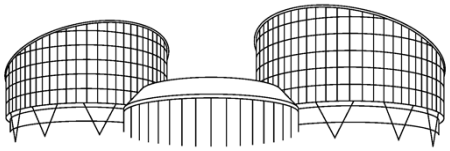

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF WAŁĘSA v. POLAND

(Application no. 50849/21)

JUDGMENT

Art 6 § 1 (civil) • Tribunal established by law • Independent and Impartial tribunal • Reversal by Supreme Court's Chamber of Extraordinary Review and Public Affairs (CERPA) of final civil defamation judgment given in applicant's favour taken ten years earlier, following Prosecutor General's extraordinary appeal on defendant's behalf • Finding of a violation based on reasons in *Dolińska-Ficek and Ozimek v. Poland* in the light of the three-step test formulated in *Guðmundur Andri Ástráðsson v. Iceland* [GC] • Manifest breaches in appointment of judges to CERPA following legislative reform • Exclusive competence of CERPA in matters involving a plea of lack of independence on the part of a judge or a court. including where motion directly against them, in breach of the fundamental principle *nemo iudex in causa sua* • CERPA having uncircumscribed power in all matters concerning the Polish judiciary's independence

Art 6 § 1 (civil) • Fair hearing • Extraordinary appeal procedure incompatible with principle of legal certainty • Lack of foreseeability of relevant legal provisions • Unfettered discretion afforded to authorities and bodies involved in interpreting extraordinary appeal grounds • Exceptionally extended and retrospectively applied time-limits to contest, over a considerable period of time, judgments in civil cases closed over twenty years before legislation took effect • Lack of sufficient safeguards against a possible abuse of process and the instrumentalising of the extraordinary appeal procedure • Exclusive competence of CERPA, a body lacking the attributes of an "independent and impartial tribunal established by law", to deal with extraordinary appeals • Procedure used as an "ordinary appeal in disguise" resulting in a fresh examination of a finally determined case • Abuse of the procedure in the present case by the State authority in pursuance of its own political opinions and motives • No circumstances of a substantial and compelling nature justifying the departure from the *res judicata* principle

Art 8 • Reversing of final judgment by the CERPA adversely affected the applicant's private life to a significant degree • Breach of "in accordance with the law" requirement deriving from Art 6 § 1 violations

Art 46 • Pilot-judgment • Violations originating in interrelated systemic problems connected with the malfunctioning of domestic legislation and practice • Continued increase in applications against the respondent State stemming from the Polish judicial reform • Respondent State required to take rapid and adequate legislative and other measures to secure in its domestic legal order compliance with requirements of an "independent and impartial tribunal established by law" and the principle of legal certainty • Detailed general measures indicated by the Court

STRASBOURG

23 November 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.

In the case of Wałęsa v. Poland,

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

Marko Bošnjak*, President*,
Alena Poláčková,
Ivana Jelić,
Gilberto Felici,
Erik Wennerström
Raffaele Sabato, *judges,*
Ioannis Ktistakis*, ad hoc judge*,

and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 50849/21) 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 Lech Wałęsa ("the applicant"), on 5 October 2021;

the decision to give notice to the Polish Government ("the Government") of the application;

the decision of the President of the Section to appoint Judge Ioannis Ktistakis to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 2 (b) of the Rules of Court), Mr K. Wojtyczek, the judge elected in respect of Poland, having withdrawn from sitting in the case (Rule 28 § 3);

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

the comments submitted by the third-party interveners, the Helsinki Foundation for Human Rights, the Commissioner for Human Rights of the Republic of Poland and the Polish Judges' Association Iustitia, who were granted leave to intervene by the President of the Section;

Having deliberated in private on 14 November 2023,

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

INTRODUCTION

1. The case concerns proceedings in which, following the Prosecutor General's extraordinary appeal lodged in the applicant's defamation case, the Chamber of Extraordinary Review and Public Affairs of the Supreme Court reversed the final civil-court judgment which had been given in the applicant's favour over ten years earlier. It raises issues under Articles 6 § 1, 8 and 18 of the Convention.

LEGAL CONTEXT OF THE CASE

2. The legal aspects of the case are connected with the so-called "reform of the judiciary" in Poland which was initiated in 2017 and has been implemented by successive amending laws.

The broader domestic legal background to the present case and international material relevant for the Polish reform of the judiciary were set out in the Court's judgments in *Reczkowicz v. Poland* (no. 43447/19, §§ 4-53, 22 July 2021), *Dolińska-Ficek and Ozimek v. Poland* (nos. 49868/19 and 57511/19, 8 November 2021), *Advance Pharma sp. z o.o. v. Poland* (no. 1469/20, §§ 4-78 and 95-225, 3 February 2022), and *Grzęda v. Poland* ([GC], no. 43572/18, §§ 14-28, 15 March 2022).

3. The present case mainly concerns the operation of the Amending Act of 12 July 2017 on the National Council of the Judiciary and certain other statutes (*Ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw* – "the 2017 Amending Act"), which modified the procedure for the election of members of the National Council of the Judiciary ("NCJ"), a body responsible for recommending judges of ordinary courts, the Supreme Court, the Supreme Administrative Court, administrative courts, and military courts for appointment by the President of Poland and the Act of 8 December 2017 on the Supreme Court (*ustawa o Sądzie Najwyższym* – "the 2017 Act on the Supreme Court"), which established two new chambers of the Supreme Court – the Disciplinary Chamber (*Izba Dyscyplinarna*) and the Chamber of Extraordinary Review and Public Affairs (*Izba Kontroli Nadzwyczajnej i Spraw Publicznych*) – and introduced an extraordinary appeal (*skarga nadzwyczajna*) into the Polish legal system.

4. The Court has dealt with the operation of the 2017 Amending Act and the recomposed NCJ, including its involvement in the procedure of judicial appointments, in the cases of *Reczkowicz*, *Dolińska-Ficek and Ozimek, Advance Pharma sp. z o.o.*, *Grzęda* (all cited above), *Żurek v. Poland*, no. 39650/18, 16 June 2022; *Juszczyszyn v. Poland*, no. 35599/20, 6 October 2022; and *Tuleya v. Poland*, nos. 21181/19 and 51751/20, 6 July 2023).

In *Dolińska-Ficek and Ozimek* (see §§ 353-354) the Court found a violation of the applicants' right to an independent and impartial tribunal established by law under Article 6 § 1 of the Convention on account of the inherently deficient procedure for the appointment of judges of the Chamber of Extraordinary Review and Public Affairs.

According to official statistics published on the President of Poland's website[1], between 6 April 2018 (when the recomposed NCJ started its work) and 17 October 2023 the President appointed 2,006 judges to ordinary courts, 58 judges to the Supreme Court, 31 judges to the Supreme Administrative

[1] https://www.prezydent.pl

Court and 115 judges to regional administrative courts. The last 72 letters of appointment were handed down on 17 October 2023.

THE FACTS

5. The applicant was born in 1943 and lives in Gdańsk. In the proceedings before the Court he was represented by Ms K. Warecka, a lawyer practising in Gdańsk.

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

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

I. BACKGROUND TO THE CASE

8. The applicant is the former leader of the "Solidarity" (*Solidarność*) trade union, former President of Poland (from 1990 to 1995) and laureate of the 1983 Nobel Peace Prize.

9. In 2000 the applicant was a candidate in the presidential elections. Candidates were required by law to make the so-called "lustration declaration" (*oświadczenie lustracyjne*) under the Act of 11 April 1997 on disclosing work for or service in the State's security services or collaboration with them between 1944 and 1990 by persons performing public duties (*ustawa o ujawnieniu pracy lub służby w organach bezpieczeństwa państwa lub współpracy z nimi w latach 1944-1990 osób pełniących funkcje publiczne*). On an unspecified date the applicant made a declaration stating that he had not collaborated with the communist security services.

10. On 12 July 2000 the Warsaw Court of Appeal (*Sąd Apelacyjny*) *ex proprio motu* initiated a "lustration" (vetting) procedure (*postępowanie lustracyjne*) concerning the applicant. In the course of the proceedings evidence was taken from the material submitted by the Office for State Protection (*Urząd Ochrony Państwa*) as well as from witnesses.

11. In a judgment of 11 August 2000 the Warsaw Court of Appeal held that the applicant had filed a true lustration declaration. It concluded that it was not possible to establish with certainty whether the records of the former Security Service (*Służba Bezpieczeństwa*) relating to the secret collaborator "*Bolek*" (allegedly a codename for the applicant) were authentic and made at the material time or fabricated much later for the purpose of discrediting the applicant. For those reasons, the court held that, in the absence of any evidence of the applicant's alleged collaboration with the former Security Service, it should be concluded that he had submitted a true lustration declaration.

12. Despite that judgment, the question of the applicant's alleged collaboration has reverberated in some discussions in political and media circles, attracting at times a considerable interest of the public in the matter.

Over the years, many press articles and books have been published and historians have taken part in the discussions. Public opinion has been divided.

13. The strongest, most vocal and categoric public statements that the applicant was a secret collaborator have come from the circles of members and supporters of the Law and Justice party (hereafter also referred to as "PiS") led by Jarosław Kaczyński, from Mr Jarosław Kaczyński himself (the party's president since 2003; Prime Minister in 2006-2007; Deputy Prime Minister from 6 October 2020 to 17 June 2022 and then again Deputy Prime Minister since 21 June 2023 till present), his now late brother Lech Kaczyński, former President of Poland in 2005-2010 and Mr Zbigniew Ziobro (member of Parliament since 2005, Minister of Justice and Prosecutor General from October 2005 to November 2007; Minister of Justice since November 2015 and since February 2016 Minister of Justice and Prosecutor General, member of PiS in 2001-2011; since 2012 the leader of the party first named Solidarity Poland and currently Sovereign Poland, forming the United Right alliance with PiS from 2014).

In 1990-1991 Mr Jarosław Kaczyński served as the Chief of Chancellery of the President of Poland during the applicant's term in that office. He was dismissed by Mr Wałęsa. In January 1993 he was one of the organisers of the so-called "March on Belweder[2]", demanding that Mr Wałęsa step down. At the beginning of 1993 his former political party initiated the movement whose aim was to remove the applicant from his office.

Mr Krzysztof Wyszkowski, connected with the PiS party and the Kaczyński brothers, and a member of the party since 2010, had consistently supported the view that the applicant was a secret collaborator of the communist Security Service.

14. On 9 June 2005 the TVN 24 station broadcast a programme featuring, among other participants, the applicant and Mr Wyszkowski. During this programme, it was discussed whether the applicant should be granted victim status (*osoba pokrzywdzona*) by the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (*Instytut Pamięci Narodowej – Komisja Ścigania Zbrodni przeciwko Narodowi Polskiemu*, "the IPN"). Mr Wyszkowski took the view that the IPN should refuse to grant the applicant victim status on the ground that he had been a secret collaborator of the Security Service before he had been persecuted.

15. On 16 November 2005 the IPN granted the applicant victim status under section 6 of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (*ustawa o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu*). Under section 6(1) a victim within the meaning of that act was a "person in respect of whom organs of the secret service collected information on the basis of purposefully gathered data,

[2] Belweder Palace is one of the official residences used by the Polish presidents.

including in a secret manner". Under section 6(3), a "person who subsequently became an officer, employee or collaborator of the secret service" was not a "victim" for the purposes of the act. The IPN issued the applicant with certificate no. 1763/05, thus confirming that as a victim he had not been a collaborator of the communist State security organs. This fact was widely reported by the media.

16. In the evening of the same day, the news programmes of two television stations, TVP II and TVN 24, reported this information. The journalists sought comments from Mr Krzysztof Wyszkowski, as a former friend and associate of the applicant. Mr Wyszkowski stated, among other things, that "... today the victim status does not mean that you were not an informant. Lech Wałęsa was a secret collaborator with the alias *Bolek*, (he) reported on his colleagues, (he) received money for it ...".

II. PROCEEDINGS FOR DEFAMATION LODGED BY THE APPLICANT

17. On 23 November 2005 the applicant lodged a civil claim with the Gdańsk Regional Court (*Sąd Okręgowy*) against Mr Wyszkowski for infringement of his personality rights. He claimed that the defendant had disseminated untrue information about him and damaged his reputation. The applicant demanded that the defendant publish an apology on television stations TVP II and TVN 24, which was to be formulated as follows:

> "On 16 November 2005 at TVP's Programme II and TVN's Fakty, I stated that the applicant had collaborated with the Security Service in the 1970s and had received money in return, a statement which was manifestly untruthful, thereby undermining the reputation and personal dignity of [the applicant], and I therefore do retract [this statement] in its entirety and apologise to Lech Wałęsa for infringing his personality rights."

The applicant also sought an order requiring the defendant to make a payment of 40,000 Polish zlotys (PLN) to the Gdańsk Children's Hospital for the purchase of a new X-ray unit as compensation for non-pecuniary damage caused by his defamatory statement.

18. On 30 January 2006 the Gdańsk Regional Court gave judgment, ordering Mr Wyszkowski to publish an apology and to pay PLN 10,000 in compensation. On 25 October 2006 this judgment was set aside by the Gdańsk Court of Appeal (*Sąd Apelacyjny*) and the case was remitted to the Gdańsk Regional Court. In the reasoning of its decision, the Court of Appeal stated, among other things, that the defendant had been prevented from initiating evidence-taking proceedings before the court of first instance even though he had wished to do so.

19. By a judgment of 5 March 2007 the Gdańsk Regional Court ordered Mr Wyszkowski to publish, at his own expense, the apology in the manner specified by the applicant. In addition, the court ordered the defendant to pay

PLN 40,000 to the Children's Hospital in Gdańsk. On 23 October 2007, following the defendant's appeal, the Gdańsk Court of Appeal set aside the impugned judgment, annulled the proceedings before the Gdańsk Regional Court as from the hearing held on 5 March 2007, and remitted the case to that court.

20. On 31 August 2010 the Regional Court gave judgment and dismissed the claim.

It observed that the possibility of examining and discussing the existence of a historical fact, namely the applicant's alleged collaboration with the Security Service, could not be entirely ruled out. Nor, in the court's view, was it possible to prohibit, particularly journalists, from speaking out about the existence of a particular historical fact on the basis of reliable reports from sound historical studies. According to the court, the discussion on the applicant's alleged collaboration had not ensued as a result of Mr Wyszkowski's statement but, on the contrary, his statement was merely part of a wide-ranging, long-standing discussion on that subject. The court noted that the defendant, as an established journalist who had been collecting, analysing and publishing results of historical research and data on the subject, had the right to have his voice heard in that discussion, and that the applicant, as a public figure, had to expect that the entire period of his activity would be probed and that the result of such probing would be a subject of public debate.

In support of its conclusions, the court cited the Court's case-law on freedom of expression, the role of public debate and journalists, and the limits of permissible criticism of politicians. The court also said that the fact that a journalist observed the requisite diligence and acted in good faith was a circumstance which rendered his conduct justified, i.e. not unlawful, without it being necessary for the journalist to demonstrate that accusations made by him were true. Therefore, it was not for the defendant to prove indisputably that his journalistic statement was true but to demonstrate that he, as a journalist, had displayed the requisite diligence in researching and checking information and had obtained it from reliable sources. According to the court, the defendant had satisfied that condition and the action brought by the claimant (the present applicant) therefore had to be dismissed.

21. On 24 March 2011 the Gdańsk Court of Appeal, on the applicant's appeal, amended the Regional Court's judgment. The court ordered Mr Wyszkowski to publish an apology to the applicant on the television stations TVP II and TVN 24. It dismissed the remainder of the applicant's appeal regarding pecuniary claims.

The Court of Appeal held that the defendant had not proved the accuracy of his claims that the applicant had collaborated with the Security Service. In the court's view, the allegations made by the defendant against the applicant should have been based on accurate facts and verified evidence, in which case the applicant could not have claimed protection because, as a public figure, he had to withstand public criticism of his conduct. Consequently, the

veracity of the accusations concerning the past collaboration with the Security Service, in the court's view, should have been proved by Mr Wyszkowski.

The Court of Appeal concurred with the view expressed by the Supreme Court in the reasoning of its judgment of 10 September 2009 in case no. V CSK 64/09, according to which the veracity of factual allegations was a necessary element for excluding the unlawfulness of conduct that infringed personality rights. Unlawfulness was not removed by merely displaying the requisite diligence in verifying and using the data on which an accusation was based. Neither was it sufficient, in order to exclude the unlawfulness of a false statement which violated the personality rights of another person, for its author to believe that – in exercising his or her constitutionally guaranteed freedom of expression – he or she was acting in the defence of a socially legitimate interest. In the opinion of the Gdańsk Court of Appeal – and contrary to the view taken by the Regional Court – when formulating his allegation of the applicant's past secret collaboration, the defendant had not acted as a journalist publishing material but as an ordinary citizen asked to comment on the applicant's having been granted victim status by the IPN. The defendant's statement had been quoted for an ordinary purpose and introduced as such by the author and journalist of the television programme. The defendant had been asked to comment as one of the applicant's main opponents and his former associate, as was noted in the broadcast (see also paragraph 16 above). Therefore, it was not possible to apply the provisions of the Press Act (*ustawa prawo prasowe*) to protect the defendant's statements or, as the Regional Court had done, to seek justification for the uncompromising claims which violated the applicant's personality rights. In the court's view, the defendant had failed to prove that he was an active journalist at that time.

22. On 30 November 2011 the Supreme Court refused to entertain a cassation appeal (*skarga kasacyjna*) lodged by Mr Wyszkowski for a lack of adequate grounds.

23. The above proceedings and their outcome were the object of an application (no. 34282/12) lodged by Mr Wyszkowski with the Court on 8 May 2012 and of which notice was given to the Government on 11 March 2019 under Article 10 of the Convention[3]. That case, following the Government's unilateral declaration was struck out of the Court's list on 1 July 2021[4] (for further details see paragraphs 45-46 below).

24. On 21 March 2017 Mr Wyszkowski lodged a request with the Gdańsk Court of Appeal, seeking to have the terminated proceedings reopened on account of newly discovered evidence which allegedly proved his statements

[3] A detailed description of the proceedings up to that stage can be found in the statement of facts in the case of *Wyszkowski v. Poland* (communication of 11 March 2019), no. 34282/12, §§ 2-33, https://hudoc.echr.coe.int/eng?i=001-192357.

[4] See *Wyszkowski v. Poland* (Committee decision), no. 34282/12, 1 July 2021, https://hudoc.echr.coe.int/eng?i=001-211514 .

on the applicant's collaboration with the communist security services (secret files kept by the last communist Prime Minister of Poland which were obtained by the IPN during the search of his house after his death).

25. On 27 June 2017 the Gdańsk Court of Appeal rejected that request as lodged outside the relevant time-limit. On 30 November 2017 the Supreme Court dismissed Mr Wyszkowski's interlocutory appeal against that ruling.

26. Mr Wyszkowski, who apparently shortly after the final judgment appealed to the public for financial support to cover the costs of publication of the apology, eventually refused to publish it as ordered. The applicant published the apology on his own, by way of substitute performance. Ultimately, the TVN television station, which aired the apology, reimbursed the applicant the costs of the publication, which amounted to PLN 24,000 (approximately EUR 5,200).

III. INTRODUCTION OF AN EXTRAORDINARY APPEAL UNDER THE 2017 ACT ON THE SUPREME COURT

27. On 8 December 2017 the *Sejm* enacted a new Act of 8 December 2017 on the Supreme Court ("the 2017 Act on the Supreme Court") creating two new Chambers: the Disciplinary Chamber and the Chamber of Extraordinary Review and Public Affairs. The latter Chamber became competent to examine extraordinary appeals – a new type of appeal, also introduced into the Polish legal system under the 2017 Act on the Supreme Court (see paragraph 69 below; see also *Dolińska-Ficek and Ozimek*, cited above, §§ 23, 25, 89 and 91, 8 November 2021). The 2017 Act on the Supreme Court entered into force on 3 April 2018.

IV. THE PROSECUTOR GENERAL'S EXTRAORDINARY APPEAL AND PROCEEDINGS BEFORE THE CHAMBER OF EXTRAORDINARY REVIEW AND PUBLIC AFFAIRS OF THE SUPREME COURT (CASE NO. I NSNC 89/20)

28. On 31 January 2020 the Prosecutor General, Mr Zbigniew Ziobro, lodged an extraordinary appeal against the judgment of the Gdańsk Court of Appeal of 24 March 2011.

29. Relying on section 89(1) and (2) in conjunction with section 115(1) and (1a) of the 2017 Act on the Supreme Court, the Prosecutor General submitted that the lodging of the extraordinary appeal was necessary in order to ensure compliance with the principle of a democratic State governed by the rule of law and implementing the principles of social justice (Article 2 of the Constitution), which must protect freedom of expression and freedom of press.

30. The Prosecutor General argued that the impugned judgment had breached the principles, freedoms and rights of every human being and citizen

as enshrined in Articles 31 § 3 and 54 of the Constitution by infringing the principle of proportionality and protecting the applicant's reputation at the expense of Mr Wyszkowski's freedom of expression. The Prosecutor General also submitted, relying on the jurisprudence of the Constitutional Court, the Supreme Court and this Court, that the impugned judgment had breached the constitutional freedom of speech (*wolność słowa*) and flagrantly violated Article 10 of the Convention in conjunction with Article 54 of the Constitution and Articles 23 and 24 § 1 of the Civil Code by not concluding that Mr Wyszkowski's statements had been made within the boundaries of his freedom of expression. The Court of Appeal had not properly balanced, on the one hand, the constitutional protection of freedom of speech and, on the other, the protection of reputation and honour, unjustifiably giving primacy to the protection of private life. The Prosecutor General further argued that the Gdańsk Court of Appeal had erred in making factual findings and evaluating evidence submitted by Mr Wyszkowski, which – according to the Prosecutor General – had proved the truthfulness of the defendant's statements concerning the applicant's collaboration with the communist security services. Finally, he questioned the Court of Appeal's conclusion that Mr Wyszkowski had not been acting as a journalist, stressing that the defendant had in the past – and subsequently – published in *Gazeta Polska* and, given the economic reality, his journalistic activity had not always been a paid job.

31. Pursuant to section 91(1) of the 2017 Act on the Supreme Court, the Prosecutor General requested the Supreme Court to reverse the impugned judgment, in so far as it ordered Mr Wyszkowski to apologise to the applicant, and to rule on the merits of the case by dismissing the applicant's claim and making an award concerning the costs of the proceedings.

32. The applicant submitted that he had been served with the Prosecutor General's extraordinary appeal only on 23 June 2020 and had been required to present his arguments in reply within two weeks. In his reply, he had rebutted the Prosecutor General's arguments by contesting the constitutionality of the extraordinary appeal which, in his submission, was in breach of the rule of law and arguing that reconsideration of the case ten years after it had been finally concluded would be a violation of his right to a fair hearing and the principle of legal certainty. He stressed that the time-limit of two weeks for presenting his reply to the appeal was overly short and in breach of the principle of equality of arms. Furthermore, the new legal provisions concerning extraordinary appeals had been introduced in a political context and lacked any legal justification.

33. The applicant also pointed to the "logical impossibility" of granting the relief sought by the appeal: the Prosecutor General sought to have the final judgment quashed in the part ordering the apology whereas, in his view, the effects of an apology already published could not be made null and void.

He also argued that allowing the extraordinary appeal would constitute an unlawful interference with his right to respect for his private life.

34. On 19 April 2021 the applicant requested that seventeen judges currently sitting in the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, starting with its president, Judge Joanna Lemańska, and including Judges Aleksander Stępkowski, assigned as rapporteur to his case, and Paweł Księżak (who was subsequently to deal with the applicant's request for exclusion – see paragraph 35 below), be excluded from the examination of the Prosecutor General's extraordinary appeal in his case. The applicant submitted that the procedure for appointment of all these judges to the Supreme Court raised serious doubts from the point of view of the rule of law, especially as they had been recommended for appointment by the reformed NCJ, which had been constituted in a deficient procedure under the 2017 Amending Act. Several cases were already pending before the Court where the legality of the Disciplinary Chamber and the Chamber of Extraordinary Review and Public Affairs was being examined. This should result in suspending the operation of those bodies. Furthermore, the procedure of appointment to those chambers had been widely criticised by various institutions, including the Venice Commission, the European Commission and the Court of Justice of the European Union (CJEU). The Supreme Court had expressed its doubts as to whether a person appointed in the procedure involving the defectively elected NCJ could be considered an "independent and impartial tribunal" in a request for a preliminary ruling to the CJEU. There were therefore serious doubts regarding the independence and impartiality of Judge Stępkowski, as it was his status as judge which was the object of pending proceedings before the CJEU following the above request for a preliminary ruling (*W.Ż.*, case no. C-487/19; see *Dolińska-Ficek and Ozimek*, cited above, §§ 131-136 and 201-203). The applicant said that he was "outraged" (*zbulwersowany*) by the fact that Judge Stępkowski was sitting in his case. In that regard, he also referred to that judge's past, pre-appointment activities, including co-founding and leading "Ordo Iuris" in Poland, a non-governmental organisation which – according to the applicant – was promoting an extreme and fundamentalist programme, arousing strong opposition from wide social circles; these activities demonstrated views adversely affecting his impartiality. All this, in his submission, should disqualify Judge Stępkowski from dealing with his case.

35. On 21 April 2021 the applicant's request for the exclusion of the judges was dismissed in so far as it concerned Judge Stępkowski and the remainder was rejected. The decision was issued by the Chamber of Extraordinary Review and Public Affairs sitting in a single-judge formation (Judge Księżak). No written reasons were provided. The decision is available on the Supreme Court's website.

36. On the same day the Chamber of Extraordinary Review and Public Affairs reversed the judgment of the Gdańsk Court of Appeal of 24 March

2011 and dismissed the applicant's appeal against the first-instance judgment in so far as the Court of Appeal had allowed his claim. The bench was composed of Judges Marcin Łochowski (president), Aleksander Stępkowski (rapporteur) and lay judge (*ławnik*) Marek Sławomir Molczyk. The full text of the judgment is available on the Supreme Court's website.

37. The Chamber of Extraordinary Review and Public Affairs began its written statement of reasons by summarising the rationale behind the extraordinary appeal. Referring to the Supreme Court's jurisprudence and the Court's case-law (in particular, *Brumărescu v. Romania* [GC], no. 28342/95, § 62, ECHR 1999-VII; *Ryabykh v. Russia*, no. 52854/99, § 52, ECHR 2003-IX; and *Sutyazhnik v. Russia*, no. 8269/02, § 38, 23 July 2009), it explained that the basis for an extraordinary appeal was compatible with international standards of human rights protection and that the mechanism was aimed at rectifying mistakes that could be considered of fundamental importance for the administration of justice. Furthermore, the distinct legal basis of the extraordinary appeal, the time-limit for lodging it and additional safeguards laid down in section 89 (3) and (4) of the 2017 Act on the Supreme Court (see paragraph 69 below) ensured its compliance with the standards developed by the Court.

38. The chamber then assessed the admissibility of the appeal, characterised the arguments raised by the Prosecutor General (some of which it considered incorrectly formulated) and recapitulated the facts. Referring to the proceedings conducted before the lower courts, it held that the Gdańsk Court of Appeal could have ordered Mr Wyszkowski, at most, to publish a statement about the fact that he had not proved his allegations concerning the applicant's past, whereas it had actually ordered him to state that they were false. As such, according to the court, the judgment of the Gdańsk Court of Appeal had entailed a flagrant disregard for the constitutional freedom of speech and constituted a flagrant breach of Article 54 of the Constitution.

39. Referring extensively to the Court's jurisprudence under Articles 8 and 10 of the Convention, the chamber concluded that the latter provision had been flagrantly violated. It explained that Mr Wyszkowski should have been considered a "public watchdog" and that there had been no pressing social need to limit his freedom of expression, considering that his statement concerned the applicant – a public figure. In its view, the Court of Appeal had formalistically limited the notion of "journalist" to that defined in the Press Act and, as a result, had not excluded the unlawfulness of the defendant's acts, thus refusing him the protection accorded to journalists who fulfilled a duty of particular diligence in collecting materials for their statements and publications. Furthermore, the sanction imposed on the defendant was disproportionate.

40. The chamber considered it significant that the defendant's statements did not strictly concern the private sphere of the applicant's life but his relations with the special services of the totalitarian State. As these services

had been responsible for systematic violations of human rights, the collaboration with an organisation of this kind inevitably led to an unambiguous moral assessment, which was undoubtedly extremely damaging to the honour and good name of the person accused of such collaboration. However, this unequivocally negative assessment in respect of public figures, in particular those holding a high public office, called especially for disclosure and, justifiably, was the object of keen interest to the public and the media.

Accordingly, the applicant's private life warranted a weaker degree of protection on account of his status as a public figure.

