Warsaw, 26 April 2023

506/2023/PSP/EŚ

The European Court of Human Rights
Mr. Marko Bošnjak
President of the First Section
Council of Europe
67075 Strasbourg-Cedex
France

Ref. *Leszczyńska-Furtak, Gregajtys and Piekarska-Drążek v. Poland*
Applications nos. 39471/22, 39477/22, 44068/22

Pursuant to the letter of Ms. Renata Degener, the Section Registrar of the European Court of Human Rights dated 4 April 2023 granting us leave to make written submission to the Court by 27 April 2023, the Helsinki Foundation of Human Rights with its seat in Warsaw, Poland, would like to respectfully present its written comments on the case of *Leszczyńska-Furtak, Gregajtys and Piekarska-Drążek v. Poland* (applications nos. 39471/22, 39477/22, 44068/22).

On behalf of the Helsinki Foundation for Human Rights

Dr Piotr Kładoczny
Vice President of the Board
Helsinki Foundation for Human Rights

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: Santander Bank Polska S.A. 25 1090 1854 0000 0001 4763 6887, SWIFT WBKPPLPP

Warsaw, 26 April 2023

WRITTEN COMMENTS

BY

THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

Leszczyńska-Furtak, Gregajtys and Piekarska-Drążek v. Poland

Applications nos. 39471/22, 39477/22, 44068/22

EXECUTIVE SUMMARY:

- The case of *Leszczyńska-Furtak and others v. Poland* concerns the involuntary transfer of judges to a different division of a court, without granting them the acess to court.
- In the HFHR opinion, even though the substantive criteria for the involuntary transfer of judges between divisions of the same court formulated in the Polish law may seem non-controversial, the lack of effective access to court with regards to such decisions, renders them subject to abusive application.
- The analysis of cases of judges (Mr. Żurek, Mr. Juszczyszyn and Mr. Biliński) involuntarily transferred to other division of the same court proves that this measure is sometimes used as a covert sanction meted out by presidents of ordinary courts for upholding rule of law standards.
- In line with CJEU judgments, the Foundation claims that involuntary transfer to other division of a court should be accompanied by procedural safeguards, including the right to (independent) court. The procedure before NCJ does not fulfil such requirement, especially after 2018 legislative amendments hindering the independence of this body.
- The reliance of the Polish authorities on the judgments of the Constitutional Tribunal on incompatibility of Article 6 ECHR with the Constitution cannot be used as means for non-execution of ECtHR judgments and interim measures.

I. Introduction

1. Under Article 36 of the European Convention on Human Rights ('ECHR', 'the Convention'), pursuant to the leave granted on 4 April 2023 by the President of the Section of the European Court of Human Rights ('ECtHR', 'the Court'), the Helsinki Foundation of Human Rights ('HFHR', 'The Foundation') presents its written comments on the case of *Leszczyńska-Furtak, Gregajtys and Piekarska-Drążek v. Poland* (applications nos. 39471/22, 39477/22, 44068/22), concerning involuntary transfer of judges of the Warsaw Court of Appeal from the Criminal Division to the Labour and Social Security Division.

II. Relevant domestic legislation

2. The relevant legislative framework is provided by the Act of 27 July 2001 on the organisation of ordinary courts ('The 2001 Act'). Under Article 18(1) of the said act, in courts of appeals civil, criminal, as well as labour and social security divisions are created. Article 18a provides that different divisions can be as well created. In the Warsaw Court of Appeals there are seven divisions: three civil (1st, 5th, 6th), commercial (7th), visitation (4th), labour and social security (3rd) and criminal (2nd).

3. Under Article 22a(1) the President of the Court of Appeals determines the division of judicial activities, taking into account i.a. the specialisation of judges in adjudication of particular types of cases, as well as balanced distribution of duties and the need to guarantee efficient court proceedings. The transfer of a judge to another division requires his consent (Article 22a(4a)), but such consent is not required when the transfer is to a division where cases of the same scope are heard (Article 22a(4b)(1)), or no other judge in the division from which the transfer is made has consented to the transfer (Article 22a(4b)(2)). If transfer is made under the latter basis, the seniority of judges must be taken into account (Article 22a(4c)).

4. As these provisions are the exception from the principle of non-transfer, they should be interpreted narrowly, in light of the function they serve, that is effective functioning of the judiciary (including smooth conduct of proceedings). It seems to be the abuse of competence to use them as a method of sanctioning a behaviour deemed inappropriate. Potentially inappropriate actions of judges should be dealt with via disciplinary proceedings before disciplinary court surrounded by the relevant guarantees and not with the use of arbitrary transfers of judges between divisions of court.

