positions have been given to many those judges who previously supported the candidacies of the new members of the Council by signing the lists of support. There exist a pattern whereby the new members of the Council treat senior judicial appointments as a way of rewarding those who supported their candidacies to the NCJ.

31. The Commissioner for Human Rights submits that the legal and factual circumstances of reshaping the NCJ in 2018 have **deprived it of the attribute of independence and the ability to objectively nominate judges**. Indeed, they lead to the undermining of all appointments made by the NCJ. Subsequent NCJ activities confirm the validity of doubts raised earlier. The Council itself has *de facto* **resigned from safeguarding judicial independence and has lost the ability to perform the tasks entrusted to it under the Constitution**.

2. The course of nominations to the Supreme Court in 2018

32. As a result of the adoption of a new Act on the Supreme Court in late 2017,[28] the model for the nomination of SC judges was radically changed. Any involvement of the Supreme Court in the evaluation of candidates was excluded. The process was substantially impoverished and diluted, whilst fully entrusted to the NCJ, after it was re-staffed in line with the desire of the political authorities. The Commissioner for Human Rights does not question the legislator's prerogative to design and regulate the process of appointing judges. The CHR also recognizes that the Convention does not impose any specific model for the appointment of judges. Yet, the Convention and the ECtHR case law require the State party to respect the requirements of Articles 6 and 13 in the appointment process to the national court. The Commissioner considers, that the nomination of SC judges in 2018 did not meet these requirements.

33. *First*, the nomination procedure was initiated by an act of the President of the Republic,[29] issued **without the countersignature** of the Prime Minister as required under Article 144(3) of the Constitution. It sets a closed list of prerogatives with respect to which the President acts alone without PM's countersignature. The announcement of vacancies in the Supreme Court, which formally initiates the qualification procedure, is not included on that enumerative list. The procedure was therefore launched on

---

[23] See i.a. the SC resolution of 23.01.2020, para. 32, p. 41.
[24] 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, Journal of Laws of 2020, item 190.
[25] See: https://orka.sejm.gov.pl/Druki9ka.nsf/0/956C5F6A603B487FC12584F1003B83A2/%24File/69-008.pdf, p. 2.
[26] *Ibidem*, p. 5.
[27] The apparent nature of the application was acknowledged even by the Constitutional Tribunal itself, see CT judgment of 25.03.2019, case K 12/18, para. III.1.
[28] Act of 8.12.2017 on the Supreme Court, original text in *Dziennik Ustaw* of 2018, item 5.
[29] Announcement of the President of the Republic No. 127.1.2018 of 24.05.2018 on the vacancies of judicial positions in the Supreme Court, *Monitor Polski* of 2018, item 633.

the basis of an act which, by virtue of Article 143(2) Constitution, **has never became valid**. The initiation of the procedure was thereby in manifest and flagrant violation of the Constitution, and for that reason, **the entire process of appointments to the Supreme Court is affected by a primary legal deficiency, resulting in the invalidity of the nomination process and the recognition that the acts of judicial appointment are either non-existent or invalid *ex lege***.

34. *Second*, the contest to the Supreme Court was boycotted by the vast majority of the legal community in Poland. For the 44 positions announced, only 216 candidates applied out of all those eligible, i.e. judges, prosecutors, attorneys (*adwokaci*), legal counsellors (*radcowie prawni*) and notaries. Thus, regardless of other circumstances affecting the deficiencies of the nomination process, **the possibility of selecting the best candidates to the most important court in Poland was jeopardized**.

35. *Third*, the National Council of the Judiciary did not carry out a genuine verification of the applications. The process was a sketchy examination of the candidacies, based on limited material, mostly submitted by the candidates themselves. The process of evaluating the candidates was hectic, with four of the Council's panels spending on average only a dozen of minutes interviewing the individual candidates, whilst asking mostly some basic questions.

36. *Fourth*, the political interest and influence of the executive was evident in the process of selecting candidates to the Supreme Court. Indeed, the National Council of the Judiciary **recommended only the candidates who were associated with the authorities and had their support**. An illustration can be found in the selection of Kamil Zaradkiewicz to the Civil Chamber. In the period preceding the contest he was a department director at the Ministry of Justice, and he owes the NCJ's recommendation to the **direct intervention of the Minister of Justice** in his favour.[30] The above incident demonstrated, first, **the susceptibility of NCJ members to political pressure**. The NCJ evaluation panel rejected the candidate and then, under the influence of a government member – the Council accepted the candidate in the second vote. Secondly, the incident demonstrated the candidate's readiness to radically change his stance, contradict himself and reject his previous view in order to be elected as a judge of the Supreme Court. Third, it demonstrates candidate's significant dependence on an outside party – a major political figure: an active politician, a party leader and a member of the executive.

