Warsaw, 23 May 2023

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TO:

The Secretary of the Committee of Ministers

Council of Europe

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COMMUNICATION FROM THE HELSINKI FOUNDATION FOR HUMAN RIGHTS CONCERNING

THE EXECUTION OF ECtHR JUDGMENT IN THE CASES

RECZKOWICZ V. POLAND* (APPLICATION NO. 43447/19), *DOLIŃSKA-FICEK AND OZIMEK V. POLAND (APPLICATIONS NOS. 49868/19 AND 57511/19), ADVANCE PHARMA SP. Z O.O. V. POLAND (APPLICATION NO. 1469/20)

To the attention of:

1. Mr. Jan Sobczak

Plenipotentiary of the Minister of Foreign Affairs for cases and procedures before the European Court of Human Rights

Agent of the Polish Government

2. Mr. Marcin Wiącek

Commissioner for Human Rights

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EXECUTIVE SUMMARY:

- In the judgments in the cases of *Reczkowicz v. Poland* (application no. 43447/19), the *Dolińska-Ficek and Ozimek v. Poland,* and *Advance Pharma sp. z o.o. v. Poland* (application no. 1469/20) the Court found a violation of Article 6 § 1 ECHR due to the unlawful composition of the panels of the Supreme Court. The violation was caused by the fact that judges who participated in panels were appointed upon the request of the National Council of Judiciary which, after the reform of 2017, has lost its independence from the executive and legislative powers.
- The domestic authorities have not implemented the ECtHR's judgment. In particular, they did not change the mode of election of members of the National Council of Judiciary to restore the independence of this body.
- On 10 March 2022, the Constitutional Tribunal issued a judgment (no. K 7/21) declaring that norms that the ECtHR derived from Article 6 of the Convention and used as a legal basis of the judgment in the *Reczkowicz* and the subsequent Polish cases were inconsistent with the Constitution.
- On 15 July 2022, the new amendment to the Supreme Court Act entered into force. The law abolished the Disciplinary Chamber and replaced it with the Professional Liability Chamber. However, the new Chamber itself is composed of 11 judges, 6 out of whom were elected upon the request of unlawfully constituted NCJ.
- On 13 January 2023, the Sejm adopted a new act amending the Act on the Supreme Act and certain other acts. The new law provides, among others, the transfer of disciplinary cases concerning judges to the jurisdiction of the Supreme Administrative Court as well as modifies tests for verification of independence and impartiality of judges. However, the act was challenged by the President to the Constitutional Tribunal and so it has not entered into force yet.

RECOMMENDATIONS:

- The independence of the National Council of Judiciary must be restored. It is necessary to reform the mode of election of judicial members of the NCJ in such a way as to ensure that those members are truly representatives of the judiciary. The term of office of members elected in a procedure inconsistent with the Constitution and the international standards should be terminated.
- The law must address the status of judges appointed at the request of the 'new' NCJ. Such regulation should be consistent with international standards and ensure respect for legal certainty. The optimal solution would be to introduce a fair procedure for individual verification of judicial appointments, which would be conducted before an independent NCJ and an independent court.
- Procedural means of protecting the right to a court established by law should be provided to the parties to the proceedings. Thus, there should be effective mechanisms for challenging the legality of a judge's appointment in a motion to exclude him or her and in appeals against rulings issued by judges so appointed.
- Judges who review the independence and impartiality of unlawfully appointed persons, must not face disciplinary charges.
- All state authorities must accept that all final judgments of the ECtHR must be duly implemented and cannot be questioned in domestic proceedings. Public authorities must not challenge the validity of the ECtHR's judgments via motions to the Constitutional Tribunal.

1. Introduction

1. The Helsinki Foundation for Human Rights ("HFHR") in Warsaw respectfully submits this communication to the Committee of Ministers of the Council of Europe ("CoM") concerning the execution of the judgment issued by the European Court of Human Rights ("ECtHR") in the case of *Reczkowicz v. Poland* (app. no. 43447/19).

