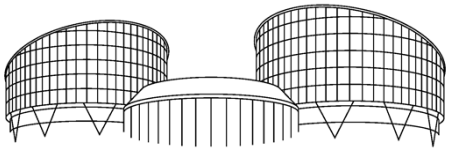

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF TULEYA v. POLAND

(Applications nos. 21181/19 and 51751/20)

JUDGMENT

Art 6 § 1 (criminal) • Tribunal established by law • Lifting of judge's immunity from prosecution and suspension from judicial duties by Supreme Court's Disciplinary Chamber • Loss of victim status in relation to suspension decision • Resolution by Supreme Court's new Chamber of Professional Liability (CPL) acknowledged Art 6 § 1 breach in respect of Disciplinary Chamber proceedings and afforded appropriate and sufficient redress • Resolution taken by judges whose appointments to the Supreme Court pre-dated reformed National Council of the Judiciary (NCJ) • Resolution a positive development in the context of the Polish rule-of-law crisis • Victim status in relation to lifting of immunity • Adverse consequences of Disciplinary Chamber's ruling not redressed by Resolution • No action taken to terminate criminal proceedings against applicant despite CPL's ruling as to non -existence of an offence • Art 6 applicable under its criminal head to immunity proceedings • Manifest breach of domestic law due to inherently deficient judicial appointment procedure to Disciplinary Chamber by reformed NCJ which lacked independence from legislature and executive • Findings in *Reczkowicz v. Poland* and *Juszczyszyn v. Poland* applied • Independence and impartiality of Disciplinary Chamber compromised
Art 8 • Private life applicable • Preliminary inquiry into applicant's request for a preliminary ruling from the Court of Justice of the European Union • Disciplinary Chamber's decision lifting applicant's immunity and suspending him from duties • Impugned measures affected applicant's private life to a very significant degree • Interferences not "in accordance with the law" • Preliminary inquiry into preliminary ruling request contrary to the Treaty on the Functioning of the European Union having precedence over domestic law • Decision on lifting immunity and suspension based on an unforeseeable interpretation of the domestic law by a body not constituting an "independent and impartial tribunal established by law"
Art 10 • Freedom of expression • Preliminary inquiries concerning applicant's public statements on a television news channel and in public meetings • Decision on lifting immunity and suspension • Impugned measures to be seen in context of successive Polish reforms resulting in the weakening of judicial independence and having regard to the sequence of events in their entirety • Authorities' action culminating in Disciplinary Chamber's decision could be regarded as a disguised sanction for the applicant's exercise of his freedom of expression • Impugned measures prompted by applicant's views and criticisms publicly expressed in his professional capacity • Interferences not "prescribed by law" and not pursuing any legitimate aims • Applicant not afforded minimum procedural safeguards in preliminary inquiries • Decision on lifting immunity and suspension taken by a body not constituting an "independent and impartial tribunal established by law" • No requisite procedural safeguards to prevent arbitrary application of relevant substantive law • Measures could be characterised as a strategy aimed at intimidating (or even silencing) the applicant • Impugned measures with chilling effect on judges' participation in public debate on legislative reforms affecting the judiciary and on its independence

STRASBOURG

6 July 2023

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Tuleya v. Poland,

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

Marko Bošnjak*, President*,
Alena Poláčková,
Krzysztof Wojtyczek,
Ivana Jelić,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato*, judges*,
and Renata Degener, *Section Registrar,*

Having regard to:

the applications (nos. 21181/19 and 51751/20) 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 Igor Tuleya ("the applicant"), on 10 April 2019 and 24 November 2020 respectively;

the decision to give notice to the Polish Government ("the Government") of the complaints under Article 6 § 1, Article 8, Article 10 and Article 13 of the Convention and to declare inadmissible the remainder of the applications;

the decision of the Court (the duty judge) of 26 November 2020 not to apply Rule 39 of the Rules of Court in application no. 51751/20 to suspend the execution of the Disciplinary Chamber's resolution of 18 November 2020;

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

the comments submitted by the Commissioner for Human Rights of the Republic of Poland, the "Judges for Judges" Foundation (the Netherlands) jointly with Professor L. Pech, the European Network of Councils for the Judiciary ("the ENCJ"), Amnesty International jointly with the International Commission of Jurists, the Polish Judges' Association Iustitia and the Government of the Kingdom of the Netherlands, who were granted leave to intervene by the President of the Section;

the additional observations submitted by the parties on 3 January 2023;

Having deliberated in private on 29 November 2022, 28 March and 6 June 2023,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The case concerns several preliminary inquiries instituted by the disciplinary officer with regard to the applicant together with the decision of the Disciplinary Chamber of the Supreme Court lifting the applicant's

immunity from prosecution and suspending him from judicial duties. The applicant submitted that the Disciplinary Chamber had not satisfied the requirements of an "independent and impartial tribunal established by law". He also claimed that preliminary inquiries and the Disciplinary Chamber's decision had amounted to a breach of his right to respect for his private life and his right to freedom of expression. The applicant relied on Article 6 § 1, Article 8, Article 10 and Article 13 of the Convention.

THE FACTS

2. The applicant was born in 1970 and lives in Warsaw. He was represented by Mr J. Dubois, Ms S. Gregorczyk-Abram, Ms M. Ejchart-Dubois and Mr M. Wawrykiewicz, lawyers practising 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 v. Poland* (no. 43447/19, §§ 4-53, 22 July 2021) and *Grzęda* ([GC], no. 43572/18, §§ 14-28, 15 March 2022).

6. The applicant was appointed a district court judge in 1996. In 2010 he was appointed as judge of the Warsaw Regional Court where he has adjudicated in a criminal division. He sat on a bench in a number of cases that attracted widespread media interest. For example, he adjudicated in the case of M. Garlicki (see *Mirosław Garlicki v. Poland*, no. 36921/07, 14 June 2011), where he critically assessed the investigative measures applied by the Central Anti-corruption Bureau against the suspect.

7. The applicant is well-known in the judicial community and to the public at large. Cases in which he has adjudicated have been commented on by politicians and representatives of the State authorities. The applicant is also involved in the activities of the Polish Judges' Association Iustitia, which defends, *inter alia*, the rule of law in Poland.

II. PRELIMINARY INQUIRIES CONCERNING THE APPLICANT

8. Preliminary inquiries (*czynności wyjaśniające*), governed by section 114(1) of the Act of 27 July 2001 on the Organisation of Ordinary Courts ("the 2001 Act"), as amended by the Act of 8 December 2017 on the Supreme Court (see paragraph 144 below), are initiated by the disciplinary officer for ordinary court judges (*Rzecznik Dyscyplinarny Sędziów Sądów Powszechnych* – "the disciplinary officer") of his own initiative or at the

request of the relevant authorities "after initial determination of circumstances necessary to establish the constituent elements of a disciplinary offence" ("*po wstępnym ustaleniu okoliczności koniecznych dla stwierdzenia znamion przewinienia dyscyplinarnego*").

9. The Deputy Disciplinary Officers, Judges M. Lasota and P.W. Radzik initiated five sets of preliminary inquiries concerning the applicant. The Government submitted that those inquiries had been initiated on account of the applicant's conduct allegedly disregarding the limits of judicial independence.

10. The deputy disciplinary officers initiated the following preliminary inquiries on the basis of section 114(1) of the 2001 Act:

(1) Case no. RDSP 712-2/18 concerning "[the applicant's] comments in a television programme on 17 July 2018 on the news channel TVN24, in particular those concerning the National Council of the Judiciary and the administration of justice". On 9 August 2018 the applicant was summoned to make a written statement on the above.

(2) Case no. RDSP 712-3/18 regarding "possible unauthorised disclosure of information from pre-trial proceedings no. VIII Kp 1335/17". On 14 August 2018 the applicant was summoned to make a written statement. According to the applicant, those proceedings were at the origin of the criminal proceedings, as a result of which the Disciplinary Chamber lifted his immunity (see paragraphs 43-54 below).

(3) Case no. RDSP 712-12/18 concerning the applicant's participation in a public meeting held at the European Solidarity Centre in Gdańsk on 28 September 2018. On 8 October 2018 the applicant was summoned to make a written statement about his participation in this event, and to indicate who had organised the meeting, in what capacity had he participated in it and whether politicians had taken part in the meeting. This meeting with the applicant concerning the Constitution, freedom and the role of courts in a democratic society was organised by the Polish Judges' Association Iustitia, the Gdańsk Bar Council and the Gdańsk Council of Attorneys-at-Law.

(4) Case no. RDSP 712-13/18 regarding a public meeting held in Lublin on 30 September 2018. On 8 October 2018 the deputy disciplinary officer sought the same information from the applicant as in the case referred to under point 3.

(5) Case no. RDSP 712-8/2-18 concerning the reference for a preliminary ruling made by the Warsaw Regional Court (the applicant) to the Court of Justice of the European Union ("the CJEU") on 4 September 2018 in a criminal case. The request dealt with the compatibility of a new disciplinary regime for judges with Article 19 of the Treaty on the EU (TEU). On 29 November 2018 the deputy disciplinary officer summoned the applicant to make a written statement with regard to possible "judicial excess" (*eksces orzeczniczy*) on account of making that request contrary to the

conditions stipulated in Article 267 on the Treaty on the Functioning of the EU (TFEU).

11. According to the Government, the applicant was summoned to make a voluntary written statement in the five above-mentioned sets of preliminary inquiries on the basis of section 114(2) of the 2001 Act.

12. The Government submitted in their observations that the deputy disciplinary officer had not found sufficient grounds for bringing disciplinary proceedings against the applicant in any of the above-mentioned cases.

13. The applicant submitted that he had not been informed by the disciplinary officer of the termination of any of those preliminary inquiries.

III. PRELIMINARY INQUIRIES CONCERNING OTHER JUDGES

14. In the following two sets of preliminary inquiries concerning other judges, the disciplinary officer summoned the applicant to give evidence as a witness:

(1) Case no. RDSP 714-61/18 concerning disciplinary misconduct (*delikt dyscyplinarny*) on the part of two judges who had worn their robes and the state emblem during a moot court at the "Pol'and'Rock" music festival in August 2018 in a manner that might have undermined the dignity of judicial office and exceeded the limits of freedom of expression of a judge with regard to their public comments about other judges and representatives of public authorities. On 5 September 2018 the disciplinary officer summoned the applicant to give evidence as a witness. The applicant did so in the presence of his lawyer. The Government submitted that this preliminary inquiry had been concluded and no disciplinary proceedings had been initiated. According to the applicant, he was not informed about the conclusion of that preliminary inquiry.

(2) Case no. RDSP 712-8/18 regarding a preliminary inquiry into the reasons for a referral to the CJEU by the Łódź Regional Court (Judge E.M.) for a preliminary ruling in a civil case. The applicant made a similar request to the CJEU for a preliminary ruling in the case mentioned above (see paragraph 10 point (5) above). On 21 September 2018 the disciplinary officer summoned the applicant to give evidence as a witness. This preliminary inquiry was concluded and no disciplinary proceedings were initiated.

15. The Government submitted that both sets of preliminary inquiries concerned the conduct of other judges and the applicant's participation in those cases was limited to giving testimony as a witness – a compulsory procedure for any person summoned as a witness pursuant to Article 177 § 1 of the Code of Criminal Procedure ("the CCP").

16. On 10 October 2018 the applicant was questioned as a witness by the deputy disciplinary officer in connection with preliminary inquiry no. RDSP 712-8/18 (see paragraph 14 point (2) above).

17. The applicant lodged an interlocutory appeal against the deputy disciplinary officer's decision to hear him as a witness. He submitted that, contrary to what was indicated in the summons of 21 September 2018, the questioning concerned his own judicial activity. He made his statements as a witness on pain of criminal liability, even though neither the 2001 Act nor the CCP provided for a possibility that a judge be heard as a witness in the framework of the preliminary inquiry. The deputy disciplinary officer refused to examine the applicant's interlocutory appeal for being inadmissible in law. A further appeal to the disciplinary officer was to no avail. According to the applicant, his statements were admitted in evidence and added to the case file of the proceedings concerning his own alleged "judicial excess" (see paragraph 10 point (5) above).

18. The applicant also requested that his lawyer be allowed to take part in the questioning. The deputy disciplinary officer refused that request on the basis of section 128 of the 2001 Act in conjunction with Article 87 § 3 of the CCP, which entitled a prosecutor to refuse to admit the lawyer's participation in the proceedings, if in his opinion it was not necessary for the protection of the interests of the person concerned, who was not a party to the proceedings. A further appeal against the refusal was to no avail.

19. The Disciplinary Officer, Judge P. Schab, in his press release of 17 December 2018 referring to cases nos. RDSP 712-8/2-18 and RDSP 712-8/18 observed that the requests for preliminary rulings by the Łódź Regional Court and the Warsaw Regional Court were identical in their content except for the reasons prompting those requests, whereas the applicant and Judge E.M. had testified in the course of the preliminary inquiries that they had not conferred with each other. For that reason the disciplinary officer considered that there was a possibility that the applicant and Judge E.M. could have committed a disciplinary offence of compromising the dignity of judicial office as a result of making their requests for preliminary rulings, while failing to observe the principle of impartiality. In addition, consideration had to be given to the possibility that one of those judges (the applicant or Judge E.M.) could have given false testimony when assuring that the requests for preliminary rulings had been prepared by themselves.

20. The disciplinary officer noted that the analysis of the legal context in which the above decisions had been made also led to the conclusion that the requests for preliminary rulings had been made contrary to Article 267 of the TFEU. In those circumstances, the deputy disciplinary officer, Judge M. Lasota considered it necessary to examine whether those requests, made in breach of Article 267 of the TFEU, had interfered with the proper conduct of the relevant domestic proceedings. In this regard, the disciplinary officer stated that the proceedings in which the applicant had made a request for a preliminary ruling concerned a particularly complex criminal case involving the commission of several serious offences. Thus, he considered it necessary

to determine whether the indefinite stay of those proceedings, as a result of the action of a court in breach of the law, could constitute disciplinary misconduct on the part of the applicant.

21. It appears that no disciplinary charge was brought against the applicant in relation to the above.

22. The applicant submitted that as a result of the preliminary inquiries concerning him, many items of an insulting or discrediting nature were published or broadcast on the State television, printed media or on Internet portals. The applicant was confronted with many actions by unknown persons that impinged on his reputation. A parcel that allegedly contained anthrax bacteria was addressed to his professional address at the Warsaw Regional Court causing the evacuation of the building.

IV. THE CJEU'S JUDGMENT OF 26 MARCH 2020 IN *MIASTO ŁOWICZ AND* PROKURATOR *GENERALNY*, C-558/18 AND C-563/18, EU:C:2020:234

23. On 31 August and 4 September 2018 the Łódź Regional Court (Judge E.M.) and the Warsaw Regional Court (the present applicant) respectively made two requests to the CJEU for a preliminary ruling in cases pending before those courts. The first request was made in civil proceedings between the town of Łowicz and the State Treasury relating to a claim for payment of public subsidies. The second request was made in criminal proceedings against several persons for participation in kidnappings for financial gain. Both courts expressed fears that their expected decisions would lead to disciplinary proceedings being brought against the judges presiding in each of the cases, referring to the new legislation on the disciplinary regime applicable to judges and its compatibility with the right of individuals to effective legal protection, guaranteed in the second subparagraph of Article 19 § 1 TEU. They stressed the considerable influence of the Minister of Justice in the new disciplinary regime and pointed to the lack of adequate safeguards accompanying that influence. They submitted that the disciplinary procedures, as thus conceived, conferred on the legislative and executive branches a means of ousting judges whose decisions did not suit them, thereby influencing the judgments which those judges were called upon to deliver.

24. In its judgment of 26 March 2020 the CJEU declared both requests inadmissible. It found that they did not concern an interpretation of EU law which met an objective need for the resolution of the disputes pending before the courts, but were of general nature.

25. The CJEU, however, also addressed the question of the national law which exposed judges to disciplinary proceedings for making a reference for a preliminary ruling. In this part, the relevant reasons for the judgment read as follows:

"54. As regards the circumstance, mentioned by the national courts in their letters ..., in which the two judges who made the present requests for a preliminary ruling were, as a result of those requests, the subject of an investigation prior to the initiation of potential disciplinary proceedings against them, it should be noted that the disputes in the main proceedings in respect of which the Court is requested to provide a preliminary ruling in the present joined cases do not relate to that circumstance. Moreover, it should be noted, as the Polish Government stated in its written observations and at the hearing before the Court, that those investigation proceedings have since been closed on the ground that no disciplinary misconduct, involving a failure to respect the dignity of their office as a result of making those requests for a preliminary ruling, had been established.

55. In that context, it is important to note, as is clear from the Court's settled case-law, that the keystone of the judicial system established by the Treaties is the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniformity in the interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (Opinion 2/13 of 18 December 2014, EU:C:2014:2454, paragraph 176, and judgment of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 41).

56. In accordance with equally settled case-law, Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving the interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case before them. National courts are, moreover, free to exercise that discretion at whatever stage of the proceedings they consider appropriate (judgments of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraph 26, and of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 42 and the case-law cited).

57. Therefore, a rule of national law cannot prevent a national court from using that discretion, which is an inherent part of the system of cooperation between the national courts and the Court of Justice established in Article 267 TFEU and of the functions of the court responsible for the application of EU law, entrusted by that provision to the national courts (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, paragraph 103 and the case-law cited).

58. Provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot therefore be permitted ... Indeed, the mere prospect, as the case may be, of being the subject of disciplinary proceedings as a result of making such a reference or deciding to maintain that reference after it was made is likely to undermine the effective exercise by the national judges concerned of the discretion and the functions referred to in the preceding paragraph.

59. For those judges, not being exposed to disciplinary proceedings or measures for having exercised such a discretion to bring a matter before the Court, which is exclusively within their jurisdiction, also constitutes a guarantee that is essential to judicial independence (see, to that effect, order of 12 February 2019, *RH*, C-8/19 PPU, EU:C:2019:110, paragraph 47), which independence is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU (see, to that effect, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 54 and the case-law cited)."

V. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

A. Background to the case

26. On 16 December 2016, during the session of the *Sejm*, the opposition blocked the parliamentary rostrum in protest, *inter alia*, against planned restrictions on the work of journalists in Parliament. The Speaker of the *Sejm* moved the session to the Column Hall in the parliament building, where a vote on the 2017 Budget Act was to be held. According to opposition MPs, they were prevented by the MPs from the majority and officials of the Chancellery of the *Sejm* from taking part in a debate on the 2017 Budget Act. Again according to opposition MPs, there were also irregularities during the vote and its course was not reliably recorded in the official transcript. Those events were subject to intense public interest and media coverage.

27. After the session in the Column Hall, certain opposition MPs filed a criminal complaint with the prosecutor, alleging that they had not been allowed to take part in the parliamentary debate. They also claimed that the required quorum might not have been attained, which would result in the Budget Act not being duly adopted. Other criminal complaints were filed by several citizens.

28. On 2 August 2017 the Warsaw Regional Prosecutor discontinued the investigation into the alleged irregularities during the *Sejm*'s session of 16 December 2016 held in the Column Hall. Four persons lodged an interlocutory appeal (*zażalenie*) against that decision.

29. On 18 December 2017 the applicant, sitting in a single-judge formation at the Warsaw Regional Court, considered the interlocutory appeal. Journalists from the two television channels who were present requested the court for permission to record the court session (*posiedzenie*). The applicant consulted the representatives of the MPs and the prosecutor, who raised no objections in this regard. The applicant accordingly decided to hold the court session in public and to allow the representatives of the media to record the court session, pursuant to Article 357 § 1 of the CCP.

30. The Warsaw Regional Court (the applicant) decided to allow the interlocutory appeal and ordered the prosecutor to continue the investigation into the alleged irregularities during the vote on the Budget Act held in the Column Hall. The applicant provided orally the main reasons for the decision. In doing so, he quoted from witness testimony given in the investigation and noted that certain MPs from the parliamentary majority could have committed the offence of giving false testimony.

31. On 18 December 2017 the portal *wpolityce.pl* published an interview with Ms K. Pawłowicz, an MP of the majority and member of the new NCJ, who is currently a judge of the Constitutional Court (see paragraph 206 below), in which she commented on the applicant's decision of 18 December 2017. She stated, *inter alia*:

> "Judge Tuleya is an extremely resentful judge and I hope he will be the first person in respect of whom the proceedings will be instituted in the new Disciplinary Chamber for bias and political motivation in adjudicating."

32. On 26 April 2018 the Warsaw Regional Prosecutor again discontinued the investigation.

B. Application for the lifting of the applicant's immunity

33. On 10 January 2018 the State Prosecutor's Office (*Prokuratura Krajowa*) instituted an investigation concerning the applicant's possible unauthorised disclosure of information from the pre-trial proceedings by allowing the media to record the session of 18 December 2017.

34. On 17 February 2020 a prosecutor from the Internal Affairs Department (*Wydział Spraw Wewnętrznych*) of the State Prosecutor's Office applied to the Disciplinary Chamber of the Supreme Court to issue a resolution permitting the applicant to be held criminally liable.

The prosecutor intended to charge the applicant as follows:

> "On 18 December 2017, as a public official, the judge of the Warsaw Regional Court, publicly failed to fulfil his official duties arising from Articles 2 § 1 (2) and 297 § 1 (1,2,4 and 5) of the Code of Criminal Procedure ('the CCP') as well as Article 241 § 1 of the Criminal Code ('the CC') and exceeded his powers under Articles 95b § 1, 329 § 1 and 357 § 1 of the CCP and Article 241 § 1 of the CC in that he allowed representatives of the media to record images and sounds during a session of the Warsaw Regional Court [in the case] no. VIII Kp 1335/17 and during the delivery of the decision in the case and oral reasons for it, as a result of which he disclosed to unauthorised persons, without the legally required consent of the authorised person [the prosecutor], information from the investigation [conducted] by the Warsaw Regional Prosecutor's Office in the case ... which he had obtained in connection with the performance of his official duties by which he acted to the detriment of public interest, namely an offence under Article 231 § 1 in conjunction with Articles 266 § 2 and 241 § 1 in conjunction with Article 11 § 2 of the CC."

35. Those acts were punishable by a term of imprisonment of up to three years.

C. The first-instance decision of the Disciplinary Chamber

36. On 9 June 2020 the Disciplinary Chamber, sitting as the first-instance court in a single-judge formation (Judge J. Wygoda), adopted a resolution (*uchwała*) dismissing the prosecutor's application (no. I DO 8/20). It found that there was no reasonable suspicion that the applicant had committed the impugned criminal offence.

37. First, the Disciplinary Chamber noted that the prosecutor had erroneously asserted that the applicant failed to fulfil his official duties arising from the statutory provisions invoked by the prosecutor by authorising the representatives of the media to record the session of the Warsaw Regional

Court on 18 December 2017 in case no. VIII Kp 1335/17 and the delivery of the decision in that case.

38. It found that the fact that the applicant had "made public" the course of the session on 18 December 2017, by allowing the media representatives to record it, had not involved any abuse of the judge's powers under Article 95b § 1 of the CCP. It was clear from the wording of this provision that in a situation where the court conducting the proceedings or the president of the court ordered a session to be held in public it could not be claimed that they abused their powers or failed to fulfil their duties since that type of decision fell within their statutory powers.

39. The Disciplinary Chamber further noted that the applicant, as a judge presiding over a public court session, had, pursuant to Article 95b § 3 in conjunction with Article 357 of the CCP, the competence to allow representatives of the media to record the session. It was therefore impossible to share the position of the prosecutor that the applicant, by allowing the representatives of the media to participate in the session of 18 December 2017 and to record it, had exceeded his powers in any way. In this context, it referred also to Article 45 § 1 of the Constitution and Article 6 § 1 of the Convention, which enshrined the right to a public hearing. In conclusion, the Disciplinary Chamber held that the applicant's act could not have been characterised as an abuse of his powers or a failure to fulfil his duties as specified in Article 231 of the Criminal Code ("the CC").

40. Secondly, the Disciplinary Chamber refuted the prosecutor's assertion that the act imputed to the applicant had carried the constituent elements of the offence defined in Article 241 § 1 of the CC. It noted that it was clear from the literal wording of this provision that that offence could not have been committed by someone who, acting as an authority, disseminated information from an investigation in court proceedings. The Disciplinary Chamber noted that in the case at hand, the "disclosure" of information from the investigation had taken place in court proceedings and emphasised that it had been made in the absence of any objection from the prosecutor conducting the investigation.

41. The Disciplinary Chamber concluded that the disclosure of material from the investigation at the public court session concerning the examination of an interlocutory appeal against the discontinuance of the investigation could not have been characterised as an offence under Article 241 of the CC, since it had taken place in the course of the court proceedings and the disclosure of information had been made by an authorised body.

42. On 16 June 2020 the prosecutor lodged an interlocutory appeal. He claimed, *inter alia*, that the applicant had, in accordance with Article 95b § 1 of the CCP, the competence to decide that the session could be held in public and to admit the representatives of the media to the session; however no provision of the law authorised him to disclose the evidential material from the investigation.

D. The second-instance decision of the Disciplinary Chamber

43. On 18 November 2020 the Disciplinary Chamber, sitting as the second-instance court, in a formation of three judges, P.S. Niedzielak, J. Sobutka and K. Wytrykowski, partly allowed the prosecutor's interlocutory appeal and amended the first-instance resolution (no. II DO 74/20). It took its decision by a majority, with Judge J. Sobutka dissenting. The Disciplinary Chamber lifted the applicant's immunity and permitted him to be held criminally liable with regard to the charge under Article 241 § 1 of the CC. The charge against the applicant was that, as president of the single-judge formation of the Warsaw Regional Court during the session of 18 December 2017, while giving oral reasons for the decision, he had publicly disclosed without permission – through the media – information from the investigation conducted by the Warsaw Regional Prosecutor's Office.

44. The Disciplinary Chamber further decided, pursuant to section 129(2) and (3) of the 2001 Act, to suspend the applicant from his judicial duties and to reduce his salary by 25% for the duration of his suspension.

45. The Disciplinary Chamber found that the first-instance court had erred in adopting an extensive interpretation of the notion of "court proceedings", one of the constituent elements of the offence under Article 241 § 1 of the CC, which defined the moment up to which the disclosure of information from pre-trial proceedings without authorisation was punishable. It noted that "court proceedings" under that provision were only those proceedings that were subsequent to the conclusion of pre-trial proceedings and were initiated by the filing of a bill of indictment or an equivalent pleading in court and which were conducted in a hearing or session dealing with the issue of the criminal liability of the person concerned. Accordingly, it should be clear that disclosure of information from pre-trial proceedings, without the permission of the relevant authority (the prosecutor), was punishable until the final conclusion of the pre-trial proceedings. However, the conduct of the applicant had taken place after the order setting aside the non-final decision to discontinue the proceedings and referring the case for further pre-trial proceedings had been given, i.e. when the pre-trial proceedings were still ongoing. The Disciplinary Chamber noted that judicial review of the prosecutor's decisions to discontinue pre-trial proceedings or to refuse to initiate such proceedings were judicial acts in pre-trial proceedings, which were not "judicial proceedings" within the meaning of Article 241 § 1 of the CC.

46. It went on to observe that an order to hold a session in public was not a discretionary decision, but had to take into account the circumstances of a given case. In the instant case, the nature and objectives of the pre-trial proceedings, including the fact that the interest of those proceedings was protected directly by Article 241 § 1 of the CC, could not be extinguished through the possibility provided for in Article 95b § 1 of the CCP. There

might be cases in which the possibility of ordering that a session be held in public would be excluded or significantly limited owing to the interest protected by Article 241 § 1 of the CC. The Disciplinary Chamber found that the Warsaw Regional Court (the applicant), when deciding to hold the session in public, should have considered whether allowing the recording of the session by the media was at all admissible in the circumstances of the case. Once he had so decided, he should have conducted the session in such a way that the offence under Article 241 § 1 of the CC would not be committed.

47. From this point of view, the Disciplinary Chamber noted that the last few minutes of the giving of oral reasons for the decision had been particularly critical. In this part, the applicant had read out extensive excerpts from the minutes of the questioning of witnesses, commented on them and quoted the content of other material from the pre-trial proceedings, when not all of the resulting information was already known to the public beforehand, in particular from the MPs' recordings of the proceedings in the *Sejm*'s Column Hall and their direct reports of those proceedings.

48. The Disciplinary Chamber noted that in view of his order to allow the media to record the session under Article 357 § 1 of the CCP, the judge should have given oral reasons for his decision in a general manner so as not to give rise to a reasonable suspicion that he had committed an offence under Article 241 § 1 of the CC. Then, he would have been able to present a detailed analysis of the evidence examined by the prosecutor in the written reasons for the decision, which were, as a rule, only available to the parties.

49. The Disciplinary Chamber also examined whether the applicant's act could be characterised as an offence under Article 231 § 1 and Article 266 § 2 of the CC, both of which required an act to the detriment of public interest. It found that the evidence adduced by the prosecutor did not justify a conclusion that the applicant's act amounted to any threat to the public interest. In this regard, the Disciplinary Chamber noted that it did not result from the material produced in the proceedings, which included the testimony of the prosecutor in charge of the impugned investigation, that the giving of oral reasons by the applicant had given rise to any real threat to the public interest. The absence of such a threat had been explicitly confirmed by the press releases published by the State Prosecutor's Office, which showed that there had been no difficulties in conducting the investigation after the applicant had publicly given oral reasons for the decision of 18 December 2017.

50. Nonetheless, the Disciplinary Chamber found that, in the light of the constituent elements of the offence under Article 241 § 1 of the CC, there was a reasonable suspicion that the applicant had committed the impugned offence by giving reasons for his decision in a manner that was unnecessary and contrary to that provision.

51. In conclusion, the Disciplinary Chamber found that on a proper interpretation of the term "court proceedings", in the light of the evidence

adduced by the prosecutor, in particular the video and audio recording of the applicant giving oral reasons for the decision made on 18 December 2017, which were publicly disseminated through the mass media, despite the fact that the Warsaw Regional Court set aside the prosecutor's decision to discontinue the investigation which meant that the pre-trial proceedings had not ended, there was no doubt as to the reasonable suspicion that the offence under Article 241 § 1 of the CCP had been committed by the applicant.

52. At the same time, the Disciplinary Chamber stressed that the offence prescribed in Article 241 § 1 of the CC was a formal offence, for the commission of which it was sufficient to take the action specified therein, without the occurrence of any negative effect of such an action, from the point of view of the interest protected by this provision. The occurrence of such an effect, on the other hand, should certainly affect the assessment of the degree of social harm caused by the act prohibited under Article 241 § 1 of the CC. In this context, the Disciplinary Chamber noted that the unauthorised disclosure of information from pre-trial proceedings could harm not only the proper functioning of the justice system, but also the individual rights of specific persons, including the participants in the pre-trial proceedings.

53. Lastly, the Disciplinary Chamber stressed that it was accepted in the Supreme Court's case-law to date and legal scholarship that, since section 80(2c) of the 2001 Act provided for the necessity of establishing a reasonable suspicion that an offence has been committed, the degree of social harm caused by the act should also be examined, and not only the existence of the constituent elements of the offence as prescribed in the CC. However, even if this view were to be regarded as correct, it was primarily aimed at strengthening the control of the legitimacy of the initiation of criminal proceedings against judges, not in order to protect judges themselves, but mostly to protect citizens from the improper influence of other authorities on judicial independence. The Disciplinary Chamber noted that it was impossible to establish such a risk in the instant case, contrary to the suggestions of the applicant, some other judges and representatives of part of the media. It went on to observe that there were no circumstances indicating that the prosecutor's action had been intended to serve any other purpose than those prescribed in the CCP in connection with a reasonable suspicion of a violation of the applicable criminal law.

54. The Disciplinary Chamber noted in this regard that, when assessing the degree of social harm caused by the applicant's conduct, the possible hypothesis that this harm was negligible was not obvious for various reasons. Therefore, the question of social harm had to be decided by the court dealing with the merits of the case.

55. The President of the Warsaw Regional Court, Judge P. Schab, who had been appointed to that position by the Minister of Justice on 16 November 2020, immediately enforced the decision on the applicant's suspension.

56. In a radio interview broadcast on 19 November 2020 the Minister of Justice/Prosecutor General stated in relation to the Disciplinary Chamber's resolution of 18 November 2020:

> "Judicial independence is not independence from everything and does not make a judge a God, but it means acting within the framework of the law.
>
> Judge Tuleya knows very well that he was issuing a decision concerning the investigation stage of the proceedings, where only the prosecutor ... can give permission to disclose to the public material from the investigation.
>
> Judge Tuleya clearly breached the letter of the law, and according to the Criminal Code, this breach constitutes an offence of disclosure of material from the pre-trial proceedings without the prosecutor's consent, and, if we take the principle of equality before the law seriously, everyone must expect to be held criminally liable for breaching criminal norms."

E. Application for leave to have the applicant arrested

57. On 16 December 2020 the prosecutor of the State Prosecutor's Office issued a decision to charge the applicant with the offence under Article 241 § 1 of the CC. In order to present the applicant with the charge he was summoned to appear before the prosecutor conducting the investigation as a suspect on the following dates: 20 January, 10 February and 12 March 2021. The summonses were correctly served on the applicant, but he did not appear before the prosecutor.

58. On each of the three dates specified above, the applicant appeared in front of the building of the State Prosecutor's Office participating in a demonstration concerning his case, publicly criticising the prosecutor's conduct, questioning the legality of the Disciplinary Chamber's resolution of 18 November 2020 and announcing to the media that he had refused and would refuse in the future to appear before the prosecutor.

59. On 15 March 2021 the prosecutor of the State Prosecutor's Office applied to the Disciplinary Chamber of the Supreme Court for leave to have the applicant arrested (*zatrzymanie i przymusowe doprowadzenie*) with a view to being charged under Article 241 § 1 of the CC and questioned as a suspect. The prosecutor submitted that the applicant's conduct had indicated his disrespectful attitude to his obligations as prescribed in the applicable law. In the prosecutor's view, there was a high probability that the applicant would continue failing to comply with the summons.

60. On 22 April 2021 the Disciplinary Chamber, sitting as the first-instance court in a single-judge formation (Judge A. Roch), dismissed the prosecutor's application (no. I DI 18/21).

61. The Disciplinary Chamber first rejected the applicant's argument that it could not hear the case owing to the CJEU's interim order of 8 April 2020 (see paragraph 228 below) as the said interim order did not apply to proceedings concerning the immunity of judges.

62. The Disciplinary Chamber noted that following the final decision on lifting the applicant's immunity in respect of the charge under Article 241 § 1 of the CC, the prosecutor had summoned the applicant on three occasions with a view to charging him and questioning him as a suspect. The Disciplinary Chamber found that the applicant's attitude (see paragraphs 57-58 above) had indicated that he did not intend to appear voluntarily.

63. In those circumstances, the Disciplinary Chamber accepted that the formal condition of arrest prescribed in Article 247 § 1(1) of the CCP had been made sufficiently probable. However, it noted that this did not mean that the disciplinary court, when examining an application for leave to arrest a judge, could limit itself to merely analysing the existence of the formal conditions referred to in the latter provision. In the context of arrest under Article 247 § 1(1) of the CCP it was also necessary to establish, on the basis of the adduced evidence, that there was a reasonable suspicion that a person concerned had committed a criminal offence. In this regard, the Disciplinary Chamber stressed the importance of maintaining a balance between, on the one hand, securing public order and the fulfilment of procedural obligations and, on the other hand, the right to liberty.

64. The Disciplinary Chamber stressed that in a case which concerned an application for leave to arrest a judge, it did not carry out a renewed assessment with regard to the decision on lifting of immunity which had already been made. A final decision in this respect could not be challenged. However, the Disciplinary Chamber had to independently make the necessary findings for the purposes of its decision on a person's arrest, also with regard to the existence of a reasonable suspicion that an offence had been committed.

65. Thus, the Disciplinary Chamber moved to verify whether it could allow the prosecutor's application for the applicant's arrest. In this regard it took account of the legal scholarship and the case-law, referring in particular to the Supreme Court's resolution of 28 March 2012, no. I KZP 26/11. In that decision the Supreme Court held, having regard to Article 45 § 1 of the Constitution and the constitutional meaning of the term "case", that although sessions in the course of pre-trial proceedings should be held *in camera*, this did not apply to sessions in which the court examined an interlocutory appeal against decisions terminating the pre-trial proceedings, namely those refusing to initiate or discontinuing an investigation. The Disciplinary Chamber found that under the current legislation, and approving of this understanding of the term "case", the court or the president of the court should and certainly could conduct sessions in this category of cases in open court.

66. Having regard to the above, the Disciplinary Chamber noted that a session where the court examined an interlocutory appeal against the prosecutor's decision discontinuing the investigation conducted at the *ad personam* stage should certainly be held in public. At the same time, the interest of secrecy of pre-trial proceedings did not, in principle, make any

difference with regard to the status of sessions concerning cases where no one had been charged. Consequently, it was not erroneous to hold that also those sessions where the court could finally terminate the criminal proceedings conducted at the *in rem* stage should be held in public.

67. The Disciplinary Chamber stressed that if the court or its president decided to hold a session in public in accordance with Article 95b § 1 of the CCP, this decision alone could lead to the possible disclosure of information from the pre-trial proceedings, in a case where even a dozen persons might appear for the session. Thus, it was not necessary for the disclosure to take place by means of the mass media, all the more so as the granting of permission to the media to record the session, despite the merely *mutatis mutandis* application of Article 357 § 1 of the CCP, was in principle obligatory. The Disciplinary Chamber noted that a public session (*jawne posiedzenie*) was governed by the same rules as those which applied to a public hearing. The presence of the media enhanced the dissemination, but was not its essence, and the decision referred to in Article 357 of the CCP was secondary to the decision ordering that a session be held in public.

68. The Disciplinary Chamber found that the content of reasons for a decision (be it written or presented orally) could not be limited in any way in order to avoid the disclosure of certain information originating from the pre-trial proceedings. It noted in this regard that when setting aside a decision discontinuing the investigation, the court should indicate the acts to be taken in the course of the pre-trial proceedings, stating, where necessary, on the basis of which material it took that decision and why certain deficiencies or doubts needed to be addressed. Referring to the importance of giving reasons for judicial decisions, the Disciplinary Chamber held that any discretionary restriction on the scope of the written reasons or oral reasons in proceedings held in public would in fact defeat the purpose of ordering a session to be held in public, since the control function of that exercise would effectively be eliminated.

69. Furthermore, the Disciplinary Chamber noted that it was undisputed that only information that was previously unknown to the public could constitute the object of the offence under Article 241 § 1 of the CC. However, in the course of the investigation conducted by the State Prosecutor's Office, it was not established which specific information, disclosed by the applicant during the session of 18 December 2017, was of such a nature. It was common knowledge that the investigation carried out by the Warsaw Regional Prosecutor concerned events in the *Sejm* which were widely known and commented on in public. The participants in those events also commented on them in the media, presenting recordings made with private mobile phones. The media had broadcast various materials showing the course of events being the subject of the investigation. Thus, the dissemination of information, even if originating from the pre-trial proceedings, in so far as it was already generally known beforehand, could not be punishable on the basis of

Article 241 § 1 of the CC, because in such a case there was no threat to the proper functioning of justice.

70. The Disciplinary Chamber noted that the prosecutor, apart from vaguely stating in the grounds of the application for the lifting of immunity that it concerned the testimony of witnesses, had not specified what precise information contained in that testimony had been disseminated by the applicant. Nor had he shown that this action caused any real threat to the interest of the pre-trial proceedings. The Disciplinary Chamber stressed that the failure to specify the precise content of the information allegedly disseminated made it impossible not only to verify the question of its disclosure, but also to examine the possible impact of the alleged disclosure on the pre-trial proceedings.

71. The Disciplinary Chamber observed that the prosecutor M. K., who had conducted the investigation in the Warsaw Regional Prosecutor's Office and attended the court session on 18 December 2017, when questioned as a witness, had testified that the public delivery of the main reasons for the decision by the applicant had not had any adverse effects on the remitted investigation. This was also apparent from the reasons for the second prosecutor's decision on discontinuance of 26 April 2018. In this particular case, the Disciplinary Chamber noted that no threat to the effectiveness of the investigation had been established.

72. In those circumstances, the Disciplinary Chamber found that there was no sufficient probability that the applicant had committed the impugned offence, taking into account the existence of different interpretations in the case-law and scholarship as to the possibility and the consequences of ordering a session to be held in public in the course of pre-trial proceedings. As a result, there was no reasonable suspicion that the applicant had acted with the intention of disclosing the protected information from the pre-trial proceedings within the meaning of Article 241 § 1 of the CC. It was also impossible to sufficiently indicate whether and, if so, which specific information from the pre-trial proceedings was disseminated and what, if any, risk this could pose to the proper conduct of the pre-trial proceedings.

