HELSIŃSKA FUNDACJA
PRAW CZŁOWIEKA

Warsaw, 18 May 2021

490/2021/PSP

Ms Ksenija Turković
The European Court of Human Rights
President of the First Section
Council of Europe
67075 Strasbourg-Cedex
France

Ref. *Advance Pharma Sp. z o.o. v. Poland*
Application no. 1469/20

Pursuant to the letters of Ms Renata Degener, the Section Registrar of the European Court of Human Rights (hereinafter also referred to as "ECtHR", "Court") dated 21 April 2021 and 30 April 2021, granting leave to make written submission to the Court by 20 May 2021, the Helsinki Foundation for Human Rights with its seat in Warsaw, Poland, would like to respectfully present its written comments on the case of Advance Pharma Sp. z o.o. against Poland (application no. 1469/20).

On behalf of the Helsinki Foundation for Human Rights,

HELSIŃSKA FUNDACJA PRAW CZŁOWIEKA ★ 16 ★ 00-490 Warszawa ul. Wiejska

Helsińska Fundacja Praw Człowieka
SEKRETARZ ZARZĄDU
Piotr Kładoczny

Helsińska Fundacja Praw Człowieka
PREZES ZARZĄDU
Danuta Przywara

00-490 Warszawa, ul. Wiejska 16, tel.: (48 22) 556-44-40, fax:(48 22) 556-44-50; e-mail: hfhr@hfhr.pl, www.hfhr.pl
NIP: 525-12-61-255, konto: PKO BP SA I O/Centrum 58 1020 1013 0000 0502 0002 9165, swift: BPKOPLPW

Warsaw, May 2021

WRITTEN COMMENTS

BY

THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

Advance Pharma Sp. z o.o. v. Poland

Application no. 1469/20

EXECUTIVE SUMMARY

- The case of *Advance Pharma Sp. z o.o. v. Poland* concerns one of the most important problems related to the situation of the judiciary in Poland, that is the status of judges of the Supreme Court appointed upon the motion of the reorganised National Council of Judiciary.
- In the context of Poland, the "right to a tribunal established by law", guaranteed under Article 6 ECHR, should be understood as requiring not only compliance with purely domestic sources of law, but also with the EU law.
- Violations of law in the process of appointments of the new judges of the Supreme Court are related primarily to the reorganisation of the National Council of Judiciary. Model in which the NCJ is *de facto* subordinated to the executive is inconsistent with the constitutional and EU standards.
- In case of certain appointments to the Supreme Court there also other irregularities, such as lack of counter-signature under the announcement on the vacancies in the Supreme Court and appointment of judges by the President despite suspension of the NCJ's motion by the Supreme Administrative Court.
- Violations of law in the process of appointment of the new judges of the Supreme Court were explicitly confirmed in the judgments issued by the Supreme Court and the Supreme Administrative Court which in turn were based on the case-law of the Court of Justice of the European Union.
- Despite all the controversies surrounding the reform of the NCJ, Polish authorities attempted to legitimise newly appointed judges by, among others, legislative changes and proceedings before the Constitutional Tribunal.

I. INTRODUCTION

1. This third party intervention is submitted by the Helsinki Foundation for Human Rights ("HFHR"), pursuant to the leave granted by the President of the Section on 21 April 2021.

2. The present written comments are divided into four sections (excluding introduction and conclusions). In the first one we analyse the question as to whether the notion of "tribunal established by law" under Article 6 § 1 ECHR should include also the requirement of compliance of the legal basis for establishment and functioning of court with the EU law. In the second section we briefly present circumstances in which the reform of the National Council of Judiciary was adopted. In the third section we discuss controversies surrounding appointment of certain judges of the Supreme Court in 2018. In the last part we discuss the controversies over legality of appointment of the new judges to the Supreme Court in the light of the case law of Polish courts.

II. THE NOTION OF "LAW" WITHIN THE MEANING OF ARTICLE 6 § 1 ECHR

3. According to Article 6 § 1 ECHR, "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". In *Guðmundur*

Andri Ástráðsson v. Iceland, the Court explained that "«law», within the meaning of Article 6 § 1 of the Convention, comprises not only legislation providing for the establishment and competence of judicial organs, but also any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular" (*Guðmundur Andri Ástráðsson v. Iceland* [GC], app. no. 26374/18, 1 December 2020, § 212). HFHR believes that the notion of «domestic law», referred to in the quoted paragraph, must, at least in the context of Poland, include also the EU law.

