Provisional text

OFFICIAL EN JUSTICE EN EUROPA
Translation into English
delivered on 2 December 2021 (1)

Joined Cases C - 357/19 and C - 547/19

Proceedings brought by Westerwaldkreis

M and Others (C - 357/19)

M (C - 547/19)

(Reference for a preliminary ruling - Rule of law - Effective judicial protection in the field covered by EU law - Second subparagraph of Article 19(1) TEU - Article 47 of the Charter of the Fundamental Rights of the European Union - Independence of the judiciary - Disciplinary proceedings against judges - Disciplinary offence - Breach of the duty of impartiality - Disciplinary measure - Transfer to a different place of work - Decision of the Disciplinary Court of the Supreme Court of Poland - Composition - Procedure - Appointment of judges - Decision of the National Council of the Judiciary - Judicial independence and political pressure - Criteria for assessing the independence of a court - Presumptions - Protection of the right to be heard - Right to a fair trial - Principle of legality - Principle of proportionality)

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1. Introduction

1. The requests for preliminary rulings open issues as to the compatibility with EU law of certain aspects of the recent reform of the Polish judicial system. They concern authorisations granted by the ordinary court to initiate criminal proceedings against judges, the transfer of judges to other places of work without their consent, the composition of the Disciplinary Chamber of the Supreme Court and the procedure which it has to follow, which is at the heart of the present case. The reference in Case C-357/19 also refers to certain Articles 2 and the second subparagraph of Article 19(1) TEU. Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') is mentioned in all the questions referred for a preliminary ruling. Article 19(1) TEU and Article 47 of the Charter are, in particular, the subject of the second question in Case C-547/19 and the second, third and fourth questions in Case C-357/19. The second question in Case C-357/19 also refers to Article 267 TFEU.

II. Legal framework - Polish law

A. The Constitution

2. Article 179 of the Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland):

'Everyone is entitled to a fair and public hearing, without undue delay, by an independent and impartial tribunal with jurisdiction.'

3. Article 180(1) of the Constitution:

'Judges, by virtue of their office, shall be independent.'

4. Article 195(1) of the Constitution:

'...

5. Article 195 of the Constitution of the Republic of Poland is the following terms:

'Judges shall be appointed for an unlimited period by the President of the Republic on a proposal of the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland, "the NRSJ").'

B. The amended Law on the Supreme Court

6. Article 30(1) of the amended Law on the Supreme Court:

'A judge may not be lawfully liable for a breach of duties only with the prior consent of a court determined by law. A judge may not be detained or arrested except in the case of apprehension in the commission of a criminal offence and if his detention is necessary to secure the proper conduct of proceedings. The provisions of the code of criminal proceedings lawfully authorised and the informed consent of the decision may only be taken by the Disciplinary Chamber of the Supreme Court.'

7. Article 107 of the Constitution of the Republic of Poland provides:

'The NRSJ shall be composed of:

(a) the First President of the Supreme Court, the Minister Justice, the President of the Prezydent Rzeczypospolitej Polskiej (President of the Republic of Poland), the Ombudsman, the President of the Krajowa Rada Radców Prawnych (National Council of Legal Advisers) and the President of the Naczelna Rada Adwokacka (National Council of Lawyers);

(b) judges chosen by the Sąd Najwyższy (Supreme Court), the ordinary courts, the administrative courts and the military courts;

(c) three members chosen by the Sejm from among its deputies, and two members chosen by the Senate from among its members;

(d) ...

8. The terms of office, three-or-more-or-less members of the [illegible] shall be four years.

9. The organisational structure, the mode of operation and the procedure for the work of the [illegible], as well as the manner of choosing its members, shall be specified by resolution.

10. Article 108(1) of the Constitution of the Republic of Poland:

'The National Council of the Judiciary shall be composed of 15 judges and [illegible] and [illegible] years' [illegible].

C. The amended Law on the ordinary courts

11. Article 27(1) of the amended Law on the ordinary courts:

'A judge may not be lawfully liable for a breach of duties only with the prior consent of a court determined by law. A judge may not be detained or arrested except in the case of apprehension in the commission of a criminal offence and if his detention is necessary to secure the proper conduct of proceedings. The provisions of the code of criminal proceedings lawfully authorised and the informed consent of the decision may only be taken by the Disciplinary Chamber of the Supreme Court.'