2. The HFHR is a Polish non-governmental organization established in 1989. Its principal objectives include the promotion of human rights, the rule of law, and the development of an open society in Poland and abroad. The HFHR actively disseminates human rights standards based on the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, "ECHR") and works to ensure the proper execution of ECtHR judgments. One of the areas of the HFHR's activity is the protection of the rule of law. In this regard, the HFHR submitted, among others, an *amicus curiae* opinion to the ECtHR in the case of *Advance Pharma sp. z o.o. v. Poland* (app. no. 1469/20), which concerned relatively similar legal problems to those which were the subject of consideration of the Court in the *Reczkowicz v. Poland* case.

3. This submission concerns only aspects related to the implementation of judgment on the general level. At the same time, this submission is limited only to those matters that we had not discussed in our previous submission dated 14 October 2022. Therefore, we will focus mostly on the possible ways to regulate the status of unlawfully appointed judges.

2. Judgment of the ECtHRs

4. The applicant in the *Reczkowicz* case was a barrister on whom the disciplinary courts of the bar association imposed a disciplinary penalty. The applicant filed a cassation complaint to the Supreme Court, but the Disciplinary Chamber dismissed it. In this situation, the applicant turned to the European Court of Human Rights. She alleged violation of Article 6 § 1 of the ECHR on the ground that the Disciplinary Chamber which adjudicated in her case was not an "independent and impartial tribunal established by law".

5. The ECtHR ruled that there was a violation of a right to a tribunal established by law guaranteed under Article 6 § 1 ECHR. The Court, referring to the landmark Grand Chamber's ruling in the *Ástráðsson v. Iceland* case (1 December 2020, app. no. 26374/18) held that judges of the Disciplinary Chamber were appointed with manifest violation of domestic law. This violation was caused by the fact that they were appointed by the President upon the motion of the reorganized National Council of Judiciary which, after changes that took place in 2018, ceased to be an independent and lawful body. In this regard, the Court relied on the findings of the Polish Supreme Court and the Court of Justice of the European Union. The judgment became final on 22 November 2021.

6. The Court presented a similar approach to the recent judicial appointments in Poland in the subsequent cases of *Dolińska-Ficek and Ozimek v. Poland* and *Advance Pharma sp. z o.o. v. Poland*. The former concerned newly appointed judges of the Chamber of Extraordinary Review and Public Affairs, while the latter – judges of the Civil Chamber. In both of them, the Court held that there was a violation of the right of a tribunal established by law due to the fact of appointment upon the motion of the unlawfully constituted NCJ and despite the stay of the NCJ resolution pending judicial review. In the *Advance Pharma* the Court aptly noted "The deficiencies of that procedure as identified in the present case in respect of the newly appointed judges of the Supreme Court's Civil Chamber, and in *Reczkowicz* (cited above) in respect of the Disciplinary Chamber of that court, and *Dolińska-Ficek and Ozimek* (cited above) in respect of the Chamber of Extraordinary Review and Public Affairs have already adversely affected existing appointments and are capable of systematically affecting the future appointments of judges, not only to the other chambers of the Supreme Court but also to the ordinary, military and administrative courts" (§ 364).

3. Current situation in the National Council of Judiciary

7. Violations of Article 6 of the Convention in the *Reczkowicz* case and two subsequent cases were caused by the unlawful composition of the National Council of Judiciary. Therefore, to eliminate the root of this problem, the legislator would have to change the model of the election of judicial members of the NCJ and restore the independence of this organ. The necessity to adopt such reform was noted also by the Court in *Dolińska-Ficek and Ozimek* and *Advance Pharma*: "It is inherent in the Court's findings that the violation of the applicants' rights originated in the amendments to Polish legislation which deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges so appointed. In this situation and the interests of the rule of law and the principles of the separation of powers and the independence of the judiciary, rapid remedial action on the part of the Polish State is required" (*Dolińska-Ficek and Ozimek*, § 368; *Advance Pharma*, § 364).

8. Unfortunately, Polish authorities did not adopt such a law and so the flawed system of election of judicial members of the NCJ remains in force. On 12 May 2022, acting based on these provisions, the Sejm elected 15 judges to the National Council of Judiciary (Official Journal Monitor Polski of 2022, item 485). 11 members of NCJ of the previous term were re-elected (that is Mrs. Katarzyna Chmura, Mr. Dariusz Drajewicz, Mr. Grzegorz Furmankiewicz, Mr. Marek Jaskulski, Mrs. Joanna Kołodziej-Michałowicz, Mrs. Ewa Łąpińska, Mr. Zbigniew Łupina, Mr. Maciej Nawacki, Mrs. Dagmara Pawełczyk-Woicka, Mr. Rafał Puchalski, Mr. Paweł Styrna) and 4 others elected for the first time (Mrs. Anna

Dalkowska, Mrs. Irena Bochniak, Mrs Krystyna Morawa-Fryźlewicz, Mr. Stanisław Zdun). Mrs. Dagmara Pawełczyk-Woicka was elected President of the Council.[1]

9. Therefore, the NCJ continues to function in unlawful composition which negatively affects the legality of judicial appointments made upon its motions.

