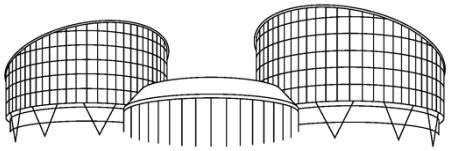

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF JUSZCZYSZYN v. POLAND

(Application no. 35599/20)

JUDGMENT

Art 6 § 1 (civil) • Grave irregularities in appointment of judges to newly established Supreme Court's Disciplinary Chamber, that suspended judge from duties for verifying independence of another judge appointed upon recommendation of reformed National Council of the Judiciary (NCJ) • Very essence of the right to a "tribunal established by law" impaired • Independence and impartiality of Disciplinary Chamber compromised • Application of *Reczkowicz v. Poland* in the light of three-step test formulated in *Guðmundur Andri Ástráðsson v. Iceland* [GC]
Art 8 • Private life • Unforeseeable suspension of judge, in connection with the giving of a judicial decision, based on manifestly unreasonable application of law, by a body not being "a tribunal established by law"

Art 18 (+ Art 8) • Restriction for unauthorised purposes • Disciplinary measures leading to applicant's suspension predominantly aiming to sanction and dissuade him from verifying lawfulness of appointment of judges upon recommendation of reformed NCJ • Context of successive reforms resulting in the weakening of judicial independence • Impugned measures in disregard of the rulings of the CJEU and the Polish Supreme Court, which made fundamental findings as to the lack of independence of the reformed NCJ and the status of judges appointed upon its recommendations • Impugned measures incompatible with the fundamental principles of judicial independence and the rule of law

STRASBOURG

6 October 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Juszczyszyn v. Poland,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Marko Bošnjak, *President,*
Péter Paczolay,
Krzysztof Wojtyczek,
Erik Wennerström,
Raffaele Sabato,
Lorraine Schembri Orland,
Ioannis Ktistakis, *Judges,*

and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 35599/20) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Paweł Juszczyszyn ("the applicant"), on 4 August 2020;

the decision to give notice to the Polish Government ("the Government") of the complaints under Article 6 § 1, Article 8, Article 18 taken in conjunction with Article 8, and Article 1 of Protocol No. 1 to the Convention;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the written comments submitted by the "Judges for Judges" Foundation (the Netherlands) jointly with Professor L. Pech, the International Commission of Jurists and the Commissioner for Human Rights of the Republic of Poland, who were granted leave to intervene by the President of the Section;

the factual update submitted by the applicant on 7 June 2022 and the Government's reply to it of 1 July 2022;

Having deliberated in private on 6 September 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the applicant's suspension from his judicial duties by the Disciplinary Chamber of the Supreme Court which, in the applicant's submission, did not satisfy the requirements of an "independent and impartial tribunal established by law". He also claimed that the suspension had amounted to a breach of his right to respect for his private life and that the restriction on the said right had been applied for a purpose not prescribed by the Convention. The applicant relied on Article 6 § 1, Article 8, Article 18 taken in conjunction with Article 8, and Article 1 of Protocol No. 1 to the Convention.

THE FACTS

2. The applicant was born in 1972 and lives in Olsztyn. He was represented by Mr P. Kładoczny, a lawyer with the Helsinki Foundation of Human Rights, a non-governmental organisation based in Warsaw.

3. The Government were represented by their Agent, Mr J. Sobczak, of the Ministry of Foreign Affairs.

4. The facts of the case may be summarised as follows.

I. BACKGROUND AND CONTEXT OF THE CASE

5. The broader domestic background to the present case was set out in the Court's judgments in *Reczkowicz* (no. 43447/19, §§ 4-53, 22 July 2021) and *Grzęda* ([GC], no. 43572/18, §§ 14-28, 15 March 2022).

II. PROCEEDINGS CONCERNING THE APPLICANT'S SUSPENSION

6. The applicant passed a judicial exam and became a trainee judge in June 2001. On 4 December 2003 he was appointed as judge of the Olsztyn District Court (*Sąd Rejonowy*).

7. On 2 September 2019 the Minister of Justice seconded the applicant to the Olsztyn Regional Court (*Sąd Okręgowy*) until February 2020. He was assigned to the civil appellate division.

8. On 20 November 2019 the applicant, sitting in a single-judge formation at the Olsztyn Regional Court, heard an appeal lodged by a defendant in a civil case against a judgment given by the Lidzbark Warmiński District Court. The District Court had given its judgment in a single-judge formation composed of Judge D.I. The proceedings concerned a claim for payment brought by an investment fund against an individual.

9. When hearing the appeal, the applicant made an order (*postanowienie*) directing the Head of the Chancellery of the *Sejm* (*Szef Kancelarii Sejmu*) to produce copies of the endorsement lists for the judicial candidates to the new National Council of the Judiciary (*Krajowa Rada Sądownictwa* – "the NCJ") who had been subsequently elected by the *Sejm* on 6 March 2018. Those documents had been submitted to the Chancellery in the framework of the procedure for election of the judicial members of the "new" NCJ laid down in the Act of 12 May 2011 on the NCJ as amended by the Act Amending the Act on the NCJ ("the 2017 Amending Act"). The applicant also directed the Head of the Chancellery to submit the statements of citizens or judges who had withdrawn their support for the candidates (for further details concerning the election procedure to the "new" NCJ see *Reczkowicz*, cited above, §§ 11-22).

10. The applicant fixed a one-week time-limit for transmission of the relevant documents from the delivery of his order, on pain of a fine being

imposed in the event of unjustified refusal to produce the requested documents. The order did not contain any reasons or the legal basis on which it was made.

Information on the order was provided to the media by the spokesperson of the Olsztyn Regional Court. According to her, the judge who adjudicated in the case at first instance had been appointed on the basis of a resolution adopted by the new NCJ. She further stated that in the appellate court's view, in the light of the CJEU's judgment of 19 November 2019, such a situation could have raised doubts as to whether the ruling made in the case had been given by a person authorised to do so.

11. The applicant submitted that he had intended to verify whether the lower court had complied with the requirement of independence under EU law since Judge D.I. had been appointed by the President of the Republic on the basis of a resolution adopted by the new NCJ. This was relevant for the validity of the first-instance proceedings and consequently for the right to a fair hearing of the parties to those proceedings in the light of the judgment of the Court of Justice of the European Union ("the CJEU") of 19 November 2019 (*A.K. and Others*, joined cases C-585/18, C-624/18 and C-625/18) concerning the independence of the NCJ and the Disciplinary Chamber of the Supreme Court (see paragraphs 120-122 below).

12. The endorsement lists were not publicly available at the relevant time. A Deputy to the *Sejm*, Ms K.G.-P., requested the Chancellery of the *Sejm* to disclose those documents under the Access to Information Act, but to no avail. She challenged the refusal before the administrative courts. However, despite a final judgment of the Supreme Administrative Court of 28 June 2019 (case no. I OSK 4282/18) ordering disclosure, the endorsement lists were not made public. They were eventually disclosed on 14 February 2020 (see *Reczkowicz*, cited above, § 22).

13. On 25 November 2019 the Minister of Justice terminated the applicant's secondment to the Regional Court. He did not give any reasons for his decision. On 26 November 2019 the Minister of Justice stated at a press conference:

> "[T]he role of a court is to adjudicate fairly, and not to play politics and undermine the status of other judges or constitutional foundations of the Republic of Poland, including the powers of such authorities as the *Sejm*, the NCJ or the President of the Republic.
>
> The Minister of Justice will never support this kind of activity in the courts, which amounts to anarchisation of the Polish judiciary and overstepping the judges' powers ..."

14. On the same day the Ministry of Justice published a press release on the termination of the applicant's secondment. It stated, *inter alia*, as follows:

> "This judge [the applicant] was examining an appeal in one of the civil cases. In the course of the proceedings he unjustifiably challenged the status of a judge appointed by the President of the Republic, who in the same case had given a first-instance judgment.

> In the Ministry of Justice's assessment, such an act constitutes an inadmissible interference with the activities of the [State] constitutional organs and may lead to chaos and anarchy.
>
> No judge has the right to assess the status of another judge by using to that end the evidential proceedings in a particular case. Once the letter of appointment to the office of judge has been signed by the President of the Republic, that letter may not be challenged ...."

15. On 26 November 2019 in a courtroom of the Olsztyn District Court the applicant made a statement to the media relating to the termination of his secondment. In this connection he stated: "... the parties' right to a fair trial is more important to me than my professional situation. A judge must not be afraid of politicians, even if they have an influence on his career. I appeal to my fellow judges to always remember their judicial oath [and] to adjudicate independently and courageously".

16. On 28 November 2019 M.L., the Deputy Disciplinary Officer for Ordinary Court Judges (*Zastępca Rzecznika Dyscyplinarnego Sędziów Sądów Powszechnych*; "the deputy disciplinary officer") initiated disciplinary proceedings against the applicant and charged him with four disciplinary offences.

17. Firstly, the applicant was charged with the disciplinary offence of compromising the dignity of the office of judge under section 107(1) of the Act of 27 July 2001 on the Organisation of Ordinary Courts ("the 2001 Act"), as applicable at the relevant time, with reference to the decision of 20 November 2019. The deputy disciplinary officer alleged that the applicant had abused his power by ordering, without any legal basis, the Head of the Chancellery of the *Sejm* to produce copies of documents regarding the election of the judicial members of the new NCJ. By doing so, he had arrogated to himself a competence to assess the lawfulness of the election of those members and of the exercise by the President of the Republic of his prerogative to appoint judges, and had thus acted against the interest of the proper functioning of the administration of justice. The deputy disciplinary officer further alleged that the applicant's order amounted to a criminal offence of abuse of power under Article 231 § 1 of the Criminal Code.

18. The deputy disciplinary officer noted that the Disciplinary Chamber was competent to hear the case as a first-instance court since the disciplinary charge relating to the decision of 20 November 2019 also carried the constitutive elements of an intentional offence.

19. Secondly, the applicant was charged with acting contrary to section 89(1) of the 2001 Act by making statements to the press relating to the termination of his secondment.

20. Lastly, he was charged with two counts of the disciplinary offence of compromising the dignity of the office of judge in connection with two requests to withdraw from hearing a criminal case. The deputy disciplinary officer alleged that in those requests the applicant had relied on untrue facts.

21. On 29 November 2019 Judge M.N., the President of Olsztyn District Court, ordered an immediate interruption in the exercise of the applicant's judicial duties for a period of one month and until the Disciplinary Chamber had given a decision in this respect, pursuant to section 130(1) of the 2001 Act. He found that the immediate suspension was justified by reference to the authority of the court and the essential interests of the service, having regard to the nature of the disciplinary charges brought against the applicant and the fact that one of them also amounted to a publicly-prosecuted offence.

22. Judge M.N. was also a judicial member of the new NCJ elected by the *Sejm* on 6 March 2018.

23. On 20 December 2019 the applicant's lawyers filed an application with the First President of the Supreme Court for withdrawal of the disciplinary officer, P.S., and his two deputies, P.R. and M.L., from dealing with the case owing to their lack of impartiality. They also submitted that their application could not be examined by the Disciplinary Chamber which, according to the Supreme Court's judgment of 5 December 2019 (no. III PO 7/18), was not a court within the meaning of EU or domestic law. They proposed that their application should be examined by the Criminal Chamber of the Supreme Court.

24. On the same day the applicant's lawyers requested the First President of the Supreme Court to find that the Disciplinary Chamber did not have competence to hear the case regarding the applicant's suspension. They requested that a different chamber be designated to examine the case. They maintained that the Disciplinary Chamber could not be regarded as an independent and impartial tribunal established by law within the meaning of Article 45 of the Constitution, Article 47 of the Charter of Fundamental Rights and Article 6 of the Convention.

25. On 23 December 2019 M.G., the First President of the Supreme Court replied that the request of the applicant's lawyers had been received on 20 December, while the case was to be heard on 23 December 2019. In these circumstances, she was unable to act as requested and, in addition, the acting President of the Disciplinary Chamber had refused to transmit the case file.

A. The first-instance decision of the Disciplinary Chamber

26. On 23 December 2019 the Disciplinary Chamber, sitting as the first-instance court in a formation of two judges, J.W. and A.R. and one lay member, adopted a resolution setting aside the order of the President of Olsztyn District Court of 29 November 2019 on the immediate interruption in the exercise of the applicant's judicial duties.

27. As a preliminary point, the Disciplinary Chamber noted that, in accordance with the established case-law of the Supreme Court, in proceedings concerning the suspension of a judge from his official duties the disciplinary court could decide only on the justification for removing a judge

from his duties in connection with the disciplinary charges brought against him. Such proceedings, being of an auxiliary nature, could not categorically determine the question of liability of a judge for the disciplinary offence in question.

28. As regards the first disciplinary charge, the Disciplinary Chamber found that the decision given by the applicant on 20 November 2019, allegedly in connection with the CJEU's preliminary ruling delivered on the previous day, had been manifestly unjustified. It was impossible to determine in the proceedings regarding the issue of the applicant's suspension whether this was an error on the applicant's part resulting from insufficient analysis of that ruling, or whether it was the result of intentional action for which the CJEU's ruling served merely as a pretext. This question would be decided by the disciplinary court in the main proceedings if a relevant disciplinary charge were brought. While noting that it was legitimate to seek transparency in the context of election of the NCJ members, the Disciplinary Chamber emphasised that the attempt to obtain the relevant information by way of a decision given by the applicant had been unjustified.

29. However, it found that there were fundamental doubts as to the possibility of engaging the disciplinary liability of a judge for issuing even an obviously groundless decision by characterising his act as the disciplinary offence of compromising the dignity of his office. The Disciplinary Chamber stressed that the giving of an unfounded judicial decision could not have been characterised as such a disciplinary offence in the light of the existing case-law and views of legal scholarship.

30. It further noted that a disciplinary offence which consisted in giving an unjustified or erroneous judicial decision, i.e. the act concerning the exercise of judicial duties, could possibly be considered as an obvious and gross violation of the law under section 107(1) of the 2001 Act. However, the disciplinary officer had not formulated such a charge despite the fact that he had alleged that the applicant had abused his powers.

31. The Disciplinary Chamber further noted that it was unjustified at this stage of the proceedings to claim that the impugned act of the applicant had amounted to the offence of abuse of power by a public official under Article 231 § 1 of the Criminal Code. It observed that there was no information in the case file about any action of a prosecutor related to such a charge against the applicant. It also found that the evidence collected by the disciplinary officer had not warranted the reasonable suspicion that the applicant had committed such an offence.

32. Furthermore, the Disciplinary Chamber found that the legal grounds invoked by the President of the Olsztyn District Court for his decision ordering an immediate interruption in the exercise of the applicant's judicial duties did not exist at the time of its consideration of the case. The issuance of even an obviously unjustified decision did not constitute such a ground. This was a one-off act on the part of the applicant, which could not be

regarded as significantly undermining the authority of the court or important interests of the service.

33. The Disciplinary Chamber noted that the criteria relevant for suspension of a judge included: detriment to the service, the degree of culpability, the interest of the administration of justice and sufficient probability of the commission of the act. In conclusion, having assessed the circumstances relating to the issuance of the order of 20 November 2019, the Disciplinary Chamber held that it was unnecessary to suspend the applicant from his judicial duties on account of the first disciplinary charge.

34. As regards the disciplinary charge of acting contrary to section 89(1) of the 2001 Act (see paragraph 19 above), the Disciplinary Chamber agreed that the applicant's making of statements to the press relating to the termination of his secondment contravened this provision. However, the disciplinary officer did not indicate whether this act should be characterised as compromising the dignity of the office of judge or as an obvious and gross violation of the law under section 107(1) of the 2001 Act. In any event, the Disciplinary Chamber found that, also with regard to this charge, there were no circumstances requiring the applicant's suspension from his judicial duties.

35. In respect of the two remaining charges (see paragraph 20 above) and having regard to the relevant criteria, the Disciplinary Chamber found that they did not justify the applicant's suspension.

36. Lastly, the Disciplinary Chamber analysed the legitimacy of the applicant's suspension in the light of the entirety of the disciplinary charges against him. It noted that a decision on suspension required great caution and should be regarded as an exceptional measure, which was to be supported by the serious gravity of the offence and the degree of culpability or the exceptionally negative public perception of the judge's conduct. However, in addition, the assessment carried out in this light did not indicate a need to suspend the judge.

37. On 30 December 2019 the deputy disciplinary officer lodged an interlocutory appeal (*zażalenie*) against the first-instance decision of the Disciplinary Chamber. He argued that the Disciplinary Chamber had erred in finding that the disciplinary charges against the applicant did not constitute a sufficient basis for his suspension. He sought to have the applicant suspended from his judicial duties and his salary reduced by 50% for the duration of the suspension.

38. On 13 January 2020 the applicant's lawyer again requested the First President of the Supreme Court to find that the Disciplinary Chamber did not have jurisdiction to hear the case and to designate a different chamber of the Supreme Court to this effect.

39. In two decisions of 4 February 2020 the disciplinary officer dismissed the applicant's challenge to the deputy disciplinary officer M.L. and left unexamined the challenge to himself and his other deputy.

B. The second-instance decision of the Disciplinary Chamber

40. On 4 February 2020 the Disciplinary Chamber, sitting as the second-instance court, in a formation of two judges, R.W. and A.T. and one lay member, amended the first-instance resolution of 23 December 2019. It decided to suspend the applicant from his judicial duties and to reduce his salary by 40% for the duration of the suspension.

41. The Disciplinary Chamber agreed with most of the reasoning of the first-instance court; however, it did not accept the latter's view as regards the assessment of the degree of social harm of the applicant's order of 20 November 2019 for the administration of justice. This issue had to be examined in the light of section 130(1) in conjunction with section 107 of the 2001 Act. Those provisions governed the grounds for ordering an immediate interruption in the exercise of judicial duties by a judge in case of an alleged disciplinary offence. The Disciplinary Chamber noted that in the applicant's case two of the grounds specified in section 130(1) were relevant, namely the authority of the court and the essential interests of the service, which were related to his conduct in the form of an obvious and gross violation of the law (*oczywista i rażąca obraza przepisów prawa*) and compromising the dignity of judicial office, as referred to in section 107(1) of the 2001 Act.

42. The Disciplinary Chamber considered that it had to focus on the applicant's order of 20 November 2019. It established the following as regards the order: (1) it did not include the legal basis on which it had been given; (2) there was a clear lack of connection between the requested documentary evidence regarding the candidates for election to the NCJ and the civil case at hand, since the former was not relevant to the determination of the latter; (3) the order had an adverse legal effect for the parties to the proceedings, since it resulted in postponing the examination of the case; and (4) it was unjustified to make the order on the basis of the CJEU's preliminary ruling of 19 November 2019. For the Disciplinary Chamber, these circumstances justified the assumption that, at the time when the order had been made, there was a manifest breach of the law.

43. The Disciplinary Chamber further noted that the applicant's disciplinary liability was related not only to a manifest breach of the law and the improper drafting of the order, but also to the violation of the Constitution in respect of provisions on the prerogatives of the President of the Republic on the appointment of judges. In view of the law in force, the President's competence to appoint judges left no doubt that he was the only organ authorised to create holders of judicial power in Poland. His powers in this respect derived directly from the Constitution and the encroachment on these powers by a court or judge was not permissible.

44. Furthermore, the Disciplinary Chamber noted that the courtesy aspect of the relationship between all courts/judges and the President of the Republic came into play. A necessary part of the ethics of the judicial profession was

to maintain respect for the office of the President of the Republic. A judge's questioning of the appointment of another judge constituted a form of accusation directed at the President of the Republic and thus compromised the dignity of the judge in a flagrant manner.

45. The Disciplinary Chamber observed that when issuing the order of 20 November 2019 the applicant had disregarded the requirement for the court to focus on the resolution of a specific case involving the actual parties to the proceedings. It could not be accepted that one judge, instead of focusing on the subject matter of the case, *de facto* intended to undermine the status of another judge. It further noted that the proper exercise of judicial power did not consist of arbitrary interpretation of the law or arbitrary arrogation of powers that one did not have. Thus, if the court had no right to assess the correctness of the President's decision to appoint a judge, then it also had no right to assess the correctness of the election of the members of the NCJ, and consequently the evidence sought by the applicant was irrelevant for the purpose intended.

46. The Disciplinary Chamber also referred to the Collection of Principles of Judges' Professional Ethics (*Zbiór zasad etyki zawodowej sędziów i asesorów sądowych*) adopted by the NCJ on 13 January 2017. In accordance with Article 4 of the Collection, a judge was required to safeguard the authority of his office, that of the administration of justice and the constitutional role of the judiciary. Pursuant to Article 8 of the Collection, in all assigned cases, the judge was obliged to act without delay and without exposing the parties and the State Treasury to unnecessary costs. However, in the Disciplinary Chamber's view, the applicant had not complied with those rules of professional ethics because he had exposed the parties to the risk of additional hearings and the State Treasury to liability for delays in the proceedings as well as failing to respect the President's prerogatives and the interests of the administration of justice.

47. The Disciplinary Chamber further questioned the applicant's motivation, noting that in this "quasi-controversy" it was impossible to see the interests of the citizen or his/her right to a fair hearing referred to in Article 45 of the Constitution. Had the parties to the proceedings previously challenged the status of the judge hearing the case, they would have had the procedural means to raise the issue. However, in this case the applicant alone had taken the initiative of raising the issue, despite the fact that Polish civil procedure was, in principle, based on an adversarial approach.

48. The Disciplinary Chamber observed that it could not fully address the motives for the applicant's conduct as he had not explained them in the proceedings. Nonetheless, it noted that the applicant's behaviour during his meeting with the media on 26 November 2019 had contradicted the assertion that the sole purpose of his action was to clarify doubts related to the status of the judge hearing the case at first instance. In the Disciplinary Chamber's

view, the applicant's action required that his superiors take immediate corrective measures by suspending him from his duties.

49. The Disciplinary Chamber went on to note that the applicant's behaviour had been harmful to the image of the judiciary and had exacerbated legal uncertainty among citizens who did not understand how the representatives of the judiciary could not know who a judge was. In its view, the respect for the State and its institutions required that every judge recognise the President's prerogative to appoint judges. Furthermore, the task of judges was to apply the law and to adjudicate cases submitted to them, not to examine the correctness of the establishment of other constitutional bodies and the manner in which they exercised their constitutional powers.

50. The Disciplinary Chamber concluded that the applicant had therefore breached not only Article 248 and the accompanying provisions of the Code of Civil Procedure by issuing the impugned order outside the powers granted to him by law, but had also violated the Constitution by undermining the constitutional legal order. This applied in particular to constitutional provisions relating to: (1) the scope of the presidential prerogative (Article 144 § 3 (17) in conjunction with Article 4 § 2 of the Constitution); (2) exceeding the limits of the law beyond the scope of competence in the exercise of the administration of justice (Article 175 § 1 in conjunction with Article 7 of the Constitution); and (3) treating the President of the Republic as an administrative organ with regard to his decisions based on prerogatives (Article 179 in conjunction with Article 10 § 2 of the Constitution). The Disciplinary Chamber found that the applicant had thus undermined the essential interests of the service and had thereby violated the authority of the court by issuing an order that was clearly contrary to the provisions of the law.

51. The Disciplinary Chamber observed that the significance of the violation, the exceptionally bad example for other judges, the undermining of the competences of the President of the Republic, the unlawfulness of the order and the threat of chaos if the practice of every judge encroaching on the President's prerogatives were to be accepted, had fully justified the need to suspend the applicant from his judicial duties.

52. As regards the 40% reduction in the applicant's remuneration, the Disciplinary Chamber took into account, on the one hand, the fact that the applicant would not be performing any work and, on the other, the need to provide him with sufficient means. It noted that this decision was one of a preventive nature and did not prejudge the outcome of the disciplinary case. However, the disciplinary charges against the applicant were of such a serious nature that it would be contrary to the interests of the administration of justice if the applicant, who had undermined the principles relating to the President of the Republic's prerogatives, were to continue exercising his judicial duties.

53. The Disciplinary Chamber's resolution of 4 February 2020 suspending the applicant was immediately enforceable. In connection with

the resolution, the President of the Olsztyn District Court ordered on the same day that no more cases be assigned to the applicant and that the cases on his docket be distributed among other judges of the court.

54. The applicant did not take part in the proceedings before the Disciplinary Chamber as he did not consider it to be a lawful tribunal.

55. On 18 February 2020 the applicant informed the President of the Olsztyn District Court that because the Disciplinary Chamber was not a court within the meaning of EU and domestic law, the resolution of 4 February 2020 could not have had the effect of suspending him. He requested the President of the District Court to allow him to resume his judicial duties. On 5 March 2020 the President of the District Court replied that he would issue necessary orders allowing the applicant's request once the resolution of the Disciplinary Chamber had been changed or set aside. Subsequent requests by the applicant to the same effect were to no avail.

56. On 14 July 2020 the deputy disciplinary officer charged the applicant with a new disciplinary offence of compromising the dignity of judicial office, alleging that he had committed an administrative offence of speeding in October 2015.

57. On 4 February 2021 the deputy disciplinary officer referred to the Disciplinary Chamber an application for examination of a disciplinary case against the applicant. These proceedings are currently pending before the Chamber of Professional Responsibility following the abolition of the Disciplinary Chamber as of 15 July 2022.

III. CIVIL PROCEEDINGS AGAINST THE OLSZTYN DISTRICT COURT

58. On 12 March 2021 the applicant lodged an application for an injunction against the Olsztyn District Court with the latter court. He sought, *inter alia*, to be allowed to exercise his rights and duties as a judge. On 23 March 2021 the Olsztyn Regional Court decided that his application would be examined by the Bydgoszcz District Court.

59. On 14 April 2021 the Bydgoszcz District Court granted the injunction. It ordered the Olsztyn District Court to allow the applicant to exercise his rights and duties as judge of the latter court for the duration of the main proceedings. It further ordered the applicant to bring proceedings in respect of his claim within two weeks from the service of the injunction. The court found that the applicant had sufficiently substantiated the existence of the claim and his legal interest in the granting of the injunction. It noted that there were reasonable doubts as to the legal existence of the Disciplinary Chamber's resolution of 4 February 2020 issued in the applicant's case. These doubts followed from the Supreme Court's judgment of 5 December 2019 (no. III PO 7/18) which had been given in consequence of the CJEU's preliminary ruling of 19 November 2019 in *A.K. and Others* (C-585/18,

C-624/18 and C-625/18; see respectively paragraphs 96-97 and 120-122 below).

60. On 20 April 2021 the applicant lodged an application with the Olsztyn District Court to initiate enforcement proceedings in respect of the injunction. His application was transferred to the Bydgoszcz District Court for examination. That court ruled that the injunction had become final on 8 June 2021. The enforcement proceedings appear to be pending before that court.

61. On 4 May 2021 the applicant brought an action for a declaratory judgment against the Olsztyn District Court with the latter court. He sought to establish that he had retained all rights and duties arising from his appointment to the position of judge of the Olsztyn District Court and that the Disciplinary Chamber's resolution had no effect on his status. He further sought that the Olsztyn District Court allow him to exercise his rights and duties as a judge. On 13 May 2021 the case was transferred to the Bydgoszcz District Court for examination.

62. On 17 December 2021 the Bydgoszcz District Court gave judgment allowing the applicant's action. In particular, it ordered the respondent to allow the applicant to exercise his judicial duties. On 20 December 2021 the applicant requested Judge K.K., the Vice-President of the Olsztyn District Court to enforce the judgment. On the same day the Vice-President of the District Court issued an order setting aside the order of the President of the Olsztyn District Court of 4 February 2020 on the basis of which the applicant had been prevented from exercising his judicial duties. However, on the very same day the Minister of Justice decided to reappoint Judge M.N. to the position of President of the Olsztyn District Court, his previous term of office in this position having expired before the Vice-President had issued his decision. Immediately after his reappointment, Judge M.N. set aside the Vice-President's order.

IV. CIVIL PROCEEDINGS AGAINST THE SUPREME COURT

63. On 23 April 2021 the applicant lodged applications for an injunction against the State Treasury, represented by the First President of the Supreme Court and the President of the Disciplinary Chamber, with all 46 Regional Courts in Poland. He sought the suspension of the effectiveness and enforceability of the Disciplinary Chamber's resolution of 4 February 2020. He further sought that the respondent be ordered to add an annotation to the said resolution on the Supreme Court's website indicating that its enforceability was suspended.

