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To the European Court of Human Right,

Sarata v Poland

Application 2415/21

The applicant's reply to the Court's questions and the Government's observations. These are written observations together with the claims presented by the applicant's lawyer Monika Gąsiorowska.

I. The Court's question.

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?

I. The Government's observations.

1. The Government rises the objection on admissibility claiming that the present application should be considered as incompatibile rationae materiae with the Convention and manifestly ill founded.
2. Shortly after the Court gave the judgment in case Advance Pharma v. Poland, the judgment of **10 March 2022** (no. K 7/21) was delivered by the Constitutional Court. It found that Article 6 § 1, first sentence, of the Convention in the same context was incompatible with Article 188 (1-2) (jurisdiction of the Constitutional Court) and Article 190 § 1 of the Constitution in so far as it authorised [the Court] or national courts to assess the conformity with the Constitution and the Convention of statutes concerning the organisation of the judicial system, the jurisdiction of courts, and the statute specifying the organisation, the scope of activity, working procedures, and the manner of electing members of the NCJ. This judgment of the Constitutional Court was given by a bench including Judge M.M., in an apparent attempt to prevent the execution of the Court's judgments in *Broda and Bojara, Reczkowicz, Dolińska-Ficek and Ozimek* and *Advance Pharma sp. z o.o.* under Article 46 of the Convention. In this connection, the Court notes that it held in *Xero Flor w Polsce sp. z o.o.* (no. 4907/18, 7 May 2021, §§ 289-291) that there had been a violation of Article 6 § 1 as regards the applicant company's right to a "tribunal established by law" on account of the presence on the bench of the Constitutional Court of Judge M.M., whose election it found to have been vitiated by grave irregularities. In the light of the *Xero Flor* judgment, the presence of the judge mentioned above on the five-judge bench of the

Constitutional Court which gave the judgment of 10 March 2022 (no. K 7/21) necessarily calls into question the validity and legitimacy of that judgment..

3. In the recent citied judgment *Juszczyszyn v. Poland*, the Court reiterated that in accordance with Article 32 of the Convention its jurisdiction "shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto" and that "[i]n the event of dispute as to whether the Court has jurisdiction, the Court shall decide". It is then the Court alone which is competent to decide on its jurisdiction to interpret and apply the Convention and its Protocols. At this juncture, the Court also stressed that all Contracting Parties should abide by the rule of law standards and respect their obligations under international law, including those voluntarily undertaken when they ratified the Convention. The principle that States must abide by their international obligations has long been entrenched in international law; in particular, "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force" (see *Grzęda, v Poland* § 340 and the reference to the Advisory Opinion of the Permanent Court of International Justice on Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, see paragraph 108 above). The Court emphasises that, under the Vienna Convention on the Law of Treaties, a State cannot invoke its domestic law, including the constitution, as justification for its failure to respect its international law commitments. In view of the foregoing, the Court considered that the Constitutional Court's judgment of 10 March 2022 cannot have any effect on the Court's final judgments in *Broda and Bojara, Reczkowicz, Dolińska-Ficek and Ozimek* and *Advance Pharma sp. z o.o.* , having regard to the principle of the binding force of its judgments under Article 46 § 1 of the Convention.

4. The applicant claims that Article 6 of the Convention applies in their case regardless the judgment of 10 March 2022.

II. The applicant's observations.

The applicant claims that the proceedings instituted by him under the 2004 Act concerned a civil right of an economic nature and were pecuniary and the proceedings he had brought were decisive for his private rights and obligations, within the meaning of the Court's case-law.

The act of 2004 – ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez uzasadnionej zwłoki was introduced as execution of the judgment Kudła v. Poland, judgment 26 October 2000. It can be lodge only during the proceedings until the second instance judgment is deliver. Later, the plaintiff may lodge a civil suit under article 417 of civil code for illegal actions of the court – length of the proceedings.

The Court reiterated that, according to the principles laid down in its case-law, it must first ascertain whether there was a "dispute" ("*contestation*") over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question. Lastly, the right must be a "civil" right (see, amongst many other authorities, *Mennitto v. Italy* [GC], no. 33804/96, § 23, ECHR 2000-X, with further references).