37. *Fifth*, the resolutions of the NCJ, in which it recommended judges to the SC were appealed to the Supreme Administrative Court by some those candidates who were refused the recommendation. For that reason the NCJ **acts of recommendation have not become final**. Additionally, by ordering interim measures, the SAC suspended the execution of a number of such resolutions – so that **the acts have not become enforceable**, either**.** This applied also to the NCJ Resolution No. 330/2018 of 28 August 2018 on the selection of candidates to the Civil Chamber, which was suspended by an order of 27 September 2018.[31] In spite of this, the President handed over the appointment acts to the persons recommended. Furthermore, the candidates accepted the acts of appointment, knowing that the appointment process should be halted. In that way the persons appointed to the court which is placed at the top of the Polish judiciary, demonstrated **the readiness to undermine the *res judicata* effect of a final court decision, if this serves their individual interest**. This undermines both the professional competence and moral integrity of those appointed to the Supreme Court.

38. *Sixth*, the process of nominating judges to the Supreme Court **was not subjected to effective judicial control** neither before the final appointment by the President nor after the appointment (see below Section IV).

IV. Lack of effective judicial review and remedy

[30] The candidature aroused strong objections of a ruling party MP, who is also a member of the NCJ. The grounds for her objection was candidate's opinion on the permissibility of same-sex partnerships in light of Article 18 of the Polish Constitution delivered several years before at an academic conference. This opinion was rejected by the MP in question. Originally, the NCJ team interviewing the candidates did not recommend the candidacy of Kamil Zaradkiewicz. However, the Minister of Justice, who had not previously participated in the selection of candidates by the Council, came specifically to the Council's meeting and strongly supported the candidacy previously rejected by the NCJ's evaluation panel. The Minister also brought with him and read out the candidate's written statements, in which, this time, he expressed an opinion opposite to the one previously shared: he held that the Constitution does not permit the existence of same-sex partnerships. After two votings, the candidate finally received the Council's recommendation.

[31] SAC order of 27.09.2018, case II GW 27/18.

1. Review prior to the appointment

39. The process of appointing Supreme Court judges could not have been subjected to effective judicial review, neither at the stage of the NCJ adopting of preliminary (preparatory) act recommending some candidates for appointment and rejecting the others, nor after the final act, i.e. the actual appointment by the President of the Republic.

40. Originally, at the opening of the contest to the Supreme Court in 2018, the appeal against the NCJ resolution was still possible to the Supreme Administrative Court. In the course of the contest, the effectiveness of **judicial review was compromised** by the legislator. At first, the Act on NCJ was amended[32] and the partial *res judicata* of NCJ resolutions was introduced.[33] It provided that a resolution of the NCJ becomes final with respect to the request for appointment, unless challenged by all participants in the proceedings. It also limited the effectiveness of rulings of the SAC repealing the NCJ resolutions, in such a way that, despite the repeal of the NCJ's act, no opportunity was provided for the appellant to return to the competition proceedings in which the resolution was adopted (see Article 44 (4) of the Act on the NCJ). Instead, it permitted joining the competition for another pending contest or the next vacancy in the Supreme Court.

41. Subsequently, the judicial review of the nomination process was **entirely excluded.** Initially, following the judgment of the Constitutional Tribunal of 25 March 2019 (Case K 12/18),[34] and then, by way of a statutory amendment of 26 April 2019.[35] Judicial review was abrogated even though it was required by national law. It is submitted that effective judicial review of NCJ resolutions in contests for the Supreme Court was **intentionally excluded**. This occurred in contravention of the well-established constitutional obligation to provide judicial review of NCJ resolutions, as confirmed by the Constitutional Tribunal in 2008 (Case SK 57/06).[36] An exclusion of this nature violates a fundamental national constitutional rule. In addition, the exclusion was entirely **arbitrary**. It covered only candidates for judges to the Supreme Court. Such a change was not supported by any convincing objective justification related to the interest of the state.

2. Review after the appointment

42. The *ex-post* control of the appointment and the fulfillment of the requirements of independence and impartiality of the judge, has been deprived of any real significance as a result of a range of actions by the national authorities of a diverse nature. These actions were taken specifically to obstruct the implementation of the ruling in *A.K. and others* and prevent the review in the manner indicated by the Court of Justice of the EU.