5. Article 22a(5-6) prescribes i.a. that the transfer under Article 22a(4b)(2) is subject to appeal to the National Council of Judiciary ('NCJ'), but no further appeal to the court against NCJ decision is possible. Currently, under settled case-law of ECtHR, the National Council of Judiciary cannot be considered a body independent from the influence of legislative and executive power[1]. It seems that the flawed composition of NCJ stems not only from the close association of particular NCJ members with the legislative and executive power[2], but also from the system of election of judges not by their peers, but by the Sejm[3]. While it is true that in May 2022 the new term of office NCJ began, it must be emphasised that it does not change the situation of lack of independence, as 11 out of 15 judicial members of NCJ were re-elected[4] on the basis of the same provisions as in 2018.

---

[1] *Reczkowicz v. Poland*, App no. 43447/19, 22 July 2021, § 276; *Dolińska-Ficek and Ozimek v. Poland*, App nos. 49868/19 et al., 8 November 2021, § 353; *Advance Pharma sp. z o.o. v. Poland*, App no. 1469/20, 3 February 2022, § 349.

[2] *Reczkowicz v. Poland*, App no. 43447/19, 22 July 2021, § 271; *Dolińska-Ficek and Ozimek v. Poland*, App nos. 49868/19 et al., 8 November 2021, § 345; *Advance Pharma sp. z o.o. v. Poland*, App no. 1469/20, 3 February 2022, § 341.

[3] *Dolińska-Ficek and Ozimek v. Poland*, App nos. 49868/19 et al., 8 November 2021, § 368; *Advance Pharma sp. z o.o. v. Poland*, App no. 1469/20, 3 February 2022, § 364; implicitly *Grzęda v. Poland* [GC], App no. 43572/18, 15 March 2022, § 305.

[4] See Official Journal *Monitor Polski* of 2022, item 485.

6. It is worth indicating that detailed provisions on transfers (Article 22a(4a-4c) were inserted to the 2001 Act in 2017. The reasons for such legislative amendment were described as follows: 'It is obvious that sometimes the transfer can be a form of harassment (e.g. a [transfer] of civil-law specialist to criminal division). The proposed regulation to large extent limits discretionary power of the president of the court by means of regulating the shape of proceedings and criteria to be used by the body of judicial administration when taking such decision'[5].

7. As a side note, there are several legal avenues to solve the problem of understaffing in courts by other means, namely:

- The Minister of Justice can create new judicial positions, thereby increasing the number of judges in a court (Article 20a);
- The Minister of Justice can delegate judges from other courts (Article 77);
- The Minister of Justice can refrain from delegating judges of the said court to the National School of Judiciary and Public Prosecution and to the Ministry of Justice (*a contrario* Article 77)[6].

III. The practice of application of provisions on transfer of judges

8. There are several cases, which the Foundation would like to discuss in order to outline the practice of bodies of judicial administration. All of them were or will be subject to the review of ECtHR.

9. The first case concerns Judge Juszczyszyn[7], who decided to verify whether the lower-instance judge – appointed on the motion of NCJ composed in 2018 – met the requirement of independence in light of EU law (see *Juszczyszyn*, § 9-12). In connection with these actions, the Minister of Justice terminated his secondment to the higher-instance court (*Ibid*, § 15), disciplinary charges were brought (*Ibid*, § 17-20), his duties were interrupted (*Ibid*, § 21) and he was later suspended by virtue of the decision of the Disciplinary Chamber of the Supreme Court (*Ibid*, § 40). Although the suspension was afterwards lifted (*Ibid*, § 73-78), the President of the Olsztyn District Court (and NCJ member), Mr. Maciej Nawacki, transferred Mr. Juszczyszyn from the Civil to the Family and Juvenile Division of said court (*Ibid*, § 79). Although it was not stipulated explicitly by the Court, it seems that the transfer can be perceived as a part of measures aimed at sanctioning Mr. Juszczyszyn and dissuading him from assessing the status of judges appointed upon the recommendation of the recomposed NCJ (*Ibid*, § 337). These measures were found to serve ulterior political motive (*Ibid*, § 338).

---

[5] https://orka.sejm.gov.pl/Druki8ka.nsf/0/0607FAECB2502632C12581070067DFE6/%24File/1491.pdf, (Sejm Paper no. 1491/VIII term of office), p. 9 of reasons.