64. On 10 May 2021 the Olsztyn Regional Court granted the injunction as requested for the duration of the proceedings initiated by the applicant's action. It also ordered the applicant to bring his action within two weeks from the service of the injunction. After the Olsztyn Regional Court had granted the injunction, the applicant withdrew the applications he had lodged with

other Regional Courts. The Supreme Court lodged an interlocutory appeal against the injunction, claiming that the Olsztyn Regional Court had no jurisdiction to examine the matter. On 30 September 2021 the interlocutory appeal was dismissed and the injunction became final.

65. On 1 June 2021 the Supreme Court published the statement of the First President of the Supreme Court, referring to the injunction issued by the Olsztyn Regional Court on 10 May 2021. The First President of the Supreme Court stated that she did not have "the right, legal possibility or intention to interfere with the content of judgments of the Supreme Court by placing any annotations or additions on their first page".

66. On 17 June 2021 the applicant lodged an application with the Warszawa-Śródmieście District Court to initiate enforcement proceedings in respect of the injunction granted on 10 May 2021. The enforcement proceedings were pending before that court as of 20 September 2021.

67. On 1 June 2021 the applicant brought an action against the State Treasury – the Supreme Court with the Olsztyn Regional Court. He sought firstly a declaratory judgment that the Disciplinary Chamber's resolution was not a ruling of the Supreme Court. Secondly, he brought a claim for infringement of his personal rights under Article 23 in conjunction with Article 24 § 1 of the Civil Code. In this respect, the applicant sought to order the respondent to refrain from impugning his reputation and dignity and for that purpose to remove the resolution at issue from the Supreme Court's website and to prohibit the respondent from republishing it in the future.

68. The Olsztyn Regional Court transmitted the applicant's action to the Supreme Court and fixed a time-limit for submission of its reply. The Supreme Court submitted its reply on 26 July 2021. On 30 July 2021 the Olsztyn Regional Court decided to return the reply as it had been submitted out of time.

69. On 30 July 2021 the Olsztyn Regional Court gave a default judgment in the case (no. I C 593/21). It firstly held that the Disciplinary Chamber's resolution of 4 February 2020 was not a ruling of the Supreme Court. Secondly, it ordered the respondent to refrain from infringing the applicant's personal rights by enjoining it to take the measures sought by the applicant. It dismissed the remainder of the applicant's claim.

70. On 17 August 2021 the Supreme Court lodged an objection to the Olsztyn Regional Court's default judgment. It alleged that the impugned judgment had been given in breach of the provisions of the civil procedure because the Olsztyn Regional Court had failed to examine a valid request for the removal of Judge J.C. from the case.

71. On 28 December 2021 the Olsztyn Regional Court upheld its default judgment. According to the information submitted by the applicant on 14 January 2022 that ruling was not yet final.

V. CRIMINAL COMPLAINTS

72. The applicant lodged criminal complaints against the President of the Olsztyn District Court and the First President of the Supreme Court, alleging that they had failed to respect the injunctions of 14 April and 10 May 2021. The prosecutor refused to open investigations into the cases. The applicant lodged interlocutory appeals and the relevant proceedings were pending as of 20 September 2021 according to the information provided by him.

VI. LIFTING OF THE APPLICANT'S SUSPENSION

73. On 19 February 2022 the deputy disciplinary officer addressed a pleading to the Disciplinary Chamber, requesting that the applicant's disciplinary case be promptly examined since he had already been suspended for more than two years.

74. On 23 May 2022 the Disciplinary Chamber, sitting in a one-judge formation (Judge A.R.), gave, of its own motion, a resolution and decided to lift the applicant's suspension.

75. It noted that the disciplinary case against the applicant had been registered on 4 April 2022 (no. I DSK 16/22) and that the delay in registration was related to the CJEU's interim decision of 8 April 2020 (C-791/19 R).

76. As a preliminary issue, the Disciplinary Chamber found that the validity of the applicant's suspension could not have been affected by rulings given by courts other than the Disciplinary Chamber, which had exclusive jurisdiction to examine the case. The suspension of a judge and its consequences could be decided only by the competent disciplinary court and a case of this kind was not a civil-law case. Thus, the consequences of the resolution of 4 February 2020 could not be changed by proceedings initiated in other courts.

77. As regards the assessment of the continuous need for the applicant's suspension, the Disciplinary Chamber indicated in its resolution of 4 February 2020 that this measure had been applied in connection with the issuance of the applicant's order of 20 November 2019. It noted that the disciplinary officer's claim that the impugned act had also amounted to the offence specified in Article 231 of the Criminal Code was not substantiated. The State Prosecutor's Office still conducted the investigation in the case but did not collect evidence to substantiate the reasonable suspicion that the applicant had committed such an offence, as could be inferred from the lack of its application for the lifting of the applicant's immunity.

78. The Disciplinary Chamber noted that a prolonged suspension in official duties could be justified only in a situation where the disciplinary charge was of such a nature that a judge faced a real risk of removal from office. However, this was not a real possibility in the applicant's case, having regard to the nature of the disciplinary charges against him and the evidence

collected in the proceedings. The Disciplinary Chamber found that the applicant's suspension for more than two years, when in principle the measure should have been one of a temporary nature, could be regarded as unduly interfering with the principle of irremovability of a judge enshrined in the Constitution. It concluded that at the current stage of the proceedings the harmfulness of the imputed disciplinary acts to the interests of the service and the administration of justice no longer justified the applicant's suspension. Accordingly, the Disciplinary Chamber held that his continued suspension was unjustified. As a result of lifting the suspension, the decision on the reduction of the applicant's salary was also revoked. No appeal lay against that resolution.

79. After the delivery of the Disciplinary Chamber's resolution, the President of the Olsztyn District Court decided to place the applicant on compulsory leave until 19 July 2022 due to the need to use up his outstanding annual leave for the years 2019-2020. In addition, the President of the Olsztyn District Court decided to transfer the applicant, against his will, from the Civil to the Family and Juvenile Division of that court.

VII. OTHER MATERIAL

80. On 4 December 2019 the Commissioner for Human Rights (*Rzecznik Praw Obywatelskich*) intervened in the applicant's case, making representations to P.S., the Disciplinary Officer for Ordinary Court Judges. In his view, the actions of the disciplinary officer could be regarded as interfering in the exercise of judicial power, in breach of the principle of judicial independence, by making judges fearful of adverse consequences for having taken steps to clarify all the circumstances necessary to determine a case, which was an essential element of the right to a fair hearing as enshrined in Article 45 of the Constitution, Article 6 of the Convention and Article 47 of the Charter of Fundamental Rights. The Commissioner for Human Rights further noted that the order issued by the applicant served to implement the domestic court's obligations under EU law to ensure effective judicial protection of citizens' rights, as set out in the CJEU's preliminary ruling in *A.K. and Others*.

81. On 5 February 2020 the President of the European Association of Judges, José Igreja Matos made the following statement on the applicant's case:

> "Yesterday, our Polish member "Iustitia" informed me that our colleague [the applicant] was suspended indefinitely of judicial duties and his salary was cut by 40%.
>
> The sanction was applied in the context of [the applicant]'s decision to implement the criteria indicated in the judgment of the CJEU of 19 November 2019 in the joint *A.K.* cases (C-585/18), CP (C-624/18) and DO (C-625/18) addressing the legality of the Polish Council of the Judiciary ... .

It must be firmly pointed out that judges must not be personally punished for any judicial decisions when applying international or domestic law, in particular with a severe restriction of salaries, essential for their daily subsistence."

82. In 2020 judges from the Polish Judges' Association Iustitia and a prosecutor from the Lex Super Omnia Association of Prosecutors published a report entitled "Justice Under Pressure". The report stated, in so far as relevant:

"12. Paweł JUSZCZYSZYN – Judge of the District Court in Olsztyn

...

[The applicant] was the first Polish judge to take responsibility for the implementation of the CJEU judgment of 19 November 2019, which was met with the immediate reaction of the closed disciplinary and official system created by the politicians in power in Poland, which from the very beginning had one goal – to take control of the courts.
...

The example of [the applicant] shows how efficiently a kind of a closed system works, i.e. a created disciplinary and clerical system, which from the very beginning had one goal – to take control over courts and prosecutor's office and to cause a [chilling] effect in the judicial environment. The means to achieve this goal included repression and harassment of those judges who courageously defend the values of the rule of law, democracy, independence of the courts, the independence of judges and the independence of the prosecution.

[The applicant] had not only the right, but also the obligation to examine the legal status of a judge who was appointed to this office with the participation of the new NCJ, as is clear from the content of the CJEU judgment of 19 November 2019 concerning the criteria for assessing the status of the Disciplinary Chamber and the National Council of the Judiciary, issued in the joint *A.K.* cases ... On 5 December 2019, the Chamber of Labour and Social Security of the Supreme Court held that the Disciplinary Chamber of the Supreme Court is not a court within the meaning of EU law and therefore not a court within the meaning of national law. Furthermore, the Supreme Court in the Chamber of Labour and Social Security stated that the current NCJ is not an impartial body independent of the executive and legislative authority, and indicated that the interpretation contained in the CJEU judgment of 19.11.2019 is binding on every court in Poland, as well as every state authority. Therefore, it was the duty of the Regional Court in Olsztyn to examine the legal status of the judges in connection with the Supreme Court challenging the impartiality and independence of the NCJ from the legislative and executive authorities.

However, the action of the deputy disciplinary [officer], M.L., is unacceptable and fits in with the general trend observed in prosecuting judges for the content of rulings that are inconvenient for those in power, as well as for the application by judges of European law, including respect for CJEU judgments. The General Assembly of the Judges of the Olsztyn District in its resolutions of 2 December 2019 gave full support to [the applicant], demanding, among other things, his immediate reinstatement, and condemned the actions of the political authorities, the disciplinary [officers] and the president of the Olsztyn District Court, demanding the immediate dismissal of the disciplinary [officers] ..., the dismissal of the president of the District Court in Olsztyn M.N. Judges all over Poland have supported [the applicant] in various ways, condemning the political activities of the disciplinary [officers]."

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Domestic law

1. Domestic law already summarised

83. The relevant provisions of the domestic law concerning the functioning of the judiciary and the NCJ were summarised in the Court's previous judgments in *Reczkowicz v. Poland* (cited above, §§ 59-70), *Dolińska-Ficek and Ozimek v. Poland* (nos. 49868/19 and 57511/19, §§ 82-96, 8 November 2021), *Advance Pharma sp. z o.o. v. Poland* (no. 1469/20, §§ 95-109, 3 February 2022) and *Grzęda v. Poland* ([GC], no. 43572/18, §§ 64-76, 15 March 2022).

2. Constitutional provisions

84. The relevant provisions of the Constitution read as follows:

Article 45 § 1

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

Article 180 § 2

"Dismissal of a judge from office, suspension from office, or transfer to another court or position against his or her will, may only occur by virtue of a court judgment and only in those instances prescribed by statute."

3. The Act on the Organisation of Ordinary Courts (as amended)

85. The relevant provisions of the Act of 27 July 2001 on the Organisation of Ordinary Courts (*ustawa z dnia 27 lipca 2001 r. Prawo o ustroju sądów powszechnych;* "the 2001 Act") provided as applicable at the relevant time, in so far as relevant:

Section 41b

"1. The president of the court is competent to examine complaint or request concerning the operation of the court.

...

3a. ..., and the National Council of the Judiciary is competent to hear complaint concerning the activity of the Disciplinary Officer for Ordinary Court Judges."

Section 66

"Upon appointment, a judge takes an oath before the President of the Republic of Poland, in accordance with the following formula:

'I swear, as a judge of an ordinary court, to serve faithfully the Republic of Poland, to safeguard the law, to discharge the duties of a judge conscientiously, to administer justice impartially in accordance with the law and my conscience, to keep State and professional secrets, and to act in accordance with the principles of propriety and honesty'; the person taking this oath may finish it by saying the words: 'So help me God.'"

Section 82

"1. A judge shall act in compliance with the judicial oath.

2. A judge should, when on and off duty, guard the authority of the office of judge and avoid everything that could bring discredit to the authority of a judge or weaken confidence in his or her impartiality."

Section 89

"1. Requests, interventions and complaints on matters connected with his or her office may be lodged by a judge only in an official capacity. In such matters, a judge may not address third institutions and persons or make such matters public."

Section 107(1)

"1. A judge shall be liable to disciplinary action for professional misconduct, including obvious and gross violations of the law and acts compromising the dignity of the office (disciplinary offences)."

Section 110

"Disciplinary cases against judges shall be adjudicated by:

(1) in the first instance:

(a) disciplinary courts at appellate courts, composed of three judges;

(b) the Supreme Court, composed of two judges of the Disciplinary Chamber and one judge of the Supreme Court, in cases involving disciplinary offences that constitute intentional offences prosecuted by a public prosecutor or intentional tax offences or cases in which the Supreme Court has requested that a disciplinary case be heard along with a finding of error,

(2) in the second instance – the Supreme Court, composed of two judges of the Disciplinary Chamber and one lay judge of the Supreme Court."

Section 129

"1. A disciplinary court may suspend a judge against whom disciplinary or incapacitation proceedings have been initiated, and if it delivers a resolution permitting a judge to be held criminally liable.

2. If the disciplinary court passes a resolution permitting a judge to be held criminally liable for an intentional offence prosecuted by public prosecution, it shall suspend the judge from his duties.

3. When suspending a judge from his duties, the disciplinary court shall reduce, within the limits of 25% to 50%, the amount of his remuneration for the duration of such suspension; this shall not apply to persons in respect of whom proceedings for incapacitation have been initiated.

...

4. Where disciplinary proceedings have been discontinued or resulted in an acquittal, all components of the salary or emolument shall be adjusted to the full amount."

Section 130

"1. If a judge has been apprehended in the commission of an intentional offence or if, in view of the nature of the act committed by the judge, the solemnity of the court or important interests of the service necessitate his immediate removal from the performance of his duties, the president of the court or the Minister of Justice may order an immediate interruption in the performance of the judge's duties until a disciplinary court issues a resolution, but not longer than for one month.

2. If the judge referred to in paragraph 1 performs the function of a court president, the Minister of Justice shall order an interruption in his duties.

3. The president of a court or the Minister of Justice shall notify the disciplinary court about the issuance of the order referred to in paragraph 1 within three days from its issuance. The disciplinary court shall promptly, but not later than before the lapse of the time limit for which the interruption was ordered, issue a resolution to suspend the judge from his duties or shall repeal the order of an interruption in his duties. The disciplinary court shall notify the judge of the sitting if it considers it expedient to do so."

Section 131

"1. ... in the case of suspension of a judge in his duties or revoking an order for an interruption in the performance of duties referred to in section 130(1), after hearing the disciplinary officer ... , the disciplinary court shall issue a resolution. ...

...

4. A resolution on suspension of a judge from performing his duties may be appealed against by the judge, and the disciplinary officer may also appeal against a resolution revoking an order for interruption in the performance of duties, referred to in section 130(2); an interlocutory appeal shall not stay the execution of the resolution.

5. An interlocutory appeal shall be examined by the disciplinary court of second instance."

Section 132

"The suspension shall cease as soon as the disciplinary proceedings have been finally concluded, unless the disciplinary court has cancelled it earlier."

Section 133

"The costs of disciplinary proceedings shall be borne by the State Treasury."

4. The 2011 Act on the National Council of the Judiciary and the 2017 Amending Act

86. The relevant provisions of the 2011 Act on the NCJ in force prior to and after the entry into force of the 2017 Amending Act were cited in *Reczkowicz* (cited above, respectively § 62 and § 63).

87. Section 3(1)(1-2) of the 2011 Act on the NCJ, as amended by the 2017 Amending Act provides as follows:

Section 3(1)

"The competences of the Council include:

(1) examining and assessing candidates for holding office as judge of the Supreme Court and as judge in ordinary courts, administrative courts and military courts, and as trainee judge in administrative courts;

(2) presenting to the President of the Republic of Poland motions for the appointment of judges of the Supreme Court, ordinary courts, administrative courts and military courts ..."

5. The 2017 Act on the Supreme Court

88. The Act of 8 December 2017 on the Supreme Court (*ustawa z dnia 8 grudnia 2017 o Sądzie Najwyższym*; „the 2017 Act on the Supreme Court") entered into force on 3 April 2018. The relevant provisions of this Act were rendered in *Reczkowicz* (cited above, §§ 67-68).

89. Section 29 of the 2017 Act on the Supreme Court reads as follows:

Section 29

"Appointment to judicial office at the Supreme Court shall be carried out by the President of the Republic of Poland pursuant to a recommendation of the National Council of the Judiciary."

6. The 2019 Amending Act

90. On 12 December 2019 a group of deputies from the majority introduced in the *Sejm* a bill to amend the Act on the Organisation of Ordinary Courts, the Act on the Supreme Court and Certain Other Acts. On 20 December 2019 the *Sejm* passed the Act Amending the Act on the Organisation of Ordinary Courts, the Act on the Supreme Court and Certain Other Acts (*ustawa o zmianie ustawy - Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym, oraz niektórych innych ustaw*, "the 2019 Amending Act"). On 23 January 2020 the *Sejm* refused the Senate's resolution proposing to reject the Act and on 4 February 2002 the President of the Republic signed it. The 2019 Amending Act was promulgated on 6 February 2020 and entered into force on 14 February 2020. It introduced new disciplinary offences and sanctions for judges, including for questioning the lawfulness of judicial appointments made with the participation of the new NCJ. The law has been dubbed the "Muzzle Act" ("*ustawa kagańcowa*").

91. The 2019 Amending Act introduced amendments to the Act on the Organisation of Ordinary Courts. The following provisions were amended, among others:

Section 42a

"(1) In the course of the activities of courts or judicial bodies, it shall not be permissible to question the legitimacy of courts and tribunals, constitutional State bodies and bodies constituted for the scrutiny and protection of the law.

(2) It shall not be permissible for an ordinary court or other authority to determine or assess the lawfulness of the appointment of a judge or the authority arising from such appointment to perform judicial tasks."

Section 107

"1. A judge shall be disciplinarily liable for official (disciplinary) offences, including:

(1) an obvious and gross violation of the law;

(2) acts or omissions which may prevent or significantly obstruct the functioning of the judicial authority;

(3) actions that question the existence of the official relationship of a judge, the effectiveness of his or her appointment or the constitutional authority of the Republic of Poland;

(4) public activity incompatible with the principles of independence of courts and independence of judges;

(5) acts compromising the dignity of the office."

7. Criminal Code

92. Article 231 of the Criminal Code, in so far as relevant, provides as follows:

"§ 1. A public official who, exceeding his or her authority, or not fulfilling his or her duty, acts to the detriment of a public or individual interest shall be subject to a penalty of deprivation of liberty for up to 3 years.

...

§ 3. If the perpetrator of the act specified in paragraph 1 acts unintentionally and causes significant damage, he or she shall be subject to a fine, the penalty of limitation of liberty, or deprivation of liberty for up to 2 years."

8. Civil Code

93. Article 23 of the Civil Code contains a non-exhaustive list of so-called "personal rights" (*dobra osobiste*) and states:

"The personal rights of an individual, such as in particular, health, liberty, honour, freedom of conscience, name or pseudonym, image, secrecy of correspondence, inviolability of the home, scientific or artistic work, [as well as] inventions and improvements shall be protected by the civil law regardless of the protection laid down in other legal provisions."

94. Article 24 of the Civil Code provides for ways of redressing infringements of personal rights. According to that provision, a person at risk of infringement by a third party may seek an injunction, unless the activity is

not unlawful. In the event of infringement, the person concerned may, *inter-alia*, require the party who caused the infringement to take the necessary steps to eliminate the consequences of the infringement, for example by making a relevant statement in an appropriate form, or ask the court to award an appropriate sum for the benefit of a specific public interest. If an infringement of a personal right causes financial loss, the person concerned may seek damages.

B. Domestic practice

1. Domestic practice already summarised

95. The relevant domestic practice was summarised in the Court's previous judgments in *Reczkowicz v. Poland* (cited above, §§ 71-125), *Dolińska-Ficek and Ozimek v. Poland* (nos. 49868/19 and 57511/19, §§ 97-155, 8 November 2021), *Advance Pharma sp. z o.o. v. Poland* (no. 1469/20, §§ 110-169, 3 February 2022) and *Grzęda v. Poland* ([GC], no. 43572/18, §§ 77-119, 15 March 2022).

2. Case-law of the Supreme Court

(a) Judgment of 5 December 2019, no. III PO 7/18

96. On 5 December 2019 the Supreme Court, sitting in a bench of three judges in the Labour and Social Security Chamber, gave judgment in the first of three cases that had been referred for a preliminary ruling to the CJEU, following the latter's judgment of 19 November 2019 (joined cases C-585/18, C-624/18 and C-625/18; see paragraphs 120-122 below). It set aside the negative resolution of the NCJ of 27 July 2018 concerning the continued exercise by A.K. of the office of a judge of the Supreme Administrative Court. The Supreme Court held that the NCJ in its current formation was neither impartial nor independent of the legislature or the executive. It further found that the Disciplinary Chamber did not fulfil the requirements of an independent and impartial tribunal. The Supreme Court reached the following conclusion regarding the Disciplinary Chamber:

> "79. In sum, each of the circumstances presented, when assessed alone, is not conclusive of a failure to comply with the standard of Article 47 of the [Charter of Fundamental Rights of the European Union] (Article 6 of the Convention in conjunction with Article 45 § 1 of the Polish Constitution). However, when all these circumstances are put together – the creation of a new organisational unit in the Supreme Court from scratch, staffing of this unit exclusively with new persons with strong connections to the legislative and executive powers and who, prior to their appointment, were beneficiaries of the changes to the administration of justice, and were selected by the NCJ, which does not act in a manner independent of the legislature and the executive, and its broad autonomy and competences taken away from other courts and other chambers of the Supreme Court – it follows clearly and unequivocally that the Disciplinary Chamber of the Supreme Court is not a tribunal within the meaning of

Article 47 of the Charter, Article 6 of the Convention and Article 45 § 1 of the Polish Constitution"....

97. The other relevant reasons for the Supreme Court's judgment of 5 December 2019 were cited in *Reczkowicz* (cited above, §§ 71-86).

(b) Resolution of the formation of the joined Civil, Criminal and Labour and Social Security Chambers of the Supreme Court of 23 January 2020 (no. BSA I-4110-1/20)

98. Having regard to the Supreme Court's judgment of 5 December 2019 and the resolution of 8 January 2020 by the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, the First President of the Supreme Court requested the three joined Chambers of that court to issue a resolution with the view to resolving divergences in the case-law of the Supreme Court in connection with the CJEU judgment of 19 November 2019. The request concerned the legal question whether the participation in a composition of an ordinary court or the Supreme Court of a person appointed to the office of a judge by the President of the Republic on the proposal of the NCJ formed in accordance with the 2017 Amending Act would result in a violation of Article 45 § 1 of the Constitution, Article 6 § 1 of the Convention or Article 47 of the Charter of Fundamental Rights.

99. On 23 January 2020 the Supreme Court, sitting in a formation of the joined Civil, Criminal and Labour and Social Security Chambers (fifty-nine judges) issued its resolution[1]. It noted that in issuing the resolution, it was implementing the CJEU's judgment of 19 November 2019. The Supreme Court made the following conclusions[2]:

"1. A court formation is unduly composed within the meaning of Article 439 § 1 (2) of the Code of Criminal Procedure, or a court formation is inconsistent with the provisions of law within the meaning of Article 379 § 4 of the Code of Civil Procedure, also where the court includes a person appointed to the office of judge of the Supreme Court on the recommendation of the NCJ formed in accordance with the [2017 Amending Act].

2. A court formation is unduly composed within the meaning of Article 439 § 1 (2) of the Code of Criminal Procedure, or a court formation is inconsistent with the provisions of law within the meaning of Article 379 § 4 of the Code of Civil Procedure, also where the court includes a person appointed to the office of judge of an ordinary or military court on the recommendation of the NCJ formed in accordance with the [2017 Amending Act], if the deficiency of the appointment process leads, in specific circumstances, to a violation of the guarantees of independence and impartiality within the meaning of Article 45 § 1 of the Constitution of the Republic of Poland, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 § 1 of the [Convention].

[1] Six judges annexed separate opinions to the resolution.
[2] The translation is based on the English version of the judgment published on the Supreme Court website, edited by the Registry of the Court.

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 above shall not apply to judgments given by courts before the date hereof and judgments to be given in proceedings pending at the date [of the present resolution] 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 appointed to the Disciplinary Chamber of the Supreme Court under the Act of 8 December 2017 on the Supreme Court ... irrespective of the date of such judgments.".

100. The Supreme Court's resolution contained an extensive reasoning, the relevant parts of which were rendered in *Reczkowicz* (cited above, §§ 91-105).

3. Case-law of the Constitutional Court

(a) Judgment of 2 June 2020, no. P 13/19

101. On 25 March 2019 the Supreme Court, composed of Judges T.S., J.M.-K. and K.Z. (see *Advance Pharma sp. z o.o.*, cited above, § 34) requested the Constitutional Court to determine, whether:

"Section 49 of the Act of 17 November 1964 Code of Civil Procedure to the extent in which the court examines the motion for exclusion of a judge after the raising of the question whether his or her appointment by the President of the Republic of Poland on the motion of the National Council of the Judiciary is defective, is consistent with:

– Article 45 § 1 and Article 175 § 1, Article 179 in conjunction with Article 187 § 1 and 3 of the Constitution,

– the first sentence of Article 6 § 1 of the Convention.

– Article 47, first and second sentences, of the Charter of Fundamental Rights of the European Union in connection with Article 6(1) of the Treaty on European Union."

102. On 2 June 2020 the Constitutional Court delivered its judgment in case no. P 13/19, in a bench composed of Judges M.W, S.P., J.P. (the rapporteur), B.S. and R.W. It held as follows:

"Section 49(1) of the Act of 17 November 1964 Code of Civil Procedure, to the extent in which it allows a motion for exclusion of a judge to be considered after the raising of the question whether his or her appointment by the President of the Republic of Poland on the motion of the National Council of the Judiciary was defective, is inconsistent with Article 179 of the Constitution of the Republic of Poland."

(b) Judgment of 10 March 2022, no. K 7/21

103. On 9 November 2021 the Prosecutor General referred a request to the Constitutional Court concerning the issue of the "carrying out, by national or international courts pursuant to Article 6 § 1 of the Convention, of a review of the compatibility with the Constitution and the Convention of laws concerning the organisation of the judiciary, the jurisdiction of courts and the law on the National Council of the Judiciary". The application referred to the Court's judgments in the cases of *Broda and Bojara v. Poland*

(nos. 26691/18, 27367/18, 29 June 2021) and *Reczkowicz* (cited above). He claimed that Article 6 § 1 of the Convention was unconstitutional, in so far as (1) it authorised the Court to create under domestic law the subjective right of a judge to hold an administrative post in the judiciary, (2) the requirement of a "tribunal established by law" in that provision did not take account of the universally binding provisions of the Polish Constitution and statutes, or the final and universally binding judgments of the Polish Constitutional Court, and (3) it allowed domestic or international courts to determine the compatibility of laws concerning the organisation of the judiciary, the jurisdiction of the courts, and the NCJ with the Polish Constitution and the Convention, in order to ascertain whether the requirement of a "tribunal established by law" was fulfilled.