41. Referring to the Court's case-law on Article 10 of the Convention, the chamber held that the defendant's statements could not be considered in the context of a violation of Article 8 of the Convention. The statements, apart from being unrelated to the applicant's private life or its more intimate aspects, concerned one of the key topics of public debate in Poland after 1989. Consequently, there was no basis for considering the issue of the infringement of the applicant's reputation under Article 8. It could only be considered from the point of view of the limitations referred to in Article 10 § 2 of the Convention, which had to be interpreted strictly.

42. The chamber concluded that the severity of the violation of Article 10 of the Convention had been more far-reaching than the breach of Article 54 of the Constitution as the sanctions imposed on the defendant had been severe, whereas his statements had warranted special protection under Article 10. For that reason, Article 10 of the Convention had been flagrantly violated.

43. In the subsequent part of the judgment, the chamber dismissed the Prosecutor's General arguments regarding the allegedly incorrect assessment of evidence and errors in factual findings.

44. Lastly, the chamber considered that even though more than five years had elapsed since the judgment of the Gdańsk Court of Appeal had become final, in the light of the importance of public debate for a democratic State governed by the rule of law, the impugned judgment should be reversed and there was nothing which justified granting precedence to the principle of *res judicata*. The chamber noted that the proceedings in the case of Mr Wyszkowski (see paragraphs 45-46 below), concerning a violation of Article 10 of the Convention resulting from the impugned judgment, were currently pending before this Court. It considered that, in the light of its findings in the applicant's case, the outcome of the Court's proceedings seemed "fairly easy to predict". That being so, it was obvious that the reversal of that judgment was not only proportionate but also necessary to ensure compliance with the principle of a democratic State governed by the rule of law and implementing the principles of social justice.

V. RELATED PROCEEDINGS BEFORE THE COURT (APPLICATION NO. 34282/12 *WYSZKOWSKI V. POLAND*)

45. In his application of 8 May 2012 Mr Wyszkowski complained that judicial decisions in his case, in particular the judgment of the Gdańsk Court of Appeal of 24 March 2011, had violated Article 10 of the Convention. On 11 March 2019 the Court gave notice of the application to the Polish Government (see also paragraph 23 above). On 15 January 2021, after an unsuccessful attempt to reach a friendly settlement, the Government submitted a unilateral declaration.

46. On 1 July 2021 the Court struck the case of *Wyszkowski v. Poland* (no. 34282/12, [Committee decision]) out of its list of cases in accordance with Article 37 § 1 (c) of the Convention. It noted that the Government, in their declaration, had acknowledged a violation of Article 10 of the Convention regarding the interference with Mr Wyszkowski's freedom of expression and offered to pay him 20,000 Polish zloty, which would constitute the final resolution of the case.

Since none of the parties had informed the Court of the extraordinary appeal lodged by the Prosecutor General on Mr Wyszkowski's behalf (the appeal had been lodged around one year before submission of the unilateral declaration by the Government; see paragraph 28 above) or the judgment given by the Chamber of Extraordinary Review and Public Affairs on 21 April 2021, those developments were not referred to in the Court's strike-out decision.

VI. AFTER THE COURT'S STRIKE-OUT DECISION IN *WYSZKOWSKI*

47. On 16 September 2021 the Supreme Court published a press release entitled "European Court of Human Rights confirms the ruling of the Supreme Court", which stated that "the European Court of Human Rights in Strasbourg, in its recently published decision of 1 July 2021 found a violation of Article 10 of the [Convention] on account of the interference with the freedom of expression and ordered payment of compensation to the applicant". It said that "the judgment [*sic*] was given in connection with the Republic of Poland's unilateral declaration in which a violation of the [Convention] had been admitted".

It was further added that "this violation was found, on 21 April 2021, by the Supreme Court sitting as the Chamber of the Extraordinary Review and Public Affairs which, after examining case no. I NSNc 89/20, allowed an extraordinary appeal lodged by the Prosecutor General against the judgment of the Gdańsk Court of Appeal of 24 March 2011, ordering the applicant to make apologies to the defendant for accusing him of cooperation with the [communist] Secret Service".

After notice of the present application had been given to the Government, the press release was amended and the word "judgment" was replaced by "decision".

VII. STATISTICAL INFORMATION CONCERNING OPERATION OF EXTRAORDINARY APPEALS IN 2018-2022 SUBMITTED BY THE GOVERNMENT

48. At the Court's request, the Government submitted a document describing the operation of extraordinary appeals from 3 April 2018 (the date of entry into force of the 2017 Act on the Supreme Court) to 30 November 2022. It stated that the total number of extraordinary appeals lodged with the Supreme Court during that period was 1,489, of which 801 were returned to lower courts for rectification of formal shortcomings of the case files (and thus were not examined on the merits). The Government explained that due to the method of recording statistics in the Supreme Court, the same extraordinary appeal could have been registered two or more times, under different case numbers.

Between 3 April 2018 and 30 November 2022, the Supreme Court examined 429 extraordinary appeals, of which 237 – roughly 55% – were either fully or partly allowed.

Out of those 429 examined extraordinary appeals, 348 have been lodged by the Prosecutor General (81%), of which 158 were allowed. The Chamber of Extraordinary Review and Public Affairs also examined 58 extraordinary appeals lodged by the Polish Commissioner for Human Rights (of which 37 were allowed) and 23 by other authorised bodies (of which 7 were allowed).

The Government produced two tables (in Polish) with a list of all extraordinary appeals lodged with the Supreme Court. The tables listed 1,460 cases (49 criminal and 1,411 civil) and included cases that had been returned without examination on the merits.

The vast majority of extraordinary appeals listed therein concerned civil claims (most often contractual disputes, compensation for tort, inheritance matters, land register entries, eviction and international child abduction). There were several extraordinary appeals concerning labour law disputes, pensions and social benefits. Criminal cases concerned various crimes (most often murder, theft, fraud, sexual abuse) and several requests for compensation for unlawful imprisonment.

In 234 cases (as mentioned above, roughly 55% of all those examined) the Supreme Court reversed the final ruling and either remitted the case to a lower-instance court or ruled on the merits of the case; 191 extraordinary appeals (roughly 45%) were either dismissed, rejected, disposed of at the outset or resulted in discontinuance of the proceedings. In three cases the Supreme Court limited itself to declaring that the final ruling had been delivered in violation of the law.

VIII. SELECTED MATERIAL SUBMITTED BY THE APPLICANT IN RELATION TO HIS COMPLAINT UNDER ARTICLE 18 OF THE CONVENTION

49. The applicant submitted material concerning some of his activities and his relations with the Law and Justice/PiS party, the Prosecutor General, Mr Ziobro, and the government formed in 2015-2023 by the United Right alliance, which can be summarised as follows.

50. On 23 December 2015 *The Guardian* published an article on the ongoing constitutional crisis in Poland entitled: "Poland: Lech Wałęsa warns against 'undemocratic' curbs on court" which, in its relevant part, reads:

> "Lech Wałęsa, the leader of Poland's 'Solidarity' movement in the 1980s, has warned democracy is at risk after the country's right-wing governing party sought to curb the power of the constitutional court.
>
> Wałęsa, who served as president for five years after the fall of communism, called for a referendum to reverse a law passed on Tuesday night by the Law and Justice Party (PiS). That law would require the constitutional tribunal reach a two-thirds majority to issue rulings and block legislation, raising the bar from a simple majority. Thirteen of its 15 judges would have to be present for contentious cases, rather than nine as at present.
>
> Critics say the law virtually eliminates the court as a check on the power of the government, which controls both houses of parliament after October elections.
>
> The PiS led government was sworn in on 16 November, with Beata Szydło as prime minister. But critics say the shots are being called by what they say is the party's divisive and vindictive chief, Jarosław Kaczyński.
>
> 'This government acts against Poland, against our achievements, freedom, democracy, not to mention the fact that it ridicules us in the world', Wałęsa told Radio Zet. 'I'm ashamed to travel abroad'.
>
> Wałęsa, now 72, wields little political power but is symbolically important as the embodiment of the Solidarity revolution."

51. On 18 February 2016 *The Financial Times* published an article entitled "Lech Walesa accusations are the latest twist in partisan battle" which, in its relevant part, read as follows:

> "For many in Poland, news that investigators have found documents showing former President and legendary anti-communist campaigner Lech Walesa was a communist spy is proof at last of something they have long suspected.
>
> For others it represents the latest attempt to smear a national hero in a bitter and partisan battle between two sides of Polish society opposed along the lines that were dug more than two decades ago.
>
> Mr Walesa has been accused of such actions before, and while a Warsaw court cleared him of the allegations in 2000, they continued to dog him.
>
> So rather than confirm a long-whispered rumour, the new evidence – rejected by Mr Walesa – will probably only deepen the split between those who salute the trade union activist for bringing down communism in 1989 by whichever means that were

taken, and those who can never forgive anyone who assisted a four-decades long Soviet-backed occupation of Polish politics.

...

Mr Walesa founded the Solidarity trade union that ultimately forced communist authorities to allow free elections, for which he was awarded the Nobel Prize in 1983. He was elected Poland's president 1990.

But Mr Kaczynski, who was an adviser and supporter of Mr Walesa during his election, later split from his former boss and accused him of too much cooperation with communist-era officials, sparking a bitter animosity that has lasted ever since.

..."

52. On 19 December 2016 *Politico* published an article entitled "Lech Wałęsa: Throw Poland out of the EU – Poland's independence hero has one fight left: upending the country's right-wing government", the relevant parts of which read as follows:

"... 'I'm on my way to eternity, but as long as I have strength, I don't want to allow the destruction of Poland', he says, sitting in his office in the European Solidarity Centre, a museum dedicated to the history of Solidarity, built steps away from the old gates of the Lenin Shipyard where Wałęsa once worked as an electrician.

Wałęsa has won the Nobel prize and served as Poland's president. The Solidarity labour union he led helped end Central European communism. But he still has one more political goal: to bring down Poland's ruling Law and Justice party and end dominance of its leader Jarosław Kaczyński. 'Kaczyński is breaking principles and the constitution and the law and principles of separation of powers', says Wałęsa. 'He's dangerous and irresponsible. It's going to turn out badly'.

...

Instead of sitting in quiet retirement, [Wałęsa has] taken to the road in an attempt to create a national movement for a referendum calling for new elections and taken to lobbying the European officials who make it a point to swing by his office, urging them to take a harder line with his country's government. ... Specifically, he wants Brussels to threaten to revoke Poland's membership in the bloc if the Law and Justice party continues to break democratic rules.

'I don't like speaking against Poland, but I have no choice', he says. 'It has to be that if you belong to a club but don't fit then they throw you out. Losing the right to vote [in the EU] is too little. They have to throw us out'.

Old enemies

Wałęsa and Jarosław Kaczyński, 67, have known each other for decades, and they share a mutual animosity – hate is not too strong a term.

In a recent interview with the foreign press, Kaczyński told reporters 'not to treat Wałęsa seriously, saying the former Solidarity leader has 'great intellectual deficits, character defects and a terrible past'. Wałęsa, he added, 'discredited himself'.

...

After Poland's communist government declared martial law in 1981, Wałęsa and Lech Kaczyński spent time in prison. As Jarosław was only a minor player in the opposition, the authorities didn't bother interning him.

In the roundtable talks between Solidarity and the government in 1989 the Kaczyńskis served as advisers to Wałęsa, only to fall out with their patron not long after his successful 1990 presidential campaign. Within a couple of years, Jarosław Kaczyński was leading loud anti-Wałęsa protests through central Warsaw. They've been bitter enemies ever since.

Kaczyński's disdain of Wałęsa is both personal and political. He's upset that Wałęsa is seen as Poland's liberator from communism, feeling his brother gets short shrift from historians. 'The powerful figure really running the union was my brother', Kaczyński said earlier this year – a claim Wałęsa dismissed as 'nonsense', adding that he fired the twins because they were unreliable and dangerous.

Attacking Wałęsa is a core part of Kaczyński's political message. He likes to argue that the post-1989 transformation was deeply flawed and that Wałęsa bears the blame for a deal that allowed the communists to exchange political power for being allowed to hang onto their economic gains.

...

It was Kaczyński who managed to target those disaffected people with generous social spending promises – one of the reasons his party won last year's parliamentary and presidential elections. And now that he controls the country, he wants to reshape the historical narrative and in particular Wałęsa's role.

Agent Bolek

The biggest blemish in Wałęsa's biography comes from 1970, when he was a young worker and labour organizer in the wake of a bloody military crackdown against striking shipyard workers. There is pretty strong evidence that he was cowed by the secret police and signed an agreement to inform for them, obtaining the code name ''Bolek''. He was apparently struck from the rolls of agents in 1970 due to a lack of cooperation.

Wałęsa himself has never admitted to agreeing to cooperate with the secret police, instead calling it an 'incident' in his past and saying in his interviews that he played 'games' with the secret police and tried to trick them. He was cleared of the accusation of being a collaborator by a special court in 2000.

'If I were unimportant, no one would have noticed me', he says when asked about the accusations. 'When they say these sort of things, it means that I am strong'. At an anti-government demonstration this summer, hundreds of protesters showed up wearing cardboard walrus moustaches to show their support for the old leader."

53. On 6 December 2018 *Politico* published an article entitled "Court intervenes in long-running feud between Wałęsa and Kaczyński" which, in its relevant part, read as follows:

"Lech Wałęsa, the Nobel Peace Prize laureate and former Polish president, will have to apologize to Jarosław Kaczyński, the leader of the ruling Law and Justice party, for suggesting he bore responsibility for the 2010 air crash that killed his twin brother, then the Polish President Lech Kaczyński.

A court in Gdańsk ruled Thursday that Wałęsa will have to issue an apology on his Facebook page, as well as in a newspaper and a weekly magazine. However, it rejected Kaczyński's request for 30,000 złoty (€ 7,000) in damages. The court also denied Kaczyński's demand that Wałęsa apologize for suggesting that he was mentally ill.

...

Wałęsa made the suggestions about the plane crash on his Facebook page ... . The 2010 air disaster killed 96 people, including Lech Kaczyński and many senior officials, when the plane tried to land in dense fog at a dilapidated military airfield in Smolensk, Russia.

Although investigations showed the bulk of responsibility lay with undertrained military pilots committing a cascade of errors while trying to land in terrible conditions, Law and Justice (PiS) turned the crash into a potent political symbol. The party suggested that the blame lay with Russia and with the Civic Platform party, which ruled Poland at the time.

Wałęsa accused Kaczyński, who was in Warsaw at the time of the crash, of being aware of the bad weather conditions but issuing an order by phone for the aircraft to land.

Wałęsa and Kaczyński have had a poisonous relationship for many years.

Wałęsa was the head of the Solidarity labour union in the early 1980s, and then led the effort to remove the communists from power in 1989, during which time Kaczyńskis twins were his advisors. They had an acrimonious breakup once Wałęsa was elected president.

Kaczyński has accused Wałęsa of being an informant for the communist-era secret police in the 1970s, while Wałęsa has become a fierce enemy of PiS. He accuses the party of violating the Polish constitution with its program of legal reforms, and has led efforts to galvanize public opposition to PiS ahead of next year's parliamentary election."

54. On 26 February 2020 *Gazeta Wyborcza* published an article entitled "Ziobro wants to challenge the judgment in Wyszkowski-Wałęsa from 2011. Extraordinary appeal". The article, in so far as relevant, read as follows (translation by the Registry):

"Little boy, I am not up to this kind of tricks' (*Chłoptasiu, nie ze mną te numery*) wrote a few days ago Lech Wałęsa to Zbigniew Ziobro. Today we know that this was a reaction to an extraordinary appeal filed by Ziobro against a 2011 court judgment, according to which Krzysztof Wyszkowski infringed Lech Wałęsa's personality rights by calling him an agent of the security services.

'Mr Ziobro, I am responding publicly to the letter that you addressed to me. You inform me in this letter that you intend to change the court judgments I won into lost ones. If this can be considered a threat or intimidation, then I am replying to you: little boy, I am not up to this kind of tricks' – wrote Lech Wałęsa on Facebook on 18 February.

On Tuesday, 25 February, it emerged that Wałęsa was referring in his post to an extraordinary appeal that Prosecutor General Zbigniew Ziobro had filed against the 2011 judgment of the Gdańsk Court of Appeal.

...

Now, under the December 2017 amendment to the Act on the Supreme Court, Ziobro has filed an extraordinary appeal. Zbigniew Ziobro alleges that the judgment of the Gdańsk Court of Appeal 'violates the principles, freedoms and rights of a human being and a citizen as set out in the Constitution, ... freedom of speech' and 'grossly violates the law'.

The Prosecutor General stressed that the second instance court did not take into account evidence presented by Wyszkowski on Wałęsa's agent past, while in the first instance four [pieces of evidence] were enough to acquit Wyszkowski.

Ziobro's letter was sent to the parties to the dispute and to the Gdańsk Court of Appeal. In the coming weeks, the appeal will be forwarded to the Supreme Court.

'You are destroying the achievements of Polish freedom. Therefore, I declare to you that there will never be my consent to it at any price! I therefore refuse to appear on any summons from you and your subordinate services in these matters, when forcibly led I will not even give my name or date of birth' – announced Lech Walesa in a comment addressed to Ziobro on 18 February."

55. On 22 April 2021 *Gazeta Prawna*, another daily newspaper, published an article entitled "Ziobro on the Supreme Court's judgment in the Wyszkowski case: We waited for years, but the truth has finally triumphed". The article read, in so far as relevant, as follows (translation by the Registry):

"We waited for years, but the truth has finally triumphed', wrote Prosecutor General Zbigniew Ziobro, stressing that according to Wednesday's ruling by the Supreme Court, former communist-era opposition activist Krzysztof Wyszkowski does not have to apologise to former President Lech Wałęsa for calling him a secret collaborator of the [communist Security Service].

As he added, the Supreme Court overturned the 'manifestly unfair judgment' on Wednesday.

'We waited for years, but the truth has finally triumphed. The Supreme Court upheld my extraordinary appeal and overturned the manifestly unfair judgment – [Krzysztof] Wyszkowski does not have to apologise to L. Wałęsa for calling him a secret collaborator of the [Security Service]' – reads a post published on Thursday on Ziobro's Twitter account.

At issue is Wednesday's ruling by the Supreme Court's Chamber Extraordinary Review [and Public Affairs] overturning a 2011 judgment ordering former communist-era opposition figure Krzysztof Wyszkowski to apologise to former President Lech Wałęsa for calling him a secret [communist Secret Service] collaborator. This means that the legal position returns to the one shaped by the Gdańsk Regional Court, which ruled in a 2010 first-instance judgment that Wyszkowski did not have to apologise to Wałęsa.

Speaking to journalists, Wyszkowski expressed his satisfaction with the ruling.

'I am very happy, I was strongly hoping for this kind of ruling. But I am particularly happy about the end of the reasoning of the ruling. Namely, the Supreme Court held that it was in the interest of society and for the good of public opinion that every citizen had the right to tell the truth' – he pointed out.

The former opposition figure stressed that the Supreme Court had overturned the unlawful – in his opinion – judgment of the Court of Appeal.

'In my view, [this judgment was] deeply harmful to me. I spent 16 years in the courts harassed by the 'caste' [of judges]. These judges were at the service of unworthy people, like Lech Wałęsa or Donald Tusk, who forbade discussion of general things known' – Wyszkowski added. He also expressed the hope that this 'shameful past is going back to its place'."

56. Later on that day the same information was published on the website of the Polish Radio.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Domestic law

57. A detailed rendition of the relevant provisions of the domestic law concerning the functioning of the judiciary and the NCJ can be found in the Court's previous judgments in *Reczkowicz* (cited above, §§ 59-70), *Dolińska-Ficek and Ozimek* (cited above, §§ 82-96), *Advance Pharma sp. z o. o.* (cited above, §§ 95-109) and *Grzęda* (cited above, §§ 64-76).

1. Constitutional provisions

58. The relevant provisions of the Constitution read, in so far as relevant, as follows:

Article 2

"The Republic of Poland shall be a democratic State governed by the rule of law and implementing the principles of social justice."

Article 31

"3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights."

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 47

"Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life."

Article 54

"1. The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone."

Article 79 § 1

"In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the

Constitutional Court for a judgment on the conformity with the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations under the Constitution."

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

59. The relevant provisions of the Act of 12 May 2011 on the National Council of the Judiciary (*Ustawa o Krajowej Radzie Sądownictwa* – "the 2011 Act on the NCJ") in force prior to and after the entry into force of the 2017 Amending Act are cited in *Reczkowicz* (cited above, §§ 62-63) and *Dolińska-Ficek and Ozimek* (cited above, §§ 85-87).

60. 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 ..."

3. The 2017 Act on the Supreme Court

61. The Act of 8 December 2017 on the Supreme Court *(ustawa o Sądzie Najwyższym*; "the 2017 Act on the Supreme Court"*)* entered into force on 3 April 2018.

62. Under Section 29 the judges shall be appointed to the Supreme Court by the President of the Republic acting on a recommendation from the NCJ.

63. Section 3 provided for the creation of two new chambers within the Supreme Court: the Disciplinary Chamber (*Izba Dyscyplinarna*) and the Chamber of Extraordinary Review and Public Affairs (*Izba Kontroli Nadzwyczajnej i Spraw Publicznych*).

64. Sections 89-95 introduced an extraordinary appeal into the Polish legal system.

(a) Chamber of Extraordinary Review and Public Affairs and its jurisdiction

65. The 2017 Act on the Supreme Court, in its initial version, set the scope of jurisdiction of the chamber as follows.

Section 26 (1)

"The jurisdiction of the Chamber of Extraordinary Review and Public Affairs shall include examination of extraordinary appeals, examination of election challenges and

challenges against the validity of the national referendum and the constitutional referendum, and ascertaining the validity of elections and the referendum, other public law cases, including cases in the field of competition protection, energy regulation, telecommunications and railway transport, and cases in which an appeal has been filed against the decision of the Chairman of the National Broadcasting Council, as well as complaints concerning an excessive length of proceedings before ordinary and military courts and the Supreme Court."

66. 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").

The 2019 Amending Act, which entered into force on 14 February 2020, introduced new disciplinary offences and sanctions for judges, including for questioning the lawfulness of judicial appointments made with the participation of the new NCJ.

67. Under section 10 of the 2019 Amending Act – a transitional provision – the Act also applies to cases which were subject to examination by the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, initiated and not concluded by a final decision, before the date of entry into force of this Act.

68. The 2019 Amending Act enlarged the scope of the chamber's jurisdiction. Since then it has had exclusive jurisdiction in respect of exclusion of judges, any plea or motion concerning the lack of independence of a court or a judge and in respect of applications for declaring unlawful a final judicial decision (*skarga o stwierdzenie niezgodności z prawem prawomocnego orzeczenia*) "if the unlawfulness consists in challenging the status of the person appointed to the office of judge who issued the decision in the case".

Section 26 [5]

"2. It shall be within the jurisdiction of the Chamber of Extraordinary Review and Public Affairs to hear motions or declarations for the exclusion of a judge or for the designation of the court before which the proceedings are to be held, involving a plea of lack of independence of the court or lack of independence of the judge. The court examining the case shall immediately forward the motion to the President of the Chamber of Extraordinary Review and Public Affairs for further proceedings under rules laid down in separate provisions. The forwarding of the motion to the President of the Chamber of Extraordinary Review and Public Affairs shall not stay the course of the pending proceedings.

3. The motion referred to in subsection 2 shall be left without consideration if it concerns the determination and assessment of the legality of the appointment of a judge or his authority to perform judicial duties.

[5] Paragraphs 2-6 added by the 2019 Amending Act.

4. The jurisdiction of the Chamber of Extraordinary Review and Public Affairs shall include consideration of applications for declaring unlawful a final decision of the Supreme Court, ordinary courts, military courts and administrative courts, including the Supreme Administrative Court, if the unlawfulness consists in challenging the status of the person appointed to the office of judge who issued the decision in the case.

5. The proceedings in cases referred to in subsection 4 shall be governed by the relevant provisions on declaring a final decision unlawful, and in criminal cases by the provisions on reopening judicial proceedings concluded with a final judgment. It is not necessary to establish probability or damage caused by the issuance of the [impugned] decision.

6. An application for declaring a final decision unlawful, referred to in subsection 4, may be lodged with the Supreme Court's Chamber of Extraordinary Review and Public Affairs, bypassing the court which issued the decision appealed against, and also in the event that the party has not made of the legal remedies available, including an extraordinary appeal to the Supreme Court."

(b) Extraordinary appeals

69. The relevant provisions, as applicable at the material time, provided, in so far as relevant, as follows:

Section 89

"1. If it is necessary in order to ensure compliance with the principle of a democratic State governed by the rule of law and implementing the principles of social justice, an extraordinary appeal may be lodged against a final decision (*orzeczenie*) of an ordinary court or a military court terminating proceedings in a case if:

(1) the decision violates the principles or freedoms and rights of every human being and citizen as laid down in the Constitution, [and/or]

(2) the decision grossly violates the law through its misinterpretation or misapplication, [and/or]

(3) there is an obvious contradiction between significant findings of the court and the content of evidence collected in the case

– and the decision may not be reversed or amended by means of other extraordinary remedies.

2. An extraordinary appeal may be lodged by the Prosecutor General, the [Polish] Commissioner for Human Rights and, within the scope of their competence, the President of the Office of the General Counsel of the Republic of Poland, the Ombudsman for Children's Rights, the Ombudsman for Patient's Rights, the Chairman of the Financial Supervision Authority, the Financial Ombudsman, the Ombudsman for Small and Medium Enterprises and the President of the Office for Competition and Consumer Protection.

3. An extraordinary appeal shall be lodged within five years from the date on which the decision appealed against has become final and, if a cassation appeal has been lodged against that decision, within one year from the date of its examination. [In criminal proceedings it] shall be inadmissible to allow an extraordinary appeal to the detriment of the defendant if it is lodged after one year from the date on which the decision has become final and, if a cassation appeal or a cassation [appeal in criminal

matters] has been lodged against that decision, after six months from the date of its examination.

4. If the prerequisites indicated in subsection 1 are met, and the impugned decision has had irreversible legal effects, in particular if five years have elapsed since the date on which that decision has become final, as well as if the reversal of the decision would violate the international obligations of the Republic of Poland, the Supreme Court shall confine itself to declaring that the impugned decision was issued in violation of the law and indicating the circumstances due to which it has given its ruling, unless the principles or freedoms and rights of every human being and citizen as laid down in the Constitution speak in favour of issuing the decision referred to in section 91(1).”

Section 90

“1. An extraordinary appeal may be brought only once against the same decision in the interest of the same party.

2. An extraordinary appeal may not be based on grounds which have been the subject of a cassation appeal or a cassation [appeal in criminal matters] accepted for examination by the Supreme Court.

3. An extraordinary appeal against a judgment establishing the non-existence of marriage, declaring nullity of marriage or a divorce judgment, if even only one of the parties, after such a judgment has become final, has entered into marriage, and against a decision on adoption, shall not be admissible.

4. An extraordinary appeal shall not be admissible in cases of petty offences and petty fiscal offences.”

Section 91

“1. If an extraordinary appeal is allowed, the Supreme Court shall reverse the decision appealed against in its entirety or in part and, depending on the outcome of the hearing, shall rule on the merits of the case or shall refer the case for re-examination to the competent court, if necessary also reversing the decision of the court of first instance, or shall discontinue the proceedings. The Supreme Court shall dismiss the extraordinary appeal if it finds that there are no grounds for reversing the decision appealed against.”

Section 94

“1. An extraordinary appeal shall be examined by the Supreme Court composed of two judges of the Supreme Court adjudicating in the Chamber of Extraordinary Review and Public Affairs and one lay judge of the Supreme Court.

2. If an extraordinary appeal concerns a decision of the Supreme Court, the case shall be examined by the Supreme Court composed of five judges of the Supreme Court adjudicating in the Chamber of Extraordinary Review and Public Affairs and two lay judges of the Supreme Court.”

Section 115

“1. Within three years from the date of entry into force of this Act, an extraordinary appeal may be lodged against final decisions terminating proceedings that have become

final after 17 October 1997[6]. The provision of section 89(3), first sentence, shall not apply.

1a. An extraordinary appeal against a final decision terminating proceedings in a case which has become final before the entry into force of this Act may be lodged by the Prosecutor General or the [Polish] Commissioner for Human Rights. The provision of section 89(2) shall not apply.

2. If the preconditions listed in section 89(1) are met and the impugned decision has had irreversible legal effects, in particular if five years have elapsed since the date on which that decision has become final, as well as if the reversal of the decision would violate the international obligations of the Republic of Poland, the Supreme Court shall confine itself to declaring that the impugned decision was issued in violation of the law and indicating the circumstances due to which it has given its ruling, unless the principles or freedoms and rights of every human being and citizen set forth in the Constitution speak in favour of issuing the decision referred to in section 91(1)."