[6] As it stems from the website of the Warsaw Court of Appeals (https://waw.sa.gov.pl/lista-sedziow-sadu-apelacyjnego-w-warszawie,m,mg,77,137), there are currently 4 out of 101 judges of the Warsaw Court of Appeals who are delegated elsewhere.

[7] *Juszczyszyn v. Poland*, App no. 35599/20, 6 October 2022.

10. The second case concerns Judge Biliński, whose case before ECtHR was communicated to the Polish Government[8], but it has not yet been decided. Judge Biliński issued several judgments acquitting opposition protesters in petty offences proceedings. These judgments were perceived as inconvenient by the executive power. Following dissolution of the division of petty offences, the applicant was not transferred to the criminal division (according to his specialisation and his will), but rather to family and juvenile division, by virtue of the decision of Mr. Maciej Mitera, the President of Warsaw-Śródmieście District Court (and NCJ member).
11. The third case concerns Judge Żurek[9], who up until 2018 was a spokesperson of NCJ. Before and after that date he frequently criticised legislative reforms concerning the judiciary in Poland. The Court held in this respect that measures taken by Polish authorities 'could be characterised as a strategy aimed at intimidating (or even silencing) the applicant in connection with the views that he had expressed in defence of the rule of law and judicial indpendence', which resulted in chilling effect in relation to him and other judges (*Żurek*, § 227). Although it was not directly expressed by the Court, it seems that one of the parts of such strategy was an involuntary transfer of the applicant from the Civil Appellate Division to the Civil (First Instance) Division (*Ibid*, § 87), made by Ms. Dagmara Pawełczyk-Woicka, the President of Cracow Regional Court (and NCJ member).
12. These three cases reveal the pattern of actions of the Polish authorities, which use transfer to another division of court as means for sanctioning applicants for a behaviour which they deem inappropriate. Such behaviour was in fact the protection of human rights, as well as the rule of law standards. It seems crucial to point out that presidents of the court issuing decisions on transfers were closely associated with the Ministry of Justice. They were nominated for the position of president by him, as well as they were elected to NCJ composed in 2018 (Mrs. Pawełczyk-Woicka and Mr. Nawacki were re-elected in 2022). The holistic approach reveals that since 2015 the guarantees of independence of judiciary have been gradually jeopardised, by actions of the same set of people, acting in the political interest of the executive and legislative powers.
13. In the report of *Iustitia* association of judges several examples of involuntary transfer of judges (Mr. Marczyński, Ms. Marek-Ossowska, Ms. Leszczyńska, Mr. Borodziuk) to other divisions are mentioned.[10] Although these cases concern lesser-known judges, it seems that actions of president of courts can be perceived as a part of the same pattern that in cases of Mr. Żurek, Mr. Biliński and Mr. Juszczyszyn.
14. Only as a side note, one can refer to the recent, surprising though it may seem, statement of NCJ. It dealt with the problem of delegation of judges of the Supreme Court for fixed period to other chambers of this court (Article 35(3) of the Act on the Supreme Court). It seems that the absence of legal basis for appeal to NCJ, led this body to the conclusion that Article 22(5) of 2001 Act can be applied. Article 35(3) of the Act on

[8] *Biliński v. Poland*, App no. 13278/20, communicated on 30 April 2021.
[9] *Żurek v. Poland*, App no. 39650/18, 16 June 2022.
[10] https://www.iustitia.pl/images/pliki/raport2020/Raport_PL.pdf, p. 81-83, 91.

Supreme Court was applied to Judge E. Karska – she was transferred from the Extraordinary Review and Public Affairs Chamber to the Civil Chamber for a fixed period. Following the appeal, NCJ quashed the decision of the First President of the Supreme Court in this respect. In the press release of NCJ it was emphasised that: 'The Council finds the procedure applied in respect of Judge Karska, cannot serve as a basis for solving staffing problems of Supreme Court chambers. The President of NCJ will create a team that will prepare a draft motion to the Constitutional Tribunal in respect of doubts concerning Article 35(3) of the Act on Supreme Court'[11]. Several weeks later NCJ issued a resolution on submitting a motion to the Constitutional Tribunal in this respect.[12]

