

Poland, Supreme Court, BSA I-4110-1/20, January 2020

Member State

 Poland

Topic

Independence of judges/proper appointment of judges/National Council of Judiciary

Accountability

Deciding Court Original Language

National Court:

Sąd Najwyższy

Deciding Court English translation

Supreme Court (Resolution of the combined Civil Chamber, Criminal Chamber and Labour Law and Social Security Chamber)

Registration N

BSA I-4110-1/20

Date Decision

January 23rd 2020

ECLI (if available)

Not available

EU legal sources and CJEU jurisprudence

Treaty of EU,

Charter of Fundamental Rights,

CJEU:

Judgments of the Court of Justice of the European Union of 27 February 2018, C-64/16, Associação Sindical dos Juizes Portugueses v. Tribunal de Contas, para. 35; 13 March 2007, C-432/05 Unibet London Ltd v. Justitiehanslern, para. 37; 22 December 2010, C-279/09, DEB Deutsche Energiehandels (...) v. Germany, para. 29-33;

ECtHR Jurisprudence

ECtHR:

Judgment of 12 March 2019, 26374/18, Guðmundur Andri Ástrásson v. Iceland, issued in the context of Article 6(1) ECHR;

Subject Matter

To determine under Article 6(1) ECHR and **Article 47 of the Charter** that a case is heard by a court which is impartial and independent, established by law, it is necessary to examine the process of judicial appointment in the national judicial system in order to establish whether judges can adjudicate independently and impartially.

Legal issue(s)

Independence, impartiality of judges. Problem with judges appointed by a “new” National Council of Judiciary.

Request for expedited/PPU procedures

NO

Interim Relief

1. Indicate if the national court/applicant asked the CJEU/ECtHR for interim relief and a short summary of the reasons put forward
 2. Indicate if the CJEU/ECtHR granted the interim relief
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National Law Sources

Constitution of Republic of Poland;

Acts:

on common courts/on National Council of Judiciary/Code of Criminal Procedure/Code of Civil Procedure

Facts of the case

After the ruling of CJEU and decisions of some panels of Supreme Court, there was a need for an official statement of the whole Supreme Court (in its former composition, without a “new” chambers).

This resolution of the Supreme Court has been issued due to doubts arising in particular with respect to the **special procedure of nominating candidates for the office of a judge** under the Act of 8 December 2017 amending the Act on the National Council for the Judiciary.

The Supreme Court issues a resolution in accordance with Article 83(1) of the Act on the Supreme Court where divergent legal interpretations exist in the case-law of common courts or the Supreme Court. Such state of affairs is adverse to legal certainty and the principle of trust of individuals in the State, and to the principle of equality. A legal interpretation is an immanent constitutional power of the courts, falling within the remit of judicial independence. A resolution of the Supreme Court identifies such an understanding of controversial provisions which, in the opinion of the Supreme Court, is most reasonable and appropriate taking into account the standards of the right to a fair trial by an impartial and independent court laid down in the Constitution and international law.

As a result of that Act, the National Council for the Judiciary is no longer independent. If the constitutional standard is restored and the defect of the judicial appointment procedure is eliminated, the circumstances necessitating review of the criteria of court appointment under Article 439(1)(2) of the Code of Criminal Procedure and Article 379(4) of the Code of Civil Procedure in order to ensure enforcement of the requirements under Article 47 of the Charter may longer prevail. This resolution does not concern systemic issues of the judiciary as a safeguard of effective legal protection in areas covered by Union law (second paragraph of Article 19(1) TEU).

Conclusion:

If, however, the Constitution of Poland, in particular Article 179 which provides that judges shall be appointed by the President of the Republic of Poland on application of the National Council for the Judiciary, are found to prevent review of the independence and impartiality of a court adjudicating in a given case, then the Polish Constitution would be in fundamental conflict with **Article 47 of the Charter**. In the territory of the European Union, independence and impartiality of courts must be real; and their independence and impartiality cannot be uncontestably decreed by the mere fact of being appointed to the office of a judge by the President of the Republic of Poland.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The current instability of the Polish judiciary originates from the changes to the court system over the past years, which are in breach of the standards laid down in the Constitution, the EU Treaty, the **Charter of Fundamental Rights**, and the **European Convention of Human Rights**. The leitmotif of the change was to subordinate judges and courts to political authorities and to replace judges of different courts, including the Supreme Court. That affected the appointment procedure of judges and the bodies participating in the procedure, as well as the system for the promotion and disciplining of judges. In particular, a manifestly unconstitutional attempt was made to remove

some judges of the Supreme Court and to terminate the mandate of the First President of the Supreme Court, contesting the legitimacy of the Supreme Court. The systemic changes caused doubts about the adjudicating legitimacy of judges appointed to the office in the new procedures. The political motivation of the changes jeopardised the objective conditions necessary for courts and judges to be perceived as impartial and independent.

