



Poland must take rapid action to resolve the lack of independence of the National Council of the Judiciary

The Chamber of Extraordinary Review and Public Affairs is not an “independent and impartial tribunal established by law”

In today’s **Chamber** judgment¹ in the case of **Dolińska-Ficek and Ozimek v. Poland** (application nos. 49868/19 and 57511/19) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights.

The case concerned complaints brought by two judges that the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which had decided on cases concerning them, had not been a “tribunal established by law” and had lacked impartiality and independence.

They complained in particular that the Chamber of Extraordinary Review and Public Affairs, one of two newly created chambers of the Supreme Court, had been composed of judges appointed by the President of Poland on the recommendation of the National Council of the Judiciary (“the NCJ”), the constitutional organ in Poland which safeguards the independence of courts and judges and which has been the subject of controversy since the entry into force of new legislation providing, among other things, that its judicial members are no longer elected by judges but by the *Sejm* (the lower house of Parliament).

The case is one of 57 applications against Poland, lodged in 2018-2021, concerning various aspects of the reorganisation of the Polish judicial system initiated in 2017*. The Court emphasised that its task was not to assess the legitimacy of the reorganisation of the Polish judiciary as a whole, but to determine whether, and if so how, the changes had affected Ms Dolińska-Ficek’s and Mr Ozimek’s rights under Article 6 § 1 of the Convention.

The Court found that the procedure for appointing judges had been unduly influenced by the legislative and executive powers. That amounted to a fundamental irregularity that adversely affected the whole process and compromised the legitimacy of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which had examined the applicants’ cases. The Chamber of Extraordinary Review and Public Affairs was not therefore an “independent and impartial tribunal established by law” within the meaning of the European Convention.

The judgment resembles closely that of [Reczkowicz v. Poland](#) (no. 43447/19) of July 2021. However, an additional manifest breach of domestic law was found in this judgment because, “in blatant defiance of the rule of law”, the President of Poland carried out judicial appointments despite a final court order staying the implementation of the NCJ’s resolution recommending judges to the Chamber of Extraordinary Review and Public Affairs.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

As the violation of the applicants' rights originated in the amendments to Polish 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 directly or indirectly in the judicial appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges appointed in that way, a rapid remedial action on the part of the Polish State is required.

When the Court finds a breach of the Convention, the State has a legal obligation under Article 46 of the Convention to select, subject to supervision by the Committee of Ministers, the general and/or individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress the situation. It therefore falls upon the State of Poland to draw the necessary conclusions from this judgment and to take appropriate measures in order to resolve the problems at the root of the violations found by the Court and to prevent similar violations from taking place in the future.

Principal facts

The applicants, Monika Dolińska-Ficek and Artur Ozimek are Polish nationals who were born in 1979 and 1966 and live in Siemianowice Śląskie and Lublin (Poland) respectively.

Ms Dolińska-Ficek is a district-court judge in Mysłowice; Mr Ozimek is a regional-court judge in Lublin. Both of them applied for judicial posts elsewhere in late 2017 and early 2018 respectively but were not recommended for those posts by the National Council of the Judiciary (the "NCJ"). They lodged appeals with the Supreme Court in 2018. Their appeals were examined by the newly established Chamber of Extraordinary Review and Public Affairs of the Supreme Court, one of the two new chambers created following the changes to the judiciary and composed solely of judges appointed through the procedure involving the new NCJ. Their cases were dismissed in 2019.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair hearing), the applicants complained that the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which had examined their appeals against the resolutions of the NCJ, had not been an independent and impartial "tribunal established by law" because it was composed of judges recommended by the NCJ. They referred in particular to proceedings before the Court of Justice of the European Union which ended in a ruling of 19 November 2019 and subsequent rulings by the Polish Supreme Court finding that the judges of the Supreme Court appointed in the procedure involving the NCJ were not a court constituted in accordance with domestic law.

They also complained that the President of Poland had appointed the judges recommended by the NCJ in spite of pending appeals contesting the legality of the NCJ resolution and the stay of its implementation while undergoing judicial review.

The applications were lodged with the European Court of Human Rights on 12 September and 22 October 2019 respectively. Given the similar subject matter, the Court examined the applications jointly in a single judgment.

Third party submissions were received from the Polish Commissioner for Human Rights and the International Commission of Jurists.

Michał Balcerzak was appointed to sit as an *ad hoc* judge, as Krzysztof Wojtyczek, the judge elected in respect of Poland, withdrew from sitting in the case (Article 26 § 4 of the Convention and Rules 28 § 3 and 29 § 1 (a) of the Rules of Court).

