



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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FIRST SECTION

Application no. 51455/21
Małgorzata MANOWSKA against Poland
and 5 other applications
(see list appended)
communicated on 15 February 2023

STATEMENT OF FACTS

1. A list of the applicants is set out in the appendix.

The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

2. On 24 May 2018 the President of the Republic announced seven vacant positions in the Civil Chamber of the Supreme Court. Twenty-seven candidates applied (see also *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, § 26, 3 February 2022). The competition procedure was conducted by the National Council of the Judiciary (“the NCJ”) as established under the Act of 8 December 2017 Amending the Act on the NCJ and Certain Other Acts (“the 2017 Amending Act”).

3. On 28 August 2018 the NCJ issued resolution no. 330/2018 recommending seven candidates, including the applicants in the present case, to be appointed as judges of the Civil Chamber of the Supreme Court (the first point of the resolution). The NCJ decided not to recommend other candidates (the second point of the resolution), including Mr A.S. and Mr J. Sadomski¹ (ibid. § 34).

¹ Mr J. Sadomski is the applicant before the Court in case no. 56297/21.

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4. On 20 September 2018 Mr A.S. lodged an application for an interim order with the Supreme Administrative Court prior to filing an appeal seeking to annul the NCJ's resolution of 28 August 2018. On 27 September 2018 the Supreme Administrative Court granted the interim order staying the implementation of the impugned resolution (case no. II GW 27/18). The applicants submit that the interim order of 27 September 2018 was never served on them.

5. On 1 October 2018 Mr J. Sadomski lodged an appeal (*odwołanie*) with the Supreme Administrative Court, through the intermediary of the NCJ, against the NCJ resolution of 28 August 2018 (no. 330/2018), which recommended seven candidates to be appointed as judges of the Civil Chamber of the Supreme Court and decided not to recommend other candidates, including the appellant. He argued, *inter alia*, that the President's act announcing vacant positions in the Supreme Court had been issued without the countersignature of the Prime Minister, and thus in breach of Article 144 § 2 of the Constitution. Furthermore, he submitted that judicial members of the NCJ had been elected to it in breach of the Constitution.

6. The appellant relied on section 44(1a) of the Act on the NCJ which provided, at the relevant time, that in individual cases concerning appointments to the office of judge of the Supreme Court an appeal could be lodged with the Supreme Administrative Court. Subsections 1b and 4 were added to section 44 of the Act on the NCJ by the Act of 20 July 2018 Amending the Act on the Organisation of Ordinary Courts and Certain Other Statutes, which entered into force on 27 July 2018. Subsection 1b provided that unless all the participants in the procedure challenged the NCJ's resolution in individual cases concerning appointment to the office of judge of the Supreme Court, that resolution shall become final in its entirety (see also *Advance Pharma sp. z o.o.*, cited above, § 100).

7. On 1 October 2018 the appellant applied directly to the Supreme Administrative Court for an interim order to stay the implementation of the NCJ resolution of 28 August 2018 (no. 330/2018). On 8 October 2018 the Supreme Administrative Court (case no. II GW 31/18) gave an interim order staying the implementation of that resolution in its entirety, that is to say both in the part recommending seven candidates for appointment to the Civil Chamber of the Supreme Court and in the part not recommending other candidates, including the appellant. The court also noted that the appellant's appeal against the resolution had not been transmitted by the NCJ to the Supreme Administrative Court.

8. The applicants submit that the Supreme Administrative Court did not inform them of the proceedings initiated by Mr J. Sadomski and did not serve on them the appeal of 1 October 2018 or the interim decision of 8 October 2018.

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9. On 9 October 2018 the appellant served the interim decision of 8 October 2018 on the NCJ and the President of the Republic, informing them that it was final and enforceable.

10. On 10 October 2018 while the appeals were pending, and in spite of the Supreme Administrative Court's decision to stay the implementation of resolution no. 330/2018, the President of the Republic decided to appoint the candidates recommended by the NCJ, including the applicants in the present case. On the same day the President handed them the letters of appointment and administered the oath of office to them (*ibid.* § 35).

11. On 21 November 2018 the Supreme Administrative Court made a request to the CJEU for a preliminary ruling in the case initiated by the appellant (case no. II GOK 2/18). It took the view that the recent amendments to the Act on the NCJ (see paragraph 5 above) precluded in practice any effectiveness of the appeal lodged by a participant who had not been put forward for appointment (*ibid.* §§ 46-48).

12. In its judgment of 25 March 2019 (case no. K 12/18) the Constitutional Court held that section 44(1a) of the Act on the NCJ concerning the procedure for judicial review of individual resolutions of the NCJ on the selection of judges was incompatible with Article 184 of the Constitution. In the reasons for the judgment, the Constitutional Court found that all proceedings conducted on the basis of the unconstitutional provision, which was repealed, should be terminated.

