COMMISSIONER FOR HUMAN RIGHTS

Adam Bodnar

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Judge Ksenija Turković
President, First Section
European Court of Human Rights
F-67075 Strasbourg Cedex

Written comments
of the Commissioner for Human Rights
in the case of *Igor Tuleya v. Poland*
(Application no. 21181/19)

1. Pursuant to Rule 44 (3) (a), (5) and (6) Rules of the European Court of Human Rights (**ECtHR**) and on the basis of the leave granted by the President of the First Section, the Commissioner for Human Rights (**CHR**) wishes to submit the written observations on the present case.

I. General Observations

2. This case is about protecting national judges against indirect, yet unlawful interference by the executive in the sphere of judicial independence and, as a consequence of that, also in judges' private life and their free speech. More specifically, the case concerns an unfounded scope and disproportionate application of the disciplinary regime for judges, by means of which national authorities attempt to influence those judges, who express critical opinions on the changes introduced to the Polish judicial system in recent years.

3. By lodging an individual application initiating this case, the complainant requests the European Court of Human Rights to grant him **a European guarantee** that his opinions expressed publicly and concerning changes in the Polish judiciary will allow the national authorities neither to unlawfully damage his reputation nor interfere with his freedom of expression.

4. The complaint filed by judge Igor Tuleya may precede a series of complaints which may be submitted by other judges facing various disciplinary, administrative, or eventually, criminal measures. These measures threaten judicial independence, interfere with a good reputation of the judge, infringe upon the respect for their private life, and restrict the judge's freedom of expression. They are **a manifestation of diminishing the constitutional separation of powers and backsliding of the rule of law in Poland**.

5. The review of state practice in applying disciplinary and other measures against judges, indicates the intention of national authorities to silence both the individual judge directly affected by such measures as well as, indirectly, the entire judicial community. They are aimed at discouraging judges, producing a chilling effect, or in the end, remove (suspend) the judge from adjudicating cases. The ultimate goal is to suppress criticism of the government's policy towards the judiciary. For these reasons, the present case may prove important not only for the applicant to obtain individual justice from the Strasbourg Court, but it may also provide protection for those Polish judges who are in a likewise situation.

6. In considering the case, the Court should take into account that it does not only concern facts that have already occurred, but it covers an ongoing and unfolding situation. Any **eventual judgment of the Court should not be limited to bringing retrospective justice to the complainant, but should offer a more general, future-oriented guarantee**.

II. European standards for the protection of judges

1. Guarantee of judicial independence

7. The requirements of independence and impartiality of judges and courts are key to the effectiveness of judicial protection and necessary for the protection of all rights and freedoms derived from the Convention. They are indispensable and inalienable safeguards of the right to a fair trial.[1]

8. In determining whether a body can be considered to be "independent", the ECtHR considers the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.[2] The latter serves to inspire the confidence in the courts of the public and the parties to the proceedings.[3] In the context of this case, the court (judge) must be independent of any external, extrajudicial influence, especially from the executive, but also from the legislator, i.e. the Parliament.[4] The requirement of "impartiality", for its part, covers both the subjective aspect – the court must be free of personal prejudice or bias, and the objective aspect – the court must offer sufficient guarantees to exclude any legitimate doubt in this respect.[5]

9. In the case like the present one, judicial independence may arise in two main aspects. First, it is a crucial guarantee of a fair trial. In the individual case, the issue of safeguarding this guarantee may relate to the disciplinary proceedings or preliminary inquiries initiated against the judge. It may also occur in relation to the proceedings for waiving the immunity of the judge, which is to be considered by the Disciplinary Chamber of the Supreme Court at the request of the National Prosecutor's Office. In the present case pending before the Court, the complainant has been subject to such proceedings on the grounds of "possible unauthorized dissemination of information from the investigation". The eventual waiver of immunity may lead to a criminal trial against the judge.