43. *First, a* number of legislative changes were adopted to preclude judicial review when the doubts concerning the independence of judges appointed with the participation of the new NCJ were raised. First, the so-called **"Muzzle Law"**[37] prohibited the review of the lawfulness of the appointment of judges with the participation of the new NCJ. Second, the Law vested the exclusive power to rule on the independence of judges in the Chamber of Extraordinary Control and Public Affairs staffed by persons affected by similar concerns to those they were to rule on (*nemo iudex*).[38] Third, the Law required continuation of judicial proceedings even if the independence of the court or the independence of the judge was challenged.[39] Fourth, the Law prescribed that requests concerning the determination of lawfulness of a judge's appointment were left without examination.[40]

44. *Second*, the system of disciplinary responsibility is intentionally and systemically used to **deter judges from assessing the guarantees of independence**. Against judges who act in favour of preserving judicial

---

[32] Act of 20.07.2018 amending the Law on the organization of common courts and certain other acts, *Dziennik Ustaw* of 2018, item 1443.

[33] New Article 44(1b) of the Act on the NCJ.

[34] It should be noted that the case K 12/18 was decided with the participation of unauthorised persons, i.e. appointed to the positions previously lawfully taken (so called "duplicate-judges", *sędziowie-dublerzy*). For a more complex account, see the Commissioner for Human Rights third party intervention of 28.10.2020 in the case of *Żurek v. Poland* (application no. 39650/18), para. 17–25.

[35] Act of 26.04.2019 on the amendment of the Act on the National Council of the Judiciary and the Law on the organization of administrative courts, *Dziennik Ustaw* of 2019, item 914.

[36] See CT judgment of 27.05.2008, case SK 57/06, para. III.5.

[37] 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.

[38] Art. 26(2), Art. 82(2)–(3) Act of 8.12.2017 on Supreme Court, *Dziennik Ustaw* of 2019, item 825.

[39] Art. 26(2) *in fine* Act on SC.

[40] Art. 26(3) Act on SC.

independence, and in particular those who undertake to assess the independence of judges appointed with the participation of the new NCJ, national authorities initiate disciplinary proceedings or apply measures of an administrative nature (dismissal from the delegation to a higher court, removal from official duties, transfer to another department).

45. *Third*, the Chamber for Extraordinary Control and Public Affairs blatantly deforms the *A.K.* ruling in its case-law. Its resolution of 8 January 2020 (Case No. I NOZP 3/19), reaffirmed by the subsequent decisions of this Chamber, prohibit the examination of the legal effects of the appointment acts and limit the application of the CJEU ruling in the remaining scope, i.e. the examination of the preservation of guarantees of independence and impartiality in relation to the judicial nominations by the new NCJ.

46. *Fourth*, national authorities initiate sham proceedings before the Constitutional Tribunal in order to delegitimize the *A.K.* ruling and nullify the Supreme Court's resolution of 23 January 2020 which implemented the CJEU judgment.[41]

V. Failure to comply with Convention requirements in the appointment of Supreme Court judges

47. The circumstances discussed above indicate that **the selection and appointment to the Supreme Court since 2018 was in manifest and flagrant breach of the regulations and principles of national law and European standards**. The process was clearly contrary to the explicit legal requirements. The violations consisted in a striking discrepancy between how the process of appointing a Supreme Court judge should have been conducted and how it actually was carried out.

48. All the above-mentioned defects in the appointment process are of a serious nature, some of them consisted in direct violation of constitutional rules and other fundamental rules for judicial appointment procedure. They lead to a compelling conclusion that the **judges nominated to the Supreme Court in 2018, were not properly appointed and judicial bodies (benches) with their participation have not been properly established by law**.

49. The Court links a manifest breach of law to a "real risk" of misuse of power - i.e., the exercise by the legislature or the executive of undue discretion. In the Polish context, not only was there a "real risk" of the abuse of power, but indeed, **undue discretionary powers have were exercised**. This consideration should be of significance for determining the consequences of the flawed appointment process.

50. The course of the legislative process of the amendments to the NCJ and the Supreme, in which objections to the proposed changes raised by parliamentarians, experts and representatives of civil society were ignored, and the subsequent course of the process of electing new members of the NCJ, as well as the process of selecting candidates and appointing judges to the SN – demonstrate that the **infringements were committed intentionally in order to ensure that the political authorities have a dominant influence on the appointments of judges**.