4. In the light of the Polish Constitution, the EU law is a part of national law. Primary sources of EU law have a status of international treaties ratified upon prior consent granted by statute and, in accordance with Article 91(2) of the Constitution, have precedence over statutes. This means that in case of conflict between statute and the primary source of EU law, courts must refuse to apply the former and apply the latter instead. The same concerns conflicts between secondary EU law and domestic law: "If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws." (Article 91.3 of the Constitution).

5. Application of the EU law by courts does not differ significantly from application of purely internal sources of law. Courts must interpret relevant EU law (in this context they may, and sometimes must, submit a preliminary reference to the CJEU) and apply it to the case at hand. Sometimes the EU law constitutes a sole basis for court's decision, in other situations it is used as a point of reference in interpretation of domestic law. Failure to apply EU law and application of domestic law inconsistent with the EU law may lead to compensatory liability of the State.

6. From that perspective, it would be difficult to maintain that the "law" within the meaning of Article 6 § 1 ECHR is limited to those acts of law, which were adopted by domestic organs. It is true that some judgments the Court underlined that the object of the "the right to a tribunal established by law" is to ensure "that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament" (see e.g. *Miracle Europe Kft. v. Hungary*, app. no. 57774/13, 12 January 2016, § 51 quoting *Zand v. Austria*, no. 7360/76, Commission's report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70-80). Nevertheless, HFHR believes that this passage cannot be interpreted too narrowly. The legal system in Poland, similarly as in many other European states, is multi-centric, which means that there is "the multitude of decision-making centres with regards to law-making and its interpretation"[1]. Therefore, many important issues are regulated not only in acts adopted by the Parliament, but also in "external" sources of law which sometimes, as presented above, have superior legal force to ordinary laws. The same concerns the question of independence of judiciary which, in the context of Poland, is guaranteed not only in the domestic law, but also in the EU law. Therefore, interpretation of Article 6 § 1 ECHR restricting the notion of "law" to acts adopted by domestic organs would prevent fulfilment of the purpose of the guarantee of a "right to tribunal established by law" , which is "to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers" (*Xero Flor w Polsce sp. z .o.o. v. Poland*, 7 May 2021, app. no. 4907/18, § 250).

7. In this context, HFHR would like to note that in the case of *Aristimuño Mendizabal v. France* (17 January 2006, app. no. 51431/99), took into account compliance with the Community law while assessing whether interference with the applicant's right to privacy had been carried out "in accordance with law" within the meaning of Article 8 § 2 ECHR. The case concerned the right of the applicant, Spanish citizen, to reside in France. The right of residence was guaranteed in the Community law and domestic provisions implementing it. The Court, referring among others to

[1] E. Łętowska, *Dialog i metody. Interpretacja w multicentrycznym systemie prawa, cz. I*, "Europejski Przegląd Sądowy" 2018, no. 11, p. 6)

the case law of the European Court of Justice, concluded that the failure of domestic authorities to issue the applicant a residence permit constituted an interference with her right to privacy which had not been carried out "in accordance with law" – either French or Community law ("le délai de plus de quatorze ans mis par les autorités françaises pour délivrer un titre de séjour à la requérante n'était pas prévu par la loi, que la «loi» en question soit française ou communautaire, et qu'il y a eu en l'espèce violation de l'article 8 de la Convention" - § 79).

8. HFHR is aware of the specificity of the abovementioned case. First, it concerned interpretation of Article 8 § 2 and not Article 6 § 1 ECHR. Second, even more importantly, the right at stake was guaranteed and extensively regulated in the Community law. Nevertheless, HFHR believes that it shows that the term "in accordance with law" and, different, but to some extent similar, notion "established by law", cannot be limited to purely domestic sources of law[2]. Requirement of the legal basis for interference or for functioning and composition of court reflects the principle of legality which is an inherent element of the principle of the rule of law (cf. *Xero Flor w Polsce sp. z .o.o. v. Poland*, § 282). This principle could be violated both when the state disregards its purely domestic law, as well as when it breaches relevant binding international/EU norms.

9. Moreover, HFHR would like to underline that even though EU rules concerning independence of judiciary are formulated in relatively broad terms, they were nevertheless subject of interpretation of the CJEU which derived from them many important legal standards. Therefore, the EU law can surely be a point of reference while assessing legality of given solutions adopted by the state in the area of organisation of the system of justice.

