Ministry
of Foreign Affairs
Republic of Poland
Plenipotentiary of the Minister
of Foreign Affairs for cases and procedures
before the European Court of Human Rights
Agent for the Polish Government

Warsaw, 31 October 2022

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**EUROPEAN COURT OF HUMAN RIGHTS**

**SARATA v. POLAND**

***Application no. 2415/21***

# OBSERVATIONS

# ON THE ADMISSIBILITY AND MERITS

**Submitted by the Government of the Republic of Poland**

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## I. INTRODUCTION

**1.** The Government of the Republic of Poland ("the Government") have the honour of submitting to the European Court of Human Rights ("the Court") their written observations on the application filed by **Zbigniew SARATA** ("the applicant").

**2.** The present case originates in an application no. 2415/21 to the Court. The application was lodged on 8 December 2020 and communicated on 13 June 2022.

**3.** In its letter the Court asked the Government the following questions:

1) *Was Article 6 § 1 of the Convention under its civil head applicable to the proceedings instituted by the applicant under the 2004 Act?*
2) *If so, was the Chamber of Extraordinary Review and Public Affairs of the Supreme Court which dealt with the applicant's complaint under the 2004 Act an "independent and impartial tribunal established by law" as required by Article 6 § 1 of the Convention?*

   *Reference is made to the cases of Dolińska-Ficek and Ozimek v. Poland, nos. 49868/19 and 57511/19, §§ 283- 359, 8 November 2021, and Guðmundur Andri Ástráðsson v. Iceland [GC], no. 26374/18, §§ 205-290, 1 December 2020.*
3) *Was the length of the civil proceedings in the present case in breach of the "reasonable time" requirement of Article 6 § 1 of the Convention (see Rutkowski and Others v. Poland, nos. 72287/10 and 2 others, 7 July 2015)?*
4) *Did the applicant have at his disposal an effective domestic remedy for his complaint under Article 6 § 1 concerning the unreasonable length of the proceedings under the 2004 Act, as required by Article 13 of the Convention?*

**4.** In reply to the applicant's complaint the Government submit to the Court that the application no. 2415/21 should be considered inadmissible on the basis of its incompatibility ratione materiae with the Convention as well as manifestly ill-founded character of the application in the meaning of Article 35 § 3 (a) of the Convention and therefore be rejected in accordance with Article 35 § 4 of the Convention.

**5.** Alternatively, the Government submit that there was no violation of Article 6 § 1 of the Convention in the circumstances of the case at stake.

## II. THE FACTS

**6.** The Government agree in general with the statement of facts prepared by the Registry of the Court. **However they wish to submit additional information in bold.**

## A. The circumstances of the case

**7.** The applicant is a defendant in a civil case initiated by a Warsaw-based housing cooperative before the Warsaw Regional Court (file no. XXIV C 830/11) on 2 June 2011.

**8. That court issued an order for payment on 25 July 2011 in the writ proceedings, ordering the applicant and Z.M.- S. (the second defendant) the payment to the plaintiff of the amount of PLN 91,078.13 together with interest and the costs of the trial. The applicant and the second defendant raised an objection against this judgment and the case was registered under file no. XXIV 830/11.**

**9. The first hearing was held on 18 January 2012. Evidence from the opinion of an expert in settlements of investments in housing cooperatives was admitted by the court and the hearing was adjourned without a time limit. The opinion was delivered on 30 April 2012.**

**10. The second hearing was held on 8 October 2012. The parties informed that they were conducting conciliatory negotiations, therefore they requested that the hearing be adjourned by 2-3 months. The hearing was adjourned until 7 January 2013. As the parties did not reach a settlement on that date, the hearing was adjourned until 25 February 2013, for which the expert was summoned.**

**11. During the hearing on 25 February 2013, the expert was questioned and the hearing was adjourned until 13 May 2013, summoning the applicant to this date.**

**12. The judgment was postponed until 27 May 2013, and on that date the judgment was further postponed until 4 June 2013. By the judgment of 4 June 2013, (file no. XXIV C 830/11), the Warsaw Regional Court awarded to the plaintiff (from the applicant) PLN 65,521.74 with statutory interest, divided the costs relatively between the parties to the proceedings and dismissed the claim as to the remainder.**

**13. Both parties to the proceedings appealed against this judgment. The case was submitted to the Warsaw Court of Appeal on 13 November 2013 and was registered under file no. I ACa 1629/13. The hearing was held on 26 May 2014**, and after it was closed, the judgment was announced, as a result of which the plaintiff's claim was dismissed in its entirety.

**14.** On 28 October 2014, the housing cooperative filed a cassation appeal with the Supreme Court. It was registered under file no. I CSK 1003/14. By the decision of 18 August 2015, the

Supreme Court accepted the cassation appeal to be examined. Then, by the judgment of 17 December 2015, the Supreme Court quashed the judgment under appeal and remitted the case to the Warsaw Court of Appeal for re-examination.

**15.** The case in the Warsaw Court of Appeal was registered under file no. I ACa 262/16 (later changed to V ACa 31/17). The hearing was held on 18 March 2016 and was adjourned due to "sudden indisposition of the clerk's judge" to 6 May 2016. On that day, the Court admitted evidence from an expert opinion for construction and settlement of investments of housing cooperatives. The opinion was received by the court on 15 May 2017. At the request of the parties, the expert supplemented the opinion on 24 July 2017, and then submitted additional explanations in writing during the hearing on 23 October 2017. During that hearing, the expert also made an oral explanation. The hearing was adjourned until 6 November 2017 – on that date, the hearing was closed, and the announcement of the judgment was adjourned until 20 November 2017.

**16.** On 9 March 2017, the Supreme Court composed of 7 judges passed a resolution in a case similar to the current case, file no. III CZP 69/16, in which it determined that "the claim of a housing cooperative to supplement the construction contribution by its members is associated with running an economic activity and expires after 3 years". The Supreme Court explained that a housing cooperative is an entity that conducts business activity through concluding contracts with its members for the construction of housing premises. The Supreme Court further pointed out that a member of housing cooperative should be perceived as its client/consumer. The resolution in question had significance for the applicant's case, because from the beginning of the dispute with the housing cooperative he had been raising a 3 year – expiration of the cooperative's claims against him.

**17.** On 20 November 2017 the Warsaw Court of Appeal (file no. V Aca 31/17) ordered the applicant to pay the plaintiff the amount of PLN 16,161.12 with interest, dismissing the claim as to the remainder.

**18.** A cassation appeal against the second instance judgment was lodged by the applicant. It was registered under file no. I CSK 378/18 and by the decision of 22 January 2019, the Supreme Court accepted it for examination.

**19.** By the judgment of 26 September 2019, the Supreme Court quashed the judgment of the Warsaw Court of Appeal to the extent to which the applicant (and his wife) were required to pay the plaintiff and with regard to the costs of the trial, and referred the case to the Warsaw Court of Appeal for reconsideration.

**20.** The case was entered in the Court of Appeal under file no. I ACa 620/19. The date of the hearing was scheduled for 28 February 2020.

**21. On 9 December 2019, the housing cooperative lodged a constitutional complaint to the Constitutional Tribunal to review the compliance of Article 398(20) of the Act of 17 November 1964 – Code of Civil Procedure, insofar as it does not provide for sanctions for violating the binding order by the court to which the case was referred, in respect of the interpretation of the law made in this case by the Supreme Court, and thus to the extent that allows the Supreme Court to consider a cassation appeal based on grounds contrary to the interpretation of legal provisions already made by the Supreme Court in a given case, pursuant to Article 45 § 1 in connection with Article 2 of the Constitution of the Republic of Poland. By the decision of 18 February 2020, the Constitutional Tribunal decided to proceed with the case.**

**22. At the hearing, of the Warsaw Court of Appeal on 28 February 2020, the proceedings were suspended until the Constitutional Tribunal would examine the constitutional complaint in case no. SK 24/20.**

**23. By a decision of 16 March 2020, the Warsaw Court of Appeal, in connection with the applicant's request, refused to resume the suspended proceedings. The proceeding were initiated by the decision of 10 February 2021.**

**24.** On 1 October 2020, the applicant filed a complaint under the Act of 17 June 2004 on violation of a party's right to have a case heard in court proceedings without undue delay.

**25. On 25 November 2020, the Supreme Court (file no. I NSP 166/20), composed of three judges of the Chamber of Extraordinary Control and Public Affairs, dismissed the applicant's complaint. The adjudicating bench was attended by judges: G.Ż., E.S. and P. K., appointed to serve as judges of the Supreme Court by the President of the Republic of Poland on 10 October 2018 on the basis of a recommendation from the NCJ established under the Act amending the Act on the NCJ and some other acts (Resolution No. 331/2018 of 28 August 2018).**

**26. After the date of lodging the complaint by the applicant with the European Court of Human Rights (the Court), the judgment of the Warsaw Court of Appeal was passed on 10 March 2021 (file no. I ACa 620/19), in which the judgment of the Warsaw Regional Court of 4 June 2013 was changed and the claim against the applicant was dismissed.**

**27. The plaintiff (housing cooperative) filed a cassation appeal against the judgment of the Warsaw Court of Appeal of 4 June 2021, to the Supreme Court, which in the decision of 31 May 2022 (file no. I CSK 444/22) refused to accept the cassation appeal for examination.**

**28. The Constitutional Tribunal, by decision of 22 July 2021 (file no. SK 24/20) discontinued the proceedings caused by lodging of a constitutional complaint by the aplicant's opponent on 9 December 2019.**

**29.** As a result of the submission by both parties of a complaint regarding the costs of the proceedings, the Warsaw Court of Appeal by decision of 5 July 2022, file no. I ACz 127/21 (p) reduced the amount awarded from the plaintiff to the applicant by approximately PLN 1,000.

## B. Relevant law and practice

### 1. The Constitution of the Republic of Poland

**30.** Relevant provisions of the Constitution of the Republic of Poland state as follows:

**Article 10**

1. The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.
2. Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.

**Article 45 § 1**

Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

**Article 45 § 1**

Polish citizens enjoying full public rights have the right to access the public service on the same terms.

**Article 144 § 1**

1. The President of the Republic, exercising his constitutional and statutory powers, issues official acts.
2. In order to be valid, official acts of the President of the Republic of Poland require the signature of the Prime Minister, who is accountable to the Sejm by signing the act.
3. (…) (17).Paragraph 2 above does not apply to the appointment of judges.

**Article 178 § 1**

1. Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.
(…)
3. A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges.

**Article 179**

Judges are appointed by the President of the Republic of Poland at the request of the National Council of the Judiciary, for an indefinite period.

**Article 186**

1. The National Council of the Judiciary shall safeguard the independence of courts and judges.

**Article 187**

1. The National Council of the Judiciary shall be composed as follows:
1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic;
2) fifteen judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts;
3) four members chosen by the Sejm from amongst its Deputies and two members chosen by the Senate from amongst its Senators.
2. The National Council of the Judiciary shall choose, from amongst its members, a chairperson and two deputy chairpersons.
3. The term of office of those chosen as members of the National Council of the Judiciary shall be four years.
4. The organisational structure, the scope of activity and procedures for work of the National Council of the Judiciary, as well as the manner of choosing its members, shall be specified by statute.

### 2. The Act on Supreme Court

**31.** The provision of Article 3 of the Act on the Supreme Court of 8 December 2017, in the wording in force on the date the applicant's complaint was examined, provided that the Supreme Court was divided into Chambers: 1) Civil; 2) criminal; 3) Labor and Social Security; 4) Extraordinary Control and Public Affairs; 5) Disciplinary.

**32.** Pursuant to the wording of Article 29 of the Act on the Supreme Court, a judge of the Supreme Court is a person appointed to this position by the President of the Republic of Poland, who has taken an oath before the President of the Republic of Poland.

**33.** Pursuant to the wording of Article 30 § 1 of the Act on the Supreme Court, to the post of a Supreme Court judge may be appointed a person who: 1) has only Polish citizenship and enjoys full civil and public rights; 2) has not been legally convicted of an intentional crime prosecuted by public indictment or an intentional fiscal offense or against which no final judgment has been issued conditionally discontinuing criminal proceedings for the commission of an intentional offense prosecuted by public indictment or a deliberate fiscal offense; 3) is over 40 years of age; 4) it is of pristine nature; 5) completed higher law studies in the Republic of Poland and obtained a master's degree or foreign law studies recognized in the Republic of Poland; 6) is distinguished by a high level of legal knowledge; 7) is capable, due to the state of health, of performing the duties of a judge; 8) has at least 10 years of experience as a judge, public prosecutor, President of the General Prosecutor's Office of the Republic of Poland, its vice-president, counselor, or has

been working as an advocate, legal advisor or notary public in Poland for at least ten years; 9) did not perform the service, worked or collaborated with the state security organs mentioned in Article 5 of the Act of 18 December 1998 on the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation.

**34.** Pursuant to Article 34 § 1 sentence 1 of the Act on the Supreme Court, upon appointment, a Supreme Court judge takes the oath before the President of the Republic of Poland.

**35.** Based on Article 26 § 1 of this Act, the powers of the Extraordinary Control and Public Affairs Chamber include examination of extraordinary complaints, examination of election protests and protests against the validity of a nationwide referendum and a constitutional referendum and validation of elections and referendums, other matters in the field of public law, including matters related to competition protection, energy regulation, telecommunications and rail transport, as well as cases in which an appeal has been lodged against the decision of the Chairman of the National Broadcasting Council, as well as complaints concerning the excessive length of proceedings before common and military courts and the Supreme Court.

### 3. The Act of 8 December 2017 Amending the Act on the NCJ

**36.** Before the entry into force of the Act of 8 December 2017 Amending the Act on the NCJ (*ustawa z dnia 8 grudnia 2017 o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw* – "the 2017 Amending Act"), on 17 January 2018, the Act on the National Council of the Judiciary ("the NCJ") provided that judicial members of this body were to be elected by the relevant assemblies of judges at different levels of the judiciary.

**37.** The 2017 Amending Act granted to the Sejm the competence to elect judicial members of the NCJ for a joint four-year term of office (Article 9a (1)). **In accordance with the provision of Article 9a (2), when selecting members, the Sejm shall, as far as possible, take into account the need for representation in the Council of judges of different types and levels of courts. The provision of Article 11a (2) of the Act stated that a candidate for a judge-member of the council may be proposed by a group of at least: (a) two thousand citizens of the Republic of Poland who are at least eighteen years old, have full legal capacity and enjoy full public rights; (b) twenty-five judges, excluding retired judges.**

**38.** It stipulated that the joint term of new members of the NCJ begins on the day following the day of their election (Article 9a (3)).

**39.** Pursuant to Article 6 of the 2017 Amending Act, the mandates of judicial members of the NCJ elected on the basis of the previous Act shall continue until the day preceding the beginning of the term of office of the new members of the NCJ.

**40.** The provision of Article 11a of the Act on the NCJ states in par. 2, that the entities authorized to propose a candidate for a member of the NCJ is a group of at least: 1) two thousand citizens of the Republic of Poland who have reached eighteen years of age, have full legal capacity and enjoy full public rights, or 2) twenty-five judges, excluding retired judges.