In the applicant' case there was a dispute over the applicant's right of fair trail. The opposite party, which was the President of the Court, applied for dismissing the applicant's complaint.

Additionally, it must be noted that the proceedings under the 2004 Act are the separate proceedings. There is a separate court fee in amount of 200 PLN which must be paid in order to have a complaint tried by the court. The complaint is always considered by the higher court.

The applicability of Article 6 depends on whether there was a dispute over (civil) "right and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law, and, if so whether this "right" was of a "civil" character within the meaning of Article 6 § 1 (Oerlemans v. the Netherlands judgment of 27 November 1991, Series A no. 219, pp. 20-21, §§ 45-49). Article 6 § 1 only applies if the "right" is "civil" in character (Benthem v. the Netherlands judgment of 23 October 1985, Series A no. 97, p. 14, § 32). The "dispute" must be genuine and serious; it may relate not only to the existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (Allan Jacobson v. Sweden judgment of 25 October 1989, Series A no. 163, p. 19, §§ 66-67; Masson and Van Zon v. the Netherlands judgment of 28 September 1995, Series A no. 327-A, p. 17, § 44; Balmer-Schafroth and Others v. Switzerland, 26 August 1997, Reports 1997-IV, p. 1357, § 32, Le Calvez v. France, 29 July 1998, Reports 1998-V, p. 1899, § 56, *Mennitto v. Italy* [GC] no. 33804/96, 5 October 2000, §§ 23-27).

Although the term dispute ("contestation") should not be construed in a too formalistic manner, such a dispute, nevertheless, must be of a genuine and serious nature. Just as the Convention guarantees rights that are not theoretical and illusory but practical and effective, an applicant has to show that a dispute in respect of which he or she relies on Article 6 § 1 of the Convention must relate to an issue where he or she is genuinely affected by the outcome of the dispute (see Benthem v. the Netherlands judgment of 23 October 1985, Series A no. 97, § 32; Oerlemans v. the Netherlands judgment of 27 November 1991, Series A no. 219, § 46).

For the applicant, the proceedings under the Act 2004 was important and additionally the applicant could gain just compensation in amount up to 20.000 PLN. It means the proceedings included pecuniary claim. It was in the court power

to decide if to award just compensation to the applicant and if so, in which amount, or dismiss his complaint. It means that it was a pecuniary dispute and it was the court prerogative to decide on amount of just compensation.

The applicant submits that his cases was not been heard by an impartial and independent "tribunal established by law", thus entailing a breach of Article 6 § 1 of the Convention. Firstly, the judges who had dealt with the case, sitting in the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, had been appointed through the procedure involving the new NCJ, which had not offered any guarantees of independence and impartiality. Secondly, the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which had been newly created, could not be considered an impartial and independent judicial body. The Chamber of Extraordinary Review and Public Affairs could not be considered to fulfil the guarantees of independence from the legislative and the executive had been justified in the light of the criteria set out in the CJEU judgment of 19 November 2019 and judgment of the Court *Dolińska-Ficek and Ozimek v. Poland, nos. 49868/19 and 57511/19, §§ 283-359, 8 November 2021*. The CJEU had indicated the following elements which should be taken into account in the present case: the unlawful shortening of the term of office of the members of the previous NCJ; the election of the majority of the NCJ by the political powers; existence of possible irregularities in the procedure of election of the members of the NCJ; the way in which the NCJ was performing its constitutional tasks; and the lack of an effective judicial remedy against the resolutions of the NCJ. Those criteria were reaffirmed by the Supreme Court in its judgment of 5 December 2019 and the common resolution of 23 January 2020, which clearly established that there was a fundamental breach of domestic and international law in the procedure for the appointment of judges involving the NCJ, on account of the latter lacking impartiality and independence from the executive and legislative powers. In consequence, the NCJ could no longer be considered a constitutional body empowered to present candidates for appointment to judicial office.