12. Article 107 of the Constitution of the Republic of Poland provides:

'The NRSJ shall be composed of:

(a) the First President of the Supreme Court, the Minister Justice, the President of the Prezydent Rzeczypospolitej Polskiej (President of the Republic of Poland), the Ombudsman, the President of the Krajowa Rada Radców Prawnych (National Council of Legal Advisers) and the President of the Naczelna Rada Adwokacka (National Council of Lawyers);

(b) judges chosen by the Sąd Najwyższy (Supreme Court), the ordinary courts, the administrative courts and the military courts;

(c) three members chosen by the Sejm from among its deputies, and two members chosen by the Senate from among its members;

(d) ...

13. Article 108(1) of the Constitution of the Republic of Poland:

'The National Council of the Judiciary shall be composed of 15 judges and [illegible] years' [illegible].

D. The amended Law on the National Council of the Judiciary

14. Article 30(1) of the amended Law on the National Council of the Judiciary:

'A judge may not be lawfully liable for a breach of duties only with the prior consent of a court determined by law. A judge may not be detained or arrested except in the case of apprehension in the commission of a criminal offence and if his detention is necessary to secure the proper conduct of proceedings. The provisions of the code of criminal proceedings lawfully authorised and the informed consent of the decision may only be taken by the Disciplinary Chamber of the Supreme Court.'

15. Article 107 of the Constitution of the Republic of Poland provides:

'The NRSJ shall be composed of:

(a) the First President of the Supreme Court, the Minister Justice, the President of the Prezydent Rzeczypospolitej Polskiej (President of the Republic of Poland), the Ombudsman, the President of the Krajowa Rada Radców Prawnych (National Council of Legal Advisers) and the President of the Naczelna Rada Adwokacka (National Council of Lawyers);

(b) judges chosen by the Sąd Najwyższy (Supreme Court), the ordinary courts, the administrative courts and the military courts;

(c) three members chosen by the Sejm from among its deputies, and two members chosen by the Senate from among its members;

(d) ...

16. Article 108(1) of the Constitution of the Republic of Poland:

'The National Council of the Judiciary shall be composed of 15 judges and [illegible] years' [illegible].

E. The Code of Criminal Procedure

17. Article 107(1) of the Ustawa - Kodeks postępowania karnego (Law on the Code of Criminal Procedure) of 6 June 1997 (Dz. U. of 1997, item 555) ('the Code of Criminal Procedure'):

'A judge may not be lawfully liable for a breach of duties only with the prior consent of a court determined by law. A judge may not be detained or arrested except in the case of apprehension in the commission of a criminal offence and if his detention is necessary to secure the proper conduct of proceedings. The provisions of the code of criminal proceedings lawfully authorised and the informed consent of the decision may only be taken by the Disciplinary Chamber of the Supreme Court.'

18. Article 107(2) of the Code of Criminal Procedure:

'...

19. The exemption of the court may recognise or not a judge's immunity, and the decision of the court may be brought only on the basis of the consent of the Disciplinary Chamber of the Supreme Court.'

20. Article 107(3) of the Code of Criminal Procedure, as amended, as part of the case by the Sąd Najwyższy (Supreme Court) of the Republic of Poland, the Disciplinary Chamber of the Supreme Court, which is a judicial body, and the decision of the court may be brought only on the basis of the consent of the Disciplinary Chamber of the Supreme Court.

21. The Code of Criminal Procedure, as amended, provides that the Disciplinary Chamber of the Supreme Court is the only court which can give consent to the exercise of criminal proceedings against a judge.

F. The law of the proceedings and the questions referred for a preliminary ruling

22. Article 107(1) of the Code of Criminal Procedure, as amended, provides that the Disciplinary Chamber of the Supreme Court is the only court which can give consent to the exercise of criminal proceedings against a judge.

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37 See, by analogy, judgment of 16 November 2021, Prokuratura Rejonowa w Mińsku Mazowieckim and Others (C-748/19 to C-754/19, EU:C:2021:931, paragraph 54 and the case-law cited).

38 Judgment of 22 March 2022 (C-508/19, EU:C:2022:201, paragraphs 60 to 71).

39 Pursuant to Article 258 TFEU.

40 OJ 2021 C 252, p. 9.

41 The different effects of judgments of the Court pursuant to Articles 258 and 267 TFEU should not be over emphasised. By way of example, in its judgment of 10 March 2022, Grossmania (C-177/20, EU:C:2022:175), the Court recently described the combined effects that its judgments under both procedures may have.