70. On 30 March 2021 section 115 was amended and the period of 3 years referred to in subsection 1 was extended up to 6 years, that is to say until 3 April 2024. The amendment entered into force on 2 April 2021.

4. Cassation appeals in criminal and civil proceedings

71. The Code of Criminal Procedure (*Kodeks postępowania karnego*) characterises the cassation appeal as an extraordinary remedy. The relevant provisions read as follows:

Article 524

"1. The time-limit for lodging a cassation appeal period for the parties shall be 30 days from the date on which the decision with a statement of reasons has been served ... .

2. The time-limit for lodging a cassation appeal indicated in paragraph 1 shall not apply to a cassation appeal lodged by the Prosecutor General, the Commissioner for Human Rights and the Ombudsman for Children's Rights.

3. It is inadmissible to allow a cassation appeal to the detriment of the accused which has been lodged after one year from the date on which the decision has become final."

72. The Code of Civil Procedure (*Kodeks postępowania cywilnego*) characterises the cassation appeal as one of the remedies available to the parties. It provides, in so far as relevant:

Article 398[5]

"1. A cassation appeal shall be lodged with the court which issued the decision appealed against within two months from the date on which the decision with a statement of reasons has been served on the appellant.

2. The time-limit for lodging a cassation appeal by the Prosecutor General, the Commissioner for Human Rights and the Ombudsman for Children's Rights shall be six months from the date on which the decision has become final, and, if the party has

[6] The date of entry into force of the Constitution of the Republic of Poland, adopted by the National Assembly on 2 April 1997.

requested that the decision be served with a statement of reasons, from the date on which the decision has been served on the party."

5. Reopening of civil and criminal proceedings

73. Article 408 of the Code of Civil Procedure, provides

"After the expiry of ten years from the date of the judgment becoming final, no reopening may be sought, except where the party was prevented from acting or was not duly represented."

74. Article 542 § 5 of the Code of Criminal Procedure provides:

"5. It is inadmissible to reopen proceedings *ex proprio motu* to the detriment of the accused after the expiry of one year from the date on which the decision (*orzeczenie*) has become final."

6. Application for declaring a final decision unlawful

75. Article 424[1] of the Code of Civil Procedure provides as follows:

Article 424[1]

"1. A declaration of unlawfulness of a court of second instance's judgment terminating proceedings in a case can be requested if, as a result of its issuance, a party has suffered damage, and it has not been and is not possible to amend or reverse that judgment by means of legal remedies available to the party.

2. In exceptional cases, where the unlawfulness results from a violation of fundamental principles of the legal order or constitutional freedoms or rights of every human being or citizen, the unlawfulness of a final judgment of a court of first or second instance terminating proceedings in a case may also be requested if the party has not made use of the legal remedies available to it, unless it is possible to amend or set aside the judgment by means of other legal remedies available to the party."

According to Article 424[6], an application for declaring a final judgment unlawful shall be lodged with the court which issued the impugned judgment within two years from the date on which the judgment has become final.

7. Provisions concerning effects of a court composition being "inconsistent with the provisions of law" or a court being "unduly composed"

76. Article 379 of the Code of Civil Procedure deals with invalidity of proceedings (*nieważność postępowania*):

"Proceedings shall be *null and void*:

...

(4) if the composition of the adjudicating court was inconsistent with the provisions of law, or if a judge excluded [from sitting in the case] by virtue of the law took part in the examination of the case;

..."

77. Article 439 § 1 of the Code of Criminal Procedure deals with absolute grounds of appeal (*bezwzględne przyczyny odwoławcze*; shortcomings which a court of appeal dealing with the case must take into account of its own motion):

> "Regardless of the scope of the appeal and the arguments raised, or the impact of any defects on the content of the ruling, the appellate court shall, at a sitting, revoke the decision appealed against if:
>
> ...
>
> (2) the court was unduly composed or any of its members were not present at the entire hearing".

B. Domestic practice

1. *Domestic practice already summarised*

78. 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

79. 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 *Dolińska-Ficek and Ozimek,* cited above, § 193). 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"....

80. 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 8 January 2020 (case no. I NOZP 3/19)

81. On 8 January 2020, in response to the above judgment of the Chamber of Labour and Social Security, the Chamber of Extraordinary Review and Public Affairs of the Supreme Court issued a resolution in which it interpreted the consequences of the CJEU judgment in *A.K and Others* narrowly (I NOZP 3/19). The resolution was issued in a composition of seven judges of the Chamber of Extraordinary Review and Public Affairs: Ewa Stefańska, Leszek Bosek, Tomasz Demendecki, Adam Redzik, Mirosław Sadowski, Aleksander Stępkowski and Krzysztof Wiak. The Chamber found that a resolution of the NCJ recommending to the President candidates for the post of judge could be quashed upon an appeal by a candidate only in situations where the appellant proved that the lack of independence of the NCJ had adversely affected the content of the impugned resolution, or provided that the appellant demonstrated that the court had not been independent or impartial according to the criteria indicated in the CJEU judgment. In respect of the latter, the chamber stressed that the Constitution had not allowed for a review of the effectiveness of the President's decision concerning the appointment of judges. When dealing with such appeals the Supreme Court was bound by the scope of the appeal and had to examine whether the NCJ had been an independent body according to the criteria determined in the CJEU judgment of 19 November 2019 (in paragraphs 134-144 thereof).

(c) 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)

82. 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 Małgorzata 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.

83. 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[7]. 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[8]:

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

84. The Supreme Court's resolution contained an extensive reasoning, the relevant parts of which were rendered in *Reczkowicz* (cited above, §§ 91-105) and *Dolińska-Ficek and Ozimek* (cited above, §§114-129).

85. The Supreme Court held that the legal consequences of its finding that the NCJ had not been an independent body in the process of appointment of judges depended on the type of court to which they were appointed:

> "45. Lack of independence of the [NCJ] leads to defectiveness in the procedure of judicial appointments. However, such defect and its effect undermining the criteria of independence and impartiality of the court may prevail to a different degree. First and foremost, the severity and scope of the procedural effect of a defective judicial

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

[8] The translation is based on the English version of the judgment published on the Supreme Court website, edited by the Registry of the Court.

appointment varies depending on the type of the court and the position of such court in the organisation of the judiciary.

The status of a judge of an ordinary court or a military court is different from the status of a judge of the Supreme Court. ... This is due to the different systemic position of ordinary and military courts and the Supreme Court, their different powers, and different criteria for appointment to the office (Article 175(1) of the Constitution of the Republic of Poland. Notably, the special, constitutional, systemic characteristics of the Supreme Court distinguish it not only from other judicial bodies but also from other authorities of the Republic of Poland. Such exceptional position of the Supreme Court is mainly due to the exclusive powers of the Supreme Court, essential for the functioning of the Republic of Poland, which ensure uninterrupted and proper functioning of a democratic State ruled by law ... including the lawfulness of individual participation in power through the election process, as well as civil review. ...

The stringent standard of independence of the Supreme Court from political authorities is a necessary condition for its functioning in accordance with the Constitution and the due exercise of its powers which are of fundamental importance to individuals in a democratic State. ...

The severity of irregularities in competition procedures for the appointment of judges of ordinary and military courts and judges of the Supreme Court, since the normative changes implemented in 2017, has varied; however, it was definitely more severe in the case of appointments for judicial positions in the Supreme Court.

Despite the formal requirement that candidates for the office of a judge of the Supreme Court be of impeccable moral character and have particularly extensive legal knowledge, review of those requirements was removed from the competition procedure and left only for the members of the National Council for the Judiciary appointed by the parliamentary majority. Review of the fulfilment of those requirements by candidates for the office of a judge of the Supreme Court in the procedure carried out by the National Council for the Judiciary is, by nature, limited.

The possibility of lodging an appeal against resolutions naming a candidate for the office by other participants of the competition procedure was also eliminated, leaving them the only option of running for office in another competition to be announced by arbitrary decision of the President of the Republic of Poland. That in fact left the appointment for positions in the Supreme Court for decision of the political authority."

86. As regards the Chamber of Extraordinary Review and Public Affairs, it noted:

"Persons who applied for appointment to the position of judge of the Supreme Court, being lawyers with an understanding of the applicable law and the capability to interpret it, must have been aware of the fundamental doubts concerning the new procedures for the appointment to the office of judge of the Supreme Court and the status and membership of the National Council for the Judiciary as a body participating in the procedure of judicial appointment. Those persons were also aware that resolutions of the National Council for the Judiciary presenting them as candidates to the President of the Republic of Poland had been appealed against by other participants of the competitions to the Supreme Administrative Court. Candidates for the Civil Chamber, the Criminal Chamber, and the Chamber of Extraordinary Review and Public Affairs knew that the Supreme Administrative Court had suspended the effect of the resolutions of the National Council for the Judiciary concerning them, and yet they accepted appointment to the position of judge of the Supreme Court ...

It should be noted that, due to the organisation of the Supreme Court defined in the 2017 Act on the Supreme Court, the Chamber of Extraordinary Review and Public Affairs is composed exclusively of judges appointed in the new competitions. The fact that the Chamber is composed exclusively of such judges, i.e., all (20) vacancies in the Chamber have been filled, implies that no other judge can now be transferred to that Chamber. As a result, a pre-emptive motion for recusal of a judge of that Chamber gives no guarantee that the matter will be heard objectively because such motion will be examined by judges appointed in the same defective procedure, affected by the potential argument that they lack independence and impartiality to the same extent as the judge concerned by the motion. They would not be interested in determining to what extent the defective procedure (assuming that they acknowledge such defect, cf. resolution of a formation of seven judges passed on 8 January 2020, I NOZP 3/19) affects the perception of their own independence and impartiality. Judges appointed in such competitions have adjudicated cases concerning themselves, in breach of the statutory requirement to withdraw *ex proprio motu* from the hearing of a case which personally concerns them (cf. for instance the aforementioned resolution of 8 January 2020, I NOZP 3/19).

It is also relevant to note that the exclusive jurisdiction of the Chamber of Extraordinary Review and Public Affairs includes hearing appeals against resolutions of the [NCJ] concerning candidates for the office of a judge of ordinary, military and administrative courts. As a result, a Chamber which is comprised entirely of defectively appointed judges reviews the appointment of other judges on the application of a [NCJ] formed in the same way."

87. In its final remarks, the Supreme Court referred, among other things, to the current situation of the Polish judiciary:

"59. The current instability of the Polish judiciary originates from the changes to the court system over the past years, which are in breach of the standards laid down in the Constitution, the EU Treaty, the Charter of Fundamental Rights, and the European Convention on Human Rights.

The *Leitmotif* of the change was to subordinate judges and courts to political authorities and to replace judges of different courts, including the Supreme Court. That affected the appointment procedure of judges and the bodies participating in the procedure, as well as the system for the promotion and disciplining of judges. In particular, a manifestly unconstitutional attempt was made to remove some judges of the Supreme Court and to terminate the mandate of the First President of the Supreme Court, contesting the legitimacy of the Supreme Court.

The systemic changes caused doubts about the adjudicating legitimacy of judges appointed to the office in the new procedures. The political motivation for the changes jeopardised the objective conditions necessary for courts and judges to be perceived as impartial and independent. The Supreme Court considers that the politicisation of courts and their subordination to the parliamentary majority in breach of constitutional procedures establishes a permanent system where the legitimacy of individual judges and their judgments may be challenged with every new political authority. That notwithstanding, the politicisation of courts departs from the criteria of independence and impartiality of courts required under Union law and international law, in particular Article 47 of the Charter and Article 6 § 1 [of the Convention].

That, in turn, causes uncertainty about the recognition of judgments of Polish courts in the Union space of freedom, justice and security. Even now courts in certain EU Member States refuse to co-operate, invoking violation of standards, and challenge

judgments of Polish courts. It should be noted that a resolution of the Supreme Court cannot mitigate all risks arising in the functioning of the Polish judiciary at the systemic level. In fact, that could only be done by the legislature if it restored regulations concerning the judiciary that are consistent with the Constitution of the Republic of Poland and Union law.

The Supreme Court may, at best, take into consideration such risks and the principles of stability of the case-law and legal certainty for individuals in its interpretations of provisions which guarantee that a judgment in a specific case will be given by an impartial and independent court. In its interpretation of the regulations governing criminal and civil proceedings, referred by the First President of the Supreme Court, the Supreme Court considered the effect of the judgment of the Court of Justice of the European Union of 19 November 2019 in cases C-585/18, C-624/18 and C-625/18, as well as the obligation to identify such legislative instruments in the legal system which would guarantee that a judgment will be issued by an impartial and independent tribunal despite doubts arising from a range of systemic changes affecting the status of judges."

3. Case-law of the Constitutional Court

88. The relevant parts of the Constitutional Court's judgments relating to the operation of the NCJ (of 18 July 2007 (case no. K 25/07); of 20 June 2017 (case no. 5/17) and of 25 March 2019 (case no. K 12/18)) are summarised in *Grzęda* (cited above, §§ 82-87).

(a) Judgment of 20 April 2020 (case no. U 2/20)

89. On 24 February 2020 the Prime Minister (*Prezes Rady Ministrów*) referred to the Constitutional Court the question of the compatibility of the Supreme Court's resolution of 23 January 2020 with several provisions of the Polish Constitution, the Charter of Fundamental Rights of the European Union and the Convention.

90. On 20 April 2020 the Constitutional Court issued judgment declaring that the Supreme Court's resolution of 23 January 2020 was incompatible with Articles 179, Article 144 § 3 (17), Article 183 § 1, Article 45 § 1, Article 8 § 1, Article 7 and Article 2 of the Constitution, Articles 2 and 4(3) of the Treaty on European Union (TEU) and Article 6 § 1 of the Convention. It held that decisions of the President of Poland on judicial appointments may not be subject to any type of review, including by the Supreme Court. The judgment was given by a Constitutional Court's panel including Judge Marek Muszyński[9]. It was published in the Official Gazette on 21 April 2020. The court held (references omitted), in particular:

"... The four editorial divisions of the Supreme Court's resolution, which constitute the entirety of the subject under review, introduce and regulate a normative novelty (unknown to other legal acts of the Republic of Poland, in particular the Constitution) consisting in the fact that ordinary courts, military courts and the Supreme Court may

[9] In *Xero Flor w Polsce sp. z o.o. v. Poland* (no. 4907/18, §§ 19, 58-61, 96, 106, 174, 256, 259, 261-262 and 271-291, 7 May 2021) referred to by his initials "M.M."

control and restrict a judge's right to adjudicate solely on the basis of the fact of his or her appointment by the President on a motion of the NCJ, whose members, who are judges, were elected by the *Sejm*, and not by judicial bodies ...

The contested resolution of the Supreme Court is incompatible with Article 179 of the Constitution because it undermines the character of that provision as an independent basis for the effective appointment of a judge by the President on a motion of the NCJ, and thus as an independent, complete and sufficient legal regulation enabling the exercise by the President of the powers indicated in that provision.

The contested resolution of the Supreme Court is incompatible with Article 144 § 3 (17) of the Constitution because it cannot be reconciled with the essence of the President's prerogative to appoint judges within the Republic of Poland. The President's prerogative is not subject to review in any manner whatsoever, and therefore, it may not be subject to any limitation or narrowing of interpretation within the content of an act of secondary legislation ..."

91. As regards Article 45 § 1 of the Constitution and Article 6 § 1 of the Convention the Constitutional Court held, in so far as relevant (references omitted):

"In particular, the contested resolution of the Supreme Court is incompatible with Article 45 § 1 of the Constitution and Article 6 § 1 of the Convention because, in its content, it infringes the standard of independence of a court and of a judge which, according to the case-law of the CJEU, has two aspects. The first – external – aspect of the judge's independence presupposes that the court, in its adjudication, performs its tasks completely independently, without being subject to any official hierarchy or subordinated to anyone, and does not receive orders or instructions from any source whatsoever, such that it is protected from interference and external pressure that might compromise the independence of its members (judges) when they examine cases. The content of the impugned resolution of the Supreme Court granting to some judges the right to decide that other judges appointed by the President have, *de facto*, the status of retired judges ab initio cannot be reconciled with the standard as outlined above, resulting from all the indicated relevant standards. As the CJEU points out, the second – internal – aspect of the independence of a judge is linked to the concept of impartiality and concerns an unbiased dissociation from the litigants, and their respective interests, in relation to a dispute before the court. This factor requires [of a judge] the observance of objectivity and the absence of any interest in the resolution of the dispute, apart from the strict application of the law. This aspect excludes a procedure generally questioning a judge's right to adjudicate by other judges and verifying the regularity of the procedure preceding the appointment of a judge by the President as a basis for a general objection to such a judge's right to adjudicate. An unbiased dissociation of a judge from a dispute is possible only where any conclusions of the court leading to the resolution of a case are based on respect for the Constitution as a foundation. Such aspect of the judge's independence excludes the content of the court's judgment from being made dependent on the need to choose between a constitutional provision and the content of a [law] that is in conflict with the Constitution, but which – as a result of a statutory regulation – could in all likelihood constitute a ground for challenging the judgment before a higher court. For that reason, the content of the impugned resolution of the Supreme Court cannot be reconciled with Article 45 § 1 of the Constitution and Article 6 § 1 of the Convention."

(b) Decisions of 28 January and 21 April 2020 (case no. Kpt 1/20)

92. The Speaker of the *Sejm* referred to the Constitutional Court a question as to whether there was a "conflict of competence between the *Sejm* and the Supreme Court and between the President of Poland and the Supreme Court".

93. On 28 January 2020 the Constitutional Court issued an interim decision (*postanowienie*), whereby it suspended the implementation of the Supreme Court's resolution of 23 January 2020 (see paragraphs 82-87 above) and suspended the prerogative of the Supreme Court to issue resolutions concerning the compatibility with national or international law or the case-law of international courts of the composition of the NCJ, the procedure for presenting candidates for judicial office to the President of Poland, the prerogative of the President to appoint judges and the competence to hold judicial office of a person appointed by the President of Poland upon recommendation of the NCJ.

94. On 21 April 2020 the Constitutional Court gave a decision, finally ruling on the matter of the "conflict of competence". Both the interim measure and the final ruling were given by the Constitutional Court sitting in a formation which included Judge Muszyński.

(c) Judgment of 14 July 2021 (case no. P 7/20)

95. 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.

96. 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."

97. On 17 July 2023, in connection with the above judgment and the judgment of 7 October 2021 (case no. K 3/21) referred to below (see paragraphs 98-99 below), the European Commission brought proceedings against Poland for failing to fulfil its obligations under the second subparagraph of Article 19(1) TEU (see paragraph 127 below).

(d) Judgment of 7 October 2021 (case no. K 3/21)

98. On 29 March 2021 the Prime Minister lodged an application with the Constitutional Court, alleging that (1) Article 1, first and second paragraphs in conjunction with Article 4 § 3 of the TEU; (2) Article 19 § 1, second subparagraph in conjunction with Article 4 § 3 of the TEU; and (3) Article 19 § 1, second subparagraph in conjunction with Article 2 of the TEU were incompatible with several provisions of the Constitution.

99. On 7 October 2021 the Constitutional Court delivered its judgment, sitting in a full bench composed of twelve judges, which included Judge Muszyński. The operative part of the judgment, which was published in the Journal of Laws on 12 October 2021 (item 1852), reads as follows:

> "1. Article 1, first and second paragraphs, in conjunction with Article 4 § 3 of the TEU ... – in so far as the European Union, established by equal and sovereign States, creates 'an ever closer Union among the peoples of Europe', the integration of whom – brought about on the basis of EU law and through the interpretation of EU law by the Court of Justice of the European Union – enters 'a new stage' in which:
>
> (a) the European Union authorities act outside the scope of the competences conferred upon them by the Republic of Poland in the Treaties;
>
> (b) the Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application;
>
> (c) the Republic of Poland may not function as a sovereign and democratic State,
>
> – is incompatible with Article 2, Article 8 and Article 90 § 1 of the Constitution.
>
> 2. Article 19 § 1, second subparagraph, of the TEU – in so far as for the purpose of ensuring effective legal protection in the areas covered by EU law – it grants domestic courts (ordinary courts, administrative courts, military courts, and the Supreme Court) the competence to:
>
> (a) bypass the provisions of the Constitution in the course of adjudication, is incompatible with Article 2, Article 7, Article 8 § 1, Article 90 § 1 and Article 178 § 1 of the Constitution;
>
> (b) adjudicate on the basis of provisions which are not binding, having been repealed by the *Sejm* and/or found by the Constitutional Court to be incompatible with the Constitution, is incompatible with Article 2, Article 7, Article 8 § 1, Article 90 § 1, Article 178 § 1 and Article 190 § 1 of the Constitution.
>
> 3. Article 19 § 1, second subparagraph, and Article 2 of the TEU – in so far as for the purpose of ensuring effective legal protection in the areas covered by EU law and of ensuring the independence of judges – they grant domestic courts (ordinary courts, administrative courts, military courts, and the Supreme Court) the competence to:
>
> (a) review the legality of the procedure for appointing a judge, including the review of the legality of the act in which the President of the Republic appoints a judge, are incompatible with Article 2, Article 8 § 1, Article 90 § 1 and Article 179, in conjunction with Article 144 § 3 (17) of the Constitution;
>
> (b) review the legality of the National Council of the Judiciary's resolution to refer a motion to the President of the Republic for the appointment of a judge, are incompatible with Article 2, Article 8 § 1, Article 90 § 1 and Article 186 § 1 of the Constitution;

(c) determine the defectiveness of the process for appointing a judge and, as a result, to refuse to regard a person appointed to judicial office in accordance with Article 179 of the Constitution as a judge, are incompatible with Article 2, Article 8 § 1, Article 90 § 1 and Article 179, in conjunction with Article 144 § 3 (17) of the Constitution."

(e) Judgment of 24 November 2021 (case no. K 6/21)

100. On 27 July 2021 Mr Z. Ziobro, the Minister of Justice / Prosecutor General referred the following request to the Constitutional Court:

"Application to examine the compatibility of:

1. Article 6 § 1, first sentence, of the [Convention] to the extent in which the term 'tribunal' used in that provision includes the Constitutional Court of the Republic of Poland, with Article 2, Article 8 paragraph 1, Article 10 paragraph 2, Article 173 and Article 175 paragraph 1 of the Constitution of the Republic of Poland;

2. Article 6 paragraph 2., and Article 6 paragraph 1, first sentence, of the Convention referred to in paragraph 1, to the extent to which it identifies the guarantee arising therefrom to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in the determination of his civil rights and obligations or of any criminal charge against him, with the competence of the Constitutional Court to adjudicate upon the hierarchical compliance with provisions and normative acts stipulated in the Constitution of the Republic of Poland, and thereby makes it possible to subject proceedings before the Constitutional Court to the requirements resulting from Article 6 of the Convention, with Article 2, Article 8 paragraph 1, Article 79 paragraph 1, Article 122 paragraph 3 and 4, Article 188 points 1-3 and 5 and Article 193 of the Constitution of the Republic of Poland;

3. Article 6, paragraph 1, first sentence, of the [Convention] to the extent that it encompasses the review by the European Court of Human Rights of the legality of the process of appointment of Constitutional Court judges in order to determine whether the Constitutional Court is an independent and impartial court established by law, with Article 2, Article 8, paragraph 1, Article 89, paragraph 1, point 3 and Article 194, paragraph 1 of the Constitution of the Republic of Poland."

101. On 17 August 2021 the Commissioner for Human Rights joined the proceedings and made a request to the Constitutional Court to discontinue the proceedings. He argued that the request of the Minister of Justice / Prosecutor General had clearly been prompted by the Court's judgment in the case of *Xero Flor w Polsce sp. z o.o.* (cited above).

102. On 24 November 2021 the Constitutional Court delivered its judgment. 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:

"1. The first sentence of Article 6 § 1 of [the Convention] ... , in so far as the term 'tribunal' used in that provision includes the Constitutional Court, is incompatible with Article 173 in conjunction with Article 10 § 2, Article 175 § 1 and Article 8 § 1 of the Constitution of the Republic of Poland.

2. The first sentence of Article 6 § 1 of the Convention referred to in paragraph 1, in so far as it confers on the European Court of Human Rights competence to assess the

legality of the election of judges to the Constitutional Court, is incompatible with Article 194 § 1 in conjunction with Article 8 § 1 of the Constitution."

103. On the same day the Secretary General of the Council of Europe, Marija Pejčinović Burić, made the following statement in response to the Constitutional Courts judgment:

"All 47 Council of Europe member states, including Poland, have undertaken to secure the rights and freedoms set out in the European Convention on Human Rights, as interpreted by the European Court of Human Rights. Member states are also obliged to implement the European Court's judgments.

Today's judgment from the Polish Constitutional [Court] is unprecedented and raises serious concerns. We will carefully assess the judgment's reasoning and its effects."

104. On 7 December 2021 the Secretary General of the Council of Europe, acting in accordance with Article 52 of the Convention, made a request to the Polish Minister of Foreign Affairs, Mr Zbigniew Rau, to furnish explanations in connection with the Constitutional Court's judgment of 24 November 2021.

Article 52 of the Convention provides as follows:

"On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention."

The Secretary General's cover letter, in so far as relevant, read as follows:

"I should like to refer to Article 52 of the European Convention on Human Rights, which states that "on receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention."

I hereby avail myself of the competencies conferred on me by that provision and have the honour to request that your Government furnish the explanations called for the in the appendix.

I would be grateful to receive these explanations no later than 7 March 2022."

The request, which was appended to the above letter, read as follows:

"Request for an explanation in accordance with Article 52 of the European Convention on Human Rights

The Secretary General of the Council of Europe,

Referring to Poland's engagements under the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as "the Convention") and its additional Protocols;

Referring further to Article 6, paragraph 1 of the Convention, as interpreted by the long-standing case-law of the European Court of the Human Rights, according to which, in the determination of his civil rights and obligations or of any criminal charge against him, the High Contracting Parties shall secure to everyone within their jurisdiction a fair hearing by an independent and impartial tribunal established by law;

Recalling that under Article 32 of the Convention, the European Court of Human Rights has exclusive competence to authoritatively interpret the Convention;

Considering recent developments in the domestic law, notably the judgment of the Constitutional Court of 24 November 2021 in the case K 6/21;

Acting in accordance with Article 52 of the Convention;

Invites the Republic of Poland to furnish explanations concerning the manner in which the internal law ensures the effective implementation of Articles 6 and 32 of the Convention following the judgment of the Constitutional Court of 24 November 2021 in the case K 6/21."

105. On 23 November 2022 the Secretary General published a report under Article 52 of the Convention (see paragraphs 116-117 below). The report also included the subsequent judgment of the Constitutional Court of 22 March 2022 (case no. K 7/21; see paragraphs 106-108 below).

(f) Judgment of 10 March 2022 (case no. K 7/21)

106. On 9 November 2021 the Prosecutor General referred a request to the Constitutional Court concerning the issue of the "carrying out, by national or international courts pursuant to Article 6 § 1 of the Convention, of a review of the compatibility with the Constitution and the Convention of laws concerning the organisation of the judiciary, the jurisdiction of courts and the law on the National Council of the Judiciary". The application referred to the Court's judgments in the cases of *Broda and Bojara v. Poland* (nos. 26691/18, 27367/18, 29 June 2021) and *Reczkowicz* (cited above). He claimed that Article 6 § 1 of the Convention was unconstitutional, in so far as (1) it authorised the Court to create under domestic law the subjective right of a judge to hold an administrative post in the judiciary, (2) the requirement of a "tribunal established by law" in that provision did not take account of the universally binding provisions of the Polish Constitution and statutes, or the final and universally binding judgments of the Polish Constitutional Court, and (3) it allowed domestic or international courts to determine the compatibility of laws concerning the organisation of the judiciary, the jurisdiction of the courts, and the NCJ with the Polish Constitution and the Convention, in order to ascertain whether the requirement of a "tribunal established by law" was fulfilled.

107. The Constitutional Court delivered its judgment on 10 March 2022 (no. K 7/21) in a bench composed of Judges S. Piotrowicz (president), Marek Muszyński (the rapporteur), Krystyna Pawłowicz, Wojciech Sych and Andrzej 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."

108. 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.

109. On 16 March 2022, within the procedure under Article 52 of the Convention initiated in connection with the Constitutional Court's judgment of 24 November 2021 (case no. K 6/21; see paragraphs 104-105 above), the Secretary General of the Council of Europe requested the Polish Minister of Foreign Affairs to provide additional explanations on the manner in which the internal law ensured the effective implementation of Articles 6 and 32 of the Convention in the light of the judgment of 10 March 2022 (see also paragraphs 103-105 above and 116-117 below).