### 4. Judgment no. K 5/17 of 20 June 2017

**41.** In its judgment no. K 5/17 of 20 June 2017 the Constitutional Tribunal considered the procedure of electing judges to be NCJ members as well as the provisions on the terms of office of elected members. It decided that Article 13 (3) of the relevant Act inasmuch as it stipulated that the term of office of the NCJ members elected from amongst the judges of common courts had an individual character was inconsistent with Article 187 § 3 of the Constitution. The ruling was unanimous.

**42.** The Constitutional Tribunal stated that the challenged provisions differentiated among judges in an inadmissible way, by affecting their passive electoral rights in elections to the NCJ. As a matter of fact, Article 11 of the Act on the NCJ in its wording prior to the 2017 Amending Act stipulated that the NCJ was comprised of 2 judges of the Supreme Court, 2 judges of the administrative courts, 2 judges of the appellate courts, 8 judges of the regional and district courts and 1 judge of the military courts. The election thereof was carried out by the assemblies of the respective courts. It resulted, first of all, in a differentiation in the electoral procedure (direct in the case of the Supreme Court, Supreme Administrative Court and military courts, or indirect in the case of other courts). What is more, it also led to a differentiation in the voting power between judges of different levels which meant that the votes cast were not equal, but weighed differently according to the court's degree.

**43.** According to the Constitutional Tribunal, Article 187 § 4 of the Constitution provides the legislator with a wide margin of appreciation when it comes to devising a procedure for electing members of the NCJ. However, the limits of that discretion are set by the wording of constitutional provisions. On the basis of Article 187 § 1 point (2) of the Constitution, the passive electoral right in this context is exercised by the judges of the Supreme Court, common courts, administrative courts, and military courts. Since the Constitution does not specify any criteria that the legislator could adopt to differentiate among judges mentioned in Article 187 § 1 point (2) as regards their possibility of standing for elections to the NCJ, the legislator may not determine such criteria freely by an act. Indeed, the composition of the said Council falls within

the ambit of matters required to be specified by the Constitution, and hence the composition may not be modified without constitutional authorisation. The legislator is obliged to devise a mechanism of electing the NCJ members in such a way that the proper representation of judges be guaranteed, without introducing additional criteria within the *ratione personae* scope.

**44.** When analysing the Act's provisions concerning the term of office of elected members of the Council, the Constitutional Tribunal deemed that the problem was an erroneous, continuous practice of applying certain provisions where the practice had resulted in a well-established, though unconstitutional, interpretation of the provisions of the relevant act. The Constitutional Tribunal held that it was competent to examine the unconstitutional interpretation, which had taken place also in the past.

**45.** Therefore, in the Constitutional Tribunal's view, it does not follow from Article 187 § 3 of the Constitution that the members of the NCJ are chosen individually for a set term of office (unlike, for instance, in the case of the judges of the Constitutional Tribunal). According to the Constitutional Tribunal, the wording of the constitutional provision indicates that all elected members of the said Council have one collective term of office. The group of Council members comprises: 15 judges of particular courts, as well as four Sejm deputies and two senators. Differentiation at the level of statutory norms as regards the terms of office of elected Council members results in an infringement of Article 187 § 3 of the Constitution (which stipulates that the term of office of the elected members of the NCJ lasts four years).

**46.** The Tribunal pointed out that the said Council was neither part of the judiciary nor a representative thereof. Indeed, the Council constitutes an authority that does not fall within the simple rendering of the principle of the separation of powers, as referred to in Article 10 of the Constitution. The constitution-maker placed that authority in between the three branches of the public authority (the legislature, the executive, and the judiciary), thus turning it into an instrument for the realisation of the constitutional principle of balance between the branches of government, as well as a forum for cooperation and balance between the said branches.

**47.** Due to the above-mentioned systemic position of the NCJ, as well as its duties and competencies, it is impossible to apply the same guarantees with regard to the Council as in the case of the constitutional authorities of the judiciary. The legislator has a wide margin of discretion when it comes to determining the organisational structure of the NCJ, the remit of its activity, its *modus operandi*, as well as a procedure of electing the members thereof.

**48.** However, the legislator's discretion is limited by the constitutional competencies of the Council, the composition of the Council specified in the Constitution, as well as the requirement that the elected members of the Council be chosen for a fixed term of office. In the last-mentioned aspect, the interpretation of Article 187 § 3 of the Constitution must be

consistent – the term of office of all elected members of the Council must be considered as collective, since only such an interpretation of the said term of office is consistent with the Constitution.

### 5. Judgment no. K 12/18 of 25 March 2019

**49.** In its judgment no. K 12/18, the Constitutional Tribunal agreed with the position formulated in the judgment no. K 5/17. It found thus the previous stance, namely that NCJ members should be judges elected by judges, baseless on the ground of Article 187 § 1 point (2). The interpretation limiting the way of election to the assemblies of judges violated not only the wording of the aforementioned constitutional provision, yet also its rationale and reasonability of the lawmaker (*racjonalność ustawodawcy*). It stemmed from the relevant provisions of the Constitution that the legislator provided precisely in Article 187 § 1 of the Constitution for electoral competencies of certain bodies (Sejm, Senate) and did not regulate it with reference to the representatives of the judiciary. The Constitutional Tribunal concluded therefore that such a manner of regulation of this matter was done by the legislator consciously, with a view to setting it out at the level of an act. This position was also corroborated by the discussions held in 1996 at the National Assembly's Constitutional Committee in the context of the Constitution's adoption.

**50.** Furthermore, the Constitutional Tribunal concluded that, although the NCJ was a body set out at the constitutional level, the provisions of the Constitution itself pertaining to the Council were concise to the extent that it was legitimate to find that the magnitude of matters concerning the functioning and procedures thereof were left to the legislator's margin of appreciation. The Constitution laid down solely a certain minimum of the fundamental safeguards. The Constitutional Tribunal observed that the fact of the NCJ being a representation of the judiciary did not result from the method of election of its members, yet from its composition where judges constitute a vast majority. The composition of the Council is safeguarded by the Constitution. Consequently, the Constitutional Tribunal found the impugned Article 9a of the Act on the NCJ, pertaining to the reshaped procedure of the election of the judges-members of the NCJ, constitutional.

### 6. Judgment of the Court of Justice of the European Union of 19 November 2019 (joined cases A.K. and Others nos. C-585/18, C-624/18 and C-625/18)

**51.** In August and September 2018 the Supreme Court made three requests to the CJEU for preliminary rulings in three cases pending before that court.

**52.** The requests concerned, *inter alia*, a question whether the Disciplinary Chamber of the Polish Supreme Court satisfied, "in the light of the circumstances in which it [had been] formed and its members appointed, the independence and impartiality required" by EU law.

**53.** On 27 June 2019 the Advocate General Tanchev delivered his written opinion in those cases. He also analysed the required qualifications of the NCJ with reference to the Court's case-law (§ 123 of the opinion).

**54.** On 19 November 2019 the Court of Justice of the European Union gave a preliminary ruling on the cases referred by the Supreme Court (joined Cases C-585/18, C-624/18 and C-625/18). The CJEU formulated following concerns with respect to the NCJ (§ 143 of the judgment):

> ...first, the [NCJ], as newly composed, was formed by reducing the ongoing four year term in office of the members of that body at that time; second, whereas the 15 members of the [NCJ] elected among members of the judiciary were previously elected by their peers, those judges are now elected by a branch of the legislature among candidates capable of being proposed inter alia by groups of 2 000 citizens or 25 judges, such a reform leading to appointments bringing the number of members of the NCJ directly originating from or elected by the political authorities to 23 of the 25 members of that body; third, the potential for irregularities which could adversely affect the process for the appointment of certain members of the newly-formed NCJ.

**55.** The CJEU noted that: "the decisions of the President of the Republic appointing judges to the Supreme Court are not amenable to judicial review" (§ 145 *ibid*).

### 7. Judgment no. 2/20 of 20 April 2020

**56.** The Constitutional Tribunal concluded that Supreme Court's resolution of 23 January 2020 (ref. no. BSA I 4110 1/20, OSNKW no. 2/2020, item 7), issued jointly by the Court's Civil Chamber, Criminal Chamber, as well as Labour Law and Social Security Chamber, is inconsistent with: Article 179, Article 144 § 3 point (17), Article 183 § 1, Article 45 § 1, Article 8 §1, Article 7 and Article 2 of the Constitution of Poland, Article 2 and Article 4(3) of the Treaty on European Union, Article 6 § 1 of the European Convention of Human Rights.

### 8. Constitutional Tribunal's judgment of 10 March 2022, case no. K 7/21

**57.** In its judgment of 10 March 2022 in case K 7/21, the Constitutional Tribunal has ruled that *Article 6 § 1, first sentence of the Convention, to the extent to which the notion of "civil rights and obligations" covers the subjective right of a judge to occupy an administrative function in the structure of common courts of law in the Polish legal system is inconsistent with Article 8 section 1, Article 89 section 1 point 2 and Article 176 section 2 of the Constitution*

*of the Republic of Poland*. Secondly, it has found that *Article 6 § 1, first sentence of the Convention – to the extent that, when assessing the fulfilment of the condition of a "court established by law", it allows the European Court of Human Rights or national courts to disregard the provisions of the Constitution, statutes and judgments of the Polish Constitutional Tribunal, and allows the European Court of Human Rights or national courts to disregard the provisions of the Constitution, statutes and judgments of the Polish Constitutional Tribunal and enables the independent creation of norms concerning the nomination procedure of national judges by the European Court of Human Rights or national courts in the process of interpreting the Convention – is inconsistent with Article 89 section 1 point 2, Article 176 section 2, Article 179 in conjunction with Article 187 section 1 in conjunction with Article 187 section 4 and Article 190 section 1 of the Constitution.* Third, it has stated that *Article 6 § 1, first sentence of the Convention – to the extent that it authorises the European Court of Human Rights or national courts to assess the compliance with the Constitution and the Convention of laws relating to the judiciary system, the jurisdiction of courts and the law specifying the system, scope of activities, mode of work and the method of selecting members of the National Council of Judiciary – is inconsistent with Article 188 points 1 and 2 and Article 190 section 1 of the Constitution.*

**58.** In this ruling the Constitutional Tribunal stated that the review of the right to a fair trial may only concern the action of a court in a specific case and not lead to an abstract assessment of the basis of a part of the judiciary within the state system and its organisation. Furthermore, it is also not possible to state that the Republic of Poland has agreed to include – within Article 6 of the Convention – a rule, which allows for the omission of national regulations, including constitutional ones, when assessing the legality of the process of nominating judges and creating norms in this respect by the European Court of Human Rights.

### 9. The 2004 Act

**59.** The provisions of the Act of 17 June 2004 concerning the complaint on infringement of a party's right to have a case examined in preparatory proceedings conducted or supervised by a prosecutor and in court proceedings without undue delay Journal of Laws (Dz.U.) of 2004, No. 179, item 1843 ammended with the Act of 20 February 2009 amending the Act on the complaint on infringement of a party's right to have a case heard in court proceedings without undue delay Journal of Law (Dz.U.) of 2009, No. 61, item 498 ("the 2004 Act") state as follows (changes have been underlined).

**Act of 17 June 2004 concerning the complaint on infringement of a party's right to have a case examined in preparatory proceedings conducted or supervised by a prosecutor and in court proceedings without undue delay**

**Article 1. 1.** The Act lays down the principles and procedures of lodging and hearing the complaint of a party whose right to have a case examined without undue delay has been infringed due to an action or inaction of the court and/or prosecutor conducting or supervising preparatory proceedings.

**2.** The provisions hereof shall apply accordingly where, due to an action or inaction of the court or court enforcement officer, the infringement has occurred of a party's right to have executory or any other proceedings regarding enforcement of a court decision conducted and concluded without undue delay.

**Article 2. 1.** A party may file a complaint seeking ascertainment that the proceeding that are the object of the complaint involve infringement of the party's right to have a case examined without undue delay, where the proceedings are pending longer than needed to clarify factual and legal circumstances essential for resolving the case, or to successfully conclude executory or other proceedings regarding enforcement of a court decision (protracted character of proceedings).

**1a.** Article 2(1) shall apply accordingly to preparatory proceedings.

**2.** In order to ascertain whether undue delay of proceedings has occurred in a case, it must be assessed, in particular, whether the court had acted in a timely and correct manner in order to adjudge the case as to its substance, or whether the prosecutor conducting or supervising preparatory proceedings had acted in a timely and correct manner in order to conclude the preparatory proceedings, or whether the court or court enforcement officer had acted in a timely and correct manner in order to conduct and conclude executory proceedings or other proceedings regarding enforcement of a court decision, having regard to the nature of the case in question, its factual and legal complexities , the significance of the case for the party who filed the complaint, the issues resolved therein as well as the conduct of the parties, particularly of the party alleging undue delay of the proceedings.

**Article 3.** The following shall be entitled to file a complaint:

1) in proceedings concerning fiscal offences and misdemeanors – a party;

2) in proceedings concerning misdemeanors - a party;

3) in proceedings concerning the liability of collective entities for punishable offences – a party or applicant ;

4) in criminal proceedings – a party or victim, even if the latter is not a party to the proceedings;

5) in civil proceedings – a party, an accidental intervener and a participant in the proceedings;

6) in judicial-administrative proceedings – a plaintiff and a participant in the proceedings with the rights of a party;

7) in executory proceedings or in other proceedings regarding enforcement of a court decision – a party and another person enforcing his/her right in the proceedings.

**Article 4. 1.** The complaint shall be heard by a court superior to the court conducting the proceedings.

**1a.** Where the complaint concerns undue delay in proceedings before a district court and a circuit court – it shall be heard, in its entirety, by an appellate court .

**1b.** Where the complaint concerns undue delay in proceedings before a circuit court and an appellate court – it shall be heard, in its entirety, by an appellate court.

**2.** Where the complaint concerns undue delay in proceedings before an appellate court and/or the Supreme Court – it shall be heard by the Supreme Court.

**3.** Where the complaint concerns undue delay in proceedings before a provincial administrative and/or the Supreme Administrative Court – it shall be heard by the Supreme Administrative Court.

**4.** Where the complaint concerns undue delay in executory proceedings or other proceedings regarding the enforcement of a court decision, it shall be heard by the circuit court in whose circuit the execution and/or other acts are performed; where the execution or other proceedings regarding the enforcement of a court decision are being conducted in several circuits, the complaint shall be heard by the court before whom the first act was performed.

**5.** Where the complaint concerns undue delay in preparatory proceedings, it shall be heard by the court superior to the court that has *ratione materiae* competence.

**Article 5. 1.** The complaint for ascertainment of undue delay in proceedings that are the object of the complaint shall be filed in the course of the proceedings in the case.

**2.** The complaint shall be filed with the court before which the proceedings are pending.

**3.** The complaint concerning undue delay in executory proceedings or other proceedings regarding enforcement of a court decision shall be filed with the court referred to in Article 4 (4) of this Act.

**4.** The complaint concerning preparatory proceedings shall be filed with the prosecutor conducting or supervising the proceedings.

**Article 6. 1.** The complaint shall satisfy formal requirements applicable to court filings.

**2.** The complaint shall also contain:

1) demand for ascertainment of undue delay in the proceedings that are the object of the complaint;

2) elaboration of the circumstances substantiating the request.

**3.** The complaint may contain a demand for the issuance of instructions to the court hearing the case or the prosecutor conducting or supervising the preparatory proceedings, to take appropriate action within a stipulated period of time and to award an appropriate amount of money as referred to in Article 12(4).

