

Poland, Constitutional Tribunal, K 7/21, constitutional, 10.03.2022, OTK ZU A/2022, no. 24

Member State

 Poland

Topic

mutual trust, independence, impartiality

Sector

Judicial Interaction Techniques; role of national higher courts

Deciding Court Original Language

Trybuna? Konstytucyjny

Deciding Court English translation

Constitutional Tribunal

Registration N

K 7/21

Date Decision

10/03/2022

ECLI (if available)

N/A

National Follow Up Of (when relevant)

The case follows the ECtHR decisions (in particular the judgment of 29 June 2021, Broda and Bojara v Poland (application no. 26691/18 and no. 27367/18) and the judgments of 22 July 2021, Reczkowicz v Poland (application no. 43447/19)

EU legal sources and CJEU jurisprudence

N/A

ECtHR Jurisprudence

Article 6 of ECHR

judgment of 12 March 2019, *Ástráðsson*, application no. 26374/18; judgments of 29 June 2021, *Broda and Bojara v Poland*, application nos. 26691/18 and 27367/18, judgment of 22 July 2021, *Reczkowicz v Poland*, application no. 43447/19; *Dolińska-Ficek and Ozimek v. Poland*, application nos. 49868/19 and 57511/19; judgment of 7 May 2021, *Xero Flor v Poland*, application no. 4907/18; *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)*, application no. 32772/02; *Marckx v. Belgium*, application no. 6833/74; *Shamayev and Others v. Georgia and Russia*, application no. 36378/02; *Slivenko and Others v. Latvia*, application no. 48321/99; report of the Commission on Human Rights of 14 December 1976; judgment of 25 April 1978, *Tyrer v. the United Kingdom*, application No. 5856/72; *Goodwin v. the United Kingdom*, application no. 28957/95; *Schalk and Kopf v. Austria*, application no. 30141/04; *Haas v. Switzerland*, application no. 31322/07; judgment of 7 July 1989, *Soering v. the United Kingdom*, application no. 14028/88; judgment of 12 May 2005, *Öcalan v. Turkey*, no. 46221/99; *Baka v Hungary*, application no. 20261/12; *Denisov v Ukraine*, application no. 76639/11; *Károly Nagy v Hungary*, application no. 56665/09; *Regner v Czech Republic*, application no. 35289/11; *Zand v. Austria*, application no. 7360/76; Commission decision of 10 October 1990, *G. v. Switzerland*, application no. 16875/90; decision of 4 May 2010, *Mounir El Motassadeq v. Germany*, application no. 28599/07; judgment of 5 October 2010, *DMD GROUP, a.s. v. Slovakia*, application no. 19334/03; judgment of 22 June 2000, *Coeme and Others v. Belgium*, application nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96; judgment of 28 April 2009, *Savino and Others v. Italy*, application nos. 17214/05, 20329/05 and 42113/04, § 94; judgment of 9 January 2013, *Oleksandr Volkov v. Ukraine*, application no. 21722/11; judgment of 28 November 2002, *Lavents v Latvia*, application no. 58442/00; report of the European Commission of Human Rights of 13 May 198, *Piersack v. Belgium*; *Advance Pharma sp. z o.o. v Poland*, application no. 1469/20.

Subject Matter

hierarchy of acts, right to a court, court established by law, powers of the ECtHR, scope of the ECHR, judicial dialogue

Legal issue(s)

The Prosecutor General requested an examination of the compatibility of the first sentence of Article 6(1) of the ECHR, in so far as:

- 'authorises the ECtHR to create, under national law, a judicially protected subjective right of a judge to occupy an administrative function in the organisational structure of the ordinary judiciary of the Republic of Poland', with Articles 8(1), 89(1)(2) and 176(2) of the Constitution,
 - the condition of "court established by law" contained in that provision does not take into account the universally binding provisions of the Constitution and laws, as well as final and universally binding judgments of the Polish Constitutional Tribunal, which constitute the basis for the establishment of the court, with Article 89 clause 1 point 2, Article 176 clause 2, Article 179 in conjunction with Article 187 clause 1 in conjunction with Article 187 clause 4 and Article 190 clause 1 of the Constitution,
 - allows for the binding assessment by national or international courts of the compatibility with the Constitution and the Convention of laws concerning the organisation of the judiciary, the competence of courts and the legislation concerning the National Council of the Judiciary in order to establish the fulfilment of the condition of a "court established by law", with Article 188(1) of the Constitution.
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Request for expedited/PPU procedures

No

Interim Relief

N/A

National Law Sources

Articles 8(1), 45, 89(1)(2), 176(2), 179, 187(1)(4), 188, 190 (1) of the Constitution of the Republic of Poland

Facts of the case

The Prosecutor General requested an examination of the compatibility of the first sentence of Article 6(1) of the ECHR with Polish Constitution, in so far as:

- 'authorises the ECtHR to create, under national law, a judicially protected subjective right of a judge to occupy an administrative function in the organisational structure of the ordinary judiciary of the Republic of Poland',
 - the condition of "court established by law" contained in that provision does not take into account the universally binding provisions of the Constitution and laws, as well as final and universally binding judgments of the Polish Constitutional Tribunal, which constitute the basis for the establishment of the court,
 - allows for the binding assessment by national or international courts of the compatibility with the Constitution and the Convention of laws concerning the organisation of the judiciary, the competence of courts and the legislation concerning the National Council of the Judiciary in order to establish the fulfilment of the condition of a "court established by law".
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Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Constitutional Tribunal considered whether the ECtHR case law is subject of constitutionality control. It assessed that, the Constitutional Tribunal is entitled to assess the constitutionality of the ECtHR judgments to the extent that they create legal norms. The Tribunal justified this on the grounds that the ECtHR's judgments concerning the status of judges and the procedure for the

appointment of judges in Poland go beyond what the parties had agreed to when they ratified the Convention.