IV. Legal standard to be followed

15. It seems instructive to cite a lengthy passage from the Court of Justice of the European Union ('CJEU') judgment issued in the case of Judge Żurek, following his objection to transfer to another division of the Court: 'Transfers without consent of a judge to another court, or … the transfer without consent of a judge between two divisions of the same court are also potentially capable of undermining the principles of the irremovability of judges and judicial independence. Such transfers may constitute a way of exercising control over the content of judicial decisions because they are liable not only to affect the scope of the activities allocated to judges and the handling of cases entrusted to them, but also to have significant consequences on the life and career of those persons and, thus, to have effects similar to those of a disciplinary sanction. Having examined various international instruments dealing with the issue of judicial transfers, the European Court of Human Rights thus noted that such instruments sought to confirm the existence of a right of members of the judiciary to protection from arbitrary transfer, as a corollary to judicial independence. In that regard, that court inter alia stressed the importance of procedural safeguards and the possibility of a judicial remedy concerning decisions affecting the careers of judges, including their status, and in particular decisions to transfer them without their consent, in order to ensure that their independence is not compromised by undue external influences (see, to that effect, ECtHR, 9 March 2021, *Bilgen v. Turkey*, … , §§ 63 and 96). In the light of the foregoing, it must be held that the requirement of judicial independence arising from second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter, requires that the rules applicable to transfer without the consent of such judges present, like the rules governing disciplinary matters, in particular the necessary guarantees to prevent any risk of that independence being jeopardised by direct or indirect external interventions. It follows that the rules and principles recalled in paragraph 113 of the present judgment relating to the disciplinary regime applicable to judges must, *mutatis mutandis*, also apply so far as concerns such rules concerning transfers. It is thus important that, even where such transfer measures

[11] https://krs.pl/pl/aktualnosci/1945-komunikat-z-posiedzenia-krajowej-rady-sadownictwaw-dniach-28-31-marca-2023-r.html.

[12] https://krs.pl/pl/aktualnosci/1970-komunikat-z-posiedzenia-krajowej-rady-sadownictwa-3.html.

without consent are … adopted by the president of the court to which the judge who is the subject of those measures belongs outside the disciplinary regime applicable to judges, those measures may only be ordered on legitimate grounds, in particular relating to distribution of available resources to ensure the proper administration of justice, and that such decisions may be legally challenged in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence'[13].

16. The Foundation shares the standing of the CJEU in its entirety. In terms of procedural law, the application of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union can be 'translated' into the language of the Convention by application of Article 6 ECHR to cases of transfer of judges from one division to another division. The European Court of Human Rights also confirms that in principle all cases concerning judges' careers should be subject to judicial supervision[14].

17. Although it seems possible that judicial council is considered 'court' for the purposes of Article 6 ECHR, it must follow certain requirements, that are not met when current shape of the procedure before NCJ is taken into account[15]. Additionally, under Articles 173 and 175 of the Constitution administration of justice is implemented only by courts, and judicial power consists only of courts and tribunals. Under Polish constitutional law, NCJ is not considered a court. Some of NCJ resolutions are subject to judicial review of the Supreme Court. In the opinion of HFHR, all NCJ resolutions affecting the independence of judges—*lege non distinguente*—should be subject to judicial review.

18. As a side note, it is obvious in light of settled case-law of ECtHR that if NCJ was considered court for the purposes of Article 6 ECHR, it would be a tribunal which not considered independent and established by law.

19. Moreover, the right to court encompassed by Article 6 ECHR must be a right that is practical and effective, not theoretical and illusory. Therefore, the judicial body must have full jurisdiction[16], which means i.a. the possibility of own assessment of proportionality of impugned measure[17].

20. Although it is less visible in CJEU judgment, it appears that Article 6 ECHR imposes some requirements as to the content of substantive law. It is impossible to make balancing

---

[13] Judgment of CJEU of 6 October 2021, C-487/19, § 114-118.

[14] See *Bilgen v. Turkey*, App no. 1571/07, 9 March 2021, § 96.

[15] See *Bilgen v. Turkey*, App no. 1571/07, 9 March 2021, § 74-75, where ECtHR held that judicial council in Turkey had not been the court for the purposes of Article 6 ECHR, as it had not functioned on the basis of prescribed set of procedural rules (including procedural safeguards, assessment of evidence, adversarial proceedings, hearings, reasons for decisions etc.).

[16] See e.g. *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], App no. 55391/13 et al., 6 November 2018, § 132, 176-186. It is worth indicating that this case concerned the effectiveness of appeal to the court (and full jurisdiction of this court) against the decision of judicial council on imposing disciplinary sanction. Therefore, this judgment is applicable *mutatis mutandis* (in line with the standing of CJEU) to the situation of involuntary transfer of judges.