10. Judges who review circumstances related to the appointment of judges upon the request of the new NCJ to safeguard individuals' right to an independent and impartial tribunal established by law face disciplinary charges and sanctions. The legal basis for such disciplinary sanctions is provided in Article 107 § 1 of the Act on the organization of common courts, introduced in a controversial law adopted in December 2019 (so-called "Muzzle Law")[2]. According to this provision, actions aimed at questioning the effectiveness of judicial appointment or "the mandate of a constitutional body of the Republic of Poland" constitute a disciplinary offense. In the judgment in the case of *Juszczyszyn v. Poland* the Court ruled that disciplinary suspension of the judge for taking actions aimed at verification of legality of composition of the NCJ and of appointment of the lower instance judge violated Article 8 and Article 18 taken in conjunction with Article 8 of the Convention.[3]

4. Adoption of the new amendment to the Supreme Court Act

11. On 15 July 2022 the new act amending the Act on the Supreme Court and other acts entered into force.[4] This act was discussed in detail in our previous submission.

12. On 13 January 2023 Sejm enacted a new act on amending the Act on the Supreme Court and other acts (hereinafter: 'Act of 13 January 2023').[5] This act has not yet entered into force because the President sent it to the Constitutional Tribunal for the review of its constitutionality before signing it.[6] The most important changes introduced in the said act are discussed below.

13. One of the main changes provided in the Act of 13 January 2023 concerns the disciplinary proceedings of judges. From the moment of entry into force of the new regulations, disciplinary and immunity cases of judges of ordinary courts, military courts and the Supreme Court would be decided by the Supreme Administrative Court (hereinafter: 'SAC') and not, as at present, by the Chamber of Professional Responsibility of the Supreme Court. The Supreme Administrative Court would decide disciplinary cases of Supreme Court judges in the first instance by a three-member panel and in the second instance by a five-member panel. In the case of common and military court judges, on the

[1] See also: M. Wolny, M. Kalisz, M. Szuleka, *The cost of a "reform". The work of the justice system, 2015-2022*, Helsinki Foundation for Human Rights 2022, p. 37-39, https://hfhr.pl/upload/2022/12/cost-of-a-reform-report.pdf.
[2] The Act of 20 December 2019 amending the Act - Law on the System of Common Courts, the Act on the Supreme Court and some other acts (Journal of Laws of 2020, item 190, as amended).
[3] European Court of Human Rights, *Juszczyszyn v. Poland*, 6 October 2022, app. no. 35599/20.
[4] The Act of 9 June 2022 amending the Act on the Supreme Court and other acts (Journal of Laws of 2022, item 1259).
[5] The Act of 13 January 2023 amending the Act on the Supreme Court and other acts.
[6] The case is registered under number: Kp 1/23.

other hand, the SAC will be the disciplinary court in some cases in the first instance and in all cases in the second instance. The SAC is also to take over the competence to resolve the immunity cases of judges of all courts. There may be doubts, however, as to as to whether such an extension of the SAC's jurisdiction is compatible with Article 184 of the Constitution, according to which the main task of this court is to exercise 'control over the performance of public administration'.

14. Moreover, with regard to substantive grounds for disciplinary responsibility, the Act of 13 January 2023 explicitly provides that contents of judicial decisions as well as an examination of a judge's compliance with the requirements of independence and impartiality and establishment under the law do not constitute disciplinary offences. However, the said law does not repeal the disciplinary offences introduced by the so-called Muzzle Law and by the power of the 2022 amendment. These include three new types of disciplinary torts involving, among other things, 'actions questioning the existence of a judge's official relationship, the effectiveness of a judge's appointment, or the legitimacy of a constitutional organ of the Republic of Poland'. In addition, the Act leaves in place the disciplinary tort of denial of justice, introduced in 2022.