73. Furthermore, the Disciplinary Chamber noted that, notwithstanding the above, the disclosure of information from the pre-trial proceedings could lead to criminal liability if the degree of social harm caused by the impugned act was more than insignificant, just as in respect of any offence. Therefore both in the proceedings for permission to hold a judge criminally liable or to have him arrested, it was necessary to establish whether the social harm caused by the alleged act was not manifestly insignificant.

74. The Disciplinary Chamber noted that, even though the applicant's act was allegedly intended to undermine the effectiveness of the investigation carried out by the Warsaw Regional Prosecutor, the prosecutor M.K. in charge of the continued investigation had testified that its interest had not been affected in any way. No other evidence in the case pointed to that risk.

In addition, the applicant's motives regarding his decision to hold the session in public did not indicate any harm caused by his act. The Disciplinary Chamber noted that the material of the investigation had shown that he was motivated by a desire to present to the public the grounds for the decision to discontinue the investigation and the motives behind the court's decision in a case that had aroused much public controversy. It further observed that in the case examined by the applicant the transparency of public life was of particular importance, both because the victims and potential suspects were persons holding public office and because the prosecutor was investigating the possibility of criminal action against fundamental interests of the State. The Disciplinary Chamber found that there were clearly no sufficient grounds to conclude that the social harm caused by the act imputed to the applicant had been more than insignificant.

75. In conclusion, the Disciplinary Chamber found that, in accordance with the principle of proportionality relevant for the application of the coercive measure of arrest, there was no reasonable suspicion that the applicant had committed an offence under Article 241 § 1 of the CC. Consequently, there were no sufficient grounds for allowing the prosecutor's application.

76. On 14 May 2021 the prosecutor lodged an interlocutory appeal against the Disciplinary Chamber's decision of 22 April 2021.

F. Resolution of the Chamber of Professional Liability of 29 November 2022 (II ZIZ 4/22)

77. The interlocutory appeal was to be examined by a different panel of the Disciplinary Chamber. However, the Disciplinary Chamber did not rule on it owing to difficulties in forming the panel, as a number of judges withdrew from sitting in the case. Ultimately, on 14 July 2022 the Acting President of the Disciplinary Chamber decided to transfer the applicant's case to the new Chamber of Professional Liability (*Izba Odpowiedzialności Zawodowej* – "the CPL").

78. On 15 July 2022, upon the entry into force of the Act of 9 June 2022 Amending the Act on the Supreme Court and Certain Other Acts ("the 2022 Amending Act"), the Disciplinary Chamber of the Supreme Court was abolished and the new CPL was established (for further details see paragraphs 181-187 below).

79. On 15 July 2022 the First President of the Supreme Court designated five judges of that court (Judges W. Kozielewicz, D. Kala, M. Wąsek-Wiaderek, M. Siwek and K. Wiak) to adjudicate in the CPL on a transitional basis.

80. On 8 September 2022 the applicant's case was assigned to a formation of three judges composed of W. Kozielewicz, M. Wąsek-Wiaderek (the rapporteur) and D. Kala. All these judges were appointed to the Supreme

Court on recommendation of the "old" NCJ, operating before the entry into force of the Act of 8 December 2017 Amending the Act on the NCJ ("the 2017 Amending Act").

81. On 14 November 2022 the applicant requested that Judges W. Kozielewicz and D. Kala be removed from hearing the case on account of doubts as to their impartiality. He argued, *inter alia*, that both judges had agreed to sit in judicial formations with judges appointed to the Supreme Court on the recommendation of the recomposed NCJ, thus ignoring the resolution of the joined Chambers of the Supreme Court of 23 January 2020 as well as the well-established case-law of the CJEU and of the Court, namely *Reczkowicz* (cited above), *Dolińska-Ficek and Ozimek* (nos. 49868/19 and 57511/19, 8 November 2021) and *Advance Pharma sp. z o.o.* (no. 1469/20, 3 February 2022). Furthermore, both judges annexed their dissenting opinions to the above-mentioned resolution of the joined Chambers of the Supreme Court. The applicant also requested that the judges of the Supreme Court appointed on the recommendation of the recomposed NCJ be excluded from ruling on his request for the exclusion of Judges W. Kozielewicz and D. Kala.

82. On 17 November 2022 the CPL held a session in the case.

83. On 29 November 2022 the CPL gave its resolution (no. II ZIZ 4/22). First, it dismissed the prosecutor's interlocutory appeal and upheld the Disciplinary Chamber's decision of 22 April 2021 (see paragraph 60 above). Secondly, the CPL, of its own motion, set aside the Disciplinary Chamber's resolution of 18 November 2020 in the part regarding the applicant's suspension from his judicial duties and reduction of his salary for the duration of that suspension.

84. With regard to the interlocutory appeal, the CPL found that it was manifestly ill-founded. It dismissed the prosecutor's argument that the court, in deciding on an application for leave to have a judge arrested, had been bound by an earlier decision of the court lifting the judge's immunity as regards the existence of a reasonable suspicion that an offence had been committed. The CPL agreed in this regard with the Disciplinary Chamber's decision of 22 April 2021 that, for an arrest under Article 247 § 1(1) of the CCP to be lawful, the condition of reasonable suspicion had to be satisfied (see paragraphs 64-75 above). The contrary view could not be accepted in the light of the constitutional and Convention standards.

85. The CPL had no doubt that the applicant, while deciding to hold in public the session of 18 December 2017, the subject of which was to examine an interlocutory appeal against the decision refusing to initiate the investigation, had acted on the basis and within the limits of the law, and therefore his action did not comprise the constitutive elements of the offence provided for under Article 241 § 1 of the CC. The competence of the court (in practice, the judge adjudicating in a single-judge formation) to hold that session in public followed directly from the applicable provisions, namely

Article 95b § 1 of the CCP. Furthermore, the admission of the media to report on that session had a clear basis in Article 95b § 3 of the CCP, which, with regard to open sessions, mandated that the provisions on the participation of the media in a hearing should apply accordingly. The CPL went on to note that since the legislature had created a legal basis of statutory rank (Article 95b § 1 of the CCP) enabling the court to hold a session in public, including a session which concerned a review of the refusal to initiate the investigation, it could not be accepted that a judge hearing a case in such an open session committed the offence under Article 241 of the CC.

86. The CPL further referred to the Disciplinary Chamber's finding that the applicant's actions had not constituted a threat to the interest of that specific set of pre-trial proceedings. It agreed with those arguments, but at the same time, having determined that the applicant had acted in accordance with the applicable law, it was unnecessary to assess the social harm of his actions at all. Accordingly, the prosecutor's interlocutory appeal against the resolution of 22 April 2021 was manifestly ill-founded.

87. Furthermore, the CPL found that the impugned resolution should have been upheld despite the fact that it had been given by the Disciplinary Chamber of the Supreme Court, that is, a body which, in accordance with the rulings of the CJEU, the Court and the Supreme Court, did not guarantee the right to an independent and impartial tribunal established by law (referring, *inter alia*, to the CJEU's judgment of 15 July 2021 in *Commission v. Poland (Disciplinary regime for judges)*, C-791/19 and the Court's judgment in *Reczkowicz* (cited above)). It noted that the rulings issued by such a body should have been removed from the legal system. This had been unequivocally confirmed in the 2022 Amending Act, which introduced both the requirement to "review", of its own motion, the Disciplinary Chamber's decision on suspension of a judge from his or her duties – to be done at the first session in the case – and the possibility of challenging, at the judge's request, any final resolution allowing a judge to be held criminally liable if it was issued with the participation of a judge of the Disciplinary Chamber (sections 9 and 18 of the 2022 Amending Act, respectively; see paragraphs 186-187 below). However, in the applicant's particular case, given that the impugned resolution was as favourable as possible to him and, at the same time, sharing in principle, the reasoning expressed in the resolution, the CPL decided to uphold it.

88. The CPL noted that its ruling had resulted in a final termination of the proceedings concerning the prosecutor's application for leave to have the applicant arrested, while the setting-aside of the impugned resolution of the Disciplinary Chamber would have resulted in the case having to be remitted to the CPL for examination at first instance. In view of the evident lack of grounds for consenting to the applicant's arrest, the CPL considered that the continuation of the proceedings in question, even if prompted by respect for

the important procedural directive to remove grossly flawed decisions from the legal system, would be unjust and ill-founded.

Furthermore, the CPL found that the upholding of the impugned resolution, despite its adoption by the Disciplinary Chamber, did not conflict with the obligation to comply with the Court's judgment in *Reczkowicz* (cited above). It noted that the applicant's case, whose subject-matter concerned an application for leave to have a judge arrested, was part of the procedure for allowing a judge to be held criminally liable. It was thus subject to the procedural requirements of Article 6 of the Convention (as, rightly, found in the Supreme Court's decision of 14 September 2022, no. I KZP 7/22). However, in the Convention system, violations of procedural rights under Article 6 of the Convention that occurred during proceedings terminated by acquittal or discontinuance could not be successfully invoked (see, in particular, *Batmaz v. Turkey*, no. 714/08, §§ 34-37, 18 February 2014, where the complaint of a failure to ensure the right to an independent and impartial tribunal established by law was declared inadmissible on that basis; see also *Khlyustov v. Russia*, no. 28975/05, § 103, 11 July 2013; it is only permissible to complain about the unreasonable length of such proceedings). Accordingly, the giving of a ruling that was as favourable as possible in a case resulted in the loss of the status of "victim" within the meaning of Article 34 of the Convention. The CPL noted that such position of the Court supported the view that, despite the finding in *Reczkowicz* that the Disciplinary Chamber was not a tribunal satisfying the requirements of Article 6 of the Convention, and in view of the decision reached in the impugned resolution of that Chamber, the fact it was upheld did not constitute a violation of the applicant's right to a fair hearing.

89. In so far as the applicant's suspension was concerned, on the basis of section 9 of the 2022 Amending Act, the CPL decided, of its own motion, to set aside the Disciplinary Chamber's resolution of 18 November 2020 in the part regarding the applicant's suspension and the 25% reduction of his salary for the duration of that suspension.

90. Having analysed section 9 of the 2022 Amending Act, the CPL found that this provision allowed it to examine the measures ordered by the Disciplinary Chamber in the form of suspension of a judge and reduction of his or her remuneration, regardless of whether they had been ordered in connection with the disciplinary proceedings or in connection with the lifting of the judge's immunity. In accordance with this provision, the CPL was to undertake such an examination "of its own motion, at the first session in the case". It had therefore to be assumed that it was the legislature's will that the new CPL would review of its own motion all measures imposed in the form of "suspension of a judge and reduction of his or her remuneration".

91. Having compared section 9 of the 2022 Amending Act with its section 18 (see also paragraphs 186-187 below), the CPL noted that in accordance with the latter provision a review of the final decisions of the

Disciplinary Chamber on lifting the judge's immunity was possible at the judge's request. It found that such a legal solution was inconsistent and dysfunctional since it disregarded the fact that, in accordance with section 129(2) and (3) of the 2001 Act, when adopting a resolution permitting a judge to be held criminally liable in respect of an intentional offence prosecuted by public prosecution, the disciplinary court automatically decided to suspend the judge from his or her duties, which in turn, entailed the obligation to reduce his or her remuneration by 25 to 50% for the duration of the suspension.

92. The CPL further noted that an analysis of the 2022 Amending Act led to the conclusion, although this was not apparent from the explanatory report accompanying it, that the legislature had noted the unequivocal position of the Court and the CJEU that the Disciplinary Chamber could not be regarded as an independent and impartial tribunal established by law within the meaning of Article 6 § 1 of the Convention and Article 47 of the Charter of Fundamental Rights. In view of that conclusion, the legislature had created a separate legal basis for the review and annulment of decisions suspending judges from their duties and reducing their remuneration, if the CPL found those decisions to be unjustified. Thus, it had to be assumed that section 9 of the 2022 Amending Act introduced a statutory basis for reviewing the legitimacy of a decision to suspend a judge and reduce his or her remuneration also in those cases in which suspension and reduction of remuneration was mandatory under section 129(2) and (3) of the 2001 Act.

93. The CPL emphasised again that the legal solutions ultimately adopted in the transitional provisions of the 2022 Amending Act were inconsistent. On the one hand, section 9 of the Act allowed the CPL to act of its own motion with regard to the verification of the provisional measures applied (e.g. suspension), while on the other hand, with regard to the issue of verification of the decision lifting the immunity of a judge, section 18 of the same Act provided that this was possible only at the request of the judge concerned. In view of the above, taking into account the content of section 9 of the 2022 Amending Act, the CPL found itself competent to act in this case of its own motion only with regard to the verification of the legitimacy of the provisional measures applied.

94. The CPL considered that it was obliged to apply section 9 of the 2022 Amending Act, despite the fact that it was not deciding on a request for authorisation to hold a judge criminally liable, but was ruling for the first time on the interlocutory appeal against the refusal to grant leave to have the applicant arrested with a view to being charged. It adopted such a view because of the functional, inseparable link between the subject matter of the present proceedings and the proceedings in which provisional measures in the form of suspension of the applicant from his duties and reduction of his remuneration for the duration of the suspension had been applied. It noted that both the Disciplinary Chamber's resolution of 22 April 2021, which was

the subject of the present proceedings, and the Disciplinary Chamber's resolution of 18 November 2020, had been issued in the framework of the immunity proceedings, i.e. proceedings for authorisation to hold the applicant criminally liable. Moreover, the granting of leave to have a judge arrested with a view to being charged, as well as the application of the provisional measures referred to above in the "immunity procedure", required the fulfilment of the same substantive condition, namely the establishment of a reasonable suspicion that a criminal offence had been committed.

95. The CPL found that the applicant's conduct had not comprised the constitutive elements of an offence and this conclusion resulted in upholding the Disciplinary Chamber's resolution refusing authorisation for the applicant's arrest. In its view, the fact of endorsing the Disciplinary Chamber's findings led to the removal of the conditions for the application of a *sui generis* preventive measure in the immunity proceedings, namely the suspension of a judge from his duties, which allowed the CPL to act of its own motion to the extent indicated in section 9 of the 2022 Amending Act.

96. On 29 November 2022 Judges W. Kozielewicz and D. Kala made a declaration in connection with the applicant's request for their removal from the case. They stated that they had annexed their dissenting opinions to the resolution of the joined Chambers of the Supreme Court of 23 January 2020 since they disagreed with the legal view adopted in the resolution. They also noted that the right to express a dissenting opinion was one of the guarantees of judicial independence.

G. Decision of the Chamber of Professional Liability concerning the applicant's request for removal of judges

97. On 31 January 2023 the CPL sitting in a single-judge formation (Judge M. Siwek), dismissed the applicant's request for removal of Judges W. Kozielewicz and D. Kala from the case no. II ZIZ 4/22 as ill-founded. It found that none of the circumstances invoked by the applicant justified his doubts about the impartiality of those judges.

98. The CPL noted that the judge's right to express a dissenting opinion was one of the aspects of judicial independence. As regards the resolution of the joined Chambers of the Supreme Court of 23 January 2020, it observed that the Constitutional Court in its judgment of 20 April 2020 (no. U 2/20) had held that the said Resolution was incompatible, *inter alia*, with several constitutional provisions and Article 6 § 1 of the Convention. It found that, in consequence, the said resolution had been removed from the legal system.

99. Furthermore, the CPL disagreed with the applicant's argument that adjudication in formations with judges appointed to the Supreme Court on the recommendation of the recomposed NCJ was incompatible, *inter alia*, with the Court's judgments. As regards the Court's judgments referred to by the applicant, it pointed out that those judgments were first of all binding on

the parties to the case in which they had been given. In its view, the Court's judgments did not create universally binding norms, in particular of a constitutional nature. In this connection, the CPL referred to the Constitutional Court's judgment of 10 March 2022 (no. K 7/21) in which that court had held that Article 6 § 1 of the Convention was incompatible with several provisions of the Constitution (see paragraphs 206-207 below). It further referred to the Constitutional Court's judgment of 7 October 2021 (no. K 3/21) where that court had held that several provisions of the TEU were incompatible with the Constitution. The CPL noted that those judgments, which according to the Constitution were final and universally binding, responded to the arguments raised by the applicant relating to the adjudication by Judges W. Kozielewicz and D. Kala in formations with judges appointed to the Supreme Court on the recommendation of the recomposed NCJ.

100. Lastly, as regards the applicant's request that the judges of the Supreme Court appointed on the recommendation of the recomposed NCJ be excluded from ruling on his principal request for removal of judges, the CPL found than in accordance with the Supreme Court's established case-law a party to the proceedings was not entitled to request the exclusion of a judge designated to hear an application for the removal of another judge.

H. Other facts

101. In the light of the material in the Court's possession, the criminal proceedings against the applicant are still pending.

102. On 16 April 2023 the portal *onet.pl* published an interview with the applicant. In that interview the applicant stated that he had been summoned to the State Prosecutor's Office to give evidence as a witness in a case. Shortly afterwards, the applicant was approached on the corridor by a prosecutor and invited to his office. The prosecutor informed the applicant that he was in charge of the investigation in the "Column Hall vote" case and asked the applicant if he could present charges to him in that case, but the applicant refused and left.

VI. REFERENCE FOR A PRELIMINARY RULING MADE ON 18 NOVEMBER 2020

103. On 18 November 2020 the Warsaw Regional Court, sitting in a panel composed of the applicant, submitted a reference for a preliminary ruling to the CJEU in criminal case no. VIII K 105/17. The request concerned the status of the Disciplinary Chamber and its judges as well as the competences of that body. Consequently the Warsaw Regional Court stayed the proceedings. On 28 June 2022 the CJEU held a hearing in the case (C-615/20). The proceedings are pending.

104. The prosecutor lodged an interlocutory appeal against the Regional Court's decision to stay the proceedings, claiming that the applicant was not authorised, within the meaning of Article 439 § 1(1) of the CCP, to do so. He argued that the Disciplinary Chamber's resolution of 18 November 2020 had deprived the applicant of the right to exercise judicial duties.

105. On 24 February 2021 the Warsaw Court of Appeal, sitting in a formation of three judges, M. Piekarska-Drążek (the rapporteur), D. Tyrała and P. Filipkowski, dismissed the interlocutory appeal as manifestly ill-founded. It noted that the prosecutor had unsuccessfully attempted to challenge the Warsaw Regional Court's decision to stay the proceedings as a result of that court's preliminary reference to the CJEU. The prosecutor in fact intended to challenge the very existence of those two decisions by raising a ground of appeal under Article 439 § 1(1) of the CCP, i.e. the most serious procedural flaw leading to the automatic setting-aside of the challenged decision, if that flaw had actually occurred. The Court of Appeal observed that the prosecutor had intended to have both decisions, namely on the stay and on the preliminary reference set aside, while legally he could not have challenged the preliminary reference.

106. In the Court of Appeal's view, those actions of the prosecutor could not be dissociated from the initial reasons for the prosecution's application to lift the applicant's immunity. The allegation that the applicant had committed criminal offences had been made on account of the strictly procedural decisions taken by the Warsaw Regional Court, which had adjudicated in a case concerning a breach of parliamentary procedures by public officials of the majority in the *Sejm*. The Court of Appeal held that the prosecutor's plea that the decision to stay the proceedings had been given by a "judge unauthorised to adjudicate", referring to the lifting of the applicant's immunity, was unfounded. It found that the prosecutor's reliance on the Disciplinary Chamber's resolution of 18 November 2020 was ineffective, being just as groundless and ineffective as that body's resolution on the applicant's immunity.

107. The Court of Appeal found that in the constitutional order recognised by it, the possibility of a challenge to the independence of a judge and independent decisions of a court by a body which did not have the attributes of a "court" could not be accepted. In accordance with Article 180 § 2 and Article 181 in conjunction with Article 45 § 1 of the Constitution, the suspension of a judge from office, the lifting of his or her immunity and permission to hold a judge criminally liable could only result from a final decision of a court – a court that was independent and impartial – in the course of the fair examination of a case. For the Court of Appeal, the operation of the Disciplinary Chamber had none of those characteristics.

108. The Court of Appeal shared the objections that the Disciplinary Chamber was not a "court" within the meaning of Article 45 § 1 of the Constitution, but rather an extraordinary body that could be temporarily

established according to the Constitution in time of war. A body lacking the characteristics of a court, both as regards the procedural grounds for its establishment and the selection and appointment of its members, as well as an indispensable feature of a court, namely its independence, could not be considered a court.

109. In this regard the Court of Appeal found that the Disciplinary Chamber could not, therefore, rule on the disciplinary cases of judges, still less on cases involving the lifting of a judge's immunity, the suspension of a judge from his duties or the authorisation of the deprivation of liberty of a judge. The activities of the Disciplinary Chamber in this regard since its inception, and which had intensified over the year 2020, were unacceptable and provided further evidence that the Disciplinary Chamber was pursuing a policy of sanctioning independent judges.

110. The Court of Appeal noted that the prosecutor's allegation that the applicant (judge) had been stripped of his right to adjudicate disregarded the provisions of the Constitution, the decisions of the Supreme Court and the CJEU, as well as international conventions and treaties which guaranteed everyone, including judges, the right to have their case heard by an independent court. It invoked in this respect, *inter alia*, the CJEU's preliminary ruling of 19 November 2019 in *A.K. and Others* (C-585/18, C-624/18 and C-625/18), the Supreme Court's judgment of 5 December 2019, no. III PO 7/18, the resolution of the joined Chambers of the Supreme Court of 23 January 2020 and the CJEU's interim decision of 8 April 2020 (C-791/19 R). There was therefore no doubt that the Disciplinary Chamber should not adjudicate in disciplinary cases of judges, still less in cases entailing the lifting of a judge's immunity and suspension from his or her duties, i.e. in cases with the most far-reaching consequences for the status of a judge. It was inadmissible for the Disciplinary Chamber to rule in those matters, including in the applicant's case, disregarding the rulings mentioned above. Consequently the applicant remained an ordinary judge (at all times), with immunity and the right to adjudicate attached to that office; he was therefore entitled to issue decisions to make a preliminary reference and to stay proceedings on 18 November 2020 in case no. VIII K 105/17 as a court – the Warsaw Regional Court.

111. The Court of Appeal also noted that the prosecutor's current concern not to interrupt the course of a criminal case in which the court had stayed the proceedings was a pretence, since it was at the request of the prosecution that the Disciplinary Chamber had issued the resolution lifting the applicant's immunity. The applicant's suspension was the result of those authorities' actions, known to them from the outset, in the form of stopping the course of all cases assigned to him, often involving complex and labour-intensive criminal trials. It could be inferred from those actions that neither the course of case no. VIII K 105/17, nor the efficiency of other proceedings, nor even the interest of the parties to those proceedings, including the harm to victims

of crime and the interest of the administration of justice in general, was considered a higher good.

112. In his press release of 28 February 2021, relating to the Warsaw Court of Appeal's decision of 24 February 2021, the President of the Warsaw Regional Court, Judge P. Schab stated that the applicant remained suspended. He noted that the above-mentioned decision had determined only the question of the validity of the stay of proceedings in criminal case no. VIII K 105/17 and had no impact on the need to comply with the Disciplinary Chamber's resolution of 18 November 2020.

113. Further to the Court of Appeal's decision of 24 February 2021, on 1 March 2021 the applicant requested the President of the Warsaw Regional Court, Judge P. Schab, who was at the same time the disciplinary officer, to allow him to resume his judicial duties. On 2 March 2021 the Vice-President of the Warsaw Regional Court, Judge P.W. Radzik, who was at the same time the deputy disciplinary officer, informed the applicant that in the light of the Disciplinary Chamber's resolution of 18 November 2020 his request could not be granted.

VII. CIVIL PROCEEDINGS AGAINST THE WARSAW REGIONAL COURT

114. On 8 March 2021 the applicant lodged an application for an injunction against the Warsaw Regional Court with the Warsaw Praga-Południe District Court (labour division). He sought, *inter alia*, to be allowed to exercise his rights and duties as a judge.

115. On 23 September 2021 the Warsaw Praga-Południe District Court dismissed the application. The applicant lodged an interlocutory appeal.

116. On 21 March 2022 the Warsaw Praga Regional Court amended the first-instance decision and granted the injunction (no. VII Pz 48/21). It ordered the Warsaw Regional 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 injunction of 21 March 2022 was final.

117. On 24 March 2022 the applicant sent the Warsaw Regional Court a request for enforcement of the final decision of 21 March 2022. He informed the court that he intended to report to work on 28 March 2022 and that in case of non-compliance with the injunction he would be obliged to initiate enforcement proceedings in this connection. In his reply of 25 March 2022 the Vice-President of the Warsaw Regional Court, Judge P.W. Radzik requested the applicant to rectify the formal shortcomings of his request by producing a copy of a decision setting aside the Disciplinary Chamber's resolution of 18 November 2020. The applicant renewed his request for enforcement of the decision of 21 March 2022. In a reply of the same day,

the Vice-President of the Warsaw Regional Court informed the applicant that there had been no legal grounds to allow his request, having regard to the Disciplinary Chamber's resolution of 18 November 2020 suspending the applicant from his duties.

118. On 8 August 2022 the applicant sent the Warsaw Regional Court another request for enforcement of the final injunction of 21 March 2022. It appears that the injunction of 21 March 2022 has not been enforced to date.

VIII. FACTS CONCERNING THE APPLICANT'S REINSTATEMENT

119. On an unspecified date in July 2022 Judge J. Przanowska-Tomaszek was appointed as President of the Warsaw Regional Court. On 5 August 2022 she decided to reinstate the applicant as of 8 August 2022 owing to the inactivity of the CPL of the Supreme Court as regards the examination of the Disciplinary Chamber's resolution of 18 November 2020 concerning the applicant's suspension. She also decided to place the applicant on leave from 8 August to 19 September 2022 in view of the need to use up his outstanding annual leave for 2018.

120. On 8 August 2022 the President of the Warsaw Court of Appeal, Judge P. Schab, who had meanwhile been promoted to that post from the previously held post of the President of the Warsaw Regional Court (see paragraph 55 above) and was, at the same time the disciplinary officer acting in the applicant's cases, set aside – [apparently] exercising the administrative supervision over the Warsaw Regional Court – the decisions of the President of that court on the applicant's reinstatement and taking of leave. He found that those administrative acts were incompatible with the final and enforceable resolution of the Disciplinary Chamber of 18 November 2020.

121. On 30 November 2022 the President of the Warsaw Regional Court informed the applicant that he would be reinstated as from that day, having regard to the resolution of the Supreme Court's CPL of 29 November 2022 which set aside in part the Disciplinary Chamber's resolution of 18 November 2020 (see paragraph 83 above). Subsequently, the applicant's salary was adjusted to the full amount and he received his back pay.

IX. JUDGMENT OF THE SUPREME COURT OF 19 OCTOBER 2022, NO. II KS 32/21 REGARDING THE INDEPENDENCE AND IMPARTIALITY OF JUDGE P. SCHAB

122. On 19 October 2022 the Criminal Chamber of the Supreme Court, sitting in a formation of three judges (W. Wróbel, J. Matras and M. Pietruszyński), quashed a judgment of the Warsaw Court of Appeal in a criminal case. The impugned judgment was rendered by a judicial formation

including Judges P. Schab and P.W. Radzik – the Disciplinary Officer for Ordinary Court Judges and his Deputy, respectively.

123. Analysing the procedure for appointment of Judge P. Schab to the Warsaw Court of Appeal, the Supreme Court found that, irrespective of the fact that an unconstitutional body (the recomposed NCJ) had recommended him, the Assembly of Judges of the Court of Appeal had not given its opinion on the candidature of Judge P. Schab. Moreover, the fact that he was the only candidate excluded the possibility of comparing his competences with those of other candidates. The Supreme Court further found that the analysis of the case indicated that the politically dominated NCJ had been determined to carry out the appointment procedure despite the lack of documents required by law, which could be regarded by the public as reflecting a special interest of that body in having Judge P. Schab appointed to a judicial post.

124. The Supreme Court further held that, in the context of assessing the fulfilment of requirements of independence and impartiality by Judge P. Schab, the circumstances surrounding his appointment by the political authorities to various positions were of a particular importance. In particular, the Minister of Justice, using the discretionary power created by the Act of 20 July 2018 amending the Act on the Organisation of Ordinary Courts and Certain Other Acts, on 30 May 2018 appointed Judge P. Schab to the position of Disciplinary Officer for Ordinary Court Judges. Furthermore, on 17 April 2019, Judge P. Schab was seconded by the Minister of Justice to adjudicate in the Warsaw Court of Appeal, then in November 2020 he was appointed by the same Minister to the post of the President of the Warsaw Regional Court and, later in July 2022, to the post of the President of the Warsaw Court of Appeal. The Supreme Court noted that all of those appointments had been of a discretionary nature, which in the public perception was regarded as reflecting an expression of trust in political power. It was also relevant that those appointments took place over a relatively short period of time and that most of them were made by the same politician serving as Minister of Justice.

125. The Supreme Court further found that another circumstance relevant in this context was the nature of Judge P. Schab's activities as disciplinary officer or president of the court. It noted that as disciplinary officer Judge P. Schab and his deputies had initiated disciplinary proceedings against judges in respect of their judicial acts, in particular for submitting requests for preliminary rulings to the CJEU, or actions ensuring that the court panels be duly composed in accordance with the standards deriving from Article 45 of the Constitution of the Republic of Poland, Article 6 § 1 of the Convention and Article 47 of the Charter of Fundamental Rights. The Supreme Court also referred to decisions of Judge P. Schab in his capacity as President of the Warsaw Court of Appeal, whereby he had prevented judges applying EU law from adjudicating.

126. The Supreme Court concluded that the participation in the panel of the Court of Appeal which had given the impugned judgment of Judge P. Schab, appointed as judge of the Warsaw Court of Appeal in a defective procedure before the NCJ, did not meet the standard of due composition of a court formation referred to in Article 439 § 1 (2) of the Code of Criminal Procedure owing to the failure to observe the guarantees of impartiality and independence required by Article 45 § 1 of the Constitution of the Republic of Poland, Article 6 § 1 of the Convention and Article 47 of the Charter of Fundamental Rights.

X. OTHER DEVELOPMENTS

127. On 14 July 2021, following the interim order issued by the Vice-President of the CJEU in case C-204/21 R (see paragraph 235 below), the applicant submitted a request to the President of the Warsaw Regional Court to allow him to resume his duties. In his reply of 20 July 2021, the Vice-President of the Warsaw Regional Court, Judge P.W. Radzik informed the applicant that there had been no legal grounds on which to allow his request. Referring to the Constitutional Court's judgment of 14 July 2021 (no. P 7/20; see paragraph 204 below), he stated that the execution of the above-mentioned interim order would have constituted a violation of the Constitution.

128. On 20 July 2021, following the CJEU's judgment of 15 July 2021 in *Commission v. Poland (Disciplinary regime for judges)* (see paragraphs 229-233 below), the applicant requested the President of the Warsaw Regional Court to allow him to resume his judicial duties. He submitted that in the light of the CJEU's judgment, the decision on the lifting of his immunity and his suspension had been given by a body which was not a "tribunal" within the meaning of EU law. In his reply of 23 July 2021 the Vice-President of the Warsaw Regional Court informed the applicant that in view of the Disciplinary Chamber's resolution of 18 November 2020 his request could not be granted.

129. On 26 July 2021 the applicant filed a criminal complaint against the President and Vice-President of the Warsaw Regional Court, alleging that they had unlawfully refused to allow him to resume his duties despite the CJEU's interim order of 8 April 2020 and the judgment of 15 July 2021, and thus had abused their powers. On 29 December 2021 the State Prosecutor's Office refused to initiate an investigation into the case.

130. On 2 September 2021 the applicant requested the President of the Warsaw Regional Court to authorise him to give classes at the Koźmiński University and the School of Procedural Law "*Ad Exemplum*" in the academic year 2021/2022. He submitted that he had been collaborating with those two entities for the last few years. On 10 September 2021 the Vice-President of the Warsaw Regional Court, Judge P.W. Radzik, who was

at the same time the deputy disciplinary officer, refused that request. He found that the giving of classes by the applicant would compromise the dignity of the judicial office, referring to the decision permitting him to be held criminally liable and suspending him.

131. On 4 October 2021 the applicant sought a similar authorisation to give an on-line lecture on criminal law for members of the Warsaw Bar Council. On 6 October 2021 the Vice-President of the Warsaw Regional Court refused that request relying on the same grounds as in respect of the applicant's earlier request. On 18 October and 3 November 2021 the Vice-President of the Warsaw Regional Court refused two further similar requests of the applicant concerning lectures for members of the Warsaw Bar Council.

XI. SELECTED PUBLIC STATEMENTS OF THE APPLICANT

132. On 17 July 2018 the applicant was interviewed on the TVN24 television news channel as follows:

> "Q: The judges have a difficult choice to make, because you have made the decision that maybe you [the judges] will run for the Supreme Court in order to actually delay the whole procedure. But on the other hand, it is also a choice that you accept the [new] NCJ, which you in turn recognise has been illegally appointed, and that is a little bit a tragedy of this situation.
>
> A: You very nicely said: 'the tragedy of the whole situation'. What we are going to do we already know, but for the moment I cannot say it publicly. I think that at the end of the week there will be an official position of the Iustitia board. Of course we have a strategy, we have to adapt it to the changing circumstances. To what our 'opponent' (in inverted commas) allows us to do. Well, but we are united. We have a few ideas. Of course we will fight on the ground of law. Well, indeed some people have a dilemma, because it is difficult to appeal, to discuss with a body such as the current NCJ ... This is my position. On the other hand, there are judges who believe that out of 'force majeure', we should - while not recognising the NCJ - at the same time use all these available legal-procedural paths.
>
> Well, I'll be honest and say that I don't know what I'm going to do yet, but at this point it's rather difficult for me to write or submit a request to a body that is not functioning. It has nothing to do with the judiciary anymore. It is a kind of fiction, like in *1984* where the Ministry of Truth dealt with propaganda, the Ministry of Peace with war. And the NCJ has so much to do with the judiciary that it destroys it, and the people who sit there are simply gravediggers of judicial independence.
>
> Q: I feel that you may be disciplined for these words.
>
> A: This can't be deleted. What bad luck. Also, I think my individual reluctance will prevail here and I will not apply [for a post] at the Supreme Court even if there is a need to do so.
>
> I referred to Orwell to show the paradox of the institution ... Unfortunately, everything is heading in the wrong direction, which is why I think that judges should - in defence of values, because we defend values, we don't defend particular people or posts - we should have an active role in this public, civic life. We should take part in demonstrations in defence of the courts. It is, firstly, a gesture of solidarity with people

who defend the same values that we hold dear. And secondly, it is to show that it is not true that we are fighting for the 'trough'. When we hear statements from politicians who threaten [us] with disciplinary proceedings for participating in demonstrations, it is by actively participating in the defence of the courts that we show that we do not care about our positions, but rather defend certain values. If we are threatened with removal from the profession for doing so, there are more important things than a judicial post or, as the politicians of the ruling camp say, the 'trough'. Let us also stand together with the people."

133. On 19 February 2019 the applicant was interviewed by the portal *onet.pl*. He stated, *inter alia*:

"A: It is indeed the case that judges and prosecutors who try to say out loud what they [think] about the so-called judicial reforms are exposed to various forms of harassment. It is no longer a matter of them having problems with promotion or finding it more difficult at work, but it is already concrete actions of disciplinary officers or even law enforcement agencies that are directed at them. Law enforcement agencies, that is, simply the prosecutor's office. Here we have the example of Judge Żurek, who has been repeatedly interrogated by the CBA. ...

It is not the case that our justice system works well. The judges see that a lot needs to be changed. Above all, procedures need to be improved and practitioners have their opinions [and] demands that they try to present to politicians, but politicians have never been interested in actually bringing the courts closer to the citizens. Over the last few years, you can see that they are only focused on either getting rid of inconvenient judges or muzzling judges who dare to stand up in defence of the courts.

Q: Are you not afraid to speak out in the media and in public about what is happening in the Polish judiciary, given that you are also on this 'black list'?

A: Of course I am not afraid and I am convinced that the vast majority of judges are not afraid to express their views. This is simply our duty - to call a spade a spade. Of course we reckon with such consequences [potential removal from the profession], but these are costs that are built into our activity."

XII. OTHER SELECTED MATERIAL

A. The OSCE Office for Democratic Institutions and Human Rights

134. In its press release of 20 November 2020 the OSCE Office for Democratic Institutions and Human Rights (ODIHR) stated as follows:

"The ruling by the Disciplinary Chamber of the Supreme Court of Poland on 18 November 2020, stripping Judge Igor Tuleya of his immunity, raises concerns about judicial independence in the country.

The independence and impartiality of judges is a crucial component of the right to a fair trial. In both 2017 and 2020, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) made recommendations to improve legislation regarding the executive branch influence over disciplinary proceedings against judges in Poland. ODIHR reports have found that shortcomings in the current legal framework seriously undermine judicial independence and the separation of powers in Poland.

Poland, like all OSCE participating States, has committed to "support and advance the independence of judges and the impartial operation of the public judicial service"

as well as to "respect the internationally recognized standards that relate to the independence of judges". ..."

B. The International Association of Judges

135. The International Association of Judges released the following statement about an application to lift the judicial immunity of Judge Igor Tuleya, a serving judge, due to be heard on 9 June 2020 by the Disciplinary Chamber of the Polish Supreme Court, which read in so far as relevant (original English):

"We are deeply concerned that the proceedings against Judge Tuleya seriously undermine fundamental pillars of justice which is the right of the Polish people. We are concerned that:

i) The proceedings to strip Judge Tuleya of his immunity from criminal suit for his *bona fide* exercise of judicial functions including contributing to public debate on legitimate criticisms of Polish legislative measures affecting the independence of the judiciary are misconceived.

ii) There is serious doubt about the independence of the Disciplinary Chamber which is due to hear the application.

The IAJ confirms its support to all judges in Poland, the European Union and elsewhere who fearlessly uphold and apply the principles of law including where applicable European union law, human rights law and the principles of judicial independence reflected in other international rulings and authoritative statements. Indeed, it is their duty to do so; and to do so fearlessly and without favour. The confidence of the public is necessary undermined and eroded when that is not the case."

C. The Bar Council of England and Wales

136. On 25 September 2020 the Bar Council of England and Wales and the Bar Human Rights Committee of England and Wales addressed their third letter to the Polish President and Prime Minister, and to the Speakers of the *Sejm* and the Senate regarding the motion to lift the immunity of Judge Tuleya. The letter read, in so far as relevant:

"We are deeply dismayed that the hearing is due to take place before the Disciplinary Chamber in the face of the clear ruling by the Supreme Court that it is not a 'court' within the meaning of either Polish or EU law. In addition, the Court of Justice of the European Union (CJEU) judgment of 8 April 2020 requires Poland to suspend the legislative provisions constituting the basis of the jurisdiction of the Disciplinary Chamber to rule in disciplinary cases concerning judges, and to refrain from referring pending cases to a panel which does not meet the requirements of independence as defined by the CJEU. ...

In light of the above, we reiterate our serious concern that the pursuit of this motion in the case of Judge Tuleya is not only unlawful but represents an unacceptable reprisal against him for his defence of the rule of law in Poland and forms part of a series of measures which strike at the heart of judicial independence in Poland and fundamentally undermine the rule of law. ...

Accordingly, we urge you again to take steps to ensure that the arbitrary motion against Judge Tuleya is withdrawn without delay."

D. Report of the American Bar Association Center for Human Rights

137. The report of the ABA Center for Human Rights of November 2020 is entitled "The Case of Judge Igor Tuleya: Continued Threats to Judicial Independence in Poland". Its relevant part reads as follows (original English):

"The Polish government's use of the judicial disciplinary system to interfere with Judge Tuleya's judicial decisions fails to meet these international standards and threatens the independence of Poland's judiciary. It further undermines Judge Tuleya's fundamental rights and will likely have a chilling effect on other Polish judges' participation in the public discourse over judicial reforms and independence of the judiciary ...