**Article 7.** The court or the prosecutor with whom the complaint has been filed shall submit the same forthwith to the competent court, together with the case files of the proceedings.

**Article 8. 1.** The court shall hear the complaint in a panel of three judges.

**2.** In matters unregulated by this Act, the court shall apply to proceedings resulting from the complaint regulations on appeal proceedings applicable in the proceedings subject to the complaint.

**Article 9. 1.** Should a complaint fail to satisfy the requirements set forth in Article 6(2), it shall be rejected by the court competent to hear the same, without requesting correction of its formal defects.

**2.** The court shall reject a complaint submitted by an unauthorised party or inadmissible pursuant to Article 14.

**Article 10. 1.** The court competent to hear the complaint shall notify the State Treasury – the president of the court whose action or inaction, as alleged by the complainant, resulted in undue delay of proceedings – of the pending proceedings , serving the president with a copy of the complaint.

**2.** Where the complaint concerns undue delay in proceedings conducted by a court enforcement officer, the court shall notify the court enforcement officer and the State Treasury – the president of the District Court having jurisdiction over the court enforcement officer, serving the president with a copy of the complaint.

**2a**. Where the complaint concerns undue delay in preparatory proceedings, the competent Court shall notify the State Treasury – prosecutor superior to the prosecutor conducting or supervising the preparatory proceedings, serving the former with a copy of the complaint.

**3.** If they give notice of their respective intention to join the case, the State Treasury and the court enforcement officer shall enjoy the rights of a party to the complaint proceedings.

**Article 11.** The court shall pass a decision within two months of the complaint being filed.

**Article 12. 1.** An unjustified complaint shall be dismissed by the court.

**2.** The court allowing a complaint shall ascertain undue delay in the proceedings that are the object of the complaint. .

**3.** The court, acting at the request of the complainant or ex-officio, shall recommend that the court hearing the case as to its substance or the prosecutor conducting or supervising preparatory proceedings, carry out appropriate measures within a specified period of time, unless making such recommendations is patently redundant. The recommendations shall not address the factual and legal assessment of the case.

**4.** The court allowing a complaint, where requested by the complainant, shall order the State Treasury, or, when the complaint concerns undue delay in proceedings conducted by a court enforcement officer, the relevant court enforcement officer, to pay an amount of money between PLN 2,000 and PLN 20,000.

**5.** If the amount of money is awarded from the State Treasury, the payment shall be made by:

1) the court conducting the protracted proceedings, from its own funds;

2) Circuit Prosecutor's Office in whose circuit the protracted preparatory proceedings are being conducted and, as regards preparatory proceedings conducted by local branches of Organised Crime Bureaus of the National Prosecutor's Office , by the competent Appellate Prosecutor's Office , from their own respective funds.

**6.** Where the amount of money is awarded in the case referred to in Article 4(1a) or in the case referred to in Article 4(1b), the payment shall be made, respectively, by the Circuit Court or the Appellate Court, from their own respective funds.

**Article 13. 1.** The court shall serve a copy of the decision allowing the complaint concerning undue delay in proceedings before a court on the president of the relevant court. The president of the court served with the decision shall take supervisory measures

under the Common Courts System Act of 27 July 2001 (Journal of Laws No. 98, item 1070, as amended[1)]).

**2.** The court shall serve a copy of the decision allowing the complaint concerning undue delay in proceedings conducted by a court enforcement officer on the Minister of Justice.

**3.** The court shall serve a copy of the decision allowing the complaint concerning preparatory proceedings on the prosecutor superior to the prosecutor conducting or supervising the preparatory proceedings. The prosecutor who has been served with a copy of the decision shall take supervisory measures under the Prosecutor Service Act of 20 June 1985 (Journal of Laws of 2008, No. 7, item 39 and 2009, No. 1, item 4 and No. 26, items 156 and 157).

**Article 14.** A complainant may lodge a new complaint in the same case after the lapse of twelve months following the date of the court decision referred to in Article 12. In the case of preparatory proceedings involving pre-trial detention, executory proceedings or any other proceedings regarding enforcement of a court decision, the said period shall be 6 months.

**Article 15. 1.** A party whose complaint is allowed may claim, in separate proceedings, compensation for losses resulting from ascertained undue delay in proceedings, either from the State Treasury or, jointly and severally, from the State Treasury and the court enforcement officer.

**2.** The ruling allowing a complaint shall be binding on the court in civil proceedings for damages or compensation, with regard to the ascertainment of undue delay in proceedings.

**Article 16.** A party who failed to file a complaint against undue delay in proceedings under Article 5(1) may claim damages for losses resulting from undue delay of proceedings under Article 417 of the Civil Code Act of 23 April 1964 (Journal of Laws No. 16 item 93, as amended), after the proceedings are concluded as to their substance with a binding decision.

**Article 17. 1.** A complaint shall be subject to a fixed filing fee of PLN 100.

**2.** Where a complaint has been filed by several persons, each of them shall pay the fee separately; where a single fee has been paid without appropriate indication of the payer, it shall be deemed to have been paid by the person first named in the complaint.

**3.** The court, allowing or rejecting a complaint, shall automatically return the fee paid on such complaint.

**Article 18.**

1. Within 6 months of the entry into force of this Act, persons who before that date lodged an application with the European Court of Human Rights (hereinafter referred to as "the Court") alleging infringement of their right to have their case heard within a reasonable time, as referred to in Article 6(1) of the Convention on the Protection of

[1] Amendments to the said Act were promulgated in the followings volumes of the Journal of Laws: 2001 No. 154 item 1787; 2002 No. 153 item 1271; No. 213 item 1802 and No. 240 item 2052; 2003 No. 188 item 1838 and No. 228 item 2256; 2004 No. 34 item 304, No. 130 item 1376, No. 185 item 1907 and No. 273 items 2702 and 2703; No. 13 item 98, No. 131 item 1102, No. 167 item 1398, No. 169 items 1410, 1413 and 1417; No. 178 item 1479 and No. 249 item 2104; 2006 No. 144 item 1044 and No. 218 item 1592; 2007 No. 25 item 162, No. 64 item 433, No. 73 item 484, No. 99 item 664, No. 112 item 776, No. 136 item 959, No. 204 item 1482 and No. 230 item 1698; and 2008 No. 41 item 251.

Human Rights and Fundamental Freedoms (Journal of Laws 1993 No. 61, item 284; 1995 No. 36, items 175, 176 and 177; 1998 No. 147, item 962 and 2003 No. 42, item 364), may lodge a complaint against undue delay in proceedings hereunder, if the application to the Court has been lodged in the course of proceedings subject to that application, provided the Court has not ruled as to the admissibility of the application.

2. A complaint filed under Article 18(1) shall indicate the date of lodging the application with the Court.

3. The competent court shall immediately notify the minister competent in foreign affairs of any complaints filed under the procedure set out in Article 18(1).

**Article 19.** This Act shall enter into force after the lapse of one month following the date of its publication.

### 10. Additional articles on the amendment of the Act on the complaint on infringement of a party's right to have a case heard in court proceedings without undue delay that will not be covered by the uniform text of the amended act

Article 2. 1. Within 6 months of the entry into force of this Act, persons who before that date lodged an application with the European Court of Human Rights (hereinafter referred to as "the Court") alleging infringement of their right to have their case heard within a reasonable time, as referred to in Article 6(1) of the Convention on the Protection of Human Rights and Fundamental Freedoms (Journal of Laws 1993 No. 61, item 284, as amended[2]), may lodge a complaint against undue delay in proceedings hereunder, if the application to the Court has been lodged in the course of proceedings subject to that application, provided the Court has not ruled as to the admissibility of the application.

2. A complaint filed under Article 18(1) shall indicate the date of lodging the application with the Court.

3. The competent court shall immediately notify the minister competent in foreign affairs of any complaints filed under the procedure set out in Article 18(1).

Article 3. This Act shall enter into force after the lapse of 14 days of its publication.

## III. THE LAW

[2] Amendments to the said Act were promulgated in the followings volumes of the Journal of Laws: 1993 No. 61 item 284; 1995 No. 36 item 175, 176 and 177; 1998 No. 147 item 962; 2001 No. 23 item 266; and 2003 No. 42 item 364.

## A. Formal requirements of the admissibility of the application

### 1. *Ratione materiae* incompatibility with the Convention

#### a. Constitutionally justified objection – composition of the Supreme court's panel

**60.** The Government raise the preliminary objection – as regards the admissibility of the allegation of infringement of Article 6 § 1 of the Convention with regard to the composition of the panel in the Supreme Court - that the foregoing application should be considered *ratione materiae* incompatible with the Convention and therefore be rejected in accordance with Article 35 § 4 of the Convention.

**61.** The Government observe that the circumstances of the foregoing application *prima facie* lead to the conclusion that they are covered by the scope of the judgment of the Constitutional Tribunal of 10 March 2022 in case K 7/21.

**62.** In its judgment the Constitutional Tribunal has ruled *i.a.* that Article 6 § 1, first sentence of the Convention – to the extent that, when assessing the fulfilment of the condition of a "court established by law", it allows the European Court of Human Rights or national courts to disregard the provisions of the Constitution, statutes and judgments of the Polish Constitutional Tribunal, and allows the European Court of Human Rights or national courts to disregard the provisions of the Constitution, statutes and judgments of the Polish Constitutional Tribunal and enables the independent creation of norms concerning the nomination procedure of national judges by the European Court of Human Rights or national courts in the process of interpreting the Convention – is inconsistent with Article 89 section 1 point 2, Article 176 section 2, Article 179 in conjunction with Article 187 section 1 in conjunction with Article 187 section 4 and Article 190 section 1 of the Constitution. It also has stated that Article 6 § 1, first sentence of the Convention – to the extent that it authorises the European Court of Human Rights or national courts to assess the compliance with the Constitution and the Convention of laws relating to the judiciary system, the jurisdiction of courts and the law specifying the system, scope of activities, mode of work and the method of selecting members of the NCJ – is inconsistent with Article 188 points 1 and 2 and Article 190 section 1 of the Constitution.

**63.** The result of this judgment is the removal of the norms indicated therein from the system. Hence, in effect, the decisions issued on their basis, i.e. four judgments of the Court: the judgment of 29 June 2021 in the case of *Broda and Bojara v. Poland*; the judgment of 22 July 2021 in the case of *Reczkowicz v. Poland*; the judgment of 8 November 2021 in the case of

*Dolińska-Ficek and Ozimek v. Poland* and the judgment of 3 February 2021 in the case of *Advance Pharma sp.z o.o. against Poland,* do not have the attribute provided for in Article 46 of the Convention (enforceability obligation). The same defect would have the judgment finding a violation of Article 6 § 1 of the Convention in the present case.

**64.** In its judgment, the Constitutional Tribunal emphasized that international law is of consensual character and is derived solely from the will of states. Poland granted the Court certain conventional ruling powers of a judicial and interpretative nature in the area of its sovereignty. However, this consent has not been unlimited in content. Material (content norm) and formal (binding procedure) framework remains the Constitution of the Republic of Poland, the guardian of which is the Constitutional Tribunal. Therefore, the Court may exercise certain conventional ruling powers of a judicial and interpretative nature until Poland expresses a constitutionally justified objection on this matter, e.g. in the form of judgments of the Constitutional Tribunal. This type of rule is known to the Court (see Judge Garlicki's separate opinion from Case No. 46221/99, *Öcalan v. Turkey*, paragraph 4) (§ 425 of the Constitutional Tribunal judgment). For the above reasons, in the current case and in the light of the Constitutional Tribunal's case-law, as regards the allegation of infringement of Article 6 § 1 of the Convention with regard to the composition of the panel in the Supreme Court, the Court has no competence *ratione materiae*, as it would mean acting outside the scope of its authority.

### b. Applicability of Article 6 § 1 of the Convention to the incidental proceedings initiated on the basis of the 2004 Act

**65.** The Government raise their preliminary objection as regards the admissibility of the allegation of infringement of Article 6 § 1 of the Convention with respect to proceedings initiated on the basis of the 2004 Act.

**66.** In its judgment of 4 June 2000 in the case *Kudła v. Poland*, the Court stated that the right to have a case heard within a reasonable period of time would not be effective unless the possibility to submit a complaint against the excessive length of proceedings with a national body was introduced, and that the Court would only consider an application after all the domestic remedies are exhausted. The introduction of a new procedure for examining the excessive length of proceedings into Polish law was a step towards achieving those goals.

**67.** As for Poland, the relevant act came into force on 17 September 2004 and applies to all judicial proceedings, also as regards the implementation of judgments.

**68. On the one hand, from a strictly procedural point of view proceedings initiated with a complaint against the excessive length of proceedings are separate from those that the complaint itself relates to** (cf. the justification of the resolution of the SC of 21 June 2006, III SPZP 1/06, SC Bulletin 2006, No. 10; the justification of the resolution of the SC of 28 June 2005, III SPZP 1/05, OSNP 2005, No. 19, item 312). The 2004 Act specifies its scope (Article 1 paras. 1 and 2 of the 2004 Act); the grounds of the complaint (Article 2 paras. 1 and 1a of the 2004 Act); the criteria for determining a protraction of the proceedings (Article 2 § 2); the entities entitled to submit complaints (Article 3 of the 2004 Act); the court that has jurisdiction to consider the complaint (Article 4 of the 2004 Act); the formal requirements of the complaint (Articles 6 and 17 of the 2004 Act); the procedure for submitting the complaint (Articles 5 and 14 of the 2004 Act); the modes of considering the complaint (Articles 8–9 and Article 11 of the 204 Act); the requirement of notifying the State Treasury of the pending proceedings (Article 10 of the 2004 Act); the types and legal consequences of decisions adopted as a result of the adjudication of the complaint (Articles 12–15 of the 2004 Act).

**69.** However, on the other hand, as clearly indicated above, **in the functional sense a plea concerning the excessive length of proceedings is always of a derivative (secondary) nature and at the same time incidental with respect to other proceedings pending in a given case (which are the initial and basic proceedings)**, as the complaint relates to the "proceedings in this case" that are already pending (Article 2 of the 2004 Act).

**70.** It should therefore be underlined that the 2004 Act proceedings do not have a separate existence (**they cannot be initiated without the main proceedings they concern**) and are not characterized by the features necessary for typical court proceedings: the complaint is examined only in one instance in a closed session (Article 397 § 1 of the Code of Civil Procedure).

**71.** The one-instance nature of the proceedings initiated with a complaint had already been noted in the justification of the Government's bill concerning a complaint against the excessive length of proceedings. When providing its opinion on the said bill on 23 July 2003, the National Council of Judiciary also pronounced itself in favour of maintaining the one-instance procedure, stating, e.g. that "*The provisions of the bill indicate that the complaint proceedings are to have the incidental nature of proceedings initiated with an interlocutory appeal. The proposed solution is correct and should definitely be maintained during further works on the bill. The lengthy, two-instance consideration of a complaint should not be allowed, as instead of reducing the excessive length of proceedings it could yield an adverse result*". Reference was also made to the experiences of other states, in which the two-instance model of proceedings resulted in the further protraction of the main proceedings (G. Artymiak, *Zasada szybkości postępowania*

*karnego...*; cf. M. Sykulska, *Prawo do skutecznego środka odwoławczego na przewlekłość postępowania...*). The one-instance character of the complaint proceedings was also accepted by T. Ereciński (Gazeta Prawna of 12 January 2005, p. 25) and T. Zembrzuski, who argued that the said proceedings "*had been created as incidental proceedings based on the one-instance model*" (*Niezaskarżalność orzeczeń w przedmiocie skargi na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki*, Palestra 2006, volumes 9–10, p. 36).