Judgment was given by a Chamber of seven judges, composed as follows:

Ksenija **Turković** (Croatia), *President*,
Gilberto **Felici** (San Marino),
Erik **Wennerström** (Sweden),
Raffaele **Sabato** (Italy),
Lorraine **Schembri Orland** (Malta),
Ioannis **Ktistakis** (Greece) and,
Michał **Balcerzak** (Poland), *ad hoc Judge*,

and also Renata **Degener**, *Section Registrar*.

Decision of the Court

Article 6 § 1

The Court examined the case in the light of the criteria laid down by the Grand Chamber of the Court in the case of *Guðmundur Andri Ástráðsson v. Iceland* (no. 26374/18) of December 2020 and also applied in *Reczkowicz v. Poland* (no. 43447/19) of July 2021.

First, the Court established that there had been a manifest breach of domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to the Chamber of Extraordinary Review and Public Affairs of the Supreme Court. That was because the NCJ, as established under the Amending Act on the NCJ of 8 December 2017, did not provide sufficient guarantees of independence from the legislative or executive powers.

The Court then went on to find that the President of Poland's appointment of all the judges to the Chamber of Extraordinary Review and Public Affairs upon NCJ resolution no. 331/2018, notwithstanding the ruling of the Supreme Administrative Court of 27 September 2018 suspending the NCJ's resolution, amounted to a manifest breach of the domestic law. Deliberate disregard of a binding judicial decision and interference with the course of justice in order to minimise the validity of a pending judicial review of the appointment of judges could only be characterised as blatant defiance of the rule of law. In light of the above, the Court did not find it necessary to determine whether there was also a separate breach of the domestic law resulting from the fact that the President's announcement of vacant positions in the Supreme Court had been made without the Prime Minister's countersignature.

The Court found that a procedure for appointing judges which was unduly influenced by the legislative and executive powers was in itself incompatible with Article 6 § 1 of the Convention and, as such, compromised the legitimacy of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court. The applicants' right to a "tribunal established by law" had been impaired.

In coming to this conclusion, the Court referred in particular to rulings by the Polish Supreme Court finding that the judges of the Supreme Court appointed in the procedure involving the NCJ were not a court constituted in accordance with domestic law. The Court considered that those rulings were based on convincing arguments, including a thorough and careful evaluation of the relevant Polish law from the perspective of the Convention's fundamental standards and of EU law. It also took into account rulings of the Court of Justice of the European Union, as well as multiple reports and assessments by European and international institutions.

The Court concluded that the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which examined the applicants' cases, was not a "tribunal established by law". There had therefore been a violation of Article 6 § 1 of the Convention.

As regards the question whether the same irregularities also compromised the independence and impartiality of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, the

Court held that it was linked with the same underlying problem of inherently deficient procedure for judicial appointments and that it had already been answered in its examination of the complaint alleging that that chamber lacked attributes of a “tribunal established by law”. It did not therefore require further examination.

Lastly, the Court considered that there was no need to give a separate ruling on the applicants’ additional complaints of a breach of the right to a fair hearing in the proceedings before the NCJ.

Article 46 (binding force and execution of judgments)

When the Court finds a breach of the Convention, the State has a legal obligation to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress the situation.

The violation of the applicants’ rights originated in the amendments to Polish 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 directly or indirectly in the judicial appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges appointed in that way. In this situation and in the interests of the rule of law and the principles of the separation of powers and the independence of the judiciary, a rapid remedial action on the part of the Polish State is required.

The Court refrained from giving any specific indications as to the type of individual and/or general measures that might be taken in order to remedy the situation and limited its considerations to general guidance. It therefore falls upon the State of Poland to draw the necessary conclusions from this judgment and to take any individual or general measures as appropriate in order to resolve the problems at the root of the violations found by the Court and to prevent similar violations from taking place in the future.

Just satisfaction (Article 41)

The Court held that Poland was to pay the each of the applicants 15,000 euros (EUR) in respect of non-pecuniary damage.

The judgment is available only in English.

*See also previous press releases concerning pending cases of [Grzęda v. Poland](#) (no. 43572/18), [Advance Pharma Sp. z o.o v. Poland](#) (no. 1469/20), [Brodowiak and Dżus v. Poland](#) (nos. 28122/20 and 48599/20), [Biliński v. Poland](#) (no. 13278/20), [Pionka v. Poland](#) (no. 26004/20), [Juszczyszyn v. Poland](#) (no. 35599/20), [Żurek v. Poland](#) (no. 39650/18), and [Tuleya v. Poland](#) (no. 21181/19), and the press releases in the judgments [Xero Flor w Polsce sp. z o.o. v. Poland](#) (no. 4907/18) and [Broda and Bojara v. Poland](#) (nos. 26691/18 and 27367/18).

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.