15. The Act of 13 January 2023 provides also for changes concerning the so-called 'independence and impartiality test' of a judge. This is a relatively new institution, which was introduced by a presidential amendment to the Act on the Supreme Court in July 2022. It is intended to allow for an examination of a judge's compliance with independence and impartiality requirements, taking into account the circumstances surrounding his or her appointment and his or her conduct after the appointment, if in the circumstances of a given case, they may lead to a breach of the independence or impartiality standard affecting the outcome of the case. The possibility of such tests is provided for all judges and, under the current legislation, a request for such a test may be made by a party to the proceedings conducted by the judge concerned. According to the Act of 13 January 2023, a test of a judge's impartiality could be initiated not only by a party to the proceedings but also *ex officio* by the court. The amendment also supplements the possibility of examining the requirements of independence and impartiality during the test with the criterion of the establishment of the court 'by law' (see below, § 36).

5. Decision of the Committee of Ministers.

16. On 8 December 2022 the Committee of Ministers adopted a decision concerning the implementation of the *Reczkowicz* group as well as the judgment in *Broda and Bojara v. Poland*[7].

17. With regards to the general measures in the *Reczkowicz* group the Committee of Ministers urged Polish authorities 'to introduce legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ, thus securing the independence of the NCJ; and to address the status of all judges appointed in deficient procedures upon a motion of the NCJ as constituted after March 2018 and of decisions issued with their

[7] European Court of Hunan Rights, *Broda and Bojara v. Poland*, 29 June 2021, app. nos. 26691/18 and 27367/18.

participation'. Moreover, the Committee called Polish authorities 'to ensure that courts are entitled to: effectively review resolutions of the NCJ proposing judicial appointments to the President of Poland, including of SC judges; and to decide on the legitimacy of judicial appointments, independence and impartiality of judges without any restrictions or sanctions for applying the Convention; urged them in this context to abolish or modify all provisions prohibiting questioning the compliance of a judicial appointment with the right to a tribunal established by law or providing sanctions for judges applying the requirements of the Convention, as set out in these judgments'.

6. The necessary reform of the NCJ.

18. The HFHR agrees with the Committee of Ministers that one of the necessary steps to ensure adequate implementation of the *Reczkowicz* group is the restoration of the independence of the NCJ. This could be achieved only by reinstating the model in which judicial members of the NCJ are elected by other judges.

19. We would like to underline that there are no legal obstacles to adopting such a reform. Even leaving aside the controversies around the Constitutional Tribunal judgment of 20 June 2017, case ref. K 5/17, which declared the previous model of the election of judicial members of the NCJ unconstitutional, it is possible for the national legislature to reconcile the requirements stemming from this ruling with the possibility of electing NCJ members by assemblies of judges. The Constitutional Tribunal itself held that both systems are permissible under the Constitution of Poland.

20. Furthermore, the HFHR believes that the term of office of members elected in a procedure inconsistent with constitutional and international standards should be terminated. In our opinion, the only way to avoid further violations of Article 6 is to put an end as soon as possible to the continuous existence of the NCJ lacking independence from the executive and the legislative. Termination of the term of office of the current judicial members of the NCJ would not violate Article 6 of the Convention. Current members must have been aware that their election was burdened with a manifest violation of the law, and thus, they are not in the same situation as lawful members whose term of office was terminated in 2018. Moreover, unlike in the case of *Grzęda v. Poland*,[8] the termination of the term of office of current members would not damage the principle of judicial independence – quite the contrary, it would contribute to the restoration of the standards of judicial independence. Finally, as already mentioned, the HFHR does not see any less restrictive measures that could ensure the immediate end of the state of systemic inconsistency with the ECHR.

7. Status of unlawfully appointed judges.

21. The Committee of Ministers noted that in order to fully implement the *Reczkowicz* judgment, it will be necessary to regulate the status of defectively appointed judges. In this regard, the HFHR would like to draw attention to several considerations.

[8] European Court of Human Rights (GC), *Grzęda v. Poland*, 15 March 2022, app. no. 43572/18.