13. Subsequently, section 44 was modified by the Act of 26 April 2019 Amending the Act on the NCJ and the Act on the System of Administrative Courts, which entered into force on 23 May 2019. Section 44(1b) was repealed and section 44(1) was amended to exclude the right of appeal in individual cases regarding the appointment to the office of judge of the Supreme Court. Furthermore, section 3 of the Act of 26 April 2019 stipulated that "the proceedings in cases concerning appeals against NCJ resolutions in individual cases regarding the appointment to the office of judge of the Supreme Court, which have been initiated but not concluded before this Act comes into force, shall be discontinued by operation of law" (see also *Advance Pharma sp. z o.o.*, cited above, § 101).

14. On 14 May 2019 the Prosecutor General requested the Supreme Administrative Court to discontinue the proceedings initiated by appeals against the NCJ's resolutions, having regard to the Constitutional Court's judgment of 25 March 2019.

15. Considering that henceforth it was deprived of its jurisdiction to obtain an answer to the questions that it had previously referred to the CJEU, the Supreme Administrative Court, in its complementary request for a preliminary ruling of 26 June 2019, asked a question about the compatibility of the new rules introduced by the Act of 26 April 2019, when the judicial review was pending, with EU law.

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16. On 2 March 2021 the CJEU delivered a judgment in *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18 (see also *Advance Pharma sp. z o.o.*, cited above, §§ 207-209), holding in the operative part, in so far as relevant, as follows:

“1. Where amendments are made to the national legal system which, first, deprive a national court of its jurisdiction to rule in the first and last instance on appeals lodged by candidates for positions as judges at a court such as the Supreme Court, Poland against decisions of a body such as the NCJ not to put forward their application, but to put forward that of other candidates to the President of the Republic of Poland for appointment to such positions, which, secondly, declare such appeals to be discontinued by operation of law while they are still pending, ruling out the possibility of their being continued or lodged again, and which, thirdly, in so doing, deprive such a national court of the possibility of obtaining an answer to the questions that it has referred to the Court for a preliminary ruling:

...

– the second subparagraph of Article 19(1) TEU must be interpreted as precluding such amendments where it is apparent – a matter which it is for the referring court to assess on the basis of all the relevant factors – that those amendments are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges appointed, by the President of the Republic of Poland, on the basis of those decisions of the NCJ, to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

Where it is proved that those articles have been infringed, the principle of primacy of EU law must be interpreted as requiring the referring court to disapply the amendments at issue, whether they are of a legislative or constitutional origin, and, consequently, to continue to assume the jurisdiction previously vested in it to hear disputes referred to it before those amendments were made.

2. The second subparagraph of Article 19(1) TEU must be interpreted as precluding provisions amending the state of national law in force under which:

– notwithstanding the fact that a candidate for a position as judge at a court such as the Supreme Court lodges an appeal against the decision of a body such as the NCJ not to accept his or her application, but to put forward that of other candidates to the President of the Republic of Poland, that decision is final inasmuch as it puts forward those other candidates, with the result that that appeal does not preclude the appointment of those other candidates by the President of the Republic of Poland and that any annulment of that decision inasmuch as it did not put forward the appellant for appointment may not lead to a fresh assessment of the appellant’s situation for the purposes of any assignment of the position concerned, and.

– moreover, such an appeal may not be based on an allegation that there was an incorrect assessment of the candidates’ fulfilment of the criteria taken into account when a decision on the presentation of the proposal for appointment was made,

where it is apparent – a matter which it is for the referring court to assess on the basis of all the relevant factors – that those provisions are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges thus

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appointed, by the President of the Republic of Poland, on the basis of the decisions of the NCJ, to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

Where it is proved that the second subparagraph of Article 19(1) TEU has been infringed, the principle of primacy of EU law must be interpreted as requiring the referring court to disapply those provisions and to apply instead the national provisions previously in force while itself exercising the judicial review envisaged by those latter provisions.”

17. Following the CJEU’s judgment of 2 March 2021, on 6 May 2021 the Supreme Administrative Court gave judgment in the case initiated by Mr J. Sadowski (case no. II GOK 2/18). The court dismissed the Prosecutor General’s request for discontinuation of the proceedings. It annulled NCJ resolution no. 330/2018 in the part concerning the recommendation of seven candidates for appointment to the Civil Chamber of the Supreme Court, including applicants in the present case. As regards the part of resolution no. 330/2018 concerning the NCJ’s refusal to recommend certain other candidates, the Supreme Administrative Court annulled it in so far as it concerned the appellant.

18. In the judgment, the Supreme Administrative Court held, pursuant to, *inter alia*, the CJEU judgment of 2 March 2021 (see paragraph 15 above), that the NCJ did not offer guarantees of independence from the legislative and executive branches of power in the process of appointment of the judges.

19. The Supreme Administrative Court found that the amendments introduced by the Acts of 20 July 2018 and 26 April 2019 (see, respectively, paragraphs 5 and 12 above) had been intended to prevent any judicial review of appointments to the Supreme Court made with the involvement of the NCJ as established under the 2017 Amending Act.