10. The question of relevance of the EU law for the interpretation of the notion of "established by law" (in the context of Poland) has been recently analysed by Professor Leszek Garlicki. He argued, first, that Article 6 § 1 ECHR does not use the notion of "domestic law" but simply "law", what means that this is a broader term, encompassing all relevant, binding legal norms. Moreover, such broader interpretation is justified by the necessity to ensure the effectiveness of the Convention. Secondly, L. Garlicki referred to the position of the EU law in the Polish legal system (see above). He concluded that "In the light of Polish constitutional terminology, it is permissible to consider that the legal norms contained in the EU treaties constitute - *mutatis mutandis* - also «part of the domestic legal order»".[3]

11. To conclude, even though the primary task of the Court is interpretation of the Convention, and not the EU law, the HFHR believes that if violation of the EU law had been stated confirmed in case law the CJEU and domestic courts, the Court should take it into account for the purpose of application of the test formulated in *Ástráðsson v. Iceland.* Different approach would be too narrow from the perspective of the object and purpose of Article 6 § 1 ECHR and would not be consistent with the character of the domestic legal system which is composed of legal norms adopted both by domestic organs, as well as the EU bodies.

III. THE REFORM OF THE NATIONAL COUNCIL OF JUDICIARY

12. The NCJ is a constitutional body whose main function is to safeguard the independence of the courts and judges in Poland. The most important responsibility of the NCJ is participation in the process of judicial appointments – according to Article 179 of the Constitution, judges are appointed by the President on the motion of the National Council of the Judiciary, what means that the President cannot appoint a person who is not nominated in the NCJ resolution.

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[2] Cf. C. Costello, *The Human Rights of Migrants and Refugees in European Law*, Oxford University Press 2016, p. 286; S. Greer, J. Gerards, R. Slowe, *Human Rights in the Council of Europe and the European Union*, Cambridge 2018, p. 203–204.

[3] L. Garlicki, *Trybunał Strasburski a kryzys polskiego sądownictwa. Uwagi na tle wyroku Europejskiego Trybunału Praw Człowieka z 19.12.2020 r., Ástráðsson przeciwko Islandii*, „Przegląd Sądowy" 2021, no. 4, p. 16.

13. Article 187(1) of the Constitution provides that the NCJ is composed of 25 members, including 15 judges chosen from amongst the judges of the SC, common courts, administrative courts and military courts. The Constitution does not provide explicitly that the judge-members of the NCJ must be elected by the judiciary. However, from the moment of the establishment of the NCJ in 1989 until 2018 the law provided that the judge-members are elected by other judges. This model of electing the NCJ members was consistent with the primary function of the NCJ, that is safeguarding the independence of courts and its role as a forum for exchanging opinions between branches of state power[4].

14. In December 2017, Sejm adopted a law which significantly amended the procedure of electing the judge-members of the NCJ.[5] As from the new law's entry into force, the judge-members are elected by the Sejm from a pool of candidates proposed by groups of 2,000 citizens or 25 judges. Moreover, the law provided premature termination of the term of office of incumbent judicial members of the NCJ – question which is now subject of the Court's consideration in the case of *Grzęda v. Poland* (app. no. 43572/18).

15. The declared purpose of the said law was implementation of the Constitutional Tribunal's judgment of 20 June 2017 (ref. no. K 5/17). The Tribunal ruled therein that the procedure of election of judicial members of NCJ was unconstitutional because it differentiated electoral rights of various categories of judges. In particular, according to the Tribunal, the law discriminated judges of lower courts as compared with those of higher courts. In addition, the Constitutional Tribunal (hereinafter: "CT") recognized as unconstitutional statutory provisions according to which the term of office of elected judicial members of NCJ had an individualized character. According to the Tribunal, the Constitution required introduction of joint length of term of office. However, the judgment did not specify the manner of its implementation. In particular, the Tribunal held that the Constitution does not require that judicial members of NCJ are elected by the judiciary, but at the same time – does not prohibit adoption of such solution provided that all judges are treated equally in the election process.