II. INTERNATIONAL MATERIAL

A. Material already summarised

110. The relevant international material is set out in *Reczkowicz* (cited above, §§ 126-176), *Dolińska-Ficek and Ozimek* (§§ 156-210), *Advance*

Pharma sp. z o.o. (§§ 170-225), *Grzęda* (§§ 120-167) and *Juszczyszyn* §§ 107-129; all cited above).

B. Vienna Convention on the Law of Treaties

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

Internal law and observance of treaties

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

C. The Permanent Court of International Justice

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

"[62] It should however be observed that, while on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force..."

D. The Organization for Security and Cooperation in Europe (OSCE)'s Office for Democratic Institutions and Human Rights (ODIHR)

113. The 13 November 2017 opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (as of 26 September 2017), (JUD POL/315/2017), read, in so far as relevant, as follows:

"2.1. The New [Chamber of Extraordinary Review and Public Affairs] and Extraordinary Appeals

22. Article 1 par 1 (b) of the Draft Act introduces a completely new jurisdiction for the Supreme Court, by which it will 'exercise extraordinary review over final judicial decisions to ensure the rule of law and social justice by hearing extraordinary [appeals]'. This so-called 'extraordinary appeal (in Polish *skarga nadzwyczajna*), will fall within the jurisdiction of the newly established Extraordinary Review and Public Affairs Chamber. ...

23. Pursuant to Article 25 of the Draft Act, the new [Chamber of Extraordinary Review and Public Affairs] will have jurisdiction to hear 'extraordinary [appeals]', but also electoral disputes and disputes against the validity of elections and referendums. Its jurisdiction will also cover other matters of public law (including competition protection, energy, telecommunications and rail transport regulation cases) and appeals against decisions by the President of the National Broadcasting Council and against

resolutions of the National Council of the Judiciary, as well as complaints concerning overly lengthy proceedings before common and military courts. This means that the newly established Chamber would take over part of the jurisdiction of the Supreme Court currently falling within the ambit of the work of the Labour Law, Social Security and Public Affairs Chamber, i.e. 'public affairs' matters, including adjudication upon the validity of presidential and parliamentary elections, elections to the European Parliament, and national referenda and referenda concerning constitutional amendments (Article 1 par 3).

24. Pursuant to Article 1 par 1 (b) and Article 91 pars 2-3 of the Draft Act, the [Chamber of Extraordinary Review and Public Affairs] will have appellate jurisdiction over final decisions of the other Supreme Court chambers, as a result of the wide scope of 'extraordinary appeals' (see Sub-Section 2.1.2 *infra*). This *de facto* confers a higher or special status to this chamber compared to the others....

2.1.6. Conclusion

57. In the light of the foregoing, the introduction of this extraordinary review of final court decisions raises serious prospects of incompatibility with key rule of law principles, including the principle of *res judicata* and the right of access to justice. It also runs the risk of potentially overburdening the Supreme Court, while conferring upon the other branches of government an influence over the judiciary that runs counter to the principles of judicial independence and separation of powers. It is thus recommended to remove the provision for extraordinary [appeals] from the Draft Act as being inherently incompatible with the international rule of law and human rights standards. As mentioned above, the same goals of protecting the rule of law and social justice could be achieved through the proper use of already available general or cassation appeals to ensure the rectification of judicial errors or other deficiencies before judgments become final and enforceable."

E. Council of Europe

1. The Parliamentary Assembly of the Council of Europe

114. On 28 January 2020 the Parliamentary Assembly of the Council of Europe ("PACE") decided to open its monitoring procedure in respect of Poland, which is the only member State of the Council of Europe, among those belonging to the European Union, currently undergoing that procedure. In its Resolution 2316 (2020) of the same date entitled "The functioning of democratic institutions in Poland", the Assembly stated:

"7. The Assembly lauds the assistance given by the Council of Europe to ensure that the reform of the justice system in Poland is developed and implemented in line with European norms and rule of law principles in order to meet their stated objectives. However, it notes that numerous recommendations of the European Commission for Democracy through Law (Venice Commission) and other bodies of the Council of Europe have not been implemented or addressed by the authorities. The Assembly is convinced that many of the shortcomings in the current judicial system, especially with regard to the independence of the judiciary, could have been addressed or prevented by the implementation of these recommendations. The Assembly therefore calls upon the authorities to revisit the total reform package for the judiciary and amend the relevant legislation and practice in line with Council of Europe recommendations, in particular with regard to:

...

7.4. the reform of the Supreme Court... The introduction of the possibility of a so-called extraordinary appeal, on wide-ranging and subjective grounds, against judgments that have already been finalised and whose appeals process has been terminated in accordance with the law, is of serious concern as it violates the principles of legal certainty and res judicata. The Assembly is concerned that the introduction of the extraordinary appeal could considerably increase the number of applications against Poland before the European Court of Human Rights. The composition and manner of appointment of the members of the disciplinary and extraordinary appeals chambers of the Supreme Court, which include lay members, in combination with the extensive powers of these two chambers and the fact that their members were elected by the new National Council of the Judiciary, raise questions about their independence and their vulnerability to politicisation and abuse. This needs to be addressed urgently."

2. The Venice Commission

115. The Opinion on the Draft [2017 Amending Act], on the Draft [2017 Act on the Supreme Court] proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts adopted by the Venice Commission at its 113th Plenary Session on 11 December 2017 (Opinion No. CDL-AD(2017)031), read, in so far as relevant, as follows:

"3. Extraordinary review of final judgments

53. The newly created Extraordinary Chamber will receive the power to revise legally binding judgments by way of 'extraordinary control'. Such extraordinary appeals may be lodged by a number of designated office holders (Prosecutor General, Ombudsman, a group of MPs, etc.) within five years after the contested judgement had been taken, or even within twenty years during the transitional period (Article 115). Extraordinary appeals may be lodged on points of fact and law (Article 86 § 1). Extraordinary appeals may be introduced against decisions examined by the SC in cassation, but grounds for such an appeal should be different from the grounds for cassation (Article 87 § 2).

54. A system of extraordinary appeals against final judgements existed in many former communist countries. Such system was found by the ECtHR as violating the principle of res judicata and of the legal certainty. The proposed Polish system is not entirely identical to the old Soviet system, but has a lot of similarities with it.

55. Several elements of the new system are particularly problematic. First, the Draft Act stipulates that final judgments may be overturned for the sake of 'social justice' (Article 86 § 1). The Venice Commission notes that, under Article 2 of the Polish Constitution, the Republic of Poland is 'a democratic state ruled by law and implementing the principles of social justice'. However, this term is open to a large discretion in the interpretation in the legal proceedings. When it comes to the conditions for overturning final and binding judgments, such unspecific criteria should not serve as a basis for decisions. The use of such criteria is against the principle of foreseeability, which is a cornerstone principle of the broader concept of the Rule of Law. If a law has been interpreted by the courts in a manner which is not welcome politically or unpopular, the legislator might change that law for the future, in line with the legitimate expectations of the persons concerned, but this new law must not – as a rule – affect the validity of the past judgments.

56. Second, according to the Draft Act, it will be possible to revise a final judgement on points of fact (Article 86 § 1 p. 3). Thus, the new instrument will permit the

reopening of old cases not because of some newly discovered circumstances (like perjury committed by a key witness, for example) but beyond this. Normally, the main function of the highest judicial instance in a country is to review cases on points of law; extraordinary review should not be an 'appeal in disguise', and 'the mere possibility of there being two views on the subject is not a ground for re-examination'. Interpretation of evidence and establishment of facts should normally be the tasks of the first-instance courts and of the courts of appeal.

57. The Draft Act provides for very few restrictions to the use of this instrument. Thus, extraordinary appeals should not be based on the same arguments as those examined in cassation (Article 87 § 2). This rule is reasonable, but may be difficult to implement, since lawyers could reformulate the grounds of appeal to present them as 'new grounds'. In addition, the Draft Act does not require explicitly that the contested judicial decision should be first challenged by way of an ordinary appeal/cassational appeal. It is also unclear how the new instrument correlates with other 'extraordinary remedies' which may exist under the Polish law (see Article 86 §1 (3) part 2).

58. The Draft Act introduces time-limits for the extraordinary appeals: thus, *reformatio in peius* (reversal to the detriment of the accused) is possible only if the request is introduced six months from the date of the 'final' judgment (see Article 86 § 3). This is positive; however, it is understood that this temporal limitation applies only in the context of criminal proceedings, and that in all other disputes (including public law disputes) the 5-years' time-limit, which is very long by itself, will apply. In addition, during the transitional three years' period, the Extraordinary Chamber will be able to reopen all cases decided after 17 October 1997. In effect, it will be possible to reopen any case decided in the country in the past 20 years, on virtually any ground. Moreover, in the proposed system the new judgements, adopted after the re-opening, will also be susceptible to the extraordinary review. It means that no judgment in the Polish system will ever be 'final' anymore.

59. It also appears that the request for the reopening may be introduced without the knowledge and even without consent of the parties. This is a further similarity to the former Soviet legal system. By itself, the practice of 'appeals in the general interest' launched without reference to or participation by the parties, is not acceptable, because there is a risk that such appeals may focus on wrong issues, and be contrary to the best interests of the party on whose behalf the appeal was introduced.

60. Besides the far reaching possibilities of removing final judgments, the involvement of MPs in such proceedings is particularly questionable. The Ombudsman or the Prosecutor General may (at least in theory) be regarded as independent and neutral authorities acting in the general interest, but it is very unusual to entrust such procedural powers to politicians. The Polish authorities explained that 'during the course of the legislative work it was decided that MPs and senators would be excluded from the group of entities entitled to submit extraordinary appeals'. This Venice Commission welcomes this amendment.

61. Finally, in one respect the proposed system is even worse than its Soviet predecessor. The Draft Act introduces a system of extraordinary review for the future judgments, which is problematic by itself. In addition, the Draft Act provides for the reversal of old judgments, which, at the moment of their adoption, were final and were not subject to any further review. This is not quite a retroactive application of criminal law, but, in practical terms, it may have a similar effect.

62. This does not mean that final judgments should never be called into question. Under the Rule of Law Checklist, the principle of *res judicata* implies that "final judgments must be respected, unless there are cogent reasons for revising them". Some

of the proposals made by the Draft Act are acceptable. For example, Article 86 § 1 provides for the reopening of the proceedings where there has been a violation of human rights and freedoms. In such circumstances, the reopening must be possible, but only under certain conditions – namely, where the Constitutional Tribunal of Poland or the ECtHR established the fact of such violations.

63. In sum, the mechanism of the 'extraordinary control, as designed in the Draft Act, jeopardies the stability of the Polish legal order and should be given up."

3. 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

116. 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 (see also paragraphs 103-105 above).

117. The report's concluding remarks, in so far as relevant, 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 *Advance 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."

4. GRECO

118. In the light of the judicial reform of 2016-2018 in Poland, GRECO, Group of States against Corruption, decided at its 78th Plenary meeting (4-8 December 2017) to apply its *ad-hoc* procedure to Poland.

119. As a result, GRECO adopted an addendum to the Fourth Round Evaluation Report on Poland (Rule 34) at its 80th Plenary Meeting (Strasbourg, 18-22 June 2018). It addressed the following recommendations to Poland. Firstly, to amend the provisions on the election of judges to the

NCJ, to ensure that at least half of the members of the NCJ are judges elected by their peers. Secondly, to reconsider the establishment of the Chamber of Extraordinary Review and Public Affairs and Disciplinary Chamber at the Supreme Court and to reduce the involvement of the executive in the internal organisation of the Supreme Court. In respect of the structural changes in the Supreme Court and creation of the two above-mentioned chambers, GRECO stated:

> "31. These structural reforms have been subject to extensive criticism in broad consensus by the international community, including bodies such as the Venice Commission, the Consultative Council of European Judges (CCJE), OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the European Commission. For example, concerns have been raised that the procedure of extraordinary appeals is 'dangerous for the stability of the Polish legal order' and additionally problematic due to its retroactivity, permitting the reopening of cases determined long before the enactment of the [Supreme Court Act], which is not limited to newly established facts. Furthermore, the establishment of the special chambers for extraordinary appeals and for disciplinary matters has been criticised for creating a hierarchy within the court , in that these two chambers have been granted special status and may be seen as superior to the other 'ordinary chambers': the extraordinary appeals chamber may examine decisions taken by the 'ordinary chambers' of the SC, the disciplinary chamber having jurisdiction over disciplinary cases of judges sitting in the other chambers as well as a separate budget (and, in addition, judges of the disciplinary chamber receive a 40% higher salary). Moreover, the use of lay judges at the SC, which has been introduced as a way of bringing in a 'social factor' into the system, according to the Polish authorities, has also been criticised, partly for being alien to other judicial systems in Europe at the level of supreme courts, but also due to the unsuitability of lay persons for determining significant cases involving legal complexities. The fact that they are elected by the legislature, which has the potential of compromising their independence, is a particular concern in this respect."

5. Committee of Ministers of the Council of Europe – execution of judgments against Poland concerning the independence of the judiciary

120. At its 1451st meeting (December 2022), the Committee noted with grave concern that the Constitutional Court in a judgment of 10 March 2022 in the case K 7/21 had found unconstitutional Article 6 § 1 of the Convention as interpreted by the Court in the relevant cases. The Committee recalled that the provisions of national law could not justify a failure to perform obligations stemming from the Convention and stressed that Poland remained bound by the unconditional obligation assumed under Article 46 of the Convention.

121. At its 1468th meeting of 5-7 June 2023 the Committee of Ministers adopted the following decision:

> "The Deputies
>
> 1. recalled that these cases concern reforms undermining the independence of the judiciary in Poland, which in particular resulted in: infringements of the right to a tribunal established by law, as the applicants' cases were examined by judges appointed

after March 2018 in various chambers in the Supreme Court in a deficient procedure involving the National Council of the Judiciary ('NCJ'), which lacked independence (*Reczkowicz* group); lack of judicial review of the premature termination of the applicants' term of office as vice-presidents of a regional court on the basis of temporary legislation (*Broda and Bojara*) or of the premature *ex lege* termination of the applicant's mandate as judicial member of the NCJ (*Grzęda*);

2. reiterated their grave concern regarding the authorities' persistent reliance on the Constitutional Court's judgment in case K 7/21 in which it found partly unconstitutional Article 6 § 1 of the Convention as interpreted by the European Court in the cases under examination; recalled that such an approach not only contradicts Poland's voluntarily assumed obligation under Article 46 of the Convention, to abide by the Court's final judgment, but also its obligation under Article 1 to secure the rights and freedoms as defined in the Convention, authoritatively interpreted by the European Court under Article 32;

3. firmly underlined again Poland's unconditional obligation to execute the Court's judgments in these cases, regardless of any obstacles existing within the domestic legal system, including the case-law of the Constitutional Court;

As regards individual measures

4. noted with satisfaction the payment of the just satisfaction in the case of *Dolińska-Ficek and Ozimek* in respect of the applicant Mr Ozimek, and in the case of *Grzęda*, and the authorities' information on processing the remaining payments in the case of *Dolińska-Ficek and Ozimek* in respect of the applicant Ms Dolińska-Ficek and in the case of *Advance Pharma*; invited them to provide information on whether in the cases of *Reczkowicz* and *Dolińska-Ficek and Ozimek,* the applicants requested the reopening of domestic proceedings and on any developments as regards the application for reopening submitted in the *Advance Pharma* case, including whether the panel of the [Supreme Court] to decide on this application is composed of judges appointed in deficient procedures;

5. noted that, since domestic law still does not allow for the review by a body exercising judicial functions of the dismissal of the applicants in the *Broda and Bojara* case and premature *ex lege* termination of the applicant's term of office as a judicial member of the NCJ in the *Grzęda* case, the individual measures in these cases appear to be linked to the general measures;

As regards general measures

6. noted with deep regret that the legislative reform of January 2023, which is pending constitutional review, did not address the main requirements for the execution of the *Reczkowicz* group; in particular that the transfer of disciplinary cases concerning judges from the Chamber of Professional Liability in the Supreme Court (SC) to the Supreme Administrative Court (SAC) does not prevent risks of a violation of the right to a tribunal established by law, as a substantial part of the judges of the SAC have also been appointed on the motion of the NCJ after March 2018; noted also that the above reform did not introduce an adequate framework for examining the legitimacy of judicial appointments and did not remove all risks of disciplinary liability for judges applying the requirements of Article 6 of the Convention;

7. expressed deep concern that the authorities have continued to take worrying steps regarding judges who question the status of other, deficiently appointed, judges, and at the same time have relied on the Constitutional Court's judgment in case K 7/21 to refuse to comply with interim measures indicated by the European Court in such cases;

8. recalled the European Court's findings in the *Reczkowicz* group that the main underlying problem leading to the violation of Article 6 was the appointment of judges upon a motion of the NCJ as constituted under the impugned 2017 framework, which deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled interference by the executive and the legislature in judicial appointments; and that this problem has systematically affected appointments of judges of all types of courts, which may result in potentially multiple violations of the right to an 'independent and impartial tribunal established by law'; thus deplored the position of the Polish authorities rejecting the need for remedial action regarding the composition of the NCJ and the status of deficiently appointed judges and their decisions;

9. exhorted the authorities to rapidly elaborate measures to: (i) restore the independence of the NCJ through introducing legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ; (ii) address the status of all judges appointed in deficient procedures involving the NCJ as constituted after March 2018 and of decisions adopted with their participation; (iii) ensure effective judicial review of the NCJ's resolutions proposing judicial appointments to the President of Poland, including of Supreme Court judges, respecting also the suspensive effect of pending judicial review; (iv) ensure examination of the questions as to whether the right to tribunal established by law has been respected, without any restrictions or sanctions for applying the requirements of the Convention;

10. noted with concern as regards the *Broda and Bojara* case the authorities' unchanged position that no general measures are necessary for the execution of this judgment because the relevant provisions that allowed for the applicants' dismissal are no longer applicable, and noted also that the procedure for the dismissal of presidents of domestic courts still lacks sufficient safeguards; urged the authorities to elaborate measures to protect presidents and vice-presidents of courts from arbitrary dismissals, including through introducing judicial review;

11. invited them, as concerns the *Grzęda* case, to present without delay the results of their reflection on the measures needed to ensure the security of tenure of judicial members of the NCJ, notably by allowing an independent judicial body to review the legality of any measure resulting in shortening the length of mandates of the NCJ's judicial members, including *ex lege* termination of a mandate;

12. exhorted the authorities to present the information on all the above aspects without further delay and instructed the Secretariat, in the absence of meaningful information on progress in the execution of the *Reczkowicz* group of cases and in the case of *Broda and Bojara* by 15 September 2023, to prepare a draft interim resolution for examination at their 1483rd meeting (December 2023) (DH)."

F. European Union

1. European Union law

(a) Treaty on European Union

122. Article 2 of the Treaty on European Union ("TEU") provides:

"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 ordinary to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

123. Article 4(3) of the TEU reads as follows:

> "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

124. Article 19(1) of the TEU reads as follows:

> "1. 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) Consolidated version of the Treaty on the Functioning of the European Union

125. Article 267 of the Consolidated version of the Treaty on the Functioning of the European Union ("TFEU") provides:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
>
> If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

2. The European Commission

(a) Extraordinary appeal

126. On 20 December 2017 the European Commission adopted its fourth *Recommendation regarding the rule of law in Poland* (2018/103) finding that the concerns raised in earlier recommendations had not been addressed and the situation of systemic threat to the rule of law had seriously deteriorated further. In particular, it stated that "the new laws raised serious concerns as regards their compatibility with the Polish Constitution as underlined by a

number of opinions, in particular from the Supreme Court, the [NCJ] and the Polish Commissioner for Human Rights". However, as explained in the Rule of Law Recommendation of 26 July 2017, an effective constitutional review of these laws was no longer possible.

The Commission also referred to the extraordinary appeal procedure:

"2.1.3. *The extraordinary appeal*

18. The law introduces a new form of judicial review of final and binding judgments and decisions, the extraordinary appeal. Within three years from the entry into force of the law the Supreme Court will be able to overturn completely or in part any final judgment delivered by a Polish court in the past 20 years, including judgments delivered by the Supreme Court, subject to some exceptions. The power to lodge the appeal is vested in, *inter alia*, the Prosecutor General and the Ombudsman[10]. The grounds for the appeal are broad: the extraordinary appeal can be lodged if it is necessary to ensure the rule of law and social justice and the ruling cannot be repealed or amended by way of other extraordinary remedies, and either it (1) violates the principles or the rights and freedoms of persons and citizens enshrined in the Constitution; or (2) it is a flagrant breach of the law on the grounds of misinterpretation or misapplication; or (3) there is an obvious contradiction between the court's findings and the evidence collected.

19. This new extraordinary appeal procedure raises concerns as regards the principle of legal certainty which is a key component of the rule of law. As noted by the Court of Justice, attention should be drawn to the importance, both for the EU legal order and national legal systems, of the principle of res judicata: 'in order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question'. As noted by the European Court of Human Rights, extraordinary review should not be an 'appeal in disguise', and 'the mere possibility of there being two views on the subject is not a ground for re-examination.

20. In its opinion on the draft law on the Supreme Court, the Venice Commission underlined that the extraordinary appeal procedure is dangerous for the stability of the Polish legal order. The opinion notes that it will be possible to reopen any case decided in the country in the past 20 years on virtually any ground and the system could lead to a situation in which no judgment will ever be final anymore.

21. The new extraordinary appeal also raises constitutionality concerns. According to the Supreme Court and the Ombudsman, the law affects the principle of stability of jurisprudence and the finality of judgments, the principle of protecting trust in the state and law as well as the right to have a case heard within a reasonable time.

(b) European Commission v. Republic of Poland (Case C-448/23)

127. On 17 July 2023 the Commission brought proceedings before the CJEU against Poland for failing to fulfil its obligations under the second subparagraph of Article 19(1) TEU on account of the Constitutional Court's interpretation in its judgments of 14 July 2021 (case P 7/20) and of 7 October 2021 (case K 3/21) (see paragraphs 95-96 and 98, 99 above), seeking a declaration that Poland has failed to fulfil its obligations under the second

[10] Referred to as the [Polish] "Commissioner for Human Rights" in the present judgment.

subparagraph of Article 19(1) and the general principles of autonomy, primacy, effectiveness and uniform application of EU law and the principle of the binding effect of judgments of the CJEU. Its action was formulated as follows:

"**Form of order sought**

The applicant claims that the Court should:

declare that, in the light of the interpretation of the Constitution of the Republic of Poland made by the Trybunał Konstytucyjny (Constitutional Court, Poland) in its judgments of 14 July (Case P 7/20) and of 7 October 2021 (Case K 3/21), the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) of the Treaty on European Union;

declare that, in the light of the interpretation of the Constitution of the Republic of Poland made by the Trybunał Konstytucyjny (Constitutional Court) in its judgments of 14 July (Case P 7/20) and of 7 October 2021 (Case K 3/21), the Republic of Poland has failed to fulfil its obligations under the general principles of autonomy, primacy, effectiveness and uniform application of EU law and the principle of the binding effect of judgments of the Court of Justice;

declare that, since the Trybunał Konstytucyjny (Constitutional Court) does not satisfy the requirements of an independent and impartial tribunal previously established by law as a result of irregularities in the procedures for the appointment of three judges to that court in December 2015 and in the procedure for the appointment of its President in December 2016, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;

order the Republic of Poland to pay the costs.

Pleas in law and main arguments

By the first and second pleas in law, the Commission challenges two judgments of the Trybunał Konstytucyjny (Constitutional Court) of the Republic of Poland ('the Constitutional Court') of 7 October 2021 (Case K 3/21) and of 14 July 2021 (Case P 7/20). Those judicial decisions result in an infringement of different, but not unrelated obligations imposed on Poland by the EU treaties. The first plea concerns the infringement by the aforementioned judgments of the Constitutional Court of the second subparagraph of Article 19(1) TEU, as interpreted by the Court of Justice of the European Union, in particular in the judgments of 2 March 2021, *A.B. and Others (Appointment of Judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, and of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, because the Constitutional Court interpreted the Constitution of the Republic of Poland in relation to the EU law requirements of effective judicial protection by an independent and impartial tribunal previously established by law too narrowly, incorrectly, and in a manner that manifestly disregards the case-law of the Court of Justice of the European Union. The second plea concerns the infringement by those judgments of the Constitutional Court of the principles of primacy, autonomy, effectiveness and uniform application of EU law and the binding effect of judicial decisions of the Court of Justice of the European Union, as the Constitutional Court, in those judgments, unilaterally disregarded the principles of primacy and effectiveness of Articles 2, 4(3) and 19(1) TEU and Article 279 TFEU, as consistently interpreted and applied by the Court of Justice of the European Union, and ordered all Polish authorities to disapply those Treaty provisions.

By the third plea, the Commission argues that the Constitutional Court no longer offers the guarantees of an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, (i) as a result of manifest irregularities in the appointments to judicial positions at the Constitutional Court in December 2015 in flagrant breach of Polish constitutional law and (ii) as a result of irregularities in the procedure for the election of the President of the Constitutional Court in December 2016. Each of those irregularities gives rise, in the light of the activities of the Constitutional Court composed of persons appointed in this way, to reasonable doubts in the minds of individuals as to the impartiality of the Constitutional Court and its imperviousness to external factors."

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

128. The relevant case law of the CJEU is summarised in *Dolińska-Ficek and Ozimek* (§§ 190-203); *Advance Pharma sp. z o.o.* (§§ 204-216); *Juszczyszyn* (§§ 120-128); and *Tuleya* §§ 224-242; all cited above).

129. On 5 June 2023 the Grand Chamber of the CJEU delivered its judgment in case of *Commission v. Poland* (Independence and private life of judges, C-204/21, EU:C:2023:442) upholding the Commission's action. The CJEU, referring to its earlier case-law, held*, inter alia*, that by establishing the exclusive jurisdiction of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court to examine complaints and questions of law concerning the lack of independence of a court or a judge, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19 § 1 TEU, in conjunction with Article 47 of the Charter, and under Article 267 TFEU and the principle of the primacy of EU law.

THE LAW

I. PRELIMINARY OBJECTIONS RAISED BY THE GOVERNMENT

A. The Government's objections in general

130. The Government raised several preliminary objections to the admissibility of the application. As regards the application in general, the Government argued that it should be rejected as being incompatible *ratione materiae* and *ratione personae* with the Convention. They further made separate specific objections in respect of each complaint, alleging, on various grounds, the inapplicability of Article 6 § 1, Article 8 and Article 18 of the Convention and non-exhaustion of domestic remedies in respect of the applicant's complaint under Article 6 § 1. The Court will examine those specific objections when dealing with the applicant's respective complaints (see paragraphs 131, 132, 134-154 and 183 above and 261-273 below).

B. Victim status

131. As regards the applicant's victim status under Article 34 of the Convention, the Government, in support of their argument, extensively cited the Court's case-law on the matter; however, the grounds for their objection as such were limited to the following passage, which (verbatim) reads as follows:

> "116. ... [T]he Government observe that the applicant in the present case was not able to show the Court negative consequences that the proceedings in question had allegedly inflicted on him. In particular, he failed to prove that he suffered any significant disadvantage in terms of his general livelihood and reputation as a result of the proceedings before the Supreme Court and its judgement.
>
> 117. Having regard to the above, the Government submit that the present application should be declared inadmissible on account of the applicant's lack of the victim status."

132. Based on the content of the above submission and the Government's reference to the applicant's failure to demonstrate harm to "his general livelihood and reputation", the Court considers that, despite the fact that the Government relied on Article 34 and argued that the applicant had not "suffered a significant disadvantage", which is the ground for inadmissibility laid down in Article 35 § 3 (b) of the Convention, their objection should be interpreted as actually being directed against the applicability of Article 8 of the Convention and will consequently be examined under that head (see paragraphs 261-273 below).

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

133. The applicant complained under Article 6 § 1 of the Convention that his case had been examined by the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, a body that did not constitute an "independent and impartial tribunal established by law" within the meaning of this provision. He further alleged a lack of individual independence and impartiality on the part of Judge Stępkowski, who had been the rapporteur in his case.

Article 6 § 1 of the Convention reads, in so far as relevant, as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Admissibility

1. Incompatibility ratione *materiae*

(a) The parties' submissions

134. The Government observed that the circumstances of the application *prima facie* led to the conclusion that they were covered by the scope of the judgment of the Constitutional Court of 10 March 2022 in case K 7/21 (see paragraphs 107-108 above).

135. They emphasised that in that judgment, the Constitutional Court had ruled that Article 6 § 1, first sentence, of the Convention – to the extent that, when assessing whether the requirement of a "tribunal established by law" had been met, it permitted the European Court of Human Rights or national courts to disregard the provisions of the Constitution, statutes and judgments of the Polish Constitutional Court, and enabled the European Court of Human Rights or national courts to independently create norms, by interpreting the Convention, pertaining to the procedure for appointing national court judges – was inconsistent with Article 89 § 1 (2), Article 176 § 2, Article 179 in conjunction with Article 187 § 1 in conjunction with Article 187 § 4 and with Article 190 § 1 of the Constitution.