The Supreme Court considers that the politicisation of courts and their subordination to the parliamentary majority in breach of constitutional procedures establishes a permanent system where the legitimacy of individual judges and their judgments may be challenged with every new political authority. That notwithstanding, the politicisation of courts departs from the criteria of independence and impartiality of courts required under Union law and international law, in particular **Article 47 of the Charter and Article 6(1) ECHR**. That, in turn, causes uncertainty about the recognition of judgments of Polish courts in the Union space of freedom, justice and security. Even now courts in certain EU Member States refuse to co-operate, invoking violation of the standards, and challenge judgments of Polish courts.

Relation of the case to the EU Charter

“The safeguarded principle of judicial independence and impartiality implies that the substance and substantiation of that principle should be decided by courts. A contrary view, prohibiting courts from taking a position in such matters or implying that courts should examine cases disregarding a review of the criteria of independence and impartiality, would undermine the substance of the right to a fair trial as a safeguard of constitutional rights. Constitutional independence of judges and courts and an interpretation of Article 45(1) of the Constitution of the Republic of Poland in a way consistent with Article 6 ECHR and **Article 47 of the Charter** may only be ensured on the assumption that no such presumption exists: a judge appointed with the participation of a defectively formed and defectively functioning National Council for the Judiciary cannot be presumed to be independent. A contrary conclusion would imply that the legislature and executive in the Polish legal system may deprive individuals of the guarantee of the right to have their cases heard by an independent judge and an independent court. The Supreme Court’s interpretation of the provisions of the Code of Civil Procedure and the Code of Criminal Procedure in line with Article 45(1) of the Constitution of the Republic of Poland, **Article 47 of the Charter** and Article 6 ECHR aims to prevent that effect. That is particularly urgent following the judgment of the Court of Justice of the European Union of 19 November 2019 and the judgment of the Supreme Court of 5 December 2019, **III PO 7/18**, (template#14) **which concluded that in the permanent absence of conditions necessary for the National Council for the Judiciary to be perceived as an independent body, a structural defect affects the participation of that body in the procedure of nominating candidates for the office of a judge.**

Use of Judicial Interaction technique(s)

Consistent interpretation:

“The Supreme Court may, at best, take into consideration such risks and the principles of stability of the case-law and legal certainty for individuals in its interpretations of provisions which guarantee that a judgment in a specific case will be given by an impartial and independent court. In its interpretation of the regulations governing criminal and civil proceedings, referred by the First President of the Supreme Court, the Supreme Court considered the effect of the **judgment of the Court of Justice of the European Union of 19 November 2019 in cases C-585/18, C-624/18 and C-625/18**

, as well as the obligation to identify such legislative instruments in the legal system which would guarantee that a judgment will be issued by an impartial and independent court despite doubts arising from a range of systemic changes affecting the status of judges.”

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

“The same concept of the right to a fair trial is enshrined in **Article 47 of the Charter** [cf. judgments of the Court of Justice of the European Union of 27 February 2018, C-64/16, Associação Sindical dos Juizes Portugueses v. Tribunal de Contas, para. 35; 13 March 2007, C-432/05 Unibet London Ltd v. Justitiehanslern, para. 37; 22 December 2010, C-279/09, DEB Deutsche Energiehandels (...) v. Germany, para. 29-33]. The first paragraph of Article 47 of the Charter, which provides that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal”

Strategic use of judicial interaction technique (purpose aimed by the national court)

Supreme Court solves a conflict of judicial interpretation involving fundamental rights enshrined in the EU Charter.

Impact on Legislation / Policy

Unfortunately, no actions were taken by the legislature after the ruling.

Two of six vota separata

Notes on the national implementation of the preliminary ruling by the referring court

Yes it does – quoting the III PO 7/18 judgment

“It should be stressed that, according to Article 91(3) of the Constitution of the Republic of Poland, if an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws. That concerns in particular the Charter of Fundamental Rights. Consequently, in the event of a conflict of laws with norms arising from such legal act, Polish courts are required to disregard such laws in adjudicating. In this context, it is important to quote once again in extenso the principle reiterated on many occasions in the case-law of the Court of Justice of the European Union (formerly the European Court of Justice): “any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of community law.” That is because a “national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently” (**judgment of 9 March 1977, C-106/77**).”

Impact on national case law from the same Member State or other Member States

- I NO 96/19
 - I NO 192/19
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Connected national caselaw / templates

Templates #2 and #3 – vota separata to the resolution;

Template #6 – judges supporting members of NCJ – transparency;

Template#14 – retirement age of magistrates;

Template #9 – Supreme Court, when recognizing appeals against NCJ resolutions, should supervise the effective implementation of constitutional requirements and EU law.

(Link to) full text

case BSA I-4110-1 / 20

Author

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History of the case: (please note the chronological order of the summarised/referred national

judgments.)

1. CJEU judgment in cases – November 19th 2019;
 2. Supreme Court Resolution BSA I – 4110 – 1/2020 – January 23rd 2020.
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