10. Secondly, many Polish judges, like the applicant, stand up for judicial independence as a necessary element of the rule of law and the essence of the right to a fair trial. For this reason, these judges face negative consequences in their professional, social and private life. The latter aspect is the subject of the case pending before the Court and requires the Court to assess whether actions taken by national authorities against judges undermine their Conventional protection. And if so, what measures should be taken to reinstate the due protection.

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[1] See ECtHR judgment of 15.10.2009, *Micallef v. Malta*, para. 86.
[2] ECtHR judgment of 28.06.1984, *Campbell & Fell v. UK*, para. 78
[3] See ECtHR judgment of 21.06.2011, *Fruni v. Slovakia*, para 141.
[4] ECtHR decision of 18.05.1999, *Ninn Hansen v. Denmark*, p. 20.
[5] ECtHR judgment of 25.02.1997, *Findlay v. UK*, para. 73.

2. Recent ECJ cases related to the disciplinary regime

11. In recent years, the link between the disciplinary regime for judges and their independence has been several times examined by the Court of Justice of the European Union (**ECJ**) in the context of Polish cases. In the case C-216/18 *LM*, the ECJ made it clear that the requirement of independence also means that **the disciplinary regime for judges must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions**.[6] Further, the Court pointed out that this applies in particular to the rules which define both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary.[7]

12. In the process of implementation of the *LM* ruling, some further questions have arisen which the Court is considering in the pending preliminary ruling case initiated by the Amsterdam Court (C-354/20 and C-412/20). In its reference of 31 July 2020, the court in Amsterdam stated that **no Polish court is independent anymore due to systemic or general irregularities, and all Polish judges are now risking disciplinary proceedings against them**. Accordingly, this could lead to a case of a person surrendered on the basis of a European Arrest Warrant being brought before a body whose independence is no longer guaranteed.

13. In the context of disciplinary proceedings or preliminary inquiries undertaken by the national authorities in relation to questions referred by a judge to the ECJ under Article 267 TFEU, the Luxembourg Court, in cases C-558/18 and C-563/18 brought by judges Igor Tuleya and Ewa Maciejewska, stated that **a rule of national law cannot prevent the national court from using its widest discretion in referring question to the ECJ**.[8] Therefore, provisions of national law which expose judges to disciplinary proceedings as a result of making a reference for a preliminary ruling cannot be permitted.[9] The ECJ concluded that not being exposed to disciplinary proceedings or measures for exercising this discretion also **constitutes a guarantee that is essential to judicial independence**.[10]

14. Furthermore, the Court in Luxembourg has been currently examining the Polish disciplinary regime for judges in an infringement case launched by the European Commission under Article 258 TFEU (C-791/19 *Commission v Poland*, see also below, section III.2). On 29 April 2020, the European Commission has also initiated infringement proceeding against Poland for the adoption of the Muzzle Law,[11] which substantially expands the disciplinary responsibility of judges, i.a. for undertaking an assessment of the establishment and independence of the courts, while ignoring that it is compatible with or even required by the case law of the ECJ (*A.K.* ruling), as well as ECtHR standards (see below, section III.4).

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[6] ECJ judgment of 25.07.2018, C-216/18 PPU *LM*, para. 67; see also ECJ judgment of 5.11.2019, C-192/18 *Commission v. Poland (Independence of ordinary courts)*, para. 114.
[7] *Ibidem.*
[8] ECJ judgment of 26.03.2020, C-558/18 and C-563/18 *Miasto Łowicz*, paras. 56–57.
[9] *Miasto Łowicz*, para 58.
[10] *Miasto Łowicz*, para 59.
[11] See Commission's Press Release no IP/20/772, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_772 (access: 19.10.2020).