16. The discussed ruling may raise serious controversies, not only because of highly questionable interpretation of the Constitution presented in it, but also due to participation in the adjudicating bench of two unlawfully elected persons (see also: para. 17 of this opinion). Moreover, it is worth to note in the past that the CT itself stated that the Constitution requires that the judicial members of NCJ are elected by the judiciary[6] and this manner of election was in force from the moment of establishment of the NCJ in 1989 until 2018, what was consistent with the character of NCJ as a forum for cooperation between all three powers in the state. That is because in order to ensure that such cooperation takes place, the NCJ must be composed of persons who represent each power. If judges were elected to the NCJ by the Parliament or appointed by the President, they could not be considered as representatives of the judiciary but rather of the body which elected them. Also the Court, referring to the opinion of the Venice Commission, held that the mere fact that only judges are eligible to be elected to some position does not render this position an organ of judicial self-government if the election belongs to the competence of the Parliament (*Miracle Europe Kft v. Hungary*, 12 January 2016, app. no. 57774/13, § 61).

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[4] See, e.g., W. Brzozowski, *Niezależność konstytucyjnego organu państwa i jej ochrona*, Warszawa 2016, p. 63.

[5] Ustawa z dnia 8 grudnia 2017 r. o zmianie ustawy of Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Journal of Laws 2018, item 3).

[6] Judgment of the Constitutional Tribunal of 18 July 2007, ref. no. K 25/07.

17. The new law has raised serious controversies. It was argued that it was unconstitutional and threatened the judicial independence.[7] However, the CT, in its judgment of 25 March 2019,[8] ruled that the new law was consistent with the Constitution because the Constitution does not establish any particular model of electing the judge-members of the NCJ. However, the judgment in question was issued by a panel of the CT composed of, among others, one person elected in 2017 to the seat which was occupied by a judge lawfully elected in 2015 from whom the President did not take an oath. In this context, HFHR notes that in the recent judgment in the case of *Xero Flor w Polsce sp. z o.o. v. Poland*, the Court, referring to the case law of the Polish CT, confirmed that election of three persons in December 2015 was unlawful and that that participation of an unlawfully elected person in the CT's panel which discontinued the proceedings concerning constitutional complaint of the individual, violated the right to a "tribunal established by law". HFHR believes that the same conclusion must apply to persons who were elected for the seats vacated by two judges elected in December 2015 who died before the expiration of their term of office. Moreover, even though a judgment concerning the reform of the NCJ had not been issued in the proceedings initiated by a constitutional complaint but by an abstract motions of the NCJ and group of senators, HFHR believes that the Court should take into account the fact that it was issued with violation of law.

18. The concerns over the lawfulness of actions taken by the new NCJ were further strengthened by the judgment of the Court of Justice of the European Union ("CJEU") of 19 November 2019[9] concerning the NCJ and the Disciplinary Chamber of the SC. The CJEU underlined that the manner of judicial appointments is a factor to be taken into account while assessing the independence of courts. The mere fact that judges are appointed by the President does not violate the principle of judicial independence, provided that "... the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges..." (§§ 133-134). According to the CJEU, the participation of the NCJ in the process of judicial appointments "may contribute to making that process more objective" by limiting discretionary powers of the President, but only if the NCJ is "sufficiently independent" (§§ 137-138).

19. Regardless of the concerns caused by the changes introduced by the 2017 "reform", further controversy has arisen regarding the lawfulness of the election of one of the NCJ members. The controversy results from the fact that some judges stated that they had withdrawn their support for a candidate before the candidate was elected to the NCJ by a vote of the Sejm[10].

IV. ELECTION OF JUDGES TO THE SUPREME COURT IN 2018

20. There are two additional factors that may affect legality of certain appointments of Supreme Court judges.

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[7] See, e.g., K. Grajewski, *Krajowa Rada Sądownictwa w świetle przepisów ustawy z dnia 8 grudnia 2017 r. – zagadnienia podstawowe*, "Krajowa Rada Sądownictwa" (1)2018, pp. 21–34; (last access: 18.12.2019); T. Zalasiński, *Opinia prawna w sprawie oceny konstytucyjności prezydenckiego projektu ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa oraz o zmianie niektórych innych ustaw, zawartego w druku sejmowym nr 2002/VIII kadencja*, http://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/KRS-opinia%20dr%20Zalsinskiego.pdf (accessed on: 16.05.2021); W. Sadurski, *Bad Response to a Tragic Choice: the Case of Polish Council of the Judiciary*, "Vefassungsblog", 16 April 2018, https://verfassungsblog.de/bad-response-to-a-tragic-choice-the-case-of-polish-council-of-the-judiciary/ (accessed on: 16.05.2021).

