

## Poland, Sąd Najwyższy, III KK 404/21, 26 July 2022

Member State

 Poland

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Topic

Independence

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Sector

Role of national higher courts

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Deciding Court Original Language

Sąd Najwyższy

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Deciding Court English translation

Supreme Court

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Registration N

III KK 404/21

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Date Decision

26th July 2022

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ECLI (if available)

N/A

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National Follow Up Of (when relevant)

Indirect follow up of ECHR Reczkowicz 43447/19 case - quoting the Three Chambers of Supreme Court of Poland resolution from January 23rd 2020 - BSA I-4110-1/2020 - the case in TRIAL database <https://cjc.eui.eu/data/data/data?idPermanent=206&trial=1>

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## EU legal sources and CJEU jurisprudence

CFR art.47

C-64/16, Associação Sindical dos Juizes Portugueses, 27 February 2018, ECLI:EU:C:2018:117, par. 41;

C-619/18, Commission v. Poland, 24 June 2019, ECLI:EU:C:2019:531, par. 57;

C-791/19, Commission v. Poland, 15 July 2021, ECLI:EU:C:2021:596, paras. 57 and 98;

Joined cases C-585/18, C-624/18 and C-625/18, A.K. & Others, 19 November 2019, ECLI:EU:C:2019:982, par. 143;

C-824/18, A.B. & Others, 2 March 2021, ECLI:EU:C:2021:153, par. 123;

C-487/19, W.?, 6 October 2021, ECLI:EU:C:2021:798, par. 148.

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## ECtHR Jurisprudence

ECHR art.6 § 1

26374/18, Guðmundur Andri Aðstraðsson, 43447/19 Reczkowicz vs. Poland

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## Subject Matter

Independence of courts, appointment of a judge to the court of higher instance, National Council of Judiciary, public trust in judiciary

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## Legal issue(s)

Supreme Court's overturning of the verdict. The only reason is the participation of a judge, appointed in violation of the rules. The court does not deal with the merits of the judgment, considering that the sitting of a judge appointed by the NCJ and his conduct does not guarantee independence and impartiality.

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## Request for expedited/PPU procedures

N/A

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## Interim Relief

## National Law Sources

Polish Constitution, Law on National Council of Judiciary, Code of criminal procedure,

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## Facts of the case

One of the members of the panel of the Court of Appeal was a judge, nominated to this court after a procedure before the NCJ. This judge had been on indefinite secondment to the Ministry of Justice since 21 September 2012. While working at the ministry, he was appointed president of the regional court in 2016, assigned to adjudicate in the district court with 1/4 of the caseload. After 14 months, he became vice-president of the court of appeal. He was later appointed judge of the court of appeal and became president of that court also.

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

It was stated in the three-chamber resolution that the fair trial standard of Article 6(1) of the ECHR and Article 47 of the Charter of Fundamental Rights, insofar as it requires a case to be heard by an independent and impartial court established by law, also includes an examination of the very process of appointment of judges within the national judicial system. In turn, the justification of the Supreme Court's resolution in I KZP 2/22 aptly states that the appointment of the NCJ - as a result of the amendment of 8 December 2017 - in a manner contradictory to the Constitution of the Republic of Poland has the effect of overturning the presumption of independence and impartiality of a judge appointed at the request of the NCJ thus formed, which was functioning in gremio and a priori; this presumption collapsed in view of the overwhelming influence of the executive power on the manner of appointment of the NCJ and the fact that many members of the NCJ are persons directly subordinate to the Minister of Justice as presidents of courts. It is for this reason that the assessment of a judge's impartiality cannot be based only on the assumption of the existence of intrinsic subjective impartiality, but must first of all be assessed on the basis of those elements which are objectively discernible and therefore relevant to the judge's objective impartiality. This refers primarily to the circumstances of a given judge's appointment which, in a situation where a mechanism of subordination of the NCJ to the executive power has been created (in order to be appointed to the NCJ, it is necessary to obtain the support of the executive power), may indicate the existence of potential bias, resulting from the fact of "repaying" for a certain selection and promotion. In the justification of the resolution of 2 June 2022, I KZP 2/22, this element of the examination was referred to as the "institutional impartiality of the judge" (its component is objective impartiality; cf. extensive arguments on this issue in the justification of the resolution) and extensive reference was also made to the judgment of the Grand Chamber of the Court of Justice of the European Union (CJEU) of 19 November 2019 in Joined Cases C- 585/18, C-624/18 and C-625/18 (paragraphs 128 and 171). It has, moreover, been emphasised in the literature that the position set out in the resolution of the three Chambers is nothing more than the application of the mechanism indicated in the judgment of the European Court of Human Rights (ECHR) in *Guðmundur Andri Ástráðsson v Iceland*. It is also necessary to cite the circumstances that have