Several aspects of the prosecutor's actions against Judge Tuleya threaten judicial independence based on these standards. First, the prosecution has neither alleged nor offered any evidence that Judge Tuleya acted in malice to support their argument that his immunity from criminal prosecution should be lifted. Second, Judge Tuleya's decision to allow media representatives to attend and record the hearing in his courtroom on December 18, 2017 was an exercise of his judicial discretion based on his assessment of the facts and his understanding of the law. In particular, it was based on his understanding of his authority under Article 95b of Poland's Criminal Procedure Code. As explained in the Disciplinary Chamber's June 9, 2020 decision, Judge Tuleya's decision to permit media to record the proceeding in his courtroom on December 18, 2017 fell within his judicial authority under Article 95b. By calling into question the legitimacy of the judge's decision to hold a hearing in his court open to the press by seeking criminal charges against him for that decision, the prosecution inappropriately interfered with the judicial process. Further, a reasonable observer in this case may conclude that, in light of the new appointment structure within the disciplinary system for judges and the merger of the Prosecutor General and Minister of Justice positions, the seven disciplinary inquiries sent to Judge Tuleya in 2018 also constitute inappropriate influence and interference with his ability to fulfil his judicial functions in an independent manner. Each of the seven inquiries related, on their face, to otherwise protected activities that were adverse to stated PiS [Law and Justice ruling party] positions. For this reason, the clustered inquiries, with the threat of follow-up disciplinary action, appear solely aimed at intimidation of Judge Tuleya. The Disciplinary Chamber's November 18 decision to lift Judge Tuleya's immunity goes many steps further – not simply to intimidate Judge Tuleya, but to intimidate all judges in Poland who publicly oppose the government's judicial reforms or rule in a manner unfavorable to the PiS party. The sheer volume of disciplinary measures initiated against Judge Tuleya – together with public statements by PiS members and the timing of the National Prosecutor's move to seek criminal sanctions – suggest that the prosecutor's office targeted Judge Tuleya for speaking out against the government's judicial reforms. In addition, the prosecutor's pursuit of criminal charges against Judge Tuleya and the Disciplinary Chamber's permission to charge the judge criminally signal an escalation in the government's efforts to curb Polish judges' engagement in the public discourse surrounding the reforms and violate Judge Tuleya's freedom of expression. ...

Judge Tuleya's public statements about the government's reforms to the judiciary and the threat they pose to judicial independence in Poland fall squarely within permissible

speech, even for judges. There is no question that Judge Tuleya's public statements directly affect the independence of the judiciary, operation of the courts, and the administration of justice in Poland. Thus, even with his unique status as a judge and the resulting limitations on freedom of expression recognized by international standards, Judge Tuleya's public statements should not subject him to disciplinary actions. ...

Taken together, the volume, timing, and subject matter of the disciplinary actions initiated against Judge Tuleya suggest that the judicial disciplinary process in Poland is being used in a politicized manner in retaliation for public statements and positions taken against the sitting government. The Disciplinary Chamber's authorization for Judge Tuleya to be criminally charged for a decision made under his judicial authority sets a dangerous precedent and may be just the beginning of heightened interference with judicial independence in light of the recently enacted 'muzzle law'. The Disciplinary Chamber's failure to safeguard the independence of the judiciary and ensure judges are not improperly targeted appears to bear out concerns that have been consistently raised about whether so-called reforms to the judiciary in Poland are, as enacted and as applied to individual judges, a means to ensure political control of the courts. The Government of Poland should take immediate action to change its course and comply with its obligations under regional and international law to ensure an independent judiciary and the rule of law."

E. Amnesty International

138. In 2019 Amnesty International published a report entitled "Poland: Free Courts, Free People. Judges Standing for Their Independence". The report referred, *inter alia*, to the preliminary inquiries instituted by the disciplinary officer with regard to the applicant and contained the following passage:

"3.1 TARGETING JUDGES WHO TURNED TO THE CJEU WITH QUESTIONS

...

Amnesty International remains concerned that the disciplinary proceedings mechanism appears to be used against judges solely for the performance of their duties. Regular targeting of certain judges by investigations – even if they eventually conclude that they did not commit any offence – may amount to a form of harassment. National courts in EU member states have the right under Article 267 of the TEU to submit questions to the CJEU regarding the interpretation of the Treaties. Launching a disciplinary investigation against judges simply because they have exercised this right raises serious concerns about interference with the administration of EU law."

F. Report "Justice Under Pressure"

139. 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" (*Wymiar sprawiedliwości pod presją*). The report stated, in so far as relevant:

"26. Igor TULEYA – Judge of the Warsaw Regional Court

"... Judge Igor Tuleya is a member of the Warsaw Branch of the Polish Judges' Association Iustitia. [He] has repeatedly spoken in public debate on the state of the rule

of law in Poland and in his statements he has always boldly defended the independence of the courts, the independence of judges and the principles of a democratic state under the rule of law, openly criticising the unconstitutional changes introduced in the area of justice by those currently in power. A judge regularly meets with citizens in meetings on the rule of law, judicial independence, independence of judges, the principles of the democratic rule of law and human rights. During these meetings, Judge Igor Tuleya brings closer and explains to citizens the importance of independent courts in a democratic state under the rule of law, as well as the role of independent judges in protecting human rights and fundamental freedoms. Judge Igor Tuleya is a model of a steadfast judge who advocates for judicial independence and respect for constitutional ... values. Among other things, the judge gave judgments that were unfavourable to the ruling camp, or concerned politicians from that camp. Judge Igor Tuleya's educational and civic activities met with a systemic response from the disciplinary officer. The judge was called several times for questioning as a witness and was also called upon to make written statements."

G. Selected press articles about the applicant

140. On 10 January 2020 the *New York Times* published an article about the applicant entitled "In Poland, a Stubborn Defender of Judicial Independence". The article read, *inter alia*:

"In Poland's yearslong struggle over the rule of law, its judges have often found themselves at the ramparts – frequently vilified but also leading the efforts to stop the nationalist government's campaign to tighten control over the judiciary. In the last two years, at least 20 judges have reported political harassment, while hundreds of judges and lawyers currently face threats of disciplinary proceedings widely regarded as politically motivated.

At the center of the dispute is Judge Tuleya, whose rulings – branded 'political' by Poland's governing Law and Justice Party – have been cited by the authorities as one of the reasons they need to bring the country's judiciary to heel. The overhaul has already triggered a process in Brussels that could see the country become the first European Union country to lose its voting rights.

Judge Tuleya, 49, like many of his colleagues, said he has no choice but to resist, no matter the professional or personal cost.

'Next year, some of us might be removed from office and those who will remain will be harassed into obedience,' he said during an interview at the District Court in Warsaw, where he is a judge trying criminal cases. 'We will go back to the times of communism, when the judiciary was under the heel of politicians. We need to stand our ground while we still can.'

These days Judge Tuleya, along with some of his peers from the Polish judges' association, Iustitia, spends more and more time outside the courtroom, traveling the country to help educate the public about the consequences of the government's threats to judicial independence.

In court, Judge Tuleya, who is single and known for his serious demeanor, always wears a suit underneath his scarlet robes. Outside the courtroom, though, he prefers a military green parka and funky T-shirts with bold statements like 'Judge Not Dead', 'Free Courts, Free People' and the increasingly popular slogan of the protest movement: 'Konstytucja' or Constitution.

He believes that the actions of Law and Justice have given birth to a 'civic judge,' a new type of a justice who is 'not isolated from the world but engages with the public outside the courtroom.'

'Perhaps this is not a model known in older democracies in Europe, but I don't think it's at odds with their standards,' he said. 'It may be new and it's very needed here.'

Those efforts at public outreach seem to be the target of a draft law proposed by Law and Justice in December that seeks to punish judges who criticize the government's campaign to overhaul the judiciary and who engage in unspecified 'political activities.'

'None of the changes they have made in the last four years have made the courts more efficient, transparent or friendlier toward citizens,' Judge Tuleya said. 'All they have meant to do is fill key positions with loyalists.'

On Saturday, Polish judges led by Judge Tuleya, among others, will be joined by their peers from about 20 European countries in the March of a Thousand Scarlet Robes in Warsaw to protest the new bill."

141. On 26 November 2020 the *Financial Times* published an article about the applicant entitled "Suspended judge fights rearguard action over Polish judicial reforms". The article read, in so far as relevant:

"In the bitter five-year battle over the future of the Polish judiciary, judges have often been on the front line. But few more so than Igor Tuleya.

Last week, the Warsaw judge, one of the most outspoken critics of a controversial judicial overhaul introduced by the ruling Law and Justice party (PiS), had his immunity from prosecution revoked in relation to a highly political case three years ago, and was suspended from his duties.

Prosecutors demanded the move so that they could file criminal charges against Mr Tuleya, alleging he had overstepped his powers by allowing journalists to hear and record his ruling on case relating to a disputed 2016 parliamentary vote.

Mr Tuleya dismisses the claims as false and says the move is designed to stifle dissent: 'This is an attempt to intimidate judges,' he told the Financial Times in an interview at the central Warsaw court where he has worked for a decade. 'And I think it is also about removing an inconvenient judge.' ...

The removal of his immunity is both a message to his Polish colleagues and, Mr Tuleya suspects, a gesture of defiance 'to European courts and the EU'.

Over the past five years, Warsaw and Brussels have clashed repeatedly over PiS's judicial changes, with the European Commission launching legal action over fears they undermine rule of law. Those tensions escalated last week when Poland and Hungary threatened to block the EU's €1.8tn budget and recovery package after European officials struck a deal to link access to the funds to EU principles, including judicial independence. ...

Mr Tuleya, has no intention of giving up his fight for judicial independence. Although prosecutors can now press criminal charges against him, he plans to remain in Poland. But he said he would not voluntarily submit to questioning as that would imply recognition of the disciplinary chamber and its decision to remove his immunity.

If a criminal case went against him, he could face jail. But Mr Tuleya is not deterred. 'I can't turn back,' he said. 'I am convinced that I am fighting for a just cause. And so I am also prepared to pay that price.'"

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Domestic law

1. Domestic law already summarised

142. 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

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

Article 42 § 2

"Anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings"

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 91

"1. After promulgation thereof in the Journal of Laws of the Republic of Poland, a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.

2. An international agreement ratified upon prior consent granted by statute shall take precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

3. If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and take precedence in the event of a conflict of laws."

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."

Article 181

"A judge shall not, without prior consent granted by a court specified by statute, be held criminally liable or deprived of liberty. A judge shall not be arrested or detained, except where he or she has been apprehended in the commission of an offence and his or her arrest is necessary for securing the proper course of proceedings. The president of the competent court shall forthwith be notified of any such arrest and may order the immediate release of the person arrested."

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

144. 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 as follows:

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 42

"2. The courts shall hear and decide cases in open court.

3. The hearing of a case in camera or the exclusion of the public from the proceedings shall be allowed only as provided by statute."

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 85

"A judge shall keep secret the circumstances of a case of which he or she has become aware by reason of his or her office outside a hearing in open court."

Section 89(1)

"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

"1. Disciplinary cases against judges shall be adjudicated by:

(1) in the first instance:

(a) disciplinary courts at the courts of appeal, 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.

(2a) The disciplinary court in whose region the judge subject to the proceedings serves shall have local jurisdiction to hear the cases referred to in section 37 (5) and section 75 (2)(3). The cases referred to in sections 80 and 106zd shall be adjudicated in the first instance by the Supreme Court composed of one judge of the Disciplinary Chamber, and in the second instance by the Supreme Court composed of three judges of the Disciplinary Chamber."

Section 114[1]

"1. The disciplinary officer undertakes preliminary inquiries (*czynności wyjaśniające*) at the request of the Minister of Justice, the president of a court of appeal or the president of a regional court, the board of a court of appeal or the board of a regional court, the National Council of the Judiciary, as well as on his own initiative, after a preliminary determination of the circumstances necessary to establish the elements of a disciplinary offence. The preliminary inquiries activities should be conducted within thirty days from the date of the first action taken by the disciplinary officer.

2. The disciplinary officer, in the framework of the preliminary inquiries, may call upon a judge to make a written statement concerning the subject matter of the inquiry

[1] The current text of section 114 of the 2001 Act was introduced by the Act of 8 December 2017 on the Supreme Court amending the Act on the Organisation of Ordinary Courts which entered into force on 3 April 2018 (see paragraph 176 below).

within fourteen days of receiving such request. The disciplinary officer may also take an oral statement from the judge. Failure by the judge to submit the statement shall not impede the further course of the proceedings.

3. If, following the preliminary inquiries, there are grounds for initiating disciplinary proceedings, the disciplinary officer shall initiate such proceedings and draw up disciplinary charges in writing.

4. Immediately after drawing up the disciplinary charges, the disciplinary officer shall notify them to the accused. When notifying the charges, the disciplinary officer shall call upon the accused to provide explanations and all requests for evidence in writing within fourteen days from the date of notification of the disciplinary charges. In the event of failure to comply with this obligation, the disciplinary officer may leave unexamined the requests for evidence made by the accused after the expiry of this time limit, unless the accused shows that the evidence was not known to him/her beforehand.

5. The disciplinary officer may also obtain from the accused, and shall obtain from the accused when so requested, oral explanations by way of a hearing.

6. Failure to submit explanations within the time limit specified in subsection 4 or failure to appear at the hearing date set by the disciplinary officer shall not impede further proceedings.

7. Simultaneously with the notification of charges, the disciplinary officer shall request the President of the Supreme Court directing the work of the Disciplinary Chamber to appoint a disciplinary court to hear the case in the first instance. The President of the Supreme Court in charge of the work of the Disciplinary Chamber shall appoint this court within seven days from receipt of the request.

8. After the expiry of the time limit referred to in subsection 4, and, if necessary, after further evidence has been taken, the disciplinary officer shall submit a motion to hear the disciplinary case to the disciplinary court designated pursuant to subsection 7. The request shall contain a precise identification of the act which is the subject of the proceedings, a list of evidence justifying the request and the grounds for the request.

9. If the disciplinary officer does not find grounds to institute disciplinary proceedings, upon the request of the authorised body, he/she shall make a decision to refuse to institute such proceedings. A copy of the decision shall be notified to the body which submitted the request to initiate proceedings, the board of the regional court or of the court of appeal respectively and to the accused. A copy of the order shall also be notified to the Minister of Justice, who may lodge an objection within thirty days. The lodging of an objection shall be regarded as entailing an obligation to initiate disciplinary proceedings, and the Minister of Justice's indications as to the further course of the proceedings shall be binding on the disciplinary officer.

10. Where the disciplinary proceedings have not provided grounds for a request to the disciplinary court to hear a disciplinary case, the disciplinary officer shall make a decision to discontinue the disciplinary proceedings."

Section 128

"The provisions of the General Part of the Criminal Code and the provisions of the Code of Criminal Procedure, with the exception of Articles 344a and 396a, shall apply *mutatis mutandis* to matters not regulated in this Chapter, taking into account the specificities resulting from the nature of disciplinary proceedings."

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."

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."

4. The immunity of ordinary court judges

(a) Previous regulations of constitutional and statutory rank

145. Article 79 of the Constitution of 17 March 1921 provided as follows:

"Judges may not be held criminally liable or deprived of their liberty without the prior consent of the court designated by law, unless they are apprehended in the act of committing an offence, but even in such a case the court may demand the immediate release of the detained person."

146. Article 67 of the Constitution of 23 April 1935 read as follows:

"A judge may not be held criminally liable without the consent of the competent disciplinary court or arrested without a court order, unless he was apprehended in the act of committing an offence."

147. The Constitution of the Polish People's Republic of 1952 did not regulate the institution of judicial immunity. However, during the period of the People's Republic of Poland and until the adoption of the new Constitution in 1997 judicial immunity was provided for at the statutory level, first in the Decree of the President of the Republic of Poland of 6 February 1928 and then in the Act of 20 June 1985 on the Organisation of Ordinary Courts.

(b) The regulation of the immunity of ordinary court judges in the 2001 Act

148. The immunity of ordinary court judges is regulated in section 80 of the 2001 Act, contained in Chapter 1a "The status of judge". The relevant part of section 80 read as follows:

> "1. A judge may not be arrested or held criminally liable without the permission of the competent disciplinary court. This shall not apply to an arrest when a judge is apprehended in the act of committing an offence, if the arrest is necessary to ensure the proper conduct of the proceedings. Only urgent actions may be taken until a resolution authorising a judge to be held criminally liable is issued.
>
> 2. The president of the court of appeal having jurisdiction over the place of arrest shall be immediately notified of the arrest of a judge. He may order the immediate release of the arrested judge. The president of the court of appeal shall immediately notify the National Council of the Judiciary, the Minister of Justice and the First President of the Supreme Court of the fact that a judge has been arrested.
>
> 2a. An application for permission to hold a judge criminally liable, if not lodged by a prosecutor, should be drawn up and signed by an advocate or legal adviser acting as a representative.
>
> ...
>
> 2c. The disciplinary court shall issue a resolution permitting a judge to be held criminally liable if there is a sufficiently justified suspicion that the judge has committed an offence. The resolution shall contain a decision on the authorisation to hold a judge criminally liable, together with the reasons for the decision.
>
> 2d. The disciplinary court shall examine an application for permission to hold a judge criminally liable within fourteen days from the date on which it was lodged with the disciplinary court.
>
> 2e. Before issuing the resolution, the disciplinary court shall hear the disciplinary officer, the judge concerned, the representative of the authority or the person who requested permission – if they appear. Their non-appearance, as well as the non-appearance of defence counsel, shall not suspend the examination of the application.
>
> 2f. The judge whom the proceedings concern shall have the right to access the documents enclosed with the application. However, when lodging the application with the disciplinary court, the prosecutor may stipulate that such documents or a part thereof may not be disclosed to the judge, having regard to the interest of the pre-trial proceedings.
>
> 2g. If the prosecutor has made the objection referred to in § 2f, the president of the disciplinary court shall immediately refer the case to a session. The disciplinary court may refuse a judge access to the documents enclosed with the application."

(c) Procedural aspects

149. Prior to the establishment of the Disciplinary Chamber, disciplinary cases concerning judges of the ordinary courts were heard, at first instance, by the courts of appeal and, at second instance, by the Supreme Court acting as the disciplinary court. Their jurisdiction included the examination of applications for the lifting of immunity of judges. The disciplinary courts

adjudicated in three-judge formations. The composition of the disciplinary court was determined, by drawing lots, from the list of all the judges of the disciplinary court concerned (with minor exceptions), subject to the proviso that at least one judge adjudicating in criminal cases was to form part of the composition (see sections 110 and 111 of the 2001 Act in their wording at the relevant time).

150. The Act of 8 December 2017 on the Supreme Court, which entered into force on 3 April 2018, modified the organisation of that court by, in particular, creating the Disciplinary Chamber. That Chamber became competent to rule, *inter alia*, on cases concerning the disciplinary proceedings conducted under the 2001 Act (section 27(1)), including the lifting of immunity of the ordinary court judges. The latter cases were heard, at first instance, by one judge of the Disciplinary Chamber and, at second instance, by a three-judge formation of that Chamber. Following the abolition of the Disciplinary Chamber, those cases are at present heard by the CPL (see paragraph 183).

(d) Domestic practice

(i) Case-law of the Constitutional Court

(α) Judgment of 28 November 2007, no. K 39/07

151. In this judgment, the Constitutional Court reviewed, on an application from the First President of the Supreme Court, the constitutionality of several provisions modifying the procedure for lifting the immunity of a judge, which were added to the 2001 Act on the Organisation of Ordinary Courts by the Act of 29 June 2007 amending the former Act.

152. The first of the contested provisions (section 80(2f) and (2g)) concerned the access of a judge to the case file of the immunity proceedings, which could have been restricted by a decision of the prosecutor. Such a decision was also binding on the court. The Constitutional Court held (by nine votes to six) that section 80(2f) and (2g) of the 2001 Act, in so far as it precluded a judicial review of the prosecutor's decision refusing access to documents in the file to a judge who was the subject of the immunity proceedings, was incompatible with Article 42 § 2 and Article 45 § 1 in conjunction with Article 181 of the Constitution.

153. In its general observations, the Constitutional Court noted that judicial immunity was a constitutional guarantee protecting the courts and judges in their independent adjudication. The existence of immunity had a subjective aspect, as it protected a specific person; however, that aspect was of a secondary nature. The fundamental purpose of immunity was to ensure judicial independence as the foundation for the functioning of courts that were independent of other authorities and not subject to their influence. According to the Constitutional Court, it could not be argued that judicial independence was not possible without judicial immunity, since there were

countries whose legal system did not provide for it (e.g. Austria, Germany, France). However, those countries were mature democracies with a well-established understanding of the separation of powers and a high level of legal and political culture. In the so-called "young" democracies with less established democratic traditions and a still-developing understanding of the separation of powers, the existence of judicial immunity was an important component of judicial independence.

154. Next, the Constitutional Court considered whether the restrictions on access to the file of the immunity proceedings could be examined in the light of the constitutional right to defence, as enshrined in Article 42 § 2 of the Constitution. It disagreed that this right was relevant only for the criminal proceedings *stricto sensu*, having regard to the autonomous meaning of terms used in the Constitution. It noted that it was established in its case-law that Article 42 of the Constitution referred to "repression-related proceedings" (*postępowanie represyjne*) in general, which was a broader concept than criminal proceedings regulated by the Code of Criminal Procedure. The right to defence in the constitutional sense applied to "all proceedings", so there was no basis for a restrictive interpretation eliminating interlocutory or pre-trial proceedings as long as they were related to an encroachment on constitutional rights and freedoms (see Article 31 of the Constitution). The immunity proceedings, being a preliminary stage for holding a person criminally liable, should provide for the right to defence on account of that very liability which was potentially engaged by those proceedings.

155. In this connection, the Constitutional Court held as follows:

> "The lifting of immunity does not result in a mere removal of a procedural obstacle [for holding a person criminally liable], but amounts to placing an individual in the shadow of suspicion, which as such justifies – on constitutional grounds – the need for protection at this stage. ... Immunity proceedings have a constitutional basis (Article 181 of the Constitution). It is clear that, depending on the subject-matter of the proceedings and their purpose, the procedure and the guarantees contained therein may be different. In particular, it does not have to be the model resulting from the CCP or reproducing it. The scope of application of Article 42 § 2 of the Constitution, however, cannot ... be reduced to situations existing only after charges have been brought in criminal proceedings *stricto sensu*. Thus, this provision of the Constitution refers to all repression-related proceedings: criminal (irrespective of their stage) and other (quasi-criminal: e.g. disciplinary or preparatory prior to proper proceedings). In the light of the Strasbourg Court's judgments, it was incorrect to hold that the proceedings conducted before the disciplinary court did not have the characteristics of a 'case' within the meaning of Article 6 of the Convention and therefore did not have to comply with the standards established under this provision, and thus that the exclusion of the right of defence would be justified therein.
>
> ... It should be noted that a request for the lifting of immunity involves the direct application of repressive measures such as suspension from judicial duties and a reduction in remuneration ... Indeed, the [filing of an] application [for lifting immunity] with a court involves the initiation of a 'case' within the meaning given to the term under the Convention, which requires the right of defence to be afforded at the stage of the initiation of such a 'case'. The affording of a defence is therefore necessary

in any proceedings, even those not involving interference with constitutional rights and freedoms, which seek to legalise the use of coercive measures of any kind. This is what every fair procedure requires, by virtue of Article 2 of the Constitution.

This should be applied *a fortiori* to situations where, as in the present case, the subject of interference lies in the sphere of constitutionally guaranteed freedoms (Article 181 of the Constitution). A person against whom proceedings associated with adverse consequences are directed (it is difficult to deny the existence of such consequences by the mere fact of being 'put under the shadow of suspicion', especially in the case of persons supposed to have an impeccable reputation) must be provided with possibilities of defence adequate to the purpose of those proceedings. The mere fact of initiating immunity proceedings causes trouble for the judge, even if it later turns out that the case had no grounds and no criminal liability will follow. ...

The idea that the right of defence can be restricted at the stage of immunity proceedings since the case will in future be heard anyway by the court deciding on the [commission of] an act, as well as on the questions of [a judge's] guilt and punishment, is also constitutionally unacceptable. Every stage of criminalisation, even the preliminary stage, must be accompanied by guarantees of defence rights that are appropriate to that stage. This view by no means implies that the initiation of the immunity proceedings is to be accompanied by all the guarantees ... available in the Code of Criminal Procedure for the criminal proceedings; it only means that the initiation of [the proceedings] for the lifting of immunity, leading as it does to a limitation of the constitutionally protected sphere, requires a procedure that must comply with procedural standards in the form of the right of defence."

156. The Constitutional Court found that the regulation under which a prosecutor could refuse access to the material justifying an application for the lifting of immunity to the judge concerned and where the prosecutor's decision was binding on the disciplinary court, reduced the court to an enforcer of the prosecutor's decision. Such a regulation could not be reconciled with the independence of the court because its power in respect of one aspect of the immunity proceedings was limited by a decision of the public prosecutor. In this context, the Constitutional Court noted that the constitutional guarantees enshrined in Articles 45 and 181 of the Constitution were applicable to the immunity proceedings since the Constitution required that those proceedings be conducted before a court, i.e. an independent body, not bound in its adjudicatory activity by other authorities.

157. The second group of contested provisions (sections 80a to 80c) concerned the introduction of an accelerated and simplified procedure for lifting the immunity of a judge in cases of serious crime. Those provisions introduced a 24-hour time-limit for the court to examine an application for the lifting of immunity (section 80a(1)) and application for leave to have a judge arrested and detained on remand (section 80b(1)). As regards the latter, the judge concerned had no right to take part in a court session (section 80b(3)). The relevant provisions further stipulated that a first-instance decision lifting the immunity of a judge or authorising his arrest (detention on remand) was immediately enforceable regardless of the lodging of an interlocutory appeal (sections 80a(3) and 80b(4) respectively).

158. The Constitutional Court ruled that the above-mentioned provisions were unconstitutional as they had been adopted in a procedurally-flawed manner. In addition, it held that sections 80a(1) and 80b(1 and 3) of the 2001 Act were incompatible with Article 45 § 1 in conjunction with Article 181 of the Constitution. It further ruled that sections 80a(3) and 80b(4) of the 2001 Act were incompatible with Article 176 § 1 in conjunction with Article 181 of the Constitution.

(β) Judgment of 15 January 2009, no. K 45/07

159. In its application to the Constitutional Court, the NCJ also contested the constitutionality of several provisions of the 2001 Act as amended by the Act of 29 June 2007 (see paragraphs 151-152 and 157 above). One of those provisions was section 80(2h) of the 2001 Act, which allowed the prosecutor lodging an application for the lifting of the immunity of a judge to simultaneously seek leave for the judge's arrest and detention on remand.

160. In its judgment of 15 January 2009, no. K 45/07 the Constitutional Court held that section 80(2h) of the 2001 Act, in so far as it established a presumption that a resolution permitting a judge to be held criminally liable also comprised leave for the judge's arrest and detention on remand, was incompatible with Article 42 § 2 and Article 181 of the Constitution. It found that the impugned presumption failed to meet the requirements of Article 181 of the Constitution, under which the court's consent to each of the above measures should be given in separate decisions. The Constitutional Court further confirmed its earlier judgment of 28 November 2007, no. K 39/07 (see paragraphs 151-158 above), as regards the applicability of the rights of the defence, enshrined in Article 42 § 2 of the Constitution, to all repression-related proceedings, including immunity proceedings.

(ii) Case-law of the Supreme Court

(α) The resolution of 20 September 2007, no. SNO 58/07

161. In that resolution, the Supreme Court, sitting as a disciplinary court of second instance, refused to lift the immunity of a judge and made some general comments on the nature of the relevant proceedings. It found that the purpose of the proceedings for permission to hold a judge criminally liable (section 80 of the 2001 Act and Article 181 of the Constitution) was not to prejudge the criminal liability of the judge (questions concerning the commission of an act, guilt and punishment), as this matter was reserved to the exclusive competence of the court within the framework of regular criminal proceedings. Accordingly, the Supreme Court noted that the gathering of evidence and the conduct of proceedings by the disciplinary court should be limited to determining whether there was a sufficiently justified suspicion that the judge had committed the act alleged in the prosecutor's application. Therefore, the provisions of criminal procedure

concerning the determination of the commission of the act and the acknowledgement of guilt should be applied *mutatis mutandis* (this concerned the relevant provisions of the CCP applied by the double reference to section 80d(1) *in fine* and section 128 of the 2001 Act).

162. The Supreme Court further found that the duty of the disciplinary court in the proceedings initiated by an application of the prosecutor to lift the immunity of a judge was to examine the evidence adduced in order to ascertain whether there was a sufficiently justified suspicion that the judge had committed an offence (referred to in section 80(2c) of the 2001 Act). That scrutiny was of a substantive nature, although it did not reach such a high level of conviction on the part of the court as in the case of adjudication in regular criminal proceedings as to the commission of an act and the guilt of the perpetrator.

163. The Supreme Court noted that the condition justifying the lifting of judicial immunity specified in section 80(2c) of the 2001 Act was similar to that prescribed in Article 313 § 1 of the CCP for drawing up a decision on the presentation of charges. This latter procedural act should also be preceded by the examination of the evidence adduced, in order to assess the fulfilment of the same condition. The assessment of the disciplinary court in the case of the lifting of immunity of a judge should be similar; however, having regard to the constitutional aspects of judicial immunity, the probability of a judge having committed an offence calls for a higher threshold than in the framework of regular pre-trial proceedings.

(β) The resolution of 27 May 2009, no. I KZP 5/09

164. The First President of the Supreme Court requested a seven-judge formation of the Supreme Court (Criminal Chamber) to issue a resolution on the legal question whether, in the proceedings for permission for a judge to be held criminally liable, the provisions of the CCP should apply *mutatis mutandis*. This request was prompted by the Constitutional Court's judgment of 28 November 2007, no. K 39/07 which led to a repeal in the 2001 Act of a provision referring to the *mutatis mutandis* application of the CCP to immunity proceedings.

165. On 27 May 2009 the Supreme Court issued its resolution, case no. I KZP 5/09 which read as follows:

> "In the proceedings pending before the disciplinary court concerning the permission for a judge to be held criminally liable or to be remanded in custody, the provisions on disciplinary proceedings contained in the 2001 Act apply *mutatis mutandis*, and to the extent not regulated by them, which is necessary to maintain the functionality and standards of a fair trial, the provisions of the Code of Criminal Procedure apply in the same manner ".

166. The Supreme Court found that there was no doubt that proceedings for the lifting of immunity of an ordinary court judge under section 80 of the 2001 Act, like those under section 49 of the Act of 23 November 2002 on the

Supreme Court in respect of the Supreme Court judges, were closely related to the pending *in rem* pre-trial proceedings and conditioned the possibility of conducting criminal proceedings against a judge protected by immunity. Moreover, if only in the light of the reasons contained in the Constitutional Court's judgment of 28 November 2007, no. K 39/07 there was no doubt that proceedings aimed at lifting a judge's immunity were repression-related proceedings.

(γ) The decision of 14 September 2022, no. I KZP 7/22

167. In the context of pending interlocutory appeal proceedings, the Elbląg Regional Court decided to refer a legal question to the Supreme Court (Criminal Chamber) as to whether a situation in which the final resolution lifting the immunity of a prosecutor had been issued by the Disciplinary Chamber of the Supreme Court could be regarded as lacking the required authorisation to prosecute within the meaning of Article 17 § 1(10) of the CCP.

168. In its decision of 14 September 2022, no. I KZP 7/22, the Supreme Court refused to adopt a resolution on the legal question, considering that the statutory conditions for doing so were not fulfilled[2]. However, it provided certain guidance to the referring court with a view to assisting it in reaching its decision.

169. The Supreme Court noted that the statutory regulation of the procedure for the lifting of immunity of a prosecutor did not have as strong a systemic protection as the same procedure for judges, since the latter was anchored in the Constitution. As regards the lifting of immunity of judges, the Constitution required that a relevant decision had to be taken by a court having the attributes indicated in Article 45 § 1 of the Constitution and Article 6 § 1 of the Convention.

170. The next question to be examined was whether the subject-matter of the proceedings concerning the lifting of immunity of a prosecutor fell within the scope of Article 45 § 1 of the Constitution and Article 6 § 1 of the Convention. In this respect, the Supreme Court recalled that the constitutional notion of a "case" was an autonomous one and could comprise not only the main proceedings, but also other proceedings – interlocutory, auxiliary, outside the subject of the "main" proceedings – in which the court determined the rights and obligations of a given private-law subject. Referring to the Constitutional Court's judgment of 28 November 2007, no. K 39/07, the Supreme Court noted that the standard of the right to a defence in Article 42 § 2 of the Constitution applied to the immunity proceedings and that they were judicial proceedings within the meaning of Article 45 § 1 of the

[2] The Supreme Court sat in a formation of three judges, J. Matras, K. Klugiewicz and Z. Puszkarski who had been appointed to that court on the recommendation of the NCJ as composed prior to the entry into force of the 2017 Amending Act.

Constitution. It stressed that the above-mentioned judgment of the Constitutional Court concerned the procedure for the lifting of immunity of a judge; however, the subject-matter of those proceedings was no different as regards the immunity of a prosecutor. Having regard to the above, the Supreme Court found that permission for a prosecutor to be held criminally liable had to be given by a body having the characteristics indicated in Article 45 § 1 of the Constitution, namely a court in the substantive sense. Although the immunity proceedings were conducted before a disciplinary court, this did not alter the fact that they were interlocutory proceeding in the framework of (or at least closely related to) the *in rem* pre-trial proceedings, conditioning the possibility of conducting criminal proceedings against a person protected by immunity; they were therefore not disciplinary proceedings.

171. The Supreme Court further considered that the immunity proceedings had to fulfil the standard of Article 6 § 1 of the Convention. It stressed that this provision was subject to extensive interpretation in order to determine the scope of the notion of a "criminal charge" (it referred for example to judgment of 17 January 1970, *Delcourt v. Belgium*, no. 2689/65). Although that notion was autonomous, the national law had to be taken into account in the context. In this connection, the Supreme Court referred to the three "*Engel* criteria", namely the classification of the offence under national law, the nature of the offence and the degree of severity of the possible penalty (judgment of 8 June 1976, *Engel and Others v. the Netherlands*) and the fact that the charge was to be understood not in a formal, but in a substantive manner (judgment of 27 February 1980, *Deweer v. Belgium*, no. 6903/75), which implied not only an official notification by the competent authority of an allegation that a person had committed a criminal offence, but also other measures allowing an inference of the existence of suspicion against the person and seriously affecting the position of that person.

(δ) The Supreme Court's resolution of 31 August 2022, no. I ZI 7/22

172. In that resolution lifting the immunity of a judge, the Chamber of Professional Liability of the Supreme Court, sitting in a single-judge formation (Judge W. Kozielewicz), made some general observations on judicial immunity. It noted that the prohibition, prescribed in Article 181 of the Constitution, against holding a judge criminally liable without the consent of a court specified by statute, constituted the so-called formal (procedural) immunity of a judge. That provision did not result in the exclusion of liability for the committed act, but only introduced a prohibition against holding the person enjoying such immunity criminally liable, unless the prosecutor obtained the consent of the authorised body to do so.

173. The Supreme Court went on to note that the immunity of a judge was one of the guarantees of judicial independence. It was clear from Article 181 of the Constitution that judicial immunity was relative in nature, as it could be lifted, allowing a judge to be held criminally liable. This constitutional

provision set out the following requirements in this regard: (1) the lifting of a judge's immunity had to always be prior in nature, meaning that until the date on which the decision to lift the immunity became final, it was possible to conduct criminal proceedings "in the case" only (*in rem*) and not "against the person" (*in personam*); (2) the decision to lift the immunity of a judge could only be made by a "court" and in the procedure ensuring the essential guarantees of a fair hearing; and (3) such decision could only be made by a court "specified by statute" which implied the general statutory regulation prescribing the jurisdiction of the court to decide on the lifting of immunity. The Supreme Court stressed that the institution of judicial immunity had a long-standing tradition in Polish law, starting with the Constitution of March 1921.

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

174. 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).

175. 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 ..."

6. The 2017 Act on the Supreme Court

176. 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).

177. 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."

178. The rules of disciplinary liability of judges were significantly changed by the Act of 8 December 2017 on the Supreme Court amending the

Act on the Organisation of Ordinary Courts which entered into force on 3 April 2018. The Minister of Justice – Prosecutor General assumed significant powers in the new model of disciplinary liability. The minister appoints, *inter alia*, the disciplinary officer for ordinary court judges (*Rzecznik Dyscyplinarny Sędziów Sądów Powszechnych*; "the disciplinary officer") and his two deputies for a four-year term as well as judges adjudicating in the disciplinary court of first-instance at the courts of appeal. The amendments established also the office of the disciplinary officer of the Minister of Justice who is appointed by the minister.

7. The 2019 Amending Act

179. 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 into law. 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*").

180. 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."

8. The abolition of the Disciplinary Chamber and establishment of the Chamber of Professional Liability

181. On 4 February 2022 the President of the Republic introduced in the *Sejm* a bill to amend the Act on the Supreme Court and Certain Other Acts. According to the explanatory report, the bill sought to introduce changes in the organisation of the Supreme Court through the creation of the Chamber of Professional Liability and the abolition of the Disciplinary Chamber, and thus sought to ensure that the actual disciplinary liability of judges could be engaged in the proceedings conducted before the Supreme Court.

182. On 9 June 2022 the *Sejm* adopted the Act Amending the Act on the Supreme Court and Certain Other Acts (*ustawa z dnia 9 czerwca 2022 r. o zmianie ustawy o Sądzie Najwyższym oraz niektórych innych ustaw*; "the 2022 Amending Act"), which entered into force on 15 July 2022.

183. Upon the entry into force of the Amending 2022 Act, the Disciplinary Chamber of the Supreme Court was abolished and the new Chamber of Professional Liability ("CPL") was established (section 8(1)). In accordance with section 8(2) of the 2022 Amending Act, cases pending before the Disciplinary Chamber and not concluded before the date of entry into force of the Act, were to be transmitted to the CPL. The CPL has the exclusive competence to rule, *inter alia*, on disciplinary cases of judges of the Supreme Court and ordinary courts as well as applications authorising judges to be held criminally liable or detained on remand.

184. Pending the appointment of at least five judges to the CPL, on 15 July 2022 the First President of the Supreme Court designated five judges of that court to adjudicate in the new Chamber on a transitional basis (section 8(4)), namely Judges W. Kozielewicz, D. Kala, M. Wąsek-Wiaderek, M. Siwek and K. Wiak. Judges Siwek and Wiak were appointed to the Supreme Court on recommendation of the "new" NCJ as established under the 2017 Amending Act.

185. On 17 September 2022 the President of the Republic designated eleven judges of the Supreme Court, from among thirty-three chosen by drawing lots, to adjudicate in the new CPL for a term of five years. Six of those judges had been appointed to the Supreme Court by the President of the Republic on recommendations of the NCJ as established under the 2017 Amending Act. The President of the Republic's decision was countersigned by the Prime Minister.

186. Section 9 of the 2002 Amending Act provides that the CPL must examine, of its own motion, at the first session in the case, the Disciplinary Chamber's decision ordering the suspension of a judge from his duties, where disciplinary proceedings have been instituted against that judge or a resolution has been issued permitting the judge to be held criminally liable and reducing his salary for the duration of his suspension or disciplinary proceedings.

187. In accordance with section 18(1) of the 2002 Amending Act, within six months from the date of entry into force of the Act, a judge in respect of whom a final resolution permitting him to be held criminally liable was adopted by the Disciplinary Chamber, shall be entitled to request the reopening of the proceedings. Requests for reopening of the proceedings shall be examined by the CPL.

9. The 2016 Prosecution Service Act

188. The Prosecution Service Act (*ustawa Prawo o prokuraturze*) was enacted on 28 January 2016. It provides that the Prosecutor General is the highest authority in the prosecution service and that this office merged with the office of the Minister of Justice (section 1(2)).

189. The prosecution service is composed of, *inter alia*, the Prosecutor General, the State Prosecutor, other deputies of the Prosecutor General and prosecutors of the ordinary units of the prosecution service (section 1(1)). The Prosecutor General manages the operation of the prosecution service directly or through the State Prosecutor (the first deputy of the Prosecutor General) and other deputies of the Prosecutor General (section 13(1)). The Prosecutor General is the hierarchical superior of all prosecutors (section 13(2)).

10. Criminal Code

190. The Criminal Code, in so far as relevant, provides as follows:

Article 1

"§ 2. A prohibited act whose social harm is insignificant shall not constitute an offence."

Article 231

"§ 1. A public official who, exceeding his authority, or not fulfilling his 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 hereof acts unintentionally and causes significant damage, he or she shall be subject to a fine, the penalty of limitation of liberty, or that of deprivation of liberty for up to 2 years."

Article 241

"§ 1. Whoever publicly disseminates, without permission, information from the pre-trial proceedings before they have been disclosed in court proceedings shall be subject to a fine, the penalty of restriction of liberty or that of deprivation of liberty for up to 2 years."