[8] Judgment of the CT of 25.03.2019, case no. K 12/18.

[9] Judgment of the CJEU of 19.11.2019 in joined cases C□585/18, C□624/18 and C□625/18, *A.K. and Others*.

[10] See, e.g., M. Kryszkiewicz, *Sędziowskie nominacje do podważenia. Przez procedurę wyboru jednego z członków KRS*, Gazetaprawna.pl, https://prawo.gazetaprawna.pl/artykuly/1425714,krs-nawacki-wycofanie-poparcia-dla-kandydatury-nominacje-sedziowskie.html (accessed on: 16.05.2021).

21. First, pursuant to Article 31 § 1 of the Supreme Court Act, the process of SC judicial appointments is initiated by the publication of the President's notice of a vacancy on the SC bench. In May 2018 the President issued the notice but without counter-signature of the Prime Minister. According to many legal scholars, that was inconsistent with Article 144(2) of the Constitution that provides as follows: "Official Acts of the President shall require, for their validity, the signature of the Prime Minister who, by such signature, accepts responsibility therefor to the Sejm". Some scholars argued that this defect rendered the whole appointment process invalid.[11] The legal necessity of counter-signature of the President's notice was subsequently confirmed in the judgments of the Supreme Court and the Supreme Administrative Court (see below, paras. 25 and 28).

22. Second, in case of certain appointments, the President ignored the decisions of Supreme Administrative Court ("SAC") which suspended the enforceability of the NCJ's resolutions nominating candidates for judicial appointments. A failure to observe SAC decisions may be perceived as inconsistent with Article 179 of the Constitution which provides that the President may appoint only a candidate nominated by the NCJ as this constitutional provision should reasonably be interpreted as requiring the nomination to be expressed in a final and *enforceable* resolution of the NCJ. It is true that in the abovementioned K 12/18 judgment (issued after the said appointments to the SC were made), the CT ruled that provisions authorising the SAC to review the legality of the NCJ resolutions concerning nominations for judicial appointments were unconstitutional, however, as already mentioned, the said judgment was issued with participation of unlawfully elected person. Still, the judgment was implemented by the legislator by introducing an amendment[12] which explicitly excluded access to court in cases concerning NCJ resolutions on the nominations for the appointment to the positions in the Supreme Court. Moreover, the new law provided that pending proceedings in such cases shall be *ex lege* discontinued. However, in the case judgment of 2 March 2021[13] the CJEU ruled that that if such provisions "have had the specific effects of preventing the Court from ruling on questions referred for a preliminary ruling such as those put to it by that court and of precluding any possibility of a national court repeating in the future questions similar to those questions" and/or they are capable "giving rise to legitimate doubts, in the minds of subjects of the law" about independence and impartiality of the judges appointed, the EU law obliges courts to disapply them. Subsequently, the SAC reviewed the legality of the NCJ's resolutions (see below, para 28).

V. THE REVIEW OF LEGALITY OF APPOINTMENTS

23. In the section III and IV we briefly presented the most fundamental concerns about the new model of the NCJ and the legality of appointments upon the motions submitted by the reorganised NCJ. What is important, these concerns were subsequently confirmed in the case law of the Supreme Court and the SAC.

24. In the resolution of 23 January 2020 (ref. no. BSA I-4110-1/2020) the Supreme Court held that the panel of the Supreme Court which includes a person appointed upon the motion of the reorganised NCJ is "unduly appointed" within the meaning of the Code of Criminal Procedure and "unlawful" within the meaning of the Code of Civil Procedure. It is worth to underline that such composition of the Supreme Court's panel is always "unlawful" or "unduly appointed" (although

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[11] See, e.g., M. Florczak-Wątor, T. Zalasiński, *Opinia prawna w sprawie zgodności z Konstytucją obwieszczenia Prezydenta Rzeczypospolitej Polskiej z dnia 24 maja 2018 r. nr 127.1.2018 o wolnych stanowiskach sędziego w Sądzie Najwyższym, wydanego bez kontrasygnaty Prezesa Rady Ministrów*, https://www.iustitia.pl/images/2018_09_03_Opinia_prawna.pdf (accessed on: 16.05.2021).

[12] The Act of 26 April 2019 on amending the Act on the National Council of Judiciary and the Act on the Organisation of Common Courts (Journal of Laws of 2019, item 914).

