

Poland, Supreme Court - dissenting opinion, BSA I-4110-1/20, 23 January 2020

Member State

 Poland

Topic

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

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

Votum Separatum of SCJ Zbigniew Myszka to the judgment

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-

ECtHR Jurisprudence

ECtHR:

Judgment of 12 March 2019, 26374/18, Guðmundur Andri Ástráðsson 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

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

See Decision BSA I-4110-1/20 - Template #1

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

Significant and worth describing Votum Separatum of SCJ Zbigniew Myszka to the judgment. Here is a conclusion of VS:

“The Supreme Court has no constitutional or systemic basis for

repression of newly appointed constitutionally irremovable judges (Art.

180(1) of the Constitution), who would not rule on or restrict participation in

adjudicating after the adoption of a hybrid interpretative resolution with the following characteristics of unequal treatment, application of direct discrimination or indirect and prohibited harassment or violation of professional dignity, and other protected personal rights of newly appointed judges (Article 32 in connection with Articles 179 and 180 of the Constitution in connection with Article 5 of the Code of Civil Procedure in connection with Article 111- 3 3a 3 11 , Article 18 and Article 93 of the Labour Code).

Also, the CJEU should bear in mind that certain motives of the judgment of 19 November 2019 aimed at denying or "delegitimizing" by some Polish courts of the Disciplinary Chamber as a "court of law" would require the legislative "abolition" of that Chamber of the Supreme Court, which is the sole responsibility of the Polish legislator and only in the event of a change in the system of the Supreme Court (Articles 176(2) and 182 of the Constitution in opposition to Articles 2, 4, 5, 19 TEU and 267 TFEU).

In the revealed Polish and EU normative system, the Polish justice system is opposed to being destabilised as a result of the jurisdictional "hybrid" adoption of blockades or "tests" of independent, impartial and independent judgement by several hundred newly appointed judges, who - without a trial and the right of defence - have been truncated, i.e. The inappropriate composition of the judges of the three Chambers of the Supreme Court unduly blocks or expects newly appointed judges to refrain from adjudicating, under the pain of possible contestation of their impartiality, independence or independence in adjudication, with the "gracious" status of "non-judge" judges who could not adjudicate ("quasi" judges) being left unknown to the civilised legal order. Meanwhile, no judge, including those who humiliate, humiliate or intimidate the "suspect" (Article 40 of the Constitution of the Republic of Poland) must not be subject to a tortious limitation or "testing" in the performance of the constitutional duty of independent adjudication under the hybrid pretext that it adjudicates in a "non-judgement" or "court of law" in an inappropriate cast, while every judge, including the "incriminated" one, has a constitutional and systemic duty to adjudicate (Article 180(1) of the Constitution of the Republic of Poland), unless he or she would be removed from office or suspended from office (Article 180(2) of the Constitution).

Discriminatory "exponential" waiting to refrain from adjudicating newly appointed judges therefore has no justification or binding or reasonable legal value within the meaning of Article 45 § 1 of the Constitution of the Republic of Poland and Article 47 of the Charter of Fundamental Rights of the European Union and Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms or Articles 7 and 14 of the International Covenant on Human and Citizen's Rights (Journal of Laws of 1997 No. 38, item 167, hereinafter the ICoHCR).

“I strongly oppose the demolition, undermining and anarchy of the Polish judiciary on the basis of

total negation of the staffing of the courts and the ability to judge newly appointed by the President of the Republic of Poland judges, to whom an injured, degrading and humiliating status of "suspect" judges is attributed, although they have not been proven in the constitutionally correct court procedure (Article 2 of the Constitution). 180(2) of the Constitution) of the tortual misrepresentation of the constitutional right and duty to adjudicate independently, independently or impartially in a manner potentially justifying a limitation of the constitutional capacity to adjudicate within the meaning of Article 45(1) in conjunction with Article 178(1) of the Constitution of the Republic of Poland in the procedures referred to in Article 180(2) of the Constitution. The CJEU should also be aware that when making recommendations to defend the rights of a limited number of retired Supreme Court judges who have remained in uninterrupted service by law