Article 266

"§ 2. A public official who discloses to an unauthorised person classified information marked 'restricted' or 'confidential', or information which he has obtained in connection with the performance of his official duties, the disclosure of which may compromise a legally protected interest, shall be subject to a penalty of imprisonment of up to 3 years."

11. Code of Criminal Procedure

191. The Code of Criminal Procedure, in so far as relevant, provides as follows:

Article 17 § 1

"§ 1. An investigation shall not be opened and a pending investigation shall be discontinued where:

(1) no offence has been committed or there is insufficient material to justify the suspicion that an offence has been committed;

(2) an act [in question] does not comprise constituent elements of an offence or a statute prescribes that a perpetrator has not committed an offence;

...

(10) there is no required authorisation to prosecute or no request to prosecute from a person so entitled, unless otherwise provided by law;"

Article 41§1

"1. A judge shall be removed [from a case] if circumstances arise of such a nature which may give rise to justified doubts about his or her impartiality in a given case."

Article 95b

"§ 1. The session shall be held in camera unless otherwise provided by law or otherwise ordered by the president of the court or the court.

...

§ 3. The provisions of chapter 42 [Articles 355-364] shall apply accordingly to publicly held sessions."

Article 247

"§ 1. The public prosecutor may order the arrest and compulsory appearance of a suspect or a suspected person if there is a justified fear that:

1) they may fail to appear when summoned to participate in the activities referred to in Article 313 § 1 or Article 314, or in the examinations or activities referred to in Article 74 § 2 or 3;

2) they may otherwise unlawfully obstruct the proceedings."

Article 313

"1. If the material existing upon the opening of an investigation or [the material] collected in the course of an investigation justify sufficiently a suspicion that the [criminal] act has been committed by a specific person, a decision on the presentation of charges shall be drawn up and shall promptly be communicated to a suspect, who shall be questioned unless the communication of the decision or the questioning are not possible because he has gone into hiding or is absent from the country.

2. A decision on the presentation of charges shall include an indication of a suspect, with the exact description of the impugned act and its legal classification.

..."

Article 322 § 1

"§ 1. If no grounds have been found to lodge a bill of indictment, an investigation shall be discontinued without a prior acquainting [of a suspect] with the material of the investigation and its closure."

Article 357

"§ 1. The court shall allow representatives of the media to make video and audio recordings of a hearing by means of an apparatus.

§ 2. The court may set conditions for the participation in a hearing of representatives of the media."

192. According to the commentary on the CCP[3], the presentation of charges regulated in Article 313 of the CCP plays an important role in the course of the investigation since it shifts the investigation from the *in rem* stage to the *in personam* stage. From the point at which the charges are presented, the suspect appears in the proceedings as a party with all the procedural rights and obligations.

The presentation of charges is one of the most important safeguards in the conduct of pre-trial proceedings. It secures the suspect's fundamental right to know that the criminal proceedings are being brought against him or her, what they involve and on what factual basis the prosecuting authorities have acted (compare Article 6 §§ 1 and 3(a) of the Convention).

The drawing-up of a decision on the presentation of charges requires the existence of a more detailed factual basis than that which is sufficient to initiate an investigation under Article 303 of the CCP. In addition to a reasonable suspicion that an offence has been committed, there must also

[3] Commentary to the Code of Criminal Procedure, vol. II, ed. P. Hofmański, Warsaw 2007, pp. 96 and 98-99.

be a sufficiently justified suspicion that the act was committed by a specific person.

12. Civil Code

193. 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."

194. 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

195. The relevant domestic practice was summarised in the Court's previous judgments in *Reczkowicz* (cited above, §§ 71-125), *Dolińska-Ficek and Ozimek* (cited above, §§ 97-155), *Advance Pharma sp. z o.o.* (cited above, §§ 110-169) and *Grzęda* (cited above, §§ 77-119).

2. Case-law of the Supreme Court

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

196. On 5 December 2019 the Supreme Court, sitting in a bench of three judges of 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 (*A.K. and Others*, joined cases C-585/18, C-624/18 and C-625/18; see paragraphs 224-226 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"....

197. 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)

198. 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, Ms M. Gersdorf, 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.

199. 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[4]. 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[5]:

> "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,

[4] Six judges annexed separate opinions to the resolution.

> 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].
>
> 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.".

200. 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

201. On 25 March 2019 the Supreme Court, composed of Judges T. Szanciło, J. Misztal-Konecka and K. Zaradkiewicz (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."

202. On 2 June 2020 the Constitutional Court delivered its judgment in case no. P 13/19, in a bench composed of Judges M. Warciński, S. Piotrowicz, J. Przyłębska (the rapporteur), B. Sochański and R. Wojciechowski. 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 14 July 2021, no. P 7/20

203. On 9 April 2020 the Disciplinary Chamber of the Supreme Court referred a legal question to the Constitutional Court on the conformity of certain provisions of the TEU with the Constitution in so far as they concerned the obligation of a member State of the EU to execute interim measures relating to the organisation of the judicial authorities of that State.

204. On 14 July 2021 the Constitutional Court, sitting as a bench of five judges, held a hearing and gave judgment in the case. It held, by majority, as follows:

> "The second sentence of Article 4 § 3 of the TEU, in conjunction with Article 279 of the TFEU, to the extent that the Court of Justice of the European Union imposes *ultra vires* obligations on the Republic of Poland, as a member State of the European Union, by issuing interim measures relating to the organisation and jurisdiction of the Polish courts and the procedure before those courts, is incompatible with Article 2, Article 7, Article 8 § 1 and Article 90 § 1 in conjunction with Article 4 § 1 of the Constitution of the Republic of Poland and to that extent is not subject to the principles of primacy and direct applicability [of a ratified international agreement] set out in Article 91 § 1 to 3 of the Constitution."

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

205. On 9 November 2021 Mr Z. Ziobro, 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.

206. The Constitutional Court delivered its judgment on 10 March 2022 (no. K 7/21) in a bench composed of Judges S. Piotrowicz, M. Muszyński (the rapporteur; see *Xero Flor w Polsce sp. z o.o.*, no. 4907/18, 7 May 2021, §§ 59-61, 253, 259-262, 273-274, 280 and 287), K. Pawłowicz, W. Sych and A. Zielonacki. 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."

207. 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.

(d) Other relevant rulings

208. 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. The Council of Europe

1. The Committee of Ministers

209. 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.
>
> 71. When not exercising judicial functions, judges are liable under civil criminal and administrative law in the same way as any other citizen."

2. The Parliamentary Assembly of the Council of Europe

210. 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:

> "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. ..."

211. The above-mentioned resolution was based on the report of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe of 6 January 2020 (doc. 15025) which stated, in so far as relevant:

> "4. Disciplinary proceedings against judges
>
> 95. As we outlined in the previous sections, a main objective of the reform started after the 2015 legislative elections has been to bring the judiciary firmly under the control of the ruling majority. In that context, the reports of disciplinary proceedings against, and harassment of, judges and prosecutors who are seen as acting against the interests of the ruling majority, or who have been openly critical of the reforms, is extremely concerning. This is all the more the case since recent disclosures that a campaign of harassment of judges was orchestrated with the involvement of leading personalities in the Ministry of Justice and High Council of Justice closely connected to the current ruling majority. ...
>
> ...
>
> 98. According to the Polish Constitution, judges cannot be members of political parties or engage in activities that would be incompatible with the principle of the independence of the courts and judiciary. While judges should refrain from political activities, the law does not clearly define what amounts to political activity and what is protected under the right to freedom of speech [footnote omitted]. While we concur with the prohibition of party-political activities for judges, this cannot have the effect of forbidding judges from being able to express an opinion on the legal system and changes to it that would affect them directly."

212. 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:

> "4. As regards Poland, the Assembly notes that many judges have been subjected to various forms of harassment in recent months. In particular, disciplinary or pre-disciplinary proceedings have been brought against judges who have spoken in public about the independence of the judiciary, criticised ongoing reforms, taken part in activities to raise public awareness of issues concerning the rule of law and/or submitted preliminary questions to the Court of Justice of the European Union (CJEU) or to the Polish Supreme Court. Some judges have been threatened or effectively demoted. The Assembly condemns the campaign of intimidation waged by the political power against certain critical judges and against the judiciary in general, as well as the lack of protective measures for judges who are the subjects of that campaign. Such conduct is unworthy of a democracy and a law-governed State."

213. 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 Consultative Council of European Judges ("the CCJE")

(a) Opinion no. 10 (2007)

214. Opinion no. 10 (2007) of the CCJE for 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:

"V.C.2 Discipline

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

215. 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."

216. 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).

4. Report by the Secretary General under Article 52 of the Convention on the consequences of decisions K 6/21 and K 7/21 of the Constitutional Court of the Republic of Poland

217. On 23 November 2022 the Secretary General of the Council of Europe published a report assessing the information provided by the Government on how the internal law ensured the effective implementation of the Convention requirements in the light of the above-mentioned judgments of the Constitutional Court.

218. The report's relevant concluding remarks read as follows:

"29. As a result of the findings of unconstitutionality in the judgments K 6/21 and K 7/21 of the Constitutional Court, the European Court's competence as established in Article 32 of the Convention was challenged and the implementation of Article 6 § 1 of the Convention – as interpreted by the European Court in the cases of *Xero Flor w Polsce sp. z o.o., Broda and Bojara, Reczkowicz, Dolińska-Ficek and Ozimek* and *Advanced Pharma sp. z o.o.* – has so far not been carried out. The ensuing obligation of Poland to ensure the enjoyment of the right to a fair trial by an independent and impartial tribunal established by law to everyone under its jurisdiction is not, at this stage, fulfilled.

30. To ensure the implementation of its international obligations under Article 1, Article 6 § 1 and Article 32 of the Convention, action is required by Poland. This action coincides with Poland's obligation to abide by the judgments of the European Court in the cases of *Xero Flor w Polsce sp. z o.o., Broda and Bojara, Reczkowicz, Dolińska-Ficek and Ozimek* and *Advanced Pharma sp. z o.o*. In a nutshell, Poland has an obligation to ensure that its internal law is interpreted and, where necessary, amended in such a way as to avoid any repetition of the same violations, as required by Article 46 of the Convention. Poland has not been released from its unconditional obligation under Article 46 of the Convention to abide by the European Court's judgments fully, effectively and promptly."

B. Material relevant to the complaint under Article 10 of the Convention

1. Material already summarised

219. The international material relevant to the applicant's complaint under Article 10 of the Convention was set out in *Żurek v. Poland* (no. 39650/18, §§ 102-104 and 108-112, 16 June 2022).

2. The CCJE

220. Opinion no. 25 (2022) of the CCJE for the attention of the Committee of Ministers of the Council of Europe on the Freedom of Expression of Judges adopted on 2 December 2022 reads, in so far as relevant:

> "IV. General principles
>
> ...
>
> 26. The CCJE takes a broad view on the personal scope of the right to freedom of expression of judges as an individual right [footnote omitted]. Accordingly, a judge enjoys the right to freedom of expression like any other citizen. The right to free expression of judges extends to personal opinions expressed in connection with the exercise of their office and entitles judges to make statements out of court as well as in court, both in public and in private, and to engage in public debates and in social life in general.
>
> 27. However, the institutional and governmental nature of the judicial office gives an ambivalent character to the freedom of expression of an individual judge. Statements of judges may have an impact on the public image of the justice system, as the public may generally perceive them not only as subjective but also as objective assessments and ascribe them to the entire institution.
>
> 28. In their official function, judges have a prominent role in society as guarantors of the rule of law and justice [footnote omitted]. The very essence of being a judge is the ability to view the subjects of disputes in an objective and impartial manner. It is equally important for judges to be seen as having this ability [footnote omitted]. This is because they need the public's trust in their independence and impartiality in order to be successful in carrying out their duties [footnote omitted] and in preserving the authority of the judiciary to resolve legal disputes or to determine a person's guilt or innocence on a criminal charge [footnote omitted]. It follows that judges have to affirm these values through their conduct [footnote omitted]. It is therefore legitimate for the state to impose on judges a duty of restraint that pays due regard to their role in society [footnote omitted].
>
> 29. Given the above-mentioned premises, the "duties and responsibilities" referred to in Article 10(2) of the ECHR assume a special significance for statements of judges [footnote omitted]. For legal restrictions on judges' freedom of expression, this Article provides that these must be prescribed by law and are necessary in a democratic legal order for serving a legitimate purpose. Legitimate aims, as defined in the Article, include preserving the authority and impartiality of the judiciary and the protection of the confidentiality of proceedings. Further, the rights of others, such as the guarantee of the presumption of innocence, serve as legitimate aims for restricting freedom of expression. In the absence of a legitimate aim, a restriction of a judge's right to free expression may appear as an illegitimate retaliation against the judge for unwanted criticism [footnote omitted]. In most member States, ethical restraints on free speech of judges are geared towards similar purposes [footnote omitted].
>
> 30. The restriction of free speech requires justification. In the case law of the European Court of Human Rights, an interference is deemed necessary in a democratic society when it responds to a "pressing social need" and is "proportionate to the legitimate aim pursued" [footnote omitted]. Proportionality of a measure requires that it is the least restrictive measure [footnote omitted].

31. It follows that a balance must be struck between the fundamental right of an individual judge to freedom of expression and the legitimate interest of a democratic society to preserve public confidence in the judiciary [footnote omitted]. The Bangalore Principles formulate two fundamental considerations in this respect. The first is whether the judge's involvement could reasonably undermine confidence in his/her impartiality. The second is whether such involvement may unnecessarily expose the judge to political attacks or be inconsistent with the dignity of judicial office. If either is the case, the judge should avoid such involvement [footnote omitted]. The question to be asked is therefore, whether in a particular social context and in the eyes of a reasonable and informed observer, the judge has engaged in an activity, which could objectively compromise his/her independence or impartiality [footnote omitted]. Important criteria to be considered are the wording of the statement and circumstances, context and overall background against which a statement was made, including the position of the relevant judge [footnote omitted].

...

V. Limitations on the freedom of expression / controversial cases

...

2. Statements regarding public debates

45. The principles of democracy, separation of powers and pluralism call for the freedom of judges to participate in debates of public interest [footnote omitted]. However, the principle of separation of powers requires judges to refrain from acting as politicians themselves when speaking in public. Thus, a reasonable balance needs to be struck between the degree to which judges may be involved in public debates and the need for them to be and to be seen to be independent and impartial in the discharge of their duties[footnote omitted]. The content and context of a given statement assume special relevance in this regard [footnote omitted].

46. Due to their unique position in a democracy based on the rule of law, judges have the expertise and ensuing responsibility to contribute to the improvement of the law, the defence of fundamental rights, the legal system and the administration of justice[footnote omitted]. Hence, subject to preserving their impartiality and independence, they should be permitted and even encouraged to participate in discussions on the law for informative and educational purposes [footnote omitted] and to express views and opinions on weaknesses in the application of the law and improving the law, as well as the legal system.

47. In all public statements on matters of public interest, judges should express themselves with prudence, moderate in tone, balanced and respectful manner. They should refrain from discrimination, political, philosophical or religious proselytising or militancy.

3. Statements regarding matters of concern for judiciary as an institution

48. Judges have the right to make comments on matters that concern fundamental human rights, the rule of law, matters of judicial appointment or promotion and the proper functioning of the administration of justice, including the independence of the judiciary and separation of powers [footnote omitted]. If the matter directly affects the operation of the courts, judges should also be free to comment on politically

controversial topics, including legislative proposals or governmental policy [footnote omitted]. This follows from the fact that the public has a legitimate interest in being informed about these issues as they involve very important matters in a democratic society [footnote omitted]. Judges in leadership positions or those holding a position in judges' associations or the council for the judiciary are in a prominent position to speak out on behalf of the judiciary.

...

VI. Defending judicial independence as a legal and / or ethical duty of judges, associations of judges and councils for the judiciary

58. In line with CCJE Opinions No. 3(2002) [footnote omitted] and No. 18(2015) [footnote omitted], the CCJE asserts that each judge is responsible for promoting and protecting judicial independence, which functions not only as a constitutional safeguard for the judge but also imposes on judges an ethical and/or legal duty to preserve it and speak out in defence of the rule of law and judicial independence when those fundamental values come under threat [footnote omitted]. It extends to both matters of internal and external independence.

59. With a view to European and international cooperation in legal matters and the importance of European and international law in protecting judicial independence, judges may address threats to judicial independence both at national and international level.

60. If judicial independence or the ability of the judicial power to exercise its constitutional role are threatened, or attacked, the judiciary must be resilient and defend its position fearlessly [footnote omitted]. This duty particularly arises, when democracy is in a malfunctioning state, with its fundamental values disintegrating, and judicial independence is under attack.

61. Since the duty to defend flows from judicial independence, it applies to every judge [footnote omitted]. When a judge makes such statements not only in his or her personal capacity, but also on behalf of a judicial council, judicial association or other representative body of the judiciary, the protection afforded to that judge will be heightened [footnote omitted]. Taking this into account and depending on the issue and context, the council for the judiciary [footnote omitted], associations of judges [footnote omitted], court presidents or other independent bodies may be best placed to address these issues, for example high-level constitutional issues. Judges may also express their views within the framework of an international association of judges."

III. EUROPEAN UNION LAW

A. The Treaty on European Union

221. 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."

222. 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

223. 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*

224. 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.

225. 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 above-mentioned chamber, so that those cases may be examined by a court which meets the above-mentioned requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field."

226. 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*

227. 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.

228. 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."

229. Following its interim decision of 8 April 2020 (see paragraph 228 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.

230. 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;

2. Declares that, by allowing the right of courts and tribunals to submit requests for a preliminary ruling to the Court of Justice of the European Union to be restricted by the possibility of triggering disciplinary proceedings, the Republic of Poland has failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU;"

231. The 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).

232. 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."

233. The relevant reasons for the judgment regarding the restrictions of the right of national courts to submit requests for a preliminary ruling to the CJEU read as follows:

"222. It should be recalled at the outset that the keystone of the judicial system established by the Treaties is the preliminary ruling procedure provided for in Article 267 TFEU which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member

States, has the object of securing uniformity in the interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy, as well as, ultimately, the particular nature of the law established by the Treaties (Opinion 2/13 of 18 December 2014, EU:C:2014:2454, paragraph 176 and the case-law cited, and judgment in *A.B. and Others*, paragraph 90 and the case-law cited).

223. According to the settled case-law of the Court, Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving the interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case before them (judgments of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraph 26, and in *A.B. and Others*, paragraph 91 and the case-law cited).

...

225. It is also settled case-law that a rule of national law cannot prevent a national court from exercising that discretion, or complying with that obligation, which are an inherent part of the system of cooperation between the national courts and the Court of Justice established in Article 267 TFEU and of the functions of the court responsible for the application of EU law entrusted by that provision to the national courts (judgment in *A.B. and Others*, paragraph 93 and the case-law cited).

226. Furthermore, a national rule the effect of which may *inter alia* be that a national court will choose to refrain from referring questions for a preliminary ruling to the Court is detrimental to the prerogatives thus granted to national courts and tribunals by Article 267 TFEU and, consequently, to the effectiveness of that system of cooperation (see, to that effect, judgment in *A.B. and Others*, paragraph 94 and the case-law cited).

227. Provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they have made a reference for a preliminary ruling to the Court of Justice cannot therefore be permitted. Indeed, the mere prospect, as the case may be, of being the subject of disciplinary proceedings as a result of making such a reference or deciding to maintain that reference after it was made is likely to undermine the effective exercise by the national judges concerned of the discretion and the functions referred to in paragraph 225 of the present judgment (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 58).

228. For those judges, not being exposed to disciplinary proceedings or measures for having exercised such a discretion to bring a matter before the Court, which is exclusively within their jurisdiction, also constitutes a guarantee that is essential to judicial independence, that independence being, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 59 and the case-law cited).

229. In the present case, it must be borne in mind that it is already apparent from the examination which led the Court to uphold the first complaint brought by the Commission that the definitions of the disciplinary offence contained in the provisions of 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 derived from the second subparagraph of Article 19(1) TEU, since they give rise to the risk that the disciplinary regime at issue might be used for the purpose of creating, in respect of judges of the Polish ordinary courts, pressure and a deterrent effect which are likely to influence the content of the judicial decisions which those judges are called upon to give.

230. Such a risk also concerns the decisions by which a national court is called upon to choose to exercise its discretion under Article 267 TFEU to submit a request for a preliminary ruling to the Court of Justice or, where appropriate, to comply with its obligation to make such a reference for a preliminary ruling under that provision.

231. As attested to by the examples highlighted by the Commission and discussed, in particular, in paragraphs 117, 118 and 125 of the present judgment, the practice initiated by the Disciplinary Officer confirms that such a risk has, to date, materialised through the opening of investigations concerning decisions whereby Polish ordinary courts have submitted requests for a preliminary ruling to the Court of Justice; investigations which have included, in particular, interviewing the judges concerned and sending those judges questionnaires concerning the question whether the references for a preliminary ruling which had thus been made by those judges were likely to have given rise to disciplinary offences.

232. In addition, it must be stated that, in its defence, the Republic of Poland merely minimised the scope of such practices by claiming, *inter alia*, that those investigations were carried out not by the disciplinary courts themselves, but by disciplinary officers, that the investigation stage had to be distinguished from that relating to the disciplinary proceedings themselves, that those investigations had in the meantime been closed and that they had, moreover, related to the circumstances surrounding the adoption of the orders for reference concerned and the conduct of the judges in question on that occasion, rather than the orders themselves.

233. It must be borne in mind, in that regard, first, that strict compliance with Member State obligations derived from Article 267 TFEU is required in respect of all State authorities and, therefore, in particular, in respect of a body which, like the Disciplinary Officer, is responsible for investigating, if necessary under the authority of the Minister for Justice, disciplinary proceedings that may be brought against judges. Second, as has been argued by both the Commission and the Member States intervening in support of the form of order sought by that institution, the mere fact that the Disciplinary Officer conducts investigations under the conditions referred to in paragraph 231 of the present judgment is sufficient to give concrete expression to the risk of forms of pressure and of a deterrent effect referred to in paragraph 229 of the present judgment and to undermine the independence of the judges who are the subject of those investigations.

234. It follows that the fifth complaint, alleging that the Republic of Poland has failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU by allowing the right of courts and tribunals to submit requests for a preliminary ruling to the Court of Justice to be restricted by the possibility of triggering disciplinary proceedings, must be upheld."

3. Interim orders in case C-204/21

234. In March 2021 the European Commission commenced infringement proceedings in respect of the 2019 Amending Act (see paragraphs 179-180 above), considering that the law undermined the independence of Polish judges and was incompatible with the primacy of EU law. The Commission maintained that, in so far as the 2018 Amending Act conferred on the Supreme Court's Disciplinary Chamber, whose independence and impartiality were not guaranteed, jurisdiction to rule on cases having a direct impact on the status of judges and the performance of their duties, that law affected their independence. Furthermore, according to the Commission,

the 2019 Amending Act prohibited any national court from reviewing compliance with the EU requirements relating to an independent and impartial tribunal previously established by law and characterised such a review as a disciplinary offence. The Chamber of Extraordinary Review and Public Affairs of the Supreme Court was deemed to have exclusive jurisdiction to carry out such reviews. Finally, the Commission maintained that, by requiring judges to communicate information relating to their activities in associations or foundations and previous political memberships, and by planning to publish that information, the amending law infringed the right to respect for private life and the right to protection of personal data. The Commission also decided to ask the CJEU to order interim measures until it had given a judgment in the case.

235. 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 subsection 1a of section 27(1) of the 2017 Act on the Supreme Court as amended by the 2019 Amending Act, under which the Disciplinary Chamber of the Supreme Court had jurisdiction to adjudicate, at both first instance and second instance, on applications for authorisation to initiate criminal proceedings against judges, place them in provisional detention, arrest them or summon them to appear before it, and second, the effects of the decisions already adopted by the Disciplinary Chamber on the basis of that article which authorised the initiation of criminal proceedings against or the arrest of a judge.

236. On 27 October 2021 the Vice-President of the CJEU ordered Poland to pay to the European Commission a periodic penalty payment of EUR 1,000,000 per day until such time as that member State complied with the obligations arising from the order of 14 July 2021, or, if it failed to do so, until the date of delivery of the final judgment in the case (C-204/21 R, EU:C:2021:878).

237. On 10 March 2023 the Republic of Poland made an application for cancellation or variation of the order of 27 October 2021, relying on the adoption of the 2022 Amending Act and the abolition of the Disciplinary Chamber. On 21 April 2023 the Vice-President of the CJEU ordered that the amount of the periodic penalty payment which Poland was required to pay under the previous order was to be reduced to EUR 500,000 per day (C-204/21 R-RAP, EU:C:2023:334). In that decision the Vice-President of the CJEU examined the implementation of the various interim measures prescribed by the order of 14 July 2021.

238. As regards the obligation to suspend the effects of the decisions adopted by the Disciplinary Chamber authorising the initiation of criminal proceedings against or the arrest of a judge, the order analysed the two remedies introduced by section 9 and section 18(1) of the 2022 Amending Act.

In this respect the relevant reasons for the order read as follows:

"33. It follows from point 1(a) of the operative part of the order of 14 July 2021 that that order required the Republic of Poland, *inter alia*, to suspend the effects of the decisions adopted by the Disciplinary Chamber on the basis of point 1a of Article 27(1) of the amended Law on the Supreme Court.

34. The Republic of Poland submits, in essence, that it has implemented that interim measure in full by introducing two separate legal remedies, provided for, respectively, in Article 9 and Article 18(1) of the Law of 9 June 2022.

...

39. As regards, in the second place, Article 18(1) of the Law of 9 June 2022, it follows from the wording of that provision that it affords the judge concerned by certain decisions adopted by the Disciplinary Chamber that have become final the possibility of applying, within six months from the entry into force of that law, for the procedure concerning him or her to be reopened.

40. Whilst the introduction of such a remedy is, in so far as it is effective, capable of strengthening the judicial protection available to the judges concerned by proceedings brought before the Disciplinary Chamber, the fact remains that its introduction by no means entails the suspension of the effects of a decision adopted by the Disciplinary Chamber if the judge in question has not submitted an application for review of that decision pursuant to the conditions laid down in the Law of 9 June 2022.

41. In addition, even if such an application for review is submitted, it is not apparent from Article 18(1) of that law that the effects of the decision of the Disciplinary Chamber to which that application relates are suspended pending the examination of the application.

42. It appears, therefore, that the legal remedies upon which the Republic of Poland relies are incapable of guaranteeing, in all cases and immediately, the suspension of the effects of the decisions adopted by the Disciplinary Chamber on the basis of point 1a of Article 27(1) of the amended Law on the Supreme Court.

43. In those circumstances, the fact that some of those decisions have in fact been called into question or could be in the near future, assuming this were established, cannot, in any event, establish that the interim measure referred to in paragraph 33 of this order has been implemented in full.

44. Accordingly, the Republic of Poland has complied with that interim measure only partially."

4. Judgment of 5 June 2023 in Commission v. Poland (Independence and private life of judges), C-204/21, EU:C:2023:442

239. On 5 June 2023 the Grand Chamber of the CJEU delivered its judgment upholding the Commission's action. The CJEU held, *inter alia*, referring to its earlier case-law, that the Disciplinary Chamber of the Supreme Court did not satisfy the requirements of independence and impartiality.

240. 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 conferring on the Disciplinary Chamber of the Supreme Court, Poland, whose independence and impartiality are not guaranteed, jurisdiction to hear and determine cases having a direct impact on the status of judges and trainee judges and the performance of their office, such as, on the one hand, applications for authorisation to initiate criminal proceedings against judges and trainee judges or to detain them and, on the other hand, cases relating to employment and social security law that concern judges of the Supreme Court and cases relating to the compulsory retirement of those judges, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;"

241. The relevant reasons as regards the Disciplinary Chamber and its jurisdiction read as follows:

"95. As regards specifically the rules governing the disciplinary regime applicable to judges, it thus follows from the settled case-law of the Court that the requirement of independence derived from EU law, and, in particular, from the second subparagraph of Article 19(1) TEU, means that that regime must provide the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. In that regard, rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, rules which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, especially the rights of the defence, and rules which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary (judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 61 and the case-law cited).

96. The same must, in principle, apply, *mutatis mutandis*, to other rules relating to the status of judges and the performance of their duties, such as those governing the waiver of their criminal immunity where such immunity is, as in the present case, provided for in the national law concerned (see, to that effect, judgment of 18 May 2021, *Asociaţia 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 213).

97. As the Advocate General observed, in essence, in point 206 of his Opinion, the application of such rules is likely to have major consequences both for the career progress of judges and on their living conditions. That is certainly the case with rules such as those in respect of which points 1a, 2 and 3 of Article 27(1) of the amended Law on the Supreme Court entrusts the application or review to the Disciplinary Chamber, in so far as such application may lead to authorisation to initiate criminal proceedings against the judges concerned, to arrest them and to place them in provisional detention, as well as to the suspension of those judges and a reduction in their remuneration.

...

99. In those circumstances, the legal order of the Member State concerned must include guarantees capable of preventing any risk of such rules or decisions being used as a system of political control of the content of judicial decisions or as an instrument of pressure and intimidation against judges which could, *inter alia*, lead to an appearance of a lack of independence or impartiality on their part capable of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in individuals (see, to that effect, judgment of 18 May 2021, *Asociaţia 'Forumul*

Judecătorilor din România' and Others, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 216).

100. To that end, it is therefore important, as has been recalled in paragraph 95 of the present judgment in relation to the rules applicable to the disciplinary regime for judges, that decisions authorising the initiation of criminal proceedings against the judges concerned, their arrest and detention, and the suspension or reduction of their remuneration, or decisions relating to essential aspects of the employment, social security or retirement law schemes applicable to those judges, be adopted or reviewed by a body which itself satisfies the guarantees inherent in effective judicial protection, including that of independence (see, by analogy, judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 80 and the case-law cited).

101. In that regard, it should be noted in particular that the mere prospect, for judges, of running the risk that authorisation to prosecute them might be sought and obtained from a body whose independence is not guaranteed is liable to affect their own independence (see, by analogy, judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 82 and the case-law cited). The same is true of risks that such a body may decide whether to suspend their duties and reduce their remuneration or whether they should be retired early, or even to rule on other essential aspects of their employment and social security law regime.

102. In the present case, it should be recalled that, in the light of all the factors noted and considerations set out in paragraphs 89 to 110 of the judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596), to which reference must be made, the Court held, in paragraph 112 of that judgment, that, taken together, the particular context and objective circumstances in which the Disciplinary Chamber was created, the characteristics of that chamber and the way in which its members were appointed are such as to give rise to reasonable doubts in the minds of individuals as to the imperviousness of that body to external factors, in particular the direct or indirect influence of the Polish legislature and executive, and its neutrality with respect to the interests before it and, thus, are likely to lead to that body's not being seen to be independent or impartial, which is likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in those individuals."

242. Other relevant case-law of the CJEU is cited in the Court's above-cited 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).

THE LAW

I. JOINDER OF THE APPLICATIONS

243. The Court notes that in his first application (no. 21181/19) the applicant complained under Article 8 and Article 13 of the Convention about the various preliminary inquiries initiated by the disciplinary officer. The Court decided to give notice to the Government of those complaints and, in addition, of its own motion, of the complaint under Article 10 of the

Convention. In his second application (no. 51751/20), the applicant complained about the Disciplinary Chamber's decision of 18 November 2020 lifting his immunity and suspending him from his judicial duties. In respect of that decision, he raised complaints under Article 6 § 1, Article 8 and Article 10 of the Convention.

244. Having regard to their similar subject matter and for reasons of procedural economy, the Court finds it appropriate to examine the two applications jointly in a single judgment (Rule 42 § 1 of the Rules of Court).

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

245. The applicant complained under Article 6 § 1 of the Convention that the decision to lift his immunity and consequently to suspend him from his judicial duties had been taken by the Disciplinary Chamber of the Supreme Court, a body that did not satisfy the requirements of "an independent and impartial tribunal established by law". Article 6 § 1 of the Convention, in so far as relevant, 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. Victim status

(a) The parties' submission

(i) The Government

246. In their additional observations of 3 January 2023, the Government maintained that the CPL's resolution of 29 November 2022 was unequivocally favourable to the applicant. In view of that resolution, they argued, the applicant had lost his victim status and the application should be considered incompatible *ratione personae* with the provisions of the Convention.

247. In that regard, they noted that the said resolution had been issued under section 9 of the 2022 Amending Act, which had been applied by the CPL for the first time. In its decision, the CPL had taken into account the case-law of the Court and the CJEU concerning the Disciplinary Chamber, and in particular the interim order issued by the Vice-President of the CJEU in case C-204/21 R (see paragraph 87 above). The Government further submitted that the resolution was final and legally binding. The applicant still remained subject to criminal prosecution by virtue of the Disciplinary Chamber's resolution of 18 November 2020, but this decision could be

reversed at the applicant's request under the procedure provided for in section 18 of the 2022 Amending Act.

(ii) The applicant

248. In his additional observations, the applicant submitted that following the CPL's resolution he had been reinstated under the previous conditions as of 30 November 2022, i.e. after 741 days of suspension. Furthermore, his salary had been adjusted to the full amount and he had received his back pay. Nonetheless, the amount paid did not include the interest due. The applicant also submitted that throughout the period of his suspension there had been no legal mechanism for his effective reinstatement by way of a judicial decision.

249. The applicant argued that the CPL had not ruled on the issue of his immunity, having acknowledged that it did not have such a possibility under the current legislation. The same Chamber had found that the applicant's actions had not comprised the constitutive elements of the offence under Article 241 of the CC, yet it had left in force part of the Disciplinary Chamber's resolution allowing him to be held criminally liable for an act which had not constituted an offence.

250. The applicant stressed that he had been unable to file a request to amend the resolution on the lifting of his immunity with the CPL since, in his view, that body did not satisfy the requirements of an "independent and impartial tribunal established by law" owing, *inter alia*, to the designation of its members by the President of the Republic.

251. The applicant submitted that the degree of interference with his rights and freedoms as a result of the proceedings conducted against him meant that he was still suffering from the effects of the proceedings before the Disciplinary Chamber, while the resolution of the CPL had not restored the previously existing state of affairs in terms of non-pecuniary damage.

(b) The Court's assessment

(i) General principles

252. The Court reiterates that it falls first to the national authorities to redress any violation of the Convention and that in assessing whether an applicant can claim to be a genuine victim of an alleged violation, account should be taken not only of the formal position at the time when the application was lodged with the Court but also of all the circumstances of the case in question, including any developments prior to the date of the examination of the case by the Court (see *Tănase v. Moldova* [GC], no. 7/08, § 105, ECHR 2010, and *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 217, 22 December 2020).

253. A decision or measure favourable to the applicant is not, in principle, sufficient to deprive him of his status as "victim" for the purposes of Article 34 of the Convention unless the national authorities have

acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 179-80, ECHR 2006 V; *Gäfgen v. Germany* [GC], no. 22978/05, § 115, ECHR 2010; *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 259, ECHR 2012 (extracts); and *Cristea v. the Republic of Moldova*, no. 35098/12, § 25, 12 February 2019). Only where both these conditions have been satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of the application (see *Rooman v. Belgium* [GC], no. 18052/11, § 129, 31 January 2019, and *Selahattin Demirtaş*, cited above, § 218).

254. The alleged loss of the applicant's victim status involves an examination of the nature of the right in issue, the reasons advanced by the national authorities in their decision and the persistence of adverse consequences for the applicant after the decision (see *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 67 *in fine*, 2 November 2010).

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

(α) As regards the applicant's suspension

255. In the instant case, the Government contended that the applicant had lost his victim status owing to the CPL's favourable resolution of 29 November 2022.

256. The applicant's grievances under Article 6 § 1 of the Convention concern the Disciplinary Chamber's resolution of 18 November 2020 lifting his immunity and suspending him from his judicial duties. The Court will first address the question of the applicant's victim status with regard to his suspension.

257. To begin with, the Court notes that the 2022 Amending Act abolished the Disciplinary Chamber of the Supreme Court and established the new CPL as of 15 July 2022 (see paragraph 183 above). Pending the appointment of at least five judges to the CPL, the First President of the Supreme Court designated five judges of that court to adjudicate in the new Chamber on a transitional basis (see paragraph 184 above). In consequence, the applicant's case, which at that stage concerned the examination of the prosecutor's interlocutory appeal against the Disciplinary Chamber's decision refusing leave to have him arrested with a view to being charged with a criminal offence, was assigned to a formation of three judges of the Chamber of Professional Liability sitting in its transitional composition (see paragraph 80 above).

258. The formation of the CPL in the applicant's case was composed of three judges appointed to the Supreme Court on the recommendation of the NCJ, as previously composed, i.e. prior to the entry into force of the 2017 Amending Act whose operation in respect of the procedure for judicial appointments to that court gave rise to the Court's finding of a violation of

Article 6 § 1 of the Convention in *Reczkowicz*, *Dolińska-Ficek and Ozimek*, and *Advance Pharma sp. z o.o.* (all cited above).

259. In its resolution of 29 November 2022 the CPL finally dismissed the prosecutor's application for leave to have the applicant arrested; the prosecution could not therefore arrest him for the purposes of having him charged but, at the same time, was not prevented from charging him as his immunity still remained lifted, the question of immunity being outside the CPL's jurisdiction (see paragraphs 83 and 91-95 above). Furthermore, the CPL, of its own motion, set aside the Disciplinary Chamber's resolution of 18 November 2020 in the part regarding the applicant's suspension and the reduction of his salary for the duration of that suspension (see paragraphs 83 and 89 above). As a result, the applicant was reinstated on 30 November 2022 and his salary was adjusted to the full amount and he received his back pay (see paragraph 248 above).

260. In setting aside the applicant's suspension and reduction of his salary, the CPL took account of the fact that that measure had been ordered by the Disciplinary Chamber, a body not satisfying the requirements of an independent and impartial tribunal established by law within the meaning of, *inter alia*, Article 6 § 1 of the Convention (see paragraphs 87 and 92 above). Having regard to the above, the Court finds that the CPL has acknowledged – in substance – that there was a violation of Article 6 § 1 of the Convention in respect of the proceedings before the Disciplinary Chamber.

261. As to the redress which is appropriate and sufficient in order to remedy a breach of a Convention right at national level, the Court has generally considered this to be dependent on all the circumstances of the case, having regard, in particular, to the nature of the Convention violation at stake (see *Scordino (no. 1)*, § 186 and *Gäfgen*, § 116, both cited above). In that regard, the Court observes that the violation of Article 6 § 1 of the Convention alleged by the applicant essentially rests on the fact that his case was heard by the Disciplinary Chamber, a body which could not be considered a "lawful" and "independent and impartial" tribunal according to the Court's judgment in *Reczkowicz.* However, as noted above (see paragraph 258 above), the resolution putting an end to the applicant's suspension and unequivocally establishing that he committed no criminal offence was given by a formation of three judges whose appointments to the Supreme Court raise no concerns under Article 6 § 1 of the Convention in the light of the *Reczkowicz* judgment and the Court's related case-law as they occurred before the entry into force of the 2017 Amending Act – an act which entrusted recommendations for judicial appointments to the "new" NCJ, a body that lacked sufficient guarantees of independence from the legislature and the executive (see *Reczkowicz*, §§ 274-277 and 280-282, and *Grzęda*, § 322, both cited above). Consequently, the Court accepts that at last instance the applicant received a hearing before an "independent and impartial tribunal established by law", as required by Article 6 § 1 of the Convention.

262. As to the applicant's argument that the CPL resolution has not restored the state of affairs existing before the alleged violation in terms of non-pecuniary damage (see paragraph 251 above), the Court reiterates that, according to its case-law under Article 41 of the Convention, the purpose of awarding sums by way of just satisfaction is to provide reparation solely for damage suffered by those concerned to the extent that the relevant events constitute a consequence of the violation that cannot otherwise be remedied (see *Ilgar Mammadov v. Azerbaijan* (infringement proceedings) [GC], no. 15172/13, § 156, 29 May 2019 and *Sorbalo v. Moldova* (dec.). no. 1210/10, § 59, 31 January 2023). In the circumstances of the present case and having regard to its findings above (see paragraph 261 above), the Court considers that the CPL resolution can be regarded as affording the applicant appropriate and sufficient redress in so far as his suspension was concerned. Accordingly, the Court finds that the applicant has lost victim status in respect of that aspect of his complaint under Article 6 § 1 of the Convention.

263. Finding it unnecessary in the present case to deal with the applicant's arguments as to whether the CPL taken as a whole complies with the requirements of "an independent and impartial tribunal established by law" (see paragraph 250 above), the Court cannot but welcome the resolution given in the applicant's case and considers it a positive development in the context of the rule-of-law crisis in Poland (see *Grzęda*, cited above, § 346).