It had also stated that Article 6 § 1, first sentence of the Convention – to the extent that it authorised the European Court of Human Rights or national courts to assess the compliance with the Constitution and the Convention of laws relating to the judiciary system, the jurisdiction of courts and the law providing for that system, its scope of activity, working procedures and the manner of electing members of the NCJ – was inconsistent with Article 188 §§ 1 and 2 and Article 190 § 1 of the Constitution.

136. In their comments on the *amicus curiae* brief submitted by the Polish Judges Association Iustitia, the Government added that the effect of this judgment was the removal of the provisions indicated therein from the legal system, and as a result, the removal of decisions issued on the basis thereof, i.e., four judgments of the Court: judgment of 29 June 2021 in *Broda and Bojara v. Poland*; judgment of 22 July 2021 in *Reczkowicz v. Poland*; judgment of 8 November 2021 in *Dolińska-Ficek and Ozimek v. Poland* and judgment of 3 February 2021 in *Advance Pharma sp. z o.o. v. Poland* (all cited above) as "they did not have for the Polish State the attributes provided for in Article 46 of the Convention".

Replying to the brief submitted by the Helsinki Foundation for Human Rights, the Government said that the limitation resulting from the Constitutional Court's judgment could not be perceived as a violation by Poland of the international law that was binding upon the State because it did not affect the very content of the provision of the Convention that Poland had accepted when ratifying it. It constituted a boundary in the dynamics of the Court's law-making autonomy and should be treated as the State's opposition

to an attempt to shape an international obligation with a new content and impose it on Poland *per facta concludentia*, outside the treaty amendment procedure.

137. They further said that in that judgment the Constitutional Court had emphasised that international law was consensual and derived solely from the will of the States. Poland had made concessions in terms of its sovereignty and had conferred on the Court the Convention powers of authority of a judicial and interpretative nature. However, this consent was not unlimited in content. Its substantive framework (i.e. the content of the norms) and procedural framework (i.e. the procedure to become bound by an instrument) were provided by the Constitution of the Republic of Poland, with the Constitutional Court as its guardian. Consequently, the Court could exercise its authority as long as Poland did not oppose it on the grounds of the Constitution, e.g., by way of a Constitutional Court ruling.

138. In the Government's view, that judgment had to be treated as an emanation of the constitutionally justified objection against the Court's authority of a judicial and interpretative nature, thus making Article 6 inapplicable to the present case.

139. The applicant made no comments regarding the above arguments.

(b) The Court's assessment

140. The Court notes that in *Juszczyszyn* (cited above, §§ 207-209) it has already dealt with the judgment of the Constitutional Court of 10 March 2022.

141. To begin with, that judgment was given by a bench including Judge M. Muszyński (in *Juszczyszyn* and *Xero Flor w Polsce sp. z o.o.* referred to by his initials "M.M."), in an apparent attempt to prevent the execution of the Court's judgments in *Broda and Bojara v. Poland* (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. As regards this particular judge, the Court has already held in *Xero Flor w Polsce sp. z o.o.* (no. 4907/18, 7 May 2021, §§ 289-291) that there was a violation of Article 6 § 1 as regards the applicant company's right to a "tribunal established by law" on account of his presence on the bench of the Constitutional Court, as his election had been vitiated by grave irregularities. In the light of the *Xero Flor w Polsce sp. z o. o.* judgment, his presence on the five-judge bench of the Constitutional Court which gave the judgment of 10 March 2022 necessarily called into question the validity and legitimacy of that judgment (see *Grzęda*, § 277; see also *Reczkowicz*, § 263 *in fine* and *Dolińska-Ficek and Ozimek*, § 319, all cited above).

142. Furthermore, in accordance with Article 32 of the Convention the Court's jurisdiction "shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto" and that "[i]n the event of dispute as to whether the Court has jurisdiction, the Court shall decide". It is then the Court alone which is competent to decide on its

jurisdiction to interpret and apply the Convention and its Protocols (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 293, ECHR 2005-III).

All Contracting Parties should abide by the rule of law standards and respect their obligations under international law, including those voluntarily undertaken when they ratified the Convention. The principle that States must abide by their international obligations has long been entrenched in international law; in particular, "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force" (see *Grzęda*, cited above, § 340, and the Advisory Opinion of the Permanent Court of International Justice on Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, (cited in paragraph 112 above). The Court emphasises that, under the Vienna Convention on the Law of Treaties, a State cannot invoke its domestic law, including the constitution, as justification for its failure to respect its international law commitments (see Article 27 of the Vienna Convention cited in paragraph 111 above; see also *Grzęda*, § 340; and *Juszczyszyn*, § 208, both cited above).

143. Consequently, as established in *Juszczyszyn*, the Constitutional Court's judgment of 10 March 2022 cannot have any effect on the Court's final judgments in *Broda and Bojara, Reczkowicz*, *Dolińska-Ficek and Ozimek* and *Advance Pharma sp. z o.o.* (all cited above), having regard to the principle of the binding force of its judgments under Article 46 § 1 of the Convention (see *Juszczyszyn*, cited above, § 209).

Nor can it extinguish the Court's interpretation of Article 6 § 1 of the Convention in those cases and any similar future cases or result in inapplicability of that provision in the present case.

144. In that regard, the Court would emphasise that the acceptance of the State's obligations under the Convention may not be selective and that the Contracting State – including its highest courts – cannot, at their will, exclude the operation and application of the Convention provisions by, as the Government seem to suggest in the present case, "removing" them, together with the Court's final and binding judgments, from the legal system (see paragraphs 134-136 above). Ratifying the Convention, the States take upon themselves, as stated in the Preamble to the Convention "the primary responsibility to secure the rights and freedoms defined in [the] Convention". While the Preamble recognises the State's margin of appreciation in discharging that responsibility, that margin is subject to the Court's supervisory jurisdiction. As a consequence, the States must respect the Court's treaty-given power under Article 32 of the Convention to rule on all matters concerning the interpretation and application of the Convention.

In the exercise of that power, in accordance with its case-law, the Court may review the domestic courts' decisions so as to ascertain whether those courts struck the requisite balance between the various competing interests at

stake and correctly applied the Convention standards (see *Reczkowicz*, cited above, § 259).

Seen from this perspective, the Constitutional Court's judgment cannot be considered anything other than an attempt to restrict the Court's jurisdiction under Articles 19 and 32 of the Convention, undermining the rule of law standards. A similar conclusion has also been reached in the Council of Europe Secretary General's Report under Article 52 of the Convention, where the findings of unconstitutionality of Article 6 of the Convention in the impugned judgment were characterised as a challenge to the Court's competence as established in Article 32 of the Convention (see paragraphs 116-117 above).

145. In view of the foregoing, the Government's objection as to the applicability of Article 6 of the Convention in the present case must be dismissed.

2. Exhaustion of domestic remedies

(a) The parties' submissions

146. As regards the reversing of the final judgment of the Gdańsk Court of Appeal, the Government argued that the applicant had failed to exhaust domestic remedies because he had not lodged a constitutional complaint, pursuant to Article 79 of the Constitution. In their opinion, the Court's examination of the application should be regarded as contrary to the principle of subsidiarity.

147. 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, namely (1) that the individual decision, which allegedly violated the Convention, had been adopted in direct application of an unconstitutional provision of national legislation; and (2) procedural regulations applicable to the revision of such type of individual decisions provided for the reopening of the case or the quashing of the final decision in consequence of the judgment of the Constitutional Court in which unconstitutionality had been found.

The applicant should therefore have lodged a constitutional complaint. Had his complaint been successful, it would have been possible for him to apply for re-opening of the proceedings. In that regard, the Government referred to Article 45 § 1 of the Constitution, emphasising that it guaranteed to everyone the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court,

148. The applicant did not make any specific comments.

(b) The Court's assessment

149. The Court notes at the outset that, in contrast to previous cases where the Government made similar preliminary objections in the context of the right to an independent and impartial tribunal established by law under Article 6 § 1 (see, for instance, *Advance Pharma sp. z o.o.* § 237, and *Juszczyszyn*, § 148; both cited above), in the present case they have not mentioned any specific legal provisions directly applied in the applicant's case which he could possibly have challenged as unconstitutional, relying on their incompatibility with Article 45 § 1 of the Constitution.

150. 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; and *Juszczyszyn*, cited above, § 241).

Given the general nature of the Government's objection, the burden of proof does not seem to have been satisfied in the present case.

151. However, for the sake of consistency in its approach to preliminary objections on non-exhaustion related to a constitutional complaint raised in similar terms in the Polish cases concerning the independence of the judiciary and, in particular, the right to an independent and impartial tribunal established by law under Article 6 § 1 of the Convention in the context of judicial appointments to the Supreme Court with the NCJ's involvement, the Court wishes to reiterate the position it has taken in the previous cases.

152. In *Advance Pharma sp. z o.o.* and *Juszczyszyn* (both cited above), the Court, having regard to its rejection of the Constitutional Court's position, as stated in its judgment of 20 April 2020 (no. U 2/20; see paragraphs 89-91 above), on the manifest breach of the domestic law and its interpretation of Article 6 of the Convention, found no sufficiently realistic prospects of success for a constitutional complaint based on the grounds suggested by the Government and dismissed their preliminary objection.

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 also *Advance Pharma sp. z o.o.*, § 319; and *Juszczyszyn*, § 150, both cited above).

153. In *Juszczyszyn* (cited above), the Court also noted that the above-mentioned Constitutional Court's judgment of 20 April 2020 (no. U 2/20; see paragraphs 89-91 above) and the subsequent judgment of 2 June 2020 (no. P 13/19; cited in *Juszczyszyn* at paragraph 101) 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, cited in *Juszczyszyn* at paragraph 102) found that the amended model of election of judicial members of the NCJ was compatible with the Constitution. The Court concluded that this line of the Constitutional Court's case-law indicated that that body was essentially determined to preserve the new judicial appointment procedure involving the recomposed NCJ (see *Juszczyszyn*, cited above, § 150).

154. In the light of the foregoing, the Court rejects the Government's objection regarding the applicant's failure to lodge a constitutional complaint.

3. Conclusion as to admissibility

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

B. Merits

1. The parties' submissions

(a) Whether the Chamber of Extraordinary Review and Public Affairs satisfies the standard of an "independent and impartial tribunal established by law"

156. The applicant submitted that in the light of the Court's case-law, in particular the judgments in *Reczkowicz* and *Dolińska-Ficek and Ozimek* (both cited above), none of the judges of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court complied with the standard of judicial independence and impartiality as they had all been appointed to the Supreme Court in a fundamentally defective procedure on which the executive and legislative powers had a decisive influence.

157. The Government argued that there had been no manifest breach of the domestic law with regard to the process of appointing the judges who had heard the applicant's case. Referring to the Court's judgment in *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 for 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 on the NCJ seemed to be devoid of any 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 – an independent constitutional authority of the State – they acted only as its members without having a decisive role in making any decisions. In addition, they pointed out that the majority of the NCJ's members were judges.

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

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

160. The Government emphasised that the Convention did not contain any norms implying an obligation for the Contracting States to apply a specific model of appointment of judges of the highest courts of their countries. Nor did the Convention require the setting-up of a judicial council or such a body's participation in the procedure for appointing judges. The procedure for appointing Supreme Court judges in Poland did not differ from solutions adopted in other countries. In this context, the Government

presented examples of procedures for appointing judges in several States of the Council of Europe. In their view, the analysis of the existing solutions indicated that the participation of representatives of the judicial authorities in the procedure for appointing judges was often limited or not foreseen at all. In Poland, on the other hand, the participation of representatives of the judiciary in the procedure for appointing judges was relatively broad and was carried out by the NCJ. The risk of excessive influence of the executive on the process of appointing judges was thus reduced.

161. Furthermore, the constitutional provisions relating to the NCJ were scant; only Articles 186 and 187 of the Constitution referred to the NCJ and it was clear from them that the exact regulation regarding the NCJ was left to further consideration by the legislature. Having regard to the foregoing, the Government argued that the court which had dealt with the applicant's case was a "tribunal established by law", as required by Article 6 § 1 of the Convention. In particular, there had been no breach of domestic law as regards the establishment and functioning of the Chamber of Extraordinary Review and Public Affairs. Nor had the ability of the judges to perform their duties free of undue interference been adversely affected. In this context, the Government referred to the principle of subsidiarity and the concept of the "margin of appreciation".

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

(b) As regards the alleged lack of independence and impartiality on the part of Judge Stępkowski

163. The applicant submitted that in the light of publicly available information on Judge Stępkowski's various activities, in particular the fact that, apart from having been unlawfully appointed to the Supreme Court, he was a well-known right-wing activist and founder of the Ordo Iuris Foundation in Poland, the applicant could have legitimate fears as to his independence and impartiality. The applicant had expressed those fears

openly, asking for Mr Stępkowski's disqualification from dealing with his case, but this had been to no avail.

164. The Government submitted that the applicant's allegations as to Judge Stępkowski's lack of independence and impartiality were of a general and subjective nature. In their view, the applicant had failed to demonstrate how that judge's previous activities and personal views affected his independence and impartiality when examining the extraordinary appeal in the applicant's case.

2. The third-party intervener – the Commissioner for Human Rights of the Republic of Poland

165. The Commissioner for Human Rights of the Republic of Poland (the "Commissioner") maintained that in the jurisprudence of the CJEU there was a tendency to avoid the automatic presumption that a judge who had been appointed after 6 March 2018 (the date on which the NCJ as established under the 2017 Amending Act started its work) would never meet the requirements of independence. The mere fact that a judge had been appointed on a recommendation of the NCJ composed mostly of members chosen by the legislature and the executive was insufficient to rebut the presumption of independence.

166. The Commissioner invited the Court to comment directly on the assessment of independence of judges recommended by the NCJ after 6 March 2018. In his view, such an assessment could fall within the third step of the *Ástráðsson* test, namely whether an obvious and serious breach of national law had been effectively investigated and remedied by national courts.

3. The Court's assessment

(a) Whether the Chamber of Extraordinary Review and Public Affairs satisfies the standard of an "independent and impartial tribunal established by law"

(i) General principles deriving from the Court's case-law

167. 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).

The above principles have recently been applied by the Court in a number of cases concerning the independence of the judiciary in Poland (see, in particular, *Xero Flor w Polsce sp. z o.o.,* cited above, §§ 243-291;

Reczkowicz, §§ 216-282; *Dolińska-Ficek and Ozimek v. Poland*, cited above, §§ 272-355; *Advance Pharma sp. z o.o*, §§ 304-351; and *Juszczyszyn*, §§ 193-211, all cited above).

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

168. In *Dolińska-Ficek and Ozimek*, which specifically concerned the Chamber of Extraordinary Review and Public Affairs (hereinafter the "CERPA"), the Court made, among others, the following findings.

169. As regards the first step of the *Ástráðsson* test, the Court established that, on two counts, there had been a manifest breach of the domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to the CERPA of the Supreme Court.

First, the appointment was made upon a recommendation of the NCJ, as established under the 2017 Amending Act, a body which no longer offered sufficient guarantees of independence from the legislative or executive powers.

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 (see paragraphs 79-80 and 82-87 above), and to that court's conclusions as to the procedure for judicial appointments to the CERPA 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 *Dolińska-Ficek and Ozimek*, cited above, §§ 283-312).

170. For a number of reasons stated in that judgment, the Court was not persuaded by the Government's argument – on which they have also relied in the present case (see paragraph 162 above) – that the Constitutional Court's judgment of 20 April 2020 (no. U 2/20) 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., §§ 314-319). The Court found that this judgment appeared to focus mainly on protecting the President's constitutional prerogative to appoint judges and the *status quo* of the current NCJ, leaving aside the issues which were crucial in the Supreme Court's assessment, such as an inherent lack of independence of the NCJ which, in that court's view, irretrievably tainted the whole process of judicial appointments, including to the Supreme Court. Furthermore, the Court did not accept the Constitutional Court's interpretation of the standards of independence and impartiality of a court under Article 6 § 1 of the Convention, to the effect that those Convention standards excluded the power of "other judges" to generally question a "judge's right to adjudicate" or to verify "the regularity of the procedure preceding the appointment of a judge by the President", which had

led the Constitutional Court to the conclusion that the Supreme Court's interpretative resolution was incompatible with that provision. The Court saw no conceivable basis in its case-law for such a conclusion (ibid., § 316).

In sum, the Court found that the Constitutional Court's evaluation must be regarded as arbitrary and as such could not carry any weight in the Court's conclusion as to whether there was a manifest breach, objectively and genuinely identifiable as such, of the domestic law involved in the procedure for judicial appointments to the CERPA (ibid., § 317).

171. As regards the second breach of the domestic law, the Court held that the President of Poland, despite the fact that the implementation of NCJ resolution no. 331/128 – whereby all the judges in the CERPA had been recommended for appointment – had been stayed by the Supreme Administrative Court and the issue of legal validity of that resolution was yet to be determined by that court, had appointed them to judicial office in manifest disregard for the rule of law.

In that context, the Court subscribed*, inter alia*, to the views expressed by the Supreme Court and the CJEU (ibid., § 328). It first had regard to the Supreme Court's comprehensive assessment of the appointment procedure in respect of Judge Stępkowski (referred to as Judge A.S in *Dolińska-Ficek and Ozimek*). That assessment was made in the Supreme Court's decision to ask the CJEU for a preliminary ruling on the question whether a judge appointed by the President of Poland in the above circumstances could be regarded as an "independent and impartial tribunal established by law" (see *Dolińska-Ficek and Ozimek,* cited above, § 322). In the Supreme Court's view, the participation of the person so appointed in a judicial formation justified the conclusions that such a body was not a "court established by law" (ibid., § 323).

The CJEU, in its judgment in *W.Ż.* (for the relevant parts of the judgment see *Dolińska-Ficek and Ozimek*, cited above, § 203)*,* noted, among other things, that when the appointment of Judge A.S. had taken place, there could have been no doubt, first of all, that the effects of resolution no. 331/2018 proposing his candidature had been suspended by the final order issued by the Supreme Administrative Court. It had also been clear that the said suspension would remain valid until the CJEU had given a preliminary ruling in *A.B. and Others* (for the relevant parts of this judgment see *Dolińska-Ficek and Ozimek*, cited above, § 193).

In the light of the CJEU's case-law, EU law required that the national court dealing with a dispute governed by that law must be able to grant interim relief in order to ensure the full effectiveness of the judgment to be given. Thus, the appointment of A.S. in breach of the authority attaching to the final order of the Supreme Administrative Court, and without waiting for the CJEU judgment in *A.B. and Others*, had undermined the system established in Article 267 TFEU. Subject to the final assessment to be made by the domestic court, the circumstances of the case seen as a whole were such as to lead to

the conclusion that the appointment of A.S. had taken place in clear disregard of the fundamental procedural rules for the appointment of judges to the Supreme Court.

172. The Court concluded that the actions of the executive power in the process of appointment of judges to the CERPA demonstrated an attitude which could only be described as one of utter disregard for the authority, independence and role of the judiciary. Those actions had clearly been taken with the ulterior motive of not only influencing the outcome of the pending court proceedings but also preventing the proper examination of the legality of the resolution that recommended candidates for judicial posts and, in consequence, rendering judicial review of the resolution meaningless. They were aimed at ensuring that the judicial appointments as proposed by the NCJ – a body over which the executive and the legislative authorities held an unfettered power – would be given effect even at the cost of undermining the authority of the Supreme Administrative Court, one of the country's highest courts, and despite the risk of setting up an unlawful court. As such, the actions were in flagrant breach of the requirements of a fair hearing within the meaning of Article 6 § 1 of the Convention and were incompatible with the rule of law (ibid., § 330).

173. As regards the second step of the test, the Court found that, by virtue of the 2017 Amending Act, which 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 the executive powers 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. This, in effect, enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, a possibility of which these authorities had taken advantage. This situation was further aggravated by the subsequent appointment of judges to the CERPA by the President of Poland, carried out in flagrant disregard for the fact that the implementation of NCJ resolution no. 331/2018 recommending their candidatures had been stayed.

The Court concluded that the breaches of the domestic law that it had established, arising from non-compliance with the rule of law, the principle of the separation of powers and the independence of the judiciary, inherently tarnished the impugned appointment procedure. A procedure for appointing judges disclosing 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 the judges so appointed.

In sum, the breaches in the procedure for the appointment of judges to the CERPA of the Supreme Court were found to have been of such gravity that

they impaired the very essence of the applicants' right to a "tribunal established by law" (ibid., §§ 348-350).

174. As regards the third step of the test, the Court found that there was no procedure under Polish law whereby the applicants could challenge the alleged defects in the process of appointment of judges to the CERPA (ibid., § 352).

175. In conclusion, in *Dolińska-Ficek and Ozimek* the Court held that the above irregularities in the appointment process compromised the legitimacy of the CERPA 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 was "lawful" for purposes of Article 6 § 1 of the Convention. It further held that, on that account, there had been a violation of Article 6 § 1 of the Convention as regards the right to an independent and impartial tribunal established by law (ibid., §§ 353 *in fine* and 357, and the fifth operative provision of the judgment).

176. In view of the foregoing and for the same reasons as in *Dolińska-Ficek and Ozimek*, the Court concludes in the present case that the CERPA which examined the extraordinary appeal in question was not an "independent and impartial tribunal established by law".

(b) As regards the alleged lack of independence and impartiality on the part of Judge Stępkowski

177. The Court notes at the outset that the applicant unsuccessfully asked for the exclusion of seventeen judges currently sitting in the CERPA, listing them by name. The list included, in particular, Mr Stępkowski, the judge rapporteur, and Mr Księżak, who would subsequently deal, sitting as a single judge, with the applicant's request for exclusion. As regards all the judges concerned, the applicant submitted that their appointment procedure raised serious doubts from the point of view of the rule of law, especially as they had been recommended for appointment by the reformed NCJ, constituted in a deficient procedure under the 2017 Amending Act. In respect of Mr Stępkowski, he stressed that his doubtful status as a judge was the object of proceedings before the CJEU (see also paragraph 171 above, with reference to the case of *W.Ż*) and alleged that his past (pre-appointment) activities had demonstrated extreme and fundamentalist views adversely affecting his impartiality (see paragraph 34 above).

178. The applicant's request was dismissed in so far as it related to Judge Stępkowski and rejected in its remainder by the judge directly concerned by the applicant's challenge, as the procedure for his appointment and his own independence and impartiality were at stake (see paragraph 35 above). As the judge gave no reasons for his decision, the Court is unable to ascertain on which legal basis he relied, what considerations were behind the decision and whether, and if so how, the issue of Judge Stępkowski's alleged lack of individual independence and impartiality was addressed.

179. The Court notes, as it did in *Dolińska-Ficek and Ozimek* (cited above, § 337), that pursuant to section 26(1) of the 2017 Act on the Supreme Court, as amended by the 2019 Amending Act, the CERPA, in addition to its already extensive powers, was entrusted with exclusive jurisdiction in respect of any plea of a lack of independence on the part of a judge or a court. Under subsection (2) a motion for exclusion of a judge concerning – as in the present case – the legality of his appointment or "authority to perform judicial duties" was (and still is) to be left without consideration by the CERPA. In effect, the powers of the CERPA were extended to cover all matters concerning the independence of the Polish judiciary, thus giving it uncircumscribed power in that regard and enabling it to protect against any challenge the NCJ's recommendations for judicial appointment by the President of Poland.

180. The Court finds it unacceptable from the point of view of the fair trial standards that in the present case the ruling was given by the person who, by virtue of the fundamental principle *nemo iudex in causa sua*, should have been prevented from dealing with the matter. It notes, with still more concern, that this cannot be seen as an isolated incident but is, as explained above, consistent with the applicable law. Considering that the CERPA does not meet the requirements of independence and impartiality required under the Convention, this legal solution – as also noted by the Supreme Court in its resolution of 23 January 2022 (see paragraph 86 above) – gives no guarantee that the matter will be heard objectively.

181. In reaching the conclusion that the CERPA dealing with the applicant's case lacked the attributes of an "independent and impartial tribunal established by law", the Court has had regard – as in *Dolińska-Ficek and Ozimek* – to the appointment of Judge Stępkowski, the judge rapporteur in the applicant's case (see paragraph 171 above). The Court notes that the Commissioner invited it to comment directly on the independence of the judges appointed on recommendations by the NCJ as constituted under the 2017 Amending Act (see paragraphs 165-166 above).

In that regard, the Court would refer to the Supreme Court joined chambers' resolution of 23 January 2020, holding that a court formation including a judge appointed to the Supreme Court on the NCJ's recommendation was inconsistent with the provisions of the law within the meaning of Article 379 § 4 of the Code of Civil Procedure, regardless of whether the deficiency in the appointment procedure led, in the specific circumstances, to a violation of the guarantees of independence and impartiality within the meaning of Article 45 of the Constitution, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 § 1 of the Convention (see paragraph 83 above). This interpretation – which the Court endorses – is applicable to the applicant's case.

In consequence, the issue of whether this particular judge of the Supreme Court in addition displayed, as the applicant alleges, any bias against him based on his individual political or other views or activities outside his

judicial functions, should be considered absorbed within the finding of the breach of Article 6 § 1 as established above.

For that reason and having regard to its considerations under Article 46 of the Convention (see paragraphs 319-327 below), the Court also finds it unnecessary to respond further to the Commissioner's plea inviting it to comment on the independence of judges recommended by the reformed NCJ.

(c) Conclusion as to the alleged violation of the right to an "independent and impartial tribunal established by law"

182. Having regard to all the above considerations, the Court concludes that there has been a violation of Article 6 § 1 of the Convention as regards the applicant's right to an "independent and impartial tribunal established by law".

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE PRINCIPLE OF LEGAL CERTAINTY

183. The applicant also alleged a breach of Article 6 § 1 of the Convention in that the Prosecutor General's extraordinary appeal had been based on legal provisions violating the principle of legal certainty.

Article 6 § 1 of the Convention reads, in so far as relevant, as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

1. The Government's objection as to non-exhaustion

184. The Government pleaded non-exhaustion in respect of both of the applicant's complaints under Article 6 § 1. The Court has already dismissed their objection when dealing with the first complaint (see paragraphs 149-154 above). It sees no reason to hold otherwise in respect of the second complaint.

2. The Court's conclusion

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

B. Merits

1. The parties' submissions

186. The applicant submitted that a package of judicial system reforms introduced in Poland in 2017 which, among other things, established the CERPA and introduced an extraordinary appeal, was highly controversial and

had been criticised by numerous European bodies. The "face" of the reform was Mr Ziobro, a politician of very well defined political opinions, who since 2015 had occupied the position of Prosecutor General and, at the same time, Minister of Justice, following the merger of those offices.

187. In his arguments concerning the alleged general defects of an extraordinary appeal, the applicant fully subscribed to the comments of the Helsinki Foundation of Human Rights and the Polish Judges Association Iustitia (see paragraphs 201-211 and 219-221 below). He stressed that the list of public bodies that could lodge an extraordinary appeal had been set up arbitrarily and the law gave to the Prosecutor General a disproportionate and actually unlimited power to challenge any final ruling. The grounds and the scope of operation of the appeal were overly broad and not precisely defined. The five-year time-limit for lodging it was excessive, raising doubts in the context of the principles of *res judicata*, legal certainty and stability and foreseeability of the law. A brand new chamber of the Supreme Court – the CERPA – had been specially created to deal with extraordinary appeals; however, all the judges sitting in that chamber were appointed in an unlawful procedure, as established in *Dolińska-Ficek and Ozimek* (cited above). Transitional provisions of the 2017 Act on the Supreme Court gave the Prosecutor General the possibility of undermining any final judicial decision given in Poland as from 17 October 1997; in fact, it gave personally to Mr Ziobro, a member of the executive, an unlimited and totally arbitrary power to do so. Moreover, a case in which he lodged an extraordinary appeal was to be heard by judges approved by the government.

In sum, in the light of the Court's case-law, an extraordinary appeal as operating in Poland was incompatible with Article 6 § 1 of the Convention.

188. Referring to his own case, the applicant maintained that the Prosecutor General had arbitrarily decided to lodge an extraordinary appeal against the judgment in his favour, under retroactive provisions of the 2017 Act on the Supreme Court. Furthermore, the Prosecutor General had enjoyed unlimited time to prepare his extraordinary appeal, whereas the applicant had been allowed only fourteen days to submit his reply.