The applicant underlines that, in accordance with the Court's case-law, in particular the judgment in *Guðmundur Andri Ástráðsson v. Iceland* ([GC], no. 26374/18, 1 December 2020), a court must always be "established by law". In the light of this requirement the Court was called upon to examine whether the domestic law had been complied with. In the applicant's opinion there had been clear and fundamental breaches of domestic laws in the process of appointment of judges to the Chamber of Extraordinary Review and Public Affairs. Those breaches concerned fundamental principles of the procedure for appointing judges. The gravity of the breaches was further compounded by their intentional nature and the lack of effective judicial review.

In the present case, the long series of irregularities which had resulted in the Chamber of Extraordinary Review and Public Affairs, which had examined the applicants' cases, not being a "tribunal established by law" had started with the structural changes to the NCJ effected by the 2017 Amending Act. Contrary to the Constitution, which held that the *Sejm* should only select four members of the NCJ, the 2017 Amending Act had entrusted the *Sejm* with the election of fifteen additional members, from among judges, who had so far been elected by their peers. As a result, the legislative and executive branches of power had granted themselves a quasi-monopoly to appoint the members of the NCJ in that they were to appoint twenty-three out of twenty-five members. Moreover, the changes to the structure of the NCJ had been carried out in parallel to other laws affecting the Polish judiciary which had led to, *inter alia*, the initiation of various infringement procedures by the European Union bodies and suspension of NCJ in the ENCJ.

As regards the process of appointment of judges to the Chamber of Extraordinary Review and Public Affairs, the applicant referrs to the following gross shortcomings. The procedure had been initiated by an act of the President of Poland that had been incompatible with the Constitution as it had lacked the requisite countersignature of the Prime Minister. The new NCJ, which had

participated in the process of appointment of the judges, had been composed in an unconstitutional manner and had not offered the guarantees of impartiality and independence. Moreover, the resolutions of the NCJ could not be effectively appealed against. The Polish President had appointed the judges recommended by the NCJ in spite of pending appeals against resolution no. 331/2018 with the intention of rendering its judicial review meaningless. In such conditions the act of appointment by the President had been legally ineffective.

The applicant rises that the Court already delt with question wherever the formation of the Civil Chamber of the Supreme Court was an "independent and impartial tribunal established by law" as required by Article 6 § 1 of the Convention and found a violation of the Article 6 § 1 in case *Advance Pharma Sp. z o.o* v. Poland, judgment of 3 February 2022. In present case it was the Chamber of Extraordinary Review and Public Affairs dismissed the applicant's complaint. However, the breaking of rule of law and the Convention is the same as regards Criminal Chamber as the judges were chosen by the same body – NCJ. The rules on appointing the judges remains the same.

On 27 November 2020 The Supreme Court dismissed his cassation appeal (case no. II KK 326/20). It sat in a single judge formation, composed of judge A.B., appointed to that court by the President of Poland on 10 October 2018 on recommendation of the NCJ (resolution of 28 August 2018 2019, no. 331/2018).

In the earlier judgment in *Guðmundur Andri Ástráðsson*, the Grand Chamber of the Court clarified the scope of, and meaning to be given to, the concept of a "tribunal established by law". The purpose of the requirement that a "tribunal" be "established by law" was to ensure "that the judicial organization in a democratic society [did] not depend on the discretion of the executive, but that it [was] regulated by law emanating from Parliament".

> As regards the notion of a "tribunal", in addition to the requirements stemming from the Court's settled case-law, it was also inherent in its very notion that a "tribunal" be composed of judges selected on the basis of merit

– that is, judges who fulfilled the requirements of technical competence and moral integrity. The Court noted that the higher a tribunal was placed in the judicial hierarchy, the more demanding the applicable selection criteria should be.

As regards the term "established", the Court referred to the purpose of that requirement, which was to protect the judiciary against unlawful external influence, in particular from the executive, but also from the legislature or from within the judiciary itself. In this connection, it found that the process of appointing judges necessarily constituted an inherent element of the concept "established by law" and that it called for strict scrutiny. Breaches of the law regulating the judicial appointment process might render the participation of the relevant judge in the examination of a case "irregular".

As regards the phrase "by law", the Court clarified that the third component also meant a "tribunal established in accordance with the law". It observed that the relevant domestic law on judicial appointments should be couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interferences in the appointment process.