264. In particular, the Court notes that the judges dealing with the applicant's case were guided by the Court's case-law and, applying and interpreting for the first time section 9 of the 2022 Amending Act, they did so in the light of the requirements of a fair trial as established by the Convention. In putting together various strands of the Court's and the CJEU's rulings, they not only reached a decision consistent with the Convention and the rule-of-law standards but, at the same time, gave practical effect to the principle of subsidiarity underlying the Convention. The Court cannot over-emphasise the fundamental role played by the national courts as guarantors of justice in upholding that principle through their decisions whereby they give direct effect to the Convention rights and freedoms or remedy Convention violations that have already occurred (see *Grzęda*, cited above, § 324). Nor can the Court fail to see that the resolution in the applicant's case is a step forward in terms of ensuring compliance with the Court's judgments given in the context of the independence of the judiciary in Poland.

(β) As regards the lifting of the applicant's immunity

265. It remains for the Court to examine the question of the applicant's victim status in so far as the lifting of his immunity is concerned. It notes that, even though the CPL held, in unequivocal terms, that the applicant had not committed the impugned offence (see paragraphs 85-86 and 95 above), the part of the Disciplinary Chamber's resolution of 18 November 2020

permitting him to be held criminally liable still remains in force and the criminal proceedings against him are still pending.

266. The Government, without relying on the rule of exhaustion of domestic remedies or advancing any arguments that could imply the applicant's non-compliance with that rule, maintained that that part of the impugned resolution could have been reversed at the applicant's request (see paragraph 247 above).

267. It is true that, in accordance with section 18 of the 2022 Amending Act for a period of six months following its entry into force, that is to say, from 15 July 2022 to 15 January 2023, the applicant could have asked for the reopening of the proceedings in which his immunity had been lifted (see paragraph 187 above) and that he did not do so for the reasons explained in his observations (see paragraph 250 above). The Court cannot speculate whether a request for reopening could or could not result in the applicant's case being heard by a court that can be considered "lawful" for the purposes of Article 6 § 1 of the Convention in view of the composition of the CPL which, in the applicant's contention, allegedly did not satisfy the requirements of this provision (see paragraphs 184-185 and 250 above; see also *Reczkowicz,* §§ 280-282*; Dolińska-Ficek and Ozimek*, §§ 353-355; and *Advance Pharma sp. z o.o.*, §§ 349-351*,* all cited above). However, leaving aside that issue, the Court must note that, as the CPL established, the legal solution in section 18 of the 2022 Amending Act which made the verification of the decision lifting judicial immunity conditional on the judge's request was inconsistent and dysfunctional, given that, under section 9, the provisional measures such as suspension from judicial duties were to be reviewed of the Chamber's own motion (see paragraphs 90-94 above).

268. In that regard the Court also takes note of the order of the Vice-President of the CJEU of 14 July 2021 in the case C-204/21 under which Poland was required to suspend, *inter alia*, the effects of the decisions adopted by the Disciplinary Chamber authorising the initiation of criminal proceedings against or the arrest of a judge (see paragraph 235 above). In the subsequent order of 21 April 2023 the Vice-President of the CJEU examined the implementation of the various interim measures prescribed by the initial order of 14 July 2021 and found that the remedy provided for in section 18 was "incapable of guaranteeing, in all cases and immediately", the suspension of the effects of the Disciplinary Chamber's decisions lifting the immunity of a judge (see paragraph 238 above). In these circumstances, the Court considers that the fact that the applicant has not made a request under section 18 of the 2022 Amending Act does not have any decisive bearing on his victim status.

269. Furthermore, even though the CPL's finding that "the applicant's conduct had not comprised constitutive elements of an offence" (see paragraphs 85 and 95 above) seemed to have – for all practical purposes

– overruled the legal ground for lifting the applicant's immunity, which was a reasonable suspicion that he had committed the offence defined in Article 241 § 1 of the CCP (see paragraphs 43-54 above), the prosecution authorities have not undertaken any action to follow the Supreme Court's ruling as to non-existence of an offence in the criminal proceedings against the applicant. Accordingly, the Court finds that adverse consequences for the applicant persist despite the CPL's resolution.

270. In that context, the Court notes that, pursuant to Article 17 § 1 (1)-(2) of the CCP, the fact that no offence has been committed or that an act does not comprise constitutive elements of an offence are autonomous legal grounds for not opening an investigation or for discontinuing a pending investigation (see paragraph 191 with reference to Article 17 of the CCP above; in this connection, see also the Government's arguments cited in paragraph 273 below). The lifting of the applicant's immunity cannot therefore be seen any longer as a material consideration for the prosecution to justify the pursuit of a criminal case against him. However, as said above, no action aimed at terminating the criminal proceedings against him has been taken at domestic level.

271. In these circumstances and having regard to the deficiency of the legal solution in the 2022 Amending Act as established by the CPL, the resolution of 29 November 2022 cannot be regarded as an act redressing all the adverse consequences suffered by the applicant on account of the Disciplinary Chamber's ruling of 18 November 2020.

272. In view of the foregoing, the Government's preliminary objection as to the applicant's victim status in respect of the lifting of his immunity must be dismissed.

2. Applicability of the criminal limb of Article 6 § 1 to immunity proceedings

(a) The Government's submissions

273. The Government raised a preliminary objection as to the applicability of Article 6 § 1 of the Convention in its criminal limb to the lifting of the applicant's immunity. The proceedings in which a court decided whether to permit a judge to be held criminally liable were neither criminal nor even disciplinary. They were of an ancillary nature and were conducted separately from the criminal proceedings at their *in rem* stage. The subject of those proceedings was solely the question whether the immunity of a judge should be lifted and their aim was limited to allowing a prosecutor in charge to conduct the criminal proceedings in order to establish whether the offence in question had been committed. If the court decided not to lift the immunity of a judge, the criminal proceedings could not enter their *in personam* stage and would have to be discontinued in accordance with Article 17 § 1 (10) of

the CCP. A person whose immunity had been lifted did not automatically become a suspect.

274. The Government submitted that the Disciplinary Chamber of the Supreme Court had refrained from adjudicating on the merits of the criminal case. It had neither prejudged the outcome of criminal proceedings nor pronounced on the applicant's guilt. They stressed that in cases concerning the lifting of immunity the Supreme Court exercised a supervisory function in respect of the actions of the prosecution service and thus protected the independence of the judiciary. Furthermore, the lifting of the applicant's immunity as well as its consequences, namely his suspension from judicial duties and the reduction of his salary for the duration of the suspension, could not be regarded as a penalty.

275. The Government claimed that, under Polish law, judges were not granted any right to be released from criminal liability. A judge performing his or her duties in a particular post did not have an absolute "right" to remain in office irrespective of his or her conduct. The domestic legislation, pursuing the legitimate aim of ensuring the proper administration of justice, allowed for attributing disciplinary or criminal liability to a judge, as a result of a decision of a relevant authority. Such regulations did not constitute an interference with the rights of an individual, since the exercise of public authority should not be considered as an inherent part of a person's individuality.

(b) The applicant's submissions

276. The applicant maintained that Article 6 § 1 under its criminal head was applicable to his case as the interlocutory proceedings before the Disciplinary Chamber on the lifting of immunity of a judge were of a repression-related nature. In those proceedings a competent court could decide to lift an obstacle to pursuing a criminal case and to authorise the detention of a judge. He submitted that the decision to lift his immunity had resulted in his obligatory suspension from judicial duties and the reduction of his salary.

(c) The Court's assessment

(i) General principles

277. The protections afforded by Article 6 apply to a person subject to a "criminal charge", within the autonomous Convention meaning of that term. A "criminal charge" exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him (see *Deweer v. Belgium*, 27 February 1980, §§ 42-46, Series A no. 35; *Eckle v. Germany*, 15 July 1982, § 73, Series A no. 51; and

Simeonovi v. Bulgaria [GC], no. 21980/04, § 110, 12 May 2017, with further references).

278. Thus, for example, a person arrested on suspicion of having committed a criminal offence (see, among other authorities, *Heaney and McGuinness v. Ireland*, no. 34720/97, § 42, ECHR 2000-XII, and *Brusco v. France*, no. 1466/07, §§ 47-50, 14 October 2010), a suspect questioned about his involvement in acts constituting a criminal offence (see *Aleksandr Zaichenko v. Russia*, no. 39660/02, §§ 41-43, 18 February 2010; *Yankov and Others v. Bulgaria*, no. 4570/05, § 23, 23 September 2010; and *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 296, 13 September 2016) and a person who has been formally charged, under a procedure set out in domestic law, with a criminal offence (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 66, ECHR 1999-II, and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 44, ECHR 2004-XI) can all be regarded as being "charged with a criminal offence" and claim the protection of Article 6 of the Convention. It is the actual occurrence of the first of the aforementioned events, regardless of their chronological order, which triggers the application of Article 6 in its criminal aspect (see *Simeonovi*, cited above, § 111).

279. The concept of a "criminal charge" in Article 6 § 1 is an autonomous one (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 122, 6 November 2018). The Court's established case-law sets out three criteria, commonly known as the "*Engel* criteria", to be considered in determining whether or not there was a "criminal charge" (see *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22, and *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* [GC], nos. 68273/14 and 68271/14, § 75, 22 December 2020). The first of these criteria is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative, and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see, among other authorities, *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 82, ECHR 2003-X; *Jussila v. Finland* [GC], no. 73053/01, §§ 30-31, ECHR 2006-XIV; and *Gestur Jónsson and Ragnar Halldór Hall*, cited above, §§ 75, 77-78). The fact that an offence is not punishable by imprisonment is not by itself decisive for the purposes of the applicability of the criminal limb of Article 6 of the Convention since, as the Court has pointed out on numerous occasions, the relative lack of seriousness of the penalty at stake cannot deprive an offence of its inherently criminal character (see *Ramos Nunes de Carvalho e Sá*, cited above, § 122; *Gestur Jónsson and Ragnar Halldór Hall*, cited above, § 78; and

Vegotex International S.A. v. Belgium [GC], no. 49812/09, § 67, 3 November 2022).

(ii) Application of the above principles in the particular circumstances of the present case

280. To begin with, the Court notes that under Polish law judicial immunity has a long-standing tradition and is regarded as one the guarantees of judicial independence (see paragraphs 145-147 and 153 above). In accordance with Article 181 of the Polish Constitution a judge cannot be held criminally liable or deprived of liberty without prior consent granted by a competent court (see paragraph 143 above), thus establishing the so-called formal immunity of a judge and, at the same time, conferring on a judge the constitutional right to have access to a court to have the lifting of immunity examined in judicial proceedings. This provision does not exclude the criminal liability of judges, but prescribes that prosecuting a judge with a view to establishing his or her criminal liability is possible only when the prosecutor has obtained the authorisation of the court to do so (see paragraph 172 above; compare, as regards applicability of the criminal limb of Article 6 § 1 to the procedure for lifting parliamentary immunity, *Kart v. Turkey* [GC], no. 8917/05, §§ 67-70, ECHR 2009 (extracts)).

281. As regards the ordinary court judges, the proceeding for the lifting of judicial immunity ("the immunity proceedings") are regulated in the 2001 Act, in particular its section 80. The disciplinary court grants permission to hold a judge criminally liable "if there is a sufficiently justified suspicion" that the judge has committed the alleged offence (see section 80(2c) of the said Act, quoted in paragraph 148 above). The same condition must be satisfied for the court to authorise the arrest or detention of a judge.

282. The question to be determined is whether Article 6 § 1 of the Convention under its criminal limb was applicable to the proceedings concerning the lifting of the applicant's immunity. It is therefore not the Court's task to decide whether Article 6 of the Convention applies to procedures for lifting immunity in general, its assessment being limited to the specific circumstances of the case before it. As stated above (see paragraph 279 above), the assessment of the applicability of Article 6 under its criminal limb is based on three criteria, commonly known as the "*Engel* criteria" (see *Engel and Others*, cited above, § 82, as recently applied in *Gestur Jónsson and Ragnar Halldór Hall*, cited above, § 75).

283. In the present case, the prosecutor sought permission to have the applicant's criminal liability established for allowing the media to record the court session of 17 December 2017 and for disclosing – during the oral delivery of the reasons for his decision – information from the investigation without the prosecutor's consent. In the prosecutor's view, the applicant's action had amounted to an offence under Article 231 § 1 (failure to fulfil official duties or abuse of power) in conjunction with Article 266 § 2

(disclosure of information by a public official received in connection with the performance of official duties) and Article 241 § 1 of the CC (unauthorised disclosure of information from pre-trial proceedings) (see paragraph 34 above). The Disciplinary Chamber in its first-instance resolution of 9 June 2020 dismissed the prosecutor's application, having found that there was no reasonable suspicion that the applicant had committed the offence as alleged (see paragraph 36 above). The Disciplinary Chamber in its second-instance resolution of 18 November 2020 partly allowed the prosecutor's application and lifted the applicant's immunity from prosecution in respect of the charge under Article 241 § 1 of the CC (see paragraph 43 above). It found that there was a reasonable suspicion that the applicant, while orally giving reasons for his decision during the session of 17 December 2017, had disclosed without permission information from the investigation conducted by the Warsaw Regional Prosecutor's Office into the "Column Hall vote". The Disciplinary Chamber referred in this regard to the disclosure of extensive excerpts from witness statements given to the prosecutor (see paragraph 47 above).

284. As regards the first criterion – the legal classification of the offence under national law, the Court notes that the offence in respect of which the prosecutor sought to have the applicant's liability established, namely the unauthorised disclosure of information from pre-trial proceedings defined in Article 241 § 1 of the CC, is clearly a criminal offence under domestic law.

285. It is true that, as noted above (see paragraph 280 above) the lifting of the applicant's immunity did not prejudge his criminal liability, which was to be decided by the criminal court in the framework of the regular criminal proceedings. However, it was a condition *sine qua non* for the pursuit of prosecution against him on the basis of the intended charge which had already been specified in a detailed, precise and exhaustive manner in the prosecutor's application to the Supreme Court (see paragraph 34 above). In that regard, the Court finds it useful to refer to the findings of the Polish highest domestic courts relating to the specific features and nature of immunity proceedings in Poland.

286. In its leading judgment of 28 November 2007, no. K 39/07, the Constitutional Court found that immunity proceedings belonged to the category of "repression-related proceedings" which was a broader concept than merely the criminal proceedings regulated by the CCP. It held that those proceedings, constituting a preliminary stage for holding a judge criminally liable, should secure the constitutional right of defence to the person concerned, owing to the very liability which was potentially engaged by those proceedings. The Constitutional Court rejected as constitutionally unacceptable the idea that the right of defence could be restricted at the stage of immunity proceedings since the case would in the future be heard by the court deciding on the commission of an act, as well as the questions of guilt and punishment. It held in this respect that every stage of "criminalisation", even the preliminary stage of proceedings, had to be accompanied by

guarantees of defence rights that were appropriate to that stage. Importantly, the Constitutional Court emphasised that the lifting of immunity did not result in a mere removal of a procedural obstacle for holding a person criminally liable but amounted to "placing an individual in the shadow of suspicion" of having committed a criminal offence and to the initiation of a "case" within the meaning of Article 6 of the Convention (see paragraphs 154-155 above).

287. The Supreme Court, in its resolution of 20 September 2007, no. SNO 58/07, held that in determining whether there was a sufficiently justified suspicion that a judge had committed the act as specified in the prosecutor's application laying down the intended charge, the relevant court should apply *mutatis mutandis* the provisions of the criminal procedure concerning the determination of the commission of the act and the acknowledgement of guilt. To this end, that court should examine the evidence adduced by the prosecutor; this scrutiny being of a substantive nature although not reaching the level of conviction required for adjudication as to the commission of an offence and the guilt of the perpetrator in regular criminal proceedings. In this regard, the Supreme Court held that the condition for the lifting of immunity was similar to that prescribed in Article 313 § 1 of the CCP (see paragraph 191 above) for a decision on the presentation of charges (see paragraphs 161-163 above).

288. In its resolution of the seven-judge formation of 27 May 2009, no. I KZP 5/09, the Supreme Court's Criminal Chamber agreed with the Constitutional Court's conclusions mentioned above. It held that the immunity proceedings were closely related to the pending *in rem* pre-trial proceedings and conditioned the possibility of holding a judge criminally liable. The Supreme Court had no doubt that standards of a fair trial applied in the immunity proceedings, emphasising that – to the extent necessary to maintain compliance with the said standards – the provisions of the CCP should apply *mutatis mutandis* to those proceedings (see paragraphs 165-166 above). Similarly, in the resolution of 31 August 2022, no. I ZI 7/22, the Supreme Court held that the decision to lift the immunity of a judge could only be made by a "court" and in a procedure ensuring the essential guarantees of a fair trial (see paragraph 173 above).

289. Lastly, the Court refers to the Supreme Court's findings in its resolution of 14 September 2022, no. I KZP 7/22. In that resolution the Supreme Court expressly held that the subject-matter of immunity proceedings, which were of an interlocutory nature, fell within the scope of Article 6 § 1 of the Convention under its criminal limb (see paragraphs 170-171 above). The same was confirmed in the CPL's resolution of 29 November 2022 in the applicant's case (see paragraph 88 above). However, in the resolution of 14 September 2022 the Supreme Court also added that the immunity proceedings were not disciplinary proceedings; they were judicial proceedings within the meaning of Article 45 § 1 of the Polish

Constitution – a provision which guarantees the right to a fair trial in similar terms as Article 6 § 1 of the Convention (see paragraphs 143 above).

290. The Court attaches significant weight to the above-mentioned findings of the highest domestic courts, in particular their view that the requirements of Article 6 § 1 of the Convention apply to immunity proceedings. They also acknowledged that in immunity proceedings, despite their interlocutory nature, adequate procedural safeguards had to be afforded to the person concerned.

291. On the basis of the above-mentioned findings, the Court concludes that under Polish law there are two separate sets of proceedings enabling the prosecution of a judge and the establishing of his or her criminal liability. The initial proceedings relate to the authorisation for the lifting of immunity of a judge, where – according to the Constitutional Court – he or she is "put under the shadow of suspicion" (see paragraph 155 above). This set of proceedings, a condition *sine qua non* for the subsequent prosecution of a judge is, as noted above, by virtue of the Polish Constitution, of a judicial nature and the lifting of immunity is decided by a court at two levels of jurisdiction. Criminal proceedings against a judge would begin only if the authorisation has been given by a court in the immunity proceedings and it would be for the competent criminal court subsequently to decide on the commission of an offence and the question of guilt. In the applicant's case the question of the lifting of his immunity was finally determined at second instance by the Disciplinary Chamber's resolution of 18 November 2020.

292. Another relevant consideration for the Court is the fact that under section 128 of the 2001 Act the provisions of the CCP apply *mutatis mutandis*, to the extent not regulated in chapter III of that Act, to the immunity proceedings.

293. The Government pleaded that Article 6 § 1 in its criminal limb did not apply to the lifting of the applicant's immunity. However, in their observations on the complaint under Article 8 of the Convention, the Government submitted that that measure had been prompted by the applicant's conduct, which was related to a breach of criminal law (see paragraph 375 below).

294. As to the second criterion – the very nature of the offence – the Court observes that Article 241 § 1 of the CC was aimed at the public in general, and not at a specific category of persons. Thus, the charge against the applicant was criminal in nature.

295. With regard to the third criterion, the Court notes that the offence specified in Article 241 § 1 of the CC was punishable by a fine, restriction of liberty or imprisonment for up to two years, thus pointing to the seriousness of the penalties at stake.

296. The Court further observes that, in accordance with section 80(2c) of the 2001 Act, the disciplinary court lifting the immunity has to determine whether there was a "sufficiently justified suspicion" that the judge has

committed an offence. Such determination involves an assessment in fact and in law as to the existence of the requisite level of suspicion. In the present case this assessment was carried out in two resolutions of the Disciplinary Chamber of 9 June and 18 November 2020 and subsequently – in the context of the application for leave to have the applicant arrested – in the decisions of the Disciplinary Chamber of 22 April 2021 and the Chamber of Professional Liability of 29 November 2022. This indicates that the issue was subjected to a thorough examination.

297. Furthermore, the Court notes that the Disciplinary Chamber's resolution of 18 November 2020 lifting the applicant's immunity in respect of the charge under Article 241 § 1 of the CC was of significance for his legal position *vis-à-vis* his possible criminal liability (see, in that regard, paragraph 277 above, with references to *Deewer* and other Court judgments). In its resolution, the Disciplinary Chamber not only established that there was a "sufficiently justified suspicion" that the applicant had committed the offence at issue and opened the way for the pursuit of the criminal proceedings against him but also made an extensive interpretation of the constituent elements of that offence, an interpretation which was capable of affecting his future position in the investigation and trial. Having concluded that the applicant had acted in "pre-trial proceedings" as opposed to "judicial proceedings" – which by itself made the impugned disclosure of information punishable – it held that "he should have conducted the session in such a way that the offence under Article 241 § 1 of the CC would not be committed". Having found that the giving of oral reasons by the applicant had not given rise to any real threat to the public interest, it nonetheless concluded that there was a "sufficiently justified suspicion" that he had committed the impugned offence "by giving reasons for his decision in a manner that was unnecessary and contrary to that provision". Moreover, while ostensibly leaving to the court dealing with the applicant's case the final assessment of social harm involved in the offence, it nevertheless found that "the possible hypothesis that this harm was not negligible was not obvious for various reasons" (see paragraphs 45-54 above).

298. Moreover, the Court would recall that, as noted above, according to the Supreme Court, the condition for the lifting of immunity was similar to that prescribed in Article 313 § 1 of the CCP (see paragraph 191 above) for a decision on the presentation of charges (see paragraphs 161-163 above). That being so, the position of the applicant in the immunity proceedings was analogous to a suspect in criminal proceedings against whom a charge was to be laid down.

299. Consequently, even though the applicant has not yet been formally charged in the criminal proceedings opened in connection with a suspicion against him, the Court finds that following the above-mentioned resolution the applicant's situation became substantially affected – within the meaning of the Court's case-law – by actions taken by the authorities as a result of

a suspicion against him (see *Deweer*, §§ 42-46, and *Simeonovi*, §§ 110-111, both cited above). In this regard, the Court also refers to the judgment of 5 June 2023 in *Commission v. Poland (Independence and private life of judges)* (C-204/21, EU:C:2023:442) where the CJEU held that the mere prospect of judges running the risk that authorisation to prosecute them may be sought and obtained from a body whose independence is not guaranteed is likely to affect their own independence (see paragraph 241 above).

300. In view of the foregoing and having regard to the specific features of the immunity proceedings in the present case, the Court finds that Article 6 § 1 of the Convention under its criminal limb is applicable to those proceedings. It follows that the Government's objection in this regard must be dismissed.

3. Non-exhaustion of domestic remedies

(a) The Government's submissions

(i) Premature character of the complaint

301. The Government argued that the case was premature. They noted that the criminal proceedings against the applicant relating to the charge under Article 241 § 1 of the CC were still pending. The applicant had failed to answer the summons to participate in those proceedings, which therefore could not have been finalised.

(ii) Constitutional complaint

302. 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 and section 3(1), (1) and (2), of the 2011 Act on the NCJ, as amended by the 2017 Amending Act (see paragraphs 175 and 177 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.

303. 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 18 November 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.

(b) The applicant's submissions

304. The applicant disagreed. In his view, no effective domestic remedy was available to him.

(c) The Court's assessment

(i) Premature character of the complaint

305. The Government submitted that the complaint under Article 6 § 1 was premature because the criminal proceedings against the applicant were still pending. However, the Court observes that the applicant complained under Article 6 § 1 of the Convention that the decision to lift his immunity had been taken by the Disciplinary Chamber of the Supreme Court, a body that did not satisfy the requirements of "an independent and impartial tribunal established by law" (see paragraph 245 above). It therefore finds that the complaint at issue relates exclusively to the immunity proceedings which, as noted above, were finally closed and terminated by the Disciplinary Chamber's resolution of 18 November 2020 and not to the pending criminal proceedings against the applicant. Accordingly, the Court rejects the Government's objection regarding the premature character of the complaint.

(ii) Constitutional complaint

306. The Government referred to two specific legal provisions whose application, in their view, could have been challenged as unconstitutional by the applicant (see paragraph 302 above). They relied, in particular, on section 29 of the 2017 Act on the Supreme Court which provided, 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 175 and 177 above).

307. 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 that they made in *Advance Pharma sp. z o.o.* (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).

308. 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).

309. The Court also notes that the above-mentioned Constitutional Court 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.

310. 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.

311. 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 ruling of 10 March 2022, finding Article 6 § 1 of the Convention partly unconstitutional (no. K 7/21; see paragraphs 206-207 above), which was given in an apparent attempt to prevent the execution of the Court's judgments in *Broda and Bojara* (nos. 26691/18 and 27367/18, 29 June 2021), *Reczkowicz*, *Dolińska-Ficek and Ozimek* and *Advance Pharma sp. z o.o.* (all 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).

4. Overall conclusion on admissibility

312. The Court notes that the complaint under Article 6 § 1 regarding the proceedings for the lifting of the applicant's immunity 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

313. The applicant argued that the Disciplinary Chamber of the Supreme Court, which had dealt with his case, did not meet the requirements of an "independent and impartial tribunal established by law". In his view, the Disciplinary Chamber had been established in flagrant breach of the domestic law since the judges of that Chamber had been appointed by the President of the Republic on the recommendation of the recomposed NCJ, which, in turn, had been established contrary to the Constitution. In the latter respect, the applicant referred to the fact that judicial members of the NCJ had been elected by the *Sejm* and not by their peers, and that the term of office of the previous judicial members had been unlawfully terminated.

314. In support of his contention, the applicant relied on the *Reczkowicz* judgment (cited above). He further referred to a number of other rulings, including *inter alia*, the CJEU's preliminary ruling of 19 November 2019 in *A.K. and Others* (C-585/18, C-624/18 and C-625/18), the Supreme Court's judgment of 5 December 2019 (no. III PO 7/18) given following the latter ruling, the resolution of the joined Chambers of the Supreme Court of 23 January 2020 and the CJEU's judgment of 15 July 2021 in *Commission v. Poland (Disciplinary regime for judges)* (C-791/19).

315. As regards the comments made by the First President of the Supreme Court asserting that the change in the model of electing judicial members of the NCJ was compatible with the Constitution and did not affect the independence of that body (see paragraphs 325 and 330 below), the applicant disagreed, referring to the findings made in the resolution of the joined Chambers of the Supreme Court of 23 January 2020. In his view, it was evident that the election of judges to the NCJ by their peers was a standard of a democratic State governed by the rule of law, since only the predominance of judicial representation in that body safeguarded the independence of the judiciary from the legislative and executive authorities. The applicant also referred to the opinion of the Polish Commissioner for Human Rights, submitted in the course of legislative work on the 2017 Amending Act, that the proposed change in the model of electing judicial members of the NCJ would lead to a breach of Article 10, Article 173 and Article 187 § 1(2) of the Constitution. He pointed out that in accordance with Article 187 § 1(3) of the Constitution the *Sejm* was authorised to elect four members of the NCJ from

among its deputies and that was where its constitutional powers on the election of members of the NCJ ended. Similarly, the Senate elected two members of the NCJ from among the senators. The explicit specification of the creative competence of the two houses of Parliament to elect only six members of the NCJ meant, *a contrario*, that those houses could not elect more members of that body. The applicant argued that Article 187 § 1(2) of the Constitution, taking into account the constitutional principles relating to judicial independence expressed in Articles 10, 45 § 1, 173, 174 and 178 § 1, implied that judicial members of the NCJ should be elected by other judges as representatives of the judicial community.

316. Contrary to the view of the First President of the Supreme Court, the applicant argued that the Constitutional Court had unequivocally stated in the reasons for its judgment of 18 July 2007 (no. K 25/07) that, according to the Constitution, judicial members of the NCJ were to be elected by judges. In that judgment the Constitutional Court had explicitly referred to the constitutional guarantees of the NCJ's independence, which – in the applicant's view – were breached by the 2017 Amending Act. Furthermore, that judgment was clearly in contradiction with its judgment of 20 June 2017 (no. K 5/17).

317. As regards the domestic case-law on the status of the new NCJ referred to by the First President of the Supreme Court, the applicant stated that it should be supplemented by three decisions of the Criminal Chamber of the Supreme Court of 16 September, 29 September and 28 October 2021 (case nos. I KZ 29/21, V KZ 47/21 and III KK 237/21). Those rulings confirmed the established line of the Supreme Court's case-law that a judge appointed on a recommendation of the new NCJ did not have the attributes of an "independent and impartial tribunal established by law".

318. The applicant also noted that the Supreme Administrative Court had given nineteen judgments in cases concerning appeals against resolutions of the NCJ by which the latter had decided not to propose to the President of the Republic the appointment of the appellants to positions as judges of the Supreme Court and to propose the appointment of other candidates to those positions. The Supreme Administrative Court had quashed the impugned NCJ resolutions in the part concerning the refusal to propose the appointment of the appellants, referring to the lack of independence of the recomposed NCJ (see, *inter alia*, the judgments of 6 May 2021 (nos. II GOK 2/18 and others).

319. The applicant lastly submitted that in the light of the CJEU's interim order of 8 April 2020 (C-791/19 R), the Disciplinary Chamber had been precluded from ruling on the lifting of his immunity and his suspension.

2. The Government's submissions

320. The Government argued that there had been no manifest breach of domestic law with regard to the process of appointing the judges of the Disciplinary Chamber 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 had to be noted that the majority of the members of the NCJ were judges.

321. Furthermore, as regards the right to an "independent and impartial tribunal established by law", the Government restated the same arguments as those that they had already submitted in *Juszczyszyn* (cited above, §§ 171-178).

322. The Government also contended that the independence of the Supreme Court judges resulted not only from the procedure for appointing them but, above all, from an extensive system of constitutional and statutory guarantees that aimed to ensure that all judges adjudicated completely free from external influence, namely, *inter alia*, the appointment of judges for an indefinite period (Article 179 of the Constitution), the irremovability of judges (Article 180) and their judicial immunity (Article 181).

323. In addition, the Government submitted that the fact that the procedure for the appointment of judges in Poland, including the judges of the Disciplinary Chamber, involved a judicial council which was not composed of members directly elected by the judiciary, did not affect the assessment of a judge's independence from the executive. There was no doubt for the Government that the judges of the Supreme Court's Disciplinary Chamber were completely independent judges, and the court which dealt with the applicant's case had been independent and impartial.

324. The Government supplemented their observations with submissions made by the First President of the Supreme Court.

325. The First President of the Supreme Court submitted that there were absolutely no grounds for considering the change in the model of the election of the judicial members of the NCJ as incompatible with the Constitution. It was not possible to indicate any legal norm that had been breached in connection with the introduction of the new model of electing judicial members of the NCJ. Accordingly, it could not be demonstrated that the new model had led to a violation of Article 6 § 1 of the Convention according to

the criteria established in the *Guðmundur Andri Ástráðsson* judgment. The First President of the Supreme Court maintained that it was not possible to demonstrate a simple breach of domestic law, still less the obvious nature of an alleged breach, which was indispensable to fulfil the "manifest breach of domestic law" test. Moreover, there were no grounds for the claim that the NCJ was not independent merely because its judicial members were currently elected by the *Sejm* from amongst judges proposed by their peers.

326. 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.

327. According to the First President of the Supreme Court, the allegations made against the change in the statutory model for electing judicial members of the NCJ indicated that it resulted from a fundamental and unjustified departure from the well-established case-law of the Constitutional Court concerning the interpretation of Article 187 § 1(2) of the Constitution. This, so-called, "new and divergent interpretation of the Constitution", applied without convincing reasons, was supposed to confirm the "manifest breach of domestic law". However, a detailed analysis of the Constitutional Court's judgments cited in the recent case-law of the Court indicated that there were absolutely no grounds for such a claim. In both *Reczkowicz* and *Dolińska-Ficek and Ozimek* the Court had referred to the judgment of 18 July 2007 (no. K 25/07), which allegedly provided a "firmly established" model for the appointment of judicial members of the NCJ. However, the judgment in case no. K 25/07 had made no mention whatsoever of this issue, and thus the reference to this judgment as allegedly confirming that "judicial members of the NCJ could be elected only by judges" had resulted from unfamiliarity with this judgment and from its free citation by the Court.

328. 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) was groundless. 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 had contradicted the Constitution and had 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 had been *obiter dicta*.

329. The First President of the Supreme Court submitted that, taking account of different views presented in the Supreme Court case-law, it could not be proved that the solutions introduced by the legislator in 2017 were incompatible with the Constitution. Before 2019 it had been consistently held in that case-law that Article 187 § 1(2) of the Constitution contained no specific rules for the selection of judges to the NCJ and that the duty to determine such rules had been entrusted to the legislature. Having regard to the above, it was clear that the case-law considered by the Court in the *Reczkowicz* and *Dolińska- Ficek and Ozimek* judgments concerned only one side of the issue. There were numerous other examples in the case-law, including that of the Supreme Court, which pointed in the opposite direction. Also, after the *Reczkowicz* judgment there had been no consistent case-law on the matter of the composition of the Supreme Court. In this respect the First President of the Supreme Court referred to the decision of the Supreme Court's Criminal Chamber of 23 September 2021 (no. IV KZ 37/21) and two judgments of the Supreme Administrative Court of 4 November 2021 (nos. III FSK 3626/21 and III FSK 4104/21).

330. 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 recommendation 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.

331. 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 judicial office 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. The Court's assessment

(a) General principles

332. 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

333. 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 decided to lift the applicant's immunity. 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.

334. In *Reczkowicz* (cited above) the Court previously examined whether the fact that an 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).

335. 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 the joined Chambers of the Supreme Court 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).

336. 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).

337. 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 elect judicial members of the NCJ – a right afforded to it under the previous legislation and recognised by international standards – the legislative and 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).

338. 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).

339. 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).

340. 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).

341. 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).

342. In the present case, the Government contested the findings made in the *Reczkowicz* judgment. Furthermore, in the supplement to their additional observations of 3 January 2023, entitled "The Government's general assessment of the cases concerning the rule of law", the Government referred to the Constitutional Court's judgment of 10 March 2022 (no. K 7/21). In that judgment the Constitutional Court found that Article 6 § 1, first sentence, of the Convention, as interpreted by the Court, was incompatible in a number of respects with several constitutional provisions (see paragraphs 206-207 above). The Government submitted that that Constitutional Court's judgment had resulted in a situation where the Court's above-cited judgments in *Broda and Bojara, Reczkowicz*, *Dolińska-Ficek and Ozimek* and *Advance Pharma sp. z o.o.* did not have the attributes provided for in Article 46 of the Convention. The Court has already examined the Government's arguments, which were phrased in similar terms, in the *Juszczyszyn* case and dismissed them (see *Juszczyszyn*, cited above, §§ 200-209). The grounds on which the Court reached its conclusions still stand. It is therefore unnecessary to reiterate them in detail in the present case.

343. In sum and for the same reasons as in *Reczkowicz* and *Juszczyszyn*, the Court concludes that the Disciplinary Chamber of the Supreme Court, which examined the applicant's case, was not a "tribunal established by law".

344. Having made that finding, it further holds that the question whether those 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 *Reczkowicz,* § 284; and *Juszczyszyn*, § 215; see also *Advance Pharma sp. z o.o.*, § 353, all cited above).

345. Accordingly, 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.

III. THE APPLICANT'S VICTIM STATUS AS REGARDS THE REMAINDER OF THE APPLICATION

346. As regards the remaining part of the application, the CPL did not – and, given the scope of its review defined by the domestic law (see

paragraph 183 above), could not – address the applicant's further grievances under other Articles of the Convention.

347. It thus follows that the applicant has not lost his victim status in respect of the alleged violations of Articles 8, 10 and 13 of the Convention, for the purposes of Article 34 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

348. The applicant complained that his right to respect for his private life had been violated on account of the various preliminary inquiries initiated by the disciplinary officer and of the Disciplinary Chamber's resolution of 18 November 2020 lifting his immunity and 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

349. Referring to *Denisov v. Ukraine* ([GC], no. 76639/11, 25 September 2018), the Government maintained that there was insufficient 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 measures the applicant's "inner circle", as well as his opportunity to establish and develop relationships with others, had been affected.

350. The Government stressed that no disciplinary proceedings had been brought against the applicant. The deputy disciplinary officer had initiated five sets of preliminary inquiries on account of the applicant's conduct allegedly exceeding the limits of judicial independence. The Government submitted that the preliminary inquiries had not led to disciplinary proceedings against the applicant, nor had they resulted in imposition of any sanctions upon him. Those inquiries had been related to the applicant's activities as a judge. The first category included the suspicion that the applicant might have committed a disciplinary offence owing to the alleged irregularities in making a reference for a preliminary ruling to the CJEU as well as an offence specified in Article 241 § 1 of the CC. The second category

comprised the applicant's public appearances and his participation in public meetings that might have exceeded the limits of judicial independence and impartiality. It was apparent to the Government that the reasons for the initiation of preliminary inquiries did not relate directly to the applicant's conduct in his private life. Furthermore, those inquiries had not had serious negative consequences for the applicant's private or professional life.

351. As regards the Disciplinary Chamber's resolution of 18 November 2020 lifting the applicant's immunity and suspending him from his judicial duties, the Government, invoking similar arguments to those raised in respect of the preliminary inquiries, argued that Article 8 was not applicable in this respect either. The Government noted that, according to the applicant, the lifting of his immunity had damaged his career and professional reputation. However, since the measures stemming from the Disciplinary Chamber's resolution of 18 November 2020 were only of temporary nature, they disagreed that the consequences of those measures had been very serious and affected the applicant's private life to a very significant degree.

352. The Government stressed, referring to *Gillberg v. Sweden* ([GC], no. 41723/06, 3 April 2012) 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".

353. They argued that the above-mentioned principle was applicable to the applicant's case. In this context, the Government submitted that the initiation of the preliminary inquiries or of the criminal proceedings were the authorities' reactions to the applicant's conduct allegedly incompatible with the authority of the judicial office or to his alleged violation of the provisions of criminal law. They noted that if any person whose activities were in the sphere of interest of the authorities responsible for the prosecution of offences or disciplinary misconducts claimed that their rights under Article 8 of the Convention had been violated on account of ongoing criminal or disciplinary proceedings, investigating and combatting crime and other types of misconduct would become extremely cumbersome, if not impossible.

354. In the Government's submission, the impugned measures were the normal and inevitable consequences of the applicant's conduct who, as an experienced judge adjudicating in criminal cases, must have had an excellent knowledge of both the provisions of criminal law and criminal procedure as well as the scope of his rights and obligations as a judge.

355. The Government maintained that the sole aim of the Disciplinary Chamber's resolution of 18 November 2020 was to permit the prosecution authorities to establish the applicant's criminal liability, should such a decision be made on the basis of the evidence gathered in the course of the criminal proceedings. They stressed that the proceedings at issue had concerned solely the applicant's conduct at the court session of 18 December

2017 and the reasons for the lifting of the applicant's immunity and his suspension were strictly limited to his professional performance on that exact day. At no point did the Supreme Court examine the applicant's overall performance as a judge or express opinions on his judicial career, his competence and professionalism. Similarly, the Supreme Court did not prejudge the outcome of the criminal proceedings, it did not pronounce on the applicant's guilt or otherwise discredit the applicant.

356. Furthermore, the Government referred to the applicant's statements indicating that as a result of the preliminary inquiries and the criminal proceedings "many items that were of an insulting nature were published or broadcast on the State television, printed media or on internet portals". In addition, the applicant claimed that he "[had] regularly experienced physical and verbal aggression" in public and that "these attacks [were] a result of the propaganda of hatred with respect to Polish judges spread by the ruling party".

357. In this respect, the Government first argued that the reason for those acts was not the initiation of the preliminary inquiries or of the criminal proceedings, in the course of which the applicant's immunity was lifted, but the dissemination of information about those proceedings by the various media and a wide spectrum of unspecified events referred to by the applicant. Secondly, the above contentions did not demonstrate substantial damage to the applicant's reputation. The applicant had further failed to provide specific examples or supporting evidence concerning such actions or attacks and their connection to the impugned measures taken by the authorities.

358. In conclusion, the Government argued that the complaint under Article 8 was incompatible *ratione materiae* with the provisions of the Convention.

(b) The applicant's submissions

359. With regard to the preliminary inquiries the applicant submitted that they had been conducted by the disciplinary officers as part of the disciplinary proceedings as a whole. They had been the first step in the disciplinary process and could not be treated as separate from the disciplinary proceedings.