189. The Government argued that the introduction of an extraordinary appeal into Polish law had been a response to emerging demands to create an effective legal remedy which would allow the elimination of final rulings that violated the Constitution, flagrantly violated the law and/or were manifestly contrary to evidence collected in a case. In this context, they referred to decisions of the Constitutional Court dating back to 2003, holding that the Polish legal order had lacked an extraordinary remedy that would allow efficient protection of the rights and freedoms enshrined in the Constitution. Due to its narrow scope and the emphasis given to removing from the legal order a provision that violated constitutional rights and freedoms, the constitutional complaint did not fulfil those requirements.

190. In their view, recourse to an extraordinary appeal was restricted to the most exceptional situations, where the final ruling could not be reversed or amended by means of other extraordinary remedies. Further guarantees had been introduced to ensure the proper use of that remedy, such as reasonable time-limits and vesting only a few public officials – who enjoyed the highest degree of public trust – with the right to lodge an extraordinary appeal.

191. The Government emphasised that the admissibility of an extraordinary appeal was conditional on the need to ensure compliance with the principle of a democratic State governed by the rule of law and implementing the principles of social justice. This limitation meant that even a serious defect of a decision challenged by means of an extraordinary appeal did not automatically lead to declaring an extraordinary appeal admissible. Each decision on its admissibility was preceded by the weighing-up of conflicting constitutional values and interests, as laid down in Article 2 of the Constitution.

192. The Government added that the Supreme Court had signalled multiple times that mere defectiveness of a court decision was insufficient to render an extraordinary appeal admissible. Each case required a careful assessment of whether the departure from the principle of *res judicata* was warranted by the nature and extent of irregularities in the judgment appealed against. In the Government's view, the argument that the extraordinary appeal mechanism was contrary to the principle of legal certainty could result not only from ignorance of domestic law but also from an erroneous perception of that principle as being of an absolute character.

193. Relying on the Court's judgment in *Ryabykh* (cited above), the Government submitted that the extraordinary appeal could be successfully used only in cases of infringements of a serious and unmistakable nature which had resulted in a miscarriage of justice. They further stated that the extraordinary appeal not only met the criteria developed in the Court's case-law, but also constituted a mechanism aimed at identifying and redressing human rights violations. Consequently, it increased the standards of protection of the rights guaranteed by the Convention at domestic level.

194. The Government provided several examples of extraordinary appeals lodged by the Prosecutor General and allowed by the Supreme Court. In particular, they referred to cases concerning loans denominated in Swiss francs (see *Sadlik v. Poland*, no. 44180/17, § 3, 31 August 2021 [Committee decision]), inheritance matters, usurious loans, employees' rights and the return of children born in Poland, under the Hague Convention on the Civil Aspects of International Child Abduction.

195. Unlike in the Court's judgments in *Brumărescu* and *Ryabykh* (both cited above), where a violation of Article 6 of the Convention had been particularly flagrant due to the fact that the relevant extraordinary remedy

could be lodged without any time-limit, the provisions of the 2017 Act on the Supreme Court had introduced strict time-limits.

196. The Government submitted that the existence of the extraordinary appeal mechanism had improved the overall effectiveness of the execution of the Court's judgments in Polish civil cases. Given that the reopening of civil proceedings following a finding of a violation of Article 6 of the Convention by the Court was not provided for in the Polish legal system, the extraordinary appeal provided an additional opportunity to remove from the legal system a decision that was at the root of a Convention violation. The Government noted that the retrospective jurisdiction of the Supreme Court in cases involving extraordinary appeals potentially extended to all cases in which the Court found a violation of the Convention.

197. The Government further stated that their position accorded with the comments made by the Commissioner on the extraordinary appeal mechanism (see paragraphs 212-218 below). They invited the Court to accept the position presented by them and corroborated by the Commissioner, in contrast to the opinions of the other third-party interveners.

198. Turning to the extraordinary appeal lodged in the applicant's individual case, the Government maintained that the Prosecutor General's recourse to that remedy had not only been justified but also necessary since it had been the sole possibility of reversing the judgment of the Gdańsk Court of Appeal of 24 March 2011, which had infringed the fundamental right to freedom of expression. In consequence, it was a legitimate and proportional legal instrument to be used in the circumstances.

199. Since in the applicant's case one of the basic constitutional freedoms had been violated, the Prosecutor General, who was undoubtedly a public authority upholding the rule of law, had had not only legal grounds, but also a duty to use this extraordinary remedy in order to eliminate from the legal system a ruling violating the fundamental freedoms and rights of every human being and citizen as laid down in the Constitution. In that context, the Government stressed that the basic reason for lodging an extraordinary appeal was the duty to ensure fair court judgments, based on correctly applied legal provisions. Rulings that did not meet these standards, and which were thus incompatible with the basic criteria of fairness, including, most of all, with the Polish Constitution, needed to be corrected, even if they had already become final.

200. For these reasons, the Government concluded that the CERPA's judgment reversing the final judgment of the Gdańsk Court of Appeal of 24 March 2011 upon the Prosecutor General's extraordinary appeal did not amount to a breach of the principle of legal certainty.

2. The third-party interveners' comments

(a) The Helsinki Foundation for Human Rights

201. The Helsinki Foundation for Human Right ("Helsinki Foundation") began its observations by recalling that the 2017 Act on the Supreme Court had introduced not only the extraordinary appeal into the Polish legal system but also a number of other controversial regulations, such as the establishment of the Disciplinary Chamber of the Supreme Court and the lowering of the retirement age of the Supreme Court judges. Moreover, on the same day the Polish Parliament had adopted the 2017 Amending Act whereby it changed the manner of election of judicial members of the NCJ and prematurely terminated the term of office of serving members of the NCJ. All these changes had led to multiple violations of the Convention, as confirmed by the Court's final judgments in *Reczkowicz, Dolińska-Ficek and Ozimek, Advance Pharma sp. z o.o.* and *Grzęda* (all cited above).

202. As regards extraordinary appeals, the intervener maintained that final judgments of courts should be respected and enforced and that their binding nature should not be challenged. However, the principle of legal certainty was not absolute and, in certain circumstances, could be limited in favour of other legal values, essential for the maintenance of the rule of law. In its view, the design and practical operation of extraordinary remedies must ensure an appropriate balance of conflicting interests and values. In particular, extraordinary remedies must serve primarily the protection of individuals against grave injustice and not be used for reasons of a political nature.

203. First of all, grounds for lodging extraordinary remedies must be precisely framed in order to avoid arbitrariness in the revision of final decisions. Secondly, they should be limited to particularly serious violations of substantive or procedural laws. Referring to the Court's judgment in *Moreira Ferreira v. Portugal (no. 2)* ([GC], no. 19867/12, § 62, 11 July 2017), the intervener stated that the extraordinary appeal should not be treated as an "appeal in disguise", and the mere possibility of there being two views on the subject was not a ground for re-examination.

204. In its view, the required level of seriousness and precision of grounds for revision of a final judgment might depend on the type of case. In civil proceedings, grounds for revision must be limited in order to ensure legal certainty and a proper balance between the rights of both parties.

205. Another crucial factor was the time-limit for lodging extraordinary remedies. The longer the time since a ruling was made, the more important it would be to respect legal certainty and the more difficult it should be to challenge that ruling.

206. The intervener did not rule out the possibility of granting the right to lodge an extraordinary appeal to certain public bodies, even in lieu of parties to the proceedings. Nevertheless, States should not have absolute discretion

in this regard. It would be contrary to the rule of law if final court judgments could be challenged by political authorities, especially if grounds and time-limits for lodging extraordinary remedies were not sufficiently precise to prevent arbitrariness in this area. In such a situation, an extraordinary remedy could be transformed from an exceptional measure aimed at protecting fundamental rights of individuals against grave injustice into a tool of political supervision over court judgments by the executive. On the other hand, the fact of providing independent State organs, such as the Commissioner for Human Rights, whose constitutional tasks included protection of fundamental rights, with the possibility of lodging an extraordinary remedy, would give rise to lesser controversies.

207. The intervener further observed that there was a close link between the right to an independent and impartial tribunal established by law and the right not to have a final judicial decision called into question.

208. Referring to the opinions of the Venice Commission and the OSCE/ODIHR (see paragraphs 113-115 above), the Helsinki Foundation maintained that the grounds for lodging an extraordinary appeal were too vague and open to interpretation. It agreed with the Venice Commission that the notion of a "democratic State governed by the rule of law and implementing social justice" was open to broad discretion in the legal proceedings and that such unspecific criteria ran counter to the principle of foreseeability of the law and should not be a basis for overturning final and binding judgments. It also submitted that the general time-limit for lodging such an appeal was very long in itself, especially when compared to other extraordinary remedies existing in Polish law, notably a cassation appeal, reopening of proceedings and an application for declaring a final ruling unlawful. The law provided for a two-month time-limit for lodging a cassation appeal for the parties in civil proceedings and six months for the Prosecutor General, the Commissioner for Human Rights and the Commissioner for Children's Rights. In criminal proceedings it was 30 days for the parties and while no time-limit for the three above-mentioned bodies existed, after one year from the date on which a ruling had become final a cassation appeal was inadmissible. An application for reopening of civil proceedings must be lodged within three months from the date on which a party had become aware of the existence of a ground for reopening but not later than ten years after the ruling in question had become final, unless a party had been prevented from acting or had not been duly represented. In criminal proceedings the time-limit for an application for reopening was one year from the date of the final ruling and no *ex officio* (*sic*) reopening was possible after that time-limit.

209. Furthermore, in accordance with section 115 of the 2017 Act on the Supreme Court as applicable at the material time, within three years (currently six years) from the date of entry into force of that Act, it was possible for the Prosecutor General and the Commissioner to lodge an

extraordinary appeal against final rulings terminating proceedings that had become final after 17 October 1997. The length of that time-limit was extraordinary and, in itself, posed a serious threat to legal certainty.

210. According to the Helsinki Foundation, another issue arose with regard to the actual position and role of the Prosecutor General, whose office was merged in 2016 with that of the Minister of Justice. The independent office of the Prosecutor General which operated in 2010-2016 had been abolished. Although in Poland the position of Prosecutor General and the Minister of Justice had also been merged before 2010, the 2016 reform gave the Prosecutor General more extensive powers to influence the course of specific criminal proceedings. According to publicly available statistical data, the Prosecutor General had – thus far – lodged the largest number of extraordinary appeals. As noted by the Court in its judgment in *Dolińska-Ficek and Ozimek* (cited above), the Minister of Justice had a strong influence on the composition of the NCJ operating after 6 March 2018, which recommended all the judges currently sitting in the CERPA – a body with exclusive jurisdiction to examine extraordinary appeals.

211. Lastly, the intervener acknowledged that the extraordinary appeal was often used in important cases concerning ordinary citizens. However, it also indicated that practice showed that the risk of abusing the mechanism of extraordinary appeal by the Prosecutor General for political purposes was not merely hypothetical.

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

212. The Commissioner observed that the extraordinary appeal mechanism had been inspired by the institution of an extraordinary review (*rewizja nadzwyczajna*), which had operated in Poland in 1950-1996. The extraordinary appeal filled the gap between a constitutional complaint to the Constitutional Court and a cassation appeal to the Supreme Court.

213. The purpose of an extraordinary appeal was by no means to set aside all judgments that might be perceived as unjust by citizens. Referring to the jurisprudence of the CERPA, the Commissioner submitted that the extraordinary appeal was aimed at eliminating only those decisions that contained defects of a fundamental nature. That remedy's unique nature was demonstrated by a narrowly defined list of authorities who could use it and relatively narrow conditions of its admissibility. In practice, the vast majority of extraordinary appeals had been lodged by the Commissioner and the Prosecutor General.

214. By the end of 2022, the Commissioner had received some 13,700 requests for lodging an extraordinary appeal. In his view, tens of thousands of people felt aggrieved by final decisions that could not be challenged in any other way. The Commissioner systematically reviewed such requests, balancing the interests of individuals against the need to protect legal certainty.

215. So far the Commissioner had lodged 112 extraordinary appeals, the majority of which concerned civil and commercial matters. Most contested rulings dated back to 2010-2018, although there had been cases of older rulings that had been challenged (the oldest one had been issued in 1999).

216. The intervener provided examples of cases in which his office had lodged an extraordinary appeal. They concerned issues of so-called "double inheritance", i.e. inheritance of debts by children, imposing joint and several liability on minors for occupying dwellings without legal title, consumer rights, rights of homeless people in the context of eviction of disabled persons, right to a court or right to respect for private life.

217. In the Commissioner's view, there was room for improvement in the extraordinary appeal procedure. In particular, grounds of appeal should be limited in a way that excluded the lodging of such appeals by public officials serving the interest of the State Treasury. In his view, the extraordinary appeal should only serve to protect the rights of an individual. He referred to an extraordinary appeal lodged by the Prosecutor General in a case of a citizen who had successfully sued the State Treasury for compensation for a violation of his personal interests caused by air pollution.

218. The intervener concluded that the extraordinary appeal was an important and necessary element of the Polish legal system. Its removal from the legal system would deprive the Commissioner of an important tool to assist citizens whose constitutional rights had been violated by final court rulings.

(c) Polish Judges' Association Iustitia

219. The Polish Judges Association Iustitia ("Iustitia") maintained that before the introduction of an extraordinary appeal into the legal system, Polish law had already included a wide catalogue of extraordinary remedies allowing final court decisions to be challenged. It submitted that the extraordinary appeal was not limited to points of law but could also involve examination of the facts of a case, even after a significant lapse of time. This in turn increased the risk of judicial error, undermining the overall efficiency of the justice system.

220. Broad regulation of the time-limit for lodging an extraordinary appeal meant that legal protection granted in final judicial decisions carried a risk of being merely provisional and dependent on the will of certain public bodies, including active politicians.

221. The intervener referred to the fact that the extraordinary appeal could be lodged by the President of the General Counsel of the Republic of Poland – an official responsible for legal representation of the State Treasury. This could undermine the effectiveness of the constitutional principle of equality before the law (Article 32 § 1 of the Constitution), given that only one litigant was entitled to lodge an additional appeal, to the detriment of its opponent. A similar risk was present in the case of the Prosecutor General,

who was an active politician and who could lodge an extraordinary appeal in essentially all cases, including those where a prosecutor had acted as a party. Given the broadly defined grounds for lodging an extraordinary appeal, it ran the risk of being used instrumentally, based on political factors.

3. The Court's assessment

(a) General principles deriving from the Court's case-law

222. The principle of legal certainty is implicit in all the Articles of the Convention (see, among many other authorities, *Guðmundur Andri Ástráðsson*, cited above, § 238, and *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 56, 20 October 2011). Under Convention law, the principle of legal certainty manifests itself in different forms and contexts, one of them being the requirement that where the courts have finally determined an issue, their ruling should not be called into question (see, for instance, *Brumărescu,* § 61, cited above). This latter aspect of legal certainty presupposes, in general, respect for the principle of *res judicata*, which, by safeguarding the finality of judgments and the rights of the parties to the domestic proceedings – including any persons involved as victims – serves to ensure the stability of the judicial system and contributes to public confidence in the courts (see *Guðmundur Andri Ástráðsson*, cited above, § 238).

223. The *res judicata* principle requires that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. The review should not be treated as an ordinary appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination (see *Roşca v. Moldova*, no. 6267/02, § 25, 22 March 2005; *Agrokompleks v. Ukraine*, no. 23465/03, § 148, 6 October 2011; *Vardanyan and Nanushyan v. Armenia*, no. 8001/07, § 67, 27 October 2016; *Şamat v. Turkey*, no. 29115/07, § 53, 21 January 2020; and *Tığrak v. Turkey*, no. 70306/10, § 48, 6 July 2021).

224. While the requirements of the principle of legal certainty, and the force of *res judicata*, are not absolute (see, for an example in the criminal-law sphere, *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 62, 11 July 2017), a departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character, such as the correction of fundamental defects or a miscarriage of justice (see, for instance, *Ryabykh,* § 52*,* cited above, and *OOO Link Oil SPB v. Russia* (dec.), no. 42600/05, 25 June 2009). These notions do not, however, lend themselves to precise definition; the Court has to decide, in each case, to what extent the departure from the principle of legal certainty is justified (see, for instance, *Sutyazhnik v. Russia*, no. 8269/02, § 35, 23 July 2009).

225. Merely considering that the decision in the applicant's case was incomplete or one-sided or that the proceedings led to an erroneous outcome, cannot of and by itself, in the absence of jurisdictional errors or serious

breaches of court procedure, abuses of power, manifest errors in the application of substantive law or any other weighty reasons stemming from the interests of justice, indicate the presence of a fundamental defect in the previous proceedings (see *Tığrak*, cited above, § 48).

226. The relevant considerations to be taken into account in this connection include, in particular, the effect of the reopening and of any subsequent proceedings on the applicant's individual situation, whether the reopening resulted from the applicant's individual situation, and whether the reopening resulted from the applicant's own request; the grounds on which the domestic authorities overturned the judgment in the applicant's case; the compliance of the procedure at issue with the requirements of domestic law; the existence and operation of procedural safeguards in the domestic legal system capable of preventing abuse of that procedure by the domestic authorities; and other pertinent circumstances of the case (ibid.)

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

227. Before assessing, under Article 6 § 1 of the Convention, the individual consequences of the reversal of the final judgment in the applicant's case, the Court will first examine, in the light of its case-law, the general features of the extraordinary appeal as it operates in Poland.

(i) General features of the extraordinary appeal and their assessment in Convention terms

(α) Public bodies authorised by law to lodge an extraordinary appeal

228. The Court notes at the outset that section 89(2) of the 2017 Act on the Supreme Court makes a distinction between, on the one hand, the Prosecutor General and the Commissioner for Human Rights, both of whom may lodge an extraordinary appeal against any final judicial decision and, on the other, the other public bodies which may do so only "within the scope of their competence" (see paragraph 69 above). In consequence, the former two offices have a considerably stronger position as regards the institution of the proceedings. While the statistics produced by the Government show that between April 2018 and November 2022 the Commissioner's office used its prerogatives rather sparingly, as it lodged 58 appeals out of 429 examined by the CERPA, the Prosecutor General's office displayed much more intense activity over that period; it lodged 348, amounting to 81% of all appeals examined. The remaining seven authorised bodies lodged 23 appeals (see paragraph 48 above).

229. The above data demonstrates an imbalance between the evidently larger scale on which the Prosecutor General contested final judicial decisions and the limited recourse to the impugned remedy by other persons enumerated in section 89(2).

230. The fact that an authorised body, within its statutory competence, makes use of an exceptional procedure of this kind more often than others cannot *per se* indicate abuse of its prerogatives or defective practice.

However, as emphasised by the applicant, the Helsinki Foundation and Iustitia, the Prosecutor General is also an active politician who in addition performs the functions of Minister of Justice as member of the party forming the ruling government coalition in 2015-2023. He is the main author of the far-reaching reorganisation of the Polish judicial system which started in 2017 and, among other things, significantly increased the powers of the Minister of Justice in relation to the internal organisation of the courts and to the appointment and dismissal of the presidents and vice-presidents of the courts. It also extended his powers in the areas of promotion and discipline (see *Grzęda*, cited above, §§ 17-18). It is further known that he exerted significant political influence on the composition of the NCJ as established by the 2017 Amending Act, a body entrusted with recommending candidates for judicial office, including the CERPA (see *Reczkowicz*, cited above, §§ 77-79, 100 and 272).

231. In these circumstances, entrusting the Prosecutor General – who is at the same time part of the executive and, in this role, wields considerable authority over the courts and exerts a strong influence on the NCJ -– with the unlimited power to contest virtually any final judicial decision creates more than a hypothetical risk that the legal remedy, which is in theory designed to protect the fundamental rights of an individual, may in practice become a tool of political supervision over court judgments by the executive (in this context, see also the submissions of the Helsinki Foundation and Iustitia at paragraphs 210-211 and 221 above).

(β) Grounds for lodging an extraordinary appeal

232. Under section 89(1) of the 2017 Act on the Supreme Court an extraordinary appeal may be lodged only "if it is necessary to ensure compliance with the principle of a democratic State governed by the rule of law and implementing the principles of social justice" and where the final judicial decision in question – which may not be reversed or amended by means of other extraordinary remedies available under Polish law – "violates the principles or freedoms and rights of every human being and citizen as laid down in the Constitution", and/or "grossly violates the law through its misinterpretation or misapplication" and/or "there is an obvious contradiction between the significant findings of the court and the content of evidence collected in a case" (see paragraph 69 above).

233. Already before this provision of the 2017 Act on the Supreme Court entered into force on 3 April 2018, serious concerns as to its compatibility with the rule of law had been raised by various European institutions.

The OSCE/ODIHR, in its opinion of 13 November 2017, referred to the "risk of potentially overburdening the Supreme Court, while conferring upon

the other branches of the government an influence over the judiciary that runs counter to the principles of judicial independence and separation of powers". It recommended that this provision be removed from the draft Act on the Supreme Court as "being inherently incompatible with international rule of law and human rights standards". At the same time, it was stressed that the aim of protecting the rule of law and social justice could be achieved by the proper use of existing legal remedies, notably a cassation appeal, to ensure rectification of judicial errors or other deficiencies before a judgment became final and enforceable (see paragraph 113 above).

The Venice Commission, in its opinion of 11 December 2017, noted that the system of extraordinary appeals had existed in many former communist countries and that the Polish proposed system, while not being entirely identical to the old Soviet system, bore many similarities with it. It was particularly concerned with the provision to the effect that a final judgment could be overturned for the sake of "social justice", a term open to broad discretion in its interpretation in legal proceedings and therefore at odds with the principle of foreseeability of the law. The Venice Commission also criticised the possibility of revising a final judgment on points of fact, the establishment of the facts being primarily the task of first-instance courts (see paragraph 115 above).

The European Commission, in its fourth Recommendation regarding the rule of law in Poland of 20 December 2017, referring to the broadly set grounds for an extraordinary appeal, considered that it raised concerns as regards the principle of legal certainty and the rule of law (see paragraph 126 above).

234. Following the Act's entry into force, further criticism has come from various other sources. For instance, GRECO, in the addendum to the Fourth Round Evaluation Report on Poland, drew attention to concerns that an extraordinary appeal was dangerous for the stability of the Polish legal order (see paragraphs 118-119 above). PACE, in its Resolution of 28 January 2020, stated that the introduction of an extraordinary appeal against final judgments "on wide-ranging and subjective grounds" violated the principle of legal certainty and *res judicata* and could considerably increase the number of applications against Poland before the Court (see paragraph 114 above).

235. The Court endorses the above opinions. It is particularly concerned with the following elements.

First, one of the conditions *sine qua non* for lodging an extraordinary appeal is a need to ensure compliance with the principles of social justice. The term "social justice", while obviously meant to refer to Article 2 of the Constitution (see paragraph 58 above), is generic in nature and vague – people in general (and lawyers alike) may reasonably disagree about its meaning. Its interpretation is therefore subject to a broad degree of discretion. The understanding and interpretation to be given to this concept may considerably vary depending on the points of reference chosen by the interpreting body,

resulting in a lack of clarity as to its meaning for the purposes of court proceedings. Such a large scope of discretion afforded to the public bodies authorised to lodge an extraordinary appeal and to the CERPA opens the door to possible arbitrariness, misuse of the legal remedy and abuse of process. Consequently, the impugned provision does not satisfy the Convention requirements for the quality of the "law", as domestic law must indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities so as to ensure to individuals the minimum degree of protection to which they are entitled under the rule of law in a democratic society (see *Piechowicz v. Poland*, no. 20071/07, § 212, 17 April 2012, with further references to the Court's case-law).

Second, the final decision may be appealed against on the grounds of "an obvious contradiction between significant findings of the court and the content of evidence collected in the case". In practical terms, that means that in civil cases even many years after the events the CERPA may act as the tribunal of fact at the third or fourth level of jurisdiction, even though the lower courts had established the facts on the evidence directly taken or heard before them. In effect, this solution undermines both the stability of final judicial decisions and the individual's legitimate expectation to be protected by law from repeated litigation of a matter that has already been finally determined, thus revealing the extraordinary appeal as an ordinary appeal in disguise, whereby a fresh examination of the case can be obtained, contrary to the *res judicata* principle (see paragraph 223 above, with references to the Court's case-law).

(γ) Time-limits for lodging an extraordinary appeal

236. Pursuant to section 89(3), the general time-limit for lodging an extraordinary appeal is five years from the date on which the decision appealed against has become final. In that regard, the Court takes note of the Venice Commission's opinion – which it endorses – that this period is very long by itself (see paragraph 115 above). This term is reduced to one year in cases where a cassation appeal has been lodged and the law prohibits *reformatio in peius* (where the appellant is put in a worse position than if there had been no appeal) in criminal cases, reducing to one year the general time-limit and to six months where a cassation appeal has been lodged.

However, under the transitional provision of section 115(1) the general time-limit of five years, except for criminal cases where the prohibition of *reformatio in peius* still operates, does not bind the Prosecutor General and the Commissioner. In that respect they have both been granted additional, exceptional powers. Pursuant to section 115(1) and (1a), within three years at the material time (and currently within six years) from 3 April 2018, the date of the entry into force of the 2017 Act on the Supreme Court, they could, and still may, lodge an extraordinary appeal against any final judicial decision

that had become final before the Act's entry into force, going as far back as decisions given from 17 October 1997 (see paragraphs 69-70 above).

237. Against this background, the Court cannot accept the Government's argument that the 2017 Act on the Supreme Court introduced strict time-limits for lodging an extraordinary appeal (see paragraphs 190-195 above). Conversely, it finds the exceptions set out by the transitional provision incompatible with the requirements of the rule of law, in particular the principles of legal certainty, *res judicata* and foreseeability of the law. In terms of the rule of law it is inconceivable to introduce, retrospectively, a legal avenue enabling the reopening of a court case terminated before the entry into force of the new legal provisions, i.e. a case which was not subject to any further judicial review on the date of the final decision in the case. The possibility for the Prosecutor General and the Commissioner to seek, over a considerable period which is still running, the revision of court decisions in civil cases closed over twenty years before the legislation took effect is particularly alarming and cannot be justified by any plausible necessity relied on by the respondent Government, including the need to ensure "compliance with the principle of a democratic State governed by the rule of law and implementing the principles of social justice".

(δ) Powers of the adjudicating body

238. Pursuant to section 91(1) of the 2017 Act on the Supreme Court, if an extraordinary appeal is allowed, the CERPA will reverse the decision appealed against in its entirety or in part and, depending on the outcome of the proceedings, will either rule on the merits itself or refer the case back for re-examination to the competent court, if necessary also reversing the first-instance judgment. It may also discontinue the proceedings (see paragraph 69 above). All judicial decisions, including those given by the Supreme Court may be subject to the CERPA's review (see section 94, cited in paragraph 69 above).

Thus the CERPA has powers much similar to those of a court of cassation; however, in cases where a contradiction between significant findings of the court and the content of evidence is alleged, it may also act as a tribunal of fact (see also the remarks in paragraph 235 above). Having regard to the above conclusions as to the broadly defined grounds for an extraordinary appeal, its operation as an ordinary appeal in disguise and time-limits allowing the Prosecutor General and the Commissioner to challenge decisions that became final before the entry into force of the Act, the CERPA's powers – which practically allow it to extinguish the entirety of finally terminated proceedings – raise serious concerns from the point of view of the principle of legal certainty.

(ε) Characteristics of the adjudicating body

239. The Court has already established in *Dolińska-Ficek and Ozimek* and in the present case that the irregularities in the process of appointment of its judges have compromised the legitimacy of the CERPA to the extent that it lacked and continues to lack the attributes of an "independent and impartial tribunal established by law" (see paragraph 175 above). In consequence, the examination of an extraordinary remedy which may lead to far-reaching, adverse and often irreversible legal consequences for the individual concerned, including the wiping-out of the final judicial decision in his or her case, and demonstrating serious deficiencies *vis-à-vis* the principle of legal certainty is entrusted to a body which cannot be considered a "tribunal" in Convention terms. Such a situation, currently perpetuated by the Constitutional Court's judgments of 24 November 2021 (no. K 6/21) and 10 March 2022 no. (K 7/21) (see paragraphs 100-102 and 106-108 above), is causing a general systemic problem within the Polish judicial system which requires the respondent State to take rapid and adequate measures to restore compliance with the Convention (see paragraphs 319-327 below).

(ii) The extraordinary appeal lodged in the applicant's case and the CERPA's judgment

240. The facts of the applicant's case constitute an exemplification of the deficiencies of the extraordinary appeal procedure as established above.