3. Protection of reputation and private life of judges (Article 8)

15. The broad concept of "private life", as developed in the ECtHR's case-law, is not capable of an exhaustive definition.[12] It is not restricted to the notion of the individual's "inner circle" and by comprising to a certain degree the right to establish and develop relationships with other human beings ("private social life"), it does not exclude the **activities of a professional nature**, since they provide a significant opportunity of developing relationships with the outside world.[13] Furthermore, in the case of *Denisov*, the Court expressly confirmed that the situation when the measure affecting an individual's professional life has or may have serious negative impact on his or her **social or professional reputation** is covered by Article 8 ECHR as well.[14]

16. The applicability of Article 8 ECHR to an attack on a person's reputation has been determined by the Court by a severity test.[15] In line with the case law, the applicants are obliged to identify and explain the concrete repercussions on their private life and the nature and extent of their suffering, and to substantiate such allegations in a proper way.[16] On his part, in this third party intervention, the Commissioner for Human Rights would like to refer to **objective circumstances** existing in the cases of judges expressing critical opinions about changes in the Polish judiciary, who have been affected by oppressive actions undertaken by national authorities.

17. The Commissioner submits that disciplinary, administrative (e.g. cancellation of secondment to a higher court, suspension in duties, transfer to another court department, etc.) as well as criminal law measures, are now **regularly taken with the intention of undermining the credibility of judges, depriving them of the authority and confidence of the public**, which are necessary for judges to effectively perform their role entrusted to them by law.

18. The practice of disciplinary authorities indicates that these proceedings are not initiated in order to hold the judge responsible for any actual misconduct. They are illusory in nature and are instituted in order to exert pressure on the individual judge and the entire judicial community. Therefore, the **exclusion clause** denying Convention protection when the loss of reputation is the foreseeable consequence of one's own misconduct or criminal offence,[17] is not applicable to such cases.

4. Exercise of the freedom of expression by judges (Article 10)

19. The freedom of expression, which is an essential foundation of a democratic society, also applies to the members of the judiciary.[18] However, in an attempt to silence criticism, national authorities in Poland repeatedly use the argument that the judges commenting on changes in the judiciary are politically involved in a way that they should not be. This argument must be rejected.

20. Indeed, judges should not participate in political life. The Polish Constitution prohibits their membership in a political party or carrying out public activities that would compromise the independence of the judiciary (Article 178 (3). As stated by the ECtHR, the law may also require certain level of discretion and self-restraint by judges in exercising their freedom of expression, bearing in mind the special role under the law, as guarantors of justice, as well as the need to uphold

[12] ECtHR judgment of 16.12.1992, *Niemietz v. Germany*, para. 29.
[13] *Ibidem.*
[14] ECtHR judgment of 25.09.2018 *Denisov v. Ukraine*, paras. 107 and 112; see also ECtHR judment of 27.11.2020, *J.B. and Others v. Hungary*, para. 127.
[15] *Denisov*, paras. 111–112.
[16] *Denisov*, para. 114.
[17] *Denisov*, para. 98.
[18] ECtHR judgment of 23.06.2016, *Baka v. Hungary*, para. 140.

the authority and confidence which courts must inspire both in the parties to the proceedings and the public at large.[19]

21. Nevertheless, Polish judges who are critical of the changes in the judiciary, point out above all the threats to judicial independence and dismantling of the separation of powers and the rule of law which those changes entail. Judges are not only entitled but also **bound to stand up for their independence**.[20] These issues, certainly, are matters of constitutional law and inevitably have political implications. Yet, the ECtHR held before that this element alone should not prevent judges from making statements on such matters.[21] Additionally, while the issues concerning the **functioning of the justice system constitute questions of public interest**, the debate on them enjoys the protection of Article 10.[22]

22. Since judges' comments on changes in the judiciary which impact on the guarantee of a fair trial are both acceptable and desirable, national authorities should not prevent or discourage judges from expressing their opinions. On the contrary, states have **positive obligations** under the Convention to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear, **even if they run counter to those defended by the official authorities**.[23]

23. In its case law, the Court has identified various forms of interference with the exercise of the freedom of expression, e.g. a "formality, condition, restriction or penalty".[24] The Court also indicated that the scope of the measure must be determined in the light of the case as a whole, by putting it in the context of the facts and the relevant legislation.[25]

24. The Commissioner submits that disciplinary proceedings including their initial phase (preliminary inquiries), administrative measures, as well as criminal proceedings or measures taken against judges for the content of their opinions **undermine individual rights granted by the Convention**. When assessing a violation of the Convention, the account should be taken of proceedings that have already been completed, but equally of pending proceedings, as well as the real risk of future proceedings, especially when they are based on **domestic legislation unclearly drafted or the state practice of arbitrary application of the legislation has been established**.