[17] See e.g. *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], App no. 55391/13 et al., 6 November 2018, § 201. See also *mutatis mutandis* (under Article 13 ECHR, which considered *lex generalis* to Article 6 ECHR) *Smith and Grady v. the United Kingdom*, App no. 33985/96 et al., 27 September 1999, § 138.

exercise (i.e. assessment of proportionality) without legally established criteria. Nevertheless, the Polish law – albeit in theory – provides appropriate criteria for involuntary transfer, enshrined in Article 22a of the 2001 Act, that is: seniority of judges, balanced distribution of duties and the need to guarantee efficient court proceedings. However, the practice of application of these provisions proves that without efficient and independent judicial review these rules are subject to abuse by presidents of courts. In such light, the requirement of access to court is crucial[18].

V. The non-implementation of ECtHR judgments by Poland

21. It seems that the problem of non-implementation of ECtHR judgments by the Polish authorities can be of some relevance in adjudication of the case at hand. The refusal of the Polish authorities to comply with the interim measure ordered by the Court seems to be the final step of gradually developing situation. The Polish authorities use the Constitutional Tribunal for evasion of obligations to execute ECtHR judgments. It is worth emphasising that judgments of the Constitutional Tribunal No. K 6/21 and K 7/21 were relied on by the Polish Government in the proceedings before the Committee of Ministers[19].

22. The first judgment concerning the rule of law crisis in Poland was *Xero Flor w Polsce sp. z o.o. v Poland* App no 4907/18 (ECtHR, 7 May 2021). The European Court of Human Rights held that flagrant breaches in the procedure of nomination of Mr Mariusz Muszyński to the Constitutional Tribunal contributed to the violation of Article 6 ECHR (in respect of the requirement of the tribunal being established by law).

23. The Polish Government did not decide to apply for referral of this case to the Grand Chamber; instead, on 27 July 2021, the Prosecutor General decided to submit a motion to the Constitutional Tribunal demanding i.a. to confirm incompatibility of Article 6 ECHR with the Constitution of the Republic of Poland so far as: (1) Article 6 ECHR covers the Constitutional Tribunal as the 'court' within the meaning Article 6 ECHR; (2) Article 6 ECHR empowers ECtHR to assess the legality of election of judges to the Constitutional Tribunal. On 24 November 2021, the Constitutional Tribunal issued a judgment (No. K 6/21) on incompatibility of Article 6 ECHR with the Constitution on these two grounds. The *Xero Flor* judgment was considered by the Constitutional Tribunal as issued *ultra vires*, and therefore non-existent.[20]

24. The Constitutional Tribunal has still issued decisions and judgments with Mr Mariusz Muszyński included in the bench[21]. Up until 2022 27 motions of Ombudsman to exclude

[18] It can be added that the similar reasoning can be presented under Article 8 ECHR, should ECtHR find this provision of the Convention applicable.

[19] See e.g.: https://hudoc.exec.coe.int/eng?i=DH-DD(2023)429E.

[20] See also the view of Prosecutor General in this respect in: https://www.gov.pl/web/sprawiedliwosc/europejski-trybunal-praw-czlowieka-nie-moze-oceniac-legalnosci-wyboru-polskich-sedziow.

[21] e.g. No. K 3/21, dated 7 October 2021; No. P 10/19, dated 23 February 2022; No. K 7/21, dated 10 March 2022; No. SK 113/20, dated 23 November 2022. Some of these cases concern important issues of the rule of law and compatibility of ECtHR and EU treaties with the Constitution of the Republic of Poland.

Mr Mariusz Muszyński (or other two judges in respect of which similar doubts arise[22]) were refused[23].

25. In response to judgments of ECtHR in the cases of *Reczkowicz, Dolińska-Ficek and Ozimek, Advance Pharma*, as well as *Broda and Bojara*[24], the Prosecutor General submitted a motion to the Constitutional Tribunal. In the judgment dated 10 March 2022, No. K 7/21, the Constitutional Tribunal held that Article 6 ECHR is incompatible with the Constitution of the Republic of Poland so far as Article 6 ECHR: (1) covers subjective right of a judge to perform administrative functions in ordinary courts, and (2) enables ECtHR or domestic courts (2a) to omit provisions of the Constitution, ordinary laws and judgments of the Constitutional Tribunal; (2b) to independently create norms regarding nomination of domestic judges; (2c) to check whether laws on judicial system and competence, as well as functioning and election of members to NCJ, are compliant with the Constitution or ECHR.