42 It is undisputed that the referring court, as a court or tribunal within the meaning of EU law, acts within the Polish legal order in the 'fields covered by Union law' pursuant to the second subparagraph of Article 19(1) TEU and must therefore meet the requirements of effective judicial protection. Judgment of 6 October 2021, W.Z. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment) (C-487/19, EU:C:2021:798, paragraph 106 and the case-law cited).

43 Judgment of 22 February 2022, RS (Effects of the decisions of a constitutional court) (C-430/21, EU:C:2022:99, paragraphs 34 to 37 and the case-law cited).

44 See question 1(c) and question 3(f) in Case C-615/20.

45 Namely point 5 of Article 3, Article 27 and Article 73(1) thereof. In accordance with the order of 8 April 2020, the Republic of Poland was also required to refrain from referring the cases pending before the Disciplinary Chamber to a panel that did not meet the requirements of independence defined, inter alia, in the *A. K.* judgment.

46 See Article 27(1)(1a) of the amended Law on the Supreme Court and Article 80, Article 110(2a) and Article 129 of the amended Law on the organisation of the ordinary courts.

47 In any event, the suspension came to an end with the delivery of judgment of 15 July 2021, Commission v Poland (Disciplinary regime for judges) (C-791/19, EU:C:2021:596) ('the *Disciplinary regime for judges* judgment'). The declaration that the Polish Government had not fulfilled its obligations under the second subparagraph of Article 19(1) TEU by its failure to guarantee the independence and impartiality of the Disciplinary Chamber and, in particular, the criteria the Court relied upon in reaching that finding, are of particular relevance to the present proceedings. See also the *A. K.* judgment.

48 Order of the Vice-President of the Court of 14 July 2021, Commission v Poland (C-204/21 R, EU:C:2021:593) ('the order of 14 July 2021').

49 Immediately and pending delivery of the judgment closing the proceedings in Case C-204/21, *Commission* v *Poland (Independence and private life of judges)*.

50 As defined in the *A. K.* judgment.

51 Order of the Vice-President of the Court of 27 October 2021, Commission v Poland (C-204/21 R, not published, EU:C:2021:878).

52 Without being contradicted by the Polish Government.

53 Subject to verification by the referring court, that law entered into force on 15 July 2022.

54 In order, for example, to have his suspension lifted.

55 As the Polish Government and the Commission indicated in their observations, in the absence of EU rules on the matter, it is for the Member States to determine whether certain actions by a judge are disciplinary or criminal in nature. EU law thus, in principle, does not preclude a provision such as Article 181 of the Constitution of the Republic of Poland, which envisages lifting a judge's immunity from criminal prosecution and his or her detention by a court established by law. See question 2 in Case C-615/20.

56 Judgment of 18 May 2021, Asociaţia 'Forumul Judecătorilor din România' and Others (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraphs 210 to 213). See question 2(a) in Case C-615/20.

57 See, to that effect, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C824/18, EU:C:2021:153, paragraph 112 and the case-law cited).

58 Relating to authorisation to initiate criminal proceedings against judges or trainee judges or place them in provisional detention, to employment and social security law concerning judges of the Sąd Najwyższy (Supreme Court) and to the compulsory retirement of those judges.

59 See also the order of 14 July 2021 (paragraph 81).

60 See, by analogy, the *Disciplinary regime for judges* judgment (paragraphs 80 and 83).

61 See question 1(a) and question 3(d) in Case C-615/20.

62 Thereby excluding any possibility of transferring to that chamber judges already serving on the Sąd Najwyższy (Supreme Court) even though such transfers were in principle permitted.

63 Twenty-three of the 25 members of the KRS in its new composition were appointed by the Polish executive or legislature or are members thereof. Previously the judges selected 15 members of the KRS from their own ranks.

64 The ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, item 5), in the consolidated version published in the Dziennik Ustaw Rzeczypospolitej Polskiej of 2019 (item 825).