already occurred after the Supreme Court issued the order implementing the resolution of the three Chambers of the Supreme Court on 27 January 2022 in case III KK 404/21, and which should not be left without consideration in the context of ensuring the standard of independence and impartiality of a judge and, above all, understanding this element in objective terms in relation to the adjudication by Judge J. D.. Indeed, it has not happened so far that in the course of cassation proceedings (still pending) a judge of an appellate court, who was on the bench of the appellate court issuing the decision subject to cassation review, complained to the First President of the Supreme Court about the adjudicatory actions of the Supreme Court and requested that disciplinary proceedings be considered against the adjudicatory panel in connection with the procedural decision taken. On 17 February 2022. The President of the Court of Appeal in [...] sent an extensive letter to the First President of the Supreme Court in which he included a number of allegations concerning the proceedings in case III KK 404/21 (the letter was sent in copies to: National Public Prosecutor's Office, National Council of the Judiciary and the Minister of Justice) to demand in their final conclusions that the First President of the Supreme Court request that he consider initiating disciplinary proceedings against the entire panel adjudicating in case III KK 404/21. These allegations concerned, first of all, the lack of impartiality of the referee in the cassation case, i.e. the judge of the Supreme Court, Jarosław Matras, and the circumstances justifying this type of allegation were, inter alia, that this judge should not rule on the cases of the court from which he originated and, moreover, that he had ruled in the District Court in L. and the Court of Appeal in [...] for many years and, as a result, has social and family connections with judges who lost their positions after 2016 (3 judges' names are mentioned here) and, moreover, has spoken publicly "about the subject matter of the case" (p. 3 of the application). Quite apart from the applicant's lack of knowledge of the rules for the allocation of cases in the Supreme Court in the current (random allocation of a case according to the list of judges - this follows from the generally applicable legislation), but also in the previous state of the law (the standard referred to by J. D. did not exist, which was easy to establish), as well as the perception of the institution of the exclusion of a judge (in relation to the judges who rule in the given court, and not through the prism of Articles 40 and 41 of the Code of Criminal Procedure) and what the media statements of Judge J. Matras concerned (they did not concern the subject matter of this case), one must conclude that by filing the complaint in question, Judge J. D. externalised his conviction as to how he perceives the judicial function of the courts (the administration of justice). According to Judge J. D., there is a need to consider pursuing disciplinary proceedings for the way in which the Supreme Court proceeds at the cassation hearing. This circumstance seems to indicate what is already apparent from the forementioned circumstances.

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## Relation between the EU Charter and ECHR

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#### Use of Judicial Interaction technique(s)

N/A

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

Court constantly refers to previous, fundamental judgment of S.C. (resolution from January 23rd, 2020)

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

N/A

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

Court constantly shows the way to solve the conflict of norms and defines again "the properly stuffed court, established by law".

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#### Impact on Legislation / Policy

N/A

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

The outcome is absolutely consistent with the CJEU jurisprudence, and in line with cited resolution.

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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?

Yes - cases quoted in 4.3

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

No

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Did the national court take into account national case law on fundamental rights?

It does: referring to cases on access to court, esp. Supreme Court case

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If the court that issued the preliminary reference is not a last instance court, and the “follow up” was appealed before a higher court, include the information

Last instance court - N/A

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

N/A

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(Link to) full text

<http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iii%20kk%20404-21-1.pdf>

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