The Commission, acting in accordance with the procedure laid down in Article 3(1)(b) of the Judicial Systems Code, may be jointly liable for collective harm to several hundred newly appointed judges who have been deprived of the right to defend their independence, impartiality and judgemental independence or may be compelled to demonstrate compliance with the standards of judicial service, in violation not only of the principles of legalism and the rule of law but of simple civilised decency, as laid down in Article 3(2) of the Judicial Systems Code. 47 of the Charter of Fundamental Rights of the European Union, Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms and Articles 7 and 14 of the International Convention on Human and Civil Rights and Articles 2, 4, 5, 19 TEU and 267 TFEU”

“Taking up office obliges a constitutionally indelible judge (Article 180 Section 1 of the Constitution) to administer justice on behalf of the Republic of Poland (not yet on behalf of the European Union) and on the basis of the Polish Constitution and the national and EU legal order, with the exceptional admissibility of an ex officio or suspension of a judge from office only on the basis of a decision of a competent Polish court and only in cases specified in the Act (Article 180 Section 2 of the Constitution). Priority or direct application of EU law occurs in the event of a collision with Polish laws (Article 91 Section 3 of the Constitution), except that the Constitution of the Republic of Poland is not a law within the meaning of this provision or other constitutional regulations (in particular Article 178 Section 1 of the Constitution). This means that the absolute primacy of EU law over the Constitution of the Republic of Poland is neither unequivocal nor definitively resolved, especially since the CJEU did not provide the treaty legal basis (specific TEU or TFEU standards) for the motives and judgment of 19 November 2019. and prima facie did not foresee the scale of corporate discrimination and violation of fundamental rights of several hundred newly appointed judges whose jurisdictional capacity to deliver independent, impartial and independent judgment is denied by the criticised resolution (judges of the Disciplinary Chamber of the Supreme Court) or significantly restricted (other newly appointed judges).”

Relation of the case to the EU Charter

Relation between the EU Charter and ECHR

[please explain what were the reasons behind citing the ECHR, ornamental or whether the protection granted through the EU Charter is more extensive than that stemming from ECHR in the particular case]

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

Please mention if the national court makes a simple citation and engage with an assessment of other national judgments, also whether there was constitutionality review involved. Please mention if there was a reason behind citing the jurisprudence of a foreign Constitutional Court.

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

Please mention if the national court makes a simple citation and engage with an assessment of other national judgments or European courts, also whether there was constitutionality review involved; shortly describe the interaction between the ordinary and appellate/supreme court, if applicable.

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

Please indicate what was (presumably) the scope pursued by the national court when using judicial interaction techniques, namely whether they wanted to solve a conflict of norms, conflicts of judicial interpretation involving fundamental rights enshrined in the EU Charter, fill in legislative gaps, institutional conflict, etc.

Impact on Legislation / Policy

When applicable, indicate if the interactions between courts triggered changes to the legislative framework (e.g. as a reaction prompted by the decision of the CJEU).

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

Two of six vota separata are described on templates #2 and #3

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

Insofar as possible, when analysing the follow up of a preliminary ruling to the CJEU, address the following questions (making a separate point for each of them):

- Is the outcome achieved by the national judge consistent with the decision of the CJEU?

If there is a gap between the two, specify what this is and the reasons for (partial) divergence (for instance, the national court could grant priority to domestic sources of protection, or to other standards.

- Did the national court quote case law of the CJEU/ECtHR (in particular cases not already referred to by the CJEU in its decision) or the Explanations?

- Did the national court quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports?

Yes it does – quoting the III PO 7/18 judgment (template #14)

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

When applicable, expand on change of approach with respect to previous case law prompted by the decision of the CJEU.

Connected national caselaw / templates

Templates #1 resolution and #3 – votum separatum 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

<http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/Zdanie%20odr?bne%20SSN%20Zbign>

Author

Jarosław Gwizdak INPRIS

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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