**72.** Although the provisions of the 2004 Act do not provide a clear, direct answer to the question about the nature of the procedure caused by the complaint, which has momentous practical consequences whether this procedure is incidental in the case in connection with the recognition of which it is pending or is a separate procedure, such conclusion can be convincingly and indisputably drawn through the purposeful and functional interpretation of the provisions of this legal act and justification for its draft.

**73.** The subject of the proceedings caused by the complaint against the length of the proceedings is the examination of the complaint raised by the complainant that there was a violation of his right to court by protraction of proceedings in his case. **The allegation is made to the court, the authority conducting or supervising the preparatory proceedings or the authority responsible for the implementation of the decision, and not the opposite party or the participant in the proceedings in the case under which the complaint proceedings occur**. The subject of the proceedings caused by the complaint against the length of proceedings is therefore not the same as the subject of the main roceedings in the case in which the complaint is lodged, and the relationships between those two are functional.

**74.** A different subject of proceedings in the case and proceedings caused by a complaint against the length of proceedings in that case might prompt the thesis that proceeding based on the 2004 Act form a separate procedure twards the main proceedings in the case and are not incidental for the case against the background of which the complaint was filed. Nevertheless the justification of the 2004 Act's draft (Sejm print No. 2256) shows that **the intention of the legislator was to shape the procedure on a complaint about the length of proceedings as the incidental proceedings towards those on the essence of the case. The adoption of such a perspective is demonstrated by the fact that the legislator has not created a new procedure for examining the complaint against the length of proceedings from scratch, but assumed that the complaint is to be submitted through the court before which the proceedings are pending** (Article 5 (2) of the 2004 Act). **Furthermore, in unregulated matters the legislator referred to the appropriate application of the provisions on the complaint proceedings (*postępowanie***

***zażaleniowe*) in force in the proceedings to which the complaint relates** (Article 8 (2) of the 2004 Act). It should be emphasized that this reference has a relatively narrow scope, because it only concerns the "proceedings pending as a result of the complaint", and at the same time means that the provisions on the complaint procedure (*postępowania zażaleniowego*) should be applied taking into account the specificity and purpose of the proceedings caused by the complaint about the length of proceedings.

**75.** Proceedings regarding the complaint do not form a classic, model incidental procedure, because they do not decide the procedural issue conditioning and affecting the main proceedings. This however does not change the fact that the model of incidental proceedings assumes in its essence that the complaint about lengthiness is considered under the main case. Such an assessment of the nature of the proceedings caused by the complaint against the length of proceedings has been commonly accepted in case-law[3] and determines the method of interpreting the provisions of the 2004 Act on the complaint about the length of proceedings.

**76.** In conclusion the Government wish to raise preliminary objection as regards the admissibility of the allegation of infringement of Article 6 § 1 of the Convention with respect to proceedings initiated on the basis of the 2004.

### 2. Manifestly ill-founded character of the application

**77.** The Government are of the view that the application should be considered inadmissible on account of its manifestly ill-founded character and therefore rejected in accordance with Article 35 of the Convention.

**78.** First of all, the Government consider that Article 6 § 1 of the Convention under its civil head shall not be applicable to the proceedings conducted pursuant to the provisions of the 2004 Act for the reasons thoroughly outlined above. These proceedings do not decide on "civil" rights within the meaning of Article 6 of the Convention and they do not form a "dispute" in a civil sense.

**79.** Furthermore, in addition and acting with a far-reaching procedural caution, if the Court considered however that Article 6 § 1 of the Convention shall be applicable to the incidental proceedings based on the 2004 Act, the Government wish to submit that the very fact that the panel of the court which dealt with the applicant's case was composed of persons appointed to serve office of the Supreme Court judges following a recommendation from the NCJ does not

[3] See. justification of the Supreme Court Resolution (7) of 16.11.2004, III SPP 42/04, OSNP 2005, No. 5, position 71; Decision of the Supreme Court of 8.11.2010, WZ 51/10, unpublished; Decision of the Supreme Court of 12.10.2007, I CNP 57/07, unpublished; Decision of the Supreme Court of 24.8.2005, V CNP 7/05, unpublished..

mean that the applicant's right to a fair trial, *i.e.* an independent and impartial tribunal established by law, was violated within the meaning of Article 6 of the Convention.

**80.** On the contrary, the detailed circumstances of the facts hereby presented by the Government explicitly show that the applicant's case (with its origins in 2011) was examined each time and very diligently by the independent and impartial organs.

**81.** Thus, the Government are of the opinion that the foregoing case does not disclose prima facie grounds that there has been a violation of the Convention. They observe that the applicant failed to adduce any evidence in support of his allegations.

**82.** The detailed argumentation concerning other aspects of manifestly ill-founded character of the application is presented below (see *Substantive requirements of the admissibility of the application*).

## B. Substantive requirements of the admissibility of the application

### 1. General considerations on the essence of the right to a "tribunal established by law"

**83.** The essence of the right to a "tribunal established by law", as provided for in Article 6 § 1 of the Convention, it is that persons who exercise judicial functions should be "free from influence and pressure in the exercise of it and the question is always whether, in a given case, the requirements of the Convention are met" (*Guðmundur Andri Ástráðsson*, § 207). This does not mean that, on the basis of the Convention, a single model of the selection and appointment of judges is accepted, nor that the states-parties to the Convention are to adapt to the theoretical concepts defining the permissible limits of interaction between authorities. Providing an individual with access to a "tribunal established by law" is intended to create a judiciary system that will not depend on the discretion of the executive, but will be regulated by law emanating from the parliament (*Guðmundur Andri Ástráðsson*, § 214 and the case-law cited therein). The Court has made it clear that "interaction between the three powers is not only inevitable but even necessary as long as one of the powers does not unduly infringe the functions and powers of the others" (*Guðmundur Andri Ástráðsson*, § 215). The role of the Court is not to substitute for the domestic authorities in interpreting and assessing compliance with domestic law, but to comment on the possible consequences of such identified violations in relation to the requirements of the Convention (*Guðmundur Andri Ástráðsson*, §§ 210, 216). This excludes the possibility of using any automaticity of assessments, but must always take into account the scale and gravity of possible violations. It is in this context that the Court referred

extensively to the general principles and previous statements regarding the requirement of a "tribunal established by law" (*Guðmundur Andri Ástráðsson*, §§ 211-217), and then, referring to these positions, "specified and clarified the meaning" that should be given to this concept in conjunction with the principles of independence and impartiality (*Guðmundur Andri Ástráðsson*, §§ 218-234).

**84.** When assessing the fulfilment of the "tribunal" criterion, the competences of persons appointed to perform judicial functions are of fundamental importance. The court is to be composed of people with appropriate substantive and moral qualifications. It was emphasized in this context that the choice of judges based on competence not only ensures the capacity of the judicial authority to administer justice, but is also essential to ensuring the public trust that should be enjoyed by judicial authorities in a democratic state (*Guðmundur Andri Ástráðsson*, §§ 220-222 ).

**85.** The Government observe that the most relevant for the assessment of the situation complained of by the applicant in the case of *Guðmundur Andri Ástráðsson* are the remarks of the Court contained in §§ 222 *et seq*. In this part of the judgment, the Court has emphasized how important is the rigor of the judicial appointment process to ensure that they are fulfilled with persons with the highest qualifications and that the process of appointing judges requires strict control, as breach of the law regulating the process of appointing judges may make the participation of a given judge in the examination of the case "incorrect".

**86.** The statement that the tribunal is to be "established" by law means that the process of appointing judges is to originate from legal provisions. As a result, the appointment to the office of a judge in accordance with the Constitution and other applicable national law gives the judge the necessary powers and legitimacy. The correctness of the procedure for appointing judges, assessed in the context of the content of the applicable regulations, is therefore to constitute necessary and, at the same time, sufficient guarantee of rights under the Convention (*Guðmundur Andri Ástráðsson*, §§ 223-228).

**87.** Finally, the requirement of a tribunal established by "law" defines the specific expectations to be met by the legislator who sets the national legal framework for the judicial appointment procedure. Its primary task is to structure the law in such a way that it is "formulated unambiguously so as to prevent arbitrary interference in the appointment process, including by the executive" (*Guðmundur Andri Ástráðsson*, § 230). It should be noted, however, that the requirements so defined do not completely rule out the possibility of the executive power influencing judicial appointments. The Court has clearly stated that the requirement that the tribunal be constituted "by law" is by no means intended to impose uniformity of judicial appointment practices in the Member States. In many of these states, the representatives of

the executive branch have a decisive influence on the appointment of judges, and this fact, by itself, cannot be regarded as inconsistent with characterizing a court as constituted by "law" (*Guðmundur Andri Ástráðsson*, § 230).

**88.** The essential importance of the *Guðmundur Andri Ástráðsson* judgment lies in the development of the "threshold test" to assess the degree of failure in the appointment procedure of judges (*Guðmundur Andri Ástráðsson*, § 243). The Court has clearly stated that the right to a "tribunal established by law" "should not be interpreted excessively broadly" but must "exercise a certain restraint" (*Guðmundur Andri Ástráðsson*, § 236). Not every finding of a violation of the law in connection with the appointment of judges may result in depriving an individual of his rights guaranteed in Article 6 § 1 of the Convention. The restraint in assessing the violation of this provision results from the necessity to interpret it in a broader perspective, taking into account other principles protected in the Convention. Against this background, the Court stressed the importance of two principles. First, the principle of legal certainty, which implies the requirement that a judgment cannot be challenged in the event of a final settlement of the issue (*Guðmundur Andri Ástráðsson*, § 238). Secondly, the principle of irremovability of judges resulting from the independence of judges and which is a necessary condition for the rule of law. Although this principle is not absolute, the exception to it must be qualified and involve the inability to independently exercise the judicial function (*Guðmundur Andri Ástráðsson*, § 239).

**89.** The Court has emphasized that each time it is stated that a given court is not a "tribunal established by law", there are consequences in relation to both of the aforementioned principles – legal certainty and irremovability of judges (*Guðmundur Andri Ástráðsson*, § 240). That is why, when assessing the breach of the guarantees specified in Article 6 § 1 of the Convention, it is important to introduce the criterion of "manifest breach", which is to allow for the balancing of various principles deriving from the Convention. This reflects the assumption underlying the "threshold test" formulated by the Court in the case of *Guðmundur Andri Ástráðsson*, namely that a breach of the conventional guarantees of the right to a "tribunal established by law" cannot be automatically equated with any breach of law, but must always be qualified, referring to the scale and scope of the infringement found. Only by adopting such a perspective, clearly emphasized in the *Guðmundur Andri Ástráðsson* judgment (§§ 235, 243), it is possible to understand the meaning of the various elements of the test formulated by the Court and to apply them correctly.

**90.** The various elements of the test referred to in the case of *Guðmundur Andri Ástráðsson* are, on theoretical grounds, fairly well known. It is only worth recalling that the preconditions for the application of that test are, first, a finding that there has been a breach of

domestic law with regard to the rules governing the appointment of a judge and, second, that that infringement is "manifest". In this regard, the Court has indicated that this was to be an infringement "that is objective and genuinely identifiable as such" (*Guðmundur Andri Ástráðsson*, § 244). In addition, any such "manifest" breach must lead to a situation in which it is not possible to perform the judicial duties freely without undue interference. This breach must therefore affect the essence of the right to a "tribunal established by law" (*Guðmundur Andri Ástráðsson*, § 247). Ultimately, the assessment of the consequences of this "manifest" breach of the law, excluding the possibility of administering justice, must also take into account whether the domestic courts have "reacted" appropriately in a given situation, and thus whether they have guaranteed the individual's rights under the Convention. Only the finding that the effects of the breach have not been properly assessed and that the national court has not "weighed the conflicting interests" and – consequently has not drawn "the necessary conclusions" can justify the interference of the Court, which – as underlined – is aware of its essentially subsidiary role in the supervisory mechanism established by the Convention" (*Guðmundur Andri Ástráðsson*, §§ 250, 251).

**91.** At the same time, it should be emphasized that the criteria making up the "threshold test" drawn up by the Court in the case of *Guðmundur Andri Ástráðsson* must always be considered together. Only then can they constitute grounds for stating that the irregularities in a given judicial appointment procedure were so serious that they entailed a breach of the right to a fair trial established by law (*Guðmundur Andri Ástráðsson*, § 243). This means that in the event of failure to meet any of the conditions of the above-mentioned test, its application will not be possible, and therefore it will not be treated as a justification for finding a violation of Article 6 § 1 of the Convention.

**92.** The Government observe that in the case of *Guðmundur Andri Ástráðsson* the source of the Court's finding of a violation of Article 6 § 1 of the Convention was first and foremost breach of domestic law by an executive branch. It should also be indicated that recognizing the defectiveness of the judge's appointment process and its inconsistency with the Convention, the Court held that the issues of independence and impartiality of that judge did not require a separate examination (§ 295). It does not follow from the Convention that such bodies have to be appointed by the High Contracting Parties of the Convention. The participation of such bodies in the procedure of nomination of judges is not regulated in the Convention as well. Hence, it must be concluded that in this respect the national authorities should be given a wide margin of appreciation and the judgment in the case of *Guðmundur Andri Ástráðsson* cannot be applicable automatically to the applicant's case.

**93.** Referring to the circumstances of the present case, the Government observe that there was no manifest or flagrant breach of domestic law with regard to the process of appointing judges who considered the applicant's case.

**94.** Subsequently, the Government wish to submit that although the foregoing case deal with the very issue of the functioning of the domestic court, its composition and the procedure for appointing their members, the applicant did not substantially specify the allegations in this regard in his complaint.

**2. With regard to the Court's first question**

**95. In its first question the Court asks whether Article 6 § 1 of the Convention under its civil** head is applicable to the proceedings instituted by the applicant under the 2004 Act.

**96.** In reply the Government wish to notice that Article 6 § 1 of the Convention under its civil head shall not apply to proceedings conducted pursuant to the provisions of the 2004 Act. These proceedings do not decide on "civil" rights within the meaning of Article 6 of the Convention, because they do not concern a "dispute" in a civil sense. These proceedings are initiated on the basis of a complaint, which - in the case of complaints concerning proceedings before a civil court - is submitted to the president of the court, whose actions or sluggishness the complaint is about.

**97.** In addition to the detailed argumentation presented above under subsection 1 of point A (*Ratione materiae incompatibility with the Convention - as regards the applicability of Article 6 § 1 of the Convention to the incidental proceedings initiated on the basis of the Act of 17 June 2004 concerning the complaint on infringement of a party's right to have a case examined in preparatory proceedings conducted or supervised by a prosecutor and in court proceedings without undue delay*), the Government wish to note that the 2004 Act does not provide for an obligation to submit a response to the complaint, and such right is, under Article 10 § 3 of the 2004 Act, granted to the president of the court only in the event of participation in the case. Nevertheless, although the parties' arguments are presented in writing, the adjudicating court independently examines the course of the case and adjudicates on the basis of its files (meanwhile, civil proceedings in Poland are, as a rule, adversarial). Moreover, it has been the Court itself that criticized the excessively formalistic approach of Polish courts, which attached too much importance to the content of the 2004 Act complaint (cf. eg Wende and Kukówka v. Poland, judgment of 10 May 2007, application no. 56026/00, §§ 49-57; Ziaja v. Poland, judgment of 16 May 2019, application no.45751/10, §§ 28 and 50).