360. In the applicant's view, the initiation of preliminary inquiries had had the objective of creating a chilling effect on him and other judges and was used instrumentally to trigger a smear campaign in the media against the judiciary. In this regard, he referred to the unclear basis for initiating those inquiries. The average citizen did not differentiate between preliminary inquiries and disciplinary proceedings, while the only message he or she received was that a judge was acting unlawfully and in breach of the judicial ethics. Similarly, he submitted that the objective of the criminal proceedings instituted in connection with the alleged disclosure of information from the investigation had been to intimidate him and other Polish judges and to

suggest that any judgment criticising the authorities could result in the initiation of disciplinary proceedings. The authorities' aim had been to produce a "chilling effect" among judges participating in the public debate on the reforms of the judiciary which were being carried out by the Government at the time.

361. The applicant argued that the preliminary inquiries and the accompanying media campaign had produced concrete repercussions for his private life and had been damaging to his career and professional reputation. He maintained that even though the seven sets of preliminary inquiries, in which he had appeared in various procedural roles, had not led directly to sanctions, they could be regarded as "legal harassment".

362. With regard to the Disciplinary Chamber's resolution of 18 November 2020, the applicant contended that the lifting of his immunity, combined with his suspension from judicial duties had resulted in serious negative consequences for his reputation and his judicial career.

363. In addition, the initiation of a number of preliminary inquiries concerning the applicant and the lifting of his immunity combined with his suspension had undermined his competence to hold office in the eyes of the public. Because of the duties entrusted to him, he should be perceived by citizens as someone of good repute, trustworthy and of the highest ethical standards. The public were sensitive to the behaviour of judges, as this was a profession of public trust, which was subject to greater scrutiny.

364. The applicant submitted that he had been living with a sense of uncertainty and fear for his family, who could also become targets of hatred and attacks. He was in a state of permanent stress on account of attacks by the authorities and the media that were associated with them. The applicant claimed that all proceedings concerning him had been covered in detail by those media and that the coverage had intensified after the proceedings concerning his judicial immunity had been initiated. Journalists from the media associated with the Government used language inciting emotions, such as for example "celebrity judge", "martyr", "This is supposed to be a judge?", "Tuleya is hysterical", and so forth. The applicant also referred to offensive comments about him that had been posted on the Internet by readers of the articles or on social media.

365. The applicant claimed to have regularly experienced physical and verbal aggression in public. The messages addressed to him by the attackers indicated that those incidents were a result of the propaganda of hatred with respect to Polish judges spread by the ruling party. Those incidents had intensified after his immunity had been lifted.

366. He further contended that the above situation had had an adverse impact on his family relations, including his relationship with his son. The applicant asserted that he and his relatives lived in constant fear for their health and lives. Wishing to protect his son from the consequences of the actions taken against himself, the applicant had experienced additional

discomfort and difficulty in providing him with the requisite safety. The applicant stated that his son had decided to postpone going to university abroad out of concern for his father.

367. The applicant stated that the refusal of the Vice-President of the Warsaw Regional Court, Judge P.W. Radzik, to authorise him to give lectures to the Warsaw Bar Council or the students had had an adverse impact on his well-being as teaching had always been an important part of his life.

(c) Submissions of third-party interveners

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

368. With regard to the protection of the reputation and private life of judges, the Commissioner referred to objective circumstances existing in the cases of judges expressing critical opinions about changes in the Polish judiciary, who had been affected by repressive actions undertaken by national authorities. He submitted that various measures were currently being taken by the authorities with the intention of undermining the credibility of judges, depriving them of their authority and confidence of the public, which were necessary for judges to effectively perform their role. Those measures included disciplinary proceedings, administrative decisions (e.g. termination of secondment to a higher court, suspension in duties, transfer to another court division, and so on) as well as criminal-law measures. The practice of disciplinary authorities demonstrated that those proceedings were not initiated in order to hold the judge responsible for any actual misconduct, but in order to exert pressure on the individual judge and the entire judicial community.

(ii) European Network of Councils for the Judiciary

369. The intervener submitted that a distinction needed to be made between the independence of the judiciary as a whole and the independence of individual judges. While the independence of the judiciary as a whole was a necessary condition for the independence of a judge, it was not a sufficient condition. Individual independence could be affected by the external influence of State bodies and by internal influences within the judiciary.

370. According to the intervener, the disciplinary measures against judges for their interpretation of the law, their assessment of facts or weighing up of evidence in determining a case should not be permitted. Furthermore, disciplinary measures could never be initiated against a judge for speaking out when democracy and fundamental freedoms were in peril.

371. Judges subjected to disciplinary proceedings should be accorded certain procedural rights, such as to be fully informed of the charge against them, to be represented, to be heard and to submit evidence and to be informed promptly if a complaint was to be investigated.

(iii) Amnesty International and the International Commission of Jurists

372. The interveners submitted that disciplinary proceedings constituted a legitimate and important element of the judicial system that served the purpose of guaranteeing the balance of power and accountability. Whilst such proceedings carried the risk of undermining the judge's credibility and authority, they could further impact the public's trust in the judiciary. Both judicial independence and the reputation of judges had an individual, personal dimension, as well as an institutional aspect.

373. Disciplinary proceedings against a judge affected their professional reputation and the nature of their role implied that such proceedings affected the individual's private life. Such proceedings also affected professional relationships that the individuals had developed in their career and were likely to cast a significant doubt on their professional reputation, impugning their honour, probity and professional merit both amongst colleagues within the judiciary, and in society at large.

(d) The Court's assessment

(i) General principles

374. 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

375. In the present case, the applicant alleged that an interference with his right to respect for his private life had resulted from, firstly, various preliminary inquiries initiated by the deputy disciplinary officers and, secondly, from the Disciplinary Chamber's resolution of 18 November 2020 lifting his immunity and suspending him from his judicial duties. The Government claimed that both of those impugned measures had been prompted by the applicant's conduct, which had been incompatible with the authority of judicial office and was related to a breach of criminal law. The Court finds that the reasons underpinning both of the impugned measures were linked to the performance of the applicant's 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.

376. 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. The applicant claimed for his part that his actions had not constituted any form of misconduct. Considering all the relevant circumstances, the Court finds that the alleged misconduct on the applicant's 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 encroached upon private life.

(α) As regards the preliminary inquiries

377. The Court notes that the deputy disciplinary officers initiated five preliminary inquiries concerning the applicant (see paragraph 10 above). It considers that the question of the applicability of Article 8 arises in respect of two preliminary inquiries related to the exercise of judicial duties by the applicant, namely the inquiry into his alleged unauthorised disclosure of information from the investigation (see paragraph 10 point (2) above) and the inquiry into his making a request for a preliminary ruling to the CJEU (see paragraph 10 point (5) above). In this regard, the Court will focus on the latter of those inquiries, noting that the issues concerning the alleged disclosure of information from the investigation will be more appropriately examined in the context of the scrutiny of the Disciplinary Chamber's

resolution of 18 November 2020. The three remaining preliminary inquiries will be examined in the context of the complaint under Article 10 of the Convention (see paragraph 519 below).

378. The deputy disciplinary officer initiated a preliminary inquiry concerning the request for a preliminary ruling to the CJEU made by the applicant on 4 September 2018 in a criminal case. He considered that the applicant's request had been made contrary to Article 267 of the TFEU, classifying it as a possible "judicial excess" (see paragraph 10 point (5) above). In his view, that request, which resulted in the stay of complex criminal proceedings, could have amounted to disciplinary misconduct on the part of the applicant. The inquiry in the applicant's case was related to the one initiated with regard to Judge E.M. of the Łódź Regional Court, who had made a similar request for a preliminary ruling in a civil case. Having regard to the similarity between the two requests, the disciplinary officer stated in his press release of 17 December 2018 that the applicant and Judge E.M. could have committed a disciplinary offence of compromising the dignity of judicial office. He further suggested that one of the two judges could have given false testimony when stating that their requests for a preliminary ruling had been prepared by themselves (see paragraph 19 above). The Court notes that the preliminary inquiry was terminated on an unspecified date without the applicant being informed of this fact. Furthermore, no disciplinary charge was brought against the applicant. In that context, the Court would also observe that other preliminary inquiries concerning the applicant were initiated within a short space of time (see paragraph 10 above) and that in none of them was he notified of the termination of the relevant inquiry. They were terminated with the same result.

379. Nonetheless, the Court finds that the initiation of a preliminary inquiry under section 114(1) of the 2001 Act into the allegedly improper exercise of judicial duties by the applicant, even if not leading to disciplinary proceedings *stricto sensu*, was undertaken – in any event – with a view to initially determining whether a disciplinary offence had been committed. It considers that such a preliminary inquiry, on the suspicion that the applicant's judicial act might have amounted to disciplinary misconduct, was capable of adversely affecting the applicant's judicial integrity and his professional reputation. In this regard, the Court notes that the CJEU declared the requests for a preliminary ruling made by the Warsaw Regional Court (the applicant) and the Łódź Regional Court (Judge E.M.) inadmissible in its judgment of 26 March 2020 (*Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18; see paragraph 24 above). However, it held at the same time that "provisions of national law which expose[d] national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling [could] not ... be permitted" (see paragraph 25 above). Having regard to the above, the Court finds that

the initiation of the preliminary inquiry at issue affected the applicant's private life to an extent sufficient to trigger the applicability of Article 8.

(β) As regards the Disciplinary Chamber's resolution of 18 November 2020

380. As regards the question of applicability of Article 8 to the consequences stemming from the Disciplinary Chamber's resolution of 18 November 2020, the Court notes the following.

381. The prosecutor sought permission to have the applicant's criminal liability established for allowing the media to record the court session of 17 December 2017 and for disclosing – during the oral delivery of the reasons for his decision –information from the investigation without the prosecutor's consent. The Disciplinary Chamber in its first-instance resolution of 9 June 2020 dismissed the prosecutor's application, having found that there was no reasonable suspicion that the applicant had committed the offence as alleged (see paragraphs 36-41 above). The Disciplinary Chamber in its second-instance resolution of 18 November 2020 partly allowed the prosecutor's application and lifted the applicant's immunity from prosecution in respect of the charge under Article 241 § 1 of the CC (see paragraph 43 above). It found that there was a reasonable suspicion that the applicant, while orally giving reasons for his decision during the session of 17 December 2017, had disclosed without permission information from the investigation conducted by the Warsaw Regional Prosecutor's Office into the "Column Hall vote". The Disciplinary Chamber referred in this regard to the disclosure of extensive excerpts from witness statements given to the prosecutor (see paragraph 47 above). On the other hand, when examining the prosecutor's application for leave to arrest the applicant, the Disciplinary Chamber determined in its first-instance resolution of 22 April 2021, for the purposes of those proceedings, that there was no reasonable suspicion that the applicant had committed an offence under Article 241 § 1 of the CC (see paragraphs 72 and 75 above). The CPL's resolution of 29 November 2022 also found that the applicant had not committed the impugned offence (see paragraphs 85 and 95 above). The Court will return to that first-instance resolution below.

382. It transpires from the above three decisions of the Disciplinary Chamber that there was no controversy as to the fact the applicant had the competence under Article 95b § 1 of the CCP to order that a session be held in public and, in such a case, to allow the media to record the session in accordance with Article 357 of the CCP. However, the Disciplinary Chamber specifically observed in its resolution 18 November 2020 that in the above scenario a judge – when orally giving reasons for his decision – was required to act in a manner that would not contradict Article 241 § 1 of the CC.

383. The Disciplinary Chamber in its final resolution of 18 November 2020 allowed the prosecution to seek the applicant criminally liable in respect of the offence under Article 241 § 1 of the CC, having established that there

was a reasonable suspicion of his having committed that offence. In other words, the Disciplinary Chamber ruled that the applicant had a criminal case to answer because he had allegedly disclosed information from the investigation into the "Column Hall vote", while giving reasons orally in open court for his ruling setting aside a prosecutor's decision to discontinue that investigation. The Court would stress that the offence imputed to the applicant concerned an act performed in the exercise of his judicial duties and not an ordinary criminal offence, to which different considerations may apply.

384. In the Court's view, even taking account of the interlocutory nature of the proceedings concerning the lifting of immunity, the findings of the Disciplinary Chamber that there was a reasonable suspicion that the applicant, an experienced criminal-law judge, had committed a criminal offence in the course of exercising his duties, clearly called into question the core of his judicial integrity, competence and professionalism. As such those findings were evidently capable of adversely affecting the applicant's professional reputation (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 v. Romania*, no. 36889/18, § 90, 20 October 2020, 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 the public, the applicant could be perceived as being unworthy of holding judicial office (compare and contrast, *Xhoxhaj v. Albania*, no. 15227/19, § 363 *in fine*, 9 February 2021).

385. As a result of lifting the applicant's immunity, the Disciplinary Chamber further ordered his suspension from his judicial duties and a 25% reduction of his salary for the duration of the suspension. With regard to the suspension, the Court finds that that measure deprived the applicant 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 v. Ukraine*, no. 11423/19, § 88, 22 July 2021). The consequences of the applicant's suspension are indisputably significant, given that he was prevented from exercising his judicial duties, which constituted his fundamental professional role, from 18 November 2020 to 30 November 2022, thus for two years and twelve days, which must be considered a substantial period (see *Juszczyszyn*, cited above, § 236 where the period of suspension of a judge amounted to more than two years and three months; 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).

386. Lastly, the Court considers it relevant to take account of the context of the case, namely that the applicant was one of the most active and outspoken critics of the judicial reforms undermining the rule of law standards and judicial independence. It is also of importance that the applicant's decision of 17 December 2017 concerned a prosecutorial investigation into events in the *Sejm* and attracted considerable public attention.

(γ) Conclusion

387. Having regard to the nature and the duration of the various negative effects stemming from the initiation of preliminary inquiry into the applicant's request for a preliminary ruling (see paragraphs 378-379 above) as well as from the lifting of his immunity and the ensuing suspension (see paragraphs 384-385 above), the Court considers that the impugned measures 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

388. The Government raised a preliminary objection of non-exhaustion of domestic remedies in respect of the complaint under Article 8.

389. They contended that the applicant had had at his disposal an effective remedy, namely a civil action under Articles 23 and 24 of the Civil Code read in conjunction with Article 448 of that Code, but had failed to initiate civil proceedings for damages on account of an alleged breach of his personal rights. Such proceedings could have been initiated against the disciplinary officers, who according to the applicant, had conducted seven sets of disciplinary proceedings in which he had been involved and had therefore damaged his reputation and had "cast doubt on the applicant's professional competences".

390. In addition, if the applicant regarded the activities conducted by the disciplinary officer as illegal, he could have submitted a criminal complaint that an offence of abuse of power had been committed by the disciplinary officer. Furthermore, the Government claimed that the applicant could have lodged a complaint under section 41b of the 2001 Act (see paragraph 144 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, had he felt that inquiries or disciplinary proceedings had

been unfounded. The applicant, however, had not pursued any of those possibilities.

391. As regards the applicant's suspension and reduction of his remuneration ordered by the Disciplinary Chamber, the Government contended, in general terms, that the applicant could have had recourse to labour law provisions and have submitted claims for reinstatement or payment of remuneration for the period in which he could not have exercised his judicial duties.

392. Furthermore, the Government stressed that the criminal proceedings concerning the charge of the alleged disclosure of information from the investigation were still pending at the national level.

393. The same civil action could have been used against any media outlets which, according to the applicant, had published harmful content. The Government noted that the applicant had attached to his second application several critical articles, published mainly on one Internet portal, but had failed to initiate any domestic legal actions in reply to the alleged "attacks" on him. Despite claiming in his application to "have been living for almost eight years with a sense of uncertainty and fear for his family, who may also become targets of hatred and attacks", the applicant refrained from having recourse to the simplest available domestic measures, such as lodging complaints with the police or filing civil claims against the publishers or public officials for protection of personal rights.

394. Secondly, the applicant had at his disposal criminal law measures, of which he must have been aware owing to his profession and experience in adjudicating criminal cases. Furthermore, while the applicant claimed to have been the victim of the "propaganda of hatred ... spread by the ruling party", which had triggered acts of "physical and verbal aggression" in public and whereas he must have been aware of a punishable nature of such acts, there was no information as to whether he actually reported the offences allegedly committed to his detriment or sought police assistance.

(b) The applicant's submissions

395. The applicant contested the Government's objection regarding the non-exhaustion of domestic remedies. He claimed that no effective remedy was available to him under domestic law.

396. As regards a civil action for the protection of his personal rights under the Civil Code, the applicant argued that bringing such an action would have not remedied the alleged breaches of the Convention in his case. Such an action would not have addressed the essence of the case because it would concern one specific statement or article tarnishing the applicant's reputation and not the systemic breaches of his rights committed by the State in this case.

397. The applicant also submitted that despite the Warsaw Court of Appeal's decision of 24 February 2021 he was not allowed to resume his judicial duties. He noted in this regard that his case was not an isolated one.

He referred to the case of Judge Juszczyszyn, who was not reinstated to his post, despite this having been ordered by the Bydgoszcz District Court's judgment of 17 December 2021.

(c) The Court's assessment

(i) As regards the preliminary inquiries

398. The Court has already found, above, that Article 8 of the Convention applied to the preliminary inquiry into the applicant's request for a preliminary ruling to the CJEU (see paragraph 387 above). The Government claimed that the complaint with regard to the preliminary inquiries or actions of the disciplinary officers was inadmissible for non-exhaustion of domestic remedies. They argued that the applicant could have filed a civil claim for protection of his personal rights, a criminal complaint alleging abuse of power on the part of the disciplinary officer or a complaint under section 41b of the 2001 Act (see paragraphs 389-390 above) had he considered that the disciplinary proceedings against him were groundless.

399. 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). As regards a civil-law remedy, the Court observes that a person whose personal rights have been infringed may, under Articles 23 and 24 of the Civil Code seek redress – such as, for instance, requiring the defendant to take the necessary steps to eliminate the consequences of the impugned infringement or damages – unless the activity is not unlawful (see paragraphs 193-194 above). However, in their submissions concerning the merits of the complaint, the Government vigorously argued that the preliminary inquiries of the disciplinary officers and the proceedings before the Disciplinary Chamber had a solid legal basis in the domestic law (see paragraphs 414-417 below). They have not explained how and on which grounds a person in the applicant's situation faced with, as the Government insisted, purportedly legal actions of the State authorities could have any reasonable prospects of success in pursuing a civil claim or a criminal complaint against them. Furthermore, a complaint about activities of the disciplinary officers under section 41b of the 2001 Act would have been examined by the National Council of the Judiciary as constituted under the 2017 Amending Act – a body which according to the series of the Court's final judgments inherently lacked independence from the legislative and executive powers (see *Reczkowicz*, § 276; *Dolińska-Ficek and Ozimek*, § 349, *Advance Pharma sp. z o.o.*, § 345 and *Grzęda*, § 322, all cited above).

400. That being so, the Court fails to see how any of the remedies mentioned by the Government could have proved effective. Consequently, it dismisses their objection of non-exhaustion of domestic remedies with regard to the preliminary inquiries.

(ii) As regards the suspension and pending criminal proceedings

401. The Government further argued, in general terms, that with regard to the applicant's suspension and the reduction of his salary decided by the Disciplinary Chamber's resolution the applicant could have pursued the relevant claims under labour law.

402. However, they failed to explain how those remedies could have specifically put right the applicant's grievances under Article 8 of the Convention in the sense of remedying directly the impugned state of affairs and providing 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 that context, the Court notes that the Government have not demonstrated that the civil (labour) proceedings could have resulted in setting aside or amending the Disciplinary Chamber's decision on suspension. Furthermore, the Court notes that the applicant obtained a final injunction ordering the Warsaw Regional Court to allow the applicant to exercise his rights and duties as judge (see paragraph 116 above). However, despite the applicant's efforts, that injunction has not been enforced to date (see paragraph 118 above).

403. The Government also referred to the fact that the criminal proceedings against the applicant were pending. However, the Court notes that the complaint at issue concerns the Disciplinary Chamber's decision of 18 November 2020 lifting the applicant's immunity and suspending him from judicial duties and not the pending criminal proceedings against him. For those reasons, the Court dismisses the Government's objection.

(iii) As regards acts of private parties

404. Lastly, the Government claimed that in respect of acts of private parties, such as harmful publications or acts of physical or verbal aggression against the applicant, he was required to have recourse to civil claims for the protection of personal rights or criminal law measures such as complaints to

the police or prosecution authorities. The applicant disagreed in view of, what he termed, systemic breaches of his rights by the State. However, the Court finds that in respect of the acts of private parties the applicant should have had recourse to the available domestic remedies referred to by the Government, which do not appear *prima facie* inadequate or ineffective. Accordingly, the Court upholds the Government's objection in so far as the acts of private parties were concerned.

3. Overall conclusion on admissibility

405. The Court notes that the complaint under Article 8 of the Convention, in so far as it concerns the initiation of a preliminary inquiry into the applicant's request for a preliminary ruling and the Disciplinary Chamber's resolution of 18 November 2020, 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

406. The applicant maintained that the interference with his right to respect for his private life in the form of preliminary inquiries and the Disciplinary Chamber's resolution lifting his immunity had not been "in accordance with the law" since domestic law did not afford him adequate safeguards in respect of the arbitrary actions of the disciplinary officer. Similarly, no such safeguards were available as regards the activities of the Disciplinary Chamber which had been functioning in conflict with the judgments of the domestic courts and the CJEU's interim measure.

407. Next, the applicant argued that the interference in his case had not pursued any legitimate aim. He submitted that the legislature had deliberately designed the current disciplinary regime for judges to be used as an instrument of political control over them. The operation of the disciplinary regime in its current form, violated the constitutional legal order, undermined the principle of the separation of powers, sought to subjugate judges to the political powers and destroyed the public image of courts as independent bodies.

408. The applicant stressed that the preliminary inquiry initiated in connection with the so-called "judicial excesses" related to the referral of his request for a preliminary ruling to the CJEU (see paragraph 10 point (5) above) was in direct conflict with the settled case-law of that court. He referred to the judgment of 5 July 2016 in *Atanas Ognyanov* (case C-614/14) where the CJEU ruled out the possibility of the existence and application of any national disciplinary provisions which could in any way contribute to

discouraging national courts from referring requests for a preliminary ruling under Article 267 TFEU.

409. The applicant contended, referring, *inter alia*, to the resolution of the joined Chambers of the Supreme Court of 23 January 2020 (see paragraphs 199-200 above) and the CJEU's interim order of 8 April 2020 (C-791/19 R; see paragraph 228 above) that the actions of the Disciplinary Chamber which resulted in the lifting of his judicial immunity were in conflict with both Polish and EU law and as such should not be protected under the Convention.

410. The applicant also submitted that he had had the competence to admit the media to the session of 18 December 2017. According to Article 95b § 1 of the CCP, while sessions of the court were generally not open to the public, the court or the president of the court could decide otherwise. The applicant took such a decision in the impugned proceedings taking account of the public interest in the case. He also referred to the Disciplinary Chamber's resolution of 22 April 2021 which found that the reasonable suspicion against him had not been substantiated.

411. The applicant further maintained that the interference in his case had not been "necessary in a democratic society" and was contrary to its fundamental values.

412. Referring to the submissions of the Commissioner for Human Rights (see paragraph 368 above), the applicant stated that his case had not been an isolated incident where the authorities had taken disciplinary and criminal measures against the judges with a view to undermining their credibility. The authorities were instrumentally making use of the applicable regulations to persecute the applicant, who publicly opposed the unconstitutional changes in the justice system and their illegal activities with regard to the exercise of his judicial powers. Similarly, the legal harassment of the applicant gave rise to an interference with his judicial independence, and therefore an unlawful act violating not only his rights, but also the rights of all citizens to be judged by an independent and impartial tribunal.

2. The Government's submissions

413. The Government referred to their earlier submissions that the complaint under Article 8 was incompatible *ratione materiae*. Should the Court decide otherwise, they argued that neither the preliminary inquiries nor the Disciplinary Chamber's resolution of 18 November 2020 contravened the requirements of Article 8 § 2 of the Convention.

414. As regards the lawfulness of the alleged interference, they submitted that the impugned preliminary inquiries had been initiated on the basis of section 114(1) of the 2001 Act (as amended), according to which the disciplinary officer may initiate such inquiries after a preliminary determination of circumstances necessary to establish constituent elements of a disciplinary offence. The applicant's participation in the preliminary

inquiries was in line with section 114(2) of the 2001 Act as he had been summoned by the disciplinary officer to make written and oral statements concerning the subject of the inquiries.

415. The Government further indicated that the Disciplinary Chamber's resolution of 18 November 2020 was based on section 80(2c) of the 2001 Act according to which a disciplinary court could issue a resolution permitting a judge to be held criminally liable if there was a reasonable suspicion that the judge had committed an offence. Under section 129(2) and (3) of the 2001 Act, should the disciplinary court issue such a resolution, the judge would be suspended automatically from his judicial duties and his remuneration would be reduced by 25 to 50% for the period of the suspension (see paragraph 144 above). These two provisions concerning judicial immunity had been in force since 1 October 2001 when the 2001 Act entered into force and since then they had not undergone any substantial change. The Government noted that the proceedings in which the court lifted a judge's immunity were neither disciplinary proceedings, nor were they in any way connected with them. The aim of those proceedings was limited to allowing the prosecutor in charge to continue the criminal proceedings in order to establish whether the offence in question had been committed by a judge.

416. Furthermore, the resolution at issue had been adopted owing to a reasonable suspicion that the applicant might have committed the offence of publicly disclosing information from the pre-trial proceedings before it had been disclosed in the court proceedings, an offence under Article 241 § 1 of the CC.

417. The Government maintained that the alleged interferences had a solid basis in domestic law. Moreover, owing to the applicant's profession and experience, not only had he needed to be familiar with the relevant rules on judicial conduct, as well as criminal law provisions, he should also have been able to foresee the consequences of breaching them. Therefore, the alleged interference was in accordance with the law.

418. The Government contended that the impugned measures had pursued the legitimate aims of the prevention of crime and the protection of the rights of others. Along with the alleged irregularities concerning the applicant's professional conduct, they had constituted circumstances indicating that he might have committed disciplinary offences. The applicant's actions could simultaneously have undermined the authority of the judiciary, obstructed the proper administration of justice and infringed the rights of the parties to the proceedings.

419. Moreover, the applicant's decision allowing the media to record the session of 18 December 2017 had resulted in the alleged disclosure of information from the investigation. Such behaviour might have impeded the conduct of the pre-trial proceedings and simultaneously interfered with the rights of persons whose testimonies had been made public. Accordingly, the Government maintained that initiating the preliminary inquiries and lifting

the applicant's immunity from prosecution had served the legitimate aims and allowed the disciplinary officer to examine whether the applicant had committed disciplinary offences and the prosecutor in charge to continue the criminal proceedings in order to establish whether the applicant had committed the offence in question.

420. 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 that it had been proportionate to the legitimate aims pursued. 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.

421. 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. 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.

422. Taking account of the above regulations, the Government maintained that all Polish judges, including the applicant, were subjected to the same rules, which required them to abide by the highest ethical and professional standards of conduct. Any signs of behaviour deviating from such standards would be scrutinised and thoroughly examined by the relevant authorities in order to safeguard the authority of the judiciary. In particular, allegations of criminal conduct of a judge required an immediate and firm response. It would be unfounded to expect that the appropriate provisions of generally applicable laws would not be applied to the applicant's conduct, especially taking into account his above-average media exposure. Such expectation would inevitably contravene the principle of equality before the law.

423. The Government pointed out that the preliminary inquiries had not led to the conclusion that the applicant had breached any of the above-mentioned rules and no sanctions had been imposed upon him. Therefore, taking into account the circumstances of the case, the Government submitted that the preliminary inquiries had been proportionate and necessary in terms of Article 8 § 2 of the Convention.

424. The Government submitted that the applicant's judicial immunity had been lifted on the basis of a reasonable suspicion that he might have

committed an offence in the exercise of his judicial duties. They noted that such an allegation had cast a shadow on the applicant's professional conduct and questioned his ability to properly deliver justice. The adoption of the resolution of 18 November 2020 lifting the applicant's immunity had simply enabled the authorities to fulfil their duties related to the prosecution of crimes. In this regard, it could not be overlooked that the powers and privileges which judges enjoyed were not tantamount to releasing them entirely from any liability in the event of a criminal offence being committed.

425. The Government contended that the resolution of 18 November 2020 had been in line with the principle of legalism enshrined in Article 10 of the CCP, which obliged the prosecution authorities to institute and conduct pre-trial proceedings with respect to offences prosecuted of their own motion, and the prosecutor to bring and substantiate charges. They noted in this regard that having acquired the information that the applicant, acting in the capacity of a judge, might have committed an offence, the public authorities had no discretion and they had been obliged to react. They requested the domestic court to lift the applicant's judicial immunity, in particular taking into account his profession and his significant role in the administration of justice as well as the impact that the applicant had as a judge on the rights and freedoms of others. Therefore, the measure corresponded to a pressing social need.

426. In addition, the Disciplinary Chamber's resolution of 18 November 2020 had not challenged the applicant's status as a judge, but only suspended him from his judicial duties. The suspension had been a temporary measure which would be lifted upon the conclusion of the criminal proceedings should the prosecutor find that the applicant had not committed the offence at issue. Similarly, the applicant's remuneration was reduced only for the period of his suspension. They Government also noted that the Disciplinary Chamber had applied the lower statutory limit for this measure and had reduced the applicant's remuneration by 25% instead of the maximum 50%. Thus, in their view, the measure was proportionate to the legitimate aims pursued.

427. In conclusion, the Government argued that 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 legitimate aims invoked by them. Consequently, they submitted that no violation of Article 8 of the Convention had occurred in the case.

3. The Court's assessment

428. As established above, the initiation of a preliminary inquiry into the applicant's request for a preliminary ruling as well as the lifting of his immunity and the ensuing suspension from exercising judicial duties affected his private life to a very significant degree (see paragraph 387 above). The impugned measures therefore constituted an interference with the applicant's right to respect for his private life (see, *mutatis mutandis*, *Gumenyuk and Others*, cited above, § 93).

429. 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" - general principles concerning the lawfulness of interference

430. 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).

431. 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).

432. 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).

433. 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 other authorities, *Molla Sali v. Greece* [GC], no. 20452/14, § 149, 19 December 2018, and *Grzęda*, cited above, § 259).

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

(i) As regards the preliminary inquiry into the reference for a preliminary ruling

434. As noted above, the deputy disciplinary officer initiated a preliminary inquiry concerning the request for a preliminary ruling to the

CJEU made by the applicant on 4 September 2018 in a criminal case, considering that the request had been made contrary to Article 267 of the TFEU (see paragraph 378 above). The inquiry was terminated on an unspecified date without the applicant being informed of this fact and no disciplinary charge was brought against him.

435. The Court notes that in terms of statute law the preliminary inquiry was initiated on the basis of section 114(1) of the 2001 Act. However, it considers that the most relevant question as to the lawfulness of that measure arises in so far as its compatibility with EU law is concerned. It notes in this regard that the applicant's request for a preliminary ruling was examined jointly with the request made by the Łódź Regional Court in the CJEU's judgment of 26 March 2020 (*Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18). The CJEU held that it was not apparent from the orders for reference that there was a connecting factor between the provision of EU law to which the preliminary reference questions related and the disputes in the main proceedings and declared both requests inadmissible. At the same time, referring to Article 267 TFEU, which gave national courts the widest discretion in referring matters to the CJEU if they considered that a case pending before them raised questions involving the interpretation of provisions of EU law, or consideration of their validity, which were necessary for the resolution of the case before them, the CJEU found that provisions of national law which exposed national judges to disciplinary proceedings as a result of the fact that they submitted a preliminary reference could not be permitted. It went on to find that even the mere prospect of being the subject of disciplinary proceedings as a result of making such a reference was likely to undermine the effective exercise by the national judges concerned of the discretion afforded to them. The CJEU stressed that for those judges, not being exposed to disciplinary proceedings or measures for having exercised such a discretion to bring a matter before it, which was exclusively within their jurisdiction, also constituted a guarantee that was essential to judicial independence (see paragraph 25 above).

436. 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, *inter alia*, that Poland had failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU by allowing the right of courts and tribunals to submit requests for a preliminary ruling to the CJEU to be restricted by the possibility of triggering disciplinary proceedings. The CJEU referred to the disciplinary officer's practice of opening preliminary inquiries concerning decisions whereby Polish ordinary courts had submitted requests for a preliminary ruling to the CJEU, including specifically in the applicant's case. It found that that practice confirmed the risk that the disciplinary regime was being used for the purpose of creating, in respect of judges of the Polish ordinary courts, pressure and a deterrent effect which was likely to influence the content of

the judicial decisions which those judges were called upon to give. The CJEU held that strict compliance with member States' obligations derived from Article 267 TFEU was required in respect of all State authorities and, in particular, in respect of the disciplinary officer, who was responsible for conducting disciplinary proceedings that might be brought against judges. It went on to find that the mere fact that the disciplinary officer conducted preliminary inquiries as referred to above was capable of undermining the independence of the judges who were the subject of those inquiries (see paragraph 233 above). The Court attaches significant weight to those findings of the CJEU.

437. In this connection, the Court finds that it was immaterial that the disciplinary officer terminated the preliminary inquiry in the applicant's case and brought no disciplinary charge against him. The crux of the matter was that the applicant was investigated in connection with making a request for preliminary ruling to the CJEU, which is a judicial decision. In the Court's view, the imposition or the threat of 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).

438. In view of the foregoing, the Court cannot but concur with the CJEU's conclusion that the interference in the form of a preliminary inquiry into the reference for a preliminary ruling was contrary to Article 267 TFEU for the reasons stated above (see paragraphs 435-437 above). This conclusion is equivalent to the finding that section 114(1) of the 2001 Act, as applied to the applicant's case, was incompatible with Article 267 TFEU, while Article 91 § 2 of the Polish Constitution provides that an international agreement ratified upon prior consent granted by statute, like the TFEU, takes precedence over statutes if such an agreement cannot be reconciled with their provisions. It follows that the interference with the applicant's right to respect for his private life in this part was not "in accordance with the law" within the meaning of Article 8 of the Convention.

(ii) As regards the Disciplinary Chamber's resolution of 18 November 2020

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

439. In terms of statute law, the Court observes that the decision on the lifting of the applicant's immunity was based on section 80(2c) of the 2001 Act, while his suspension was based on section 129(2) and (3) of the same Act. However, even though the interference complained of had a basis in statute 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).

440. The Court notes that, in accordance with Article 181 of the Polish Constitution, a judge cannot be held criminally liable without the prior consent of a court, while pursuant to 180 § 2 of the Constitution, suspension of a judge from office can only result from a court judgment (see paragraph 143 above). The Court has previously found in *Reczkowicz* (cited above) that the Disciplinary Chamber of the Supreme Court failed to satisfy the requirements of an "independent and impartial tribunal established by law" as 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).

441. 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 229-231 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 199-200 above).

442. In view of the foregoing and having regard to its above considerations under Article 6 § 1 (see paragraphs 333-345 above), the Court finds that the decision permitting the applicant to be held criminally liable and suspending him was given by a body which cannot be considered a "court" for the purposes of the Convention, despite the explicit requirements under Article 181 and Article 180 § 2 of the Polish Constitution that decisions of this kind must emanate from a court (see paragraph 143 above).

443. 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 432 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.

444. 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

445. The Court will analyse whether it was foreseeable for the applicant that the Disciplinary Chamber would regard the oral delivery of reasons for his decision of 18 December 2017 as entailing a reasonable suspicion of the offence under Article 241 § 1 of the CC. In the Government's contention, the Disciplinary Chamber's resolution of 18 November 2020 was lawful since the 2001 Act provided for the lifting of a judge's immunity where there was a reasonable suspicion that he had committed a criminal offence.

446. In its case-law concerning Article 7 of the Convention, the Court has recognised that however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 92, ECHR 2013, and *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, § 59, 3 December 2019). Moreover, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. The lack of an accessible and reasonably foreseeable judicial interpretation can lead to a finding of a violation of the accused's Article 7 rights (see, in connection with the constituent elements of an offence, *Pessino v. France*, no. 40403/02, §§ 35-36, 10 October 2006, and *Dragotoniu and Militaru-Pidhorni v. Romania*, nos. 77193/01 and 77196/01, §§ 43-44, 24 May 2007; see, as regards penalties, *Alimuçaj v. Albania*, nos. 20134/05, §§ 154-162, 7 February 2012). Were that not the case, the object and the purpose of this provision – namely that no one should be subjected to arbitrary prosecution, conviction or punishment – would be defeated (see *Del Río Prada*, cited above, § 93).

447. In the Court's view, the imposition or the threat of imposition of criminal liability in connection with an act related to the exercise of judicial functions must be seen as an entirely exceptional measure and be subject to restrictive interpretation, having regard to the principle of judicial independence (see, *mutatis mutandis*, as regards the imposition of disciplinary liability on judges, *Oleksandr Volkov*, cited above, § 180; see also paragraphs 137 and 138 of the CJEU's judgment in *Commission v. Poland (Disciplinary regime for judges)*, paragraphs 230-232 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, 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 (see paragraph 209 above; a similar view was expressed by the CCJE, see paragraphs 214-215 above).

448. Having regard to the above, the Court notes that it was excluded by the Disciplinary Chamber, in its resolution of 18 November 2020, that the oral delivery of reasons by the applicant had given rise to any real threat to the public interest, in particular as regards any adverse impact on the conduct of the investigation following the applicant's decision of 18 December 2017 (see paragraph 49 above). Furthermore, the Disciplinary Chamber observed that when establishing a reasonable suspicion it should also examine the degree of social harm caused by the act allegedly committed by the applicant. In this regard, the Court notes that in accordance with Article 1 § 2 of the Criminal Code a prohibited act whose social harm was insignificant (*znikoma szkodliwość społeczna czynu*) did not constitute an offence (see paragraph 190 above). Nonetheless, the Disciplinary Chamber in its resolution of 18 November 2020 did not address this point without providing any specific reasons for its omission, whilst this element is one of the constituent elements of any offence under Polish law.

449. In this connection, the Court refers to the Disciplinary Chamber's resolution of 22 April 2021 which dismissed at first-instance the prosecutor's application for leave to have the applicant arrested. In that decision the Disciplinary Chamber made findings that were divergent in several aspects from those reached by the Disciplinary Chamber in its resolution of 18 November 2020 in respect of the reasonable suspicion. As regards the issue of the degree of social harm, the Disciplinary Chamber found that it was unquestionably insignificant. It referred in this connection to the lack of any adverse effects of the applicant's decision on the remitted investigation as well as to his motives for his decision in a case that aroused much public controversy and related to the question of transparency of public life (see paragraphs 70-71 and 74 above). The Disciplinary Chamber also found that the prosecutor of the State Prosecutor Office had not specified which concrete information had been disclosed by the applicant, while this was of crucial importance for determining his liability. It stressed that any discretionary restriction on the scope of reasons given orally in proceedings held in open court would eliminate the control function of such an exercise (see paragraph 68 above). Importantly, the Disciplinary Chamber found that there were no grounds to consider that the applicant had acted with the intention of disclosing the protected information from the pre-trial proceedings (see paragraph 72 above). Lastly, the CPL held that the applicant's actions had not comprised the constitutive elements of the offence under Article 241 of the CC (see paragraphs 85 and 95 above). For its part, having regard to all relevant circumstances, the Court cannot discern any malice in the applicant's act.

450. The Court would stress that the applicant's case must be seen in 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.).

451. In its assessment of the applicant's complaint under Article 8 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).

452. The applicant's individual circumstances must be seen against the general context mentioned above. As noted above, he is one of the most outspoken critics of the judicial reform in Poland. In 2018 the disciplinary officer and his deputies, all appointed by the Minister of Justice, who is at the same time the Prosecutor General, subjected the applicant to intensive scrutiny by initiating five preliminary inquiries. In addition, in January 2018 the State Prosecutor's Office instituted investigation into the alleged unauthorised disclosure of information by the applicant. It was in the framework of that investigation that the prosecutor sought to lift the applicant's immunity from prosecution. It should be noted in this regard that the Prosecution Service Act of 28 January 2016, which merged the offices of the Minister of Justice and the Prosecutor General, provided that the Prosecutor General would act as a hierarchical supervisor of all prosecutors. In this connection, the Court notes the statement of the Minister of Justice/Prosecutor General following the Disciplinary Chamber's resolution of 18 November 2020 that "Judge Tuleya clearly breached the letter of the law ... and, if we take the principle of equality before the law seriously, everyone must expect to be held criminally liable for breaching criminal norms" (see paragraph 56 above).