Subsequently, the interaction between the requirement that there be a "tribunal established by law" and the conditions of independence and impartiality need to be examined. The Court noted that although the right to a "tribunal established by law" was a stand-alone right under Article 6 § 1 of the Convention, a very close interrelationship had been formulated in the Court's case-law between that specific right and the guarantees of "independence" and "impartiality". The institutional requirements of Article 6 § 1 shared the ordinary purpose of upholding the fundamental principles of the rule of law and the separation of powers. The Court found that the examination under the "tribunal established by law" requirement had to systematically enquire whether the alleged irregularity in a given case was of

such gravity as to undermine the aforementioned fundamental principles and to compromise the independence of the court in question (ibid., §§ 231-234). In order to assess whether the irregularities in a given judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law, and whether the balance between the competing principles had been struck by State authorities, the Court developed a threshold test made up of three criteria, taken cumulatively.

In the first place, there must, in principle, be a manifest breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable. However, the absence of such a breach does not rule out the possibility of a violation of the right to a tribunal established by law, since a procedure that is seemingly in compliance with the domestic rules may nevertheless produce results that are incompatible with the object and purpose of that right. If this is the case, the Court must pursue its examination under the second and third limbs of the test set out below, as applicable, in order to determine whether the results of the application of the relevant domestic rules were compatible with the specific requirements of the right to a "tribunal established by law" within the meaning of the Convention.

Secondly, the breach in question must be assessed in the light of the object and purpose of the requirement of a "tribunal established by law", namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers. Accordingly, breaches of a purely technical nature that have no bearing on the legitimacy of the appointment process must be considered to fall below the relevant threshold. To the contrary, breaches that wholly disregard the most fundamental rules in the appointment or breaches that may otherwise undermine the purpose and effect of the "established by law" requirement must be considered to be in violation of that requirement.

Thirdly, the review conducted by national courts, if any, as to the legal consequences – in terms of an individual's Convention rights – of a breach of a domestic rule on judicial appointments plays a significant role in determining whether such a breach amounted to a violation of the right to a "tribunal established by law", and thus forms part of the test itself. The assessment by the national courts of the legal effects of such a breach must be carried out on the basis of the relevant Convention case-law and the principles derived therefrom.

The applicants submit that **his case has been heard by judges of the the Chamber of Extraordinary Review and Public Affairs of the Supreme Court appointed in the procedure involving the new NCJ, a body which has not offered any guarantees of independence or impartiality. The appointment procedure has been neither transparent nor independent. The NCJ as established under the 2017 Amending Act no longer offered sufficient guarantees of independence from the legislative and executive powers. The breaches in the procedure for the appointment of judges to the the Chamber of Extraordinary Review and Public Affairs of the Supreme Court were of such gravity that they impaired the very essence of the applicant's right to a "tribunal established by law"**. Therefore, the applicant's case has not been heard by an "independent and impartial tribunal established by law", thus causing a breach of Article 6 § 1 of the Convention.

The violation of the applicant's rights originated in the amendments to the legislation, which deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled the executive and the legislature to interfere in the judicial appointment procedure. In respect of the newly appointed judges to the Supreme Court, the Court in the *judgment Advance Pharma sp. z o.o* held in its recent judgment that the breaches in the procedure of appointment

of judges were of such gravity that they impaired the very essence of the applicant's right to a "tribunal established by law".

5. **The applicant claims that all the Court's reasoning and findings presented in *Advance Pharma sp. z o.o* apply to the present case as the facts regarding judges of the Supreme Court in** the Chamber of Extraordinary Review and Public Affairs. In the applicant's case, the judges G.Ż, E.S., and P.K. of the the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, who were all sitting in the formation in camera refused to entertain the applicant's complaint, have been appointed with a fragrant violation of Polish law.