104. The Constitutional Court delivered its judgment on 10 March 2022 (no. K 7/21) in a bench composed of Judges S.P., M.M. (the rapporteur), K.P., W.S. and A.Z. It held that Article 6 § 1 of the Convention was incompatible with various provisions of the Constitution. The operative part of the judgment stated as follows:

> "Article 6 § 1, first sentence, of [the Convention] in so far as:
>
> (1) under the concept of 'civil rights and obligations', it comprises the judge's subjective right to hold a managerial position within the structure of ordinary courts in the Polish legal system
>
> – is inconsistent with Article 8 § 1, Article 89 § 1 (2) and Article 176 § 2 of the Constitution of the Republic of Poland,
>
> (2) in the context of assessing whether the requirement of a "tribunal established by law" has been met:
>
> (a) it permits [the Court] or national courts to disregard the provisions of the Constitution and statutes as well as the judgments of the Polish Constitutional Court,
>
> (b) makes it possible for [the Court] or national courts to independently create norms, by interpreting the Convention, pertaining to the procedure for appointing national court judges,
>
> – is inconsistent with Article 89 § 1 (2), Article 176 § 2, Article 179 in conjunction with Article 187 § 1 in conjunction with Article 187 § 4 as well as Article 190 § 1 of the Constitution,
>
> (c) authorises [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
>
> – is inconsistent with Article 188 § 1 and 2 as well as Article 190 § 1 of the Constitution."

105. According to the written reasons for that judgment, the Constitutional Court held that the Court – through its judgments – was creating new norms of public international law, different from those that the member State had accepted when ratifying the Convention. In the

Constitutional Court's view, these "new norms" created through the Court's interpretation of Article 6 § 1 were incompatible with the Constitution. It further held that the Court's actions had been contrary to the Constitution.

(c) Other relevant rulings

106. Other relevant rulings of the Constitutional Court were summarised in the Court's judgments in *Reczkowicz* (cited above, §§ 107-121) and *Grzęda* (cited above, §§ 77-99).

II. INTERNATIONAL MATERIAL

A. Vienna Convention on the Law of Treaties

107. Article 27 of the Vienna Convention on the Law of Treaties of 1969 provides, in so far as relevant:

Internal law and observance of treaties

"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty..."

B. The Permanent Court of International Justice

108. The Permanent Court of International Justice in its advisory opinion of 4 February 1932 on Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (PCIJ, Series A/B, no. 44) held, in so far as relevant:

"[62] It should however be observed that, while on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, 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..."

C. The Council of Europe

1. The Committee of Ministers

109. The relevant extracts from the appendix to Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, adopted on 17 November 2010, provide:

"*Chapter VII − Duties and responsibilities*

...

Liability and disciplinary proceedings

66. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence.

...

68. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice.

69. Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate.

70. Judges should not be personally accountable where their decision is overruled or modified on appeal."

2. The Parliamentary Assembly of the Council of Europe

110. On 28 January 2020 the Parliamentary Assembly decided to open its monitoring procedure in respect of Poland. In its resolution of the same date entitled "The functioning of democratic institutions in Poland" (2316 (2020)), the Assembly stated, in so far as relevant:

"9. The Assembly expresses its deep concern about the draft amendments to the Law on the Common Courts, the Law on the Supreme Court and some other laws of the Republic of Poland, as adopted by the Sejm on 23 January 2020, despite their rejection by the Polish Senate on 17 January 2020 and the very critical assessment of these amendments by the Venice Commission. It regrets that these amendments were considered under an accelerated procedure without any consultation with the main stakeholders or civil society. The Assembly welcomes and supports the opinion of the Venice Commission on these amendments. ...

11. The Assembly deplores the abuse of disciplinary proceedings against judges and prosecutors in Poland. It reiterates its concern that the political control of the Minister of Justice over the initiation and conduct of these proceedings does not provide the required safeguard against their abuse. ... The credible reports that disciplinary investigations have been opened against judges and prosecutors solely for being critical of the justice reforms, and the fact that disciplinary investigations have been opened against judges as a result of decisions they have taken when adjudicating cases in their courts, needs to be condemned. ..."

111. On 26 January 2021 the Parliamentary Assembly adopted a resolution entitled "Judges in Poland and in the Republic of Moldova must remain independent" (2359 (2021)), in which it stated, in so far as relevant:

"13. ... It considers that the entry into force of the law of 20 December 2019 ..., may prevent [judges] from raising doubts as to whether the composition of a court might render proceedings void on grounds of nullity.

14. Accordingly, the Assembly calls on the Polish authorities to:

14.1 refrain from applying the provisions of the law of 20 December 2019;"

112. The above-mentioned resolution was based on the report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe of 5 January 2021 (doc. 15204) which stated, in so far as relevant:

> "65**.** According to several sources, large numbers of judges and prosecutors have been subjected to various forms of harassment in recent years. Judges have been transferred to posts in moves which could actually be considered to amount to demotions. Disciplinary or pre-disciplinary ("explanatory") proceedings have been brought against judges who have spoken in public about the independence of the judiciary, criticised the reforms being made, taken part in activities to bring public attention to issues concerning the rule of law (such as organising informal discussion groups), or applied to the CJEU for preliminary rulings. As indicated by Judge Mazur during the exchange of views on 9 November 2020, disciplinary proceedings have been brought against 22 judges who applied to the CJEU for preliminary rulings, or challenged the appointment of members of the NCJ or the independence of judges appointed on the recommendation of the NCJ. Judge Paweł Juszczyszyn, for example, who called for the publication of the lists of supporters of the candidates for seats on the National Council of the Judiciary, suffered a 40% decrease in salary and was suspended from duty by the Disciplinary Chamber of the SC."

3. The European Commission for Democracy through Law (Venice Commission)

113. On 18 June 2020 the Venice Commission endorsed (by written procedure replacing the 123rd Plenary Session) a Joint Urgent Opinion (CDL-AD(2020)017) on the 2019 Amending Act that it had prepared with the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe. The relevant extracts of the Opinion read as follows:

> **"C. Prohibition to question the lawfulness of the judge's appointment**
>
> 31. Several provisions of the amendments eliminate the competence of the Polish courts to examine whether another court decision was issued by a person appointed as a judge in compliance with the Constitution, European law and other international legal standards. These amendments are seemingly designed to have a nullifying effect on the CJEU ruling of 19 November 2019 and the Supreme Court judgment of 5 December 2019, and on other pending proceedings where the competence of the newly appointed judges has been challenged.
>
> 32. ... New Article 42a prohibits courts (except the Extraordinary Chamber) from questioning (a) the powers of courts, constitutional state bodies and law enforcement and control bodies, and (b) the jurisdiction of a judge dealing with a case.
>
> 33. In order to guarantee that no judge in Poland questions the validity of an appointment made by the new NCJ, amended Article 107 § 1 of the Acts on the Common Courts (on disciplinary offences) prohibits "actions questioning ... the effectiveness of the appointment of a judge or the constitutional mandate of an organ of the Republic of Poland". ... It also prohibits procedural actions which challenge the validity of appointment of other judges.
>
> ...

36. These provisions, taken together, significantly curtail the possibility to examine the question of institutional independence of Polish courts by those courts themselves. This approach raises issues under Article 6 § 1 of the ECtHR, since judicial review should involve examination of all relevant aspects of the independence of the tribunal, including institutional ones. Thus, as demonstrated by the ECtHR's case-law, the composition of the body which appoints judges is relevant from the stand-point of the requirement of "independence". There are other institutional elements which should be assessed – for example, the risk of an arbitrary removal of a judge by the Minister of Justice, or the risk of undue pressure by the president of the court in which the judge works. In the opinion of the Venice Commission, national judge should not be prevented from examining these aspects of the case, along with other elements which may affect the "independence and impartiality" requirement under Article 6 § 1 of the ECHR. This is certainly true when the normal chain of appeals is concerned; however, the Strasbourg Court did not have an occasion to examine situations when one national court contests the legitimacy of another judicial body (with the reference to the lack of independence or otherwise) outside of the normal chain of appeals, and what should be a proper procedural framework for resolving such disputes.

37. Furthermore, the above provisions, taken together, aim at nullifying the effects of the CJEU ruling. This is a serious challenge to the principle of the primacy of EU law. In the preliminary ruling of 19 November 2019, the CJEU clearly held that it was a duty of the referring court to examine the question of independence of the Disciplinary Chamber, in particular by looking at the composition of the selecting body (the NCJ). Polish courts dealing with the consequences of the CJEU judgment of 19 November 2019 or confronted with an issue of judicial independence in a different context, will be put in an impossible position of choosing between following the requirements of the EU law as interpreted by the CJEU, or using legal avenues provided by the TFEU, and abiding by the new law.

...

43. In the short-term perspective, the Venice Commission urges the Polish authorities to remove provisions (on disciplinary offences and other) which prevent the courts from examining the questions of independence and impartiality of other judges from the standpoint of the EU law and the ECHR."

4. The Consultative Council of European Judges ("the CCJE")

(a) Opinion no. 10 (2007)

114. Opinion no. 10 (2007) of the CCJE to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society adopted on 23 November 2007 reads, in so far as relevant:

"62. The question of a judge's responsibility was examined by the CCJE in Opinion No. 3(2002). The recent experiences of some States show the need to protect judges from the temptation to broaden the scope of their responsibility in purely jurisdictional matters. The role of the Council for the Judiciary is to show that a judge cannot bear the same responsibilities as a member of another profession: he/she performs a public function and cannot refuse to adjudicate on disputes. Furthermore, if the judge is exposed to legal and disciplinary sanctions against his/her decisions, neither judicial independence nor the democratic balance of powers can be maintained. The Council for the Judiciary should, therefore, unequivocally condemn political projects designed to limit the judges' freedom of decision-making. This does not diminish judges' duty to respect the law.

63. A judge who neglects his/her cases through indolence or who is blatantly incompetent when dealing with them should face disciplinary sanctions. Even in such cases, as indicated by CCJE Opinion No.3(2002), it is important that judges enjoy the protection of a disciplinary proceeding guaranteeing the respect of the principle of independence of the judiciary and carried out before a body free from any political influence, on the basis of clearly defined disciplinary faults: a Head of State, Minister of Justice or any other representative of political authorities cannot take part in the disciplinary body."

(b) Magna Carta of Judges

115. The Magna Carta of Judges (Fundamental Principles) was adopted by the CCJE in November 2010. The relevant section reads as follows:

"6. Disciplinary proceedings shall take place before an independent body with the possibility of recourse before a court.

...

19. In each State, the statute or the fundamental charter applicable to judges shall define the misconduct which may lead to disciplinary sanctions as well as the disciplinary procedure.

20. Judges shall be criminally liable in ordinary law for offences committed outside their judicial office. Criminal liability shall not be imposed on judges for unintentional failings in the exercise of their functions.

21. The remedy for judicial errors should lie in an appropriate system of appeals. Any remedy for other failings in the administration of justice lies only against the state."

116. Further international materials are cited in the Court's judgments in *Reczkowicz* (§§ 126-148), *Dolińska-Ficek and Ozimek* (§§ 156-177), *Advance Pharma sp. z o.o.* (§§ 170-191) and *Grzęda* (§§ 122-144, all cited above).

III. EUROPEAN UNION LAW

A. The Treaty on European Union

117. Article 2 of the Treaty on European Union ("the TEU") reads as follows:

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

118. Article 19 § 1 of the TEU provides:

"The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

B. The Charter of Fundamental Rights

119. Title VI of the Charter, under the heading 'Justice', includes Article 47 thereof, entitled 'Right to an effective remedy and to a fair trial', which states as follows:

"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. ..."

C. Case-law of the Court of Justice of the European Union

1. *Judgment of 19 November 2019 in A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982*

120. Between August and October 2018 the Labour and Social Security Chamber of the Supreme Court made three requests to the CJEU for a preliminary ruling in cases pending before that court which arose in connection with the lowering of the retirement age for judges of the Supreme Court in the new Act on the Supreme Court adopted in December 2017. This rule was also applicable to judges of the Supreme Administrative Court. The cases in question involved proceedings brought by a judge of the Supreme Administrative Court (A.K.) against the NCJ, and proceedings brought by two Supreme Court judges (C.P. and D.O.) against the President of the Republic. The requests concerned, *inter alia*, the issue whether the newly established Disciplinary Chamber of the Supreme Court that was to have jurisdiction in such cases could be regarded as an independent court under EU law in light of the fact that it was composed of judges selected by the new NCJ.

121. On 19 November 2019 the CJEU delivered its preliminary ruling. It held, in so far as relevant:

"Article 47 of the Charter of Fundamental Rights of the European Union and Article 9(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal, within the meaning of the former provisions. That is the case where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to

that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. It is for the referring court to determine, in the light of all the relevant factors established before it, whether that applies to a court such as the Disciplinary Chamber of the Supreme Court.

If that is the case, the principle of the primacy of EU law must be interpreted as requiring the referring court to disapply the provision of national law which reserves jurisdiction to hear and rule on the cases in the main proceedings to the abovementioned chamber, so that those cases may be examined by a court which meets the abovementioned requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field."

122. The relevant reasons for the judgment were cited in paragraph 164 of *Reczkowicz* and paragraphs 151-152 of *Grzęda* (both cited above).

2. *Judgment of 15 July 2021 in Commission v. Poland (Disciplinary regime for judges), C-791/19, EU:C:2021:596*

123. The Commission brought proceedings against Poland for failing to fulfil its obligations under the second subparagraph of Article 19(1) TEU and the second and third paragraphs of Article 267 TFEU on account of national measures establishing the new disciplinary regime for the judges of the Supreme Court and the ordinary courts instituted by legislation adopted in 2017. In particular the Commission contended that the Republic of Poland has infringed the second subparagraph of Article 19(1) TEU on four grounds regarding: first, the treatment of the content of judicial decisions as a disciplinary offence; second, the lack of independence and impartiality of the Disciplinary Chamber of the Supreme Court, third, the discretionary power of the President of that Chamber to designate the competent court, which prevents disciplinary cases from being decided by a court established by law; and, fourth, the failure to guarantee the examination of disciplinary cases within a reasonable time and the rights of the defence of accused judges.

The Commission also claimed that Poland had infringed the second and third paragraphs of Article 267 TFEU because the right of national courts to make a reference for a preliminary ruling was limited by the possible initiation of disciplinary proceedings against judges who exercised that right.

124. On 8 April 2020 the CJEU (Grand Chamber) issued an interim order in a case initiated by the Commission and concerning disciplinary proceedings against judges pending before the Disciplinary Chamber of the Supreme Court. The interim order stated:

"1. The Republic of Poland is required, immediately and pending delivery of the judgment closing the proceedings in Case C-791/19,

– to suspend the application of the provisions of Article 3(5), Article 27 and Article 73(1) of the Law on the Supreme Court of 8 December 2017 (Dz. U. of 2018, item 5), as amended, forming the basis of the jurisdiction of the Disciplinary Chamber of the Supreme Court to rule, both at first instance and on appeal, in disciplinary cases concerning judges;

– to refrain from referring the cases pending before the Disciplinary Chamber of the Supreme Court before a panel that does not meet the requirements of independence defined, *inter alia*, in the judgment of 19 November 2019, *A. K. and Others* (Independence of the Disciplinary Chamber of the Supreme Court) (C-585/18, C-624/18 and C-625/18, EU:C:2019:982), and

– to inform the European Commission, at the latest one month after being notified of the order of the Court granting the requested interim measures, of all the measures it has adopted in order to comply fully with this order."

125. On 6 May 2021 Advocate General Tanchev delivered his opinion in which he considered the complaints raised by the Commission to be well founded. With respect to the CJEU judgment of 19 November 2019 in *A.K. and Others* the Advocate General stated:

"95 ... Indeed, in my view, the judgment in *A.K. and Others* provides strong support for finding that, on the basis of the combination of elements invoked by the Commission and which were examined in that judgment, the Disciplinary Chamber does not meet the requirements of independence and impartiality under the second subparagraph of Article 19(1) TEU. As I concluded in my Opinion in that case, the mandates of the previous [NCJ] members were prematurely terminated and the changes to the method of appointment of the judicial members means that 23 out of 25 [NCJ] members come from the legislative and executive authorities which, taken together, disclose deficiencies that compromise the [NCJ's] independence (See Opinion in *A.K. and Others* (points 131 to 137)."

The opinion concluded with the following proposal to the CJEU:

"(1) declare that by allowing, pursuant to Article 107(1) of the Law on the ordinary courts and Article 97(1) and (3) of the Law on the Supreme Court, the content of judicial decisions to be treated as a disciplinary offence; by failing to guarantee, pursuant to Articles 3(5), 27 and 73(1) of the Law on the Supreme Court and Article 9a of the Law on the [NCJ], the independence and impartiality of the Disciplinary Chamber; by granting, pursuant to Articles 110(3) and 114(7) of the Law on the ordinary courts, the President of the Disciplinary Chamber the power to designate the competent disciplinary court of first instance in cases concerning ordinary court judges; by granting, pursuant to Article 112b of the Law on the ordinary courts, the Minister for Justice the power to appoint a Disciplinary Officer of the Minister for Justice and by providing, pursuant to Article 113a of the Law on the ordinary courts, that activities related to the appointment of *ex officio* defence counsel and that counsel's taking up of the defence do not have a suspensive effect on the course of the proceedings and, pursuant to Article 115a(3) of the Law on the ordinary courts, that the disciplinary court is to conduct the proceedings despite the justified absence of the notified accused or his or her defence counsel, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;

(2) declare that, by allowing the right of national courts to make a reference for a preliminary ruling to be limited by the possibility of the initiation of disciplinary proceedings, the Republic of Poland has failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU; ..."

126. Following its interim decision of 8 April 2020 (see paragraph 124 above), on 15 July 2021 the Grand Chamber of the CJEU delivered its judgment in the case of *Commission v. Poland (Disciplinary regime for*

judges) holding that the new disciplinary regime for judges was not compatible with EU law. The CJEU found, *inter alia*, that in light of the global context of major reforms that had recently affected the Polish judiciary, in which context the Disciplinary Chamber of the Supreme Court had been created, and owing to a combination of factors that framed the process whereby that new chamber had been established, that chamber did not provide all the guarantees of impartiality and independence and, in particular, was not protected from the direct or indirect influence of the Polish legislature and executive; among those factors, the Court criticised, in particular, the fact that the process for appointing judges to the Supreme Court, including the members of the Disciplinary Chamber, was essentially determined by the NCJ, which had been significantly reorganised by the Polish executive and legislature and whose independence could give rise to reasonable doubts.

The relevant part of the operative part of the judgment reads as follows:

> "On those grounds, the Court (Grand Chamber) hereby:
>
> 1. Declares that:
>
> – by failing to guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court, Poland, which is responsible for reviewing decisions issued in disciplinary proceedings against judges (Article 3(5), Article 27 and Article 73 § 1 of the Law on the Supreme Court) of 8 December 2017, in the consolidated version published in the [Journal of Laws] of 2019 (item 825), read in conjunction with Article 9a of the Law on the National Council of the Judiciary of 12 May 2011, as amended by the Law amending the Law on the National Council of the Judiciary and certain other laws of 8 December 2017;
>
> – by allowing the content of judicial decisions to be classified as a disciplinary offence involving judges of the ordinary courts (Article 107 § 1 of the Law on the organisation of the ordinary courts of 27 July 2001, in the version resulting from the successive amendments published in the [Journal of Laws] of 2019 (items 52, 55, 60, 125, 1469 and 1495), and Article 97 §§ 1 and 3 of the Law on the Supreme Court, in the consolidated version published in the [Journal of Laws] of 2019 (item 825));
>
> ...
>
> the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;"

127. The relevant reasons for the judgment regarding the lack of independence and impartiality of the Disciplinary Chamber were cited in § 161 of the *Grzęda* judgment (cited above).

128. The relevant reasons for the judgment as regards the disciplinary liability of judges on account of the content of their judicial decisions read as follows:

> "134. As is apparent from paragraph 61 of the present judgment, the requirement of independence and impartiality derived from, *inter alia*, the second subparagraph of Article 19(1) TEU which must be met by national courts or tribunals who, like the Polish ordinary courts, may be called upon to interpret and apply EU law, requires, in order to avoid any risk of the disciplinary regime applicable to those whose task is to

adjudicate being used as a system of political control of the content of judicial decisions, that such a regime include, in particular, rules defining the forms of conduct which constitute a disciplinary offence.

135. By its first complaint, the Commission submits that, in defining the forms of conduct constituting a disciplinary offence on the part of judges of the ordinary courts as covering, respectively, any 'obvious and gross violations of the law' and any 'error' entailing an 'obvious violation of the law', Article 107 § 1 of the Law on the ordinary courts and Article 97 §§ 1 and 3 of the new Law on the Supreme Court permit such political control, as is evidenced, moreover, by the various specific cases where those provisions have been applied that have been referred to by that institution.

136. In that regard, it should be noted at the outset that it is true that the disciplinary regime applicable to judges falls within the organisation of justice and, therefore, within the Member States' competence, and that, in particular, the possibility that a Member State's authorities may put in issue the disciplinary liability of judges can, *inter alia*, depending on the Member States' choice, be a factor which contributes to the accountability and effectiveness of the judicial system. However, ... in exercising that competence, the Member States must comply with EU law, by safeguarding, *inter alia*, the independence of the courts called upon to rule on questions concerning the application or interpretation of EU law, in order to ensure the effective judicial protection of individuals required by the second subparagraph of Article 19(1) TEU (see, by analogy, judgment in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraphs 229 and 230).

137. In that context, the safeguarding of that independence cannot, in particular, have the effect of totally excluding the possibility that the disciplinary liability of a judge may, in certain very exceptional cases, be triggered as a result of judicial decisions adopted by that judge. Such a requirement of independence is clearly not intended to support any serious and totally inexcusable forms of conduct on the part of judges, which would consist, for example, in violating deliberately and in bad faith, or as a result of particularly serious and gross negligence, the national and EU law with which they are supposed to ensure compliance, or acting arbitrarily or denying justice when they are called upon, as guardians of the duty of adjudicating, to rule in disputes which are brought before them by individuals.

138. On the other hand, it appears essential, in order to preserve that independence and to prevent the disciplinary regime from being diverted from its legitimate purposes and being used to exert political control over judicial decisions or pressure on judges, that the fact that a judicial decision contains a possible error in the interpretation and application of national and EU law, or in the assessment of the facts and the appraisal of the evidence, cannot in itself trigger the disciplinary liability of the judge concerned (see, by analogy, judgment in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraph 234).

139. Consequently, it is important that the putting in issue of the disciplinary liability of a judge as a result of a judicial decision should be limited to entirely exceptional cases such as those referred to in paragraph 137 of the present judgment and be governed, in that regard, by objective and verifiable criteria, arising from requirements relating to the sound administration of justice, and also by guarantees designed to avoid any risk of external pressure on the content of judicial decisions and thus helping to dispel, in the minds of individuals, any reasonable doubts as to the imperviousness of the judges concerned and their neutrality with respect to the interests before them (see, by analogy, judgment in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraph 233).

140. To that end, it is essential that, *inter alia*, rules should be laid down which define, in a manner that is sufficiently clear and precise, the forms of conduct which may trigger the disciplinary liability of judges, in order to guarantee the independence inherent in their task and to avoid exposing them to the risk that their disciplinary liability may be triggered solely because of the decisions taken by them (see, by analogy, judgment in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraph 234).

141. In the present case, it should be noted that, having regard to their wording alone, Article 107 § 1 of the Law on the ordinary courts and Article 97 §§ 1 and 3 of the new Law on the Supreme Court do not meet the requirements of clarity and precision set out in paragraph 140 of the present judgment. It must be pointed out that the expressions 'obvious and gross violations of the law' and 'finding of error' entailing an 'obvious violation of the law' used in those respective provisions are not such as to prevent the liability of judges from being triggered solely on the basis of the supposedly 'incorrect' content of their decisions while ensuring that that liability is always strictly limited to entirely exceptional situations, such as those referred to in paragraph 137 of the present judgment.

...

143. In that regard, it is true that the Republic of Poland has referred in detail before the Court to the case-law developed over many years by the Supreme Court with regard to the various constituent elements of the concept of 'obvious and gross violations of the law' for the purposes of Article 107 § 1 of the Law on the ordinary courts. The national case-law thus described, the existence and content of which have not been disputed by the Commission, does indeed appear to have adopted a particularly restrictive interpretation in relation to that concept, displaying a clear concern to preserve judicial independence.

...

145. Next, it should be noted that the decisions of the Supreme Court relating to Article 107 § 1 of the Law on the ordinary courts thus referred to by the Republic of Poland were adopted not by the current Disciplinary Chamber of that court but by the chamber of that court which had jurisdiction before the reform.

...

147. In the present case, as is apparent from the reasoning whereby the Court upheld the second complaint relied on by the Commission in support of its action, the Disciplinary Chamber recently established by the new Law on the Supreme Court, which has been entrusted with jurisdiction to hear, depending on the case, either as the court of second instance, or as the court of first and second instance, disciplinary proceedings concerning judges of the ordinary courts, does not meet that requirement of independence and impartiality.

148. Accordingly, that fact is, in turn, liable to increase the risk that provisions such as Article 107 § 1 of the Law on the ordinary courts and Article 97 §§ 1 and 3 of the new Law on the Supreme Court, which define disciplinary offences in terms which do not meet the requirements of clarity and precision set out in paragraph 140 of the present judgment and do not ensure that the putting in issue of the liability of judges as a result of their decisions is strictly limited to the situations referred to in paragraph 137 of the present judgment, will be the subject of an interpretation which will thus permit the disciplinary regime to be used in order to influence judicial decisions.

149. The existence of a risk that the disciplinary regime will in fact be used in order to influence judicial decisions is, moreover, confirmed by the decision of the

Disciplinary Chamber of 4 February 2020 referred to in paragraphs 126 and 127 of the present judgment.

150. In that regard, it is necessary at the outset to reject the Republic of Poland's line of argument according to which that decision of the Disciplinary Chamber cannot be taken into consideration by the Court for the purpose of assessing that Member State's alleged failure to fulfil obligations, on the ground that that failure must, in accordance with settled case-law, be assessed on the date on which the period prescribed in the reasoned opinion expired. As the Commission correctly argued at the hearing before the Court, that decision of the Disciplinary Chamber is merely an item of evidence produced after the reasoned opinion was issued, intended to illustrate the complaint set out both in that reasoned opinion and in the present action concerning the risk that, in the context resulting from the legislative reforms recently implemented in Poland, the disciplinary regime applicable to judges of the Polish ordinary courts could be used in order to influence the content of judicial decisions. As has already been noted by the Court, the taking into account of an item of evidence produced after the reasoned opinion was issued does not constitute a change in the subject matter of the dispute as set out in that reasoned opinion (see, to that effect, judgment of 11 July 2002, *Commission* v *Spain*, C-139/00, EU:C:2002:438, paragraph 21).

151. It is apparent from that decision of the Disciplinary Chamber that a judge may, in principle, be accused of a disciplinary offence on the basis of Article 107 § 1 of the Law on the ordinary courts for having ordered the Sejm, allegedly in obvious and gross violation of the law, to produce documents relating to the process for appointing members of the [NCJ] in its new composition.

152. Such a broad interpretation of Article 107 § 1 of the Law on the ordinary courts is a departure from the particularly restrictive interpretation of that provision used by the Supreme Court as referred to in paragraph 143 of the present judgment and thus reflects a reduction, within the Member State concerned, in the protection of the value of the rule of law.

154. Lastly, the Commission has referred to various specific recent cases in which the Disciplinary Officer, in the context of the new disciplinary regime introduced by the Law on the ordinary courts, initiated disciplinary investigations in respect of judges because of the content of the judicial decisions adopted by those judges, without it appearing that the judges concerned had committed breaches of their duties such as those referred to in paragraph 137 of the present judgment. In that regard, it should be noted, more specifically, that disciplinary proceedings have been initiated, *inter alia*, because of judicial decisions whereby requests for a preliminary ruling had been submitted to the Court of Justice seeking clarification as to the compatibility of certain provisions of national law with the provisions of EU law relating to the rule of law and the independence of judges.

155. Even though the Republic of Poland contends that the complaints made by the Disciplinary Officer in those cases do not concern obvious and gross violations of the law for the purposes of Article 107 § 1 of the Law on the ordinary courts, but the exceeding, by the judges concerned, of their jurisdiction or the bringing into disrepute by those judges of their judicial office, the fact remains that those complaints are directly related to the content of the judicial decisions taken by those judges.

156. The mere prospect of such disciplinary investigations being opened is, as such, liable to exert pressure on those who have the task of adjudicating in a dispute (see, to that effect, judgment in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraph 199).