65 Which included, in particular, the creation of two new chambers within that court, one being the Disciplinary Chamber, together with the introduction of a mechanism to lower the retirement age of judges of the Sąd Najwyższy (Supreme Court) and its application to serving judges of that court. The premature termination of the terms of office of certain members of the KRS and the reorganisation of that body took place in a context in which it was expected that numerous posts would become vacant within the Sąd Najwyższy (Supreme Court), and in particular within its Disciplinary Chamber.

66 The Court also held that such a development reduced the protection of the value of the rule of law. The *Disciplinary regime for judges* judgment *(paragraph 112)*.

67 See point 212 of my Opinion in Case C-204/21, *Commission* v *Poland (Independence and private life of judges)*.

68 See points 28 and 29 of the present Opinion. See also question 3(e) in Case C-615/20. The Court has stated that the role of the KRS in the appointment process of judges of the Disciplinary Chamber is decisive and that its independence from the political authorities is questionable thus giving rise to legitimate doubts as to the independence and impartiality of that chamber. The *Disciplinary regime for judges* judgment (paragraphs 101 and 108).

69 See question 3(f) in Case C-615/20.

70 The *A. K.* judgment (paragraphs 120 to 122).

71 See point 28 of the present Opinion. An analogy may be drawn with the judgment of 27 May 2019, OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau) (C-508/18, EU:C:2019:456, paragraphs 73 to 90), on the links between the German Minister for Justice and the public prosecutor's office with regard to the risk that the former gives instructions to the latter in specific cases.

72 Coupled with the other factors to which the Court referred in its *Disciplinary regime for judges* judgment.

73 The *Simpson* judgment (paragraph 55).

74 Judgment of 1 July 2008, Chronopost v UFEX and Others (C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 46).

75 See the *Simpson* judgment (paragraph 57), and judgment of 24 March 2022, Wagenknecht v Commission (C-130/21 P, EU:C:2022:226, paragraph 15), with respect to the Court of Justice and the General Court. See judgment of 6 October 2021, W.Z. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment) (C-487/19, EU:C:2021:798, paragraph 126 to 131), with respect to the courts and tribunals of the Member States.

76 See the *Simpson* judgment (paragraphs 55 and 57) and judgment of 1 July 2008, Chronopost v UFEX and Others (C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 46).

77 Judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses (C-64/16, EU:C:2018:117, paragraphs 29, 36 and 37).

78 The *Simpson* judgment (paragraph 55).

79 See judgment of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions) (C-824/18, EU:C:2021:153, paragraph 128 et seq. and the case-law cited). It could be asserted, for example, that it is a disciplinary offence to examine the role of the KRS in the procedure leading to the appointment of a judge.

80 In its judgment of 4 March 2020 (Case P 22/19) (Dz. U. of 2020, item 413), the Trybunał Konstytucyjny (Constitutional Court) held that provisions of national law which permit a motion to exclude a judge from a case, due to his or her defective appointment by the President of the Republic acting upon a proposal of the KRS, are inconsistent with Article 179 read in conjunction with Article 144(3)(17) of the Constitution of the Republic.

81 The *A. K.* judgment (paragraph 145).

82 Paragraph 129 of the Court's judgment of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions) (C-824/18, EU:C:2021:153), holds that 'the fact that it may not be possible to exercise a legal remedy in the context of a process of appointment to judicial positions of a national supreme court may, in certain cases, not prove to be problematic in the light of the requirements arising from EU law, in particular the second subparagraph of Article 19(1) TEU'.

83 Judgment of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions) (C-824/18, EU:C:2021:153, paragraphs 128 to 136 and the case-law cited).

84 The *A. K.* judgment. See also judgment of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions) (C-824/18, EU:C:2021:153), and the *Disciplinary regime for judges* judgment.

85 The *Disciplinary regime for judges* judgment concerns the jurisdiction of the Disciplinary Chamber to rule in disciplinary cases concerning judges of the Sąd Najwyższy (Supreme Court) and the ordinary courts. As point 69 of the present Opinion and point 212 of my Opinion in Case C-204/21, *Commission* v *Poland (Independence and private life of judges)* indicate, the reasoning in that case-law also applies to the Disciplinary Chamber's jurisdiction to authorise the prosecution, detention and suspension of judges and trainee judges and the reduction of their remuneration.