22. There have long been discussions in Poland on how to address the problem of defective judicial appointments. According to some, persons appointed at the request of the reorganized NCJ are not judges at all and are therefore not protected by constitutional guarantees of non-removal.[9] This assumption forms the basis of the draft law prepared by the Association of Judges 'Iustitia'.[10] This draft assumes that the resolutions of the new NCJ on judicial appointments are invalid by operation of law and therefore have no legal effect. Upon its entry into force, the new judges would lose their positions in the courts where they currently serve but could return to their previous positions if they held judicial positions before the defective appointments. However, this effect would be excluded for persons appointed to their first judicial post after a period of assessment. Such individuals would be re-evaluated by the NCJ, and only if the NCJ found that the application for appointment was not justified, it would apply to the disciplinary court to remove the judge from office.

23. There are also other perspectives. For example, the current Ombudsman considers that flawed judicial appointments should instead undergo a verification process that could result in the approval of the appointments by an independent NCJ, thereby dispelling doubts about their impartiality and independence.[11] A form of verification of judicial appointments is envisaged in the draft law amending the Act on the National Council of the Judiciary, the Act on the Supreme Court, and certain other laws, brought to the Sejm by the Senate in June 2022.[12] This draft assumes that once the independence of the NCJ is restored, the NCJ would have to reconsider all individual cases of judicial appointments decided by the reorganized (non-independent) NCJ within a 2-year period. If the NCJ concluded that a particular appointment had been decided in violation of the principles of judicial independence, it could request the disciplinary court to remove the defectively appointed judge from office.

24. In the HFHR's view, the optimal solution would be to adopt a procedure for individualized verification of defective judicial appointments. The following arguments support such a solution.

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[9] See e.g. A. Kappes, J. Skrzydło, *Czy wyroki neo-sędziów są ważne? – rozważania na tle uchwały trzech połączonych izb Sądu Najwyższego z 23.01.2020 r. (BSA I-4110-1/20)*, 'Palestra' 2020, no. 5, p. 136; M. Wrzołek-Romańczuk, *Status prawny osoby formalnie powołanej na urząd sędziego na skutek rekomendacji udzielonej przez krajową radę sądownictwa w obecnym składzie – uwagi na tle wyroku TSUE z 19.11.2019 r. oraz orzeczeń Sądu Najwyższego będących konsekwencją tego rozstrzygnięcia*, 'Palestra' 2021, no. 5, p. 74-99.

[10] Draft Act amending the Act on the National Council of Judiciary, the Supreme Court Act and some other acts, https://www.iustitia.pl/images/A/projekt_IUSTITII_o_przywracaniu_praworz%C4%85dno%C5%9Bci-1_-_do_sejmu_plus_zakaz_wznowienia.pdf.

[11] Commissioner for Human Rights, opinion on the Act of 26 May 2022 amending the Act on the Supreme Court and certain other acts (Senate print no. 722), 1 June 2022, no. VII.510.49.2022/JRO, p. 6-7, https://bip.brpo.gov.pl/sites/default/files/2022-06/RPO_Senat_SN_ustawa_opinia_1.06.2022.pdf.

[12] Senate of the Republic of Poland, Resolution of 8 June 2022 on the submission to the Sejm of the Draft Act amending the Act on the National Council of Judiciary, the Supreme Court Act and some other acts, https://orka.sejm.gov.pl/Druki9ka.nsf/Projekty/9-020-72-2020/$file/9-020-72-2020.pdf.

25. It does not follow from the ECtHR's judgments to date that all appointments of judges at the request of the new NCJ are legally non-existent. The Court has held that the participation of a defectively appointed judge of the NCJ in the adjudication of cases violates the right to a court established by law, but it does not mean that such a judge is not entitled to any rights under national law regarding their official relationship. This conclusion is also not supported by the case law of the CJEU or the Polish courts. The Supreme Court recognizes that while the involvement of a defectively appointed judge of the Supreme Court always leads to the invalidity of the proceedings, an individualized examination is required in the case of judges of general courts to determine whether the circumstances surrounding the appointment undermine the standards of independence and impartiality of judges.[13] The jurisprudence of the administrative courts is even more cautious, emphasizing that a defective appointment alone is not sufficient to question a judge's impartiality.[14] Moreover, although the administrative courts have overturned some of the NCJ's resolutions on the nomination of candidates for judicial positions, they have emphasized that this does not affect the validity of the appointments of these judges.[15]

26. In these circumstances, it could be considered arbitrary for the legislature to assume that all persons appointed at the request of the new NCJ are deprived of judicial status. According to the principle of the separation of powers, such an assessment by the legislature should only be made in clear cases where the non-existence of the appointments is beyond doubt and confirmed by judicial decisions. Otherwise, a law declaring the non-existence of appointments could be seen as an attempt to circumvent Article 180(2) of the Constitution, which permits the removal of a judge from office or transfer to another position only through a court decision.