**98.** It should further be underlined that the 2004 Act proceedings do not have a separate existence, they cannot be initiated without the main proceedings they concern and are not characterized by the features necessary for typical court proceedings: the complaint is examined only in one instance in a closed session (Article 397 § 1 of the Code of Civil Procedure).

**3. With regard to the Court's second question**

**99.** In its second question the Court asks **whether – in case of the positive response to the first question - the Chamber of Extraordinary Review and Public Affairs of the Supreme Court which dealt with the applicant's complaint under the 2004 Act was an "independent and impartial tribunal established by law" as required by Article 6 § 1 of the Convention.** Reference is made to the cases of *Dolińska-Ficek* and *Ozimek v. Poland*, nos. 49868/19 and 57511/19, §§ 283- 359, 8 November 2021, and *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, §§ 205-290, 1 December 2020.

**100.** In reply, the Government reiterate that the application in this part should be regarded *ratione materiae* incompatible with the Convention. In case the Court does not share this view the Government wish to recall that in the light of the Court's case-law the phrase "established by law" covers not only the legal basis for the very existence of a "tribunal", but also compliance by the tribunal with the particular rules that govern it (*Sokurenko and Strygun v. Ukraine*, nos. 29458/04 and 29465/04, 20 July 2006, § 24). The lawfulness of a court or a tribunal must by definition also encompass its composition (*Buscarini v. San Marino*, no. 31657/96, decision of 4 May 2000).

**101.** Thus, in the Court's case-law, the notion of "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 (*DMD Group, A.S., v. Slovakia*, no. 19334/03, 4 September 2012, § 59; *Gorguiladzé v. Georgia*, no. 4313/04, 20 October 2009, § 68 and *Pandjikidzé and Others v. Georgia*, no. 30323/02, 27 October 2009, §104). This includes, in particular, provisions concerning the independence of the members of a "tribunal", the length of their term of office, impartiality and the existence of procedural safeguards (*Gurov v. Moldova*, 36455/02, 11 July 2006, § 36).

**102.** The Court has emphasised that the object of the term "established by law" in Article 6 § 1 of the Convention is to ensure that the organisation of the judicial system does not depend on the discretion of the executive but is regulated by law emanating from Parliament (*Biagioli v. San Marino*, no. 64735/14, decision of 13 September 2016, § 74; *Savino and Others v. Italy*, nos. 17214/05 and 2 others, 28 April 2009, § 94).

**103.** It follows from the above that with regard to the Convention standards of a "tribunal established by law", the existing case-law of the Court is already well-established. It is clear in the light of these judgments that a person appointed as a judge in flagrant breach of national law should not be able to exercise judicial functions and that a judicial authority of which such a person is a member should not be regarded as a "court established by law" within the meaning of the Convention.

**104.** Referring to the particular circumstances of the present case the Government observe that the complaint was examined by the Supreme Court's Chamber of Extraordinary Review in a three – person composition by E.S. judges, P.K. and G.Ż.

**105.** Judge E.S.[4], before taking the position of the Supreme Court judge on 10 October 2018, held the office of a common court judge for over 17 years: from 21 January 2001 at the District Court for Warsaw-Mokotów in Warsaw, and then from 27 April 2006 in Regional Court for Warsaw-Praga in Warsaw and from 14 January 2010 at the Warsaw Court of Appeal.

**106.** Judge P.K.[5] is a professor at the University of Łódź. In the years 2001–2004 he completed a judicial application and passed the judge's exam. In the years 2004-2018 he worked as attorney-at-law. In 2006 he obtained a doctorate in legal sciences, and in 2011 the degree of habilitated doctor of legal sciences. He was a lecturer and head of postgraduate studies in the field of family law for judges adjudicating in matters in the field of family law in the courts of all levels (2012) as well as lecturer and head of postgraduate administrative studies: "Registration of marital status" (2010/2011 and 2011/2012). He has conducted training for notaries, barristers and attorneys, as well as bar apprentices and notarial applicants many times. He promoted several dozen masters and one doctor, he was a reviewer of six doctoral dissertations and one habilitation dissertation. He was a member of problem teams at the Civil Law Codification Commission. He is the author of over 100 scientific publications regarding civil law and the co-author of two comments to the Civil Code and numerous articles.

**107.** Judge G.Ż.[6] is a professor at the University of Silesia. In the years 1996–1997 he completed post-graduate studies at the University of Trier with excellent result (Summa Cum Laude). In 2001 he obtained a doctorate in legal sciences, and in 2014 the degree of habilitated doctor of legal sciences. In 2015-2019 he managed the Center for Research on European Private Law at the Faculty of Law and Administration of the University of Silesia. He is the author and co -author of numerous scientific, national and international studies, devoted to the issues of private international, international commercial law, international currency law, European law,

[4] Informacje o powołaniach sędziów Sądu Najwyższego (sn.pl)
[5] http://www.sn.pl/osadiejwyzny/sitepages/nota_iknisp_ksiezak.aspx
[6] http://www.sn.pl/osadzienajwyzszym/SitePages/Nota_iknisp_zmij.aspx

civil law and arbitration. Parallel to scientific work in 1998-2002 he completed the attorney-at-law application and after passing the exam was entered on the list of attorneys. He practiced this profession from 2002 to October 2018. He actively participated in local attorney's government, including acting in the years 2013-2018 as a member of the District Council of the Chamber of Legal Attorneys in Katowice, a guardian and lecturer in attorney-at-law apprentices. He appeared many times as an arbitrator in the National and International Commercial Arbitration, and in 2011-2018 he was the vice president of the Arbitration Court at Regional Chamber of Commerce in Katowice.

**108.** The above extracts from the three Supreme Court's judges impressive portfolios undoubtedly indicates their very high qualifications. Judge E.S. went through all levels of the common courts architecture, in total adjudicating over 17 years in those courts, and the other two judges are professors of law specializing in civil law, having additionaly several years of attorney-at-law expertise. **The applicant, in turn, did not provide any specific reason or circumstances that could weaken trust as to the impartiality of the abovementioned judges depicting, for example, that a given judge did not perform his juridicial duties in an independent manner, which could affect the impartiality of the court issuing the judgment**. He did not refer to any premise that could show that there was a defectiveness of the appointing process in specific circumstances of that case, that would lead to violation of the standard of independence and impartiality within the meaning of Article 6 of the Convention. The applicant's allegation regarding such doubts should be constructed *in concreto*. The applicant should formulate specific allegations, as well as demonstrate or even substantiate the circumstances indicating the lack of impartiality or independence of judges, which would prove that there could be a violation of the standard of independence and impartiality in the meaning of the Convention.

**109.** It should be emphasized again in this context that the very fact that the judge was appointed in a nominational procedure conducted by the NCJ shaped by the Act of 8 December 2017 amending the Act on the NCJ and some other acts, does not justify the allegation of lack of independence or impartiality.

**110.** Furthermore, in view of the Government, naming a judge in the official application to the Court, as the so-called "neo judge" seems not to liege with the principles of professional ethics (§ 28 of the Code of Bar Ethics), because this concept was created In the media space, and not in the doctrine or even more in the case law of the Court and the CJEU, which examined the issues of the status of the judge. Persons applying for the nomination for the position the Supreme Court judge must meet a number of requirements and have significant professional experience. The nomination for the office of the Supreme Court is a professional promotion for

these judges, for which they worked hard for whole of their professional life. Therefore, calling them "neo judges" only because of the change in the procedure of choosing judge-members to the NCJ seems unprofessional, does not face the seriousness of the profession of a barrister and violates the dignity of the judge.

### 4. Change of the statutory model for selecting the composition of the NCJ in Poland

**111.** The Government wish to first and foremost challenge the argumentation existing in the Court's recent case law that the changes introduced to the Act on the NCJ, consisting in the introduction of a new model of selecting the judges to the NCJ, were unconstitutional, and that the regulation in force before 2017 entrusting the right to elect judges-members of the NCJ to other judges "was firmly established in the Polish legal order and unambiguously confirmed by the Constitutional Tribunal in the judgment of 18 July 2007". In this context, however, no justification that could confirm the legitimacy of such adopted position has ever been provided. Furthermore, it has also not been shown that the change in the model of appointing the NCJ made in 2017 was inconsistent with Constitution and that this resulted from a departure from the previous jurisprudence of the Constitutional Tribunal.

**112.** From the point of view of the Polish Constitution, there is no single acceptable model for shaping the judiciary of the NCJ. Therefore, it cannot be argued that a change in the election of judges-members of the NCJ could constitute a departure from this model and – therefore – prejudge the unconstitutionality of legislative solutions in this respect. For instance, in the case of *Dolińska – Ficek and Ozimek* , the Court tried to demonstrate a manifest breach of the law, basing its position on the findings made in the judgment of the Constitutional Tribunal of 18 July 2007, ref. No. K 25/07 (OTK ZU 7 / A / 2007, item 80). Nevertheless, the judgment of the Constitutional Tribunal in the case K 25/07, which has become the foundation of all the statements and arguments of the Court relating to the Polish Constitution, cannot be cited as defining – in a "well-established" manner – the model of appointing judges who are members of the NCJ because it did not address this issue at all.

**113.** The constitutional problem examined by the Constitutional Tribunal in the case K 25/07 concerned the limitation of the possibility of simultaneously performing the function of a member of the NCJ and the president or vice president of the court. When speaking in this respect, the Constitutional Tribunal referred to the wording of Article 187 § 1 point 2 of the Constitution, but only to state that this provision does not introduce any additional requirements as to which of the judges may apply for election to the NCJ and may be elected to this body. On this basis, the Constitutional Tribunal found that the legal norm introduced

to the act, which narrows the constitutionally defined group of persons who may become members of the NCJ, violates the constitutional foundations of the system of the NCJ and is inconsistent with Article 187 § 1 (2) of the Constitution. There are no grounds for deriving a binding statement from that judgment of the Constitutional Tribunal in relation to the model of appointing judges to the NCJ, as the judgment did not refer to this issue at all.

**114.** On the other hand, the interpretation of the Constitution presented by the Constitutional Tribunal in the judgment of 20 June 2017, ref. K 5/17 (OTK ZU A / 2017, item 48) has emphasized equal chances of all judges to be elected to the composition of the NCJ. In this respect, the Constitutional Tribunal not only has not radically changed the current model, but also confirmed its previous jurisprudence on this issue, including – above all – the view already expressed in the case K 25/07. In both judgments the Constitutional Tribunal has consistently stated the same. It indicated that Article 187 § 1 point 2 of the Constitution does not establish any additional conditions, the fulfilment of which could enable a judge of one of the courts indicated in this provision to apply for election to the NCJ. This position in the case K 25/07 justified the declaration of unconstitutionality of the provision preventing the appointment to the NCJ of judges who were president or vice-president of the court.

**115.** The same view was maintained in the case K 5/17. The Constitutional Tribunal has indicated that the Constitution "does not list criteria that the legislator could adopt in order to differentiate the possibility of a judge candidate for a member of the NCJ mentioned in Article 187 § 1 point 2 of the Constitution". The Constitutional Tribunal has clearly stated that "the position of the Constitutional Tribunal in the judgment K 25/07 remains unchanged that the legislator may not establish additional subjective rules related to which of the judges may apply for election and be elected to the NCJ, and which is to be deprived of this right". On this basis, the Constitutional Tribunal found that the introduction of criteria limiting the passive electoral right to a member of the NCJ to judges of common courts, and thus differentiating their situation in relation to judges of other courts, is inconsistent with the Constitution.

**116.** The essence of the judgment of the Constitutional Tribunal in the case K 5/17 was to evaluate the existing procedure of selecting judges-members of the NCJ. The Constitutional Tribunal, similarly to the case K 25/07, questioned the introduction of passive electoral law limitations for judges of particular types of courts, considering that they had no basis in the Constitution. A comparative analysis of the judgments in the cases K 25/07 and K 5/17 shows that in the part in which these judgments are universally binding and final, they use an identical interpretation of Article 187 § 1 point 2 of the Constitution with regard to similar problems arising from the statutory model of electing judges-members of the NCJ.

The difference that can be noticed in relation to these judgments is related to a different, but – what is important – expressed *obiter dicta*, assessment of what belongs to matters falling under statutory competence pursuant to Article 187 § 4 of the Constitution. The Constitutional Tribunal has not analysed this issue in the case K 25/07, but only **confirmed that the legislator is free to determine the model of selecting members of the NCJ from among judges. It also found that the election of these judges "by judges" did not violate Article 187 § 1 point 2 of the Constitution**. **In the case K 5/17, again *obiter dicta,* the Constitutional Tribunal has only found that the election of 15 judges-members of the NCJ does not necessarily have to be formed in one possible way**. It has considered that the scope of the reference under Article 187 § 4 of the Constitution covers not only "how" this choice is made, but also "who" – which subject – can make it. It should be noted, however, that the position of the Constitutional Tribunal in this matter was expressed in the justification of the judgment K 5/17. It was not decisive for the resolution of this case and only indicated the possibility of a different approach to the statutory rules for selecting members of the NCJ from among judges. The Constitutional Tribunal – as in the case of K 25/07 – has not decided how this model should look like. It has also not prejudged that this model should be changed so that it would be in line with the Constitution. The Constitutional Tribunal has clearly stated that "there is nothing to prevent judges from being elected to the NCJ by the judges. However, one cannot agree with the statement that only judicial bodies must be the guardians of active election rights".

**117.** Both the aforementioned judgments of the Constitutional Tribunal were issued – which should be emphasized – even before the amendment introduced in the Act on the NCJ of 8 December 2017. Even if there was a specific model for the election of judges to the NCJ, and the legislator departed from it by adopting new rules, still - recognizing them as unconstitutional - could not be done retrospectively, by referring to earlier judgments of the Constitutional Tribunal. The constitutionality of the new solutions could not be assessed independently by the Supreme Court or any other judicial authority in Poland. Pursuant to Article 188 § 1 of the Constitution, only the Constitutional Tribunal is appointed to adjudicate on the conformity of statutes with the Constitution, while judges of common, administrative and Supreme Court courts are subject to the Constitution and statutes (Article 178 § 1 of the Constitution).

**118.** In this context, it should be stated that the constitutionality of the new solutions introduced to the Act on the NCJ was assessed in the proceedings before the Constitutional Tribunal. **In the judgment of 25 March 2019 in case K 12/18, the Constitutional Tribunal stated that the model of electing judges to the NCJ by the Sejm, introduced by the Act,**

**complies with Article 187 § 1 point 2 of the Constitution**. This is – so far – the only judgment in which the model of electing judges-members of the NCJ adopted by the legislator (here: by voting in the Sejm) was the subject of a ruling, and thus it is also the judgment of the Constitutional Tribunal, which has the force of universally binding and final (Article 190 § 1 of the Constitution). While the essence of the judgments in the cases K 25/07 and K 5/17 was the assessment of additional criteria or limitations to be met by judges applying for election to the NCJ, in the case K 12/18 the Constitutional Tribunal assessed the constitutionality of such a model for the first time.