86 Judgment of 10 March 2022, Grossmania (C-177/20, EU:C:2022:175, paragraphs 35, 36, 38 and the case-law cited).

87 See Article 190(1) of the Constitution of the Republic of Poland.

88 See, by analogy, judgment of 22 February 2022, RS (Effect of the decisions of a constitutional court) (C-430/21, EU:C:2022:99, paragraphs 73 to 75). See also judgments of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions) (C824/18, EU:C:2021:153, paragraph 146), and of 18 May 2021, Asociaţia 'Forumul Judecătorilor din România' and Others (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 250).

89 See questions 4(a) and (b) in Case C-615/20 and question 3(a) in Case C-671/20.

90 See question 3(b) in Case C-671/20. YP considers that an authorisation to prosecute a judge may be granted only by an independent and impartial tribunal following an equitable and transparent examination of a case. Since the Disciplinary Chamber did not comply with any of those requirements its resolution is null and void. The Polish Government considers that Judge I.T.'s suspension is valid and his participation in the criminal proceedings would therefore infringe the parties' right to an independent tribunal previously established by law.

91 Irrespective of the nature of the jurisdiction it purported to exercise.

92 Since the Court's existing case-law provides a clear answer to the question as to whether the Disciplinary Chamber complies with the second subparagraph of Article 19(1) TEU – in particular in its *Disciplinary regime for judges* judgment – the national court is required to do everything necessary within its jurisdiction to ensure the application of that interpretation. See, to that effect, judgment of 10 March 2022, Grossmania (C-177/20, EU:C:2022:175, paragraph 38 and the case-law cited).

93 Judgment of 10 March 2022, Grossmania (C-177/20, EU:C:2022:175, paragraph 63).

94 See, by analogy, judgment of 6 October 2021, W.Z. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment) (C-487/19, EU:C:2021:798, paragraphs 152 to 155).

95 And all emanations of that State, including the referring court.

96 See judgment of 19 November 1991, Francovich and Others (C-6/90 and C-9/90, EU:C:1991:428, paragraph 36).

97 See, by analogy, judgment of 9 March 1978, Simmenthal (106/77, EU:C:1978:49, paragraph 23), which states, inter alia, that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from a national court having jurisdiction to apply such a law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent EU rules from having full force and effect are incompatible with those requirements of EU law. See also judgment of 22 June 2010, Melki and Abdeli (C-188/10 and C-189/10, EU:C:2010:363, paragraphs 43 and 44 and the case-law cited).

98 See judgments of 2 April 2020, CRPNPAC and Vueling Airlines (C-370/17 and C-37/18, EU:C:2020:260, paragraphs 88 and 89), and of 17 September 2020, Rosneft and Others v Council (C-732/18 P, not published, EU:C:2020:727, paragraph 52 and the case-law cited).

99 See, by analogy, judgment of 6 October 2021, W.Z. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment) (C-487/19, EU:C:2021:798, paragraph 160).

100 This does not mean that judges who were subject to proceedings before the Disciplinary Chamber pursuant, for example, to Article 80 of the amended Law on the organisation of the ordinary courts may not be subject to further proceedings pursuant to that provision before an independent and impartial tribunal previously established by law. It is a matter for the relevant State authorities to (re)initiate such proceedings against the judges in question where appropriate.

101 Were it impossible to establish formations of the referring court that included Judge I.T., courts would be unable to verify whether they are independent and impartial tribunals previously established by law, thus rendering unworkable the *Simpson* judgment (paragraphs 55 and 57).

102 In particular a court president. See Article 41b(1) and (3) of the amended Law on the organisation of the ordinary courts.

103 This is without prejudice to the possibility that a judge may bring an action for damages. Polish law appears to provide for the compensation of suspended judges in certain instances: Article 129 of the amended Law on the organisation of the ordinary courts refers.

104 Given the considerable lapse in time since Judge I.T.'s suspension on 18 November 2020, many of the cases initially assigned to him may have already been ruled upon.

105 See paragraph 4 of the observations of the Regional Public Prosecutor.

106 I am aware that the lapse of time between the Disciplinary Chamber's resolution of 18 November 2020 and the request for a preliminary ruling in Case C-671/20 of 9 December 2020 – and thus the suspension of the main proceedings – is short and that the main proceedings in that case may not have advanced in the meantime. That consideration does not alter my position. Legal certainty and a clear, abstract position on such matters that are applicable in all cases must have priority over claims for expediency in individual cases.