27. According to the HFHR, the removal of all new judges from office or their transfer to their previous positions could also violate the rights of these individuals guaranteed by the European Convention on Human Rights. The case law of the ECtHR has recognized that disputes concerning the employment relationship of judges, such as removal from office or transfer, may be considered as concerning civil rights under Article 6 of the ECHR.[16] The HFHR believes that the same conclusion should apply to possible disputes over the removal from office of defectively appointed judges, who can invoke the clear provision of Article 180(2) of the Constitution prohibiting their removal without a court decision. Judges could also invoke Article 8 of the ECHR, which has been used by the

[13] Supreme Court, resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, 23 January 2020, case ref.: BSA I-4110-1/20; Supreme Court, resolution of 2 June 2022, case ref. I KZP 2/22.

[14] SAC, decision of 10 August 2022, case ref. I GSK 2156/18.

[15] SAC, judgment of 6 May 2021 r., case ref. II GOK 2/18; SAC, judgment of 6 May 2021 r., case ref. II GOK 3/18; SAC, judgment of 6 May 2021 r., case ref, GOK 5/18; SAC, judgment of 6 May 2021 r., case ref. II GOK 6/18; SAC, judgment of 6 May 2021 r., case ref. II GOK 7/18; SAC, judgment of 6 May 2021 r., case ref. II GOK 4/18.

[16] See e.g. European Court of Human Rights, *Bilgen v. Turkey*, 9 March 2021, app. no. 1571/07; European Court of Human Rights, *Oleksandr Volkov v. Ukraine*, 9 January 2013, app. no. 21722/11.

ECtHR to assess various disciplinary measures applied to judges.[17] Therefore, it is important to ensure that any verification procedure respects these rights. It should be noted that although the situation in the Polish judiciary regarding faulty appointments is complex, the ECtHR has stressed the need to respect the rule of law and guarantees, even in special vetting or lustration procedures,[18] and has highlighted the importance of individualized measures, with exceptions allowed only in exceptional cases.[19]

28. The *ex lege* removal of all new judges from office or their transfer to their previous positions could also lead to chaos in the Polish judiciary. Currently, there are nearly 3,000 defective appointments, and the sudden removal of all these judges would undoubtedly have a negative impact on the efficiency of the judiciary. Moreover, these individuals have already issued millions of rulings, many of which are uncontested and enforceable. If it were considered that these persons are not judges at all due to the invalidity of their appointments, all these rulings could potentially be challenged. Additionally, in the case of individuals who had no prior experience as judges before their defective appointments, their rulings could even be deemed non-existent.

29. Taking all these factors into account, the HFHR believes that proposals involving the removal or transfer to previous positions of all defectively appointed judges should be rejected. Instead, a verification process for all these appointments should be conducted. In this regard, it is essential to ensure the participation of an independent NCJ and independent courts, as only a court can rule on the removal of a judge from office, as stipulated by the Constitution. The role of the NCJ would be to determine whether a particular appointment was correct and lawful or purely politically motivated. The law should establish a set of criteria for the NCJ to use in making such determinations, focusing on the circumstances surrounding the appointment and the relationship between the judge and the executive or legislature, rather than the judge's adjudicative decisions. If the NCJ concludes that the appointment was proper, it would issue a resolution approving the judge's appointment, thus rectifying the defect. On the other hand, if the appointment is found to be irregular, the NCJ would direct the court to request the removal of the judge from office. The HFHR suggests that interim measures could be applied for the duration of the review procedure, allowing for the temporary removal of a judge from office.

