

Poland, Supreme Court - Dissenting opinion, BSA I-4110-1-2020, 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)

Votum Separatum of SCJ Krzysztof Staryk to the judgment.

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

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)

Here is a conclusion:

"I share the view of the resolution that the NCJ formed by the Act of 8 December 2017 amending the Act on the National Council of the Judiciary could be judged as having been appointed contrary to the Constitution, as 15 judges should be elected by the judges from among the judges and not de facto by the executive from among the judges most compliant with this authority (formally elected by the Sejm). The lack of transparency in the election of the members of the NCJ and the violation of the principle of objectivity of their statements undermine the neutrality of this body. However, I do not accept all the consequences of such a position contained in the resolution".

"Judgments handed down by young judges, approved and elected by the new NCJ, cannot be considered as casting doubt on the biased court - simply because the judges have successfully passed the appointment or promotion procedure before the new NCJ. In the oral justification of the resolution, an analogy was quoted that a sick tree can also bear healthy fruit (by implication - most are sick fruit). This is a completely wrong parallel, as the character, legal knowledge and life experience of young judges was not in any way produced or shaped by the new NCJ. It can also not be assumed that a short-term contact with the new NCR was infectious like a coronavirus from Wuhan. Or maybe "Everyone carries the plague, because nobody is free from it. And you have to watch over yourself constantly, so that in the moment of distraction you don't breathe the plague into the face of another person (Albert Camus - Plague)".

"The feature that is essential in the work of a judge is not the one by which the NCJ was nominated, but the ability to critically analyse the facts, think logically and independently, including a critical analysis of the evidence. We live in a world of ever-increasing manipulation of half-truths and lies, but a judge must not succumb to opinions imposed by the media but must establish the truth himself. For example, many top-ranking politicians are imposing on societies the opinion that global warming is caused by increased carbon dioxide emissions. However, everyone should consider how such a microscopic amount of carbon dioxide in the earth's atmosphere - 0.04 % - can affect climate change. In greenhouses the amount of this gas is increased in order to make the plants grow more vigorously. 10 times more carbon dioxide than was presently the case during the Cambrian period, when various forms of life were developing extremely rapidly (the so-called Cambrian explosion). I believe that there is no reason to doubt the intellectual independence of the judges accepted by the new NCJ, as they will be critical of all the slogans imposed on societies by politicians holding the highest offices. Nor will they follow the voice of a Swedish girl who is constantly being promoted but who is two years late in school education and has been diagnosed with perceptual dysfunction".

"The immediate effect of the resolution may result in organisational mess, further prolongation of court proceedings and uncertainty about such an important issue as the independence and impartiality of individual judges. In criminal proceedings this may lead to reversed procedural consequences; it is the judge who will be judged (tested), not the accused, and it is the judge who

should be judging the wrongdoers. In a civil trial, too, the parties should consider the correctness of the subversion used in the judgment rather than testing the independence of the judge.”

Relation between the EU Charter and ECHR

There is no distinction nor the favouritism of any document.

Impact on Legislation / Policy

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

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

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%20Krzys>

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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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