157. Having regard to all the foregoing considerations, the Court considers it to be established that, in the particular context resulting from the recent reforms that have affected the Polish judiciary and the disciplinary regime applicable to judges of the ordinary courts, and in particular having regard to the fact that the independence and impartiality of the judicial body with jurisdiction to rule in disciplinary proceedings concerning those judges are not guaranteed, the definitions of disciplinary offence contained in Article 107 § 1 of the Law on the ordinary courts and Article 97 §§ 1 and 3 of the new Law on the Supreme Court do not help to avoid that disciplinary regime being used in order to create, with regard to those judges who are called upon to interpret and apply EU law, pressure and a deterrent effect, which are likely to influence the content of their decisions. Those provisions thus undermine the independence of those judges and do so, what is more, at the cost of a reduction in the protection of the value of the rule of law in Poland within the meaning of the case-law referred to in paragraph 51 of the present judgment, in breach of the second subparagraph of Article 19(1) TEU.

158. Accordingly, the first complaint must be upheld."

129. Other relevant case-law of the CJEU is cited in the Court's judgments in *Reczkowicz* (§§ 161 and 165), *Dolińska-Ficek and Ozimek* (§§ 190, 194-196 and 201-203), *Advance Pharma sp. z o.o.* (§§ 207-209 and 214-216) and *Grzęda* (§§ 148 and 153-159, all cited above).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE RIGHT TO A TRIBUNAL ESTABLISHED BY LAW

130. The applicant complained under Article 6 § 1 of the Convention that the Disciplinary Chamber of the Supreme Court, which had ordered his suspension, had not been a "tribunal established by law" within the meaning of that provision. The first sentence of Article 6 § 1 of the Convention reads as follows:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

A. Admissibility

1. Applicability of Article 6 § 1

(a) The parties' submissions

131. The Government raised a preliminary objection as to the applicability of Article 6 § 1 of the Convention in its civil limb. Having regard to the Court's case-law and referring to the particular circumstances of the case, they claimed that under Polish law there was no right to exercise public

authority, while the subject-matter of the dispute in issue related to this question.

132. The applicant participated in the exercise of public power or there existed a "special bond of trust and loyalty" between him as judge and the State, as employer. Therefore, the dispute in the applicant's case was not an example of an "ordinary labour dispute" relating to "salaries, allowances or similar entitlements" to which Article 6 should in principle apply. Accordingly, the applicant's complaint should be considered incompatible *ratione materiae*.

133. The applicant maintained that Article 6 § 1 under its civil head was applicable to his case, referring, *inter alia*, to the Court's case-law concerning temporary suspension of a judge in the course of disciplinary proceedings. He also noted that the Disciplinary Chamber's resolution had negatively affected his professional status by preventing him from adjudication and withholding part of his salary.

(b) The Court's assessment

134. The general principles regarding the applicability of Article 6 § 1 in its "civil" limb were recently summarised in *Grzęda v. Poland* ([GC], no. 43572/18, §§ 257-264, 15 March 2022).

135. The Court observes that the applicant in the present case, who is a judge, faced disciplinary charges and that in the course of the disciplinary proceedings against him he was suspended from the exercise of his judicial duties by the Supreme Court's Disciplinary Chamber.

136. The Court reiterates that the employment relationship of judges with the State must be understood in the light of the specific guarantees essential for judicial independence. Thus, when referring to the "special trust and loyalty" that they must observe, it is loyalty to the rule of law and democracy and not to holders of State power (see *Grzęda*, cited above, § 264 and the cases cited therein).

137. Applying the criteria established in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, § 62, ECHR 2007-II) in an earlier case, which concerned a similar situation of suspension of a judge within the context of disciplinary proceedings, the Court held that the guarantees of Article 6 were applicable to the suspension in issue (see *Paluda v. Slovakia*, no. 33392/12, §§ 33-34, 23 May 2017; see also *Camelia Bogdan v. Romania*, no. 36889/18, § 70, 20 October 2020). The Court sees no reason to reach a different conclusion in the present case and finds, therefore, that Article 6 § 1 in its civil limb is applicable. The Government's objection must accordingly be dismissed.

2. Non-exhaustion of domestic remedies

(a) The Government's submissions

(i) Constitutional complaint

138. As regards the issue of the composition of the Disciplinary Chamber, the Government argued that the applicant had failed to exhaust the available domestic remedies. He should have lodged a constitutional complaint challenging the compatibility of section 29 of the 2017 Act on the Supreme Court (see paragraph 89 above) and section 3(1) (1) and (2) of the 2011 Act on the NCJ, as amended by the 2017 Amending Act (see paragraph 87 above), with Article 45 § 1 of the Constitution. The latter provision enshrined the right to a fair hearing of one's case before a competent, impartial and independent court.

139. According to the Government, the two conditions relevant for the effectiveness of a constitutional complaint, as set out in the *Szott-Medyńska v. Poland* decision (no. 47414/99, 9 October 2003), were satisfied in the applicant's case. As regards the first condition, the Government submitted that an "individual decision" which allegedly violated the Convention, and which had been adopted in direct application of possibly unconstitutional provisions of national legislation was the Supreme Court Disciplinary Chamber's resolution of 4 February 2020. In the applicant's view, this resolution had been given by Supreme Court judges who should have been disqualified from hearing his case. Thus, the first condition deriving from the Court's case-law was met in the applicant's case. As regards the second condition, it was also satisfied as the applicant could have lodged a request for reopening of the disciplinary proceedings in the event of the successful outcome of the constitutional complaint proceedings.

(ii) Other remedies

140. The Government further submitted that the complaint under Article 6 § 1 was premature because the disciplinary proceedings against the applicant were still pending. At the same time the civil proceedings initiated by the applicant were pending. The Government also claimed that the applicant could have lodged a complaint under section 41b of the 2001 Act (see paragraph 85 above) had he considered that the disciplinary proceedings against him were groundless or could have sought to engage the disciplinary liability of the disciplinary officer.

(b) The applicant's submissions

(i) Constitutional complaint

141. The applicant disagreed. In his view, a constitutional complaint could no longer be considered an effective remedy which had to be exhausted before lodging an individual application with the Court. He submitted that in

consequence of personal and legal changes which had been introduced since the autumn of 2015, the Constitutional Court could no longer be regarded as an independent and impartial judicial body able to fulfil its constitutional functions. The most important problem was the participation of three unlawfully elected "judges" in the work of the Constitutional Court. As a result, many judgments of that court were given in panels which included unlawfully elected judges. The Court held in *Xero Flor w Polsce sp. z o.o.* (7 May 2021, no. 4907/18) that such a situation, at least in the context of the constitutional complaint proceedings, violated the right to a tribunal established by law guaranteed in Article 6 § 1. There were many other factors undermining the perception of the Constitutional Court as an impartial and independent body. For example, a group of judges of that court had published open letters stating that the President of the Constitutional Court assigned judges to adjudicating panels in an arbitrary manner.

142. Furthermore, the applicant argued that even leaving aside the question of independence, impartiality and lawfulness of the functioning of the Constitutional Court, a potential constitutional complaint in his case would have had no reasonable prospects of success.

143. As regards section 29 of the 2017 Act on the Supreme Court, this provision had not yet been the subject of constitutional review. However, in 2020 the Constitutional Court had given three judgments in which it held that questioning the legality of a judicial appointment or the competence of a judge to adjudicate on the basis of the fact that the judge had been appointed upon the motion of the new NCJ was incompatible with the Constitution[3]. Therefore, there was no reason to believe that the Constitutional Court would depart from that view.

144. The second of the statutory provisions referred to by the Government, i.e. section 3(1) (1) and (2) of the 2011 Act on the NCJ as amended by the 2017 Amending Act was not relevant for the applicant's case as it only specified competences of the NCJ related to the assessment and nomination of candidates for judicial appointments. There was nothing unconstitutional in it, since those competences of the NCJ had a legal basis in the Constitution. On the other hand, the unconstitutionality concerned the new method of election of judicial members of the NCJ as introduced by the 2017 Amending Act. However, the applicant argued that it would be difficult to challenge such provisions directly because the constitutional complaint could be directed only against provisions which constituted the legal basis of a final decision issued in the case of an individual, and which violated his/her constitutional rights and freedoms. Regardless of other potential obstacles in lodging a constitutional complaint, the applicant noted that the law amending the procedure of election of judicial members of the NCJ had been found to

[3] Judgments of 4 March 2020, no. P 22/19; 20 April 2020, no. U 2/20; and 2 June 2020, no. P 13/19 (cited in paragraph 102 above).

be constitutional by the Constitutional Court in its judgment of 25 March 2019 (no. K 12/18), that is almost a year before the Disciplinary Chamber had issued the resolution in his case.

(ii) Other remedies

145. The applicant maintained that the pending disciplinary proceedings against him did not render his complaint under Article 6 § 1 premature. In his case the alleged violation of his rights under Article 6 § 1 resulted from the Disciplinary Chamber's decision on his suspension. The suspension constituted an interference with his rights which was separate from the main disciplinary proceedings against him.

146. The applicant disagreed that his complaint under Article 6 § 1 was premature on account of the pending civil proceedings initiated by him. The two sets of proceedings brought by the applicant were not appeals against the Disciplinary Chamber's resolution and the ordinary courts were not formally authorised to set aside or amend the Disciplinary Chamber's resolution. Secondly, those two sets of civil proceedings were undoubtedly unprecedented, relating as they did to the systemic problems surrounding the establishment and functioning of the Disciplinary Chamber. Thirdly, even if the ordinary courts were to give final rulings favourable to the applicant, such decisions were unlikely to be enforced. The applicant referred in this context to two injunctions issued in April and May 2021 by the Bydgoszcz District Court and the Olsztyn Regional Court, the default judgment upheld by the latter court on 28 December 2021 and the judgment of the Bydgoszcz District Court of 17 December 2021. None of these decisions had been implemented and the applicant remained suspended from the exercise of his judicial duties.

147. As regards the complaint under section 41b of the 2001 Act, which was a form of administrative complaint or the possibility of engaging the disciplinary liability of the disciplinary officer, the applicant argued that they could not lead to changing the Disciplinary Chamber's resolution.

(c) The Court's assessment

(i) Constitutional complaint

148. The Government referred to two specific legal provisions whose application, in their view, could have been challenged as unconstitutional by the applicant (see paragraph 138 above). They relied, in particular, on section 29 of the 2017 Act on the Supreme Court stipulating, at the relevant time, that "appointment to a judicial office at the Supreme Court shall be carried out by the President of Poland pursuant to a recommendation of the NCJ" and section 3(1) (1) and (2) of the 2011 Act on the NCJ (as amended by the 2017 Amending Act), which defined the NCJ's competences as, *inter-alia*, "examining and assessing candidates for judicial office in the Supreme Court" and "presenting to the President of the Republic of Poland

motions for appointment of judges of the Supreme Court" (see paragraphs 87 and 89 above).

149. The Court notes that the Government's arguments in the present case concerning the applicant's failure to lodge a constitutional complaint with a view to contesting the rules governing the procedure of appointment to the Supreme Court are the same as those made in *Advance Pharma sp. z o.o. v. Poland* (cited above, §§ 230-232). In that judgment, having regard to the considerations that led it to reject the Constitutional Court's position, as stated in its judgment of 20 April 2020 (no. U 2/20), on the manifest breach of the domestic law and its interpretation of Article 6 of the Convention, the Court found no sufficiently realistic prospects of success for a constitutional complaint based on the grounds suggested by the Government and dismissed their preliminary objection (ibid., § 319).

150. In *Advance Pharma sp. z o.o.*, the Court further considered that the effectiveness of the constitutional complaint had to be seen in conjunction with the general context in which the Constitutional Court had operated since the end of 2015 and its various actions aimed at undermining the finding of the Supreme Court's resolution of 23 January 2020 as to the manifest breach of domestic and international law due to the deficient judicial appointment procedure involving the NCJ. These actions have been described in more detail in *Reczkowicz* (cited above, § 263) and characterised as, among other things, an "interference with a judicial body, aimed at incapacitating it in the exercise of its adjudicatory function in the application and interpretation of the Convention and other international treaties" and as an "affront to the rule of law and the independence of the judiciary" (see *Advance Pharma sp. z o.o.*, § 319).

The Court also notes that the above-mentioned Constitutional Court's judgment of 20 April 2020 (no. U 2/20) as well as the subsequent judgment of 2 June 2020 (no. P 13/19) removed any possibility of mounting a successful constitutional challenge to the status of a judge appointed with the participation of the NCJ as established under the 2017 Amending Act. In addition, the Constitutional Court's judgment of 25 March 2019 (no. K 12/18) found that the amended model of election of judicial members of the NCJ was compatible with the Constitution. This line of the Constitutional Court's case-law indicates that that body was essentially determined to preserve the new judicial appointment procedure involving the recomposed NCJ.

151. In the light of the foregoing, the Court sees no grounds to reach a different conclusion in the present case and accordingly rejects the Government's objection regarding the applicant's failure to lodge a constitutional complaint.

152. In connection with the Constitutional Court's actions related to the application and interpretation of the Convention, the Court cannot but note the Constitutional Court's recent ruling of 10 March 2022

(see paragraphs 103-105 above), which was given in an apparent attempt to prevent the execution of the Court's judgments in *Reczkowicz* and *Dolińska-Ficek and Ozimek* (both cited above) under Article 46 of the Convention and to restrict the Court's jurisdiction under Articles 19 and 32 of the Convention in respect of Poland (see also, *Advance Pharma sp. z o.o.*, cited above, § 320). The Constitutional Court found that Article 6, first sentence, of the Convention was incompatible, *inter alia*, with several constitutional provisions in so far as in the context of assessing whether the requirement of "tribunal established by law" had been met, (a) it permitted [the Court] or national courts to disregard the provisions of the Constitution and statutes as well as the judgments of the Polish Constitutional Court, and (b) made it possible for [the Court] or national courts to independently create norms, by interpreting the Convention, pertaining to the procedure for appointing national court judges; and (c) it authorised [the Court] or national courts to assess the conformity with the Constitution and [the Convention] of statutes concerning the organisational structure of the judicial system, the jurisdiction of courts, and the statute specifying the organisational structure, the scope of activity, *modus operandi*, and the mode of electing members of the NCJ.

153. The applicant also submitted that he was not required to lodge a constitutional complaint since, following personal and legal changes which had been introduced since the autumn of 2015, the Constitutional Court could no longer be regarded as an independent and impartial judicial body able to fulfil its constitutional functions. Having regard to its conclusion above (see paragraph 151), the Court does not consider it necessary to examine in the instant case the applicant's arguments relating to the current status of the Constitutional Court.

(ii) Other remedies

154. The Government referred to several other pending procedures or potential remedies, claiming that the applicant's complaint under Article 6 § 1 was inadmissible for non-exhaustion of domestic remedies. First, they submitted that the complaint was premature because the disciplinary proceedings against the applicant were still pending. However, the Court notes that the complaint at issue concerns the Disciplinary Chamber's decision of 4 February 2020 on the applicant's suspension and not the pending disciplinary proceedings against him. Secondly, the Government referred to the pending civil proceedings initiated by the applicant against the Olsztyn District Court and the Supreme Court. Yet, those proceedings could not formally result in setting aside or amending the Disciplinary Chamber's decision of 4 February 2020. This was made clear by the Disciplinary Chamber itself in its decision of 23 May 2022, which confirmed that this body had exclusive jurisdiction to examine the issue of the applicant's suspension (see paragraph 76 above). Thirdly, the Government submitted that the

applicant could have lodged a complaint under section 41b of the 2001 Act had he considered that the disciplinary proceedings against him were groundless or sought to engage the disciplinary liability of the disciplinary officer. Nonetheless, the Court notes that these possibilities would have had no direct bearing on the Disciplinary Chamber's decision of 4 February 2020.

155. In this connection, the Court reiterates that under Article 35 § 1 of the Convention there is no obligation to have recourse to remedies which are inadequate or ineffective. To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 73-74, 25 March 2014). In the present case, as regards the second and third arguments raised by the Government, the Court fails to see how the remedies mentioned by them could have proved effective.

156. In conclusion, the Court dismisses the objection of non-exhaustion of domestic remedies raised by the Government.

3. Overall conclusion on admissibility

157. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

158. The applicant argued that his right to a tribunal established by law had been violated because his suspension had been decided by the Disciplinary Chamber of the Supreme Court. The judges of that Chamber had been appointed to their positions in manifest breach of the domestic law within the meaning adopted in the Court's case-law, with at least the following provisions of domestic law being breached: Article 179 taken in conjunction with Article 187 § 1 (1) and with Articles 173 and 175 of the Constitution. The applicant submitted that the Constitution required that judges be appointed by the President of the Republic upon the motion of the NCJ. However, the current NCJ was not a properly constituted organ, because its personal composition did not guarantee that it fulfilled its constitutional duties in a manner consistent with the principle of judicial independence. As a consequence of the participation of such organ in the judicial appointment procedures, the whole process was flawed and resulted in a violation of Article 6 § 1. This violation was not related to the fact that judges in Poland were appointed by the President of the Republic. The applicant relied on the Court's judgment in *Reczkowicz v. Poland* which, in his view, was fully applicable to his case.

159. Referring to the CJEU's judgment of 15 July 2021 (C-791/19, see paragraph 126 above), the applicant further submitted that the irregularities concerning the establishment and functioning of the Disciplinary Chamber were so serious that this body could not be even considered a "court" within the meaning of EU law. In his view, there were convincing arguments to hold that violations of domestic and EU law were so grave that all rulings issued by the Disciplinary Chamber were devoid of legal effects (*sententia non existens*).

160. With regard to the Government's argument about the Court applying double standards (see paragraph 177 below), the applicant submitted that it was hard to escape the impression that in this part of their submissions they were expressing their disagreement with the *Reczkowicz* judgment, which was now final. In the applicant's view, it was difficult to understand the Government's decision to withdraw their request for the referral of that case to the Grand Chamber. If the Government believed that the judgment was incorrect, it should have given the Grand Chamber a possibility to reconsider it. Withdrawal of the referral request could suggest that the Government had accepted the interpretation adopted by the Chamber. In reality, however, the Polish authorities had adopted a different approach – they wanted to use the Constitutional Court to indirectly "invalidate" the Court's ruling in *Reczkowicz* by eliminating the legal norm upon which that judgment had been issued. A similar strategy had been used with regard to the *Xero Flor v. Poland* judgment (he referred to the Constitutional Court's judgment of 24 November 2021, no. K 6/21). This approach showed that the Government were not willing to accept or implement the Court's judgments in good faith.

161. The applicant maintained that, in contrast to the Government's opinion (see paragraph 177 below), there was no discrepancy between the *Ástráðsson* and *Reczkowicz* judgments (both cited above). He stressed that in his case, as in *Reczkowicz* and *Dolińska-Ficek and Ozimek* (both cited above), the violation of the right to a tribunal established by law was mainly caused by the non-compliance with the constitutional principles in the process of appointment of judges. If judges adjudicating in the applicant's case were appointed in accordance with the law, that is upon the motion of the lawfully composed NCJ, there would be no violation of the "right to a tribunal established by law". The applicant also objected to the Government's comparative-law arguments, stating that one could not reasonably compare different legal systems without taking into account all relevant legal norms, their practical functioning, or differences in legal and political culture, and so forth.

162. The applicant submitted that the legality of judicial appointments with the participation of the recomposed NCJ had been questioned in the interpretative resolution of the Supreme Court of 23 January 2020. Moreover, in May 2021 the Supreme Administrative Court had issued a series of rulings (nos. II GOK 2/18, II GOK 3/18, II GOK 5/18, II GOK 6/18, II GOK 7/18)

in which it had set aside resolutions of the NCJ on the basis of which the President had appointed, *inter alia*, seven judges to the Civil Chamber of the Supreme Court. Irregularities in the functioning of the NCJ and, consequently, the questionable legal status of judges appointed with the participation of this body had also been noted in numerous rulings of the CJEU. There was therefore a substantial body of rulings of both domestic and international courts which confirmed that appointments of judges upon the motion of the new NCJ had violated the law. This concerned in particular persons appointed to the Disciplinary Chamber of the Supreme Court.

163. As regards the comments made by the First President of the Supreme Court (see paragraphs 179-185 below), the applicant noted that she could not be regarded as fully neutral in the present case. The First President had been appointed as a judge of the Supreme Court in 2018 upon the motion of the recomposed NCJ. In this situation she could be seen as personally interested in questioning the case-law of the Court and the CJEU in cases related to the rule of law crisis in Poland.

164. With regard to the margin of discretion granted to the legislature in regulating the composition of the NCJ, the applicant, replying to the First President's comments, maintained that it was not unlimited. When regulating this issue, Parliament had to take into account such fundamental constitutional principles as the separation of powers and judicial independence, as well as the constitutional position and tasks of the NCJ itself. The applicant argued that the NCJ would be able to perform its functions in line with constitutional standards, in particular its participation in the procedure for appointment of judges, only if it was independent. Thus, it was clear that the composition of the NCJ could not be dominated by the representatives of the executive and the legislature because in such a situation the NCJ would not be sufficiently independent. For these reasons, the new model of personal composition of the NCJ had to be rejected as unconstitutional.

165. As regards the model of electing judicial members of the NCJ by their peers, the applicant, relying on the Constitutional Court's judgment of 18 July 2007 (no. K 25/07), submitted that this was the only constitutionally permissible option and that this view reflected a generally accepted interpretation of the Constitution. Furthermore, contrary to the First President's suggestions, the Constitutional Court had itself admitted that in K 25/07 it had adopted an interpretation according to which judicial members of the NCJ had to be elected by other judges and that in the judgment of 20 June 2017 (no. K 5/17) it had openly departed from that interpretation.

166. Contrary to the view of the First President of the Supreme Court, the applicant argued that the right to an independent court could not be equated with the right to a tribunal established by law. In *Reczkowicz* and *Dolińska-Ficek and Ozimek* (both cited above) the Court had ruled that Article 6 had been violated because judges who heard the applicants' cases

had not been legally appointed, that is they had been appointed in manifest breach of domestic law. Therefore, the Court did not need to modify its case-law on the independence of lawfully appointed judges. Adjudication by judges who were appointed with a manifest breach of domestic law, within the meaning adopted in the Court's case-law, would always lead to a violation of the Convention, even if in the context of particular cases such judges were personally independent.

167. The applicant disagreed with the view of the First President of the Supreme Court that it was groundless to consider that the independence of judges appointed with the participation of the recomposed NCJ was undermined. He noted that in the recent months and years both the Court and the CJEU had issued numerous rulings confirming that the Disciplinary Chamber did not satisfy European standards. The applicant also submitted that the Court's approach in *Reczkowicz* and *Dolińska-Ficek and Ozimek* (both cited above) was consistent with the principle of subsidiarity, as the findings made in those judgments had relied on the case-law of the Supreme Court and the Supreme Administrative Court.

168. In sum, his right to an independent and impartial tribunal had been violated. He referred to the manner of appointment of judges of the Disciplinary Chamber, which had negatively affected their independence. Moreover, many persons appointed to that Chamber had strong links with the executive. The circumstances in which the Disciplinary Chamber had been established strongly suggested that the true motive for its creation was to limit judicial independence. Decisions taken by that Chamber to waive judges' immunity from prosecution and disciplinary measures against them were regarded by many as a measure of repression against independent judges. These circumstances showed that the Disciplinary Chamber did not present appearances of independence.

169. As regards impartiality, the applicant raised two points. First, he submitted that the main issue considered by the Disciplinary Chamber related to his actions aimed at verifying the lawfulness of nomination of the candidates to the NCJ which, in turn, was necessary for the assessment of independence of the judge who had given a decision reviewed by the applicant in the appellate proceedings. The applicant relied on the interpretation of law developed by the CJEU and the Supreme Court, which was undoubtedly relevant for all judges appointed with the participation of the recomposed NCJ, including those appointed to the Disciplinary Chamber. Therefore, the judges of the Disciplinary Chamber had an interest in eliminating such an interpretation. As a result, while issuing the resolution in the applicant's case, the judges of the Disciplinary Chamber decided, *de facto*, in their own case to protect their status. Secondly, the applicant referred to the presence on the bench of Judge A.T. who prior to his appointment to the Disciplinary Chamber, had not hidden his support for the ruling party.

2. The Government's submissions

170. The Government argued that there had been no manifest breach of domestic law with regard to the process of appointing the judges who had heard the applicant's case. Referring to *Guðmundur Andri Ástráðsson v. Iceland* ([GC], no. 26374/18, 1 December 2020), they noted that the Convention did not establish any universally binding model with regard to the procedure of appointment of candidates for judicial office, nor did it prohibit the cooperation of the authorities in that procedure. Accordingly, the applicant's assertion that the judges adjudicating in his case had been improperly appointed as a result of being subject to an unspecified political influence of the NCJ seemed to be devoid of substantive justification and could not constitute a violation of Article 6 § 1. The Polish legislature could not be accused of violating any standards applicable to the appointment of judges on account of the participation of the *Sejm* in the election of the judicial members of the NCJ. Although the representatives of the legislature and members of the executive, including the Minister of Justice, were members of the NCJ, the independent constitutional authority of the State, they acted only as its members without having a decisive role in making any decisions. In addition, it should be noted that the majority of the members of the NCJ were judges.

171. The Government submitted that the procedure for appointing all judges in Poland, including judges of the Disciplinary Chamber of the Supreme Court, was prescribed in the Constitution. Pursuant to Article 179 in conjunction with Article 144 § 3 (17) of the Constitution, judges were appointed by the President of the Republic, upon a proposal from the NCJ, for an indefinite period. The conditions to be met by a candidate for the position of a Supreme Court judge were laid down in the 2017 Act on the Supreme Court. The Government pointed out that the provisions of the 2017 Act on the Supreme Court did not differ from section 21 of the previous Act of 23 November 2002 on the Supreme Court. Consequently, they argued that the appointment of the judges under the new law, which had entered into force on 3 April 2018, did not result in a legal defect of the bench that examined the applicant's case.

172. The Government observed that the appointment of judges by the executive seemed not only to be admissible in Europe, but appeared even to be the rule. In many European countries the impact of the executive on nomination of judges was also legally permissible (e.g. Germany, the Czech Republic). This rule was also accepted in the Court's case-law. They also referred to the CJEU's preliminary ruling of 19 November 2019 in *A.K. and Others* (C-585/18, C-624/18 and C-625/18) which indicated that the mere fact that judges were appointed by an executive body did not give rise to a relationship of subordination of the former to the latter or to doubts as to the former's impartiality, if, once appointed, they were free from influence or pressure when carrying out their role.

173. The Government emphasised that the Convention did not contain any norms implying an obligation to apply a specific model of nomination of judges of the highest courts of the Contracting States. Nor did the Convention require the appointment of a judicial council or its participation in the procedure for appointing judges. They maintained that the procedure for appointing Supreme Court judges in Poland did not differ from solutions adopted in other countries. In this context, the Government presented examples of procedures for appointing judges in several States of the Council of Europe. The analysis of the existing solutions indicated that the participation of representatives of the judicial authorities in the procedure for appointing judges was often limited or not foreseen at all. In Poland, on the other hand, the participation of representatives of the judiciary in the procedure for appointing judges was relatively broad and was carried out by the NCJ. The risk of excessive influence of the executive on the process of appointing judges was thus reduced.

174. The Government submitted that the constitutional norms relating to the NCJ were scant (Article 186 and 187 of the Constitution) and that it was clear from them that the exact regulation of the NCJ was left to further consideration by the legislature. Having regard to the foregoing, the Government argued that the court which had dealt with the applicant's case was a "tribunal established by law" as required by Article 6 § 1. In particular, there had been no breach of domestic law as regards its establishment and functioning and there had been no violation of the ability of the judiciary to perform its duties free of undue interference. In this context, the Government referred to the principle of subsidiarity and the concept of the "margin of appreciation".

175. The Government argued that all doubts that might have arisen in connection with the status of the new Chambers of the Supreme Court and the judges appointed to them, in particular in the resolution of the joined Chambers of the Supreme Court of 23 January 2020, had been removed by the Constitutional Court's judgment of 20 April 2020 (no. U 2/20). In that judgment the Constitutional Court had held that the said Resolution was incompatible, *inter alia*, with Article 179 and Article 144 § 3 (17) of the Constitution. Accordingly, the Government submitted that the procedure for appointing judges of the Disciplinary Chamber of the Supreme Court was consistent with the domestic law. The judges met the requirements as to their qualifications, participated in the competition before the NCJ and were presented in a resolution of the NCJ to the President of the Republic who appointed them to serve as judges of the Supreme Court.