30. The HFHR believes that the process of reviewing appointments should involve the participation of an independent and lawfully composed NCJ and courts since, as already indicated, according to the Constitution, only a court can rule on the removal of a judge from office. It would be the task of the NCJ to determine whether the nomination of a particular person for appointment as a judge was correct and lawful or perhaps purely politically motivated. The law should establish a set of criteria to be used by the NCJ in making such a determination. However, these criteria should be limited to the

[17] See e.g. European Court of Human Rights, *Ovcharenko and Kolos v. Ukraine*, 12 January 2023, app. nos. 27276/15 and 33692/15;
[18] See e.g. ibid., § 109.
[19] European Court of Human Rights, *Polyakh and others v. Ukraine*, 17 October 2019, app. nos. 58812/15 and others, §§ 290-296.

circumstances surrounding the appointment and the relationship between the judge and the executive or legislature, and should not extend to assessing how the judge has adjudicated cases. If the NCJ finds that the appointment was correct, it would issue a resolution approving the judge's appointment, thereby rectifying the defect in their appointment. Conversely, if the NCJ determines that the appointment was irregular, it would direct the court to request the removal of the judge from office. The HFHR would also have the ability to seek interim measures from the court to remove a judge from office during the review procedure.

31. In the opinion of the HFHR, implementing such a procedure would allow for addressing the situation in the Polish judiciary comprehensively while respecting the rights of individuals appointed at the request of the new NCJ. It is important to emphasize that not all of the 3,000 new judges are incapable of performing their judicial functions independently and impartially. An individual verification procedure would also enhance legal certainty and ensure compliance with the standards set forth in the *European Convention on Human Rights*.

32. At the same time, we wish to emphasize that the verification procedure must be conducted fairly and in good faith. It is crucial to reject both a purge of the judiciary and the establishment of facade mechanisms that only seek to legitimize the unlawful actions of those currently in power. The HFHR strongly advocates for an unbiased and transparent verification process that upholds the principles of justice and the rule of law.

8. Assessment of legality of judicial appointments by courts.

33. As indicated above, the Committee of Ministers also noted the need to ensure, 'that courts are entitled to effectively review resolutions of the NCJ proposing judicial appointments to the President of Poland, including of SC judges; and to decide on the legitimacy of judicial appointments, independence and impartiality of judges without any restrictions or sanctions for applying the Convention'. Unfortunately, also in this area, the Committee's recommendations remain unimplemented.

34. As already indicated in our previous letter on the implementation of the *Reczkowicz* judgment, the law of 26 May 2022 introduced provisions empowering the courts to conduct a test of the independence and impartiality of judges. First of all, it concerns only the independence of judges and not the requirement of a 'tribunal established by law'. New provisions prescribe that the circumstances surrounding the appointment of a judge cannot be the sole basis to challenge judgments issued by this judge or to question his/her independence. Second, the motion to apply a judicial independence test must fulfil very strict requirements, which can be perceived as an example of excessive formalism. The party to the proceedings must prove circumstances surrounding the appointment, the influence on the particular case (taking into account conditions of the party involved and the nature of the case) and provide evidence within a short term. The motion not in conformity with these requirements will be rejected without a call to rectify formal irregularities. Third, there is no mechanism to ensure that the judicial independence test

will not be performed by judges to whom the same objections concerning the requirement of 'tribunal established by law' exist.

35. The test of judicial independence is rarely used in practice. According to media reports, from 15 July to 30 November 2022, 768 applications for it were filed. Of this number, a total of 496 applications were processed, but only in 67 cases were the party's arguments found to be valid what led to the change of judge.[20]

36. The aforementioned Act of 13 January 2023 provides for the introduction of further changes in the shape of the judicial independence and impartiality test. Firstly, the legislator has placed a stronger emphasis on the requirement of being 'established by law' under procedure on the test of whether a judicial appointment has been made in accordance with the law. The test itself could be held not only from the perspective of a right to an independent and impartial court but also the right to a court established by law. In addition, the legislator decided to delete the regulation prohibiting the questioning of a judicial appointment solely based on the circumstances surrounding the appointment of the judge. The catalogue of entities that may request an examination of the fulfilment of the requirements of independence, impartiality, and establishment based on a statute (hereinafter the criteria for the right to a court) is also to be expanded. The existing entitled parties (parties and participants to the proceedings) will also be joined by the court before which the case is pending. At the same time, however, the effectiveness of such a test will be limited by various factors. For example, the referring party will still be required to demonstrate a link between irregularities in the process of judicial appointments and the breach of the standard of independence, impartiality or establishment by law in the circumstances of the case. The Act of 13 January 2023 also leaves unchanged the time limits for filing an application initiating proceedings to examine the criteria for the right to a court - a party will therefore still have only one week from the time it is informed of the composition of the court-appointed to hear the case to demonstrate circumstances demonstrating that the judge in question does not meet the criteria for the right to a court. The consideration of the applications will be within the jurisdiction of the SAC, which may raise doubts in light of the constitutional regulations concerning the tasks of this body. Moreover, there will still be no guarantees that the test of impartiality and independence will not be carried out before a defectively appointed SAC judge. The low effectiveness of the test may also be influenced by the fact that the public generally has no access to the competition procedures before the NCJ. Apart from the public nature of the lists of persons appointed by the new NCJ or the recordings of its deliberations, there are no detailed documents in the public space regarding the procedures taking place before it. As a rule, the public is not aware of the opinions submitted in the course of the competition or the minutes of the hearings by the various NCJ panels. All this casts doubt on the effectiveness of the proposed regulations - in practice, it will usually be very difficult for a party to the proceedings to demonstrate how

