

## Poland, Sąd Apelacyjny w Krakowie, I Aca 518/21, judgment of 19 April 2023

### Member State

 Poland

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### Topic

Independence, impartiality

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### Sector

Judicial Interaction Techniques, Judicial Self-Government (Judicial Council)

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### Deciding Court Original Language

Sąd Apelacyjny w Krakowie

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### Deciding Court English translation

Krakow Court of Appeal

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### Registration N

I Aca 518/21

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### Date Decision

April 19th, 2023

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### ECLI (if available)

N/A

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### National Follow Up Of (when relevant)

Indirect (A.K. and others (C-585/18, C-624/18 & C-625/18) and Commission v Poland (C-791/19))

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EU legal sources and CJEU jurisprudence

Charter of Fundamental Rights - Art. 47;

Treaty on European Union: Art. 19 (1);

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

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## ECtHR Jurisprudence

ECHR Art. 6;

Jurisprudence - not directly, while Astradson test applied, Astradson v Iceland (Appl no. 26374/18, judgment of 12 March 2019).

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## Subject Matter

Appointment of a judge - independence of a judge promoted by new NCJ - independent review of judge's career instead of NCJ evaluation - court established by law (definition)

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## Legal issue(s)

Independence and impartiality - possibility/obligation to verify the judicial appointment by other court

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## Request for expedited/PPU procedures

N/A

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## Interim Relief

N/A

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## National Law Sources

Polish Constitution - art. 45, Law on Constitutional Court, Law on National Council of the Judiciary, law on ordinary courts, code of civil procedure - art. 379 § 4,

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## Facts of the case

The Court of Appeal was hearing an appeal against a judgment of the Cracow District Court. The court of first instance was composed of a single judge who had been appointed as a judge in the procedure before the NCJ in its current form (first term after the amendment of the law on the NCJ).

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

"The judgment was delivered by the District Court sitting as a single judge, the adjudicating judge, Mr Zygmunt Drożdżko, having been appointed to the office of district court judge pursuant to the procedure referred to in the above-mentioned resolution. Indeed, he obtained his nomination to the office of judge by a decision of the President of the Republic of Poland dated 2 June 2020. (M.P.

of 3 July 2020, item 605), as a result of the presentation by the National Council of the Judiciary (formed pursuant to the procedure of the aforementioned Act of 8 December 2017) by Resolution No. 195/2019 of 14 February 2019". "The importance of shaping the courts as bodies corresponding to the characteristics of independence and independence is similarly understood in the case law of the European courts. In this regard, it suffices to refer to the text of the judgment of the Court of Justice of the European Union of 15 July 2021 in Case C-791/19, in which it was pointed out that, in order for judicial authorities to ensure effective legal protection, "it is crucial to preserve the independence of such authorities, as confirmed by Art. 47, second paragraph, of the Charter of Fundamental Rights, which includes access to an 'independent' tribunal among the requirements linked to the fundamental right to an effective remedy" (para. 57), and that " It is settled case law that the guarantees of independence and impartiality required under Union law mean that there must be rules , in particular as regards the composition of the body, the appointment of its members, the duration of their term of office and the grounds for their exclusion or removal, such as to exclude, in the opinion of individuals, any reasonable doubt as to the invulnerability of that body to external factors and its neutrality with regard to the interests which clash before it" (para. 59)." Freedom of expression - in the way judge Drozd?ejko was supporting the reform was also taken into consideration in the reasoning: Judge Zygmunt Drozd?ejko has furthermore externalised his view on the changes being made in the judiciary by the political authorities. Indeed, he published an article that appeared in the daily newspaper (...) of 22 August 2021, under the title: "...). In this publication, Zygmunt Drozd?ejko expressed a view fully accepting the actions of the political authorities which had the effect of shaping the composition of the National Council of the Judiciary in its judicial part in a way that violated the independence of the courts and the independence of judges. He pointed out, inter alia: "I believe that the appointment of the members of the NCJ by the Sejm strengthens the independence of judges", "There are no grounds to question the correctness of the selection of the members of the National Judicial Council". Mr Justice supported his arguments in this respect with simplistic judgements, without referring to the in-depth assessments expressed in the case law of the European Courts and the Supreme Court, indicating a breach of the fundamental principles concerning the independence and functioning of the judiciary. Similar theses, approving unconstitutional solutions, were expressed by Mr Judge in the article(...)

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#### Relation of the case to the EU Charter

N/A

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#### Relation between the EU Charter and ECHR

N/A

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

Disapplication of national law in favour of EU law - disaplication of CC rulings, in favour of EU law

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

Strong internal interaction - against the rulings of Constitutional Court, in favour of Supreme Court following EU law. Thus, firstly, the Court of Appeal fully shares the assessment expressed in the

reasons for the decisions of the Supreme Court of 16 September 2021 (ref. I KZ 29/21) and of 29 September 2021 (ref. V KZ 47/21). Although the legal considerations contained in these judgments refer to the constitutional position of the Supreme Court, the conclusion that it is inadmissible - in the light of the norms of the Constitution of the Republic of Poland, as well as the European Convention on Human Rights - for the Constitutional Court to limit the statutory prerogatives of the Supreme Court in interpreting the applicable law, should also be applied to the prerogatives of common courts. It is only the courts that are entitled, in the process of applying the law, to interpret the legal provisions in force and applicable in a given case. It should be noted that both judgements of the Constitutional Tribunal cited above do not in fact aim at the control of concrete legal norms with the features of general and abstract regulation, but are aimed exclusively at creating a specific interpretation of the law - in fact, it is an action aimed at creating the desired practice of applying the law in force, which does not fall within the competences of the Constitutional Tribunal.

Secondly, it is also accurate - with respect to both judgements of the Constitutional Court - to conclude that due to the fact that the Tribunal is composed of three persons who have not been duly elected to the office of a judge of the Constitutional Tribunal, the judgements suffer from a material defect in the form of a violation of Article 194(1) of the Constitution. Consequently, it cannot be considered that judgments issued in these conditions are covered by the effect determined by the norm of Article 190(1) of the Constitution of the Republic of Poland (so the Supreme Court in its decision of 29 September 2021, ref. V KZ 47/21).

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

Critical approach to CC judgments - see above. Court directly applies Astradson test: In this state of affairs, following the arguments of the Supreme Court expressed in the grounds of the resolution of 23 January 2020, it is necessary - in the case of persons appointed in a flawed procedure to the office of a judge of a common court - to carry out a specific test, the result of which will be an assessment of the influence of the political factor on the process in question, including inter alia by: a) referring to the substantive, character and emotional criterion of the person in question to hold the office; b) the reliability of the verification of the substantive and ethical requirements, observing the same criteria to all co-applicants for nomination in the same competition; c) independence from extrajudicial bodies, independence from the authorities and other judicial bodies, independence from the influence of social factors; d) character traits that determine the judge's internal strength and independence. In the Supreme Court's view, circumstances such as whether the appointment is to a higher or lower court; whether it is the first or subsequent appointment; what type of cases - from the point of view of the authorities - are heard at the court in question; whether or not a party has requested the judge's exclusion on this ground; what are the circumstances concerning the judge himself, including involvement or lack thereof in the activities of the political (executive) power; the externalisation of views in accepting unconstitutional changes; the course of the competition, including, for example, the the affiliation of the members of the NCJ with the candidate; whether the person would have met the criteria under the previous state of the law.

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

Court solves institutional conflict, thus in Poland the conflict seems unsolvable (JG)

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## Impact on Legislation / Policy

No changes to legislative framework

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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, as mentioned above

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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?

No

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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

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

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