The Tribunal found that the ECtHR, in deciding on the status of judges and the compatibility with the ECHR of the procedure for the appointment of judges, acted inconsistently with the Polish Constitution. The Court found that the ECtHR's reference to the jurisprudence of Polish courts (in a selective manner), while ignoring the entire case-law of the Constitutional Tribunal on the issue of the status of judges and the manner of their appointment, was an expression of the creation of norms on the appointment process of Polish judges that did not exist in domestic law. It further stated that the ECtHR, as an international court, has no jurisdiction to review judgments of the Constitutional Tribunal, either in terms of their content and procedure, or in terms of the composition of the judiciary. When deciding the cases of Broda and Bojara v. Poland, Reczkowicz v. Poland, Dolińska-Ficek and Ozimek v. Poland; Advance Pharma sp. z o.o. v. Poland, the ECtHR disregarded the provisions of the Constitution, domestic laws and final and universally binding judgments of the Constitutional Tribunal. Also, the ECtHR's independent creation, in the process of interpreting the ECHR, of norms concerning the nomination procedure for judges of national courts was unconstitutional.

The Constitutional Tribunal considered that when analysing the concept of 'court established by law', the point of reference should be national law, including the Constitution and laws. If a norm of international law allows national law to be disregarded in assessing the fulfilment of the condition of a court established by law, this constitutes a violation of the Constitution. The norms of international law, especially those under the Convention, cannot shape either a universal court system for the Member States, or their jurisdiction, or the detailed rules concerning the processes for the appointment of judges. This is a matter that falls within the competence of the state and derives from its functions. It forms part of a constitutional identity and is an expression of state sovereignty.

National law establishes the principle of the exclusivity of the law for regulating the system of courts, the assessments made against the background of Article 6(1) of the Convention must take this circumstance into account.

In the Court's view, the issue under consideration concerns the relationship between human rights and state sovereignty. From a constitutional perspective, it is also undoubtedly about the essence and core of the Constitution, namely the element of Poland's constitutional identity. With regard to all (three) issues included in the motion, the Constitutional Tribunal declared the ECHR unconstitutional.

Consequently, the Tribunal held that the effect of the Tribunal's ruling is to remove - at least in relation to Poland - the norms established by the ECtHR from the content of the ECHR's provisions, and therefore they do not fall within the scope of Article 6(1) of the Convention and are not treated as international law binding on the Republic of Poland (Article 9 of the Constitution). As a result of the above, the judgments issued on their basis, i.e. four judgments of the ECtHR: judgment of 29 June 2021 in the case of Broda and Bojara v. Poland (application nos. 26691/18 and 27367/18); judgment of 22 July 2021 in the case of Reczkowicz v. Poland (application no. 43447/19); judgment of 8 November 2021. Dolińska-Ficek and Ozimek v. Poland (Application nos. 49868/19 and 57511/19); judgment of 3 February 2022 in the case of Advance Pharma sp. z o.o. v. Poland (Application no. 1469/20), do not have for the Polish State the attribute provided for in Article 46 of the ECHR, as having been issued on a basis lying outside the scope of the State's legal obligations. Since the ECtHR judgment declared an order to comply with a Convention standard, which turned out to be unconstitutional in many contexts, it cannot constitute an obligation of Poland.

Relation of the case to the EU Charter

N/A

Relation between the EU Charter and ECHR

The citation of ECtHR case-law was ornamental.

Use of Judicial Interaction technique(s)

comparative reasoning with foreign legislation or foreign caselaw, mutual recognition. The Tribunal emphasizes that "constitutional control of the norms of the Convention is an expression and type of tribunal dialogue (the Constitutional Tribunal - the ECtHR) and will enable the formulation of constitutional demands regarding the "living" and constantly evolving Convention system".

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

The Constitutional Tribunal refers to the case law of courts of other countries, including constitutional courts. It does not analyze the cited judgments, they serve as an instrumental justification of the position adopted by the Tribunal. The Tribunal also refers to the jurisprudence of the Polish Constitutional Tribunal, including decisions perceived in the doctrine as inconsistent with the Constitution (e.g. judgments issued by judges elected illegally).

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

The case concerns a constitutionality review. The case was initiated by the Prosecutor General. The Tribunal wanted to prevent common courts and the Supreme Court from applying the jurisprudence of the ECtHR.

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

The Constitutional Tribunal highlighted the conflict between the norms derived by the ECtHR from the ECHR and the Polish Constitution. It also considered that the ECtHR, by ruling on the standards of the Polish judiciary, interferes with the competence of the legislator, as well as the Constitutional Court.

Impact on Legislation / Policy

N/A

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

The Constitutional Tribunal granted priority to the Polish Constitution.

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?

N/A

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

N/A

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

N/A

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

Was there a consensus among national courts on how to implement the CJEU's preliminary ruling; and were there divergences between the judiciary and other state powers regarding the implementation of the preliminary ruling?

N/A

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

N/A

Connected national caselaw / templates

N/A

Other

N/A

(Link to) full text

<https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%207/21>

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

N/A