[20] T. Żółciak, G. Osiecki, *Stress test bezstronności. Sądy testujemy rzadziej niż COVID-19*, 'Gazeta Prawna', 10 January 2023, https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8630930,test-bezstronnosci-sedzia-sedziowie-sady-dane-ministerstwo-sprawiedliwosci.html.

the circumstances surrounding a judge's appointment affect the standard of independence and impartiality in his or her particular case. And finally, as already mentioned, there is a risk that ultimately the new test would not even enter into force because the President challenged the law to the Constitutional Tribunal.

37. The HFHR, therefore, considers that the current regulations on the independence and impartiality test do not provide parties with a fair opportunity to realize the right to a court established by law. The January 2023 Act introduces some improvements in this regard, but firstly, they do not eliminate the main shortcomings of the mechanism in question, and secondly, it is uncertain whether this act will enter into force at all, as it is currently subject to proceedings before the Constitutional Court.

38. Finally, we would like to stress that even the introduction of the possibility to effectively carry out a test of the independence, impartiality and legality of an appointment of a judge for the purposes of a concrete pending judicial proceeding will not replace the procedure for the verification of judges discussed above. Conducting such a test will always be difficult, and different courts may assess the status of a given judge differently. Therefore, in order to end the crisis in the Polish judiciary, it is necessary to resolve the status of defectively appointed judges with general effect in a fair procedure which would end either with the approval of the appointment or with the dismissal of the judge.

9. Recommendations of the HFHR

39. The HFHR believes that to fully implement the judgment of the Court in the *Reczkowicz* case, the following steps must be taken.

40. First, the Parliament must change the Act on the National Council of Judiciary to restore the independence of this organ. To achieve this aim, it will be necessary to reform the mode of election of judicial members of the NCJ in such a way as to ensure that those members are truly representatives of the judiciary and not – of the executive or the legislature. In addition, the term of office of members elected in a procedure inconsistent with the Constitution and the international standards should be terminated to prevent further violations of the Convention.

41. Secondly, it is necessary to regulate by law the status of defectively appointed judges. Such regulation should be consistent with international standards and ensure respect for legal certainty. For this reason, the optimal solution would be to introduce a fair procedure for individual verification of judicial appointments, which would be conducted before an independent NCJ and an independent and legally established court. On the other hand, solutions involving the removal from office or transfer to lower positions by the law of all judges appointed at the request of the new NCJ should be rejected. Such measures could not only collide with the standards stemming from the Constitution and the ECHR but also deepen the already serious crisis in the Polish judiciary.

42. Thirdly, procedural means of protecting the right to a court established by law should be provided to the parties to the proceedings. Thus, there should be effective mechanisms

for challenging the legality of a judge's appointment in a motion to exclude him or her and in appeals against rulings issued by judges so appointed. Furthermore, judges who apply standards developed by the ECtHR in the *Reczkowicz* and other judgments, and those who apply the EU law and the interpretation provided in the Supreme Court's resolution of 23 January 2022 to review the independence and impartiality of unlawfully appointed persons, must not face disciplinary charges.

43. Finally, all state authorities must accept that all final judgments of the ECtHR must be duly implemented and cannot be questioned in domestic proceedings. Public authorities must not challenge the validity of the ECtHR's judgments via motions to the Constitutional Tribunal.

On behalf of the Helsinki Foundation for Human Rights,