241. To begin with, in order to challenge the final judgment in the applicant's favour, the Prosecutor General used his exceptional powers under section 115(1), enabling him to lodge an extraordinary appeal in cases terminated after 17 October 1997, outside any normally allowed time-limits. In the appeal, he argued that lodging it was necessary to ensure compliance with the principle of a democratic State governed by the rule of law and implementing the principles of social justice, in particular to ensure freedom of expression. He considered that the impugned judgment was not only in breach of constitutional freedom of speech, but also amounted to a flagrant violation of Article 10 of the Convention, as it had unjustifiably given primacy to the protection of the applicant's private life instead of concluding that Mr Wyszkowski had acted within the boundaries of freedom of expression. He also alleged that the judgment grossly violated the law and that there was an obvious contradiction between significant findings of the Court of Appeal and the evidence collected in the case. In his view, the court had made erroneous findings of fact and had wrongly assessed the evidence. In particular, it had erred in its conclusion that Mr Wyszkowski had not acted as a journalist and had disregarded evidence produced by him which – in the Prosecutor General's view – proved the truthfulness of his statements concerning the applicant's collaboration with the communist secret service (see paragraphs 28-31 above).

242. The Court notes that although the Prosecutor General referred to a breach of fundamental freedom of expression as guaranteed in the Constitution and the Convention as an overarching ground for his appeal, in reality the arguments in support of this contention were in substance challenging the establishment of the facts and assessment of evidence by the Court of Appeal which, in his opinion, should have been diametrically different. Furthermore, he insisted on the "truthfulness" of Mr Wyszkowski's statements attributing collaboration with the secret service to the applicant and said that he had proved this fact before the court.

In the Court's view, these elements indicate that the remedy was used by the Prosecutor General as an "ordinary appeal in disguise", whose aim was to have the same facts and subject-matter re-examined in fresh proceedings and give the defendant in the original proceedings, on whose behalf he was acting, yet another chance to have his civil liability redetermined after having lost his case (compare *Şamat v. Turkey*, no. 29115/07, § 61, 21 January 2020).

243. The CERPA, for its part, considered that the judgment of the Court of Appeal had entailed a flagrant disregard for the constitutional freedom of expression and an even more severe violation of Article 10 of the Convention. In its view, Mr Wyszkowski had not acted merely as a "journalist" but also as a "public watchdog", which absolved him from liability for the defamation alleged by the applicant. To this end and in contrast to the Court of Appeal, having evaluated the facts of the case, it interpreted the term "journalist" in his favour, thus affording him an increased legal protection of his statements. In that regard, the Court notes that the question whether or not the defendant, when asked for comments, had indeed acted as a journalist, rather than a former associate, had previously been thoroughly examined by the lower courts, which had taken differing views on the matter, with the Court of Appeal finally finding that Mr Wyszkowski had been asked for comments as one of the applicant's main opponents and his former associate, as had been noted in the broadcast (see paragraphs 18-21 above).

244. At the same time, the CERPA held that the applicant could not benefit from the protection of Article 8 of the Convention since Mr Wyszkowski's statements did not concern strictly his private life but "his relations with the special services of the totalitarian state". As these relations were the object of intense public debate and the applicant was a public figure, limitations on Mr Wyszkowski's freedom of expression were not justified. The CERPA went on to find that the interference with Mr Wyszkowski's rights was disproportionate also in view of the sanctions imposed on him, which it considered "disproportionate" and "severe" (see paragraphs 39 and 42 above). It also referred to Mr Wyszkowski's case which was then pending before the Court, saying that its outcome, in the light of its own above-mentioned findings, was "fairly easy to predict". For the CERPA, it was therefore obvious that the reversing of the impugned judgment was not only proportionate but also necessary to ensure compliance with the principle

of a democratic State governed by the rule of law and implementing the principles of social justice.

245. It remains for the Court to determine whether in the present case the departure from the principles of *res judicata* was justified by "circumstances of a substantial and compelling character" (see paragraph 224 above, with references to the Court's case-law).

246. The Court notes at the outset that when the Prosecutor General lodged his extraordinary appeal, the applicant's case had been terminated already over nine years before by the final judgment of the Gdańsk Court of Appeal of 24 March 2011, after being examined at six levels of jurisdiction (three times at first instance and three times on appeal) over some five and a half years and following two first-instance judgments in the applicant's favour, one in Mr Wyszkowski's favour, two remittals on appeal and the final judgment partly granting the applicant's claim (see paragraphs 18-21above). It cannot therefore be said that the case had not been thoroughly examined from various points of view or that, given the repeated examination of the case and duration of the proceedings, the defendant did not have sufficient time or opportunity to exercise his procedural rights, present evidence or otherwise make his case.

It is also to be noted that Mr Wyszkowski's subsequent repeated attempts to challenge the judgment of 24 March 2011 were unsuccessful: the Supreme Court refused to entertain his cassation appeal for lack of adequate grounds in 2011 and his request for reopening the proceedings on the basis of new evidence failed in 2017 (see paragraphs 22 and 24-25 above).

247. As noted above, the CERPA considered that the judgment had imposed severe and, for the purposes of the Constitution and Article 10 of the Convention, disproportionate sanctions on Mr Wyszkowski. However, the only sanction under the judgment was the apology that Mr Wyszkowski had been ordered to publish but had refused to do so and this apology had already been published by the applicant by way of substitute performance. It also appears that any pecuniary claims that the applicant could have possibly had against Mr Wyszkowski in connection with the publication of the apology had already been satisfied as he was reimbursed for the costs incurred (see paragraph 26 above).

248. In the context of necessity and the pressing social need to overrule the judgment of the Court of Appeal, the CERPA also had regard to Mr Wyszkowski's case before the Court, implying that a favourable outcome was predictable in view of its own findings. The Government, in their submissions under Article 18 of the Convention (see paragraph 297 below), added that this necessity resulted from the need to adopt individual measures to remove the consequences of the violation of Article 10 of the Convention admitted by them in *Wyszkowski v. Poland*.

249. The Court takes note of the following sequence of events. The Prosecutor General lodged his extraordinary appeal on 31 January 2020.

The Government submitted their unilateral declaration in *Wyszkowski* on 15 January 2021. The CERPA, apparently having been informed at least to some extent of the nature of the *Wyszkowski* case and the procedure before the Court, allowed the extraordinary appeal on 21 April 2021. The Court's strike-out decision was delivered on 1 July 2021. The CERPA judgment was issued over two months before the Court's strike-out decision (see paragraphs 28, 36 and 45-46 above) and therefore could not, as the Government maintain, be regarded as a form of enforcement of the Court's decision, as the latter had not yet materialised. Even if it was designed to enforce the Government's admission of a violation, the unilateral declaration had not yet at that time been accepted by the Court. In addition, the Court was unaware of the developments at domestic level (see paragraph 46 above) and had no knowledge of the favourable outcome of the proceedings complained of by Mr Wyszkowski and the fact that he had borne no financial or other sanction in consequence, circumstances relevant for assessment under Article 34 of the Convention, as well as the proportionality of the interference in question.

250. In view of the foregoing, the Court cannot discern any compelling circumstances militating in favour of contesting the final judgment in the applicant's case. In particular, it cannot be said that the extraordinary appeal served to correct any fundamental defects of the proceedings before the lower courts, such as abuse of process, manifest errors in application of substantive law, serious breaches of court procedure leading to a miscarriage of justice. At this juncture, the Court would reiterate that under Article 6 no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case and that the mere possibility of there being two views on the subject is not a ground for re-examination and reversal of the final judgment (see paragraphs 223 and 225 above, with references to the Court's case-law).

251. This conclusion would normally absolve the Court from analysing the other perceived defects of the procedure before the CERPA alleged by the applicant, such as the shortness of the time allowed to him to submit his reply to the extraordinary appeal (see paragraph 188 above).

However, the Court wishes to refer to the applicant's arguments in the context of Article 18 which, at the same time, pertain to the question whether there were substantial and compelling circumstances justifying the extraordinary appeal in his case. In particular, the applicant maintained that the Prosecutor General's extraordinary appeal had been motivated by retaliation towards him as his political opponent and a vocal critic of both the Prosecutor General and current government, holding them responsible for the constitutional crisis in Poland and accusing them of violations of the rule of law. In his view, the extraordinary appeal had been based on purely political, not legal grounds and there had been no legitimate private or public interests justifying the State's interference with an entirely personal dispute between two private individuals (see paragraphs 299-304 below).

252. The Court observes that, indeed, the applicant's case cannot be separated from its political background and the political context in Poland at the material time and the long-lasting and public conflict between the applicant and the leadership of the PiS party and the United Right alliance government, which spread widely and became an element of political struggle. One of the central contentious issues is the applicant's alleged collaboration with the communist Security Service. There appears to be a polarisation of opinions on the applicant's activities as former anti-communist activist, the leader of Solidarity and the former President of Poland but, evidently, the most severe accusations of collaboration with the communist secret service– which were at the heart of the proceedings in the applicant's defamation case – have come from the PiS party and its supporters, and the Prosecutor General himself (see paragraphs 13 and 49-56 above).

253. As can be seen from the material before the Court, for a long time Mr Wyszkowski has been playing one of the key roles in disseminating those accusations to the public. It is also obvious that he is closely politically connected with the leadership of the PiS and the United Right alliance government (see paragraphs 13-14, 16 and 54-55 above).

The Prosecutor General, in his extraordinary appeal, made clear his firm opinion that in the impugned proceedings Mr Wyszkowski had proved the truthfulness of his statements concerning the applicant's alleged collaboration with the communist security service (see paragraphs 28-31 above). Even though this opinion was at the material time certainly no secret to the public, it is one thing to hold strong and hostile opinions on one's political opponents yet another to pursue those opinions through the State judicial mechanism, using one's exceptional statutory powers to challenge the finality of an unfavourable judgment in the case of a person who is closely related politically.

It is also telling that in the aftermath of the CERPA judgment, the Prosecutor General publicly expressed his deep satisfaction with the outcome, stating "we waited for years, but the truth finally triumphed", despite the fact that the applicant's alleged collaboration with the communist security service was not the object of the CERPA's ruling (see paragraph 55 above).

254. The Court notes the Government's submission that the Prosecutor General, when lodging his extraordinary appeal in the applicant's case, had undoubtedly acted as a public authority upholding the rule of law (see paragraph 199 above and 298 below). However, the circumstances of the present case demonstrate the opposite. In reality, in the light of the above findings, they indicate the abuse of the legal procedure by the State authority in pursuance of its own political opinions and motives.

255. In view of all the foregoing considerations, the Court finds no circumstances of a substantial and compelling nature that would justify the departure from the principle of *res judicata* in the present case.

256. There has accordingly been a violation of Article 6 § 1 of the Convention in respect of the principle of legal certainty.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

257. The applicant complained under Article 13 of the Convention that he had been deprived of an effective domestic remedy in respect of the proceedings concerning the extraordinary appeal before the CERPA.

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."

258. The Court notes that the complaint under Article 13 is essentially the same as that under Article 6 § 1. It reiterates that the safeguards of Article 6 § 1, implying the full panoply of a judicial procedure, are stricter than, and absorb, those of Article 13 (see, for example, *Kudła v. Poland* [GC], no. 30210/96, § 146, ECHR 2000-XI).

259. Consequently, the Court finds that it is not necessary to examine separately the admissibility and merits of the complaint under Article 13 of the Convention (see *Grzęda*, cited above, § 353).

V. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

260. Invoking Article 8 of the Convention, the applicant complained that the reversing of the final judgment in his case, which concerned his reputation and private life, constituted an unlawful interference with his private life.

Article 8 of the Convention provides, in so far as relevant, as follows:

> "1. Everyone has the right to respect for his private ... life ....
>
> 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. The parties' submissions

261. 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 impact on the applicant's reputation reached the degree of seriousness required by Article 8 of the Convention. They also alleged that he had failed to prove that he had suffered any significant disadvantage in terms of his general livelihood and reputation as a result of

the proceedings before the Supreme Court and its judgment (see also paragraph 131 above)

262. The Government stressed that while Article 8 of the Convention covered a person's reputation, it could not be relied on in cases such as the present one in order to complain of damage to reputation which was the foreseeable consequence of one's own actions. They noted in this context that the impugned statements made by Mr Wyszkowski referred strictly to the applicant's activities as a trade unionist, politician and President of Poland. In their view, the Supreme Court's decision to quash the final judgment of the Gdańsk Court of Appeal would not lead to serious negative consequences for the applicant's private life.

263. In that context, the Government referred to the fact that dozens of publications, including books, about the applicant's collaboration with the security service had been published and the topic continued to be a subject of public debate in Poland. In their view, it was doubtful whether Mr Wyszkowski's publishing an apology in the form ordered by the Gdańsk Court of Appeal influenced in any way the applicant's situation or his reputation.

264. In conclusion, the Government argued that since the proceedings conducted before the CERPA were not related to the applicant's "private life", and that their consequences did not have an impact on this sphere of his life, the complaint under Article 8 was incompatible *ratione materiae* with the Convention.

265. The applicant argued that it was obvious that the proceedings before the CERPA had had a significant impact on his rights under Article 8 of the Convention. In 2005 he had turned to the courts to have his reputation protected against public accusations about his alleged collaboration with the secret service in the 1970s spread by Mr Wyszkowski and, in 2011, the courts had finally afforded him protection of his private life. In 2021 this protection had been withdrawn following the proceedings which had evidently been in breach of the right to a fair hearing under Article 6 § 1 of the Convention.

266. Lastly, the applicant pointed out that he was of advanced age, retired and affected by serious health problems. Furthermore, he had not held any public office in Poland for many years. Considering that he was a person of significance in modern Polish history who had contributed to the fall of communism in Poland, the accusations about his alleged wilful cooperation with the communist security service were particularly harmful for him and negatively affected his reputation and his image in the eyes of others.

2. The Court's assessment

(a) General applicable principles

267. The concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a

person. It can therefore embrace multiple aspects of the person's physical and social identity. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see *Denisov,* cited above, § 95, with further references to the Court's case-law, and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 76, 27 June 2017, with further references to the Court's case-law).

Therefore, it would be too restrictive to limit the notion of "private life" to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle (see *Denisov,* cited above, § 96).

268. The right to protection of reputation is a right which is covered by the guarantees of Article 8 of the Convention as part of the right to respect for private life (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012. A person's reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her "private life". However, in order for Article 8 to come into play, an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *Denisov*, § 97, and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, § 76, both cited above).

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

269. In the present case the Government first argued that the applicant had failed to prove before the Court that the CERPA's judgment had a sufficiently serious impact on his private life and reputation so as to attract the applicability of Article 8 of the Convention. Secondly, in their view, Mr Wyszkowski's statements, which concerned the applicant's activities as a trade unionist, politician and the President of Poland, were part of an ongoing public debate. For that reason, the impugned proceedings were not related to his private life but concerned him only as a public figure.

270. The Court does not accept the Government's arguments for the following reasons.

271. To begin with, the private life, and in consequence reputation, of a person considered "public" is not removed from the protection of Article 8 of the Convention for the sole reason that he or she is an object of, or participant in, public debate or someone well known to the public. The same applies to a politician who, however, must display more tolerance to criticism (see, in the context of limitations under Article 10 of the Convention, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 52, ECHR 1999-VIII, and *Centre for Democracy and the Rule of Law v. Ukraine*, no. 10090/16, § 116, 26 March 2020) and who is normally subject to a wider and more rigorous scrutiny of his or her actions and activities than an average "private" person and must

expect that his or her privacy, including reputation, is more intensely exposed to the public eye, to criticism and to attacks by his or her opponents (see *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §§ 119-120, ECHR 2015 (extracts)).

For that reason, the fact that the applicant is a well-known public figure cannot be decisive for the applicability of Article 8 of the Convention.

272. What matters, however, is whether the consequences of the impugned proceedings caused sufficiently serious prejudice to his right to respect for his reputation.

Unquestionably, the applicant is one of the most renowned figures in Poland's contemporary history. He is recognised and well known in Poland and, as a matter of fact, elsewhere in the world for his leadership of the Solidarity trade union, underground anti-communist activities – in connection with which he was awarded the 1983 Nobel Peace Prize – and his contribution to the dismantling of communism in Central and Eastern Europe in 1989-1990. Against this background, it is evident that Mr Wyszkowski's statements accusing the applicant of paid collaboration with the communist secret service in the 1970s – statements which were the central issue in the impugned proceedings – affected the very core of what is commonly considered his life achievements as a politician, Solidarity leader and anti-communist activist.

Consequently, the outcome of the proceedings before the CERPA was capable of significantly harming the applicant's reputation, thus bringing Article 8 of the Convention into play.

In view of the foregoing, the Court dismisses the Government's objection as to the applicability of Article 8 of the Convention in the present case. It further finds it unnecessary to rule on their objection as to the applicant's victim status under this provision (see also paragraphs 131-132 above).

(c) Conclusion as to admissibility

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

B. Merits

1. The parties' submissions

274. The applicant maintained that the interference with his private life had not been "in accordance with the law", as required by Article 8. The legal basis for an extraordinary appeal lacked the necessary attributes of quality and foreseeability; in that regard, he referred to his arguments and the Helsinki Foundation's comments regarding the general legal defects of the extraordinary appeal. He also stressed that the provisions introducing an

extraordinary appeal into the domestic legal system had had retroactive effect in his case as they had been applied to a judgment that was given prior to their entry into force.

275. As to whether the impugned interference had pursued a legitimate aim, the applicant said that he could not see any such aim. The individual interests of Mr Wyszkowski had been secured; the Government had admitted a violation of Article 10 of the Convention and had paid him PLN 20,000 in just satisfaction for non-pecuniary damage so he could no longer be considered a victim of a Convention violation. The applicant accepted the interests and importance of historical debate and research concerning the 1970s events, as relied on in the CERPA judgment. However, such interests could not be properly served by the extraordinary appeal proceedings instituted in 2020, fifty years after the events. The courtroom was not the best place for historical debate, especially in proceedings conducted in flagrant breach of his right to a fair hearing.

276. As to whether the interference had been necessary in a democratic society, the applicant pointed out that the CERPA had not performed any objective balancing exercise to weigh up the various conflicting interests in his case. In particular, the court had given little or no weight to the protection of his rights under Article 8 of the Convention and completely ignored the principles of legal certainty and *res judicata,* and the need to inspire trust in the judiciary.

277. The Government first reiterated their arguments concerning the applicability of Article 8 of the Convention and denied that there had been an interference with the applicant's right to respect for his private life. They submitted that the proceedings conducted before the Supreme Court stemmed from his activities as a politician, therefore as a public figure. Mr Wyszkowski's statement to the media had borne no relation to the applicant's private life.

278. In the event that the Court was to find Article 8 of the Convention applicable to the present case, the Government submitted that the alleged interference was in accordance with the law and necessary in terms of Article 8 § 2 of the Convention. In particular, the proceedings conducted before the CERPA had been based on the relevant provisions of the 2017 Act on the Supreme Court. The Government disagreed – as they did in their submissions regarding the right to an independent and impartial tribunal established by law – that the CERPA lacked the attributes of a "tribunal" which was "lawful" for the purposes of Article 6 § 1 of the Convention.

279. They also disagreed with the applicant's argument that the interference complained of was based on provisions of the law which were incompatible with the rule of law and not foreseeable. Given that the extraordinary appeal was a legitimate instrument of domestic law, the interference should be considered to have been "in accordance with the law".

280. As regards the issue of foreseeability, the Government submitted that the legal basis of the extraordinary appeal was clearly defined in the 2017 Act on the Supreme Court which had been published in the Journal of Laws and was accessible to everyone. The relevant provisions fulfilled the condition of foreseeability as defined by the Court in the case of *Big Brother Watch and Others v. the United Kingdom* ([GC], nos. 58170/13 and 2 others, §§ 332-333, 25 May 2021).

281. The interference complained of had pursued a legitimate aim, namely the protection of public order and the rights and freedoms of Mr Wyszkowski. Furthermore, it was necessary in a democratic society to ensure respect for freedom of expression – one of the most fundamental human rights. It was also proportionate to the legitimate aim pursued, as the extraordinary appeal was the only possibility of reversing the judgment which had been in breach of that fundamental right.

282. The Government reiterated that the impugned proceedings had been instituted in connection with circumstances that stemmed directly from the applicant's activities as a politician, and thus as a public figure. Mr Wyszkowski's statement had been closely connected with the applicant's duties as President of the Republic of Poland and had not borne any relation to the applicant's private life.

283. In sum, the Government were convinced that the applicant had not only failed to substantiate his allegations concerning a violation of his rights under Article 8 of the Convention but also to demonstrate the casual link with the impugned proceedings and any substantial damage he had allegedly sustained as a result.

2. The Court's assessment

284. As established above, the reversing of the judgment of the Gdańsk Court of Appeal of 24 March 2011 by the CERPA adversely affected the applicant's private life to a significant degree (see paragraph 272 above). It therefore constituted an interference with his right to respect for his private life (see, for instance, *Juszczyszyn*, cited above, § 259).

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 deriving from the Court's case-law

285. The expression "in accordance with the law" requires, firstly, that the impugned measure must have a basis in domestic law and be compatible with the rule of law, which is expressly mentioned in the Preamble to the

Convention and is inherent in the subject-matter and aim of Article 8. The provision imposes an obligation to conform to the substantive and procedural rules of domestic law (see, among many other authorities, *Malone v. the United Kingdom*, 2 August 1984, §§ 66-68, Series A no. 82).

286. 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 (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 upon 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).

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 any 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, and *Juszczyszyn*, cited above, §§ 261-263).

287. As regards, lastly, the review carried out by the domestic courts, it should be pointed out that, whilst Article 8 contains no explicit procedural requirements, the Court cannot satisfactorily assess whether the reasons adduced by national authorities to justify their decisions were "sufficient" for the purposes of Article 8 § 2 without at the same time determining whether the decision-making process, seen as a whole, provided the applicant with the requisite protection of his interests (see *Fernandez-Martinez*, cited above, § 147, with further references to the Court's case-law).

288. 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 above principles to the present case

289. In terms of statute law, the Court observes that the CERPA's judgment was based on the provisions of the 2017 Act on the Supreme Court, in particular section 26(1) in conjunction with section 91(1) (the CERPA's

competence to deal with extraordinary appeals), section 89(1) in conjunction with section 115(1)-(1a) (the Prosecutor General's prerogative to lodge an extraordinary appeal in cases terminated after 17 October 1997 and before the Act's entry into force; see paragraphs 65 and 69 above).

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 and whether the decision-making process, seen as a whole, provided the applicant with the requisite safeguards against arbitrariness (see *Juszczyszyn*, cited above, § 265, with further references to the Court's case-law and paragraphs 285-286 above, with references to the Court's case-law).

290. The Court has already held that there has been a violation of the applicant's right to a fair hearing under Article 6 § 1 of the Convention on two counts.

First, the applicant's case was heard by the CERPA, a body which cannot be considered an "independent and impartial tribunal established by law" or, consequently, as having the attributes of a "tribunal" that is "lawful" for the purposes of the Convention. The Court has found, in particular, that the breaches of the domestic law, arising from non-compliance with the rule of law, the principle of separation of powers and the independence of the judiciary, inherently tarnished the procedure of appointment to the CERPA (see paragraph 173 above).

The independence and impartiality of the judiciary is a prerequisite and a fundamental guarantee of the rule of law. In the context of Article 6 § 1 the Court has discerned a common thread running through the institutional requirements of this provision, those of "independence", "impartiality" and a "tribunal established by law", in that they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers (see *Guðmundur Andri Ástráðsson*, § 231; *Reczkowicz*, § 260; and *Dolińska-Ficek and Ozimek,* § 315, all cited above). It is thus implied, by virtue of the rule of law principle, that for an interference with the rights guaranteed by Article 8 to be considered "in accordance with the law" it must emanate from a body which itself is "lawful" for the purposes of the Convention.

For this reason alone, the interference complained of cannot be considered "in accordance with the law" (in this context, see also, *mutatis mutandis*, *Juszczyszyn*, § 279; and *Tuleya,* § 442*,* both cited above).

291. However, there is yet another breach of the "accordance with the law" requirement deriving from the second violation of the right to a fair trial under Article 6 § 1 of the Convention established by the Court.

In its considerations concerning the general features of the extraordinary appeal and, subsequently, the circumstances of the applicant's case, the Court has found that remedy incompatible with the principles of legal certainty and

res judicata. It has found, in particular, that the time-limits for lodging an extraordinary appeal allowed to the Prosecutor General, being exceptionally extended and, as shown in the present case, operating retrospectively, are not only in breach of the above principles but also fail to satisfy the requirement of foreseeability of the law for Convention purposes. It has further found that there have been indications of the abuse of the extraordinary appeal procedure by the State authority in pursuance of its own political opinions and motives (see paragraphs 237 and 254 above).

292. The foregoing considerations are sufficient to enable the Court to conclude that the impugned interference was not "in accordance with the law", as it emanated from the decision of a body which was not a "lawful" court under the Convention, was not based on a "law" that afforded the applicant proper safeguards against arbitrariness and disclosed abuse of process on the part of the Prosecutor General.

(c) Conclusion

293. In view of its conclusion that the interference with the applicant's private life 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 whether it was necessary in a democratic society.

There has accordingly been a violation of Article 8 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION IN CONJUNCTION WITH ARTICLES 6 AND 8 OF THE CONVENTION

294. Lastly, the applicant complained under Article 18 of the Convention that the lodging of the extraordinary appeal by the Prosecutor General in his case was prompted by his political retaliation and not by any legitimate interests of justice or legal considerations.

Article 18 of the Convention provides as follows:

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

A. The parties' submissions

295. The Government were of the view that given that no repressive measures had been imposed on the applicant, there was no need to examine the purpose of their application, thus making Article 18 of the Convention inapplicable to the present case.

296. Citing the Court's judgments in *Merabishvili* (*Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017) and *Navalnyy* (*Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, 15 November 2018), they submitted that, in so far as there had been no violation of Articles 6 § 1 and 8

of the Convention in the present case, the question whether the measures imposed by the State had been applied for purposes other than those envisaged by these provisions did not even arise. In their view, the allegation of an ulterior purpose behind the restrictions did not represent a fundamental aspect of the case and thus Article 18 should not be considered separately from the other provisions of the Convention. Furthermore, the essence of the applicant's complaints had already been examined by the Court under Article 6 § 1 and Article 8 of the Convention.

297. They stressed that the reversal of the judgment of the Gdańsk Court of Appeal of 24 March 2011 resulted from the need to adopt individual measures to remove the violation of Article 10 of the Convention, as admitted by the Government in the case of *Wyszkowski* (cited above). A failure to apply individual measures to remedy the violation of the Convention would, in the light of the Government's admission of a violation in that case, amount to, in their words, "untrustworthy behaviour of the Government in the trial" and disregard for the decisions of the Court.

298. Lastly, the Government reiterated their arguments under Article 6 § 1 of the Convention concerning the Prosecutor General's role as a public authority upholding the rule of law and his duty to lodge an extraordinary appeal in the applicant's case (see paragraph 199 above).

299. In his application, the applicant submitted that the Prosecutor General, Mr Ziobro, had acted with a "hidden agenda" and out of purely political motives. It was a matter of common knowledge in Poland that the applicant openly opposed the current government and emphasised publicly that they were responsible for the constitutional crisis in Poland and were violating the rule of law.

300. In his subsequent submissions, the applicant maintained that the Prosecutor General had consistently and publicly expressed his personal bias against him. When lodging his extraordinary appeal, Mr Ziobro had acted with the aim of political retaliation. In his view, the Government had failed to prove any legitimate private or public interests justifying the recourse to an extraordinary appeal in his case. This alone should suffice for the Court to find a violation of Article 18 of the Convention.

301. From the legal perspective, the civil dispute between the applicant and Mr Wyszkowski had been a standard defamation case. There had been abundant domestic case-law and voluminous legal writing relating to the matter. The only exceptional circumstance in this purely personal dispute between two private individuals had been the applicant's status as a public and historic figure, which had given rise to significant media coverage of the proceedings.

302. The applicant recognised the need to ensure proper conditions for a serious historical and scientific debate. However, such legitimate public interest could not be guaranteed by means of the extraordinary appeal procedure. In fact, that remedy had been used by the public authorities to take

part in a debate concerning the applicant's past and they had clearly and actively supported one of the parties and one point of view. The State should have acted as a neutral protector of an honest and profound historical debate, not as its active participant forcing a specific outcome.

303. In the applicant's view, the only aim behind the decision of the Prosecutor General to lodge an extraordinary appeal in the applicant's case had been to change the perception of the applicant in the eyes of the public and paint him as a traitor and communist spy, thus undermining his political and historical heritage.

304. Lastly, the applicant stressed the dominant position of the State and public authorities in the impugned proceedings. He also referred to, in his words, "blurred lines" between the executive (i.e. Mr Ziobro acting at the same time as the Prosecutor General, the Minister of Justice and an opinionated politician personally supporting accusations against the applicant) and the adjudicating body.