176. Given the final nature of the Constitutional Court's rulings and the lack of grounds for the Court to question its findings, the Government maintained that the Court should accept the conclusion of the Constitutional Court that there had been no breach of domestic law as regards the appointment of judges to the Disciplinary Chamber of the Supreme Court.

Accordingly, the complaint was devoid of any basis in Article 6 § 1 of the Convention.

177. The Government also submitted that their analysis of the most recent case-law of the Court and the CJEU concerning the rule of law led them to a conclusion that these courts applied double standards when considering identical domestic solutions. As regards the Court, the fact of applying double standards could be inferred from the comparative analysis of its judgments in *Ástráðsson v. Iceland* and *Reczkowicz v. Poland* (both cited above) concerning the appointment procedure for judges. They made the following comments in this regard. As, in the *Ástráðsson* case, the Court had found that it was not competent to review the country's procedure of judicial appointments, the rationale behind the Court declaring itself competent to adjudicate on the Polish system of judicial appointments was inexplicable. While in the Icelandic case it was assumed that in the light of the Convention, the appointment of judges directly by the legislative or executive power was acceptable as long as after the appointment they were free from influence when adjudicating, it remained inexplicable why in the case of *Reczkowicz* it had been assumed that the imputed influence of the said powers – *via* the NCJ – on the process of judicial appointments was unacceptable and why the Court had refrained from examining whether such influence had been exerted on the judges of the Disciplinary Chamber. Contrary to the *Ástráðsson* case, the *Reczkowicz* judgment supported the general admissibility of questioning the compliance of judicial appointments to the Disciplinary Chamber, whether or not individual judicial appointments had been questioned in any manner provided for by law. In their view, the reason behind the Court using double standards when assessing similar domestic solutions should be sought in the division of European countries into "older" and "newer" democracies.

178. The Government further submitted that the core of the problem with the assessment of Polish reforms of the judiciary was the election procedure of members of the NCJ as provided by the 2017 Amending Act. They noted that the Polish model did not differ from the solutions in force in other member States, and it provided for all the safeguards of judicial independence. The system implemented in Poland was patterned on the concept that applied in Spain. While the Spanish model was not questioned, the regulations that were adopted in Poland had received undue criticism.

179. The Government supplemented their observations with the submissions made by the First President of the Supreme Court. The latter had noted that the basic criterion for finding a violation of the right to a tribunal established by law was the existence of a manifest breach of domestic law. In her view, neither in *Reczkowicz* nor in *Dolińska-Ficek and Ozimek* (both cited above) had the Court indicated which legal norm had been breached by the introduction of a change in the model of electing judicial members of the NCJ. As a result, the Court could not demonstrate the manifest nature of this

alleged breach. Thus, it had not been established that the first step of the *Ástráðsson* test was satisfied.

180. The First President of the Supreme Court had noted that similar considerations applied to the applicant's case. There had been no violation of Article 6 § 1 in the present case due to a lack of "manifest breach of domestic law". There were absolutely no grounds for considering the change in the model of the election of judicial members of the NCJ as incompatible with the Constitution. This change not only did not violate constitutional provisions, but also implemented the competences entrusted to the legislature in the Constitution. As a result, the allegation that the composition of the reformed NCJ was unconstitutional was completely unfounded. Thus, there were no grounds for claiming that the participation of the recomposed NCJ in the procedure of appointing judges was defective or that the judges appointed on the motion of the NCJ were unlawfully appointed.

181. The First President of the Supreme Court submitted that Article 187 § 1(2) of the Constitution did not provide for a mandatory rule under which the fifteen judicial members of the NCJ were to be elected solely by their peers. Moreover, pursuant to its Article 187 § 4, the manner of choosing the NCJ's members had to be specified by statute. Accordingly, the legislature had a certain margin of appreciation in determining the model of the NCJ's composition. Thus, the change from the previous model of electing judicial members of the NCJ by entrusting their election to the *Sejm* could not be considered unconstitutional.

182. According to the First President of the Supreme Court, the assertion – based on the Constitutional Court's judgment of 18 July 2007 (no. K 25/07) – that before 2017 there had been a firmly established model, explicitly provided for in the Constitution, for appointing judicial members to the NCJ by their peers, and that it had been subsequently amended entailing a presumed violation of constitutional provisions, was not only false, but also entirely unfounded. To characterise the Constitutional Court's judgment of 18 July 2007 as allegedly confirming that "judicial members of the NCJ could be elected only by judges" had resulted from unfamiliarity with this judgment and its free citation by the Court. This was especially outrageous because repeating the references to the Constitutional Court's judgments in complete isolation from their context, and subsequently building arguments on this basis in the cases of *Reczkowicz* and *Dolińska-Ficek and Ozimek* (both cited above), was not only misleading but proved that the true meaning of the findings of the Constitutional Court was being ignored.

183. Moreover, the allegation that the Constitutional Court's position expressed in case K 25/07 had been subsequently substantively modified in its judgment of 20 June 2017 (no. K 5/17) had absolutely no grounds. Both of those judgments merely pointed out that there was no firmly established position as to which body had – pursuant to Article 187 § 1(2) in conjunction with Article 187 § 4 of the Constitution – sole competence to elect judicial

members of the NCJ. Thus, it could not reasonably be argued that the modification of the statutory model for the election of those members in 2017 contradicted the Constitution and resulted in a "manifest breach of the law". It also had to be noted that in both judgments the statements about the possibility of electing judges to the NCJ by their peers were made *obiter dicta*.

184. The First President of the Supreme Court argued that the allegation that the mere legislative change replacing the previous model for choosing the judicial members of the NCJ was, by its very nature, supposed to undermine the independence of that body and subsequently – which was more important – the independence of the judges appointed on the NCJ's motion to the President of the Republic, was entirely groundless and not supported by the Court's existing case-law. Moreover, the claim that the solution adopted by the Polish legislature regarding the composition of the present NCJ had been inconsistent with Polish law was beyond the powers of the Court and violated the principle of subsidiarity and the margin of appreciation.

185. The First President of the Supreme Court maintained that it was essential that judges could exercise their duties free from the influence and pressure of other authorities However, the presumed violation of this primary principle could not be derived solely from the fact that a particular judge was appointed by the NCJ, elected in accordance with the 2017 Amending Act. Thus, to infer a lack of independence of judges merely due to reservations concerning the changes in the method of election of the NCJ's judicial members was a far-reaching simplification. This argument was based, *inter alia*, on an unsubstantiated assumption that the mere appointment of the NCJ's judicial members by the *Sejm* automatically meant that the candidates for judges presented by this body, after their appointment by the President of the Republic, would not be independent. At the same time, this argument strongly deviated from the Court's current position, according to which, when assessing the independence of a judge, the attitude of a judge exercising the office entrusted to him or her was of paramount importance. Since, in the *Guðmundur Andri Ástráðsson* case (cited above), the Court had not questioned the independence of judges appointed by the Icelandic parliament, it could not – in the present case – be reasonably assumed that the lack of independence of judges appointed as members of the Disciplinary Chamber of the Supreme Court was due solely to the fact that their candidatures had been presented by a body partially elected by a parliamentary vote from amongst judges chosen by their peers.

3. Submissions of third-party interveners

(a) Judges for Judges Foundation and Professor L. Pech

186. The interveners submitted that the instant case concerned the applicant's suspension from his official duties by a body that had since been suspended twice by the CJEU and whose lack of independence had also been definitively established as a matter of EU law in the CJEU's judgment of 15 July 2021 in C-791/19. They focused on the EU dimension of the rule of law crisis in Poland, in particular on the most recent case-law of the CJEU.

187. The interveners outlined the findings of the European Commission and the European Parliament as regards the legislative changes made to the judicial system including, *inter alia*, (i) the lack of effective constitutional review, (ii) changes made to the retirement regime of the Supreme Court judges, and (iii) changes made to the structure of the Supreme Court.

188. They further provided an overview of the CJEU's key judgments and orders regarding legislative changes targeting the Polish judiciary. The interveners submitted that the Polish authorities had refused to comply with the CJEU's preliminary ruling of 19 November 2019 in *A.K. and Others* (C-585/18, C-624/18 and C-625/18). Applying that judgment, the joined chambers of the Supreme Court had found the Disciplinary Chamber to be established in breach of both Polish and EU law in several judgments and in the resolution of the joined Chambers of 23 January 2020. In order to prevent the application of the CJEU's judgment in *A.K. and Others*, the authorities had adopted the "muzzle law", i.e. the 2019 Amending Act, providing for sanctions against any judge attempting to apply the above-mentioned ruling. Similarly, the authorities had disregarded the CJEU's order of 8 April 2020 providing for immediate suspension of the application of the national provisions on the powers of the Disciplinary Chamber with regard to disciplinary cases concerning judges. The interveners further referred to the order of 14 July 2021 in case C-204/21 R, suspending the Disciplinary Chamber and the CJEU's judgment of 15 July 2021 in case C-791/19.

189. Their conclusion was that in the time since the European Commission had activated its pre-Article 7 TEU procedure in January 2016, the rule of law situation in Poland had gone from bad to worse. Currently, the authorities were actively organising a process of systemic non-compliance with the CJEU's rulings, but also with the Court's judgments relating to judicial independence, through, *inter alia*, the active collusion of unlawfully appointed judges and the Constitutional Court, in a broader context where the violation of the fundamental principles underlying the EU legal order had been "legalised" by Poland's "muzzle law". In their opinion, judicial independence had to be understood as having been structurally disabled by the Polish authorities.

(b) The International Commission of Jurists

190. The intervener submitted that, in the present case, it was important to take account of the broader context of the persistent pressures on judicial independence in Poland to appreciate the connection between the Convention rights of the applicant and their structural consequences. In this case for the right to a fair hearing under Article 6, but also for the rule of law as a whole. Since late 2015, the government of Poland had adopted and implemented a set of legislative and policy measures that had served to severely undermine the independence of the judiciary. Amendments to the laws governing all branches of the judiciary and the Constitutional Court had rendered courts, judges and judicial institutions vulnerable to political influence. The same was applicable to the process of election to the NCJ.

(c) The Commissioner for Human Rights of the Republic of Poland

191. The Commissioner submitted that despite the rulings of the CJEU and the Court, the Disciplinary Chamber of the Supreme Court had continued to decide cases concerning judges. Those cases concerned the waiving of immunity from prosecution or suspension of judges from the exercise of their judicial duties. For example, on 16 November 2021 the Disciplinary Chamber had decided to suspend Judge M.F. who, in a case, had implemented the rulings of the Court and the CJEU regarding that Chamber. The intervener also submitted that the authorities were further seeking to curtail the legal effects of the Strasbourg and Luxembourg rulings through the Constitutional Court's judgments. He referred, among others, to the Constitutional Court's judgment of 24 November 2011 (no. K 6/21) following the *Xero Flor v. Poland* judgment (see also paragraphs 103-105 above).

4. The Court's assessment

(a) General principles

192. The general principles regarding the scope of, and meaning to be given to, the concept of a "tribunal established by law" were set out in *Guðmundur Andri Ástráðsson* (cited above, §§ 211-234). In the same judgment, the Court developed a threshold test made up of three criteria, taken cumulatively, 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 the State authorities (ibid., §§ 243-252).

(b) Application of the general principles to the present case

193. In the present case, the alleged violation of the right to a "tribunal established by law" concerns the Disciplinary Chamber of the

Supreme Court, which ordered the applicant's suspension from his judicial duties. The applicant alleged that the judges of that Chamber had been appointed by the President of the Republic upon the recommendation of the new NCJ in manifest breach of the domestic law within the meaning adopted in the Court's case-law.

194. In *Reczkowicz* (cited above) the Court previously examined whether the fact that the applicant's case had been heard by the Disciplinary Chamber of the Supreme Court had given rise to a violation of her right to a "tribunal established by law", in the light of the three-step test formulated in *Guðmundur Andri Ástráðsson* (ibid., § 243).

195. As regards the first step of the test, the Court found it established in *Reczkowicz* that there had been a manifest breach of the domestic law for the purposes of the first step of the *Ástráðsson* test, in that the process of judicial appointments to the Disciplinary Chamber was inherently defective on account of the involvement of the NCJ as a body lacking independence from the legislature and the executive. In making that finding, the Court had regard to all the relevant considerations, and in particular to the convincing and forceful arguments of the Supreme Court in its judgment of 5 December 2019 (no. III PO 7/18) and the resolution of 23 January 2020, and to that court's conclusions as to the procedure for judicial appointments to the Disciplinary Chamber being contrary to the law – conclusions reached after a thorough and careful evaluation of the relevant Polish law from the perspective of the Convention's fundamental standards and of EU law, and in application of the CJEU's guidance and case-law (see *Reczkowicz*, cited above, §§ 227-265).

In this regard, for a number of reasons stated in the judgment, the Court was not persuaded that the Constitutional Court's judgment of 20 April 2020 (no. U 2/20) relied on by the Government had deprived the Supreme Court's resolution of its meaning or effects for the purposes of this Court's ruling as to whether there had been a "manifest breach of the domestic law" in terms of Article 6 § 1 (ibid., §§ 258-263).

196. As regards the second step of the test, the Court found in *Reczkowicz* that by virtue of the 2017 Amending Act, which had deprived the judiciary of the right to nominate and elect judicial members of the NCJ – a right afforded to it under the previous legislation and recognised by international standards – the legislative and the executive powers had achieved a decisive influence on the composition of the NCJ. The Act practically removed not only the previous representative system but also the safeguards of independence of the judiciary in that regard (ibid., § 274).

The Court went on to find that the breach of the domestic law that it had established, arising from non-compliance with the principle of the separation of powers and the independence of the judiciary, inherently tarnished the impugned appointment procedure since, as a consequence of that breach, the recommendation of candidates for judicial appointment to the Disciplinary Chamber – a condition *sine qua non* for appointment by the President of

Poland – had been entrusted to the NCJ, a body that lacked sufficient guarantees of independence from the legislature and the executive. A procedure for appointing judges which disclosed an undue influence of the legislative and executive powers on the appointment of judges was *per se* incompatible with Article 6 § 1 of the Convention and as such, amounted to a fundamental irregularity adversely affecting the whole process and compromising the legitimacy of a court composed of judges so appointed (ibid., §§ 266-276).

197. As regards the third step of the test, the Court found that there was no procedure under Polish law whereby the applicant could challenge the alleged defects in the process of appointment of judges to the Disciplinary Chamber of the Supreme Court (ibid., §§ 278-279).

198. In conclusion, the Court established in *Reczkowicz* that there had been a manifest breach of the domestic law which had adversely affected the fundamental rules of procedure for the appointment of judges to the Disciplinary Chamber of the Supreme Court, since that appointment was effected upon a recommendation of the NCJ, established under the 2017 Amending Act, a body which no longer offered sufficient guarantees of independence from the legislative or executive powers. The irregularities in the appointment process compromised the legitimacy of the Disciplinary Chamber to the extent that, following an inherently deficient procedure for judicial appointments, it had lacked and continued to lack the attributes of a "tribunal" which could be considered "lawful" for the purposes of Article 6 § 1. The very essence of the right at issue had therefore been affected (ibid., § 280).

199. Having regard to its overall assessment under the three-step test, the Court held in *Reczkowicz* that the Disciplinary Chamber of the Supreme Court was not a "tribunal established by law" and found a violation of Article 6 § 1 of the Convention in that regard (ibid., §§ 281-282).

200. In the present case, the Government contested the findings made in the *Reczkowicz* judgment. They claimed that there had been no manifest breach of the domestic law in the procedure for the appointment of judges to the Disciplinary Chamber of the Supreme Court. Referring to *Guðmundur Andri Ástráðsson* (cited above), they pointed out that the Convention did not establish any universally binding model as regards the procedure for judicial appointments, including the participation of a judicial council in such procedure. Furthermore, the appointment of judges by the executive, as in Poland, seemed to be the norm in Europe (see paragraphs 170-173 above). They also claimed that any doubts concerning the status of the new Chambers of the Supreme Court and the judges appointed to those chambers had been removed by the Constitutional Court's judgment of 20 April 2020 (no. U 2/20). The Government also stated that the Court applied double standards when assessing procedures for judicial appointments as could be inferred from a comparative analysis of the

Guðmundur Andri Ástráðsson and *Reczkowicz* judgments (both cited above; see paragraphs 175-178 above).

201. In the supplement to the Government's observations submitted by the First President of the Supreme Court, she maintained that the Court had not established a manifest breach of the domestic law in *Reczkowicz* and *Dolińska-Ficek and Ozimek* (both cited above). In particular, the change in the model for the election of judicial members of the NCJ could not be regarded as unconstitutional, nor could the participation of the recomposed NCJ in the procedure for judicial appointments be seen as defective. She also maintained that the assertion, based on the Constitutional Court's judgment of 18 July 2007 (no. K 25/07), that before 2017 there had existed a firmly established model of electing judicial members of the NCJ by their peers was unfounded. The same applied to the assertion that the Constitutional Court's position in that regard as adopted in the judgment of 18 July 2007 (no. K 25/07) had subsequently been modified in its judgment of 20 June 2017 (no. K 5/17) (see paragraphs 179-185 above).

202. To begin with, the Court notes that the *Reczkowicz* judgment became final on 22 November 2021 when the panel of the Grand Chamber took note of the Government's withdrawal of its request to refer that case to the Grand Chamber. The Government had the possibility of pursuing their arguments contesting the *Reczkowicz* findings before the panel of the Grand Chamber and eventually the latter in accordance with Article 43 of the Convention, but decided not to do so.

203. In any event, the Court reiterates that the *Reczkowicz* judgment did not call into question, as such, the judicial appointment system in Poland in which judges are appointed by the President of the Republic upon a recommendation of the NCJ. In that judgment the Court examined in depth the new model of electing judicial members of the NCJ and the characteristics of the NCJ as established under the 2017 Amending Act in the light of, *inter alia*, arguments of the parties and third-party interveners, as well as various rulings of the Supreme Court, the Constitutional Court and the CJEU. That examination led the Court in *Reczkowicz* to establish a manifest breach of the domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to the Disciplinary Chamber of the Supreme Court, since the appointment had been effected upon a recommendation of the recomposed NCJ, a body which no longer offered sufficient guarantees of independence from the legislative or executive powers (ibid., § 280). The Court observes that the same finding that the violation of the applicants' rights originated in the amendments to Polish legislation, which had 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, was reached in the *Dolińska-Ficek and Ozimek* judgment (cited above) in respect of the judges appointed to the Chamber of Extraordinary Review and Public

Affairs and in *Advance Pharma sp. z o.o.* judgment (cited above) in respect of the newly appointed judges of the Supreme Court's Civil Chamber, both judgments being final.

204. The Grand Chamber of the Court confirmed that the independence of the current NCJ was no longer guaranteed following the fundamental change in the manner of electing its judicial members, considered jointly with the early termination of the terms of office of the previous judicial members (see *Grzęda*, cited above, § 322).

205. Moreover, the Court refers to its considerations regarding judicial councils made in *Grzęda*, where it found that while there existed a widespread practice, endorsed by the Council of Europe, to put in place a judicial council as a body responsible for selecting judges, the Convention did not contain any explicit requirement to this effect. In the Court's view, whatever system was chosen by member States, they had to abide by their obligation to secure judicial independence. Consequently, where a judicial council was established, the Court considered that the State's authorities should be under an obligation to ensure its independence from the executive and legislative powers in order to, *inter alia*, safeguard the integrity of the judicial appointment process. The CJEU underlined the importance of this obligation in respect of the NCJ (see §§ 138 and 142-144 of the judgment of 19 November 2019 in *A.K. and Others*, C-585/18, C-624/18 and C-625/18; and §§ 125-131 of the judgment of 2 March 2021, *A.B. and Others*, C-824/18; see paragraphs 120-122 and 129 above), a conclusion fully endorsed by the Supreme Court in its judgment of 5 December 2019 (no. III PO 7/18) and the resolution of 23 January 2020 (see paragraphs 96-100 above) as well as the Supreme Administrative Court in its judgments of 6 May 2021 (see paragraph 95 above). The Court observed that States were free to adopt such a model as a means of ensuring judicial independence. What they could not do was instrumentalise it so as to undermine that independence (see *Grzęda*, cited above, § 307).

206. Lastly, the Court notes that the Constitutional Court found in its judgment of 10 March 2022 (no. K 7/21) that Article 6 § 1, first sentence, of the Convention in so far as, in the context of assessing whether the requirement of "tribunal established by law" had been met, (a) permitted the Court or national courts to disregard the provisions of the Constitution and statutes as well as the judgments of the Polish Constitutional Court, and (b) made it possible for [the Court] or national courts to independently create norms, by interpreting the Convention, pertaining to the procedure for appointing national court judges, was incompatible, *inter alia*, with Article 176 § 2 (organisation and jurisdiction of courts are determined by statute), Article 179 (judges are appointed by the President upon recommendation of the NCJ) in conjunction with Article 187 § 1 (composition of the NCJ) in conjunction with Article 187 § 4 (organisation, activity and procedures of the NCJ are determined by statute) as well as

Article 190 § 1 of the Constitution (binding force of the Constitutional Court's judgments). It further 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.

207. 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.* (all cited above) 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 (see *Grzęda*, § 277; see also *Reczkowicz*, § 263 *in fine* and *Dolińska-Ficek and Ozimek*, § 319, all cited above).

208. Furthermore, the Court reiterates 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 (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 293, ECHR 2005-III).

At this juncture, the Court also stresses 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*, cited above, § 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 (see Article 27 of the Vienna Convention in paragraph 107 above; see also *Grzęda*, cited above, § 340).

209. In view of the foregoing, the Court considers 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.* (all cited above), having regard to the principle of the binding force of its judgments under Article 46 § 1 of the Convention.

210. In sum and for the same reasons as in *Reczkowicz*, the Court concludes that the Disciplinary Chamber of the Supreme Court, which examined the applicant's case, was not a "tribunal established by law". In addition, the Court would note in passing – as this issue was not raised by the applicant (see paragraphs 130 and 158-169 above) – that there was no legal avenue under the domestic law through which he could appeal against his suspension to a judicial body satisfying the requirements of Article 6 § 1 of the Convention.

211. Accordingly, there has been a violation of Article 6 § 1 of the Convention in that regard.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL

212. The applicant complained that the facts of the case also disclosed a breach of the right to an independent and impartial tribunal as provided for in Article 6 § 1 of the Convention. As regards the alleged lack of impartiality, the applicant argued that the judges of the Disciplinary Chamber, when suspending him and indicating in the reasoning that a verification of the validity of the appointment of other judges was inadmissible, had acted in their own personal interest. They had intended to dissuade other judges from challenging the status of judges of the Disciplinary Chamber and sought to legitimise their own appointment. In addition, Judge A.T., who sat in the formation of the Disciplinary Chamber, had lacked impartiality on account of his support for the politicians of the ruling party prior to his appointment.

213. The Government contested the applicant's view and argued that there had been no violation of this provision of the Convention.

214. The Court notes that in the present case the complaints concerning the "tribunal established by law" and "independence and impartiality" requirements stem from the same underlying problem of an inherently deficient procedure for judicial appointments to the Disciplinary Chamber of the Supreme Court. As the Court found in *Reczkowicz* and the present case, the irregularities in question were of such gravity that they undermined the

very essence of the right to have the case examined by a tribunal established by law (see *Reczkowicz*, cited above, §§ 280-281, and paragraph 210 above).

215. Having made that finding, the Court concludes that the remaining question as to whether the same irregularities have also compromised the independence and impartiality of the same court has already been answered in the affirmative and does not require further examination (see also *Advance Pharma sp. z o.o.*, cited above, § 353).

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

216. The applicant complained that his right to respect for his private life had been violated on account of the Disciplinary Chamber's decision of 4 February 2020 suspending him from his judicial duties. He relied on Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. Applicability of Article 8

(a) The Government's submissions

217. Referring to *Denisov v. Ukraine* ([GC], no. 76639/11, 25 September 2018), the Government maintained that there was no sufficient evidence to conclude that the alleged loss of the applicant's social or professional reputation reached the degree of seriousness required by Article 8 of the Convention. Equally, there was no evidence to demonstrate that on account of the impugned events the applicant's "inner circle", as well as his opportunity to establish and develop relationships with others, had been affected.

218. The Government stressed that whereas Article 8 of the Convention covered a person's reputation, it could not be relied on in order to complain of a loss of reputation which was the foreseeable consequence of one's own actions, be it a criminal offence or other misconduct entailing a measure of legal responsibility with foreseeable negative effects on "private life". They noted in this context that the decision on the applicant's suspension had been issued in the proceedings concerning his activities as a judge. Furthermore, in their view, the applicant had acted contrary to section 89(1) of the 2001 Act, making the matter related to his judicial office public by presenting statements to the media on the termination of his secondment. Thus, the

applicant could not rely on Article 8 to complain of a loss of reputation which should be seen as the foreseeable consequence of his own actions.

219. The Government argued that the suspension of the applicant from his duties, first by the president of the court, and then upon the resolution of the Disciplinary Chamber, while reducing the amount of his remuneration for the duration of the suspension, could have been perceived by him as an interference with his private life, his good name or, lastly, his financial situation. However, the suspension, which had been ordered in the circumstances specified by the domestic law, and taking into account the judicial scrutiny of such acts, could not be considered in itself as infringing the Convention standards.

220. Certain acts of a judge that undermined trust in the judiciary, in particular the commission of a disciplinary offence (which, in parallel, could be characterised as an intentional offence subject to public prosecution) could constitute the basis for a decision that, in the interests of the administration of justice, a judge should be temporarily excluded from exercising his office. The correlate of the above, related to the suspension of the right, but also to the obligation to perform work, was the reduction of the remuneration paid during this period. Thus, the legislature recognised the primacy of the value of social trust in the judiciary over the particular interests of a judge, which implied a need to temporarily impose measures aimed at securing the above-mentioned social trust in the courts. In conclusion, the Government argued that the complaint under Article 8 was incompatible *ratione materiae* with the Convention.

(b) The applicant's submissions

221. The applicant maintained that there had been an interference with his right to respect for his private life, referring to the consequences of his suspension for his private life.

222. First, he argued that the Disciplinary Chamber's resolution had adversely affected his reputation. The mere fact of suspension of a judge from his professional duties could harm his or her reputation in the eyes of public opinion as it suggested that such a judge had committed some particularly serious offence. In the applicant's case this effect was reinforced by parts of the reasoning given by the Disciplinary Chamber. The Disciplinary Chamber had held, *inter alia*, that the applicant had "breached the provisions of the Constitution by undermining the constitutional legal order", set "an exceptionally bad example for other judges", committed "an obvious violation of the law", and that his active judicial service throughout the proceedings "would be contrary to the interests of the administration of justice". The Disciplinary Chamber had therefore been extremely critical of the applicant's competences and his ethical qualifications.

223. Secondly, the Disciplinary Chamber's resolution had had very serious financial repercussions for the applicant as his salary had been

reduced by 40% for an indefinite period of time. As a judge the applicant had very limited possibilities of taking up any other employment.

224. Thirdly, referring to the *Gumenyuk and Others v. Ukraine* judgment (no. 11423/19, 22 July 2021), the applicant argued that the deprivation of his right, as a judge, to exercise his adjudicatory functions was a serious interference with his right to respect for his private life. Fourthly, even though the suspension was a temporary measure, it had been in effect from 4 February 2020 to 23 May 2022. In conclusion, the Disciplinary Chamber's resolution amounted to a serious interference with his private life.

225. The applicant further submitted that his actions, which the Disciplinary Chamber had considered as grounds for suspension, did not constitute any form of misconduct. With regard to his act which had allegedly been contrary to section 89 of the 2001 Act, the applicant argued that it had constituted an exercise of his freedom of speech and could not serve as a legitimate ground for imposition of such a severe measure as suspension. In any event, the Disciplinary Chamber's resolution had not focused on the alleged breach of section 89 of the 2001 Act.