51. **First**, (1) the premature termination of the 4-year term of office of the previous members of the NCJ guaranteed by the Constitution; (2) the unconstitutional election of the new 15 Council members by the Sejm; (3) the lack of sufficient independence of the NCJ from other public authorities; and (4) the Council's *de facto* resignation from its constitutional role of upholding judicial independence – **disqualify the NCJ as an independent, objective initiator of motions to the President of the Republic for the appointment to judicial posts**.

52. **Second**, (1) the initiation of the SC nomination procedure by an act that has never become valid for the lack of the countersignature required by the Constitution; (2) the general boycott of the election by the judiciary and other legal professions; (3) the lack of a real verification of the nominations; (4) the noticeable political influence in the nomination process; (5) the violation of final court decisions suspending the execution of the nomination resolutions; (6) obstructing the judicial review of the nomination process prior to the handing over of the appointment acts; (7) rendering ineffective any future ruling of the national court (SAC) considering appeals against the NCJ's resolutions; (8) intensive legislative and judicial action to legalize deficient

[41] See esp. (1) decision of the Constitutional Tribunal of 21.04 2020 on the competence dispute between the Sejm of the Republic of Poland and the Supreme Court and between the President of the Republic of Poland and the Supreme Court (case Kpt 1/20); (2) judgment of the Constitutional Tribunal of 20.04.2020 on the motion of the Prime Minister to examine the compatibility of the Supreme Court's resolution with the Constitution of the Republic of Poland, the EU Treaty, the ECHR and the Polish legislation (case U 2/20).

appointments – **nullify the Supreme Court nomination procedure, undermine the nomination effect and deprive those appointed of the necessary legitimacy to resolve legal disputes**. There were no objective conditions for such judges to be seen as lawfully established, independent and impartial.

53. **Third**, (1) the association of the persons nominated to the Supreme Court with the incumbent Minister of Justice and (2) their acceptance of the act of appointment despite the absence of final nomination resolutions, and in disregard of a binding court decision suspending the enforceability of the NCJ resolutions – **have seriously and permanently undermined confidence in their capacity to maintain standards of independence and impartiality in the exercise of judicial activities**.

54. The Commissioner submits that the process of appointing judges to the Supreme Court in 2018 did not meet the requirements of the appointment process. **The initiation and course of the process were affected by irregularities so grave that the its outcome becomes unacceptable *ab initio***. Manifest, intentional, and flagrant violations of the law have nullified the effect of the appointment process and prevented those so appointed from obtaining the judicial legitimacy.

55. Indeed, the legislature and the executive have formed the nomination procedure to the Supreme Court to staff it with the persons they support, and then legalize such appointments by all means. The selection of judges held in this way does not meet the aim of the nomination process. The public authorities organized the nominations in this manner, not to ensure the independence and impartiality of those appointed, but to make sure that the Supreme Court complies with their expectations and *de facto* gain influence over the content of court decisions.

56. **The entirety of the appointment of Supreme Court judges was a manifest and flagrant violation of the law.** The nomination process was only a form of giving a **procedural appearance to the discretionary decision to appoint certain persons to the Supreme Court**. The decision which was taken, in fact, **beyond the law**.

VI. Conclusions

57. The European Court of Human Rights has the authority to assess on its own and in full whether the 2018 Supreme Court appointees and the benches with their participation meet the Convention requirements of the establishment by law, judicial independence and impartiality. **Domestic measures in this respect are illusory and not capable of an effective review and remedy**. The national legal and institutional system has been intentionally shaped not to offer any longer an effective judicial insight in this regard.

58. The Commissioner for Human Rights submits that the persons nominated to the Supreme Court in 2018 and from then on, were appointed in a defective process that was contrary to the law in force. The nature and gravity of the irregularities that had occurred, undermined the integrity of the judicial appointment procedure and compromised its basic aim. The procedure was deliberately regulated and carried out in an unlawful manner. Political authorities, and especially the executive branch, have taken control of the process in order to **discretionarily appoint Supreme Court judges whom they support**. This was done not to establish independent, impartial judges and provide them with the proper democratic legitimacy, but to install into the most important court in Poland persons who are expected to comply with the desires of the government. In the Commissioner's view, these persons themselves and the judicial benches with their **participation do not meet both constitutive criteria of a "court" within the meaning of Article 6(1) of the ECHR**.

59. The situation when **the government has obtained excessive, extra-constitutional influence over the judiciary enables it to use state power at will, arbitrarily and unchecked**. This threatens the functioning of the Republic of Poland as a democratic state based on the rule of law and respecting individual rights. **Without independent, impartial judges established by law, the Polish legal and judicial system cannot function properly**. **Nor can the Convention system**.