6. The mechanism of electing NCJ members was considerably modified pursuant to the 2017 Amending Act passed jointly with the new Act on the Supreme Court. It provides a solution whereby the legislature and the executive – regardless of the long statutory tradition of a part of the NCJ members being elected by judges themselves, in reflection of the NCJ' status and mandate, and of the judiciary recognised as a power separate from other authorities under the Polish Constitution – gain a nearly monopolistic position in deciding the NCJ membership (see, judgment of the Supreme Court of 5 December 2019, no. III PO 7/18, section 43-60). In the judgment cited above, **the Supreme Court concluded that the NCJ does not secure sufficient guarantees of independence of the legislature and the executive in the judicial appointment procedure .**

7. A flagrant violation of Polish Constitution occurred several times during the process of nomination of the new Supreme Court judges, including the judges G.Ż, E.S., and P.K. of the the Chamber of Extraordinary Review and Public Affairs of the Supreme Court who dealt with the applicant's case. The nomination procedure was initiated without the countersignature of the Prime Minister, as required under Article 144(3) of the Constitution. The 15 judges of the NCJ were elected by the Sejm, in violation of Article 187(1) of the

Constitution, that stipulates they are to be elected by their peers, as confirmed by the Constitutional Court in its judgment of 18 July 2007 (K25/07, OTK-A 2007, item 80). In addition, the four-year term of the judicial members of the NCJ was prematurely terminated by the legislature, thus violating Article 187(3) of the Polish Constitution. It was terminated pursuant to a judgment of the Polish Constitutional Court of 20 June 2017 (K 5/17, OTK-A 2017, item 48), issued in a formation contradicting the constitutional standard arising from the Constitutional Court's case-law. The judgment of 2017 was delivered with the participation of judges elected in breach of Article 190(1) of the Polish Constitution. In the absence of any amendment to the Constitution, the Constitutional Court created a divergence in its case law regarding systemic issues of fundamental importance to the enforcement of the right to a fair trial enshrined in the Polish Constitution and fundamental obligations of Member States of the European Union and the Council of Europe. It should be stressed that such situation is contrary to the Convention standards as one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that when courts have finally determined an issue, their ruling should not be called into question (see, among other authorities, *Brumarescu v. Romania [GC], no. 28342/95, §61, ECHR 1999-VII*).

As a result of the change, the legislative and executive branches granted themselves almost a monopoly over the formation of the NCJ, contrary to the constitutional principle of the separation and balancing of powers enshrined in Article 10 (1) of the Polish Constitution - 23 of all 25 members of the NCJ being appointed by these extrajudicial branches. As a result, they have gained excessive influence over the course of competition procedure, and the NCJ lost the ability to contribute to making the competition procedure more objective. With the same amendment, the legislature decided to prematurely terminate the four-year term of the then judicial members of the NCJ, thus

violating constitutional rule stipulated in Article 187 (3) of the Polish Constitution. These gave grounds for the other cases lodged with the Court (see, *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022, and *Żurek v. Poland*, no. 39650/18, 16 June 2022.

It should be noticed that the election of new NCJ members, which was held in spring 2018, was boycotted by the vast majority of Polish judges, thereby expressing a firm opposition to the unconstitutional changes introduced. As a result, out of a total number of about 10 thousand Polish judges, only 18 candidates applied for 15 positions. This objectively shows understating by the judges the unconstitutional changes in law and their refusal to participate in it. After the change in the composition of the NCJ members, it no longer fulfils its constitutional role as a guardian of judicial independence. The NCJ does not intervene in cases of judges against whom politically motivated disciplinary or criminal proceedings were started. The NCJ does not address any concerns to judicial independence resulting from recent changes in domestic legislation. **The irregulates in domestic law were pointed out in the judgment of the Supreme Administrative Court delivered on 6 May 2021 in case no. II GOK 2/18.** In this judgment the Supreme Administrative Court quashed a resolution issued by the NCJ on 28 August 2018 no. 330/2018. The resolution concerned the requests to present candidates for the positions of Supreme Court judges. This resolution included a judge who was ruling in the applicant's case. The judgment refers also to the judgments given by CJUE in cases C-824/18 and C- 585/18, C-624/18, C-625/18. The Supreme Administrative Court stated that due to change of domestic law made by the law of 26 April 2019 on changes of law about the NCJ by which possibility to appeal from the resolution of the NCJ regarding appointing to the positions of the Supreme Court judges was removed and all pending proceedings concerning such appeals were to be discontinued. Removing this possibility of appealing deprived the possibility of judicial control of the

course of the competition procedure with participation of the candidates for the positions of the judges. Lack of such effective remedy constitutes a violation of law. The conclusion on lack of independence of the NCJ from executive comes also from the fact that 23 members of NCJ are nominated by other power than judicial.