B. The Court's assessment

305. In a similar way to Article 14, Article 18 of the Convention has no independent existence; it can only be applied in conjunction with an Article of the Convention or the Protocols thereto which sets out or qualifies the rights and freedoms that the High Contracting Parties have undertaken to secure to those under their jurisdiction. This rule derives both from its wording, which complements that of clauses such as the second sentence of Article 5 § 1 and the second paragraphs of Articles 8 to 11, which permit restrictions to those rights and freedoms, and from its place in the Convention at the end of Section I, which contains the Articles that define and qualify those rights and freedoms (see *Merabishvili*, cited above, § 287, with further references; *Navalnyy*, cited above, § 164; and *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 421, 22 December 2020).

306. The question whether Article 6 of the Convention contains any express or implied restrictions which may form the subject of the Court's examination under Article 18 of the Convention remains open (see *Ilgar Mammadov v. Azerbaijan (no. 2)*, no. 919/15, § 261, 16 November 2017, with references to *Navalnyy and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, § 129, 23 February 2016, where, in the circumstances relevant to that case, it rejected as incompatible *ratione materiae* a complaint under Article 18 raised in conjunction with Articles 6 and 7; *Năstase v. Romania* (dec.), no. 80563/12, §§ 105-09, 18 November 2014, where it rejected as manifestly ill-founded a complaint under Article 18 raised in conjunction with Article 6; and *Khodorkovskiy v. Russia (no. 2)*, no. 11082/06, § 16, 8 November 2011, and *Lebedev v. Russia (no. 2)*, no. 13772/05, §§ 310-14, 27 May 2010, where it declared admissible the applicants' complaints under Article 18 raised in conjunction with Articles 5, 6, 7 and 8 and subsequently, having examined

the merits of those complaints in the judgment of *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, §§ 897-909, 25 July 2013, found no violation of Article 18).

307. Having regard to the facts of the case, the submissions of the parties and its findings under Article 6 § 1 and Article 8 of the Convention, the Court considers that it has examined the main legal questions raised in the present application and that there is no need to give a separate ruling on the admissibility and merits of the complaint under Article 18 in conjunction with Article 6 § 1 and Article 8 of the Convention in the present case (see *Ilgar Mammadov*, cited above, § 262, and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014, with further references).

VII. APPLICATION OF ARTICLE 46 OF THE CONVENTION

308. Article 46 of the Convention provides, in so far as relevant, as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

309. Rule 61 of the Rules of Court, which lays down provisions governing the pilot-judgment procedure reads, in so far as relevant, as follows:

> "1. The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.
>
> 2. (a) Before initiating a pilot-judgment procedure, the Court shall first seek the views of the parties on whether the application under examination results from the existence of such a problem or dysfunction in the Contracting Party concerned and on the suitability of processing the application in accordance with that procedure.
>
> ...
>
> 3. The Court shall in its pilot judgment identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment.
>
> 4. The Court may direct in the operative provisions of the pilot judgment that the remedial measures referred to in paragraph 3 above be adopted within a specified time, bearing in mind the nature of the measures required and the speed with which the problem which it has identified can be remedied at the domestic level.
>
> ...."

A. Application of the pilot-judgment procedure

1. The Government's objection to the application of the pilot-judgment procedure

310. The Government submitted that the present case was not suitable for the pilot-judgment procedure, since the facts of the case did not disclose the existence of a "systemic" or "structural" problem or other similar dysfunction which gave or might give rise to similar applications.

311. In their view, the pilot-judgment procedure had so far been applied by the Court in cases of a dysfunction in domestic legislation which had led to inequality in social, property, electoral and civil matters or the right to have a hearing within a reasonable time. It had never been applied in relation to a procedural institution functioning in a given State. Its application in the present case would be unusual and inconsistent with the Court's established practice. The Court had not indicated that it had received a large number of applications concerning the functioning of the extraordinary appeal. As of the date of submitting their observations, the Government had not received any other communication relating to a case concerning the extraordinary appeal mechanism. If the alleged problem concerned only one application, it could hardly be considered systemic or structural.

312. Furthermore, it was unclear for the Government what were the reasons for the Court to consider the application of the pilot-judgment procedure in this case. The questions to the parties on communication of the application did not give a clear indication as to whether the Court intended to consider the institution of the extraordinary appeal as such, or the fact that it was the CERPA which was competent to examine it.

In view of the foregoing, the Government invited the Court not to apply the pilot-judgment procedure in the present case.

313. The applicant did not make any submissions under Article 46 of the Convention.

2. The Court's assessment

(a) Principles deriving from the Court's case-law

314. The pilot-judgment procedure was conceived as a response to the growth in the Court's caseload, caused by a series of cases deriving from the same structural or systemic dysfunction, and to ensure the long-term effectiveness of the Convention system (see, among many other examples, *Broniowski v. Poland* (merits) [GC], no. 31443/96, § 190-191, ECHR 2004-V; *Hutten-Czapska v. Poland* [GC], no. 35014/97, § 234, ECHR 2006-VIII; and *Burmych and Others v. Ukraine* (striking out) [GC], nos. 46852/13 et al., §§ 157-166, 12 October 2017).

315. However, the identification of a "systemic situation" justifying the application of the pilot-judgment procedure does not necessarily have to be

linked to, or based on, a given number of similar applications already pending. In the context of systemic or structural violations the potential inflow of future cases is also an important consideration in terms of preventing the accumulation of repetitive cases on the Court's docket (see *Hutten-Czapska*, cited above, § 236 *in fine*, and *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 414, ECHR 2012 (extracts)).

316. The dual purpose of that procedure is, on the one hand, to reduce the threat to the effective functioning of the Convention system and, on the other, to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of Convention rights in the national legal order. By incorporating into the process of execution of the pilot judgment the interests of all other existing or potential victims of the systemic problem identified, the procedure aims to afford proper relief to all actual and potential victims of that dysfunction, as well as to the particular applicant(s) in the pilot case (see *Broniowski* (merits), cited above, §§ 191, 193-194, and *Broniowski v. Poland* (friendly settlement) [GC], no. 31443/96, §§ 36 and 37, ECHR 2005-IX).

317. It is inherent in the pilot-judgment procedure that the Court's assessment of the situation complained of in a "pilot" case necessarily extends beyond the sole interests of the individual applicant and requires it to examine the case before it also from the perspective of the general measures that need to be taken in the interests of other already or potentially affected persons (see *Hutten-Czapska*, cited above, § 238; *Wolkenberg and Others v. Poland* (dec.), no. 50003/99, § 73, 4 December 2007; *Association of Real Property Owners in Łódź and Others v. Poland* (dec.), no. 3485/02, §§ 86-87, ECHR 2011 (extracts); *Anastasov and Others Others v. Slovenia* (dec.), no. 65020/13, §§ 94-96, 18 October 2016; and *Burmych and Others*, cited above, § 159).

318. According to the rationale of the pilot judgment, therefore, the respondent State is required to eliminate the source of the violation for the future and to provide a remedy for the past prejudice suffered not only by the individual applicant(s) in the pilot case but also by all other victims of the same type of violation. The intention is that, under the umbrella of the general measures required of the respondent State, all the other current and potential victims are absorbed into the process of execution of the pilot judgment (see *Burmych and Others,* cited above, § 159).

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

319. The present case comes to be considered after a series of judgments of the Court concerning the judicial reform in Poland initiated in 2017. As noted by the Court in *Grzęda,* the whole sequence of events – including in particular the laws on reorganisation of the judiciary in Poland – has vividly demonstrated that successive judicial reforms have 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, at remodelling the NCJ and setting up new chambers in the Supreme Court, while extending the Minister of Justice's control over the courts and increasing his or her role in matters of judicial discipline. As a result of the successive reforms, the judiciary – an autonomous branch of State power – has been exposed to interference by the executive and legislative powers and thus substantially weakened (see *Grzęda*, cited above, § 358).

320. Since 7 May 2021, when the judgment in *Xero Flor w Polsce sp. z o.o.* was delivered, up to the date of adoption of the present judgment, the Court has issued ten (of which nine are final) judgments relating to various aspects of the judicial reform in Poland in which it has found a violation of Article 6 § 1 of the Convention on various grounds (see *Xero Flor w Polsce sp. z o.o.* (the Constitutional Court lacking attributes of a "tribunal established by law"); *Broda and Bojara* (lack of access to a court to contest the Minister of Justice's decision to terminate prematurely the term of office of a court president and vice-president); *Reczkowicz* (the Disciplinary Chamber of the Supreme Court lacking attributes of an "independent and impartial tribunal established by law"); *Dolińska-Ficek and Ozimek* (the CERPA of the Supreme Court lacking attributes of an "independent and impartial tribunal established by law"); *Advance Pharma sp. z o.o.* (judges of the Civil Chamber of the Supreme Court appointed on the recommendation of the reformed NCJ lacking attributes of an "independent and impartial tribunal established by law"; *Grzęda* (lack of access to a court to contest the premature termination of the term of office of a member of the "old" NCJ) (all cited above)*; Żurek v. Poland,* no. 39650/18, 16 June 2022 (lack of access to a court to contest the premature termination of the term of office of a member of the "old" NCJ); *Juszczyszyn* (cited above; the Disciplinary Chamber of the Supreme Court lacking attributes of an "independent and impartial tribunal established by law); *Tuleya* (cited above; the Disciplinary Chamber of the Supreme Court lacking attributes of an "independent and impartial tribunal established by law" and *Pająk and Others v. Poland*, nos. 25226/18 and 3 others, 24 October 2023 (not final; lack of access to a court to contest the Minister of Justice's arbitrary decisions refusing the applicants to continue their service as judges beyond the lowered retirement age). Most of the above-mentioned judgments concern a breach of the right to an independent and impartial tribunal established by law on account of the new NCJ's involvement in the procedure for judicial appointments to the Supreme Court.

321. Already in *Dolińska-Ficek and Ozimek* the Court, in its considerations under Article 46 of the Convention, emphasised that its conclusions regarding the incompatibility of the judicial appointment procedure (involving the NCJ) with the requirements of an "independent and impartial tribunal established by law" under Article 6 § 1 of the Convention would have consequences for its assessment of similar complaints in other pending or future cases.

It further held that the deficiencies of that procedure as identified in that case in respect of the CERPA and in *Reczkowicz* (cited above), in respect of the Disciplinary Chamber of the Supreme Court, had already adversely affected existing appointments and were capable of systematically affecting the future appointments of judges not only to the other chambers of the Supreme Court but also to the ordinary, military and administrative courts.

The Court considered it inherent in its findings that the violation of the applicants' rights originated in the amendments to Polish legislation which had deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges so appointed. The Court underlined that in this situation and in the interests of the rule of law and the principles of the separation of powers and the independence of the judiciary, a rapid remedial action on the part of the Polish State was required (see *Dolińska-Ficek and Ozimek*, cited above, § 368).

At that time, there were fifty-seven (twenty-three of which had been communicated to the Government) pending applications against Poland, lodged in 2018-2021, concerning various aspects of the reform of the judicial system (ibid., § 212).

322. In *Advance Pharma sp. z o.o.* the Court, again limiting its considerations to general guidance, reiterated the above conclusions. However, as regards the remedial action to be taken, it held that while in that context various options were open to the respondent State, it was an inescapable conclusion that the continued operation of the NCJ as constituted by the 2017 Amending Act and its involvement in the judicial appointments procedure perpetuated the systemic dysfunction as established by the Court and might in the future result in potentially multiple violations of the right to an "independent and impartial tribunal established by law", thus leading to further aggravation of the rule of law crisis in Poland.

As regards the legal and practical consequences for final judgments already delivered by formations of judges appointed upon the NCJ's recommendation and the effects of such judgments in the Polish legal order, the Court at that stage noted that one of the possibilities to be contemplated by the respondent State was to incorporate into the necessary general measures the Supreme Court's conclusions regarding the application of its interpretative resolution of 23 January 2020 (see paragraphs 82-86 above) in respect of the Supreme Court and other courts and the judgments given by the respective court formations (see *Advance Pharma sp. z o.o.*, §§ 364-365).

As of the date of adoption of that judgment there were ninety-four (of which twenty-three had been communicated to the Government) pending applications against Poland, lodged from 2018 to February 2022, concerning various aspects of the reform of the judicial system. Over that period the Court delivered four judgments, of which three were final (ibid., § 226).

323. At present, that is to say eighteen months after the *Advance Pharma sp. z o.o.* judgment, there are as many as 492 pending (of which 202 communicated, including 111 communicated in 2023) cases concerning the judicial reform in Poland. Most of them concern the alleged breach of the right to an independent and impartial tribunal established by law under Article 6 § 1 of the Convention on account of the applicants' cases having been heard by formations of the Supreme Court, ordinary courts or administrative courts including judges appointed to their office in the defective procedure involving the NCJ as established under the 2017 Amending Act.

Although only a few applications concerning the operation of the extraordinary appeal are currently pending before the Court, a double violation of the right to a fair hearing under Article 6 § 1 as established above in the present case discloses a serious systemic situation, capable of continually affecting numerous persons. This situation consists in several interrelated systemic problems in the domestic law and practice; however, each of them either separately or in conjunction results, or may result in the future, in a violation of the fair trial right guaranteed by Article 6 § 1 of the Convention.

324. The systemic problems at the root of the violations of Article 6 § 1 of the Convention found in the present case are as follows:

(a) The primary problem is the defective procedure for judicial appointments involving the NCJ as established under the 2017 Amending Act which inherently and continually affects the independence of judges so appointed. Although, as held by the Supreme Court in the resolution of its joined Chambers of 23 January 2020, the lack of independence of the reformed NCJ generally results in defects undermining the independence of and impartiality of a court, the effects thereof vary depending on the type of court and its position within the judiciary. In the Supreme Court's view, those defects most adversely affect the appointments to the Supreme Court, as the "stringent standard" of independence of the Supreme Court from political authorities is a necessary condition for its functioning in accordance with the Constitution and for exercising properly its powers, which are of fundamental importance in a democratic State governed by the rule of law (see paragraph 85 above). The Court endorses this opinion.

In particular, as established in *Reczkowicz*, *Dolińska-Ficek and Ozimek* and *Advance Pharma sp. z o.o.*, all the judges appointed to two entire chambers of the Supreme Court – the Disciplinary Chamber and the CERPA, as well as judges appointed to the Civil Chamber on the reformed NCJ's recommendation – do not meet the requirements of an "independent and tribunal established by law" for the purposes of Article 6 § 1 of the Convention. By implication, the same applies to other Supreme Court judges so appointed. This situation raises grave concerns as to the continued functioning of the Supreme Court, the highest judicial authority of Poland, as

a court which is "lawful" under the Convention. It also, as underlined in *Dolińska-Ficek and Ozimek* and *Advance Pharma sp. z o.o.,* has consequences for appointments of judges not only to the Supreme Court but also to the ordinary, military and administrative courts, which have been affected by the same systemic defect.

(b) The CERPA, a body which is not, as said above, an independent and "lawful" court under the Convention has exclusive competence to deal with any motion for the exclusion of judges involving a plea of lack independence of a judge or a court, including – as shown by the facts of the present case – the situation where the motion is directed against them personally (see paragraphs 34-35 and 68 above). This, as also emphasised by the Supreme Court in its resolution of 23 January 2020 (see paragraph 86 above) gives no guarantee that the matter will be heard objectively as the CERPA judges themselves do not possess the required independence and, in cases where their own independence is being challenged on the basis of the defective appointment, they will be judges in cases concerning themselves, in breach of the fundamental principle *nemo iudex in causa sua*.

(c) The extraordinary appeal procedure as currently operating in Poland is incompatible with the fair trial standards and the principle of legal certainty under Article 6 § 1 of the Convention on account of several defects identified above, in particular, (i) the lack of foreseeability of the legal provisions which afford unfettered discretion in interpreting the grounds for appeal to the authorities and bodies involved in the procedure; (ii) the possibility of using in practice this exceptional remedy as an "ordinary appeal in disguise" and obtaining through it a fresh examination of the case, including re-determination of facts, with the adjudicating body acting as a tribunal of fact at the third or fourth level of jurisdiction; (iii) the exceptionally extended and retrospectively applied time-limits for lodging an extraordinary appeal allowing the Prosecutor General and the Commissioner to contest judgments that became final before the entry into force of the 2017 Act on the Supreme Court; (iv) the lack of sufficient safeguards against a possible abuse of process and the instrumentalising of the extraordinary appeal procedure (e.g. for political reasons, as currently demonstrated by entrusting the Prosecutor General – who is an active politician and at the same time the Minister of Justice wielding considerable authority over the courts – with extensive powers in respect of questioning the finality of judicial decisions by means of an extraordinary appeal).

(d) The extraordinary appeals are examined by the CERPA, which has exclusive competence in this respect. This creates a situation where the initial violation of Article 6 § 1 is being continually compounded by the subsequent one because the power to decide on a legal remedy incompatible with the fair trial standards and the principle of legal certainty under Article 6 § 1 of the Convention has been entrusted with a body which is not a lawful tribunal for

the purposes this provision, a situation which is inconceivable from the point of view of the rule of law.

These interrelated systemic problems thus entail repeated breaches of the fundamental principles of the rule of law, separation of powers and the independence of the judiciary.

325. Moreover, as already noted above, the Constitutional Court has actually perpetuated this state of continued non-compliance with the Convention in a series of recent judgments, in particular those of 24 November 2021 (case no. K 6/21) and 10 March 2022 (case no. K 7/21), consistently attempting to undermine and prevent the execution of the Court's judgments relating to the independence of the judiciary and the defective procedure for judicial appointments (see paragraphs 102, 107-108 and 141-144 above).

In parallel, the Constitutional Court has delivered judgments contesting the primacy of EU law and the binding effect of the CJEU judgments, declaring in its judgment of 14 July 2021 (case no. P 7/20) the provisions of the TEU and the TFEU to be incompatible with the Constitution in so far as the CJEU's power to issue interim measures relating to the organisation and jurisdiction of Polish courts and the procedure before them was concerned. In its judgment of 7 October 2021 (case no. K 3/21) it further held, among other things, that Articles 2 and 19 § 1 of the TEU were incompatible with the Constitution in so far as they would grant the domestic courts competence to review the legality of the judicial appointment procedure or the legality of the NCJ's recommendation for appointment of a judge. These judgments are currently the object of the infringement procedure initiated by the Commission (see paragraphs 95-99 and 127 above).

326. In that context, the Court would also note that the Committee of Ministers, in its decision taken at its 1468th Meeting of 5-7 June 2023 in the framework of the execution of the judgments of the so-called "*Reczkowicz* group", expressed the Deputies' grave concern regarding the Polish authorities' persistent reliance on the Constitutional Court's judgment of 22 March 2022 (no. K 7/21) to justify non-execution of judgments and underlined that such an approach not only contradicted Poland's voluntarily assumed obligation under Article 46 of the Convention to abide by the Court's final judgments but also its obligation under Article 1 to secure the rights and freedoms as defined in the Convention (see paragraph 121 above).

327. In view of the foregoing, and considering the rapid and continued increase in the number of applications concerning the independence of the judiciary in Poland and alleging, in particular, a breach of the right to an "independent and impartial tribunal established by law" over the past eighteen months and the gravity of the impugned situation, commonly referred to as "the rule of law crisis", as a result of which numerous yet unidentified persons may be adversely affected, the Court considers that the

systemic problems identified above may aggravate quickly and call for urgent remedial measures.

The Court therefore concludes that the present case is suitable for the application of the pilot-judgment procedure and dismisses the Government's objection as to the application of this procedure.

B. General measures

328. The Court has already given certain guidance under Article 46 of the Convention to the respondent State in *Dolińska-Ficek and Ozimek* and *Advance Pharma sp. z o.o.* (see paragraphs 321-322 above). Given the respondent State's lack of response to it and its conduct in the execution of the judgments concerning the independence of the judiciary (in particular, the so-called "*Reczkowicz* group"), the Court is now called upon to give more detailed indications as to general measures to be taken in respect of the systemic problem identified above.

329. As regards the defective procedure for judicial appointments, the Court fully subscribes to and endorses the indications as to the general measures given to the respondent State by the Committee of Ministers in the above-mentioned decision adopted at its 1468th Meeting, whereby it exhorted Poland to, among other things, rapidly elaborate measures to (i) restore the independence of the NCJ through introducing legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ; (ii) address the status of all judges appointed in the deficient procedure involving the NCJ as constituted under the 2017 Amending Act and of decisions adopted with their participation; and (iii) ensure effective judicial review of the NCJ's resolutions proposing judicial appointments to the President of Poland, including the Supreme Court (see paragraph 121 above).

330. As regards the functioning of the CERPA, the Court notes that it is composed exclusively of judges appointed through the defective procedure. Accordingly, although the determination of the status of its judges following the finding of a violation of Article 6 § 1 in *Dolińska-Ficek and Ozimek* and in the present case appears to be partly covered by the above general measures, the respondent State should in addition take appropriate legislative measures to ensure that this body satisfies the requirements of an "independent and impartial tribunal established by law" in accordance with the Court's case-law. This is a crucial element, given the position of the Supreme Court within the Polish judiciary and extensive competences of the CERPA under the 2017 Act on the Supreme Court (see paragraphs 65-68 and 324 above), including its power to decide on any motion involving a plea of lack of independence of a judge or a court. As to the latter, it goes without saying that the Polish State must ensure that the issues pertaining to the independence of judges are determined by a court or courts which are

themselves an "independent and impartial tribunal established by law" in the light of the Convention standards.

331. Lastly, as regards the defective operation of the extraordinary appeal procedure, the State must adopt appropriate legislative measures to ensure that the deficiencies of this exceptional remedy, as established above, are addressed and removed. In particular, the respondent State must remove or amend the legal provisions which (i) allow the bodies concerned unfettered discretion in interpreting the grounds for an extraordinary appeal; (ii) enable the authorised bodies to use in practice the extraordinary appeal procedure as an "ordinary appeal in disguise" and the adjudicating body to carry out a fresh determination of the case, including on the facts; and (iii) grant the Prosecutor General and the Commissioner exceptionally extended time-limits for lodging an extraordinary appeal, including in cases terminated before the entry into force of the 2017 Act on the Supreme Court. Furthermore, the respondent State should (iv) put in place safeguards against abuse of process in the extraordinary appeal procedure, in particular so as to exclude instrumentalisation of that procedure for political reasons.

332. It is not for the Court to elaborate further on what would be the most appropriate way to put an end to the systemic situation described above; under Article 46 the State remains free to choose the means by which it will discharge its obligations arising from the execution of the court's judgments, (see *Broniowski (merits)*, cited above, §§ 186 and 192). That being said, it will fall to the respondent State to draw the necessary conclusions from the present judgment and take general measures as appropriate, under the supervision of the Committee of Ministers and within the time-frame agreed with it, in order to resolve the systemic problems at the root of the violations found by the Court in the present case and to prevent similar violations from taking place in the future.

C. Procedure for follow-up cases

1. Principles deriving from the Court's case-law

333. As stated above (see paragraph 317 above), it is inherent in the pilot-judgment procedure that the Court examines the issues involved also from the perspective of the interests of other potentially affected persons. That assessment necessarily encompasses the procedure for similar cases – those currently pending and those liable to be lodged with the Court in the future (see, among other examples, *Broniowski* (merits)*,* cited above, § 198*; Burdov* (no. 2), cited above, §§ 142-146; *Rutkowski and Others*, cited above, §§ 223-229; and *Burmych and Others,* cited above, § 165*).*

334. Since the *Broniowski* judgment it has been the Court's consistent practice to include in pilot judgments, in addition to rulings in the pilot case, various procedural decisions concerning the future treatment of follow-up cases – those communicated to the respondent Government and new ones

alike. For instance, the Court has often decided to adjourn similar cases pending the implementation of general measures by the respondent State (see, among other examples, *Broniowski* (merits), cited above, § 198; *Hutten-Czapska,* cited above, § 247; *Kurić*, cited above, § 415; *Ivanov*, cited above, §§ 97-99, and the seventh operative provision of the judgment; *Olaru and Others*, cited above, §§ 60-61, and the sixth operative provision of the judgment; *Burdov* (no. 2), cited above, § 146, and the eight operative provision of the judgment; *Rutkowski and Others*, cited above, §§ 227-229, and the tenth and eleventh operative provisions of the judgment; *Gerasimov and Others*, cited above, § 232, and the fourteenth operative provision of the judgment; and *W.D. v Belgium*, cited above, § 174, and the seventh operative provision of the judgment). It has discontinued its examination of similar applications already pending before it and suspended the treatment of any applications not yet registered at the date of delivery of the pilot judgment (see *Greens and M.T.*, cited above, §§ 121-122). It has also anticipated its rulings on the admissibility of pending and future cases, holding that, in certain circumstances, it "may declare [them] inadmissible in accordance with the Convention" (see *Suljagić*, cited above, § 65). Where appropriate, the Court has decided to communicate, by virtue of the pilot judgment, all similar applications lodged with it before the date of delivery of the judgment (see *Rutkowski and Others*, cited above, §§ 226-227, and the ninth operative provision of the judgment). That practice, embracing a range of solutions, reflects the rationale of the pilot-judgment procedure, according to which all cases deriving from the same systemic root cause are incorporated into its framework and absorbed into the execution process of the pilot judgment (see also *Burmych and Others,* § 166, cited above).

2. Application of the above principles to the present case

335. As regards the present case, the Court would point out that, of 492 cases on its docket, notice of 202 has already been given to the respondent Government and that the vast majority of them concern the alleged breach of the right to an "independent and impartial tribunal established by law" on account of the fact that the judicial formations of various courts that have dealt with the applicants' cases included judges appointed by the President of Poland on recommendations of the recomposed NCJ (see paragraph 323 above). It is therefore clear that both the Polish State and the Committee of Ministers are aware of the large scale of the primary systemic problem as identified in the present case and earlier indicated in *Dolińska-Ficek and Ozimek* and *Advance Pharma sp. z o.o.*. As stated above, the resolution of the impugned systemic situation requires a rapid action which should above all include appropriate legislative and other measures to be taken in execution of the present judgment and the "*Reczkowicz* group" of judgments. In view of the foregoing, the Court considers that similar cases of which notice has not yet been given should be adjourned for one year as from

the date of the delivery of the present judgment, pending the adoption of general measures by the Polish State. The decision as to the further procedure in those cases will be taken in the light of future developments, if any, at domestic level. The Court will, however, proceed to judgment in communicated cases that are ready for examination and continue to give notice to the Government of applications raising different issues in the context of the independence of the judiciary.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

336. 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."

337. The applicant made no claim for pecuniary damage or the costs and legal fees incurred in the present case. He claimed 180,000 euros (EUR) in respect of non-pecuniary damage, relying on particularly serious violations of the Convention and far-reaching consequences thereof for him as a person and also as a public and historic figure. Moreover, the State, through the extraordinary appeal proceedings against him, had pursued *de facto* private and political interests.

338. The Government observed that the above claim should be regarded as extremely exorbitant and partially not related to the case. Moreover, the applicant had failed to substantiate his claims as he had not provided any documents regarding the non-pecuniary damage, proving that he had suffered distress, emotional or psychological harm, hardship, loss of income, loss of quality of life or any other damage as a result of the alleged violations of Article 6 § 1, Article 8 or Article 18 of the Convention. In that respect, the Government observed that the documents attached to the applicant's observations did not disclose any causal link between the facts and the alleged violation. In particular, the applicant had not provided any evidence that the subjective anguish and suffering he had felt had been caused by the quashing of the judgment of the Gdańsk Court of Appeal. The Government invited the Court to reject the claim in its entirety.

339. The Court, having regard to circumstances of the case, the nature of the violations found and its just-satisfaction awards in similar cases awards the applicant EUR 30,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 6 § 1 and Article 8 of the Convention admissible;

2. *Holds* 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;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the principle of legal certainty;

4. *Holds* that there has been a violation of Article 8 of the Convention;

5. *Holds* that there is no need to examine the admissibility and merits of the complaints under Article 13 and Article 18 taken in conjunction with Articles 6 and 8 of the Convention;

6. *Holds* that the above violations of Article 6 § 1 of the Convention originated in the interrelated systemic problems connected with the malfunctioning of domestic legislation and practice caused by:
   (a) a defective procedure for judicial appointments involving the National Council of the Judiciary as established under the 2017 Amending Act;
   (b) the resulting lack of independence on the part of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court;
   (c) the exclusive competence of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court in matters involving a plea of lack of independence on the part of a judge or a court;
   (d) the defects of the extraordinary appeal procedure as established in paragraphs 228-239 and 323 (c) of this judgment;
   (e) the exclusive competence of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court to deal with extraordinary appeals;

7. *Holds* that, in order to put an end to the systemic violations of Article 6 § 1 of the Convention identified in the present case, the respondent State must take appropriate legislative and other measures to secure in its domestic legal order compliance with the requirements of an "independent and impartial tribunal established by law" and the principle of legal certainty as guaranteed by this provision;

8. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 30,000 (thirty thousand euros), to be converted into the currency of the respondent State, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 23 November 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener Registrar	Marko Bošnjak President