**119.** In this context, it should be noted that neither the Constitution nor any other normative act generally applicable in Poland indicates a standard that judges belonging to the NCJ are to be elected only by other judges. In this context, Polish law fully implements the model suggested in the 2016 Venice Commission Summary of Principles on the Rule of Law, which indicated that – where they exist – "judicial councils should have a pluralist composition with a large part, if not a majority, members who are judges". At the same time, it was found that involving only judges, carries the risk of creating the impression of protecting one's own particular interests and cronyism. The Commission concludes that "as far as the composition of the judicial council is concerned, both politicization and corporatism should be avoided."[7]

**120.** The model adopted in the Polish Constitution not only confirms the fact that representatives of all authorities (legislative, executive and judiciary) are represented in the NCJ, but also guarantees a clear advantage of the judiciary, since the Constitution guarantees that out of 25 members of the NCJ, 17 are judges, and currently, there are even 18 of them, because the representative of the President in the composition of the NCJ is a retired judge of the Constitutional Tribunal. Importantly, in accordance with Article 178 § 3 of the Constitution, judges may not belong to a political party or a trade union, or perform public activities incompatible with the principles of independence of the judiciary and judges. Therefore, it is difficult to talk about the politicization of the judiciary part of the NCJ. After all, the fact of the final selection by the Sejm of a candidate for the judge of the NCJ indicated by judges, in no way deprives such an elected judge of his statutory guarantees of independence.

### 5. With regard to the Court's third question

[7] See Rule of law checklist, adopted at the 106th plenary session of the Venice Commission on March 11-12, 2016, CDL-AD (2016) 007rev, § 81. Source: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e

**121.** In its third question the Court asks whether the length of the civil proceedings in the present case was in breach of the “reasonable time” requirement of Article 6 § 1 of the Convention (see Rutkowski and Others v. Poland, nos. 72287/10 and 2 others, 7 July 2015).

**122.** With regard to the question on the length of the civil proceedings in the present case the Government refrain from taking the position as to its assessment under the “reasonable time” requirement, however they wish to attract the Court’s attention to the verified and supplemented statement of facts, which should be individually and accurately taken into account by the Court when adjudicating this issue.

**123.** In this regard the Court is kindly requested to consider that the argumentation adopted in the decision of the Supreme Court of 25 November 2020, I NSP 166/20 referred to specific allegations formulated in a complaint about the length of proceedings. These, however, concerned, to a basic extent, the decision of the Warsaw Court of Appeal of 28 February 2020 on suspending proceedings in connection with the submission of a complaint to the Constitutional Tribunal and focused on a different assessment of the grounds for this suspension. The applicant pointed out that "the Court of Appeal acted in a completely reflexionless manner" and argued that this would lead to the prolongation of the proceedings in the main case "( pp. 3-4 of the justification of the complaint of 1 October 2020). This indicates quite clearly that the applicant questioned the decision of the Warsaw Court of Appeal and against this background refered to the length of the proceedings

**124.** As a rule, the proceedings lasting 11 years may create the impression of chronic protracted behavior, but one should see the complicated legal status of the present case, which was the subject of various interpretations over the proceedings.

**125.** The Government wish to underline that the circumstances settled as part of the proceedings with the applicant's participation were assessed several times at individual stages by the courts of various instances, and (three times) by the Supreme Court. It should not be forgotten that the basic issue for these decisions, referring to the manner of determining the limitation period for claims of a housing cooperative towards a member to supplement the construction contribution, raised such a serious discrepancy and doubts in practice that it justified the release of a resolution of the composition of seven judges of the Supreme Court of 9 March 2017 (III CZP 69/16).

**126.** The scale of complexity and discrepancies in the interpretation and application of the applicant's right is evidenced by the fact that the Supreme Court examined cassation complaints derived by the parties to the proceedings three times. In relation to the first cassation

complaint, submitted on 17 November 2014 by the plaintiff - housing cooperative, a judgment of the Supreme Court of 17 December 2015 (I CSK 1003/14) was passed. The proceedings initiated with a second cassation complaint, brought this time by the applicant on 20 June 2018, ended the Supreme Court judgment of 26 September 2019 (I CSK 378/18). Finally, in relation to the complaint re -submitted by the plaintiff, on 25 June 2021, the Supreme Court issued decision on 31 May 2022 (I CSK 444/22) refusing to accept a cassation appeal to be examined.

**127.** The above described circumstances indicate that both parties to the proceedings, including the applicant, actively benefited from their procedural measures, thanks to which the possibility of defending their civil rights had been actually ensured. This can be seen especially in relation to the applicant, who, using the institution of a cassation appeal, could ultimately obtain a positive decision of his dispute with the plaintiff's housing cooperative. Importantly, this possibility occurred - from a substantive point of view - only following the Supreme Court (sitting in an increased composition) resolution of 9 March 2017 and adopted - as a result - interpretation of law in proceedings ended before the Warsaw Court of Appeal (reference number I ACa 620 /19).

**6. With regard to the Court's fouth question**

**128.** In its fourth question the Court asked whether the applicant did have at his disposal an effective domestic remedy for his complaint under Article 6 § 1 concerning the unreasonable length of the proceedings under the 2004 Act, as required by Article 13 of the Convention?.

**129.** In reply, the Government wish to recall that the Convention system is intended to be subsidiary to national systems safeguarding human rights, which is reflected in the requirement of exhaustion of effective domestic remedies before applying to the Court. The purpose of the principle of subsidiarity, on which the Convention system is founded, is to allow individuals to gain potential relief at the national level before having to invoke the international machinery of the Convention, as well as to grant the State Parties a possibility to deal with the substance of the relevant Convention complaints and to provide appropriate relief (Burden v. the United Kingdom, no. 13378/05, judgment of 29 April 2008 [GC], § 42). This rule requires that the recourse be made to remedies that are adequate and effective (Egmez v. Cyprus, no. 30873/96, judgment of 21 December 2000, § 64; Azinas v. Cyprus, no. 56679/00, judgment of 28 April 2004, § 38).

**130.** In the circumstances of the current case the Warsaw Court of Appeal stayed the proceedings under Article 177 § 1 point 3(1) of the Code of Civil Procedure. In accordance with the regulation of the Code of Civil Procedure, the court may stay proceedings on its own

initiative if the resolution of the case depends on the outcome of the proceedings pending before the Constitutional Tribunal. This provision does not provide for a mandatory suspension.

**131.** Furthermore, the applicant was entitled to submit a motion for resumption of the suspended proceedings and in case of refusal he was also entitled to appeal to a court of second instance (Article 394 § 1 (5) of the Code of Civil Procedure). The applicant took advantage of this remedy.

**132.** Hence, with regard to the question whether the applicant did have at his disposal an effective domestic remedy for his complaint under Article 6 § 1 concerning the unreasonable length of the proceedings under the 2004 Act, as required by Article 13 of the Convention, the Government refrain from taking the final position as to its assessment under the substantial "effectiveness of the remedy available" requirement, however they wish to attract the Court's attention to the verified and supplemented statement of facts, which should be individually and accurately taken into account by the Court when adjudicating this issue.

**133.** Referring to this issue, the Government also wish to note that the applicant's argumentation presented in the complaint seems to be associated with the "effectiveness" of the remedy with the result of the proceedings as desired by the applicant. It is – more precisely – the fact that the alleged lack of providing the applicant's legal measure is to be associated with the dismissal of the complaint, which questioned the decision of the Warsaw Court of Appeal to suspend the on the basis of a constitutional complaint addressed to the Constitutional Tribunal. As the applicant indicates (see p. 8/13 of the application form), "*there were no grounds to suspend the proceedings*", and "*the Constitutional Tribunal may hear the case for several years, and may decide in an incorrect composition*." Moreover, "*the applicant does not have any domestic legal means for the length of proceedings before the Tribunal Constitutional, aimed at accelerating the tribunal's diagnosis of a legal question*. " The argument included in this way is – in fact – a polemic with the position of the Supreme Court contained in its decision of 25 November 2020 (NSP 166/20) and aims to undermine the substantive decision of the court. It is furthermore addressed to the Constitutional Tribunal. Referring to this, it can only be concluded that the exact motives underlying the decision in the Supreme Court's decision were revealed in its justification, which cannot – in this place – be subject to any further control, because it would be a form of unauthorized interference in the sphere of judicial independence.

**134.** Having regard to the above, the Government submit that the issue of the alleged, prospective inactivity of the Constitutional Tribunal has no connection with the applicant's right to have access to a court for the determination of his civil rights and obligations, in accordance

with Article 6 § 1 of the Convention, and subsequently to the effective remedy to put before the domestic authorities the alleged violation of Article 6 § 1 of the Convention, as required by Article 13 of the Convention.

## IV. FINAL CONCLUSIONS

**135.** In view of the present observations the Government submit to the Court that the application no. 2415/21 should be considered inadmissible on the basis of its incompatibility *ratione materiae* with the Convention as well as manifestly ill-founded character of the application in the meaning of Article 35 § 3 (a) of the Convention and therefore be rejected in accordance with Article 35 § 4 of the Convention.

**136.** Alternatively, the Government submit that there was no violation of Article 6 § 1 of the Convention in the circumstances of the case at stake.

Jan Sobczak

Government Agent

Enclousures:

The Government's general assessment of the cases concerning the rule of law

**Enclosure: The Government's general assessment of the cases concerning the rule of law**

**1.** Recently, the Government have witnessed increased activity of the Council of Europe's bodies and the EU institutions which included attempts to interfere with the organisation of the judiciary in certain European states, mainly in Poland. An analysis of the most recent case law of European courts, *i.e.* the Court and the Court of Justice of the European Union ("the CJEU"), leads to a conclusion that these judicial bodies seem to apply double standards when considering identical domestic solutions.

**2.** With regard to the Council of Europe's legal system, the fact of applying double standards can be inferred from the comparative analysis of Court's deliberations included in its judgments of 1 December 2020 in the case of *Guðmundur Andri Ástráðsson v. Iceland* and of 22 July 2021 in the case of *Reczkowicz v. Poland* on the appointment procedure of judges. Comparing the Court's stance on the appointment procedure of judges in the Icelandic and the Polish case leads to the following conclusions:

- If in the Iceland's case the Court concluded that it is not competent to control the country's procedure of judicial appointments, the rationale behind the Court declaring itself competent to adjudicate on the Polish system of judicial appointments is inexplicable.
- If in the judgment in the case of *Guðmundur Andri Ástráðsson v. Iceland* it was assumed that in the light of the Convention, the appointment of judges directly by the legislative or executive power is acceptable, it remains inexplicable why in the case of *Reczkowicz v. Poland* it was assumed that the imputed and possible influence of the said powers – via the NCJ – on the process of judicial appointments is unacceptable.
- If in the judgment in the case of *Guðmundur Andri Ástráðsson v. Iceland* it was assumed that the appointment of judges by the executive or the legislative is acceptable as long as after the appointment they are free from influence or pressure when adjudicating, it is inexplicable that the Court refrained from examination of whether such influence or pressure is exerted on the judges of the DCSC.
- Since in the case of *Guðmundur Andri Ástráðsson v. Iceland* it was assumed that the core of the problem is to examine every time whether in a given case the requirements of the Convention had been violated, it is inexplicable that the Court assessed the compliance with the said requirements on an abstract basis, *i.e.* it

refrained from establishing whether such influence or pressure had or had not been exerted in the case of *Reczkowicz v. Poland.* Particularly that following the Court's established case law, in order to establish that the requirement of lack of influence or pressure is met, it is sufficient to find that such recommendations or instructions are not used in practice (judgment of 22 October 1984, *Sramek v. Austria*, application no. 8790/79, §§ 37–42).

- Contrary to the Icelandic case, the *Reczkowicz v. Poland* judgment ruled for general admissibility of questioning the compliance of judicial appointments to the DCSC whether or not individual judicial appointments had been questioned in any way provided by law.

**3.** The above analysis shows that **the Court's ruling of 22 July 2021 was based exclusively on the assessment of the National Council of the Judiciary's independence and the outcome of the said assessment. In this regard, the arguments were general in nature.** This fact proves that in the case of *Reczkowicz v. Poland* not only a general assessment was made of the Polish judicial appointments procedure, but also any legal importance was denied to an important – in the light of the case of *Guðmundur Andri Ástráðsson v. Iceland* – circumstance of questioning or nor the regularity of appointment procedure of a specific judge. On the sidelines, however, it should be noted that the Court did not directly indicate the provisions of domestic law which had purportedly been violated during the judicial appointment procedure to the DCSC, as highlighted by Judge Krzysztof Wojtyczek.

**4.** The reasons behind the European Court of Human Rights using double standards when assessing identical or similar domestic solutions should be sought in the division of European countries into "older" and "newer" democracies. In §§ 122 and 207 of the *Guðmundur Andri Ástráðsson v. Iceland* judgment, the Court drew on the *Report on Judicial Appointments* (CDL-AD(2007)028), adopted by the Venice Commission at its 70th Plenary Session (16–17 March 2007). The document reads:

> "5. In some **older democracies**, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time.
> 6. **New democracies**, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges."

**5.** Despite the above report being adopted by the Venice Commission over a decade ago, the judgment in the case of *Guðmundur Andri Ástráðsson v. Iceland* made the statement on the

categorisation of countries topical again. It is not the first case of using double standards while evaluating identical or similar legal solutions in the judiciary in various countries. Dividing democracies into "older" and "newer" is also visible in the Court of Justice of the European Union's case law on the independence of courts. More examples are provided upon analysis of the CJEU's most recent judgments, *i.e.* those delivered over the past two years.

**6.** The first of the judgments in question was delivered on 9 July 2020 in the case C-272/19 *VQ v. Land Hessen* and dealt with the legal regulations in the German state of Hessen. In this *Land*, the judges are appointed by the Judicial Appointments Committee composed of 12 members, seven of whom are **designated by the *Land's* parliament.** The fact that the composition of a body engaged in the judicial appointments procedure reflects the legislative power, which in turn follows the current balance of political forces in the parliament, does not prove – in the Court's view – the body's lack of independence.

**7.** It is similarly interesting to analyse the case C-896/19 *Repubblika v. Il-Prim Ministru* on the appointment of judges in Malta. On 17 December 2020, Advocate General Gerard Hogan delivered an opinion on the case, wherein he openly stated that **"In this regard, it would be pointless to deny that politics has played a role – sometimes even a decisive one – in the appointment of judges in many legal systems, including those in many Member States."** In this context, he expressed the belief that even political association of judges sitting for example in the Germany's Federal Constitutional Tribunal, does not suffice to question this body's independence (paragraph 57 of the Opinion). Even though opinions by Advocates General are not binding for the Court, yet they are taken into consideration, as practice has shown. When assessing Maltese national legislation in the case against this country, the Court in Luxemburg appears to share Advocate General's position, since in the judgment of 20 April 2021 Malta's national legislation which confers on the **prime minister**, that is, a part of the executive, a decisive power in the judicial appointments procedure was declared compliant with EU law.