(c) The Commissioner for Human Rights of the Republic of Poland

226. The Commissioner argued that the decisions of the Disciplinary Chamber could undoubtedly have an impact on the private life and reputation of judges. It was particularly the case of judges who had been sanctioned for their decisions giving effect to the case-law of the Court or the CJEU. He underlined the objective nature of the actions taken against the applicant which were linked to the exercise of his judicial duties. The fact of being subjected to disciplinary proceedings in such situations would damage the reputation of judges. The actions of public authorities which could impugn a judge's reputation should be based on criteria set out in the law, duly justified by the relevant reasons and limited to what was strictly linked to the exercise of professional duties.

(d) The Court's assessment

(i) General principles

227. The general principles regarding the applicability of Article 8 to employment-related disputes were summarised by the Court in *Denisov* (cited above, §§ 115-117) as follows:

> "115. The Court concludes from the above case-law that employment-related disputes are not *per se* excluded from the scope of "private life" within the meaning of Article 8 of the Convention. There are some typical aspects of private life which may be affected in such disputes by dismissal, demotion, non-admission to a profession or other similarly unfavourable measures. These aspects include (i) the applicant's "inner circle", (ii) the applicant's opportunity to establish and develop relationships with others, and (iii) the applicant's social and professional reputation. There are two ways in which a private-life issue would usually arise in such a dispute: either because

of the underlying reasons for the impugned measure (in that event the Court employs the reason-based approach) or – in certain cases – because of the consequences for private life (in that event the Court employs the consequence-based approach).

116. If the consequence-based approach is at stake, the threshold of severity with respect to all the above-mentioned aspects assumes crucial importance. It is for the applicant to show convincingly that the threshold was attained in his or her case. The applicant has to present evidence substantiating consequences of the impugned measure. The Court will only accept that Article 8 is applicable where these consequences are very serious and affect his or her private life to a very significant degree.

117. The Court has established criteria for assessing the severity or seriousness of alleged violations in different regulatory contexts. An applicant's suffering is to be assessed by comparing his or her life before and after the measure in question. The Court further considers that in determining the seriousness of the consequences in employment-related cases it is appropriate to assess the subjective perceptions claimed by the applicant against the background of the objective circumstances existing in the particular case. This analysis would have to cover both the material and the non-material impact of the alleged measure. However, it remains for the applicant to define and substantiate the nature and extent of his or her suffering, which should have a causal connection with the impugned measure. Having regard to the rule of exhaustion of domestic remedies, the essential elements of such allegations must be sufficiently raised before the domestic authorities dealing with the matter."

(ii) Application of the general principles to the present case

228. In the present case, the applicant's suspension was based on reasons related to the issuance of the order of 20 November 2019. In its decision of 4 February 2020 the Disciplinary Chamber found that, in issuing the impugned order contrary to the law, the applicant had undermined the authority of the court and the essential interests of the service (see paragraph 41 above). The reasons underpinning the applicant's suspension were linked to the performance of his professional duties and had no connection to his private life. It is therefore the consequence-based approach which may bring the issue under Article 8.

229. The Court will first analyse the consequences of the applicant's suspension for his social and professional reputation.

230. In the Government's contention, the applicant could not rely on Article 8 to complain about the loss of his reputation which, in their view, stemmed from his own actions. They pointed, in particular, to the applicant's statements to the media on the subject of termination of his secondment which had led to the disciplinary charge of violating section 89(1) of the 2001 Act (see paragraph 218 above). The applicant claimed that his actions, which the Disciplinary Chamber had considered as grounds for suspension, did not constitute any form of misconduct. As regards the alleged breach of section 89(1) of the 2001 Act, the applicant argued that his action constituted an exercise of his freedom of expression (see paragraph 225 above).

231. The Court notes that the applicant contested the very existence of any misconduct on his part. Considering all the relevant circumstances, it finds that the alleged misconduct on his part is indeed not evident. It cannot therefore apply the *Gillberg* exclusionary principle (see *Gillberg v. Sweden* [GC], no. 41723/06, § 98, 3 April 2012, and *Denisov*, cited above, §§ 98 and 121), according to which in cases where the negative effects complained of are limited to the consequences of the unlawful conduct which were foreseeable by the applicant, Article 8 cannot be relied upon to allege that such negative effects encroach upon private life. Furthermore, the Disciplinary Chamber's decision on the applicant's suspension of 4 February 2020 did not refer to the disciplinary charge of violating section 89(1) of the 2001 Act as justification for that measure. Consequently, the Government cannot rely on this circumstance to claim that Article 8 was inapplicable to the present case.

232. As noted above, the applicant's suspension was based on the alleged shortcomings related to the issuing of his order of 20 November 2019 (see paragraph 42 above). The Disciplinary Chamber found in its decision of 4 February 2020 that the applicant had breached several provisions of the Code of Civil Procedure by issuing his order without a legal basis and violated various provisions of the Constitution, in particular those regarding the President's prerogative to appoint judges (see paragraph 50 above). It went on to state that the applicant's action had undermined the important interests of the service and the authority of the court. The Disciplinary Chamber further observed that the applicant had given an exceptionally bad example to other judges and that his action could threaten to cause chaos in the judicial system (see paragraph 51 above). It also considered that the applicant's actions fell foul of the rules of professional ethics (see paragraphs 44 and 46 above).

233. In the Court's view, those statements, couched in virulent terms, concerned the applicant's performance as a judge and expressed a clearly negative opinion as to his judicial competence, professionalism and integrity. The criticism expressed with regard to the applicant undoubtedly related to the core of his judicial integrity and his professional reputation and resulted in the latter being adversely affected (see *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 166 *in fine*, ECHR 2013, which concerned dismissal from the post of judge of the Supreme Court for a "breach of oath"; compare and contrast *Denisov*, cited above, § 126, which concerned dismissal from the position of president of the Court of Appeal based on the unsatisfactory performance of administrative tasks; also compare and contrast *Camelia Bogdan*, cited above, § 90, where a judge was suspended for some nine months in connection with a disciplinary offence, but there were no arguments that the measure attained the requisite degree of severity). A further consequence of the Disciplinary Chamber's findings is that in the eyes of at least some members of society, the applicant could be perceived as

being unworthy of performing a judicial function (compare and contrast, *Xhoxhaj v. Albania*, no. 15227/19, § 363 *in fine*, 9 February 2021).

234. Another relevant factor is the fact that the disciplinary officer alleged that the issuing of the order of 20 November 2019 had amounted to a criminal offence of abuse of power, which, in the Court's view, likewise called into question the core of the applicant's judicial integrity and, as such, was evidently capable of adversely affecting his professional reputation in the eyes of the general public. It notes that the Disciplinary Chamber in its first-instance decision found this allegation unsubstantiated, whilst it did not address this issue in its second-instance decision. It further transpires from the Disciplinary Chamber's decision on lifting the applicant's suspension, given on 23 May 2022, that the State Prosecutor's Office still carried out the investigation in that case, but apparently without noticeable progress (see paragraph 77 above).

235. As to the consequences of the applicant's suspension for his "inner circle", he contended that the 40% reduction of his salary during the relevant period had had important financial repercussions for him (see paragraph 223 above). Even assuming that the reduction in the applicant's remuneration did not seriously affect the "inner circle" of his private life, the Court finds that the impugned suspension deprived him of the opportunity to continue his judicial work and to live in the professional environment where he could pursue his goals of professional and personal development during the relevant period (see, *Gumenyuk and Others*, cited above, § 88). These effects for the applicant's private life have not yet been fully put right since, according to the information submitted by the applicant, following the lifting of his suspension, the President of the Olsztyn District Court decided that he should use up his unspent annual leave until 19 July 2022 and subsequently transferred the applicant, against his will, from the Civil to the Family and Juvenile Division of his court (see paragraph 79 above).

236. The consequences of the applicant's suspension were indisputably significant, given that he was prevented from exercising his judicial duties, constituting his fundamental professional role, from 4 February 2020 to 23 May 2022, i.e. for 2 years, 3 months and 18 days, which must be considered a substantial period (compare and contrast the period of some nine months of suspension of a judge in connection with a disciplinary offence in *Camelia Bogdan*, cited above, § 86). This appears to have been acknowledged by the Disciplinary Chamber itself in its resolution of 23 May 2022, lifting the impugned measure and holding that his suspension for that period – given the temporary nature of that measure – could be regarded as unduly interfering with the principle of irremovability of a judge enshrined in the Polish Constitution (see paragraph 78 above).

237. Having regard to the nature and the duration of the various negative effects stemming from the applicant's suspension, the Court considers that

the impugned measure affected his private life to a very significant degree, falling therefore within the scope of Article 8 of the Convention (see, *mutatis mutandis*, *Gumenyuk and Others*, cited above, §§ 88-89). The Government's objection is therefore dismissed.

2. Non-exhaustion of domestic remedies

(a) The Government's submissions

238. The Government raised a further preliminary objection that the complaint under Article 8 of the Convention was premature. In their view, the applicant had at his disposal an effective domestic remedy, namely a civil action for protection of personal rights under Articles 23 and 24 of the Civil Code. The applicant had lodged such a civil action against the Supreme Court and the first-instance court had given judgment in his case, which however was not final.

239. The Government also claimed that the applicant could have lodged a complaint under section 41b of the 2001 Act had he considered that the disciplinary proceedings against him were groundless or sought to engage the disciplinary liability of the disciplinary officer, had he felt that inquiries or disciplinary proceedings had been unfounded. The applicant, however, had not pursued those possibilities.

(b) The applicant's submissions

240. The applicant contested the Government's plea that his complaint under Article 8 was premature on account of the pending civil proceedings for protection of his personal rights. He referred to the same arguments as those made earlier in respect of the premature character of the complaint under Article 6 § 1 (see paragraphs 145-147 above).

(c) The Court's assessment

241. For the same reasons as stated above (see paragraphs 154-155 above), the Court finds that the remedies invoked by the Government could not have proved effective also with regard to the applicant's complaint under Article 8 of the Convention. The Government pleaded, in general terms, that the applicant's civil action for the protection of his personal rights under Articles 23 and 24 of the Civil Code was an effective remedy that could put right the alleged violation. However, they failed to explain how it could have specifically remedied the applicant's grievances under Article 8 of the Convention in the sense of remedying directly the impugned state of affairs and provided him with the requisite redress for the purposes of Article 35 § 1 of the Convention. In that regard, the Court would reiterate that, as regards the burden of proof, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time. Once this burden has

been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Vučković and Others*, cited above, § 77, with further references to the Court's case-law).

In this context, the Court would also refer to the Disciplinary Chamber's unequivocal position as to the lack of competence of civil courts and its exclusive jurisdiction in all matters concerning the applicant's suspension and the consequences thereof (see paragraph 76 above) and the Court's own finding that the civil proceedings against the Olsztyn District Court and the Supreme Court could not have resulted in setting aside or amending the Disciplinary Chamber's decision of 4 February 2020 on the applicant's suspension (see paragraph 154 above). Accordingly, the Court dismisses the objection raised by the Government.

3. Overall conclusion on admissibility

242. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

243. The applicant maintained that the interference with his right to respect for his private life was not "in accordance with the law", even though it formally had a legal basis in sections 130 and 131 of the 2001 Act. The law did not meet the "quality of law" requirements because it did not afford the applicant protection against arbitrariness stemming from the actions of a body failing to meet the requirements of Article 6 § 1.

244. The applicant argued that the requirement of lawfulness could not have been limited to a mere examination of the existence of a formal legal basis for an interference. It was equally important that such interference be imposed in a lawful manner. In his view, the interference at issue could not have been considered lawful as it had been imposed by the Disciplinary Chamber, which was not a "tribunal established by law". Moreover, that body did not satisfy the requirements of independence and impartiality. On this account, there were strong arguments for finding that the Disciplinary Chamber was not even a court. Accordingly, any measure imposed by that body against the applicant had to be considered unlawful.

245. Furthermore, the applicant's decision to verify the nomination of candidates to the NCJ and the legality of the appointment of the first-instance judge could not be regarded as a violation of the law or judicial ethics. To the

contrary, judges were obliged under the Constitution, EU law and the Convention to safeguard the right of any individual to an independent and impartial tribunal established by law. Moreover, it was inconsistent with the standards of the rule of law to punish a judge for the content of his rulings, with the exception of some extraordinary cases of abuse of power.

246. The applicant also argued that the rules of disciplinary responsibility of judges had to respect the requirements of judicial independence. In making his order of 20 November 2019, the applicant had not acted in bad faith or in excess of his competences. His case showed that even without a formal amendment to section 107(1) of the 2001 Act this provision had been given a new interpretation by the unlawfully established Disciplinary Chamber. As a result, the provision was now being used to exert pressure on judges who merely applied the Convention and EU law standards.

247. Next, the applicant argued that the interference in his case had not furthered any legitimate aim. His actions had been aimed at verifying the process of nomination of candidates to the NCJ and the legality of appointment of the first-instance judge and thus served to safeguard the right to an independent and impartial tribunal established by law. In addition, they had been grounded in the case-law of the Supreme Court and the CJEU. In the applicant's view, the actual reason for his suspension had been the intention of the political authorities, disciplinary officers and the Disciplinary Chamber, to create a chilling effect in order to deter the applicant and other judges from questioning the status of unlawfully appointed judges.

248. The applicant further submitted that his suspension had not been "necessary in a democratic society" as it was manifestly disproportionate to his actions and not supported by "relevant and sufficient reasons". He referred to his arguments made earlier in respect of the applicability of Article 8.

2. The Government's submissions

249. The Government referred to their earlier submission that the complaint under Article 8 was incompatible *ratione materiae*. Should the Court decide otherwise, they argued that the Disciplinary Chamber's resolution of 4 February 2020 complied with the requirements of Article 8 § 2 of the Convention. The said resolution was based on the Act on the Organisation of Ordinary Courts, which permitted a disciplinary court to suspend a judge if there was a reasonable suspicion that the judge had committed a disciplinary offence. Therefore, the alleged interference was in accordance with the law.

250. The Government maintained that the impugned interference had pursued the legitimate aims of the protection of the rights of others and of the judicial system. They referred to the Disciplinary Chamber's view that the applicant's actions had undermined the authority of the judiciary, obstructed the proper administration of justice and infringed the rights of the parties to the proceedings.

251. Actions of a judge that undermined the trust in the judiciary, in particular by committing a disciplinary offence, could constitute the basis for a decision to suspend that judge if that was required by the interests of the administration of justice and of parties to court proceedings. They submitted that the legislature recognised the primacy of the value of social trust in the judiciary and judges over the particular interests of a judge, which implied a need to temporarily impose measures aimed at securing that trust. Thus, the disciplinary proceedings against the applicant had served legitimate aims and allowed the disciplinary officer and the Disciplinary Chamber to examine whether the applicant had committed the disciplinary offences in question.

252. As regards the assessment of the necessity, the Government submitted that the alleged interference had not gone beyond what was strictly necessary in a democratic society and was proportionate to the legitimate aims pursued.

253. They emphasised that to hold the office of judge was associated with certain limitations resulting from Article 178 § 3 of the Constitution, which restricted judges' constitutional rights of a political nature, such as freedom of speech and belief or freedom of assembly and association inasmuch as these freedoms were exercised in a public dimension. This provision enshrined one of the guarantees of judicial independence by stipulating that a judge could not belong to a political party or perform public activities incompatible with the principles of judicial independence.

254. The Government referred to the wording of an oath that judges took upon their appointment in accordance with section 66 of the 2001 Act, which stated that they were to serve faithfully the Republic of Poland, to safeguard the law, to discharge their duties conscientiously, to administer justice impartially in accordance with the law and their conscience, to keep State and professional secrets and to act in accordance with the principles of propriety and honesty. Pursuant to section 82 of the same Act, judges were required to act in compliance with the judicial oath and respect the authority of their office at all times. Furthermore, judges should submit their requests or complaints in matters related to their office only through official channels and they should not refer to other institutions in this regard, nor make the matter in question public, as prohibited by section 89(1) of the 2001 Act.

255. In addition to the above constitutional and statutory provisions, judges should abide by the rules laid down in the Collection of Principles of Judges' Professional Ethics. The Government submitted that the violation of the dignity of judicial office constituted the basis of disciplinary liability of a judge. They referred to case-law of the Supreme Court explaining the concept of the dignity of judicial office.

256. Taking account of the above regulations and practice, the Government maintained that all Polish judges, including the applicant, were subjected to the same regulations, which required them to abide by the highest moral, ethical and professional standards of conduct. Any signs of behaviour

deviating from such standards would be scrutinised and thoroughly examined by the relevant bodies, such as the disciplinary officer, in order to safeguard the authority and impartiality of the judiciary. The Government submitted that the measures taken in the applicant's case had been proportionate and necessary in terms of Article 8 § 2 of the Convention. The resolution of the Disciplinary Chamber of 4 February 2020 had suspended the applicant from his judicial (official) duties, but had not challenged his status as judge. Thus, in the Government's view, the measure at issue should be regarded as proportionate to the legitimate aims pursued.

257. In conclusion, the Government submitted that the domestic authorities had carried out a careful analysis and had sought to strike a balance between the protection of the applicant's private life and the need to protect the rights of others and the judicial system as a whole. Consequently, the Government argued that no violation of Article 8 of the Convention had occurred in the case.

3. The Commissioner for Human Rights of the Republic of Poland

258. The Commissioner argued that in cases where there was a risk of interference with judicial independence judges should be afforded procedural safeguards protecting them from arbitrariness on the part of the authorities. Judges should not have their disciplinary liability engaged for disagreeing with the representatives of the executive in cases where the constitutionality or the Convention-compliance of laws remained doubtful. A strict observance of those requirements was particularly necessary in cases where the interference with the rights of a judge was intended to produce a chilling effect on all judges and, in consequence, undermine judicial independence. The Commissioner submitted that disciplinary, administrative and criminal measures had been regularly taken against judges who criticised the changes in the Polish judiciary in order to deprive them of the confidence of the public. The practice of the disciplinary authorities indicated that the proceedings initiated by them had been aimed not at holding a judge to account for misconduct but at exerting pressure on the entire judicial community.

4. The Court's assessment

259. As established above, the applicant's suspension from exercising judicial duties affected his private life to a very significant degree (see paragraph 237 above). The impugned measure therefore constituted an interference with the applicant's right to respect for his private life (see, *mutatis mutandis*, *Gumenyuk and Others*, cited above, § 93).

260. Such interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", pursuing one or more of the legitimate aims

listed therein, and being "necessary in a democratic society" in order to achieve the aim or aims concerned.

(a) "In accordance with the law"

(i) General principles concerning the lawfulness of interference

261. The expression "in accordance with the law" requires, firstly, that the impugned measure should have some basis in domestic law. It states the obligation to conform to the substantive and procedural rules thereof (see *Gumenyuk and Others*, cited above, § 95).

262. Secondly, it refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him or her, and be compatible with the rule of law (see, among other authorities, *Kopp v. Switzerland*, 25 March 1998, § 55, *Reports of Judgments and Decisions* 1998-II). The phrase thus implies, *inter alia*, that domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which, and the conditions on which, the authorities are entitled to resort to measures affecting their rights under the Convention (see *Fernández Martínez v. Spain* [GC], no. 56030/07, § 117, ECHR 2014 (extracts) with further references, and *De Tommaso v. Italy* [GC], no. 43395/09, §§ 106-109, 23 February 2017).

263. The interference with the right to respect for one's private and family life must therefore be based on a "law" that guarantees proper safeguards against arbitrariness. There must be safeguards to ensure that the discretion left to the executive is exercised in accordance with the law and without abuse of powers. The requirements of Article 8 with regard to safeguards will depend, to some degree at least, on the nature and extent of the interference in question (see *Solska and Rybicka v. Poland*, nos. 30491/17 and 31083/17, § 113, 20 September 2018, with further references).

264. The Court reiterates that it is primarily for the national authorities, in particular the courts, to resolve problems of interpretation of domestic legislation. Unless the interpretation is arbitrary or manifestly unreasonable, the Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention (see, among many others, *Molla Sali v. Greece* [GC], no. 20452/14, § 149, 19 December 2018, and *Grzęda*, cited above, § 259).

(ii) Application of the general principles to the present case

(α) Compliance with domestic law and the rule of law

265. In terms of statute law, the Court observes that the decision on the applicant's suspension was based on sections 130 and 131 of the 2001 Act taken in conjunction with section 107(1) of the 2001 Act. However, even though the interference complained of had the basis in a statutory law, the question arises whether it was lawful for the purposes of the Convention,

notably whether the relevant legal framework was foreseeable in its application and compatible with the rule of law (see *Gumenyuk and Others*, cited above, § 97).

266. The Court notes that, in accordance with Article 180 § 2 of the Polish Constitution, suspension of a judge from office can only result from a court judgment (see paragraph 84 above). It has already found in *Reczkowicz* that the Disciplinary Chamber of the Supreme Court failed to satisfy the requirements of a "independent and impartial tribunal established by law" prescribed in Article 6 § 1 of the Convention. It is also to be reiterated that, in that context, the Court has held that the irregularities in the appointment process compromised the legitimacy of the Disciplinary Chamber to the extent that, following an inherently deficient procedure for judicial appointments, it did lack and continues to lack the attributes of a "tribunal" which is "lawful" (see *Reczkowicz*, cited above, § 280).

267. The Court further notes that the CJEU's judgment of 15 July 2021 in *Commission v. Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596) held that Poland had failed to fulfil its obligations under Article 19(1) TEU by, in particular, "failing to guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court" (see paragraph 126 above). Furthermore, the Supreme Court in its interpretative resolution of 23 January 2020 found that the Disciplinary Chamber had "structurally fail[ed] to fulfil the criteria of an independent court within the meaning of Article 47 of the Charter and Article 45 § 1 of the Constitution of the Republic of Poland and Article 6 § 1 [of the Convention]" (see paragraphs 99-100 above).

268. In view of the foregoing and having regard to its above considerations under Article 6 § 1 (see paragraphs 193-211 above), the Court finds that the decision suspending the applicant was given by a body which cannot be considered a "court" for the purposes of the Convention, despite the explicit requirement under Article 180 § 2 of the Polish Constitution that a decision suspending a judge from office must emanate from a court ruling.

269. The impugned interference thus cannot be regarded as lawful in terms of Article 8 of the Convention as not being based on a "law" that afforded the applicant proper safeguards against arbitrariness (see paragraph 263 above). This conclusion in itself would be sufficient for the Court to establish that the interference with the applicant's right to respect for his private life was not "in accordance with the law" within the meaning of Article 8 of the Convention.

270. Nevertheless, the Court finds it appropriate to examine the complaint further and establish whether the "quality of law" requirements were met.

(β) Compliance with "quality of law" requirements

271. The Court notes that the deputy disciplinary officer alleged that the applicant had committed the disciplinary offence of compromising the

dignity of judicial office, as provided for in section 107(1) of the 2001 Act, by issuing the order of 20 November 2019 in excess of his powers and without a legal basis. It observes that the above-mentioned provision refers to two separate types of professional misconduct, first, an obvious and gross violation of the law and, second, an act compromising the dignity of judicial office. The Disciplinary Chamber, in its first-instance decision of 23 December 2019, held that the giving of an unfounded judicial decision could not have been characterised, in the light of the existing case-law, as the disciplinary offence of compromising the dignity of judicial office (see paragraph 29 above). Nonetheless, the Disciplinary Chamber in its decision of 4 February 2020 suspended the applicant, having characterised his conduct both as an obvious and gross violation of the law and as compromising the dignity of judicial office (see paragraph 41 *in fine* above).

272. The Court finds this approach problematic in two respects. Firstly, because the Disciplinary Chamber's decision of 4 February 2020 characterised the issuing of the impugned order as the disciplinary offence of compromising the dignity of judicial office, without at all addressing the pertinent point made in the first-instance decision of 23 December 2019 that there had been no grounds for such a proposition in the light of the existing case-law. Secondly, despite the fact that the disciplinary charge against the applicant concerned solely the compromising of the dignity of judicial office in connection with the issuance of the impugned order, the Disciplinary Chamber's decision of 4 February 2020 characterised it also as an "obvious and gross violation of the law", which is a separate type of professional misconduct. The Court finds that in doing so, the Disciplinary Chamber ruled beyond the scope of the disciplinary charge that had been brought against the applicant.

273. The Court will also analyse whether it was foreseeable for the applicant that the Disciplinary Chamber would characterise his judicial order of 20 November 2019 as amounting to an "obvious and gross violation of the law" within the meaning of section 107(1) of the 2001 Act. In the applicant's contention, by making the impugned order he had intended to verify the nomination process of candidates to the new NCJ and the legality of the appointment of the first-instance judge, having regard to the CJEU's preliminary ruling of 19 November 2019 in the case of *A.K. and Others*. He claimed that his decision had been aimed at safeguarding the right to an independent and impartial tribunal established by law and could not be regarded as a violation of the law. The Government argued that the measure at issue was lawful since the 2001 Act permitted the suspension of a judge where there was a reasonable suspicion that he had committed a disciplinary offence.

274. The Court has recognised that in certain areas it may be difficult to frame laws with high precision and that a certain degree of flexibility may even be desirable to enable the national courts to develop the law in the light

of their assessment of what measures are necessary in the particular circumstances of each case. These qualifications, imposing limits on the requirement of precision of statutes, are particularly relevant to the area of disciplinary law (see *Oleksandr Volkov*, cited above, §§ 175-176). At the same time, the existence of specific and consistent interpretational practice concerning the legal provision in issue constitutes a factor leading to the conclusion that the provision was foreseeable as to its effects (ibid., § 179).

275. The Court notes that the Disciplinary Chamber stated in its first-instance decision that the giving of an unjustified or erroneous judicial decision could possibly be considered as professional misconduct resulting in liability for an obvious and gross violation of the law under section 107(1) of the 2001 Act (see paragraph 30 above). As noted above, the Disciplinary Chamber's second-instance decision of 4 February 2020 characterised the issuance of the applicant's order of 20 November 2019 also as an "obvious and gross violation of the law", without however referring to any of the earlier domestic case-law on the interpretation of this concept, a fact which the Court finds striking and indicative of the lack of foreseeability (see paragraph 41 *in fine* above; see also paragraph 128 above regarding the findings of the CJEU's judgment in *Commission v. Poland (Disciplinary regime for judges)*).

276. In the Court's view, the imposition of disciplinary liability in connection with the giving of a judicial decision must be seen as an exceptional measure and be subject to restrictive interpretation, having regard to the principle of judicial independence (see, *mutatis mutandis*, *Oleksandr Volkov*, cited above, § 180; see also paragraphs 137 and 138 of the CJEU's judgment in *Commission v. Poland (Disciplinary regime for judges)*, paragraph 128 above). It further refers to the recommendation made by the Committee of Ministers of the Council of Europe to member States that the interpretation of the law by judges should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence (see paragraph 109 above; similar view was expressed by the CCJE, see paragraphs 114-115 above).

277. Moreover, the Court has discerned a common thread running through the institutional requirements of Article 6 § 1, that is, of "independence", "impartiality" and "tribunal established by law", in that they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers (see *Guðmundur Andri Ástráðsson*, § 231 and *Reczkowicz*, § 260, both cited above). It has further noted that the need to maintain public confidence in the judiciary and to safeguard its independence *vis-à-vis* the other powers underlay each of those requirements (see *Guðmundur Andri Ástráðsson*, cited above, § 233). Analysed in this context, there is no indication that the applicant's order of 20 November 2019 was motivated by any reason other than the need to assess compliance with the above-mentioned institutional requirements of Article 6 § 1 of the

Convention. Furthermore, the Court considers that the applicant's action did not amount to malice or gross negligence (see also paragraph 327 below).