453. Having regard to the foregoing considerations and the significant divergences between the findings of the Disciplinary Chamber and the CPL in respect of the existence of reasonable suspicion, the Court concludes that the interpretation of Article 241 § 1 of the CC by the Disciplinary Chamber in its decision of 18 November 2020 was unforeseeable. Thus, the applicant could not have foreseen that the oral delivery of reasons for his decision of 18 December 2017 could lead to the lifting of his immunity from prosecution and 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".

(c) Conclusion

454. 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.

455. 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".

V. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

456. In his first application (no. 21181/19), the applicant complained under Article 8 of the Convention about the various preliminary inquiries initiated by the disciplinary officer. In this connection the Court decided of its own motion to give notice to the Government of the complaint under Article 10 of the Convention. In his second application (no. 51751/20), the applicant claimed, relying on Article 10, that the Disciplinary Chamber's decision of 18 November 2020 lifting his immunity and suspending him from his judicial duties had amounted to a violation of this provision. Article 10 of the Convention provides, in so far as relevant:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

1. The parties' submissions

457. The Government maintained that the applicant had failed to avail himself of the remedies available under the domestic law for his complaint under Article 10, in particular a civil action for the protection of his personal rights under Articles 23 and 24 of the Civil Code.

458. The applicant contested the Government's objection regarding the non-exhaustion of domestic remedies. He claimed that no effective remedy was available to him under domestic law, referring to the same arguments as made earlier in respect of the complaint under Article 8 (see paragraphs 396-397 above).

2. The Court's assessment

459. The Court notes that the applicant's complaint under Article 10 concerns three sets of preliminary inquiries initiated by the disciplinary officer with regard to the applicant (see paragraph 10 points (1), (3) and (4) above) and the final decision of the Disciplinary Chamber of 18 November 2020 lifting the applicant's immunity and suspending him from judicial duties. The Government pleaded, in general terms, that the applicant should have had recourse to a civil action for the protection of his personal rights. However, they offered no explanation as to how that remedy could have provided redress for the applicant's grievances under Article 10 of the Convention. The Court finds that its above conclusions as to the lack of effectiveness of a civil claim for infringement of personal rights regarding the applicant's situation in respect of Article 8 equally apply to the complaint under Article 10 (see paragraph 399 above). The present objection must accordingly be dismissed.

460. The Court further notes that the complaint under Article 10 of the Convention 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

461. The applicant submitted that he was one of the most uncompromising critics of the attack on the rule of law and judicial independence that had been taking place in Poland over the last years. His public activity in this area was undertaken in accordance with the concept of the so-called "civic judge", whose task it was to explain to citizens the principles of the rule of law. His attitude was highly appreciated by both civil society and expert bodies. In 2019 he had been awarded the Edward Wende

Prize for his involvement in the defence of judicial independence and the Civic Honorary Prize of the Polish Judges' Association Iustitia. In 2021 he was bestowed with the Harvard University Scholars at Risk Award and the Scott Crosby Human Rights Award of the European Criminal Bar Association. The American Bar Association had prepared a report on the legal harassment to which he had been subjected.

462. The applicant argued that there had been an interference with his freedom of expression. He averred that the measures taken against him, namely the preliminary inquiries and criminal proceedings, were the consequence of his public criticism of the authorities' actions aimed at undermining judicial independence. His stance in defence of judicial independence had been noted by numerous domestic and international organisations.

463. The applicant maintained that the assessment of his statements had to take into account the general context, namely the unprecedented attack by the Government on the rule of law and judicial independence that had been taking place since late 2015. This was confirmed by countless reports of international organisations and expert bodies, and also by domestic and international courts and by the position of numerous EU member States.

464. The applicant stated that the true aim of all the measures taken against him by the authorities was to produce a "chilling effect" with a view to discouraging him and other judges from taking a position on the Government's actions against the judiciary. In the applicant's submission, the sole fact that he had continued participating in the public debate on matters relating to the judiciary and the rule of law did not mean that the "chilling effect" was absent in his case. He also referred to a smear campaign against Polish judges with the involvement of high-ranking public officials. This campaign included the establishment and operation of the so-called "troll farm" within the Ministry of Justice.

465. As an example of the "chilling effect", the applicant referred to the decision of the Koźmiński University in Warsaw to terminate collaboration with him in September 2021 even though he had lectured there for years (see paragraph 130 above). This decision, subsequently reversed, had been taken in consequence of the official ban on teaching students imposed on the applicant by the Vice-President of the Warsaw Regional Court. The same authority had banned the applicant from giving lectures to members of the Warsaw Bar Council (see paragraph 131 above). The applicant maintained that a sanction did not need to be imposed in order to achieve a chilling effect, as the mere fact of having been investigated or the risk of being investigated under unclearly drafted and interpreted legislation could constitute a violation of the right to freedom of expression. He referred to *Altuğ Taner Akçam v. Turkey*, no. 27520/07, 25 October 2011.

466. The applicant contended that the disciplinary proceedings against him, the series of stigmatising messages from the representatives of the

authorities, as well as the media smear campaign against him, were all elements leading to the unlawful decision of the Disciplinary Chamber lifting his judicial immunity and suspending him from his duties. In the same vein the actions of the State Prosecutor's Office had been taken with a view to ultimately removing him from judicial office. In the applicant's view, an examination of the sequence of events in their entirety clearly showed that sanctions against him had been introduced in reaction to his public statements in defence of judicial independence.

467. The applicant submitted that the lifting of his immunity and his suspension from judicial duties also constituted the authorities' warning to all judges, showing what could happen to them for publicly defending the rule of law and the independence of the judiciary. In his view, the Disciplinary Chamber's resolution had to be seen against the background of all the circumstances of the case. The proceedings before the Disciplinary Chamber, which were initiated three years after the court session of 18 December 2017, had become the pretext for the applicant's legal harassment and for imposing unlawful restrictions on his freedom of expression. Those proceedings had been related to the fact that the court session at issue was of the utmost inconvenience to the ruling party.

468. The applicant stressed that in publicly addressing threats to judicial independence he had complied with the obligations arising from Article 178 § 3 of the Constitution. He stated that it was his obligation as a judge to speak out in protection of judicial independence and referred on this point to the Magna Carta of Judges (Fundamental Principles) adopted by the CCJE and the Sofia Declaration on Judicial Independence and Accountability adopted by the ENCJ. The applicant emphasised that both in the exercise of his judicial duties and in his public statements he had always been guided by the law and the principles of the judicial profession.

469. In the applicant's view, the course of events in his case and a significant amount of evidence adduced by him before the Court confirmed the existence of a causal link between the exercise of his freedom of expression and the measures taken against him by the authorities, in particular the Disciplinary Chamber's resolution of 18 November 2020.

470. The applicant argued that the interference at issue did not meet the requirements of Article 10 § 2 of the Convention.

471. The applicant maintained that the interference with his freedom of expression resulting from the Disciplinary Chamber's resolution of 18 November 2020 had not been "prescribed by law". He referred to his earlier submissions regarding the unlawfulness of the proceedings before the Disciplinary Chamber (see paragraphs 313-319 above). The applicant claimed that the relevant provisions of the 2001 Act, namely sections 80(2c), 110(2a) and 129(2) and (3), had been applied by the Disciplinary Chamber in an arbitrary manner with a view to depriving him of his judicial immunity. He also stressed that according to the Warsaw Court of Appeal's decision of

24 February 2021 his judicial immunity had not been lawfully lifted (see paragraphs 105-111 above).

472. He further argued that the interference at issue had not pursued any legitimate aim within the meaning of Article 10 § 2 of the Convention. All his actions as a judge and all his public statements were intended in fact to maintain the authority and impartiality of the judiciary, which had been undermined by the authorities currently in power. In this regard, he referred to the Disciplinary Chamber's resolutions of 9 June 2020 and 22 April 2021 finding a lack of reasonable suspicion that he had committed an offence under Article 241 § 1 of the CC. The applicant stated that, even as indicated by members of the illegally operating Disciplinary Chamber of the Supreme Court, his actions as a judge were in full conformity with the relevant Polish law.

473. The applicant contended that the impugned interference had not been necessary in a democratic society. He argued that neither the exercise of his judicial functions nor his involvement in public debate could justify the interference with his freedom of expression.

474. The applicant submitted that the preliminary inquiries, having regard to their number and obvious connection with his judicial and public activities had produced adverse consequences for him. All the disciplinary proceedings against the applicant had sought to involve him in various legal procedures, causing obvious impairment to the exercise of his judicial duties. In this regard, the applicant stressed that the severity of those measures had been compounded by the fact that the disciplinary proceedings had not been concluded for years and that he remained in a state of prolonged uncertainty as to further developments. In his view, those proceedings should be regarded as legal harassment.

475. The applicant argued that as a result of the unlawful actions of the State Prosecutor's Office and illegally operating Disciplinary Chamber he had been deprived of the right to exercise his judicial duties, which constituted one of the severest sanctions for a judge. He also faced the threat of being arrested at all times. The applicant further referred to the bans on his teaching activities.

476. In his view, there had been no "pressing social need" that could justify the lifting of his immunity and the subsequent actions of the State Prosecutor's Office, which had sought permission to arrest him and bring him forcibly for questioning. The applicant argued that the criminal proceedings against him had been contrary to the Polish Constitution and to the European standards and had been motivated by political considerations.

477. The applicant claimed that the proceedings before the Disciplinary Chamber, a body which did not meet the requirements of an "independent and impartial tribunal established by law", could not be regarded as fair or attended by adequate procedural safeguards.

2. The Government's submissions

478. The Government maintained that there had been no interference with the applicant's freedom of expression. As regards the preliminary inquiries, they argued that they had not amounted to such an interference. They noted that one set of preliminary inquiries had concerned the applicant's comments in a television programme and the two others related to his participation in public meetings. However, no disciplinary proceedings against the applicant had been brought and no sanctions had been imposed on him as a result of those preliminary inquiries. Moreover, at no point had the applicant been precluded from publicly expressing his views on matters relating to the Polish judicial system.

479. The Government submitted that, on the contrary, in the period subsequent to the initiation of those preliminary inquiries the applicant had remained active in the public sphere, openly criticising the public authorities and the justice system in Poland or even announcing that he would hinder the ongoing criminal proceedings against him in an interview published in the daily *Dziennik Gazeta Prawna* on 27 November 2020. They referred to numerous interviews given by the applicant to various media outlets. The Government further mentioned the applicant's participation in a public meeting organised by the Committee for the Defence of Democracy on 18 December 2018 and his speech delivered in front of the Supreme Court on 18 November 2020 during a demonstration organised by the Committee for the Defence of Justice. They lastly referred to the applicant's invitation of 3 January 2020 to participate in the March of a Thousand Robes published on the Internet by the Polish Judges' Association Iustitia.

480. Taking into account the above information, the Government maintained that it would be unfounded to claim that measures undertaken with regard to the applicant had amounted to an interference with his freedom of expression.

481. For those reasons, the applicant's case differed significantly from *Baka v. Hungary* ([GC], no. 20261/12, 23 June 2016) and *Kudeshkina v. Russia* (no. 29492/05, 26 February 2009) in the following two aspects. Firstly, in both of those cases the applicants had been subjected to harsh sanctions in the form of removal either from the office of judge or from the position of court president. By contrast, in the present case no sanction had been imposed on the applicant and no disciplinary proceedings had been initiated against him. Secondly, the Court had found in the two above-mentioned cases that the impugned measures had a "chilling effect" on judges who had expressed criticism on constitutional and legislative reforms affecting the organisation of the justice system (*Baka*, cited above, §§ 168-176) or who wished to participate in the public debate on the effectiveness of the judicial institutions (*Kudeshkina*, cited above, §§ 97-99). However, in the present case the applicant had continued criticising the

attempts to reform the justice system and thus it did not appear that the impugned measures had produced any "chilling effect".

482. In this regard, the Government argued that mere allegations that the contested measures had had a "chilling effect", without clarifying in which specific situation such an effect had occurred, was not sufficient to constitute interference for the purposes of Article 10 of the Convention (they referred to *Schweizerische Radio- und Fernsehgesellschaft and Others v. Switzerland*, no. 68995/13, decision of 12 November 2019, § 72).

483. Referring to *Morice v. France* [GC] (§§ 128 and 162), the Government stated that the particular task of the judiciary in society required judges to observe a duty of discretion. That duty pursued a specific aim: the discourse of judges was received as the expression of an objective assessment which committed not only the judge expressing himself or herself as an individual, but also, through that judge, the entire justice system. In addition, judicial authorities, in the exercise of their adjudicatory function, were required to exercise maximum discretion not only with regard to the cases with which they dealt, but also in expressing criticism towards fellow public officers and, in particular, other judges (they referred to *di Giovanni v. Italy*, no. 51160/06, 9 July 2013).

484. Having regard to that case-law, the Government submitted that judicial office was associated with certain limitations, also in the area of freedom of speech. In the Polish legal system, those limitations were prescribed in the Constitution and in statute law. Numerous interviews and public speeches delivered by the applicant indicated that he might have failed to observe the duty of discretion and lacked restraint in exercising his freedom of expression, contrary to Article 178 of the Constitution, which imposed on a judge an obligation of impartiality, this being inextricably linked to the principle of independence.

485. Taking into account, *inter alia*, sections 66, 82 and 89(1) of the 2001 Act and the rules contained in the Collection of Principles of Judges' Professional Ethics, the Government claimed that the applicant had acted in a way that, in fact, undermined his impartiality and independence since his public activities and statements had revealed his political likes and dislikes. In any event, the preliminary inquiries had not led to a conclusion that the applicant had breached any of the above-mentioned rules and no sanctions had been imposed upon him. Therefore, there had been no interference with his freedom of expression in this regard.

486. As regards the Disciplinary Chamber's resolution of 18 November 2020, the Government stressed that also in this respect there had been no interference with the applicant's freedom of expression. The resolution had not related to any statements or views expressed by the applicant in the context of a public debate, but had referred solely to his professional conduct during the session held on 18 December 2017. The applicant's conduct during

the above session had borne no relation to the reform of the judicial system or to his criticism thereof.

487. In the Government's contention, the resolution of 18 November 2020 lifting his immunity had not been a sanction. Similarly, the applicant's suspension from office and reduction of his salary were not to be considered sanctions as, firstly, they were of a temporary nature and, secondly, they constituted the consequences of adopting the resolution. The resolution had permitted the prosecution to continue conducting the investigation, which, if necessary, could then enter the phase of the proceedings *in personam*. In addition, the criminal proceedings against the applicant were at their initial stage since he had not been formally charged. The Government claimed that the applicant had failed to indicate any direct or indirect causal link between his participation in the public debate and the lifting of his immunity.

488. Furthermore, after the Disciplinary Chamber's resolution of 18 November 2020 the applicant had continued his public activities. He had participated in the demonstrations in front of the Supreme Court on 18 November 2020 and in front of the State Prosecutor's Office on 20 January, 10 February and 12 March 2021, when he had referred to the proceedings against him as a "mockery". He had been interviewed on numerous occasions, had appeared on Polish and international radio and television programmes and had expressed his opinions on the Internet and on social media. Therefore, the applicant had not been pressured by anyone to remain silent and no authorities had legally obliged him to refrain from publicly commenting on political events and legislative developments.

489. Should the Court decide that the measures at issue, namely the preliminary inquiries and the Disciplinary Chamber's resolution of 18 November 2020 amounted to an interference with the applicant's freedom of expression, the Government argued that the interference had satisfied the requirements of Article 10 § 2 of the Convention.

490. The Government submitted that the interference complained of was "prescribed by law", referring to their earlier submissions with regard to the complaint under Article 8 of the Convention (see paragraphs 414-417 above). The Disciplinary Chamber's resolution of 18 November 2020 had been adopted owing to a reasonable suspicion that the applicant might have committed an offence under Article 241 § 1 of the CC. The Government noted that the applicant, as a judge, must have been familiar with the scope of this provision, which was precise and accurate. In addition, referring to *Brambilla and Others v. Italy* (no. 22567/09, § 64, 23 June 2016), they argued that judges, compared with journalists, should all the more be expected to know the law and to realise what actions might fulfil the constitutive elements of specific offences.

491. The Government maintained that the measures at issue had pursued the legitimate aims of the prevention of crime and the protection of the reputation of others as well as preventing the disclosure of information

received in confidence and maintaining the authority and impartiality of the judiciary. They submitted that the preliminary inquiries and the disciplinary proceedings had served to maintain the highest standards of judicial conduct, simultaneously safeguarding the proper administration of justice.

492. Furthermore, the applicant's decision to allow the media to record the session held on 18 December 2017, during which he had presented extensive information from the pre-trial proceedings, had allegedly resulted in the unauthorised disclosure of information from the investigation no. VIII Kp 1335/17. Simultaneously, the applicant's action might not only have impeded the conduct of the pre-trial proceedings, but might have also violated the rights of persons whose testimonies had been made public.

493. In this context, the Government argued that the applicant, as a judge, should have taken care in processing the information received in the course of the ongoing criminal proceedings. In their view, disclosing specific factual information concerning the investigation in a sensitive case before it was made public in the court proceedings might have been regarded as incompatible with the role of a judge and as such might have undermined the authority and impartiality of the judiciary.

494. Next, the Government contended that the alleged interference had been necessary and proportionate to the legitimate aims pursued. Referring to their earlier submissions concerning the legal obligations incumbent on judges (see paragraphs 420-421 above), the Government stressed that the preliminary inquiries with regard to the applicant had been legitimate and necessary. The relevant authorities had been obliged to verify that the applicant's numerous activities in the public sphere and his open criticism of the authorities and the justice system in Poland did not amount to a violation of pertinent regulations obliging judges to remain independent and impartial. As such, the authorities were committed to maintain the authority and impartiality of the judiciary and their actions had been proportionate to the legitimate aim pursued.

495. The Government further submitted that the Disciplinary Chamber had been obliged to issue the resolution of 18 November 2020, as it had been necessary in the light of the reasonable suspicion that the applicant had committed an offence while exercising his judicial duties.

496. The Government submitted that in fact the public already had knowledge of the events that were the subject of investigation no. VIII Kp 1335/17 even before the court session of 18 December 2017 had been held. This case had received extensive media coverage as it concerned the activities of the *Sejm* and so the disclosure of specific information from the investigation could have been regarded as redundant. However, by allowing the media to record the session the applicant might have failed to exercise caution and breached the rules of professional conduct for judges.

497. In addition, the Government submitted that neither the preliminary inquiries, nor the criminal proceedings had constituted a penalty or had led to

the imposition of one. The preliminary inquiries had not resulted in disciplinary proceedings or imposed a disciplinary penalty upon the applicant. The resolution of 18 November 2020 had been issued owing to a reasonable suspicion that the applicant might have committed an offence, the perpetrator of which was liable to a fine, restriction of liberty or imprisonment for up to two years. The applicant had not been dismissed, but only temporarily suspended from his position and retained the possibility of exercising the profession of judge in the future. The applicant's salary had been reduced by a minimum amount of 25% for the period of the suspension. Therefore, the measure had corresponded to the gravity of the offence in question and had not been disproportionately severe.

498. In conclusion, the Government submitted that the domestic authorities had struck a proper balance between the need to protect the relevant aims prescribed in paragraph 2 of Article 10 of the Convention and the protection of the applicant's freedom of expression. Consequently, they argued that no violation of Article 10 had occurred in the case.

3. Submissions of third-party interveners

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

499. The Commissioner submitted that the applicant's case was about protecting national judges against indirect, unlawful interference by the executive in the sphere of judicial independence and, as a consequence, also in that of judges' private life and free speech. More specifically, the case concerned the unfounded application of the disciplinary regime for judges, by means of which national authorities attempted to influence those judges who expressed critical opinions on the changes introduced in the Polish judicial system in recent years. The intervener referred to the case-law of the CJEU stating that the requirement of independence also meant that the disciplinary regime had to encompass the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions.

500. As regards the exercise of freedom of expression by judges, the Commissioner submitted that the Polish authorities – in an attempt to silence criticism – frequently claimed that judges commenting critically on changes in the judiciary were politically involved. In the Commissioner's view, this argument had to be rejected.

501. Judges should certainly not participate in political life. The Polish Constitution prohibited them from joining a political party or carrying out public activities that would compromise the independence of the judiciary (Article 178 § 3). However, Polish judges who were critical of the changes in the judiciary were pointing above all to the threats to judicial independence as well as to the dismantling of the separation of powers and the rule of law

which those changes entailed. Judges were not only entitled, but also bound, to stand up for their independence.

502. Since judges' comments on changes in the judiciary which impacted on the guarantee of a fair trial were both acceptable and desirable, the national authorities should not prevent or discourage judges from expressing their opinions. On the contrary, States had positive obligations under the Convention to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions without fear, even if they ran counter to those defended by the authorities.

503. The Commissioner maintained that disciplinary proceedings including their initial phase (preliminary inquiries), administrative measures, as well as criminal proceedings taken against judges for the content of their opinions, undermined their individual rights. When assessing a violation of the Convention, account should be taken of proceedings that had already been completed, but equally of pending proceedings, as well as the real risk of future proceedings, especially when they were based on domestic legislation that was unclearly drafted or a State practice of arbitrary application of the legislation had been established.

504. With regard to the system of disciplinary liability for judges, the intervener submitted that following legislative changes, the current system had established a predominant position of the Minister of Justice. The Minister, *inter alia*, had been given the competence to appoint the principal disciplinary officers and granted a number of important powers within the disciplinary proceedings.

505. The Commissioner noted that under the disciplinary regime, at first, preliminary inquiries were instituted against judges, and they could subsequently lead to disciplinary proceedings. In order to assess the threat to judicial independence and the interference with judges' rights under the Convention, those inquiries should also be viewed as disciplinary proceedings. He stressed that the preliminary inquiries were undertaken by disciplinary officers as part of the disciplinary proceedings *lato sensu.* This was confirmed both by the structure of the 2001 Act and the rules of functional interpretation since section 114(1) of the 2001 Act regulating preliminary inquiries was placed in Chapter 3 concerning the disciplinary liability of judges.

506. The intervener noted that when carrying out preliminary inquiries, the disciplinary officer took action to determine whether there were grounds for a disciplinary offence. The disciplinary officer called judges as witnesses, demanded written explanations from them and requested the courts to send information about the cases handled by the judge as well as to transmit the case files. The inquiries in fact constituted the initial phase of the disciplinary proceedings and could not therefore be treated as a separate element from those proceedings. In the Commissioner's view, such preliminary inquiries could have a chilling effect on judges in the same way as disciplinary

proceedings. With regard to judges who defended judicial independence, both types of proceedings were in reality initiated with the intention of involving judges in a legal procedure and thus impeding the performance of their tasks. In fact, they amounted to legal harassment.

507. Currently, any judge in Poland could reasonably fear that he or she would face consequences for his or her attitude and opinions that were in line with the requirements of judicial independence, but did not conform to the will of the representatives of legislative and executive authorities. It was clear from the Commissioner's review of the practice of disciplinary officers that the system of disciplinary liability had been used with the intention of undermining judicial independence. The initiation of disciplinary proceedings against judges had become a "normal" practice for disciplinary officers and was used as a tool to intimidate judges. Therefore, the judges' fear of launching disciplinary proceedings against them and being drawn into the disciplinary mechanism was based on the objectively existing pattern. The Commissioner submitted that the legislature had deliberately designed the current disciplinary regime for judges to be used as an instrument of political control over judges. In his view, the application of disciplinary and other measures against judges pointed to the authorities' intention to silence both the individual judge directly affected by such measures as well as, indirectly, the entire judicial community. The impugned measures had been aimed at discouraging judges and producing a chilling effect, while the ultimate goal was to suppress criticism of the government's policy towards the judiciary.

508. In the Commissioner's opinion, the prosecutor's request to hold the applicant criminally liable was an individual measure of repression and revenge on the part of the political authorities against a judge who had critically assessed changes in the judiciary, demonstrated personal independence and was an inspiration to other Polish judges. The prosecutor's action had been intended to result in the suspension or removal of the applicant from office. It was at the same time a measure addressed to all judges in Poland to discourage them from following a similar path.

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

509. The interveners submitted that judges were under a collective professional duty to speak up in defence of the rule of law. Sanctioning them or threatening to initiate disciplinary proceedings for speaking publicly in defence of the rule of law could not amount to a legitimate aim of general interest, let alone a necessary and proportionate limitation on freedom of expression. They further referred to the recently revised Compendium of the Judiciary's Ethical Obligations of the French High Council of Judges and Prosecutors, which made it clear that judges were under a duty to "defend the independence of the judicial authority". They submitted that limitations on judges' freedom of expression should be subjected to the strictest scrutiny

when these limitations sought to formally prevent or informally intimidate judges from speaking up in a situation where the independence or quality of their national judicial systems was undermined by legislative changes.

510. In the context where legislative changes had led to the activation of exceptional monitoring mechanisms such as the EU's Article 7 TEU procedure and the Council of Europe's full monitoring procedure owing to concerns about the existence of a systemic threat to the rule of law in Poland, any limitation on judges' freedom of expression had to be presumed to violate this fundamental right where judges spoke out on matters that affected the judiciary. At the same time, judges had to be considered to be under a professional duty to state clearly their opposition to any measure undermining judicial independence or targeting judges for their defence of the rule of law.

511. The interveners referred to the European Parliament's resolution of 17 September 2020, in which that body had denounced "the smear campaign against Polish judges and the involvement of public officials therein". One particularly disturbing aspect of the smear campaign, which had been ongoing for many years, was the establishment of a secret "troll farm" hosted within the Ministry of Justice. The large-scale propaganda against the judiciary in Poland had also been criticised by the UN Special Rapporteur on the independence of judges and lawyers.

(c) Amnesty International and the International Commission of Jurists

512. The interveners submitted that when the public debate concerned matters affecting the judiciary, such as issues related to the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice, judges might have a responsibility as well as a right to exercise their freedom of association and expression. The possibility to effectively exercise this right in the light of a correlating duty had to be guaranteed. If judges feared they would face sanctions for speaking in defence of judicial impartiality and independence, the threat of sanction would inevitably have a "chilling effect" that would stand in direct contradiction to the duties and responsibility of judges to uphold the independence of the judiciary. In any assessment of whether an interference with a judge's freedom of expression was necessary in a democratic society and proportionate to a legitimate aim, therefore, the responsibility of the judge to uphold and defend judicial independence should be a significant consideration.

(d) Polish Judges' Association Iustitia

513. The intervener maintained that the measures taken by the authorities with regard to the applicant had been aimed at creating a chilling effect on him and other judges who had expressed criticism of the Government's

reforms and had been prompted by the applicant's public activity. Even though judges were expected to show restraint in exercising their freedom of expression, they could be obliged to express their views and opinions on issues that affected or may affect the judiciary. Judges could not be intimidated by a prospect of disciplinary responsibility or repression if they dared to stand up for the interests of justice or the rights of citizens. As soon as such a threat appeared, the rights of ordinary citizens who sought protection against abuse suffered the most.

(e) The Government of the Kingdom of the Netherlands

514. The Netherlands Government submitted that judges could be expected to show restraint and discretion in exercising their freedom of speech in situations where the authority and impartiality of the judiciary was at stake. Nevertheless, as previously indicated by the Court in *Baka* (cited above), questions concerning the functioning of the justice system did fall within the sphere of the public interest and enjoyed a high degree of protection under Article 10. In the opinion of the Netherlands Government, the Court should apply close scrutiny when assessing the freedom of speech of a judge in relation to the functioning of the justice system. Even in situations where the topic of the debate might have political implications, this in itself was insufficient to prevent a judge from expressing his or her views on the matter. Judges, in their capacity as legal experts, should have the ability to criticise legal reforms, on the condition that the criticism was expressed in an appropriate manner.

4. The Court's assessment

(a) Whether there has been an interference

(i) General principles

515. The Court has recognised in its case-law the applicability of Article 10 to civil servants in general (see *Vogt v. Germany*, 26 September 1995, § 53, Series A no. 323, and *Guja v. Moldova* [GC], no. 14277/04, § 52, ECHR 2008), and members of the judiciary (see, among many others, *Wille v. Liechtenstein* [GC], no. 28396/95, §§ 41-42, ECHR 1999-VII; *Harabin v. Slovakia* (dec.), no. 62584/00, ECHR 2004-VI ("*Harabin* (dec.)"); and *Baka*, cited above, § 140). In cases concerning disciplinary proceedings against judges or their removal or appointment, the Court has had to ascertain first whether the measure complained of amounted to an interference with the exercise of the applicant's freedom of expression – in the form of a "formality, condition, restriction or penalty" – or whether the impugned measure merely affected the exercise of the right to hold a public post in the administration of justice, a right not secured in the Convention. In order to answer this question, the scope of the measure must be determined by putting it in the context of the facts of the case and of the relevant legislation (see

Wille, cited above, §§ 42-43; *Harabin* (dec.), cited above; *Kayasu v. Turkey*, nos. 64119/00 and 76292/01, §§ 77-79, 13 November 2008; *Kudeshkina*, cited above, § 79; *Poyraz v. Turkey*, no. 15966/06, §§ 55-57, 7 December 2010; *Harabin v. Slovakia*, no. 58688/11, 20 November 2012; *Baka*, cited above, § 140; *Miroslava Todorova v. Bulgaria*, no. 40072/13, § 153, 19 October 2021; and *Żurek v. Poland*, no. 39650/18, § 201, 16 June 2022).

516. Where the Court has found that the measures complained of were exclusively or principally the result of the exercise by an applicant of his or her freedom of expression, it has taken the view that there was an interference with the right under Article 10 of the Convention (see *Baka*, cited above, § 151; *Kayasu*, cited above, § 80; *Kudeshkina*, cited above, §§ 79-80; and *Cimperšek v. Slovenia*, no. 58512/16, § 58, 30 June 2020). In cases where it has, by contrast, considered that the measures were mainly related to the applicant's capacity to perform his or her duties, it found that there had been no interference under Article 10 (see *Harabin*, judgment cited above, § 151; *Köseoğlu v. Turkey* (dec.), no. 24067/05, §§ 25-26, 10 April 2018; *Simić v. Bosnia-Herzegovina* (dec.), no. 75255/10, § 35, 15 November 2016; *Harabin* (dec.), cited above; *Miroslava Todorova*, cited above, § 154; and *Żurek*, cited above, § 202).

517. To that end the Court takes account of the reasons relied upon by the authorities to justify the measures in question (see, for example, *Harabin* (dec.), cited above; *Kövesi v. Romania*, no. 3594/19, §§ 184-187, 5 May 2020; and *Goryaynova v. Ukraine*, no. 41752/09, § 54, 8 October 2020) together with, if appropriate, any arguments submitted in the context of subsequent appeal proceedings (see *Kudeshkina*, cited above, § 79; *Köseoğlu*, cited above, § 25; and, *mutatis mutandis*, *Nenkova-Lalova v. Bulgaria*, no. 35745/05, § 51, 11 December 2012). It must nevertheless carry out an independent assessment of all the evidence, including any inferences to be drawn from the facts as a whole and from the parties' submissions (see *Baka*, cited above, § 143). It must in particular take account of the sequence of relevant events in their entirety, rather than as separate and distinct incidents (ibid., § 148; see also *Kövesi*, § 188; *Miroslava Todorova*, § 155; and *Żurek*, § 203, all cited above).

518. Moreover, in so far as there is any prima facie evidence supporting the version of events submitted by the applicant and indicating the existence of a causal link between the measures complained of and freedom of expression, it will be for the Government to prove that the measures at issue were taken for other reasons (see *Baka*, §§ 149-151; *Kövesi*, § 189; *Miroslava Todorova*, § 156; and *Żurek*, § 204, all cited above).

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

519. Among the measures constitutive of interference in his case, the applicant referred to the various preliminary inquiries instituted by the disciplinary officer and the Disciplinary Chamber's resolution of

18 November 2020 lifting his immunity and suspending him from judicial duties. In so far as the preliminary inquiries are concerned, the Court considers that three of them are relevant for the purposes of its examination under Article 10 of the Convention, namely the inquiry related to the applicant's interview on the TVN24 television news channel on 17 July 2018 and two inquiries concerning the applicant's participation in public meetings held in Gdańsk and Lublin on 28 and 30 September 2018 respectively (see paragraph 10 points (1), (3) and (4) above).

520. The Court notes that the applicant, in his capacity as a judge and a member of the Polish Judges' Association Iustitia, on numerous occasions publicly expressed his views or commented in the media on the legislative reforms related to the judicial system and the impact of those reforms on the functioning of the courts. He criticised various aspects of the reform for being incompatible with the Constitution, EU law and the Convention and pointed to threats to the rule of law and judicial independence stemming from them (see paragraphs 132-133 above).

521. The applicant alleged that the measures taken against him by the authorities, as referred to above in paragraph 519, in response to his critical statements on the Government's reorganisation of the judiciary, amounted to an interference with his freedom of expression. The Government disagreed (see paragraphs 478-480 and 486 above).

522. As stated above, in order to ascertain whether the measures complained of amounted to an interference with the applicant's exercise of freedom of expression, the scope of those measures must be determined by placing them in the context of the facts of the case and of the relevant legislation (see *Wille*, § 43; *Baka*, § 143, both cited above; and *Żurek*, cited above, § 205). The Court has already noted with regard to the complaint under Article 8 of the Convention that that context was one of the successive judicial reforms that had been aimed at weakening judicial independence (see paragraph 450 above). Another important element of that context is the CJEU's judgment of 15 July 2021 in *Commission v. Poland* (*Disciplinary regime for* judges, C-791/19) holding that the new disciplinary regime for Polish judges was not compatible with EU law (see paragraphs 229-232 above).

523. As regards the impugned preliminary inquiries initiated by the disciplinary officer (see paragraph 519 above), the Court notes that they concerned the applicant's public statements respectively on the television news channel and in the course of two public meetings. It is then evident that those measures were principally the result of the exercise by the applicant of his freedom of expression.

524. As regards the Disciplinary Chamber's decision of 18 November 2020, the Court notes the following. The applicant was one of the most active and outspoken critics of the Government reforms affecting the judiciary among the Polish judges. It appears that the authorities took particular interest

in him as is evidenced by the initiation of five different preliminary inquiries concerning his activities (see paragraph 10 above). Two of those inquiries were related to the exercise of judicial functions by the applicant and for that reason they are of particular concern from the point of view of protecting judicial independence. The first was the inquiry into the applicant's alleged unauthorised disclosure of information from the investigation while giving reasons for his decision in open court (see paragraph 10 point (2) above) and the second one into his making a request for a preliminary ruling to the CJEU (see paragraph 10 point (5) above). None of those inquiries led to disciplinary charges against the applicant. However, it can be inferred from the accumulation of those inquiries over a short period of time (August-October 2018) that the authorities attempted to build a negative narrative around the applicant and somewhat wished to protract it, having regard to the fact that he was not notified of the termination of those inquiries and so remained in a state of uncertainty.

525. Next, the Court has regard to the fact that on 10 January 2018 the State Prosecutor's Office, i.e. the highest level of prosecution authorities subordinated only to the Prosecutor General, instituted a criminal investigation into the possible unauthorised disclosure of information from the investigation by the applicant, while giving oral reasons for his decision at the court session on 18 December 2017. In this connection, the Court notes the comment made by the MP from the majority on the applicant's decision expecting that proceedings be brought against him in the Disciplinary Chamber for bias and political motivation in adjudicating (see paragraph 31 above). The applicant continued to express his criticism of the Government's reforms of the judiciary at various fora (see, for example, paragraphs 131-132 above). On 17 February 2020 the prosecutor of the Internal Affairs Department of the State Prosecutor's Office made an application to the Disciplinary Chamber seeking to have the applicant's immunity lifted (see paragraph 34 above). In its resolution of 18 November 2020 the Disciplinary Chamber lifted the applicant's immunity from prosecution and suspended him from his duties. In this regard, the Court notes the statement of the Minister of Justice/Prosecutor General of 19 November 2020 which suggested that the applicant had breached criminal law (see paragraph 56 above).

526. The Court notes that the measures leading to the lifting of his immunity and his suspension were initiated by the prosecutors of the State Prosecutor's Office directly subordinate to the Prosecutor General. The decision itself was taken by the Disciplinary Chamber in respect of which the Court has already found in *Reczkowicz* that it failed to satisfy the requirements of a "independent and impartial tribunal established by law" prescribed in Article 6 § 1 of the Convention (see paragraphs 343-345 above).

527. Furthermore, the Court has already established that there are substantiated doubts as regards the Disciplinary Chamber's finding that there

was a reasonable suspicion of the applicant having committed the offence under Article 241 § 1 of the CC (see paragraph 453 above). It finds that in the circumstances of the case there are grounds to consider that the authorities' action which culminated in the Disciplinary Chamber's resolution of 18 November 2020 could be regarded as a disguised sanction for the applicant's exercise of his freedom of expression.

528. Taking account of the above-mentioned context and having regard to the sequence of events in their entirety, rather than as separate and distinct incidents, the Court considers that there is prima facie evidence of a causal link between the applicant's exercise of his freedom of expression and the Disciplinary Chamber's decision lifting his immunity and suspending him from his judicial duties.

529. The above conclusion is further corroborated by the numerous documents submitted by the applicant which refer to the widespread perception that such a causal link existed. These include not only articles published in the Polish and international press, but also the reports adopted by the Monitoring Committee and the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (see paragraphs 134-136, 138-141 and 210-213 above). The Court would also refer to the report of the American Bar Association Center for Human Rights (see paragraph 137 above).

530. The Government argued that the impugned measures, namely the three preliminary inquiries instituted by the disciplinary officer and the Disciplinary Chamber's resolution of 18 November 2020 lifting his immunity and suspending him from judicial duties were unconnected with the applicant's exercise of freedom of expression or constituted neutral measures that were applied to all judges (see paragraphs 478-480 and 486 above). However, having regard to the entire context of the case, the Court does not find those reasons convincing or supported by specific evidence. Accordingly, it agrees with the applicant that the impugned measures referred to above were prompted by the views and criticisms that he had publicly expressed in his professional capacity.

531. In view of the above, the Court concludes that the impugned measures constituted an interference with the exercise of the applicant's right to freedom of expression, as guaranteed by Article 10 of the Convention (see, *mutatis mutandis*, *Wille*, § 51; *Kudeshkina*, § 80; *Baka*, § 152; and *Żurek*, § 213, all cited above). It remains therefore to be examined whether the interference was justified under Article 10 § 2.

(b) Whether the interference was justified

532. To be justified under Article 10 § 2 of the Convention, an interference with the right to freedom of expression must have been "prescribed by law", intended for the pursuit of one or more of the legitimate

aims set out in that paragraph, and "necessary in a democratic society" to achieve that aim or aims.

(i) Prescribed by law

(α) General principles concerning the lawfulness of interference

533. The general principles regarding the lawfulness of interference with freedom of expression were summarised by the Court in *Magyar Kétfarkú Kutya Párt v. Hungary* ([GC], no. 201/17, §§ 93-96, 20 January 2020), in so far as relevant, as follows:

> "93. The Court reiterates that the expression 'prescribed by law' in the second paragraph of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see, among many other authorities, *Delfi AS v. Estonia* [GC], no. 64569/09, § 120, ECHR 2015, with further references). The notion of 'quality of the law' requires, as a corollary of the foreseeability test, that the law be compatible with the rule of law; it thus implies that there must be adequate safeguards in domestic law against arbitrary interferences by public authorities (see *Malone v. the United Kingdom*, 2 August 1984, § 67, Series A no. 82, and *Olsson v. Sweden* (*no. 1*), 24 March 1988, § 61, Series A no. 130).
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> 94. As regards the requirement of foreseeability, the Court has repeatedly held that a norm cannot be regarded as a 'law' within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable a person to regulate his or her conduct. That person must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. While certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice (see *Delfi AS*, cited above, § 121, and *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 141, ECHR 2012). The criterion of foreseeability cannot be interpreted as requiring that all detailed conditions and procedures governing the interference be laid down in the substantive law itself, and the requirement of 'lawfulness' can be met if points which cannot be satisfactorily resolved on the basis of substantive law are set out in enactments of lower rank than statutes (see *Association Ekin v. France*, no. 39288/98, § 46, ECHR 2001-VIII). A law which confers a discretion is thus not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see *Gillow v. the United Kingdom*, 24 November 1986, § 51, Series A no. 109).
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> 95. That said, it is not for the Court to express a view on the appropriateness of the methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention (see *Magyar Helsinki Bizottság*, cited above, § 184).
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> 96. The Court would also reiterate that in proceedings originating in an individual application under Article 34 of the Convention, its task is not to review domestic law

in the abstract but to determine whether the way in which it was applied to the applicant gave rise to a breach of the Convention (see *Perinçek v. Switzerland* [GC], no. 27510/08, § 136, ECHR 2015 (extracts), with further references)."