20. The court also noted that the actions of the NCJ in the case under consideration showed that it had intentionally and directly sought to make it impossible for the Supreme Administrative Court to carry out a judicial review of the resolution to recommend (and not to recommend) candidates to the Civil Chamber of the Supreme Court. The NCJ transferred the appeal lodged by the appellant on 1 October only on 9 November 2018, while in the meantime it had transmitted the resolution to the President for him to appoint the recommended candidates.

21. The Supreme Administrative Court also agreed with the interpretation of the Supreme Court presented, *inter alia*, in the resolution of 23 January 2020, that the President’s announcement of vacancies at the Supreme Court required a countersignature of the Prime Minister to be valid.

22. The Supreme Administrative Court further held that:

“9. It should also be emphasised and clarified that the consequences of the ruling in this case do not relate to the validity and effectiveness of presidential acts of

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appointment to the office of judge of the Supreme Court made on the basis of recommendations submitted by the NCJ in the resolution under review.

In the current state of the law, such acts are not subject to judicial review and are not revocable (paragraphs 133 and 145 of the CJEU's judgment of 19 November 2019 and paragraphs 122 and 128 of the CJEU's judgment of 2 March 2021)."

23. The Supreme Administrative Court served its judgment on the applicants at their professional addresses.

24. On 6 May 2021 the Supreme Administrative Court gave judgments in two other cases (nos. II GOK 3/18 and II GOK 5/18) concerning appointments to the Civil Chamber of the Supreme Court. The reasoning in those cases was identical to that provided in the judgment II GOK 2/18.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

25. The detailed rendition of the relevant legal framework and practice is set out in the Court's judgments in *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, §§ 95-225, 3 February 2022 and *Grzęda v. Poland* [GC], no. 43572/18, §§ 64-167, 15 March 2022.

COMPLAINT

26. The applicants complain under Article 6 § 1 of the Convention that their right of access to a court and to a fair hearing was violated in the proceedings before the Supreme Administrative Court terminated by the judgment of 6 May 2021 (case no. II GOK 2/18), whose outcome concerned them directly. They allege that the Supreme Administrative Court did not notify them of the initiation of those proceedings or any decisions taken in them, except for the judgment of 6 May 2021, which resulted in their inability to take part in those proceedings.

Furthermore, the applicants submit that the Supreme Administrative Court noted that its judgment of 6 May 2021 (case no. II GOK 2/18) did not relate to the validity and effectiveness of presidential acts of appointment to the office of judge of the Supreme Court. However, the quashing of NCJ resolution no. 330/2018 of 28 August 2018, in the part concerning the applicants, by this judgment exposed them to doubts being raised in public debate as to the validity of their appointment.

QUESTIONS TO THE PARTIES

Victim status:

1. Can the applicants claim to be victims of a violation of the Convention, within the meaning of Article 34? Reference is made to the finding of the Supreme Administrative Court that its judgment of 6 May 2021 (case no. II GOK 2/18) “[did] not relate to the validity and effectiveness of presidential acts of appointment to the office of judge of the Supreme Court made on the basis of recommendations submitted by the NCJ in the resolution under review”.

Applicability of Article 6 of the Convention

2. If so, were the applicants’ civil rights, within the meaning of Article 6 § 1 of the Convention, determined in the proceedings before the Supreme Administrative Court terminated by the judgment of 6 May 2021 (case no. II GOK 2/18)? Reference is made to the fact that the legislature intended to prevent judicial review of appointments to the Supreme Court (see, *inter alia*, the CJEU’s judgment of 2 March 2021 in *A.B. and Others* (paragraph 138), the Supreme Administrative Court’s judgment of 6 May 2021, case no. II GOK 2/18 and *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, § 349, 3 February 2022).

Article 6 § 1 of the Convention – access to a court and fair hearing

3. In the affirmative, did the applicants have access to a court for the determination of their civil rights and obligations, as required by Article 6 § 1 of the Convention?

4. Did the applicants have a fair hearing in the determination of their civil rights and obligations, in accordance with Article 6 § 1 of the Convention?

5. The Government are requested to explain the reasons for the NCJ’s failure to serve the appeal of 1 October 2018 lodged by Mr J. Sadomski on the applicants.

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APPENDIX

No.	Application no.	Case name	Lodged on	Applicant Year of Birth Nationality
1.	51455/21	Manowska v. Poland	12/10/2021	Malgorzata MANOWSKA 1964 Polish
2.	51685/21	Zaradkiewicz v. Poland	13/10/2021	Kamil Michał ZARADKIEWICZ 1972 Polish
3.	51745/21	Krajewski v. Poland	13/10/2021	Marcin KRAJEWSKI 1971 Polish
4.	51826/21	Misztal-Konecka v. Poland	13/10/2021	Joanna Teresa MISZTAL-KONECKA 1976 Polish
5.	51857/21	Grela v. Poland	13/10/2021	Jacek Piotr GRELA 1967 Polish
6.	52230/21	Szanciło v. Poland	13/10/2021	Tomasz SZANCIŁO 1975 Polish