278. The Court also refers to important findings made by the CJEU in its judgment of 15 July 2021 in *Commission v. Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596), in which it held that Poland had failed to fulfil its obligations under Article 19(1) TEU by, *inter alia*, "allowing the content of judicial decisions to be classified as a disciplinary offence involving judges of the ordinary courts, referring to section 107(1) of the 2001 Act" (see paragraphs 126 and 128 above). The CJEU noted that the Supreme Court's case-law, which had developed over many years with regard to the constituent elements of the concept of "obvious and gross violations of the law" for the purposes of section 107(1) of the 2001 Act, had adopted a particularly restrictive interpretation in relation to that concept, displaying a clear concern to preserve judicial independence (see paragraph 143 of that judgment). The CJEU referred to the Disciplinary Chamber's decision of 4 February 2020 in the applicant's case. It observed that it was apparent from that decision that a judge could, in principle, be accused of a disciplinary offence on the basis of section 107(1) of the 2001 Act for having ordered the *Sejm*, allegedly in obvious and gross violation of the law, to produce documents relating to the process for electing members of the NCJ in its new composition (see paragraph 151 of that judgment). It found that such a broad interpretation of section 107(1) of the 2001 Act was a departure from the particularly restrictive interpretation of that provision adopted by the Supreme Court in the past (see paragraph 152 of that judgment). The Court attaches significant weight to those findings of the CJEU.

279. The Court further considers that the requisite procedural safeguards were not put in place to prevent arbitrary application of the relevant substantive law. As stated above, the decision on the applicant's suspension in connection with the disciplinary charges against him was taken by the Disciplinary Chamber, which failed to meet the requirements of an "independent and impartial tribunal established by law" (see paragraphs 210 and 214-215 above).

280. Having regard to the foregoing, the Court concludes that the interpretation and application of section 107(1) of the 2001 Act by the Disciplinary Chamber in its decision of 4 February 2020 was manifestly unreasonable and thus the applicant could not foresee that the issuance of his order could lead to his suspension. That being so, the Court finds that the condition of foreseeability was not satisfied and that, consequently, the interference at issue was not "in accordance with the law".

(iii) Conclusion

281. In view of its conclusion that the interference in the present case was not lawful, the Court is dispensed from having to examine whether it pursued

any of the legitimate aims referred to in Article 8 § 2 and was necessary in a democratic society.

282. There has accordingly been a violation of Article 8 of the Convention on the basis that the interference at issue was not "in accordance with the law".

IV. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

283. The applicant alleged that the interference with his right to respect for his private life resulting from his suspension had not furthered any legitimate interests, but had been aimed at sanctioning him and dissuading him from verifying the lawfulness of the appointment of judges who had been nominated in a politicised procedure. He relied on Article 18 of the Convention, which reads as follows:

> "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

A. Admissibility

1. The parties' submissions

284. The Government maintained that the consequences of the measures applied with regard to the applicant had not been very serious and had not affected his private life to a degree which was required to establish a violation of Article 8. Since the latter provision of the Convention could not be relied on in the case, it should be concluded that no arguable claim arose under Article 18. Thus, the Government argued that the applicant's complaint under Article 18 in conjunction with Article 8 was incompatible *ratione materiae*.

285. The applicant did not make any separate submissions on this point.

2. The Court's assessment

286. The Court has already established that the applicant's suspension affected his private live to a very significant degree and has found Article 8 to be applicable on this basis (see paragraph 237 above). It consequently dismisses the Government's objection regarding the applicability *ratione materiae* of Article 18 of the Convention taken in conjunction with Article 8.

287. The Court further notes that the complaint under Article 18 of the Convention taken in conjunction with Article 8 is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

288. The applicant argued that the restrictions on his private life had been applied for a purpose other than those prescribed by Article 8, thus entailing a violation of Article 18 of the Convention.

289. In his view, it was difficult to identify a legitimate aim justifying restrictions on his private life. Contrary to the Government's assertion, he argued that the sole or at least dominant purpose of the measures imposed on him had been, as intended by the political authorities, to curtail judicial independence and to create a chilling effect, dissuading judges from questioning the status of unlawfully appointed judges and thus legitimising the latter group of judges. In this respect, the applicant noted that the Disciplinary Chamber's resolution had focused on his decision of 20 November 2019, which would suggest that this was the main reason for his suspension. The above had to be seen in the whole context of the applicant's case, relating as it did to the implementation of the Government's reforms, which were inconsistent with the constitutional and international standards of judicial independence. Those reforms included (1) unlawful changes in the personal composition of the Constitutional Court; (2) unlawful changes in the method of election of judicial members of the NCJ; (3) the lowering of the retirement age of judges with the effect of moving into retirement a large group of serving judges (subsequently withdrawn following the CJEU's rulings); (4) the establishment of the Disciplinary Chamber at odds with the requirements of an independent and impartial tribunal; and (5) the changes in the procedure and substantive grounds for engaging the disciplinary liability of judges. The applicant submitted that the *ratio legis* and practical effect of all those reforms was aimed at curtailing judicial independence. All of them had given rise to serious controversy and had led to violations of the Constitution and international law. He noted that the CJEU and the Court had already issued several important judgments in this regard.

290. The applicant maintained that the Government had taken various steps aimed at legitimising newly appointed judges and at dissuading other judges from questioning the status of those new judges. The disciplinary proceedings against him had to be regarded as just another element of the same policy. In this respect, the applicant referred, *inter alia*, to the Act Amending the Act on the Organisation of Ordinary Courts, the Act on the Supreme Court and Certain Other Acts adopted in December 2019 ("the 2019 Amending Act"), which explicitly provided that actions aimed at questioning the effectiveness of judicial appointment or the mandate of a constitutional body of the Republic of Poland constituted a disciplinary offence. Moreover, in response to the resolution of the joined Chambers of the Supreme Court of 23 January 2020, the organs of the executive and the legislature had

attempted to use the Constitutional Court to prevent the courts from assessing the independence and impartiality of incorrectly appointed judges.

291. The applicant noted that his initial suspension had been ordered by the President of the Olsztyn District Court, Judge M.N. The latter was, at the same time, a member of the reorganised NCJ whose election to this body had been publicly disputed, as it was reported that two judges who had initially supported his candidature had withdrawn their support. It could thus be argued that the applicant's decision to question the status of the reorganised NCJ had affected the situation of Judge M.N. as well as that of the judges of the Disciplinary Chamber who had been appointed upon the recommendation of the reorganised NCJ.

292. The applicant further submitted that the mere fact that his suspension had been ordered by the disciplinary bodies and not by the political organs directly could not alter the conclusion as to the chilling effect referred to above. He referred to the following elements. First, the Minister of Justice had terminated his secondment to a higher court immediately after he had issued the order of 20 November 2019. The Minister had also publicly condemned the applicant for his actions. Although the Minister of Justice was competent to terminate a judicial secondment, such an explicit and public criticism of the applicant for a procedural decision taken by him could be regarded as inconsistent with the principle of judicial independence.

293. Secondly, the disciplinary bodies, i.e. the Disciplinary Chamber and the disciplinary officers, were not sufficiently independent from the executive or the legislature. The reform adopted by the Parliament in 2017 (the 2017 Act on the Supreme Court) introduced the position of the disciplinary officer for judges of ordinary courts, to be appointed by the Minister of Justice. His deputies were to be appointed in the same manner. Therefore, the impact of the Minister of Justice on disciplinary bodies had increased.

294. Even if this fact alone was not sufficient to claim that the whole system of disciplinary liability was subordinate to the executive power, in practice the disciplinary proceedings had been used to intimidate independent judges who questioned the unconstitutional actions of the Government. The forms of harassment against judges through disciplinary proceedings could be divided into two categories. First, some of the judges had been questioned by the disciplinary officers or even charged for an alleged transgression of freedom of expression, usually in connection with some critical statements about the actions of the Government. A second category of cases included judges, like the applicant, who had been charged with disciplinary offences in connection with a ruling which they had given in the course of judicial proceedings. Subsequently, similar disciplinary proceedings had been opened against other judges.

295. In the applicant's view, all these circumstances convincingly showed that his suspension had served the purpose of sanctioning judges and

dissuading them from questioning the legitimacy of judges unlawfully appointed upon the motion of the recomposed NCJ. As already mentioned, the CJEU in its judgment of 15 July 2021 (C-791/19; see paragraph 128 above) had also noted that the Disciplinary Chamber's resolution issued in the applicant's case confirmed "[t]he existence of a risk that the disciplinary regime [would] in fact be used in order to influence judicial decisions" (see paragraph 149 of that judgment). The applicant maintained that such a purpose was not justified under Article 8 § 2 of the Convention.

296. Moreover, it had to be regarded as inconsistent with the principle of the rule of law, which was inherent in all the Articles of the Convention. He argued in this respect that, firstly, judicial independence, being a condition *sine qua non* of the rule of law, did not allow judges to be punished for the content of their rulings, except for some extraordinary instances. This principle had recently been underlined in the CJEU's judgment of 15 July 2021 concerning the system of disciplinary liability of judges in Poland. Secondly, the Convention did not allow the States to impose restrictions on judges for their actions aimed at safeguarding the rights guaranteed in the Convention. Such a practice could damage or even destroy the domestic system of protection of rights and freedoms of individuals and as such must always be perceived as a gross violation of the Convention. In the applicant's view, there was no doubt that his suspension served an "ulterior purpose" and thus violated Article 18 taken in conjunction with Article 8 of the Convention.

297. The applicant further stressed that his complaint under Article 18 represented a fundamental aspect of his case. He had been suspended and officially reproached by the Disciplinary Chamber for the content of his decision aimed at safeguarding the right to an independent and impartial tribunal established by law. Therefore, the applicant's case concerned not only procedural issues or an unlawful and unjustified interference with his private life, but, above all, a serious attack on the principles of judicial independence and the rule of law. Such an attack constituted, at the same time, a threat to the very foundations of the human rights system established in the Convention, since if this system were to remain effective, domestic judges must not be afraid that they could be punished or suspended for applying the law, including the Convention. For this reason, the applicant's case had to be treated very seriously and acts of harassment/intimidation against him had to be condemned as clearly inconsistent with the Convention. The applicant argued that the scale of threats to judicial independence in Poland and the risks connected to it were so serious that finding a violation of Article 18 would be justified and necessary.

2. The Government's submissions

298. The Government submitted that the restrictions imposed on the applicant as a result of the disciplinary proceedings had been applied on the basis of the law and in line with the purpose for which such restrictions had

been established. They emphasised that the State authorities had acted in good faith in the present case, in order to protect the proper functioning of the judicial system and for the protection of the rights and freedoms of others.

299. The Government disagreed with the applicant's contention that the purpose of the disciplinary proceedings against him had been to intimidate him and other judges and discourage them from verifying the lawfulness of the appointment of judges nominated in a politicised procedure. In this connection, they stressed that in the system of disciplinary proceedings there was no institution with the competence that would allow the exercise of judicial power to be influenced in terms of the content of the procedural actions undertaken within the disciplinary proceedings or, most importantly, making it possible to change the disciplinary decisions under the pressure of any political factor.

300. The Government maintained that neither the disciplinary officer nor his deputies, nor the judges of the Disciplinary Chamber of the Supreme Court, were subordinated to the Minister of Justice/Prosecutor General as they were not organisationally associated with the Minister of Justice or with the Office of the Public Prosecutor. For those reasons the Minister of Justice had no competence to assess decisions taken by disciplinary officers, to influence them or to present his opinions about decisions undertaken within pending disciplinary proceedings. Moreover, the influence of political factors was not provided for in any of the acts regulating the functioning and organisation of ordinary courts or the Supreme Court. Decisions issued within the disciplinary proceedings and the correctness of the pending proceedings could only be reviewed by independent judges in connection with an appeal.

301. The Government noted that the preliminary inquiries and the disciplinary proceedings served to maintain the highest standards of judicial conduct and safeguard the proper administration of justice. The disciplinary officer was entrusted with the task of initiating preliminary inquiries, and if necessary also disciplinary proceedings, in circumstances indicating that a disciplinary offence might have been committed by a judge. It was apparent that the above measures served to maintain the authority and impartiality of the judiciary.

302. The Government emphasised that the burden of proof that the State had acted in pursuance of a purpose not prescribed by the Convention lay with the applicant. They argued that the applicant's complaint under Article 18 was ill-founded, based only on his assumptions, and was of an emotional character. The applicant had not presented any proof that the authorities had used their powers for some other purpose than those defined in the Convention in the context of his complaint under Article 18. A mere suspicion in this context was not sufficient to prove that Article 18 of the Convention had been breached. Accordingly, they submitted that the applicant's complaint under Article 18 should be rejected.

3. Submissions of third-party interveners

(a) The International Commission of Jurists

303. The intervener submitted that the disciplinary regime, which did not respect the requirements of independence and impartiality under international standards and which, furthermore, was operated so as to exert pressure on judges in breach of the rule of law and, in particular, the principle of separation of powers, engaged Article 18 of the Convention.

(b) The Commissioner for Human Rights of the Republic of Poland

304. The Commissioner noted that measures applied to prevent due protection of Convention rights were particularly susceptible of constituting a breach of this provision. The exercise of judicial duties should not lead to disciplinary liability, in particular where laws concerning judicial reform had been subject to many successful challenges before domestic and international courts. The use of disciplinary proceedings in such circumstances could hamper the judiciary in exercising its duty to uphold the rule of law by exercising judicial review of actions undertaken by other branches of power. The fact that the disciplinary authorities were linked to the executive cast further doubt in this regard.

305. The Commissioner noted that the system of disciplinary liability in Poland had been, in the past few years, intentionally and systemically used to deter judges from upholding judicial independence. The authorities had been initiating disciplinary proceedings or applying measures of an administrative nature (e.g. termination of secondment, suspension from judicial duties) against judges who defended judicial independence. In the intervener's view, these actions taken together should be carefully analysed as potentially converging evidence of a violation of Article 18, particularly in the light of their detrimental effect on judicial independence.

4. The Court's assessment

(a) General principles

306. In a similar way to Article 14, Article 18 of the Convention has no independent existence; it can only be applied in conjunction with an Article of the Convention or the Protocols thereto which sets out or qualifies the rights and freedoms that the High Contracting Parties have undertaken to secure to those under their jurisdiction. This rule derives both from its wording, which complements that of clauses such as the second sentence of Article 5 § 1 and the second paragraphs of Articles 8 to 11, which permit restrictions to those rights and freedoms, and from its place in the Convention at the end of Section I, which contains the Articles that define and qualify those rights and freedoms (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 287, 28 November 2017, with further references; *Navalnyy v. Russia* [GC],

nos. 29580/12 and 4 others, § 164, 15 November 2018; and *Selahatti Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 421, 22 December 2020).

307. Article 18 does not, however, serve merely to clarify the scope of those restriction clauses. It also expressly prohibits the High Contracting Parties from restricting the rights and freedoms enshrined in the Convention for purposes not prescribed by the Convention itself, and to this extent it is autonomous. Therefore, as is also the position in regard to Article 14, there can be a breach of Article 18 even if there is no breach of the Article in conjunction with which it applies (see *Merabishvili*, cited above, § 288, with further references).

308. It further follows from the terms of Article 18 that a breach can only arise if the right or freedom in issue is subject to restrictions permitted under the Convention (ibid., § 290).

309. The mere fact that a restriction of a Convention right or freedom does not meet all the requirements of the clause that permits it does not necessarily raise an issue under Article 18. Separate examination of a complaint under that Article is only warranted if the claim that a restriction has been applied for a purpose not prescribed by the Convention appears to be a fundamental aspect of the case (ibid., § 291, with further references; see also *Navalnyy*, § 164, and *Selahattin Demirtaş*, § 421, both cited above).

310. A right or freedom is sometimes restricted solely for a purpose which is not prescribed by the Convention. But it is equally possible that a restriction is applied both for an ulterior purpose and a purpose prescribed by the Convention; in other words, that it pursues a plurality of purposes (see *Merabishvili*, cited above, § 292). In setting out the general principles of interpretation of Article 18 in the above-mentioned *Merabishvili* judgment, the Court addressed situations where the contested restrictions pursued a plurality of purposes and adapted its approach by introducing a determination of whether the ulterior purpose, as opposed to the Convention-compliant one, was predominant. Whilst the following principles are formulated with a view to situations of plurality of purposes, they also provide guidance for situations where no legitimate aim or purpose has been shown (see *Navalnyy*, cited above, § 165).

311. The overview of the case-law set out in paragraph 301 of the *Merabishvili* judgment shows that although the legitimate aims and grounds set out in the restriction clauses in the Convention are exhaustive, they are also broadly defined and have been interpreted with a degree of flexibility. The real focus of the Court's scrutiny has been more on the ensuing and closely connected issue: whether the restriction is necessary or justified, that is to say, based on relevant and sufficient reasons and proportionate to the pursuit of the aims or grounds for which it is authorised. Those aims and grounds are the benchmarks against which necessity or justification is measured (see *Merabishvili*, cited above, § 302).

312. That manner of proceeding should guide the Court in its approach to the interpretation and application of Article 18 of the Convention in relation to situations in which a restriction pursues more than one purpose. Some of those purposes may be capable of being brought within the relevant restriction clause, while others cannot be. In such situations, the mere presence of a purpose which does not fall within the relevant restriction clause cannot, of itself, give rise to a breach of Article 18. There is a considerable difference between cases in which the prescribed purpose was the one that truly actuated the authorities, even though they might also have wanted to gain some other advantage, and cases in which the prescribed purpose, while present, was in reality simply a pretext to enable the authorities to attain an extraneous purpose, which was in fact the overriding focus of their efforts. To hold that the presence of any other purpose in itself contravenes Article 18 would not do justice to that fundamental difference, and would be inconsistent with the object and purpose of Article 18, which is to prohibit the misuse of power. Indeed, it could mean that each time the Court excludes an aim or a ground pleaded by the Government under a substantive provision of the Convention, it must find a breach of Article 18, because the Government's pleadings would be proof that the authorities were pursuing not only the purpose that the Court has accepted as legitimate, but also another one (ibid., § 303).

313. For the same reason, a finding that the restriction pursues a purpose prescribed by the Convention does not necessarily rule out a breach of Article 18 either. Indeed, to hold otherwise would strip that provision of its autonomous character (ibid., § 304).

314. The Court is therefore of the view that a restriction can be compatible with the substantive Convention provision which authorises it because it pursues an aim that is permissible under that provision, but that it could still infringe Article 18 if it was chiefly intended for another purpose that is not prescribed by the Convention; in other words, if that other purpose was predominant. Conversely, if the prescribed purpose was the main one, the restriction does not run counter to Article 18 even if it also pursues another purpose (ibid., § 305).

315. The question of which purpose is predominant in a given case depends on all the circumstances. In assessing that point, the Court will have regard to the nature and degree of reprehensibility of the alleged ulterior purpose, and bear in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law (ibid., § 307).

316. As to the burden of proof in this context, the Court finds that it can and should adhere to its usual approach to proof rather than to special rules (ibid., § 310, with further references). The first aspect of that approach is that, as a general rule, the burden of proof is not borne by one party or the other, because the Court examines all material before it irrespective of its origin,

and because it can, if necessary, obtain material of its own motion. Secondly, the standard of proof before the Court is that of "beyond reasonable doubt". In accordance with its case-law, such proof can follow from the coexistence of sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact. Furthermore, the level of persuasion required to reach a conclusion is intrinsically linked to the specificity of the facts, the nature of the allegation made, and the Convention right at stake. Thirdly, the Court is free to assess not only the admissibility and relevance but also the probative value of each item of evidence before it. In this context, circumstantial evidence means information about the primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts. Reports or statements by international observers, non-governmental organisations or the media, or the decisions of other national or international courts, are often taken into account in order to, in particular, shed light on the facts, or to corroborate findings made by the Court (ibid., §§ 311-317, with further references).

(b) Application of the general principles to the present case

317. The Court observes that the applicant's contention in the context of his complaint under Article 18 of the Convention is that his suspension pursued the ulterior purpose of sanctioning him and dissuading him from verifying the lawfulness of the appointment of judges who had been nominated in a politicised procedure. The Court regards this as a fundamental aspect of the case, the essence of which has not been addressed in its above assessment of the complaint under Article 8 of the Convention. It will therefore examine it separately (see *Merabishvili*, § 291; *Navalnyy*, § 164; and *Selahattin Demirtaş*, § 401, all cited above).

318. In its assessment under Article 8 of the Convention the Court has found it unnecessary to examine whether the interference at issue pursued any of the legitimate aims referred to in the second paragraph of this provision (see paragraph 281 above). In this regard, the applicant contended that his suspension did not correspond to any of the aims listed in the second paragraph of Article 8 (see paragraph 247 above). The Government, on the other hand, maintained that the impugned interference pursued two legitimate aims: the protection of the rights of others (i.e. the parties to the court proceedings) and protection of the proper functioning of the judicial system. They referred to the Disciplinary Chamber's findings that the applicant's actions had undermined the authority of the judiciary, obstructed the proper administration of justice and infringed the rights of the parties to the proceedings (see paragraphs 42 and 50 above).

319. The Court notes that the second paragraph of Article 8 does not refer expressly to the "protection of the proper functioning of the judicial system" or any similar concept, in contrast to Article 10 § 2 which lists "maintaining the authority and impartiality of the judiciary" as one of the legitimate aims.

320. On the other hand, the protection of the rights and freedoms of others is one of the aims set out in Article 8 § 2. Therefore, the Government can, in principle, rely upon this aim to claim that an interference with the rights guaranteed by Article 8 was permitted. In the circumstances of the present case, the Court is prepared to assume for the purposes of its examination that the applicant's suspension pursued the legitimate aim invoked by the Government.

321. From the point of view of Article 18 of the Convention, the Court will thus examine whether the decision to suspend the applicant also pursued an ulterior purpose, and, if that is the case, whether that ulterior purpose was the predominant purpose of the restriction of the applicant's right to respect for his private life (see *Merabishvili*, cited above, § 318, and *Miroslava Todorova v. Bulgaria*, no. 40072/13, § 204, 19 October 2021).

322. As regards the alleged ulterior purpose pursued by the authorities, the Court would observe the following, having regard to the parties' submissions summarised above. At the outset the Court would refer to the general context concerning the reorganisation of the judiciary in Poland. It noted in *Grzęda* (cited above) that the whole sequence of events in Poland vividly demonstrated that successive judicial reforms had been aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, the remodelling of the NCJ and the setting-up of new chambers in the Supreme Court, while extending the Minister of Justice's control over the courts and increasing his role in matters of judicial discipline (ibid., § 348). The Grand Chamber in *Grzęda* went on to observe that as a result of the successive reforms, the judiciary – an autonomous branch of State power – was exposed to interference by the executive and legislative powers and thus substantially weakened (ibid.).

323. Furthermore, the Court has already found that the main objective of the 2017 Amending Act was for the legislative and the executive powers to achieve a decisive influence over the composition of the NCJ which, in turn, enabled those powers to interfere directly or indirectly in the judicial appointment procedure (see *Reczkowicz*, § 274; *Advance Pharma sp. z o.o.*, § 344; and *Grzęda*, § 322, all cited above).

324. In so far as the applicant's individual situation was concerned, the Court notes that his suspension was the culmination of a series of measures taken by the authorities following the issuance of his order of 20 November 2019. First, in reaction to the impugned order, the Minister of Justice terminated the applicant's secondment to the Olsztyn Regional Court on 25 November 2019. The Minister stated at a press conference, *inter alia*, that the applicant's order amounted to "anarchisation of the Polish judiciary and overstepping the judges' powers" (see paragraph 13 above). In the Ministry of Justice's press release it was stated that the applicant had unjustifiably

challenged the status of another judge appointed by the President of the Republic (see paragraph 14 above).

325. Second, on 28 November 2019 the deputy disciplinary officer opened disciplinary proceedings against the applicant and charged him, *inter alia*, with compromising the dignity of judicial office under section 107(1) of the 2001 Act in relation to the order of 20 November 2019. He alleged that in issuing his order without a legal basis the applicant had abused his power, assuming competence to assess the lawfulness of the election of the NCJ's judicial members and of the exercise by the President of the Republic of his prerogative to appoint judges. The deputy disciplinary officer further alleged that the applicant's order amounted to the criminal offence of abuse of power under Article 231 § 1 of the Criminal Code (see paragraph 17 above).

326. Third, on 29 November 2019 the President of the Olsztyn District Court, Judge M.N., ordered a one-month immediate interruption in the exercise of the applicant's judicial duties in connection with the disciplinary charges against him (see paragraph 21 above). The Court notes that all of the above-mentioned measures were taken by the Minister of Justice or by persons appointed by him to their posts of disciplinary officer or court president (Judge M.N.). The Court observes, in passing, that Judge M.N. was elected to the new NCJ on 6 March 2018.

327. Next, the Court will assess the Disciplinary Chamber's decision of 4 February 2020 ordering the applicant's suspension, which, as already held above, was given by a body lacking the attributes of an "independent and impartial tribunal established by law" (see paragraphs 210 and 214-215 above).

As regards the impugned decision itself, the Court notes that the principal ground for the applicant's suspension was the disciplinary charge relating to the issuance of the order of 20 November 2019. The Disciplinary Chamber characterised the issuance of that order as both "compromising the dignity of judicial office" and an "obvious and gross violation of the law", as referred to in section 107(1) of the 2001 Act. At this juncture, the Court reiterates that it has already established that the interpretation and application of this provision in the Disciplinary Chamber's decision of 4 February 2020 was manifestly unreasonable and failed to meet the condition of foreseeability (see paragraph 280 above). It has also pointed out that the interpretation of the law by judges should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence (see paragraph 276 above). The Court cannot discern either in the applicant's order of 20 November 2019.

328. Moreover, the Court notes that the Disciplinary Chamber's decision chiefly focused on demonstrating that the applicant, in seeking to examine the status of judicial members of the new NCJ and of the judges appointed with the participation of the latter, had acted in manifest breach of the provisions of the civil procedure and the Constitution (see paragraphs 42-43

and 50 above). The Court observes that at the time when the Disciplinary Chamber gave its decision, questions concerning those issues were at the centre of public debate, in particular following the CJEU's preliminary ruling of 19 November 2019 in *A.K. and Others*, the Supreme Court's judgment of 5 December 2019 (no. III PO 7/18) given following the latter ruling, and the Supreme Court's interpretative resolution of 23 January 2020 (see paragraphs 96-100 and 120-122 above). Those rulings made fundamental findings as to the lack of independence of the new NCJ and the status of judges appointed upon its recommendations (see paragraphs 96-100 and 120-122 above). In the Court's view, the Disciplinary Chamber either sought to disregard the importance of those rulings or chose not to address them at all, and this was the case, in particular, in relation to the Supreme Court's interpretative resolution of 23 January 2020. Instead, the Disciplinary Chamber focused on the finality of the decision by the President of the Republic to appoint judges, while the applicant intended to look into the question of the independence and impartiality of a judge appointed upon the recommendation of the recomposed NCJ (see paragraphs 43-45 and 50-51 above). He did so following the CJEU's preliminary ruling of 19 November 2019 and in the implementation thereof (see comments to this effect by the Commissioner for Human Rights in paragraph 80 above).

329. On the basis of the above, the Court considers that the authorities, including the Disciplinary Chamber, were determined to demonstrate that to challenge the status of judges appointed with the participation of the recomposed NCJ would expose any judges so doing to sanctions. This intention of the authorities is corroborated by the adoption by the *Sejm* on 20 December 2019 of the 2019 Amending Act, which entered into force on 14 February 2020. The Court notes that the adoption of this Act coincided with the proceedings in the applicant's case (see paragraph 90 above). The 2019 Amending Act has introduced new disciplinary offences for judges, including for "actions that question the existence of the official relationship of a judge, the effectiveness of his or her appointment or the legitimacy of the constitutional organ of the Republic of Poland" (new subsection 3 in section 107 of the 2001 Act; see paragraph 91 above). It further prohibited an ordinary court from assessing the legality of the appointment of a judge or the entitlement arising from that appointment to perform tasks in the administration of justice (new section 42a(2) of the 2001 Act).

330. In that context, the Court finds it important to have regard to developments following the applicant's suspension. It observes that in the joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe those bodies concluded in relation to the relevant provisions of the 2019 Amending Act that "these provisions, taken together, significantly curtail[ed] the possibility to examine the question of institutional independence of Polish courts by those courts themselves." Furthermore, the opinion stated that "the above

provisions, taken together, aim at nullifying the effects of the CJEU ruling [of 19 November 2019]" (see paragraph 113 above).