26. It is obvious that under international law that a state cannot invoke its domestic law, including its Constitution (and, consequently, judgments of constitutional court), as justification for its failure to respect its international-law commitments[25]. Under Article 46 ECHR the state parties to the Convention are obliged to follow the final judgment of ECtHR in any case to which they are parties. Moreover, the content of judgments of the Constitutional Tribunal shows that they can be considered arbitrary, as they do not focus on human rights at stake, but rather on the defence of *status quo*, state sovereignty, presidential prerogatives etc.[26]. The same can be said about the obligation to cooperate with ECtHR under Article 38 ECHR, which forms basis for issuance of interim measures.

27. Even apart from the content of above-cited judgments of the constitutional court, the sole fact that the Prosecutor General submitted motions to the Constitutional Tribunal two times following judgments of ECtHR reveals unequivocal will of the executive to refrain from obligations imposed under Article 46 ECHR. This is further supported by the fact that the Minister of Justice-Prosecutor General also claimed that ECtHR judgments are 'more of political than of legal character' or 'part of broader political action against Polish state', and Poland is 'democracy under special surveillence, democracy under protectorate[27]'.

---

[22] This resulted in another application to ECtHR on the same grounds: *Botor v. Poland*, App no. 50991/21, communicated on 7 July 2022.

[23] https://bip.brpo.gov.pl/pl/content/oswiadczenie-rpo-w-sprawie-sedziow-tk.

[24] *Broda and Bojara v. Poland*, App no. 26691/18 et al., 29 June 2021.

[25] See *Grzęda v Poland* [GC], App. no 43572/18, 15 March 2022, § 340 with reference to Article 27 of the Vienna Convention on the Law of Treaties. This was also emphasised in the *Interim Resolution CM/ResDH(2020)204* (1 October 2020) of the Committee of Ministers on the execution of *OAO Neftyanaya Kompaniya Yukos v. Russia,* App no. 14902/04, 31 July 2014. Russian authorities were obliged to pay approximately 1.8 billion euros of compensation, which they failed to do, relying on the ruling of the Constitutional Court of Russian Federation allowing them to refrain from doing so.

[26] See *mutatis mutandis Reczkowicz v. Poland*, App no. 43447/19, 22 July 2021, § 261.

[27] https://www.euractiv.pl/section/demokracja/news/polski-rzad-odpowiada-etpcz-my-sie-tym-nie-przejmujemy/. During the hearing the plenipotentary of the President of the Republic of Poland considered ECtHR judgments as 'judicial imperialism' (https://oko.press/wniosek-ziobry-w-tk-skarza-przepisy-konwencji-by-walczyc-z-imperializmem-orzeczniczym).

28. These judgments of the Constitutional Tribunal can be perceived as an example of abusive constitutionalism. There is no doubt that they are in line with improper motives of Polish legislative and executive powers to weaken the independence of judiciary. They therefore contribute to the continuous persistence of conditions which led to finding violations in cases *Xero Flor, Broda and Bojara, Grzęda, Reczkowicz, Ozimek and Dolińska-Ficek and Advance Pharma*. As it can be seen from the case at hand, they can produce other violations in different contexts. Consequently, the threat to the rule of law in Poland are not eradicated as long as the Government relies on these judgments.

29. Moreover, non-execution of ECtHR judgments, in particular via motions to the Constitutional Tribunal, leads to the decrease of standards of protection of human rights and fundamental freedoms and decomposition of the system of domesitc judicial review. The principle of the interpretation (and application) of domestic law and Constitution in a manner favourable to international law[28] has been openly questioned. This contributes to creation of legal chaos. Therefore, the principle of subsidiarity of ECtHR system in respect of Poland cannot be used so broadly as it used to be.

VI. Conclusions

30. To sum up, we invite the Court to consider in adjudication of case of *Leszczyńska-Furtak, Gregajtys and Piekarska-Drążek v. Poland* the standards and the context presented in this *amicus curiae* opinion. In particular, we emphasise the need to take into account the broader context of functioning of the provisions of 2001 Act, including the pattern of their abuse by presidents of ordinary courts. Moreover, the resistance of Polish authorities against ECtHR rulings should also impact the assessment of the case at hand. For these reasons the conclusion that Article 6 ECHR is applicable to cases of involuntary transfer of judges between divisions of ordinary courts is even more justified.

[28] Outlined in e.g. judgment of the Constitutional Tribunal of 16 November 2011, No. SK 45/09 with reference to judgment of the Constitutional Tribunal 11 May 2005, No. K 18/04.