[13] Judgment of the CJEU of 2.03.2021 in case C-824/18, *A.B., C.D., E.F., G.H., I.J. v Krajowa Rada Sądownictwa*.

the Supreme Court limited retroactive effectiveness of the resolution), regardless of, for example, impact of such irregularity on the outcome of the case. Participation of a person appointed in such a procedure to ordinary court also may turn the bench "unduly appointed" or "unlawful", but only if "the defective appointment causes, under specific circumstances, a breach of the standards of independence within the meaning of Article 45(1) of the Constitution of the Republic of Poland, 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 ".[14]

25. In the reasoning to the resolution, the Supreme Court held, among others, that the new model of appointment of judges-members of the NCJ was inconsistent with the Constitution. It noted, that under the after the reform "Judges – members of the National Council for the Judiciary by political appointment have no legitimacy as representatives of the judicial community, who should have authority and stay independent of political influence". As a result, the judiciary had lost its impact on the functioning of the NCJ and, consequently, on the course of procedure of nomination of candidates for appointments, what is inconsistent with the Constitution. The Supreme Court referred also to the legal doubts concerning termination of term of office of previous members of the NCJ. Moreover, the Supreme Court noted that between 4 July 2018 and 21 November 2018 meetings of the National Council of Judiciary were held without presence of the First President of the Supreme Court who, in this period, was moved into the state of retirement on the basis of the law which, as was later found by the CJEU, was inconsistent with the EU law. Although she was later reinstated to her office, her absence in that period affected regularity of the NCJ works. The Supreme Court referred also to other irregularities mentioned in the section IV of this opinion, namely lack of counter-signature on the announcement of the President on the vacancies in the Supreme Court and the fact that the President ignored the decisions of the SAC suspending the effectiveness of the NCJ's resolutions.

26. With regards to the impact of such irregularities on the legality of judicial appointments, the Supreme Court held that: "Persons named in the lists of recommendations drawn up in a defective procedure of appointment for judicial positions cannot be considered to have been candidates for office duly presented to the President of the Republic of Poland whom the President of the Republic of Poland is competent to appoint to the office." At the same time, the Supreme Court did not state that such persons are not judges at all. However, it was necessary to analyse whether they can "exercise judicial powers without infringing on the requirement of impartiality and independence of a court which administers justice". According to the Supreme Court, irregularities in the appointment procedure may undermine the trust of the society to the judiciary. This concerns also new judges appointed in the politicised process. Moreover, actions taken by the reorganised NCJ may be questioned, what could affect also the acts of appointment of judges: "If acts of the National Council for the Judiciary are found to be defective, the authority of persons appointed to the office of a judge could be reviewed, opening the door to contesting the legality of decisions of such persons." The Supreme Court underlined that the mere fact that given judge was appointed by the president "does not lead to a permanent and incontestable presumption that the criteria of impartiality and independence will be met in every case examined by a court with the participation of such judge." This concerns in particular a situation in which the appointment procedure was flawed. Therefore, the Supreme Court held that under Article 45 of the Constitution, Article 47 of the Charter of Fundamental Rights and Article 6 ECHR, courts must be entitled to review whether in a given case judges satisfy standards of independence and impartiality. The Supreme Court, referring to the judgment of the CJEU and its earlier case law,

[14] All quotations come from the official translation of the resolution into English available on the Supreme Court's website: http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf (accessed on: 16.05.2021).

noted that the process of judicial appointments is a key factor in making of such determination. However, it underlined that due to different functions and different position within the legal system of Poland of the Supreme Court and other types of courts (ordinary and military), the effects of appointment in a flawed procedure are different. The procedure of appointments to the Supreme Court must observe the highest standards. Moreover, new judges themselves must have been aware of irregularities in the appointment procedure. Therefore, their participation in adjudication always turn the panel "unlawful" or "unduly appointed" within the meaning of procedural provisions. As already mentioned, the position of the Supreme Court towards new judges of ordinary and military courts was more nuanced.