331. It should also be noted that in March 2021 the European Commission commenced infringement proceedings in respect of the 2019 Amending Act, considering that the law undermined the independence of Polish judges and was incompatible with the primacy of EU law. The Commission also decided to ask the CJEU to order interim measures until it had given a judgment in the case. On 14 July 2021 the Vice-President of the CJEU issued an interim order in the case (C-204/21 R, EU:C:2021:593). Poland was required to suspend, *inter alia*, the application of subsections 2 and 3 of section 107(1) of the 2001 Act, as amended by the 2019 Amending Act, which allowed the disciplinary liability of judges to be engaged for having examined compliance with the requirements of independence and impartiality of a tribunal previously established by law, within the meaning of Article 19(1) TEU in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union. Poland was also required to suspend, *inter alia*, the application of section 42a(1) and (2) of the 2001 Act, as amended by the 2019 Amending Act, in so far as they prohibited national courts from verifying compliance with the requirements of the European Union relating to an independent and impartial tribunal previously established by law, within the meaning of Article 19(1) TEU in conjunction with Article 47 of the Charter of Fundamental Rights.

332. A similar intention of the authorities can be discerned from the Constitutional Court's judgment of 20 April 2020 (no. U 2/20), which excluded the possibility that the courts could review a judge's right to adjudicate solely on the basis of the fact of his or her appointment by the President of the Republic on a motion of the recomposed NCJ (see *Reczkowicz*, cited above, §§ 116 and 261). The Constitutional Court gave two other judgments in 2020 reaching the same conclusion (on 4 March 2020, no. P 22/19 and 2 June 2020, no. P 13/19; see paragraph 101 above).

333. In its assessment of the applicant's complaint under Article 18 the Court must have regard to judicial independence, which is a prerequisite to the rule of law (see *Guðmundur Andri Ástráðsson*, cited above, § 239, and *Grzęda*, cited above, § 298). It reiterates that it must be particularly attentive to the protection of members of the judiciary against measures that can threaten their judicial independence and autonomy, given the prominent place that the judiciary occupies among State organs in a democratic society and the importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 196, 6 November 2018, with further references; *Bilgen v. Turkey*, no. 1571/07, § 58, 9 March 2021; and *Grzęda*, cited above, § 302). The Court has emphasised that the Convention system cannot function properly without

independent judges and that the Contracting Parties' task of ensuring judicial independence is thus of crucial importance (see *Grzęda*, cited above, § 324).

334. In the present case, the applicant was suspended for issuing a judicial decision whereby he intended to verify whether a first-instance judge was lawfully appointed and fulfilled the requirement of independence, in other words, whether the institutional requirements of Article 6 § 1 of the Convention were complied with. The Court finds that to hold, as the Disciplinary Chamber did in its decision of 4 February 2020, that such a judicial decision amounted to a disciplinary offence which justified suspension from judicial duties should be regarded as contrary to the fundamental principles of judicial independence and the rule of law (see paragraphs 269 and 280 above regarding the Court's findings in respect of the lawfulness of the suspension). In its view, the recourse to disciplinary proceedings and ultimate suspension of the applicant for issuing a judicial order that was aimed at safeguarding the right of a party to an "independent and impartial tribunal established by law" as enshrined in Article 6 § 1 of the Convention, and equally in Article 45 § 1 of the Polish Constitution and Article 47 of the Charter of Fundamental Rights, is incompatible with the above-mentioned principles. Moreover, the Court has already observed, in reference to the Constitutional Court's judgment of April 2020, that there was no conceivable basis in its case-law for a conclusion that the Convention standards of independence and impartiality excluded the power of "other judges" to generally question a "judge's right to adjudicate" or to verify "the regularity of the procedure preceding the appointment of a judge by the President" (see *Reczkowicz*, § 261; *Dolińska-Ficek and Ozimek*, § 316; and *Advance Pharma*, § 318; all cited above).

335. The Court would again refer to the CJEU's judgment of 15 July 2021 in *Commission v. Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596; see paragraph 128 above). The CJEU found, *inter alia*, that in order to preserve judicial independence and to prevent the disciplinary regime from being diverted from its legitimate purposes and being used to exert political control over judicial decisions or pressure on judges, the fact that a judicial decision contained a possible error in the interpretation and application of national or EU law, or in the assessment of the facts and the appraisal of the evidence, could not in itself trigger the disciplinary liability of the judge concerned (see paragraph 138 of that judgment). It is noteworthy that the CJEU referred to the Disciplinary Chamber's decision of 4 February 2020 in the applicant's case to confirm the existence of a risk that the disciplinary regime might be used in order to influence judicial decisions (see paragraph 149 of that judgment).

336. Lastly, the Court notes that the disciplinary case against the applicant was referred to in the report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe of 5 January 2021 (see paragraph 112 above). In its earlier resolution of 28 January 2020

the Parliamentary Assembly condemned the fact that disciplinary proceedings had been opened against judges as a result of decisions they had taken when adjudicating cases in their courts (see paragraph 110 above). The applicant's case was also referred to in the report of the Polish Judges' Association Iustitia as an example of harassment of judges in Poland (see paragraph 82 above) and commented upon by the President of the European Association of Judges (see paragraph 81 above).

337. The Government argued that the impugned interference pursued the legitimate aim of the protection of the rights and freedoms of others (see paragraph 298 above). However, having regard to all the foregoing considerations, the Court is satisfied that the predominant purpose of the disciplinary measures taken against the applicant that led to his suspension was to sanction the applicant and to dissuade him from assessing the status of judges appointed upon the recommendation of the recomposed NCJ by applying the relevant legal standards, including those stemming from Article 6 § 1 of the Convention.

338. As this ulterior purpose is incompatible with the Convention, there has accordingly been a violation of Article 18 of the Convention taken in conjunction with Article 8.

V. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

339. The applicant complained that the reduction of his salary by 40% for the duration of his suspension, where such duration was not limited in time, had amounted to a disproportionate interference with his property rights. He relied on Article 1 of Protocol No. 1 which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. The Government's submissions

340. The Government submitted that the disciplinary court, when suspending the applicant, had reduced his salary by 40% in application of section 129(3) of the 2001 Act, and thus in accordance with the conditions provided for by law and in the public interest. They noted that if the disciplinary proceedings had been discontinued or terminated by an acquittal, section 129(4) of the same Act provided that all components of the salary should be adjusted to the full amount, understood as a salary, which a judge would have received without being suspended. They argued that the

applicant's suspension had precluded him from receiving a full salary, but that the reduction at issue should not be considered as a sanction as it was of a temporary nature.

341. In these circumstances and in line with the Court's case-law, according to which Article 1 of Protocol No. 1 applied only to a person's existing possessions and did not create a right to acquire property, the applicant's complaint under this provision was, in their view, incompatible *ratione materiae* with the Convention. In addition, the reduction of the applicant's salary resulting from his suspension concerned an income that was not being earned. Nor could it be argued that it was definitely payable. Thus, there had been no interference with, and no violation of, his rights under Article 1 of Protocol No. 1.

342. In any event, the Government submitted that the impugned measure had been necessary to control the use of State property in accordance with the general interest. It would be an inappropriate waste of resources to pay a full salary to a person not performing his professional duties due to a suspension. They further maintained that the whole system provided adequate safeguards as regards the indication of the percentage limits by which the salary could be reduced, of the judicial authority that could lower the salary and of the rules applicable to adjustment to full remuneration in the event of acquittal or discontinuance of the disciplinary proceedings.

B. The applicant's submissions

343. The applicant submitted that in *Baka v. Hungary* and *Denisov v. Ukraine* (both cited above) the removal of the applicants from their positions as presidents of a court had been found to be inconsistent with the Convention, but it had nevertheless been legally effective in terms of domestic law. For this reason, they had not been able to effectively claim that their lost salary as president of a court constituted their possession. The applicant argued that his case was distinguishable from those cases since the Disciplinary Chamber's resolution in his case had to be regarded as legally non-existent. A decision of the Disciplinary Chamber to reduce his salary could not produce legal effects because this body was not "an independent and impartial tribunal established by law" within the meaning of domestic law, EU law or the Convention. On this account the deprivation of his possessions had not been lawful. Consequently, the applicant was still entitled to a full salary. In those circumstances, the fact of receiving, in practice, a reduced salary constituted an interference with his property rights.

C. The Court's assessment

344. The Court reiterates that Article 1 of Protocol No. 1 applies only to a person's existing possessions and does not create a right to acquire property

(see *Stummer v. Austria* [GC], no. 37452/02, § 82, ECHR 2011). Future income cannot be considered to constitute "possessions" unless it has already been earned or is definitely payable (see *Erkan v. Turkey* (dec.), no. 29840/03, 24 March 2005, and *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 64, ECHR 2007-I). When suspending the applicant on 4 February 2020, the Disciplinary Chamber reduced his salary by 40% for the duration of the suspension. That reduction of salary, being of a temporary nature, was revoked with the Disciplinary Chamber's decision of 23 May 2022 lifting the applicant's suspension. The Court notes that during the period of his suspension the applicant received a reduced salary. However, this part of his income has not actually been earned. Neither can it be argued that it was definitely payable (see, *mutatis mutandis*, *Denisov*, cited above, § 137).

345. In these circumstances, the complaint under Article 1 of Protocol No. 1 is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

346. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

347. The applicant claimed 105,036.88 Polish zlotys (equivalent to 23,341 euros (EUR)) in respect of pecuniary damage corresponding to the loss of income in the period until 31 December 2021 resulting from the reduction of his salary ordered by the Disciplinary Chamber.

348. The applicant also claimed EUR 75,000 in respect of non-pecuniary damage. He submitted that, in assessing the amount of compensation under this head, the Court should take into account the scale and seriousness of the violations of the Convention in his case. First, the applicant had been suspended by a body which was unlawfully constituted and which did not satisfy the requirements of independence and impartiality. Second, his suspension had constituted unlawful and disproportionate interference with his right to his reputation and right to pursue his professional development as protected under Article 8 of the Convention. He also referred to the exceptionally lengthy period of his suspension and the statements contained in the reasoning of the Disciplinary Chamber's resolution that were damaging to his reputation. Third, the interference with his private life had not served any legitimate aim and had been motivated by an "ulterior purpose" in the

form of intimidation and dissuasion of the applicant and other judges from examining the legality of appointment and independence of unlawfully appointed judges. His suspension had therefore been part of the Government's campaign aimed at legitimising unlawfully appointed judges. Fourth, the reduction of the applicant's salary had led to an unlawful interference with his property rights. Finally, all violations of the Convention committed in the applicant's case had constituted a serious attack on the rule of law – one of the founding principles of the Convention.

349. The applicant submitted that the amount awarded under the head of non-pecuniary damage should be substantially higher than in the cases of *Reczkowicz* and *Broda and Bojara* (both cited above) since his case concerned violations of several provisions of the Convention, and not only of Article 6 § 1. In addition, the violations in his case were of a more serious nature.

350. The applicant also requested the Court to order the Polish authorities to ensure that he would be allowed to resume his judicial duties and regain his full salary at the earliest possible date, referring to *Oleksandr Volkov v. Ukraine* (cited above) and *Kavala v. Turkey* (no. 28749/18, 10 December 2019). In his view, in order to ensure full compliance with the Convention all legal effects of the Disciplinary Chamber's resolution had to be removed.

351. The Government asked the Court to reject the applicant's claims under both heads of damage since, in their view, the application was inadmissible and no violation of the Convention had occurred. As regards the claim in respect of pecuniary damage, they contended that this claim was hypothetical and speculative.

352. Concerning the claim in respect of non-pecuniary damage, the Government argued that the amounts claimed were exorbitant and unfounded in the light of the circumstances of the case and the Court's case-law in similar cases. They referred, *inter alia*, to *Guðmundur Andri Ástráðsson* (cited above), where the Grand Chamber had found that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained. Were the Court to find a violation of the Convention in the present case, the Government submitted that the finding of a violation should be regarded as constituting sufficient just satisfaction. Alternatively, they invited the Court to assess the issue of just satisfaction on the basis of its practice in similar cases and national economic circumstances.

353. With regard to the applicant's claim in respect of pecuniary damage, the Court has rejected his complaint under Article 1 of Protocol No. 1 to the Convention as incompatible *ratione materiae*. Moreover, it does not discern any causal link between the violations found in the present case and the pecuniary damage alleged by the applicant; it therefore rejects this claim.

354. However, making an assessment on an equitable basis and having regard to its finding of violations of Article 6 § 1, Article 8 and Article 18 taken in conjunction with Article 8 of the Convention, the Court considers it

reasonable to award the applicant EUR 30,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

355. As regards the applicant's request for an order, the Court notes that on 23 May 2022 the Disciplinary Chamber lifted his suspension and restored his full salary (see paragraphs 74 and 78 above). In the light of the above development, the Court does not find it necessary to consider the applicant's request.

B. Costs and expenses

356. The applicant did not make a claim for costs and expenses. Accordingly, the Court makes no award under this head.

C. Default interest

357. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint under Article 6 § 1 of the Convention admissible;

2. *Declares*, by a majority, the complaint under Article 8 of the Convention admissible;

3. *Declares*, by a majority, the complaint under Article 18 of the Convention taken in conjunction with Article 8 admissible;

4. *Declares*, unanimously, the remainder of the application inadmissible;

5. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention as regards the right to an independent and impartial tribunal established by law;

6. *Holds*, by five votes to two, that there has been a violation of Article 8 of the Convention;

7. *Holds*, by five votes to two, that there has been a violation of Article 18 of the Convention taken in conjunction with Article 8;

8. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 30,000 (thirty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses*, by four votes to three, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Marko Bošnjak
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Joint partly concurring and partly dissenting opinion of Judges Wojtyczek and Paczolay;
(b) Joint partly dissenting opinion of Judges Bošnjak, Schembri Orland and Ktistakis.

M.B.
R.D.

JOINT PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGES WOJTYCZEK AND PACZOLAY

We respectfully disagree with the view that Article 8 is applicable in the instant case. As this provision is inapplicable, it could not have been violated. Moreover, no issues could arise under Article 18 in connection with Article 8. As a result, the complaints under Article 8 and under Article 18 in conjunction with Article 8 are – in our view – inadmissible. We would also like to express some reservations concerning the reasoning under Article 6.

1. Article 6

1.1. Concerning the grievances raised under Article 6, we agree that this provision is applicable in the instant case, because the domestic disciplinary proceedings affect the applicant's subjective civil rights, connected with his employment and, in particular, his right to perform work in exchange for remuneration of a determined amount.

1.2. We agree that Article 6 has been violated in the instant case, although we would describe the violation of this provision differently from the majority.

The Court has established the following standard under Article 6: "where an adjudicatory body determining disputes over 'civil rights and obligations' does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are subject to subsequent control by a judicial body that has 'full jurisdiction' and does provide the guarantees of Article 6 § 1" (see *Fazia Ali v. the United Kingdom*, no. 40378/10, 20 October 2015; see also, among other authorities, *Albert and Le Compte v. Belgium*, 10 February 1983, § 29, Series A no. 58; *Sigma Radio Television Ltd v. Cyprus*, nos. 32181/04 and 35122/05, § 15, 21 July 2011; and *Gautrin and Others v. France*, 20 May 1998, § 57, *Reports of Judgments and Decisions* 1998-III).

Article 6 under its civil limb does not require that all disciplinary measures affecting civil rights be imposed by a court, but a person contesting such measures must have access to a court within the meaning of Article 6.

Therefore, under the Court's well-established case-law, the applicant's rights protected by Article 6 have been violated not because his case was examined (from the first instance) by a bench of the Disciplinary Chamber of the Supreme Court, but because he did not have the possibility of contesting the relevant measures before a judicial body fulfilling the criteria of Article 6.

2. Article 8

2.1. As rightly stated by the majority, the general principles regarding the applicability of Article 8 to employment-related disputes were summarised by the Court in the case of *Denisov v. Ukraine* [GC], no. 76639/11, 25 September 2018 (see paragraph 227). The quotation in the reasoning should be complemented by the following one from that case (emphasis added):

> "114. It is thus an intrinsic feature of the consequence-based approach within Article 8 that convincing evidence showing that the threshold of severity was attained has to be submitted by the applicant. As the Grand Chamber has held, **applicants are obliged to identify and explain the concrete repercussions on their private life and the nature and extent of their suffering, and to substantiate such allegations in a proper way** (see *Gillberg*, cited above, §§ 70-73). According to the requirement of exhaustion of domestic remedies, such allegations **have to be sufficiently raised at the domestic level."**

It also necessary to highlight the following principles established therein in paragraph 116 (emphasis added):

> "It is for the applicant **to show convincingly that the threshold was attained in his or her case.** The applicant has to present **evidence substantiating consequences of the impugned measure.** The Court will only accept that Article 8 is applicable where these consequences are very serious and affect his or her private life to a very significant degree."

The substantive and evidential thresholds established in that judgment are deliberately placed very high (ibid., § 116, emphasis added):

> "The Court will only accept that Article 8 is applicable where these consequences are **very serious** and affect his or her private life to a **very significant degree**."

The aim of the Grand Chamber in that case was clearly to limit considerably the scope of applicability of Article 8 in the context of employment relations. Firstly, when the reasons for imposing a measure affecting an individual's professional life are not linked to the individual's private life, Article 8 applies in employment-related disputes only in exceptional circumstances, when private life is affected to a very significant degree. Secondly, the Court rejects a presumption that a measure affecting an individual's professional life "automatically" generates an issue in the sphere of private life (ibid., § 113). Thirdly, the burden of proof in such cases rests fully upon the applicant. Fourthly, the evidential threshold defined by the Court is very demanding, as the applicant has to show "concrete repercussions".

2.2. We note that the Chamber case-law concerning the applicability of Article 8 to employment-related disputes concerning judges and prosecutors is two-fold.

In some Chamber cases, the Court applies to the letter the evidential standards established by the Grand Chamber in *Denisov* (cited above) and

declares that the threshold for the applicability of Article 8 has not been reached (see decision in the case of *J.B. and Others v. Hungary*, nos. 45434/12 and 2 others, 27 November 2018, and the judgments in the cases of *Miroslava Todorova v. Bulgaria*, no. 40072/13, 19 October 2021, and *Camelia Bogdan v. Romania*, no. 36889/18, 20 October 2020; compare also, outside the judicial context, *Ballıktaş Bingöllü v. Turkey*, no. 76730/12, 22 June 2021, and *Gražulevičiūtė v. Lithuania*, no. 53176/17, 14 December 2021).

In other Chamber cases, the Court departs from the evidential standards established in *Denisov* (cited above) and – without requiring or considering evidence substantiating the consequences of the impugned measures – relies upon the mere presumption that disciplinary or other measures taken in respect of a judge have serious consequences for the private life of an applicant (see *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021; *Polyakh and Others v. Ukraine*, nos. 58812/15 and 4 others, 17 October 2019; and *Gumenyuk and Others v. Ukraine*, no. 11423/19, 22 July 2021; compare also, outside the judicial context, *Namazov v. Azerbaijan*, no. 74354/13, 30 January 2020, and *Bagirov v. Azerbaijan*, nos. 81024/12 and 28198/15, 25 June 2020).

Although the Chambers are not legally bound by the general principles established by the Grand Chamber, we do not see sufficient reason, in the instant case, to depart from the general principles established in *Denisov* (cited above). In any event, it would be useful to try to unify once again the diverging case-law at the level of the Grand Chamber.

2.3. The applicant in his submissions dated 20 September 2021 (at pp. 36-37) pointed briefly at the judicial statements threatening his reputation and at the financial consequences of the impugned measures and moreover relied upon the presumption applied in *Gumenyuk* (cited above) that "disallowing judges of the Supreme court to exercise professional duties amounted to an interference with their right to private life, even though such measure did not affect their reputation or financial situation". No specific evidence as to the effects for the applicant's private life has been presented. The applicant failed to identify and explain the concrete repercussions on his private life and the nature and extent of his suffering or to substantiate such allegations in a proper way. Neither has he shown that the threshold of severity triggering the applicability of Article 8 was attained. Moreover, the national and international materials quoted in the judgment, and especially in paragraphs 82 and 112, show that the applicant continues to enjoy a high professional reputation both in Poland and abroad.

2.4. Applying the general substantive and evidential standards established in *Denisov v. Ukraine* (cited above), we are obliged to conclude that Article 8 is not applicable in the instant case.

3. Article 18 taken in conjunction with Article 8

3.1. The majority consider that there has been a violation of the Convention taken in conjunction with Article 8 of the Convention. This finding triggers three remarks.

3.2. Firstly, as – in our view – Article 8 is not applicable in the instant case, Article 18 is not applicable either. *A fortiori*, Article 18 taken in conjunction with Article 8 could not have been violated.

3.3. Secondly, the legal issue under Article 8 concerns the consequences for the applicant's private life.

As explained by the Court in *Denisov* (cited above, § 107),

> "When the reasons for imposing a measure affecting an individual's professional life are not linked to the individual's private life, an issue under Article 8 may still arise in so far as the impugned measure has or may have serious negative effects on the individual's private life."

That is the case here: the impugned measure is not a direct limitation upon private life but is seen by the majority as a measure having effects on the applicant's private life. These effects are produced here as if by *ricochet*. The impugned measure pursues certain aims beyond the sphere of private life and primarily has effects outside that sphere but – in the majority's view – also has some significant side effects on private life. It is questionable whether Article 18 can apply at all to measures pursuing aims beyond the sphere of private life and producing primary effects outside that sphere but having further consequences for private life. This matter would require deeper reflection.

3.4. Thirdly, the reasoning states the following:

> "337. ... However, having regard to all the foregoing considerations, the Court is satisfied that the predominant purpose of the disciplinary measures taken against the applicant that led to his suspension was to sanction the applicant and to dissuade him from assessing the status of judges appointed upon the recommendation of the recomposed NCJ by applying the relevant legal standards, including those stemming from Article 6 § 1 of the Convention.
>
> 338. As this ulterior purpose is incompatible with the Convention, there has accordingly been a violation of Article 18 of the Convention taken in conjunction with Article 8."

We agree with our colleagues that the judgments of the Court of Justice of the European Union should be implemented. However, we note in this context that Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms has never been interpreted and cannot be interpreted as empowering *per se* every judge to assess the status of other

judges examining the same case. The implementation of Article 6 standards is a matter of domestic law. It may also be a matter regulated by the law of international organisations to which States have transferred sovereign powers in this area. Article 6 as such does not preclude States from enacting rules defining special procedures for assessing the status of judges and granting jurisdiction in this respect only to some courts while excluding others from having jurisdiction in the same domain. The repartition of jurisdiction in this domain between different courts is a discretionary power belonging to the States concerned or to the international organisations to which the States have transferred their sovereign powers.

The question also arises whether in civil cases the assessment in question should be carried out by a court *proprio motu* or only at the request of one or more parties. After all, parties to civil proceedings may prefer to waive their rights in this respect and decide to submit their case to a body which does not fulfill all the criteria of Article 6 (see, for instance, *Deweer v. Belgium*, 27 February 1980, § 49, Series A no. 35; *Pastore v. Italy* (dec.), no. 46483/99, 25 May 1999; and *Transado - Transportes Fluviais Do Sado, S.A. v. Portugal* (dec.), no. 35943/02, 16 December 2003).

In this context, measures aimed at dissuading judges from assessing the status of other judges cannot be declared – in a general and categorical way – as necessarily incompatible with the Convention simply because of their aim. This issue is much more complex and would have deserved a much more thorough examination.

4. Conclusion

The approach adopted by the majority extends once again the scope of application of Article 8 in a departure from the principles set forth in the case of *Denisov v. Ukraine* (cited above). We can only agree with the following view expressed by judge Kūris in his brilliant dissenting opinion (point 14) in the case of *Erményi v. Hungary*, no. 22254/14, 22 November 2016*,* which also concerned measures affecting judges' professional life:

> "The perspective of examining privacy in terms of the right and value protected by Article 8 must be returned to its natural angle. To present it graphically, 8 should indeed be seen as
>
> 8
>
> and not – as increasingly tends to be the case – like the sign of infinity:
>
> ∞"

JOINT PARTLY DISSENTING OPINION OF JUDGES BOŠNJAK, SCHEMBRI ORLAND AND KTISTAKIS

1. Whilst voting in favour of a violation of Article 6 § 1, Article 8 and Article 18 of the Convention, we voted against the dismissal of the applicant's claim for pecuniary damage in respect of these violations (see point 9 of the operative provisions).

2. The applicant claimed 105,036.88 Polish zlotys (equivalent to 23,341 euros (EUR)) in respect of pecuniary damage corresponding to his loss of income in the period until 31 December 2021 resulting from the reduction of his salary ordered by the Disciplinary Chamber. The Court rejected the applicant's complaint in this regard, on the basis that the complaint under Article 1 of Protocol No. 1 to the Convention had been found to be incompatible *ratione materiae* and, moreover, that it did not discern any causal link between the violations found in the present case and the pecuniary damage alleged by the applicant (see paragraph 353).

3. The Chamber was unanimous in declaring the complaint under Article 1 of Protocol No. 1 inadmissible. It is not our intention to review the findings of the Court concerning Articles 6 § 1, 8 and 18, or Article 1 of Protocol No. 1, as we fully concur on all counts as premised.

4. However, we respectfully disagree with the conclusions put forward to justify rejecting the applicant's claim in respect of pecuniary damage.

5. The applicant in this case was a member of the Polish judiciary who was suspended from office by the Disciplinary Chamber of the Supreme Court in connection with the exercise of judicial powers. More precisely, the suspension was linked to the issuance of an order by the applicant, of the court's own motion, requesting the production of copies of the endorsement lists for the judicial candidates to the new National Council of the Judiciary (the NCJ) who had been subsequently elected by the *Sejm* on 6 March 2018. Taken in the context of the dispute, the suspension was a disciplinary measure issued in connection with the giving of a judicial decision. The suspension remained in effect from 4 February 2020 to 23 May 2022, during which time the applicant sustained a 40% decrease in his salary (see paragraphs 40 and 74 respectively).

6. Just satisfaction is afforded, under Article 41 of the Convention, so as to compensate the applicant for the actual damage established as being consequent to a violation. In that respect, it may cover pecuniary damage, non-pecuniary damage, and costs and expenses. It is true that Article 41 considers the granting of just satisfaction to be a matter of discretion on the part of the Court, having regard to the circumstances of the case and the nature of the violation. Furthermore, Article 41 triggers this discretion if the domestic law of the member State allows for only partial reparation in a particular case.

7. This being premised, the Court is not precluded from granting pecuniary satisfaction, which is an important element of the *restitutio in integrum* principle, in finding a violation of Articles 6 and 8, in the present case. Nor is the Court precluded from resorting to an equitable method of compensation (compare *Baka v. Hungary* [GC], no. 20261/12, § 191, 23 June 2016), or from reserving the matter for future decision (compare *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 211, ECHR 2013).

8. We are mindful that the violations which have been found in this case are fundamental to the proper guarantee of the rule of law, as applicable to disciplinary actions against the judiciary. In such a context, the finding of a violation assumes major importance. However, the Court has not chosen to declare that a finding of a violation is sufficient in itself, as it could have done, but rather, it dismissed the claim and it is on this point that we disagree.

9. In the present case, section 129(4) of the Act on the Organisation of the Ordinary Courts provides that "[w]*here disciplinary proceedings have been discontinued or resulted in an acquittal, all components of the salary or emolument shall be adjusted to the full amount*". However, the decision to reject the claim was not made on this basis but on the basis of there being no causal link between the violations found in the present case and the pecuniary damage alleged by the applicant.

10. Yet the loss of salary was a direct consequence of the applicant's suspension from office, decided in proceedings which have been determined not to be Convention compliant. Moreover, the disciplinary action was a direct consequence of the applicant's exercise of judicial power pursuant to the fulfilment of his obligations, as a judge, to seek to uphold the rule of law. Once the legal basis of the suspension was deprived of legitimacy, it followed that the consequences of that suspension could be directly imputed to the violation.

11. These consequences were not limited to his professional standing and repute, but were also undoubtedly financial in nature. Moreover, the sum could be calculated on the basis of the determinate period in which the deduction took place. Any such sum could have been awarded with the caveat that should the applicant be entitled to a reinstatement of his salary in full and with retrospective effect, then the domestic courts should also take into account the amount awarded by the Court.