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

– *As regards the preliminary inquiries*

534. As established above, the initiation of three preliminary inquiries concerning the applicant's public statements respectively on the television news channel and in the course of two public meetings constituted an interference with the exercise of his freedom of expression (see paragraphs 530-531 above). The deputy disciplinary officer initiated those inquiries in July-August and October 2018 and in each of them the applicant was summoned to provide a written statement on the subject of the inquiry. Those inquiries were terminated on unspecified dates without the applicant being informed of this fact and no disciplinary charges were brought against him. The Government submitted in their observations that those inquiries had been initiated on account of the applicant's conduct that allegedly disregarded the limits of judicial independence. However, they provided no specific details in this regard. The applicant was only informed about the initiation of the inquiries and the summons addressed to him.

535. As noted above, in terms of statute law the preliminary inquiries were initiated on the basis of section 114(1) of the 2001 Act. However, the question arises whether the applicant was provided with adequate safeguards in domestic law against arbitrary interferences by public authorities with the exercise of his freedom of expression in order to ensure compliance with the "quality of the law" requirements (see paragraph 533 above).

536. The Court has observed above that the preliminary inquiries were initiated by the disciplinary officer with a view to initially determining whether a disciplinary offence had been committed. It finds that in those proceedings the applicant should have been afforded minimum procedural safeguards, in particular the right to be informed about the termination of an inquiry. In the absence of such minimum safeguards a preliminary inquiry may be used by the disciplinary officer in an abusive manner and constitute a form of pressure on the judge concerned with regard to the exercise of his or her freedom of expression. Such a situation is capable of producing a chilling effect on the exercise of that freedom.

537. Having regard to the above, the Court finds the impugned interference with the applicant's freedom of expression in this part was not "prescribed by law" within the meaning of Article 10 of the Convention.

– *As regards the Disciplinary Chamber's resolution of 18 November 2020*

538. As concluded above, the Disciplinary Chamber's resolution of 18 November 2020 lifting the applicant's immunity and suspending him from

judicial duties constituted an interference with the exercise of his freedom of expression (see paragraphs 530-531 above).

539. The Court has already examined in the context of the complaint under Article 8 of the Convention the question of compliance of the Disciplinary Chamber's resolution with domestic law and the rule of law and found that the impugned decision was given by a body which cannot be considered a "court" for the purposes of the Convention, despite the explicit requirements under Article 181 and Article 180 § 2 of the Polish Constitution that decisions of this kind must emanate from a court. It finds that the same reasons are relevant with regard to the applicant's complaint under Article 10 of the Convention.

540. The Court further considers that the requisite procedural safeguards were not put in place to prevent arbitrary application of the relevant substantive law. As established above, the decision on the lifting of the applicant's immunity and his suspension was taken by the Disciplinary Chamber, which failed to meet the requirements of an "independent and impartial tribunal established by law" (see paragraphs 343-345 above).

541. The impugned interference thus cannot be regarded as lawful in terms of Article 10 of the Convention as it was not based on a "law" that afforded the applicant proper safeguards against arbitrariness. It follows that the interference with the applicant's freedom of expression was not "prescribed by law" within the meaning of Article 10 of the Convention.

(ii) Whether there was a legitimate aim

542. 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 10 § 2 and was necessary in a democratic society. However, the Court considers it important also to examine whether the impugned interference pursued any legitimate aim.

543. The Government claimed that the measures at issue pursued the legitimate aims of the prevention of crime and the protection of the reputation of others as well as preventing the disclosure of information received in confidence and maintaining the authority and impartiality of the judiciary (see paragraph 491 above). The applicant, on the other hand, argued that the interference had not served any legitimate aim (see paragraph 472 above).

544. The Court observes that the applicant is one of the most emblematic representatives of the judicial community in Poland who has steadily defended the rule of law and independence of the judiciary. It notes that the applicant expressed his views and criticism on legislative reforms affecting the judicial system and the impact of those reforms and considers that his statements did not go beyond mere criticism from a strictly professional perspective. The Court further notes that the applicant referred to the principle recently established in its case-law, that the general right to freedom of expression of judges to address matters concerning the functioning of the

justice system may be transformed into a corresponding duty to speak out in defence of the rule of law and judicial independence when those fundamental values come under threat (see *Żurek*, cited above, § 222; see also Opinion no. 25(2022) of the CCJE on the Freedom of Expression of Judges, paragraph 220 above). Having regard to the circumstances of the present case, it appears that the measures taken by the authorities could be characterised as a strategy aimed at intimidating (or even silencing) the applicant in connection with the views that he had expressed in defence of the rule of law and judicial independence. The Court considers that the impugned measures undoubtedly had a "chilling effect" in that they must have discouraged not only the applicant but also other judges from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary (see *Baka*, § 173; *Kövesi*, § 209; and *Żurek*, § 227, all cited above).

545. The Court would point out that the Disciplinary Chamber's resolution of 18 November 2020, one of the constitutive elements of the interference with the applicant's right to freedom of expression, lifted his immunity from prosecution and suspended him in connection with an act intrinsically linked to the exercise of judicial duties (see paragraphs 43-44 above). In this regard the Court reiterates the importance of protecting the members of the judiciary against measures that may threaten their judicial independence and autonomy, given the prominent place that the judiciary occupies among State organs in a democratic society (see paragraph 451 above). Having regard to the general and particular contexts of the applicant's case, the Court cannot accept that the interference complained of pursued any of the legitimate aims relied upon by the Government for the purposes of Article 10 § 2.

546. There has accordingly been a violation of Article 10 of the Convention on the basis that the interference at issue was not "prescribed by law" and did not pursue any of the legitimate aims permitted for the purposes of that provision.

VI. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

547. The applicant complained under Article 13 of the Convention that he had been deprived of an effective domestic remedy in relation to his complaint under Article 8. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The parties' submissions

548. The Government reiterated that Article 8 of the Convention was not applicable to the present case. The same was true for Article 13, which merely complemented the other substantive clauses of the Convention and the Protocols thereto and its applicability required the existence of an arguable claim under another Convention provision. Thus the complaint under Article 13 taken in conjunction with Article 8 had to be declared incompatible *ratione materiae*.

549. Should the Court find that Article 8 and Article 13 of the Convention were applicable, the Government submitted that the applicant had had at his disposal a range of effective domestic remedies for the purpose of addressing his complaints under Article 8 of the Convention. In this regard they referred to the submissions they had made earlier on this point (see paragraphs 388-394 above). The Government claimed that the remedies invoked by them were effective in law and in practice, but the applicant had failed to use them. Consequently, they maintained that no violation of Article 13 of the Convention taken in conjunction with Article 8 had occurred in the case.

550. The applicant argued that no effective domestic remedies were available for his complaint under Article 8. A civil action for protection of personal rights under Articles 23 and 24 of the Civil Code would not have remedied the issue raised in the complaint, namely the deliberate actions taken by the Government to discredit him in the eyes of the public by using a series of disciplinary proceedings against him.

B. The Court's assessment

551. In the light of its above findings regarding the complaint under Article 8 (see paragraph 428-455 above), the Court finds that it is not necessary to examine separately the admissibility and merits of the applicant's complaint under Article 13 of the Convention.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

552. 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

553. The applicant claimed 10,160.22 euros (EUR) in respect of pecuniary damage corresponding to the loss of earnings resulting from the reduction of his salary ordered by the Disciplinary Chamber.

554. The applicant also claimed EUR 120,000 in respect of non-pecuniary damage as compensation for the suffering and distress relating to the violation of his rights. He submitted that the criminal proceedings opened against him and the lifting of his immunity by the Disciplinary Chamber were at odds with the Polish Constitution as well as with European standards and had been motivated by political considerations. The unlawful lifting of his immunity had damaged his reputation and undermined his competence to hold his judicial office in the eyes of the public. The applicant maintained that his private and professional life had been completely disrupted as a result of the various actions taken against him by the disciplinary officer and the public prosecutor's office, together with the Disciplinary Chamber. He had had to devote a considerable amount of his time and energy to defend himself against various investigations, inquiries, press comments and attacks on his personal interests. It had been painful for the applicant to encounter supporters of the ruling majority, who had repeated allegations against him which were relayed as part of the smear campaign against him carried out by certain media. He had received numerous threats and insults of which he submitted a sample. The applicant further submitted that, while becoming a symbol of the struggle for independence of the judiciary, he had paid a huge price for it. The Polish State had been using its machinery to unlawfully harass the applicant. This had resulted in huge stress for him and the loss of public trust in the eyes of a large part of society, as well as an avalanche of hatred against him. He referred to the film depicting his unequal fight against the system, "Judges under pressure", directed by Kacper Lisowski, to which he referred as evidence supporting his application.

555. 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. Had the applicant exhausted domestic remedies, he would have been entitled to the reimbursement of the remainder of his salary in case the criminal proceedings against him had ended in acquittal. The Government thus submitted that the applicant's claims in respect of pecuniary damage were of a premature character.

556. 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. Moreover, the applicant's observations remained largely silent on the fact that the core issue of the instant case related to the criminal investigation against him for an act covered by Article 241 § 1 of the CC.

557. 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.

558. With regard to the applicant's claim in respect of pecuniary damage, the Court does not discern any causal link between the violations found in the present case and the pecuniary damage alleged by the applicant. Furthermore, following the CPL's resolution of 29 November 2022 the applicant's salary was adjusted to the full amount and he received his back pay (see paragraph 248 above). The Court therefore rejects this claim.

559. However, making an assessment on an equitable basis and having regard to its finding of violations of Article 6 § 1, Article 8 and Article 10 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.

B. Costs and expenses

560. The applicant also claimed EUR 9,225, inclusive of VAT, for the costs of legal representation before the Court and EUR 1,090.92 for translation costs, for which he produced an invoice. He submitted a copy of the legal services agreement between him and his representatives Ms S. Gregorczyk-Abram and Mr M. Wawrykiewicz.

561. The Government noted that, according to the agreement between the applicant and his representatives, an additional remuneration in the amount of 7,500 EUR plus VAT was to be paid by the applicant in the event that the Court made an award for costs and expenses. They submitted that it therefore appeared that the applicant had not, in fact, incurred any costs so far and had not presented any relevant invoices. Consequently, they asked the Court to reject the applicant's claim in that respect.

562. The Court notes that the total amount claimed under the head of costs and expenses is EUR 10,315.92. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. The Court notes that under the agreement between the applicant and his representatives he is bound to pay them the additional remuneration in the amount of EUR 7,500 plus VAT in the event of a successful outcome of the proceedings before the Court and should the

Court make an award for costs and expenses. Having regard to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 6,000 covering costs and expenses for the proceedings before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

563. 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. *Decides*, unanimously, to join the applications;

2. *Declares*, by a majority, the complaint under Article 6 § 1 of the Convention concerning the lifting of the applicant's immunity admissible;

3. *Declares*, unanimously, the remainder of the complaint under Article 6 § 1 of the Convention inadmissible;

4. *Declares*, by a majority, the complaint under Article 8 of the Convention concerning the preliminary inquiries and the Disciplinary Chamber's resolution of 18 November 2020 admissible;

5. *Declares*, unanimously, the remainder of the complaint under Article 8 of the Convention inadmissible;

6. *Declares*, unanimously, the complaint under Article 10 of the Convention admissible;

7. *Holds*, by six votes to one, 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;

8. *Holds*, by six votes to one, that there has been a violation of Article 8 of the Convention;

9. *Holds*, unanimously, that there has been a violation of Article 10 of the Convention;

10. *Holds*, unanimously, that it is not necessary to examine the admissibility and merits of the complaint under Article 13 of the Convention;

11. *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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 30,000 (thirty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 6,000 (six thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

12. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 July 2023, 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 separate opinion of Judge Wojtyczek is annexed to this judgment.

M.B.
R.D.

PARTLY DISSENTING OPINION OF JUDGE WOJTYCZEK

I respectfully disagree with the view that the complaints under Articles 6 and 8 are admissible. As a result, I also disagree with the view that these two Articles have been violated.

1. The domestic law

1.1. The issue of judicial immunity in Poland has to be apprehended in the broader context of immunities in the domestic legal system. The Polish Constitution sets forth a comprehensive and coherent system of criminal law immunities for persons holding certain important public offices (Articles 105, 108, 181, 196, 200, 206, 211). Power to lift the immunity is conferred either upon Parliament (more precisely one of its chambers) or upon a judicial body. In both sets of situations, the nature of the decision to be taken is the same. Furthermore, a special regime of immunity has been devised for the President of the Republic (Article 145 of the Constitution).

Ordinary legislation further grants criminal law immunity to some other office holders, in particular to: the Ombudsman for Children, the President of the Personal Data Protection Office, and the President of the Institute of National Remembrance, whose immunity may be lifted by the *Sejm*. Ordinary legislation also grants criminal law immunity to prosecutors (whose immunity may be lifted by a disciplinary body) and senior civil servants of the Supreme Audit Office (whose immunity may be lifted by the Board of Supreme Audit Office – *Kolegium Najwyższej Izby Kontroli*). It should be noted that these immunities may be lifted by non-judicial bodies and the constitutionality of the provisions under consideration has not been contested before the Constitutional Court.

As rightly established by this Court, the domestic courts have explained the nature of proceedings for lifting judicial immunity in the following terms (emphasis added):

(i) The Constitutional Court held "that those proceedings, **constituting a preliminary stage for holding a judge criminally liable**, should secure the constitutional right of defence to the person concerned, owing to the very liability which was potentially engaged by those proceedings" (paragraph 286).

(ii) The Supreme Court held that "the condition for the lifting of immunity **was similar to that prescribed in Article 313 § 1 of the [Code of Criminal Procedure] ... for a decision on the presentation of charges**" (paragraph 287 *in fine*).

(iii) The Supreme Court held "that the immunity proceedings were **closely related** to the pending *in rem* pre-trial proceedings and conditioned the possibility of holding a judge criminally liable" (paragraph 288).

(iv) The immunity proceedings "were of an **interlocutory nature**" (paragraph 289).

It is necessary to add a few further remarks. The Constitutional Court pointed out that judicial immunity proceedings constituted "the preparatory and preliminary stage for holding someone criminally liable" (judgment of 28 November 2007, K 39/07, III.11.3; similarly 15 January 2009, K 45/07, III.2.2.2). Legal scholarship explains that it is not the role of the disciplinary court at this stage to examine in depth the well-foundedness of the criminal charge but to verify whether the prerequisites for lifting immunity are met (see K. Szczucki, "Art. 181" in *Konstytucja RP. Komentarz*, M. Safjan, L. Bosek (eds), Warsaw 2016, vol. 2, p. 1070).

The above-mentioned domestic judgments and others state that proceedings for lifting judicial immunity in Poland are a stage of criminal proceedings and are not perceived as separate proceedings.

The Supreme Court has characterised judicial immunity in some decisions as a specific public-law entitlement (*uprawnienie o charakterze publicznym*, see in particular the decision of 4 April 2014, II CSK 407/13). The Constitutional Court expressed the view that although immunity had a subjective aspect because it protected an actual person, this aspect remained secondary, whereas the institutional aspect was essential (judgment of 28 November 2007, K 39/07, mentioned above). In the judgment of 3 December 2015, K 34/15, the Constitutional Court expressly stated that judicial immunity could be seen "neither as a privilege nor as a subjective right of a judge" (see also – in the context of parliamentary immunity – the judgments of the Constitutional Court: 28 November 2001, K 36/01; 8 November 2004, K 38/03; 21 April 2016, K 2/14). In this vein, the majority of legal scholars share the view that "judicial immunity is an institution of the constitutional system and cannot been assessed in the terms of a subjective right" (see L. Garlicki, "Artykuł 181", in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, L. Garlicki (ed.), Warsaw 2005, vol. IV, on p. 2 of the commentary to this provision; similarly, M. Masternak-Kubiak, "Art. 181" in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, M. Haczkowska (ed.), Warsaw 2014, point 1; B. Nalezinski, "Art. 181" in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, P. Tuleja (ed.), Warsaw 2019, p. 545).

1.2. The majority make a certain number of legal assessments which trigger objections or call for further clarifications.

In paragraph 280 the majority interpret Article 181 of the Polish Constitution as "conferring on a judge **the constitutional right** to have access to a court to have the lifting of immunity examined in judicial proceedings" (emphasis added). It is difficult to understand why the majority decided to take a stance on a specific issue of domestic law, without taking into account the views, prevailing in domestic scholarship and case-law, that Article 181 of the Constitution is not a source of subjective rights.

In paragraph 291 the majority make the following assessment (emphasis added):

> "On the basis of the above-mentioned findings, the Court concludes that under Polish law there are **two separate sets of proceedings** enabling the prosecution of a judge and the establishing of his or her criminal liability. The initial proceedings relate to the authorisation for the lifting of immunity of a judge, where – according to the Constitutional Court – he or she is 'put under the shadow of suspicion' (see paragraph 155 above). This set of proceedings, a condition *sine qua non* for the subsequent prosecution of a judge is, as noted above, by virtue of the Polish Constitution, of a judicial nature and the lifting of immunity is decided by a court at two levels of jurisdiction. Criminal proceedings against a judge would begin only if the authorisation has been given by a court in the immunity proceedings and it would be for the competent criminal court subsequently to decide on the commission of an offence and the question of guilt."

The thesis that proceedings for lifting immunity and criminal proceedings are two separate sets of proceedings calls for several remarks. Firstly, it is not clear what criteria are adopted for declaring sets of proceedings to be separated or unified. A similar – to some extent – issue has been examined under Article 4 of Protocol No. 7 (see for instance *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, §§ 117-134, 15 November 2016) but the case-law under this last provision does not appear relevant here. Secondly, it is not clear why the majority decided to take a stance on an academic question concerning the domestic law without trying to explain its relevance for the purpose of adjudication in the instant case. What matters is the perspective of Article 6. Seen from this angle, immunity proceedings are the initial stage of the determination of a criminal charge, in other words they are part of the criminal proceedings. The criminal charge remains in principle the same throughout the whole proceedings. Thirdly, the majority themselves consider the subsequent stage of proceedings, that in which the authorisation of coercive measures was requested (the resolutions of the Disciplinary Chamber of 22 April 2021 and of the Chamber of Professional Liability of 29 November 2022), as belonging to the same set of proceedings as the lifting of immunity (see paragraph 296). Fourthly, the majority refer generally to "the above-mentioned findings" without explaining which specific findings support their view, whereas the domestic case-law presented in the reasoning – and referred to above – provides strong arguments for the opposite view.

In paragraph 291 *in fine*, the majority state that (emphasis added) "in the applicant's case the question of the lifting of his immunity **was finally determined** at second instance by the Disciplinary Chamber's resolution of 18 November 2020*"*. While – in domestic law – the very notion of consent in Article 181 of the Constitution presupposes a definitive authorisation, which as such can neither be provisional nor subject to withdrawal (see the judgment of the Constitutional Court of 28 November 2007, K 39/07, point III 11.3.4.2), the statement about the final nature of the determination in

question has to be somewhat nuanced, if one looks at it from the Convention perspective.

Firstly, the domestic courts in subsequent proceedings can reassess whether there have been grounds for lifting immunity and such a reassessment was made in the resolution of the Disciplinary Chamber of 22 April 2021 and in the resolution of 29 November II ZIZ 4/22. By these two resolutions the domestic courts determined that the conditions for lifting immunity had not been met (see paragraph 269). The majority regard this stage of the proceedings – after the final determination – as relevant and acknowledge the thoroughness of this re-examination (see paragraph 296 *in fine*).

Secondly, in the subsequent proceedings, the prosecutor and the criminal court have the power to discontinue the criminal proceedings and the criminal court has the power to acquit. A final decision to discontinue the proceedings or a final acquittal would restore in principle the "*status quo ante*" in this regard. The majority admit that terminating the proceedings would solve the problem (see paragraph 270), implicitly confirming that immunity proceedings are a stage of the criminal proceedings and that at the subsequent stages the person concerned may lose victim status.

Thirdly, as established by the Court, in accordance with section 18 of the 2022 Amending Act, for a period of six months following its entry into force, the applicant could have asked for the reopening of the proceedings in which his immunity had been lifted but decided not do so. I agree with the view that the remedy in question is defective in many regards, however even defective remedies may ultimately provide adequate redress, at least in some types of cases (compare the decision in *Zihni v. Turkey* (dec.), no. 59061/16, 29 November 2016). At the same time, restoring judicial immunity after reopening the immunity proceedings does not automatically mean that criminal proceedings are discontinued.

1.3. Against this backdrop, one has to note that the majority do not really explain the relevance of the above-mentioned assessments for the purpose of adjudication in the instant case. Therefore, it is not clear whether they actually had a bearing on the final conclusion. More importantly, it is not clear how to articulate the general approach adopted by the majority with the broader system of criminal immunities which – in many cases – may be lifted by non-judicial bodies.

2. The principle of subsidiarity

2.1. The instant application raises important issues concerning the precise criteria for the admissibility of applications. Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, which entered into force on 1 August 2021, addressed some of these issues, by adding the following recital to the Preamble to the Convention:

> "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".

Protocol No. 15 reinforces the role of the principles of subsidiarity and of the margin of appreciation in the Convention system and in particular excludes any gradual abandonment of these principles by the case-law. Under the principle of subsidiarity, violations of Convention rights should be remedied by the domestic authorities. The new version of the Preamble contains an interpretive directive requiring a strict application of the rule that domestic remedies should be exhausted before an application can be lodged with the Court. Moreover, applications lodged while proceedings are still pending at the domestic level should be declared premature.

2.2. I note that the acts and omissions of the State authorities complained of in the present case arose partly before and partly after the entry into force of Protocol No. 15. For the purpose of the legal assessment of facts which existed as of 1 August 2021, the new version of the Preamble has to be taken into account in interpreting the provisions of the Convention.

3. The scope of Article 6 guarantees applicable to the lifting of criminal law immunity

3.1. The question of the applicability of Article 6 to the pre-trial stage of criminal proceedings has been examined in numerous judgments and decisions. The Court has expressed in particular the following views concerning the applicability of Article 6 to the initial (in principle pre-judicial) stages of criminal proceedings (see *Dvorski v. Croatia* [GC], no. 25703/11, § 76, ECHR 2015):

> "The Court reiterates that, even if the primary purpose of Article 6 of the Convention, as far as criminal proceedings are concerned, is to ensure a fair trial by a 'tribunal' competent to determine 'any criminal charge', it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 – especially paragraph 3 thereof – may be relevant before a case is sent for trial if and in so far as the fairness of the trial is liable to be seriously prejudiced by an initial failure to comply with its provisions. As the Court has already held in its previous judgments, the right set out in Article 6 § 3 (c) of the Convention is one element, among others, of the concept of a fair trial in criminal proceedings contained in Article 6 § 1 (see *Imbrioscia v. Switzerland*, 24 November 1993, §§ 36-37, Series A no. 275, and *Salduz v. Turkey* [GC], no. 36391/02, § 50, ECHR 2008)."

The Court has also stated as follows (see *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 77, 2 November 2010, emphasis added):

> "Indeed, a criminal defendant cannot claim to be a victim of a violation of Article 6 § 3 before he is convicted (see *X v. the United Kingdom*, no. 8083/77, Commission decision of 13 March 1980, Decisions and Reports 19, p. 223; *Eğinlioğlu v. Turkey*, no. 31312/96, Commission decision of 21 October 1998, unreported; *Osmanov and*

> *Husseinov v. Bulgaria* (dec.), nos. 54178/00 and 59901/00, 4 September 2003; and *Witkowski v Poland* (dec.), no. 53804/00, 3 February 2003). This is also true in respect of most of the guarantees of Article 6 § 1 of the Convention (with some exceptions concerning, for instance, the requirement of reasonable length of the proceedings, access to court, etc. – see, for example, *Polonskiy v. Russia*, no. 30033/05, §§ 160 et seq., 19 March 2009; *Kart v. Turkey* [GC], no. 8917/05, §§ 71 et seq., 3 December 2009; see also, in the context of civil proceedings, *Mihajlović v. Croatia*, no. 21752/02, §§ 26 et seq., 7 July 2005). It may appear that **the reopening of the case 'returns' the applicant to the situation existing before he became a victim and restores the *status quo ante*.**"

According to the case-law, "*la notion de « tribunal » ne s'étend pas au juge d'instruction, qui n'est pas appelé à se prononcer sur le bien-fondé d'une « accusation en matière pénale »*"[1] (see *Vera Fernández-Huidobro v. Spain,* no. 74181/01, § 110*,* 6 January 2010). Similarly, it does not encompass the body which decides upon the indictment (committing a defendant to stand trial) (see *De Lorenzo v. Italy* (dec.), no. 69264/01, 12 February 2004*,* and *Previti v. Italy* (dec.), no. 45291/06 §§ 194-95, 8 December 2009). In other words, States are free to organise the pre-trial stage of criminal proceedings, and decisions which do not deprive an individual of personal liberty (see Article 5) do not require the involvement of a tribunal.

Moreover, the Court has expressed the following viewpoint (see *International Bank for Commerce and Development AD and Others v. Bulgaria*, no. 7031/05, § 129, 2 June 2016, emphasis added):

> "Article 6 of the Convention does not guarantee the right not to be criminally prosecuted; it only enshrines the right to a fair trial within a reasonable time **if and when criminal charges are brought against a person** (see *I.J.L. and Others v. the United Kingdom*, nos. 29522/95, 30056/96 and 30574/96, § 101, ECHR 2000-IX)."

3.2. In my view, there can be no doubt that proceedings for the lifting of judicial immunity in Poland are part of criminal proceedings and therefore I fully agree with the view that Article 6 is applicable under its criminal limb in the instant case. It is obvious that this provision applies at the pre-trial stage of criminal proceedings. In particular, the right to defend oneself in proceedings for the lifting of immunity cannot be contested. At the same time, under the Court's well-established case-law, it is also obvious that not all guarantees of Article 6 are applicable at the initial stages of criminal proceedings and in particular that not all guarantees of Article 6 are applicable to proceedings for the lifting of immunity.

3.3. The majority identify the crucial question concerning the admissibility of the grievances under Article 6 in the following terms (paragraph 282):

[1] The concept of "tribunal" does not extend to the investigating judge, whose role is not to determine "a criminal charge".

> "The question to be determined is whether Article 6 § 1 of the Convention under its criminal limb was applicable to the proceedings concerning the lifting of the applicant's immunity."

On the basis of an affirmative answer to this question, the majority proceed further upon the implicit assumption that the applicability of Article 6 under its criminal limb to proceedings for the lifting of immunity implies that the decision on this matter has to be taken by a "tribunal" within the meaning of Article 6.

Such an approach triggers the following objections. Firstly, the relevant question is not *whether Article 6 § 1 of the Convention under its criminal limb was applicable* but whether Article 6 under its criminal limb requires that the decision concerning the lifting of the criminal immunity has to be taken by a "tribunal" within the meaning of Article 6. The argument focusing on the applicability of Article 6 in general completely misses the gist of the problem, which concerns the pre-trial stage of the proceedings. Secondly, as mentioned above, the reasoning of the majority is based upon the implicit assumption that the applicability of Article 6 under its criminal limb to proceedings for the lifting of immunity implies more specifically that the decision on this matter has to be taken by a "tribunal" within the meaning of Article 6. The validity of this assumption has not been discussed, let alone established. Thirdly, this assumption is simply erroneous. Under the Court's case-law, Article 6 does not require that the decision to lift criminal-law immunity be taken by a judicial body.

3.4. In an assessment as to whether, under Article 6, the decision concerning the lifting of criminal immunity must be taken by a "tribunal", it is necessary to take account of comparative law arguments.

Criminal-law immunity is always an exception in the system of criminal proceedings. The Convention does not require immunities to be established for judges and there are States where judges do not enjoy criminal law immunities. More generally, there is no European consensus in favour of the idea that decisions to start proceedings to establish a judge's liability can be taken only with the prior authorisation of judicial bodies. Moving beyond the scope of criminal law immunities, it is worth noting here that in the United Kingdom, "[a] judge of the Supreme Court holds that office during good behaviour, but may be removed from it on the address of both Houses of Parliament" (section 33 of the Constitutional Reform Act 2005; see also section 11(3) of the Senior Courts Act 1981). A similar solution has been adopted in Ireland (see Article 35 (4) of the Constitution).

If States are free not to introduce an immunity for some categories of persons and leave to the prosecuting authorities the decision as to whether there are grounds to prosecute, then *a fortiori* the States may introduce, as an additional guarantee the requirement that the presentation of charges has to be authorised by another non-judicial body. One can, in particular, easily

imagine a system in which the presentation of charges requires, in some cases, authorisation by a higher prosecuting authority.

I further note the general consensus in Europe that criminal law immunities, where granted, may be lifted by non-judicial bodies. In particular, national parliaments may lift the immunity of their members. While the fundamental principles of the national constitutional system may require a specific solution in respect of some categories of office holders, under the Convention the choice of the body which lifts a specific immunity is left to the States. In *Kart v. Turkey* ([GC], no. 8917/05, 3 December 2009) the Court accepted in particular that parliamentary immunity could be lifted by Parliament.

In the instant case, comparative law arguments plead in favour of a very broad margin of appreciation for the High Contracting Parties.

3.5. One also has to take into account the Court's case-law concerning the presentation of charges. As explained above, the Polish Supreme Court held that the condition for the lifting of immunity was similar to that prescribed in Article 313 § 1 of the CCP for a decision on the presentation of charges. The two decisions bear many similarities. According to the well-established case-law under Article 6 of the Convention, a decision on the presentation of charges may be taken by a non-judicial authority. If so, then *a fortiori*, under Article 6 of Convention, a decision to *authorise* the presentation of charges may also be taken by a non-judicial body.

4. The question of victim status under Article 6

4.1. The majority rightly refer to a series of judgments which set forth general principles concerning the question of victim status (see paragraphs 252-254). However, the Court when dealing with this question under Article 6 has devised specific legal principles which establish a separate regime for assessing victim status in respect of the right protected therein. In particular, the issues of victim status and exhaustion of domestic remedies are articulated in a specific manner. I note that the majority omit to take into account the judgments and decisions which deal with the more specific issue of victim status under Article 6 of the Convention.

Under the well-established case-law (see *Khlyustov v. Russia*, no. 28975/05, § 103, 11 July 2013; see also *I.I. v. Bulgaria* (dec.), no. 44082/98, 25 March 2004, and *Józef Oleksy v. Poland,* (dec.), no. 1379/06, 16 June 2009):

> "a person may not claim to be a victim of a violation of his right to a fair trial under Article 6 of the Convention which, according to him, occurred in the course of proceedings in which he was acquitted or which were discontinued (see *Osmanov and Husseinov v. Bulgaria* (dec.), nos. 54178/00 and 59901/00, 4 September 2003)."

This principle particularly concerns the grievance that the decision-making body was not a "tribunal" fulfilling the criteria of Article 6 (see

Bülbül v. Turkey, no. 47297/99, 22 May 2007). Furthermore, if an applicant contends under Article 6 of the Convention that he has not been tried by an independent and impartial tribunal, whereas the criminal proceedings against him are still pending, the complaint is considered premature (see *Güngörmez v. Turkey* (dec.), 38734/04, § 2, 15 September 2009). The dismissal of charges against an applicant deprives him or her of victim status for the alleged breaches of Article 6 rights (see *Batmaz v. Turkey*, no. 714/08, § 36, 18 February 2014, and *Pütün v. Turkey* (dec.), no. 31734/96, ECHR 2004-XII (extracts)).

The Court has recently explained its approach in this respect in the following terms (see *Webster v. the United Kingdom* (dec.), no. 32479/16, §§ 28-29, 24 March 2020):

> "28. According to the Court's and the Commission's settled case-law, a person may not claim to be a victim of a breach of his or her right to a fair trial under Article 6 that allegedly took place in the course of proceedings in which he or she was acquitted or which were discontinued (see, among other authorities *Flor Lemos v. Portugal,* no. 15729/15, § 23, 18 October 2018; *Blagoy v. Ukraine*, no. 18949/04, § 30, 15 October 2013; *Lenev v. Bulgaria*, no. 41452/07, § 157, 4 December 2012, and *Üstün v. Turkey*, no. 37685/02, § 24, 10 May 2007 with further references). In the Court's view, this provision applies because a criminal defendant cannot claim to be a victim of a violation of Article 6 before he or she is finally convicted (see *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 77, 2 November 2010, which concerned review proceedings following the applicant's conviction on appeal).
>
> 29. Acquiring and losing victim status are not governed by the same rules. If an applicant is finally convicted in proceedings which breached Article 6 and therefore acquires victim status, it is then for the State to provide him or her with adequate and sufficient redress in respect of that complaint in a timely manner (see *Sakhnovskiy*, cited above, § 78, and *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 180-182, ECHR 2006-V). The Court would then assess whether those subsequent proceedings deprived the applicant of victim status because he or she had been provided sufficient redress (see *Sakhnovskiy*, cited above, § 83, *Khayrullin v. Russia* (dec.), no. 58272/09, 2 July 2019 and *Dzasokov v. Georgia*, § 22 (dec.), no. 70243/11, 19 March 2019)."

I also note in this context the view expressed by the Court in *Kart* (cited above, § 113), that the opening of criminal proceedings does not necessarily have a "fundamental irreversible detrimental effect on the parties".

4.2. The majority have expressed the following view concerning the victim status of the applicant under Article 6 in paragraph 271 (emphasis added):

> "In these circumstances and having regard to the deficiency of the legal solution in the 2022 Amending Act as established by the CPL, the resolution of 29 November 2022 cannot be regarded as an act redressing **all the adverse consequences** suffered by the applicant on account of **the Disciplinary Chamber's ruling of 18 November 2020**."

It is obvious that the resolution of 29 November 2022 cannot be regarded as an act redressing all the adverse consequences suffered by the applicant on account of the Disciplinary Chamber's ruling of 18 November 2020. One has to identify consequences relevant to the different Convention Articles

applicable in the instant case. Under Article 6, the question to be answered is not whether *all the adverse consequences suffered by the applicant have been redressed* but rather we have to look at the consequences relevant to the perspective of this specific provision.

4.3. I take note of the fact that the Supreme Court in its resolution of 29 November II ZIZ 4/22 expressly took into account the Court's case-law on victim status and sought to adopt a decision which would erase – to the largest possible extent – the detrimental consequences for the applicant of earlier unfavourable decisions.

One has also to restate in this context that a hypothetical restoration of criminal immunity would not necessarily entail the automatic discontinuance of the criminal proceedings.

4.4. Under the well-established case-law (mentioned above), where the criminal proceedings are still pending, the applicant has not acquired victim status under Article 6 and his complaint under this provision must be declared premature.

4.5. The fundamental question is whether the Court should have followed the well-established case-law in this respect. The majority decided tacitly not to follow this case-law. I have, myself, expressed reservations about the well-entrenched view that a final acquittal necessarily cures the unfairness of the previous stages of the proceedings (see my Partly Dissenting and Partly Concurring Opinion appended to the judgment in the case of *Haarde v. Iceland*, no. 66847/12, 23 November 2017). It may or it may not, depending upon the nature of the unfairness and the circumstances of the case. The issue requires a thorough reconsideration by the Grand Chamber.

However, be that as it may, I consider that the complaint under the criminal limb of Article 6 is in any event inadmissible, because this provision does not require that the decision to authorise the presentation of charges has to be taken by a judicial body.

5. The question of applicability of Article 8

5.1. The instant case raises the question whether Article 8 is applicable to the actions of the State authorities that are complained of.

I note in this context that the Court has constantly refused in the past to apply Article 8 for the purpose of assessing the admissibility of criminal prosecution and has adopted the following approach in this respect (see *International Bank for Commerce and Development Ad and Others*, cited above, § 129):

> "Nor can a general right not to be criminally prosecuted be derived from Article 8 of the Convention. The appropriateness of a decision to prosecute thus normally falls out of the scope of the Court's review (see *Patsuria v. Georgia*, no. 30779/04, § 42, 6 November 2007, and *Mustafa (Abu Hamza) v. the United Kingdom* (dec.), no. 31411/07, § 34, 18 January 2011)."

I refer also in particular to the following case-law: *I.J.L. and Others v. the United Kingdom*, nos. 29522/95 and 2 others, § 101, ECHR 2000-IX; *Merabishvili v. Georgia* [GC], no. 72508/13, § 320, 28 November 2017; and *Gough v. the United Kingdom* (dec.) 2153/15, § 62, 12 June 2018).

On the other hand, in *Denisov v. Ukraine* [GC], no. 76639/11, § 121, 25 September 2018, the Court adopted a different approach in the context of disciplinary liability, invoking in particular an *obiter dictum* in *Gillberg v. Sweden* ([GC], no. 41723/06, § 70, 3 April 2012). In the instant case the Court, citing *Denisov,* decided to abandon the previous approach in respect of criminal liability and to interpret Article 8 as a guarantee against arbitrary prosecution.

5.2. The Court has recently examined the issue of applicability of Article 8 to measures affecting judges in the case of *Juszczyszyn v. Poland*, no. 35599/20, 6 October 2022. I refer in this context to the views that Judge Paczolay and I expressed in the Joint Partly Concurring, Partly Dissenting Opinion appended to that judgment, where we voiced our objections to the extensive application of Article 8, departing from the restrictive approach adopted in *Denisov* (cited above).

The circumstances of the present case are different from the circumstances in *Juszczyszyn* (cited above). In particular, the opening of criminal proceedings necessarily impacts upon the person concerned. However, in my view, despite all the differences, Article 8 is not applicable in the present case either.

In any event, it is not necessary to assess separately the interference from the viewpoint of Article 8 if the same legal problems have been apprehended from the perspective of Article 10.

6. *Nullum crimen sine lege*

6.1. The Court has rightly identified as one of most important problems in the instant case the fact that the interference with freedom of expression, protected by Article 10, was not foreseeable. The most important element of this interference (the lifting of the criminal law immunity) falls within the scope of criminal law. The gist of the applicant's grievance concerns therefore the principle *nullum crimen sine lege*, as enshrined in Article 7.

Initially the case-law considered that Article 7 was not applicable to ongoing criminal proceedings (see *Lukanov v. Bulgaria*, 20 March 1997, *Reports of Judgments and Decisions* 1997-II). Subsequently, the Court broadened the scope of application of this provision, stating the following (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 77, ECHR 2013, emphasis added):

> "It should be construed and applied, as follows from its object and purpose, in such a way as to provide **effective safeguards against arbitrary prosecution,** conviction and punishment (see *S.W. v. the United Kingdom*, 22 November 1995, § 34, Series A

no. 335-B; *C.R. v. the United Kingdom*, 22 November 1995, § 32, Series A no. 335-C; and *Kafkaris*, cited above, § 137)."

It would make no sense to exclude conviction for an act or omission but to allow prosecution for the same act or omission, if it is clear from the outset that the charges themselves are incompatible with the principle *nullum crimen sine lege*. Article 7 should be understood as excluding not only conviction but also prosecution for any act or omission which did not constitute a criminal offence at the time when it was committed. Obviously, the assessment of the indictment from the perspective of Article 7 may require more flexible standards than the assessment of the final conviction.

6.2. I note that the majority do not completely overlook Article 7 in the context of Article 8 (see paragraph 446), but in my view more prominence should be given to Article 7 in the assessment of the interference with freedom of expression (under Article 10). In our joint dissenting opinion appended to the judgment in the case of *Sanchez v. France* ([GC], no. 45581/15, 15 May 2023), Judge Zünd and I explained that for the purpose of assessing a criminal law interference with freedom of expression, Article 10 has to be read in conjunction with Article 7.

Given the specific circumstances of the case, instead of relying separately on Article 8 and Article 10 in the assessment of the same problem, it would have been preferable to address the relevant issues under Article 10 read in the light of Article 7. The Court could also have decided to reclassify the applicant's complaints as being under Article 7 taken alone. The main guarantee against arbitrary and unforeseeable prosecution should be seen in Article 7 not in Article 8.

7. Conclusion

To sum up, the majority have departed from the well-established case-law on the issue of admissibility of an application under Article 6 and have continued to expand the applicability of Article 8 well beyond the narrow limits set forth in *Denisov v. Ukraine* (cited above). The present judgment is based upon the implicit assumption that the presentation of charges is an important procedural act in criminal proceedings which requires, already at this stage, the involvement of a tribunal within the meaning of Article 6. If the case-law keeps going down this road, it will trigger major legal reforms in many States. At the same time, given the lack of sufficiently precise reasoning in this respect, it is difficult to identify, at present, not only the applicable general principles, with *erga omnes* effect for all the High Contracting parties, but also the specific legal provisions of the domestic legal system of the respondent State which will have to be adapted.