**8.** Meanwhile, in the Polish cases completely opposite standards apply. It is noteworthy that in its judgment of 15 July 2021 in the case C-791/19 *Commission v. Poland* the Court found the fact of 15 judges-members of the NCJ being currently elected by one of the branches of the legislature to be indicative of the Council's lack of independence (paragraph 108 of the judgment). **Hence, while in cases connected with the Polish judiciary reform the CJEU sets high standards, these standards do not apply in the case of countries such as Germany or Malta.**

**9.** Apart from varying assessment standards of judicial appointments procedure, European countries also employ various approaches towards judges' disciplinary accountability, yet it is only Polish regulations that trigger concerns among the bodies of the Council of Europe or the EU. In its judgment of 15 July 2021 in the case C-791/19 *Commission v. Poland*, the Court ruled

that by allowing the content of judicial decisions to be classified as a disciplinary offence involving judges of the ordinary courts (Article 107 § 1 of the Law on the organisation of the ordinary courts (*ustawa – Prawo o ustroju sądów powszechnych*) of 27 July 2001), the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) of the TEU. It should be noted that the definition of disciplinary offence in force in Poland worded as "obvious and gross violations of the law" does not allow of political control over the contents of the judgments. The provision of Article 107(1) of the Law on ordinary courts has been in force since the date of the law coming into force, i.e. 1 October 2001, and the definition of disciplinary offence adopted therein did not give rise to any objections throughout the act's life, including Poland's accession to the European Union. The tort of "obvious and gross violation of the law" is specific enough, and its interpretation included in the case law of disciplinary courts is stable and predictable.

**10.** In its judgment in the case C-173/03 *Traghetti del Mediterraneo*, the Court of Justice did not question using the criterion of "manifest infringement of the applicable law" for the purpose of ascribing liability for damage caused in the exercise of judicial power. In the case C-397/19 *Statul Roman,* Advocate General Michal Bobek indicated openly that in the case of judicial disciplinary offence its definition can only be general and abstract, and employ indeterminate legal concepts (paragraph 90). It should be noted that regulations in force in many European countries provide for judges' disciplinary accountability for "obvious and gross violation of the law" or a similarly worded reason. For example, in Ireland, judges are held responsible for incapacity or proven misconduct; in Latvia, for deliberate violations of law in court proceedings or committing gross negligence when adjudicating; in Romania, disciplinary accountability can be imposed for deeds detrimental to the prestige of the judiciary, misbehaviour harming the honour or professional integrity or the prestige of the judiciary, failure to observe decisions of the Constitutional Tribunal or the High Court of Cassation and Justice when hearing appeals in the interest of the law; in Slovakia, the reason for a judge to be brought to disciplinary accountability is passing an arbitrary decision, contrary to the law, if by doing so the judge caused substantial damage or some other particularly serious consequence; in Slovenia, judges are held responsible for misuse of office or power, and behaviour or conduct which is not in line with judicial independence or threatens professional dignity of a judge; finally, in Italy, judges incur accountability for grave violation of law resulting from ignorance of regulations or inexcusable negligence. In certain European countries, like Germany, judges do not enjoy immunities and can be held responsible under the same rules as all other citizens.

**11.** The judgment of 29 March 2022 in the case C-132/20 *Getin Noble Bank* indicates a specific nuance of the position of the Court of Justice. In the presentation conducted in support

of the above-mentioned judgment, the Court of Justice indicated that the normative content of Article 19 § 1, second indentation of the TEU corresponds to the normative content of Article 47 of the Charter of Fundamental Rights [§ 115]. The normative content of Article 47 of the Charter of Fundamental Rights, due to Article 52 section 3 of the Charter, corresponds to the normative content of Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms [§ 116]. As a result, the case law of the European Court of Human Rights is applicable, including the judgment in the case of *Guðmundur Andri Ástráðsson v Iceland*. Therefore, it should be assumed that the right to a court established in accordance with law is a self-existent law (*stand-alone law*), which is closely related to the guarantees of independence and impartiality. The purpose of this is to respect the rule of law and to respect the principle of the separation of powers [§ 117]. Irregularity in the process of appointing a judge leads to a breach of the requirement of a court established in accordance with the law, when it is of such nature and importance that it creates a real risk that the other authorities, in particular the executive, have had an influence on the outcome of this process [para 122]. **Not every defect in the process of appointing a judge makes it possible to doubt his independence and impartiality, and thus his fulfillment of the requirement of a court established in accordance with the law** [§ 123]. This position corresponds to the slightly earlier judgment of the Court of Justice of 22 February 2022 in joined cases C-562/21 PPU and C-563/21 *PPU Openbaar Ministerie*, in the justification of which it was emphasised that: "76. The fact that an authority consisting predominantly of members of the legislative or executive power or elected by that authority is involved in the appointment of the judges of the Member State issuing a warrant, cannot, in itself, justify the decision of the executing judicial authority refusing to surrender the person concerned.". As a result, it can be assumed that **the mere fact that the current composition of the NCJ participates in the procedure of appointing a judge to the office is not a circumstance *per se* depriving a given body of the status of a "court established in accordance with the law"** within the meaning of EU law.

**12.** The CJEU in the judgment in the case of *A.K. and others (C-585/18, C-624/18 and C625 / 18*), announced on 19 November 2019, identified specific factors that should be examined by the referring court in order to assess whether the DCSC offers sufficient guarantees of independence. With regard to the NCJ, the CJEU indicated circumstances that together may prevent this body from being perceived as independent from other authorities. In the opinion of the CJEU, these are: the fact that the NCJ in the new composition was established by shortening the four-year term of office of members previously belonging to this body, increasing the number of members of the NCJ elected by political forces, possible irregularities in the process of appointing new members of the NCJ, the manner in which this body performs its

constitutional tasks (in particular guards the independence of the judiciary) and the existence of effective judicial review of the decision of the NCJ. The CJEU emphasized that these elements considered separately do not justify the thesis of lack independence of the NCJ, only a combination of all these factual and legal circumstances can lead to such a conclusion.

**13.** At the same time, in the judgment *C-562/21 and C-563/21 X and Y*, the CJEU indicated that the mere fact that a case may be examined by a judge appointed at the request of the NCJ does not justify the refusal to execute the European Arrest Warrant due to the risk of violation of the fundamental right to a court established on the basis of the act. This means that these premises should always be assessed in a specific case (individual test), and not abstractly - in a way separate from it.

**14.** It should be noted that the core of the problem with international organisations assessing Polish reforms of the judiciary is the appointment procedure of members of the NCJ. In this context, it should be underlined that the reform of 2017 which changed the procedure to appoint members of the NCJ[8] – the body responsible for the judicial profession – put the right of proposing candidates to the Council in the hands of not only judges but also the general public, thus increasing democratic legitimacy of the Council members appointed from among the judges, enhancing transparency, and allowing the candidatures to be publicly debated on.

**15.** The Polish model of appointing judges does not differ in this respect from the models in force in other Member States, and it provides for all the safeguards of judicial independence. The system implemented in Poland was patterned on the concept that applies in Spain. As laid down in Article 122 of the Spanish Constitution, the Organic Law of the Judiciary determines the setting up, operation and control of the courts and tribunals as well as the legal status of professional judges and magistrates, who form a single body, and of the staff serving in the administration of justice. The General Council of the Judiciary is its governing body. An organic law sets up its statutes and the system of incompatibilities applicable to its members and their functions, especially in connection with appointments, promotions, inspection and the disciplinary system. The General Council of the Judiciary consists of the President of the Supreme Court, who presides it, and of twenty members appointed by the King for a five-year term. Amongst them are twelve judges and magistrates of all judicial categories, under the terms established by the organic law; four nominated by the Congress of Deputies and four by the Senate, elected in both cases by three-fifths of their members from amongst lawyers and other jurists of acknowledged competence and over fifteen years of professional experience. Bodies

[8] Pursuant to the Act of 8 December 2017 on amending the Act on the National Council of the Judiciary and certain other acts, Journal of Laws of 2018, item 3.

of the Council of Europe and of the European Union do not raise doubts about such a system. On the other hand, the regulations that apply in Poland have come in for undue criticism. The NCJ is composed of the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic, fifteen judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts, four members chosen by the Sejm from amongst its deputies and two members chosen by the Senate from amongst its senators (Article 187 of the Constitution of the Republic of Poland). The judges are voted into membership of the NCJ by a qualified majority of three-fifths of deputies in the presence of no less than a half of their statutory number. As a result, their election is based on a cross-party agreement among the different factions represented in the Sejm, ensuring strong democratic legitimisation of the Council's members. In its judgment of 25 March 2019 in the case ref. no. K 12/18, the Constitutional Tribunal ruled the above process to be in conformity with the Constitution.

**16.** It is noteworthy that the Federal Republic of Germany employs a highly politicised model of appointing judges. Article 92 of the German Basic Law stipulates that the judicial power is vested in the judges; it is exercised by the Federal Constitutional Tribunal, by the federal courts provided for in this Basic Law and by the courts of the *Länder*. The rules of appointing federal judges are laid down in Article 95(2) of the Basic Law, which specifies that the judges of each of these courts are chosen jointly by the competent Federal Minister and a committee for the selection of judges consisting of the competent *Land* ministers and an equal number of members elected by the Bundestag. The federal committee for the selection of judges consists of sixteen competent *Land* ministers and sixteen members elected by the Bundestag; even though the latter do not have to be members of parliament, they must possess legal literacy and enjoy eligibility for election to the Bundestag. As a consequence, the committee members include both representatives of the executive and – indirectly – the legislative.[9] Considering the Court of Justice's latest case law related to Poland, the impact of the political factor (i.e. the legislative and/or the executive) on the process of appointing judges in Germany should be looked at as a reason for the lack of judicial independence and impartiality in the said country, which, in turn, results in a failure of that country to observe its obligations as laid down in the EU Treaties. Such a model of appointing judges should also be considered inconsistent with the standards set out in the case law of the European Court of Human Rights on the basis of Poland-

[9] F. Zoll, *Jak zostaje się sędzią w Niemczech? Czy to porównanie jest uzasadnione?* [How does one become a judge in Germany? Does it compare with Poland?] [online, in Polish] https://krakow.wyborcza.pl/krakow/7,44425,22130526,jak-zostaje-sie-sedzia-w-niemczech-czy-to-porownanie-jest-uzasadnione.html.

related rulings. Yet the German regulations have not been challenged in any way, making it justifiable to argue that bodies of the Council of Europe and the EU institutions have been employing double standards.

**17.** In the jurisprudence of the Constitutional Tribunal (see *the decision of 3 June 2008, Kpt 1/08, OTK - A 2008, No. 5, item 97, judgment of the Constitutional Tribunal K 18/09 of 25 June 2012, OTK-A 2012, no. 63*), it is assumed that the appointment of a judge is an act of constitutional law consisting in shaping the composition of the judiciary. It is a discretionary decision of the president and falls within his personal prerogative. The appointment of judges by the president is not a public administration power, but a direct application of constitutional norms. To the extent that the President of the Republic of Poland acts as the head of the Polish state, symbolizing the majesty of the state, his sovereignty goes beyond the sphere of administrative activity. As part of the president's powers, Article 179 of the Constitution of the Republic of Poland also includes the right to refuse to take into account the motions of the NCJ, if it would contradict the values that it was upheld by the constitution. If the President violates the constitution in the sphere of judicial appointments, he may be liable to the Tribunal of State. Taking into account the indicated political position of the President of the Republic of Poland, it should be assumed that it would be possible to challenge the act of appointment to the office of a judge only if it is considered that this act was adopted at the time extending beyond the term of office of the President of the Republic of Poland or that it was made by another person, i.e. in the event of establishing the non-existence of this act (actus non existens). If such an extreme situation does not take place, the act of appointment by the president to the office of judge is legally binding and irrevocable.

**18.** Moreover, the Constitutional Tribunal, in its judgment of 20 June 2017, in the case file number K 5/17 stated, inter alia, that Article 13 sec. 3 of the Act of 12 May 2011 on the National Council of the Judiciary (Journal of Laws of 2016, items 976 and 2261), understood as the term of office of members of the NCJ elected from among common court judges is individual, is inconsistent with Article . 187 paragraph. 3 of the Constitution. Additionally, in accordance with the judgment of the Constitutional Tribunal of March 25, 2019, reference number K 12/18, the provision of Article 9a of the Act of 12 May 2011 on the National Council of the Judiciary (Journal of Laws of 2019, item 84) complies with Article 187 paragraph. 1 point 2 and sec. 4 in connection with Article 2, Article 10 sec. 1 and Article 173 and Article 186 paragraph 1 of the Constitution of the Republic of Poland.

**19.** Moreover, we must not lose sight of the fact that the Polish Constitutional Tribunal has looked into the constitutionality of the EU Treaties' provisions insofar as their interference with the organisation of the judicature is concerned.

**20.** This calls for a reference to the most recent **judgment of the Constitutional Tribunal of 7 October 2021 in the case ref. no. 3/21, following an application lodged by the President of the Council of Ministers.** The Constitutional Tribunal ruled that ***the European provisions whereby the bodies of the European Union act outside the scope of the competences conferred upon them by Poland are inconsistent with the Constitution of the Republic of Poland. Also inconsistent with the Constitution is the European legislation authorising domestic courts to bypass provisions of the Constitution in the course of adjudication or to adjudicate on the basis of revoked provisions, and the same applies to the provisions of the Treaty on European Union that authorise domestic courts to review the legality of the act in which the president appoints a judge and the NCJ's resolution to refer a request to the president to appoint a judge.*** The Constitutional Tribunal also found CJEU's attempted interference with the Polish judiciary to be in violation of such principles as the rule of law, the primacy of the Constitution, and the preservation of sovereignty in the process of European integration. ***Moreover, the Tribunal concluded that Polish state authorities' competences shall not be exercised by the bodies upon which Poland has not conferred them, whereas the application in Poland, on the basis of CJEU's judgments, of other than constitutional legal rules by giving them precedence over the Constitution or inconsistently with the Constitution shall equal Poland's loss of legal sovereignty.*** The Constitutional Tribunal held that the organisation of the Polish justice system is part of Poland's constitutional identity. Consequently, that organisation has never been conferred on the European Union, and it remains Polish legislator's exclusive competence. What is more, such conferral may never be the case in the light of the Constitution. The Constitutional Tribunal observed that CJEU's judgments interfering with the organisation of the Polish judicature transgressed the limits of the EU's competences and encroached upon Poland's constitutional identity. Judge rapporteur emphasised that EU law may take precedence over national laws only in terms of the conferred competences. It equals the loss of sovereignty to approve of a situation when any international organisation, the European Union included, establishes Poland-addressed rules beyond the scope of its competences and declares them directly applicable and precedent over not only national laws but also the Constitution. The Tribunal deemed this unacceptable for any Polish authority. Judge rapporteur observed that ***it is also beyond doubt that Member States […] did not authorise EU bodies to either presume competences or derive new competences from the existing ones. He also pointed out that the assessment whether international agreements conform with the Constitution definitely includes the EU Treaties.*** During the oral presentation of the reasons for the judgment, judge rapporteur stated that the Treaty on European Union – like any other international agreement – is inferior to the Constitution in the hierarchy of sources of law. Judge rapporteur observed

that CJEU's sole jurisdiction consists in interpreting EU law, while the Constitutional Tribunal is the court having the last word as regards the compliance of any legal rules, EU ones included, with the Constitution.