The Supreme Administrative Court ruled, that having regard to the CJUE judgments dated 2 March 2021 and 19 November 2019, the NCJ cannot be regarded as independent from the executive power. It was pointed that among members of the new NCJ there were presidents and vice presidents of the courts called by the executive power, who replaced dismissed presidents and vice presidents of the courts by the same executive power. The Supreme Administrative Court pointed that „In the public sphere, there is no position of the NCJ, which was established to be a body to guard the independence of courts and judges, that it respects the positions of national and European institutions and bodies stressing on the violations of the principle of the independence of the courts and judges in relation to situations which directly indicate that they suffer significant damage or oppose such situations including actions do not take into account the legal consequences resulting from the decision of the Court of Justice dated 8 April 2020, case C- 791/19 R". Furthermore, the Supreme Administrative Court stated that such negligence of the duties caused that in September 2018 the European Network of Councils for the Judiciary suspended the new Polish NCJ, considering it no longer independent from the executive branch. The Supreme Administrative Court stressed that in the situation when the possibility of effective performance of the duties by NCJ has been nullified it has a link with a certainty that judge competition procedure did not correspond with the requirement of "the good of the judiciary" as well as criteria of objectivity and fairness what reflected in pace of works related to the evaluation of candidates.

Further, it needs to be stressed that the breaches of law were indicated in a common resolution of the Supreme Court. On 23 January 2020 the joined Chambers of the Supreme Court (fifty-nine judges of Civil, Criminal, and Labour Law and Social Security Chambers) issued a common resolution. The Supreme Court made the following conclusions, in so far as relevant:

"*1. A court formation is unduly appointed within the meaning of Article 439(1)(2) of the Code of Criminal Procedure or a court formation is unlawful within the meaning of Article 379(4) of the Code of Civil Procedure also where the court formation includes a person appointed to the office of a judge of the Supreme Court on application of the National Council for the Judiciary formed in accordance with the [2017 Amending Act]. ...*

3. The interpretation of Article 439(1)(2) of the Code of Criminal Procedure and Article 379(4) of the Code of Civil Procedure provided in points 1 and 2 hereof shall not apply to judgments given by courts before the date hereof and judgments to be given in proceedings pending at the date hereof under the Code of Criminal Procedure before a given court formation.

4. Point 1 [above] shall apply to judgments issued with the participation of judges of the Disciplinary Chamber established at the Supreme Court under [the 2017 Act on the Supreme Court] irrespective of the date of such judgments."

On 5 December 2019 and 15 January 2020 respectively the Supreme Court gave judgments in the three cases in which the requests have been submitted to the CJEU for preliminary ruling. The judgment of 5 December 2019 (no. III PO 7/18) contains extensive grounds and interpretations given by the CJEU in its ruling of 19 November 2019 in joint cases C-585/18, C-624/18 and C-625/18. The Supreme Court concluded that "the National Council of Judiciary in its current formation is neither impartial nor independent of the legislature and executive, consequently the resolution passed by the NCJ must be annulled". The court's argumentation is also applicable to the present case as it refers to the judge of the Supreme Court sitting in the applicant's case as

nominated by the NCJ which was found not impartial and not independent of the legislative and executive. The Supreme Court gave also a detailed description of the breaches of domestic law in respect of the election to the NCJ (see, sections 46-60, judgment of 5 December 2019 (no. III PO 7/18).