27. Therefore, the Supreme Court did not held that due to unconstitutionality of the new model of the NCJ and other irregularities in the appointment procedure newly appointed persons are not judges at all. Neither did it rule that judgments issued by them are legally non-existent – finding that ruling was issued by unlawful/unduly appointed panel gives parties only a right to request reopening of the proceedings. However, from the perspective of Article 6 ECHR and the "right to tribunal established by law" it is crucial that the Supreme Court clearly found that the new judges of the Supreme Court were appointed with violation of law. What is more, it held that these irregularities were so fundamental that they had an impact on the perception of judges as independent and impartial by the general public. As a side note, it is worth to mention that in the decision of 12 April 2021 (ref, no. I NZP 1/21) the Chamber of Extraordinary Control and Public Affairs held that as a result of the judgment of the CT in the case U 2/20 (see below, para 30) the Supreme Court's resolution is no longer valid and effective. However, one should note that the said decision was issued by judges whose status can be questioned in the light of the Supreme Court's resolution and moreover the judgment of the CT to which it referred to was issued with participation of unlawfully elected persons.

28. Recently, irregularities in the process of appointment of certain judges of the Supreme Court were also confirmed by the Supreme Administrative Court. In five judgments issued on 6 May 2021 (ref. nos. II GOK 2/18, II GOK 3/18, II GOK 5/18, II GOK 6/18, II GOK 7/18), the SAC quashed two resolutions of the NCJ on the basis of which the President appointed seven judges to the Civil Chamber of the Supreme Court and one judge to the Criminal Chamber of the Supreme Court. The Supreme Administrative Court, referring to, among others, case law of the CJEU, held that "the current National Council of the Judiciary does not provide sufficient guarantees of independence from the legislative and executive authorities in the procedure of judicial appointments." It noted that among members of the NCJ there are court presidents appointed by the Minister of Justice after dismissal of previous presidents. Moreover, after the reforms, court presidents may be dismissed by the Minister of Justice on very vague and broadly formulated grounds. Therefore, they may be perceived as subordinated to the Minister of Justice who himself is also member of the NCJ. Furthermore, reforms of the composition of the NCJ were motivated by the intent to subject the Council to the control of the executive. In these circumstances, the NCJ is unable to carry out its constitutional functions effectively. The SAC noted also lack of counter-signature under the presidential announcement concerning vacancies in the Supreme Court (see above, para 21) and actions taken by the NCJ in order to prevent the SAC from reviewing legality of its resolutions. In this context, the SAC noted that the NCJ submitted its resolutions to the President, even though it was aware of the fact that the resolutions were challenged to the SAC which suspended their enforceability. All in all, the SAC ruled that the challenged resolutions were unlawful and decided to quash them. At the same time, it underlined that the consequences of its rulings do not affect the validity and effectiveness of acts of appointment issued by the President. That is because such acts are not subject to the judicial review and cannot be quashed.

29. Therefore, even though the Supreme Administrative Court did not invalidate the acts of appointment of judges, it found that the process of appointments was fundamentally flawed. The fact that SAC quashed resolutions of the NCJ undoubtedly may affect legitimacy of the said group of the Supreme Court judges. The mere fact that currently in Poland there is no procedure for the review of appointments of judges which could lead to their invalidation, does not mean that the irregularities in the process of appointments, found by the two the most important Polish courts, are completely irrelevant. Such interpretation would be inconsistent with the principle of legality as it would allow the public organs to violate the law in the process of appointments without any consequences for the validity of their actions.

30. HFHR believes that while analysing the legality of appointments of the new judges of the Supreme Court, the Court should also note the actions taken by the Government which were aimed at legitimisation of the said group of judges. First, as already mentioned, the Parliament adopted the law which excluded the competence of courts to review legality of the NCJ resolutions concerning nominations for the appointments to the Supreme Court. Second, in December 2019 the Parliament adopted the so-called "Muzzle law" [15] which explicitly provided that actions aimed at questioning of effectiveness of judicial appointment or "the mandate of a constitutional body of the Republic of Poland" constitute disciplinary offence (Article 1 point 32 of the Muzzle Law). Therefore, the law prevents judges from applying the standards developed in the case-law of the CJEU and the Supreme Court to assess, for example, whether judges adjudicating in the first instance proceedings satisfied the criteria stemming from the right to have one's case heard by an independent and impartial tribunal established by law. Such provisions were negatively assessed by, among others, the Venice Commission, according to which: "These provisions, taken together, significantly curtail the possibility to examine the question of institutional independence of Polish courts by those courts themselves. This approach raises issues under Article 6 § 1 of the ECtHR, since judicial review should involve examination of all relevant aspects of the independence of the tribunal, including institutional ones. (...) Furthermore, the above provisions, taken together, aim at nullifying the effects of the CJEU ruling."[16] Third, organs of the executive and the legislative attempted to use the CT to prevent courts from assessment of independence and impartiality of incorrectly appointed judges. Already one day before announcement of the Supreme Court's resolution concerning status of judges appointed upon the motions of the reorganised NCJ was inconsistent with the Constitution, the Marshal of the Sejm applied to the CT for settling the alleged dispute over competence between the President, the Parliament and the Supreme Court concerning making legal changes in the sphere of organisation of the judiciary and assessment of the validity of judicial appointments. On 28 January 2020 the CT, in the full bench composed with participation of three unlawfully elected persons, issued a decision in which it suspended the effectiveness of the Supreme Court's resolution.[17] Subsequently, on 21 April 2020, the CT held that the Supreme Court does not have a competence to change the law in the sphere of judiciary via interpretation and it does not have a power to assess validity of judicial appointments.[18] Moreover, in February 2020 the Prime Minister applied to the CT to declare that the abovementioned resolution of the Supreme Court concerning status of judges appointed upon the