**21.** In the context of the above remarks, it is also necessary to refer to **the Constitutional Tribunal's judgment of 14 July 2021 in the case ref. no. P 7/20.** In the said judgment, the Constitutional Tribunal adjudicated that Article 4(3), second sentence, of the TEU in conjunction with Article 279 of the TFEU – insofar as the Court of Justice of the European Union *ultra vires* imposes obligations on the Republic of Poland as an EU Member State, by prescribing interim measures pertaining to the organisational structure and functioning of Polish courts and to the mode of proceedings before those courts – is inconsistent with Article 2, Article 7, Article 8(1) and Article 90(1) in conjunction with Article 4(1) of the Constitution of the Republic of Poland, and within this scope it is not covered by the principles of precedence and direct application set in Article 91(1)–(3) of the Constitution. During the oral presentation of the reasons for the judgment in the case ref. no. P 7/20, judge rapporteur agreed with the view that the judicial function entrusted by the Member States to the Court of Justice ends when an interpretation of the Treaties ceases to be intelligible and becomes objectively arbitrary. In the opinion of the Constitutional Tribunal, neither the Treaty on European Union nor the Treaty on the Functioning of the European Union confers on the Union any competence in the organisation, establishment and functioning of the judiciary of a Member State. That area remains the exclusive sovereign competence of the given Member State.

**22.** According to the reasons for the judgment, the case was adjudicated on the basis of Article 188(1) of the Constitution of the Republic of Poland, which stipulates that the Constitutional Tribunal rules on the conformity of laws and international agreements to the Constitution. The EU Treaties fall within the concept of international agreements. Article 4(3), second sentence, of the TEU provides for the principle of sincere cooperation. In line with that principle and the principle of direct effect, the interim measures ordered by the Court of Justice of the European Union, however addressed to a Member State, are directly applicable by all bodies of that Member State, in particular the courts. The instructive part of that norm sets out a general and abstract standard of procedure. Following the principle of sincere cooperation, the CJEU ruled that the courts in Member States should refrain from the application of national laws where this is necessary for EU law to have direct effect. In addition, the Court argued that the principle of the primacy of EU law cannot be prevented by provisions of domestic law relating to the attribution of jurisdiction, including constitutional provisions. Judge rapporteur recalled part of the judgment of the Constitutional Tribunal in the case ref. no. K 18/04, which stated that "*the interpretation of Community law by the ECJ should fall within the functions and*

*competences conferred by the Member States on the Communities. It should also be correlated with the principle of subsidiarity, which governs the functioning of the EU institutions. That interpretation should rest on a presumption of mutual sincerity between the Community institutions and the Member States. […] The Member States shall retain the right to assess whether the legislative bodies of the Community issued a given act of law within the competences conferred upon them and whether they exercised their rights in accordance with the principles of subsidiarity and proportionality. Once these boundaries are crossed, the provisions, acts of law, laid down outside their scope shall not be subject to the principle of the primacy of Community law*."

**23.** Another judgment of the Constitutional Tribunal important from the point of view of arguments useful for conducting disputes before the Court concerning the rule of law is the **judgment of 24 November 2021, issued in case K 6/21**. In this ruling, the Constitutional Tribunal stated, first, that Article 6 § 1, first sentence of the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950, later amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284, as amended, hereinafter: "**the Convention"**) ***to the extent to which the concept of a court used in this provision includes the Constitutional Tribunal, is inconsistent with Article 173 in connection with Article 10 section 2, Article 175 section 1 and Article 8 section 1 of the Constitution of the Republic of Poland***. Secondly, it found that Article 6 § 1, first sentence of the Convention referred to in point 1, ***to the extent that it grants the European Court of Human Rights the competence to assess the legality of the election of judges of the Constitutional Tribunal, is inconsistent with Article 194 section 1 in connection with Article 8 section 1 of the Constitution.***

**24.** In the justification of this judgment, the Constitutional Tribunal points out that the provision on the right to a fair trial contained in the Convention is consistent with the Constitution, but the term "court" used in Article 6 § 1 of the Convention does not include the Constitutional Tribunal. This is because the Constitutional Tribunal is a judicial authority which has been excluded from the administration of justice and has unique competences that do not have other organs of the judiciary. Its basic task is to control the hierarchical compliance of legal norms, *i.e.* deciding whether lower-order legal norms are compliant with higher-order legal norms, in particular with the Constitution, and, if necessary, to eliminate norms inconsistent with them out of the applicable legal system. Due to this competence, the Constitutional Tribunal is sometimes referred to as a negative legislator. It distinguishes it from common courts, which are obliged to apply the applicable law in a manner that leaves no doubts. Unlike common courts of law, the Constitutional Tribunal does not adjudicate individual cases, but is a

"court of law" which examines the existence of a relation of compliance of legal norms of various rank and – as a rule – does not deal with the assessment of facts. Therefore, its functioning is twofold. "On the one hand, the Constitutional Tribunal operates in a similar manner and on similar principles as courts, but the effects of its activities – in the scope that include the examination of hierarchical compliance of norms – are carried out in the same sphere as the activities of the legislative authority (they involve introducing changes in applicable law). On the other hand, its activity consists in controlling the effects of the activities of law-making bodies and in protecting human and civil liberties and rights, *i.e.* activities typical of law protection bodies, but it is not – according to the constitutional system – an organ of state control and law protection" (A. Mączyński, J. Podkowik, commentary to Article 188 of the Constitution [in:] Constitution of the Republic of Poland. Volume II. Commentary on Articles 87-243, ed. M. Safjan, L. Bosek, Warsaw 2016, Legalis, Nb 22).

**25.** In this ruling, the Constitutional Tribunal pointed out that **the European Court of Human Rights has no grounds for examining the independence of the judges of the Constitutional Tribunal, because its source is the Constitution and statutes**. It also emphasised that the guarantees of the independence of Polish courts and the independence of Polish judges, as well as the interpretation of the concept of judicial independence, also fully apply to judges of the Constitutional Tribunal. The source of the independence of a judge of the Constitutional Tribunal is Article 195 section 1 of the Constitution, which states that judges of the Constitutional Tribunal are independent and subject only to the Constitution in carrying out their office. The constitutional and statutory guarantees of judicial independence include irremovability (durability of the office), fixed remuneration and retirement. The systemic guarantee of the independence of a judge from the authority that appointed him is, first of all, the durability of the office; irremovability frees judges from dependence on the appointing authority (or any other entity). The procedural guarantee of judicial independence is the institution of exclusion of a judge, which has its roots in Roman law and has been present from the very beginning in Polish civil, criminal and administrative procedures, as well as in proceedings before the Constitutional Tribunal. **Judicial independence is therefore always assessed on the basis of a specific case pending before a court. The Constitutional Tribunal draws attention here to the fact that the applicant company did not make use of the possibility of submitting a motion for the exclusion of a judge in the proceedings before the Tribunal, and that the independence of a judge, due to the alleged defectiveness of his choice, was only questioned in the complaint to the European Court of Human Rights.**

**26.** The attribute of independence is therefore not a derivative of the manner in which a judge was elected to office. Judicial independence is actualized already after being elected as a

judge, while holding office, therefore it is not possible to formulate the premises of independence and evaluate it *ex ante.* Whether a judge will be independent does not result from the manner in which he was appointed, but above all from his internal independence and impartiality.

**27.** Another very important ruling is **the judgment of the Constitutional Tribunal of 10 March 2022 in case K 7/21**, in particular due to the effects it brings.

**28.** First, the Constitutional Tribunal has ruled that Article 6 § 1, first sentence of the Convention, to the extent to which the notion of "civil rights and obligations" covers the subjective right of a judge to occupy an administrative function in the structure of common courts of law in the Polish legal system is inconsistent with Article 8 section 1, Article 89 section 1 point 2 and Article 176 section 2 of the Constitution of the Republic of Poland. Secondly, it has found that Article 6 § 1, first sentence of the Convention – to the extent that, when assessing the fulfilment of the condition of a "court established by law", it allows the European Court of Human Rights or national courts to disregard the provisions of the Constitution, statutes and judgments of the Polish Constitutional Tribunal, and allows the European Court of Human Rights or national courts to disregard the provisions of the Constitution, statutes and judgments of the Polish Constitutional Tribunal and enables the independent creation of norms concerning the nomination procedure of national judges by the European Court of Human Rights or national courts in the process of interpreting the Convention – is inconsistent with Article 89 section 1 point 2, Article 176 section 2, Article 179 in conjunction with Article 187 section 1 in conjunction with Article 187 section 4 and Article 190 section 1 of the Constitution. Third, it has stated that Article 6 § 1, first sentence of the Convention – to the extent that it authorises the European Court of Human Rights or national courts to assess the compliance with the Constitution and the Convention of laws relating to the judiciary system, the jurisdiction of courts and the law specifying the system, scope of activities, mode of work and the method of selecting members of the NCJ – is inconsistent with Article 188 points 1 and 2 and Article 190 section 1 of the Constitution.

**29.** At the outset, in the oral reasons for the decision, the judge-rapporteur has pointed out that judgments of international tribunals are not endowed with the attribute of direct effect in the domestic legal order, but only with an obligation to execute. It is this feature that justifies national control at the stage of transferring the effects of such a judgment to the national legal order, because the rules and conditions of this process are always determined by the national constitution. And one of the forms of state control is the possibility of verifying the constitutionality of norms resulting from the law-making effect of a judgment. **It is all the more important in the situation of Poland. Importantly, the constitutional control understood in**

**this way is not about general supervision over the activities of the European Court of Human Rights but always about the specific constitutional context of the case under examination, *i.e.* the answer to the question whether, in connection with the indicated constitutional models, the European Court of Human Rights could create a specific norm from the challenged provision of an international agreement. Constitutional control is an expression of the tribunal dialogue, in this case between the Constitutional Tribunal and the European Court of Human Rights, and enables the formulation of constitutional postulates for the living and constantly evolving system of the Convention.**

**30. Regarding the decision contained in point 1 of the ruling, the Constitutional Tribunal has emphasised that the judge did not have the subjective right to occupy a function in the structures of public authority**. It is not provided for by the Constitution or the law. Certainly, this right does not arise from Article 60 of the Constitution. This article provides the right to access the public service on an equal footing. However, this provision does not imply the right to perform specific functions in the structures of public authority, *e.g.* to be the president of a court. Also, the subjective right to a held office, including a held administrative function in a court for the time specified in the term of office, does not arise from Article 180 section 1 of the Constitution, referring to the irremovability of a judge, with which, quite surprisingly, the European Court of Human Rights tried to link this right, thus making its own interpretation of Article 180 section 1 of the Constitution in order to obtain a legal norm. The Constitutional Tribunal rejected this understanding of the Constitution not only because its interpretation does not fall within the competence of the European Court of Human Rights, but also because its reasoning is inaccurate. **The principle of irremovability concerns the status of judges, *i.e.* judicial activity, and not the administrative functions performed by judges**.

**31.** An individual's status in an international treaty cannot be shaped without the participation of Parliament. **After the ratification of an international agreement, the content of human rights norms may evolve, however, if the content of such a norm, as a result of this evolution, becomes inconsistent with the provisions of the Constitution, this norm should be assessed as introduced into the Polish legal system contrary to Article 89 section 1 point 2 of the Constitution.** This is the situation we are dealing with in the present case. The norm indicated in the first plea is also inconsistent with Article 176 section 2 of the Constitution, which guarantees the Parliament the exclusive right to shape the system of courts (the system of courts is determined by statute). Only an act of the Parliament gives the rights and freedoms a guarantee and gives them the proper rank of democratic legitimacy, and also allows to ensure greater legal stability from the point of view of the effectiveness of the right to a fair trial. If a rational legislator wanted to allow for the regulation of the system and organization of the

judiciary in an international agreement, it would be directly indicated in a provision of the Constitution.

**32. The review of the right to a fair trial may only concern the action of a court in a specific case and not lead to an abstract assessment of the basis of a part of the judiciary within the state system and its organisation.**

**33. The subject matter specified in Article 176 section 2 of the Constitution cannot be shaped by acts of international law, nor the law-making activity of an international organ** but as it is directly indicated in the above-mentioned provision of the Constitution.

**34.** Regarding the ruling contained in point 2 a and b of the ruling, the Constitutional Tribunal has emphasised that when determining whether a court is established by law, it is necessary to rely on national law, including the generally applicable jurisprudence of the Constitutional Tribunal, which will provide answers in this regard. The European Court of Human Rights cannot decode the national legal status of a court established by law in an arbitrary manner taking into account various acts and judgments of various national courts.

**35.** The judge-rapporteur has emphasised that it raises doubts that the European Court of Human Rights, based on Article 6 of the Convention, found itself competent to assess the compliance with national law of the judicial appointment process as an element of the right to a fair trial in the context of meeting the court's requirement of being established by law. **A question arises here about the very possibility of interfering with the systemic elements of the state through human rights, and thus assigning the international community – at the convention level – the right to override the state's sovereignty at the constitutional level.** The norm from *the Guðmundur Andri Ástráðsson case* did not directly allow the omission of national law in the assessment of the nomination process, nor did it allow the European Court of Human Rights to create norms in this respect, even as part of their derivation from the Convention.

**36.** As regards the decision contained in point 3 of the ruling, the Constitutional Tribunal has emphasised that **there is no procedure to assess the legality of the members of the NCJ. The composition of the NCJ is shaped by constitutional provisions – Article 187 section 1 of the Constitution (the system of the NCJ is defined by law).** This means that only the provisions relating to the composition of the NCJ, and only with regard to elected members, may be inspected. But only from the perspective of constitutional review by the Constitutional Tribunal, as it will be a review of the law's compliance with the Constitution. **With regard to the currently applicable procedures in this regard, the Constitutional Tribunal in its judgment of 25 May 2019, ref. no. K 12/18, has acknowledged the constitutional compliance of the provisions on the procedure for selecting judges-members of the NCJ. Therefore the presumption of the constitutionality of this process was confirmed.**

**37.** Moreover, the Constitutional Tribunal has pointed out that **in the Polish legal system there are no procedures for questioning the legality of a specific composition of the NCJ and its members. If such were to apply, they would have to apply at the constitutional level, as the verification of the legality of a constitutional organ of the state may only be based on the procedures laid down in the Constitution**. Therefore, the reference by the European Court of Human Rights to the jurisprudence of Polish courts, and doing so in a selective manner, while disregarding the entire jurisprudence of the Constitutional Tribunal regarding the status of judges and the manner of their appointment, is an expression of the creation of standards unknown to national law regarding the nomination process of Polish judges.

**38.** In the opinion of the Constitutional Tribunal, **it is also not possible to state that the Republic of Poland has agreed to include – within Article 6 of the Convention – a rule, which allows for the omission of national regulations, including constitutional ones, when assessing the legality of the process of nominating judges and creating norms in this respect by the European Court of Human Rights.**

**39.** Moreover, the judge-rapporteur has explicitly pointed out that the result of the ruling has been the removal of the indicated norms from the applicable system of law and, as a result, the rulings issued on their basis, namely four judgments of the European Court of Human Rights: the ruling of 29 June 2021 in the case of *Broda and Bojara v. Poland*; the judgment of 22 July 2021 in the case of *Reczkowicz v. Poland*; the judgment of November 8, 2021, *Dolińska-Ficek and Ozimek v. Poland*; the judgment of 3 February 2021 in the case of *Advance Pharma sp.z o.o. v. Poland* do not have the attribute provided for in Article 46 of the Convention (enforceability obligation).