For all the reasons presented above, in the applicants' case there has been a manifest breach of the domestic law. The applicants claim that the breach of the domestic law pertained to a fundamental rule of the procedure of appointing judges. As mentioned above, the judges of the Civil Chamber of the Supreme Court, including the judge who dealt with the applicant's case, were appointed with a fragrant violation of national law. The process of their nomination was neither transparent nor independent. The process of hearing the potential candidates to the position of a judge was run by a new NCJ which cannot be regarded as impartial and independent of the legislature or the executive. The amendment to the NCJ Act passed jointly with the new Act on the Supreme Court provided a solution in which the legislature and executive gain a nearly monopolistic position in deciding the NCJ membership. The Minister of Justice and a representative of the President of the Republic of Poland are *ex officio* NCJ members. Consequently, twenty three of the twenty-five NCJ members are appointed by other authorities than the judiciary. The division and balance of the legislative, executive and judiciary branches have been distorted contrary to the provision of Article 10 of the Polish Constitution which is a foundation of a democratic state of law model (see, judgment of the Supreme Court of 5 December 2019, no. III PO 7/18, section 43).

It is common knowledge that the course of judge competition was run speedily. The process of evaluating the candidates was hectic, with four of the Council's panels spending on average only a dozen of minutes interviewing the individual candidates, whilst asking mostly some basic questions. Furthermore, on 28 January 2020 the Constitutional Court examined a request

made by the Speaker of the Sejm on a presumed conflict of competence between the Sejm and the Supreme Court and between the President of Poland and the Supreme Court. On the above date the Constitutional Court issued an interim measure in which it suspended the enforcement of the Supreme Court's resolution of 23 January 2020 and suspended the prerogative of the Supreme Court to issue resolutions concerning issues of national or international law. This decision of the Constitutional Court was made against law as the Constitutional Court has no competence to suspend decisions of the Supreme Court. The Constitutional Court has no competence to interfere into the Supreme Court resolutions and decisions.

Finally, it should be noticed, that the constitutionality of the way of appointing the judges to the NCJ before the Law of 8 December 2017 amending the Act on the National Council of the Judiciary introduced new rules for the election of the NCJ members, had never been questioned. The system of electing the judges by the judges themselves existed since introduction a new Polish Constitution of 1997. The irregularities were introduced by the new law – the Act of 8 December 2017.

In view of the foregoing, in the applicant's case the breaches of the domestic law pertained to a fundamental rule of the procedure for appointing judge who dealt with the applicant's cassation appeal. The applicants claim that he had no measure to challenge the composition of the Criminal Chamber of the Supreme Court ruling in their case, and in particular there was no procedure under Polish law whereby the applicants could challenge the alleged defects in the election process for judges of the Supreme Court. The detailed argumentation has been presented above. The judicial review of the nomination process of judges to the Supreme Court in 2018 has been entirely excluded. Initially the appeal against the NCJ resolution was possible to the Supreme Administrative Court, however subsequently excluded by the Law of 20 July 2018 amending the Law on the organization

of common courts and certain other acts, followed by the judgment of the Constitutional Tribunal of 25 March 2019 (case K 12/18), and statutory amendment by the Law of 26 April 2019 on the amendment of the Act on the National Council of the Judiciary and the Law on the organization of administrative courts. This exclusion of the judicial review of NCJ resolutions violates well-established constitutional obligation to provide judicial review of NCJ resolutions.

The applicant claims that with respect to the first step of the test as set out in the *Guðmundur Andri Ástráðsson* several flagrant violations of Polish law have occurred. The deficiencies in the appointment of the Supreme Court's judges, including the judge who delt with the applicant's case, have been presented above. The irregularities in the appointment process have been of such gravity as it should be considered null and void and unacceptable *ab inicio*. With respect to the second step of the test established in *Guðmundur Andri Ástráðsson,* as it has been stated above, the breaches of domestic law pertained to fundamental rules of procedure for appointing judges. With respect to the third element of the test, the applicant claims that he had no means of challenging the composition of the Criminal Chamber of the Supreme Court which ruled in the applicant's case. The applicant had no remedy to complain about legal defects in the procedure of appointment to the Supreme Court.

For all the reasons presented above, the court which dealt with the applicant's case cannot be regarded as an "independent and impartial tribunal established by law" as required by Article 6 § 1 of the Convention.

The applicant claims the length of the proceedings was excessive. The applicant was a defendant in a civil case initiated by a housing cooperative on 2 June 2011. On 4 June 2013 the Warsaw Regional Court gave judgment; upon appeal, it was partly amended on 26 May 2014 by the Warsaw Court of Appeal.