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[15] The Act of 20 December 2019 on amending the Law on the organization of common courts, the Act on the Supreme Court and certain other statutes (Journal of Laws of 2020, item 190).

[16] Joint urgent opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (Dgi) of the Council of Europe on amendments to the Law on the Common Courts, the Law on the Supreme Court, and some other laws, 16 January 2020, CDL-PI(2020)002, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)002-e (accessed on: 16.05.2021) – paras. 36-37.

[17] Decision of the Constitutional Tribunal of 28 January 2020, ref. no. Kpt 1/20.

[18] Decision of the Constitutional Tribunal of 21 April 2020, ref. no. Kpt 1/20.

motions of the reorganised NCJ was inconsistent with the Constitution. On 20 April 2020 the CT ruled that the said resolution indeed violated the Constitution.[19] However, the ruling was issued in a full bench, with participation of two unlawfully elected persons. Moreover, one may argue that the CT did not have a jurisdiction to deal with that case because the resolution, as an act of application of law, cannot be the subject of the constitutional review before the CT, although the CT held that the resolution was not merely an act of application of law, but constituted a normative act. Moreover, recently the Prime Minister submitted a motion to the CT in which he challenged constitutionality of, among others, Article 19(1) of the Treaty on the European Union "understood as authorising the court to review the independence of judges appointed by the President of the Republic of Poland and to review the resolution of the National Council of the Judiciary on submitting a motion to the President of the Republic of Poland to appoint a judge"[20]. It is also worth to note, that in March and June 2020 the CT ruled that the provisions of the Code of Criminal Procedure and the Code of Civil Procedure violated the Constitution insofar as they allowed for the review by the court of a motion for recusal of a judge motivated by the irregularities in his/her appointment.[21] However, it must be noted, that the proceedings before the CT in these cases were initiated by legal questions submitted by panels of the Supreme Court composed of judges appointed upon the motions of the reorganised NCJ.

VI. CONCLUSIONS

31. To conclude, the HFHR believes that the new judges of the Supreme Court were appointed with violation of law. These violations concerned provisions of both domestic law, as well as EU law. The most important of them was the submission of a motion for appointment by the reorganised NCJ which, in its current composition, is not consistent with the constitutional and EU standards of judicial independence. In case of some judges of the Supreme Court, there were also additional violations, such as lack of counter-signature under the announcement of vacancies in the Supreme Court issued by the President and the fact judges were appointed despite suspension of the NCJ's resolution by the Supreme Administrative Court. What is important, the fact that the process of judicial appointment of the said group of judges did not conform to the requirements of the Constitution and the EU law was explicitly confirmed in the case-law of the Supreme Court and the Supreme Administrative Court.

Helsińska Fundacja Praw Człowieka
SEKRETARZ ZARZĄDU
Piotr Kładoczny

HELSIŃSKA FUNDACJA PRAW CZŁOWIEKA
HR
00-377 Warszawa, ul. Wiejska 16

Helsińska Fundacja Praw Człowieka
PREZES ZARZĄDU
Danuta Przywara

[19] Judgment of the Constitutional Tribunal of 20 April 2020, ref. no. U 2/20.
[20] The case is registered under ref. no. K 3/21.
[21] Judgment of the Constitutional Tribunal of 4 March 2020, ref. no. P 22/19; judgment of the Constitutional Tribunal of 2 June 2020, ref. no. P 13/19.