The claimant lodged a cassation appeal and on 17 December 2015 the Supreme Court quashed the judgment and remitted the case. On 20 November 2017 the Warsaw Court of Appeal gave judgment granting the claim. The applicant's cassation appeal was allowed by the Supreme Court on 26 September 2019 and the case was again remitted. In 2019 the claimant lodged a constitutional complaint; the case was stayed. The applicant requested to continue the proceedings, to no avail.
On 1 October 2020, the applicant filed a complaint under the Act of 17 June 2004, which was dismissed on 25 November 2020.
On 22 July 2021 the Constitutional Tribunal (file no. SK 24/20) discontinued the proceedings caused by lodging of a constitutional complaint by the claimant. On 10 March 2021 the Warsaw Court of Appeal gave judgment. It amended the judgment of 4 June 2013 by dismissing the claim of the housing cooperative against the applicant. The claimant lodged a cassation appeal with the Supreme Court; By the decision of 31 May 2022 (file no. I CSK 444/22) the Supreme Court refused to accept the claimant's cassation appeal for examination.

The applicant and the Government agree on the above facts. It means that the proceedings lasted over 10 years. Also the proceedings, where the applicant was a defender, were very stressful for the applicant. The proceedings were not complicated and twice the Supreme Court quashed the second instance judgment giving the guidelines for the Court of Appeal. The applicant had not participated in the length of the proceedings. To the contrary, he objected the staying of the proceedings, and later requested that the proceedings would be continued.

The "reasonable time" guarantee of Article 6 § 1 serves to ensure public trust in the administration of justice. The other purpose of the guarantee is to protect all parties to court proceedings against excessive procedural delays; in

criminal matters, especially, it is designed to avoid leaving a person charged with a criminal offence in a state of uncertainty about his or her fate too long. It underlines the importance of administering justice without delays which might jeopardise its effectiveness and credibility (see, among other examples, *Finger v. Bulgaria*, no. 37346/05, § 93, 10 May 2011, with further references to the Court's case-law, in particular to *Bottazzi v. Italy* [GC], no. 34884/97, § 22, ECHR 1999-V).The reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities. On the latter point, what is at stake for the applicant has also to be taken into account (see *Kudła v. Poland* [GC], no. 30210/96, § 124 ECHR 2000-XI).Article 6 § 1 of the Convention imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of the requirements of this provision, including the obligation to hear cases within a reasonable time. States are responsible for delays attributable to the conduct of their judicial or other authorities. They are also responsible for delays in the presentation of the reports and opinions of court-appointed experts. A State may be found liable not only for delay in the handling of a particular case, but also for failure to increase resources in response to a backlog of cases, or for structural deficiencies in its judicial system that cause delays. Tackling the problem of unreasonable delay in judicial proceedings may thus require the State to take a range of legislative, organisational budgetary and other measures.

In the applicant's case there was infringement of the applicant 's to fair trial as the proceedings lasted over 10 years, the proceedings did not proceed with the necessary expedition and failed to satisfy the reasonable time requirement.

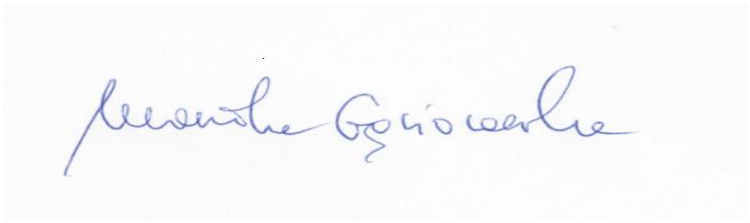
The applicant' s submits there were violations of Article 6 § 1 of the Convention in his case as to the formation of the Court and length of the proceedings.

V. The applicants' claims.

The applicant claims the amount of **15.000 EURO** as just satisfaction in respect of non-pecuniary damage.

The claims amount of 10.380 PLN in respect of legal cost which the applicant paid for lodging the application and representation before the Court. Three invoices attached.

Your respectfully,



Adwokat Monika Gąsiorowska

Attachments: 3 invoices