III. Developments in the regime of disciplinary responsibility of judges over recent years

1. Predominant position of the Minister of Justice

25. Following legislative changes, the current system of disciplinary responsibility has been overwhelmingly influenced by the Minister of Justice. The Minister appoints the principal disciplinary officers, as well as judges of first-instance disciplinary courts situated at the Courts of Appeal. The Minister has also been granted a number of important powers within the disciplinary proceedings. The Minister has the right to object to the decision of the disciplinary officer refusing to initiate a proceeding, which obligatorily results in the opening of such proceeding. The Minister of Justice has also the right to appeal to the Disciplinary Chamber of the Supreme Court against any ruling of the disciplinary court of first instance.

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[19] See ECtHR judgement of 14.09.2009, *Kudeshkina v. Russia*, para. 86; ECtHR judgment of 28.10.1999 *Wille v. Liechtenstein*, para. 64.
[20] See *i.a.* Consultative Council of European Judges, *Magna Carta of Judges (Fundamental Principles)* of 17.11.2010, CCJE (2010)3 Final, para. 3.
[21] *Wille*, para. 67
[22] *Kudeshkina*, para. 86; *Baka*, paras. 159 and 165.
[23] See ECtHR judgment of 10.01.2019, *Ismayilova v. Azerbaijan*, para. 158.
[24] *Baka*, para. 140; *Wille*, paras. 43 and 63.
[25] *Ibidem*.

2. Disciplinary Chamber of the Supreme Court

26. The new Act on the Supreme Court, adopted at the end of 2017, established the Disciplinary Chamber and vested it with the authority to decide on disciplinary responsibility of the legal professions, in particular, of the judges.[26] The Commissioner submits that **the Chamber was set up in violation of the law, and was staffed in a process that did not guarantee the independence and impartiality** of the persons appointed. This stance was taken also by the Polish Supreme Court itself in the resolution of the joined chambers of 23 January 2020.[27] A detailed analysis of the deficiencies in the nomination process to the Supreme Court, has been recently presented by the Commissioner in the third-party intervention in the case *Reczkowicz and Others v. Poland* (Applications nos. 43447/19, 49868/19, 57511/19), see in particular, paras. 22–53.

27. The Commissioner considers that, in addition to the activities of the disciplinary officers, the Disciplinary Chamber of the Supreme Court has become **the most important instrument to directly influence the activities of judges and the content of court decisions**. It has been staffed mostly by persons associated with the Minister of Justice, who owe him a prompt career and a judicial position in the Supreme Court. Some of those persons had previously served as public prosecutors, and were therefore professionally subordinated to the Prosecutor General, a position also held by the Minister of Justice. The Disciplinary Chamber has in fact been designed to deter judges from taking actions and passing judgements that are not in line with political authorities and to repress those who do not meet such expectations. Its existence and activity manifestly interfere with the adjudication function of courts and judges and violate judicial independence.

28. The negative developments in the system of disciplinary responsibility, which excessively affects judicial activity of Polish courts, have led the European Commission to launch an infringement proceeding against Poland based on Article 258 TFEU and bring an action to the Court of Justice in Luxembourg (case C-791/19). Furthermore, the ECJ in its decision of 8 April 2020 held that the independence of the Disciplinary Chamber cannot not be guaranteed, and it may pose a threat to the independence of Polish courts. For that reason, the Chamber was suspended (C-791/19 R). In the CHR's opinion, the Disciplinary Chamber has not fully complied with the ECJ decision, and is still carrying out proceedings to waive judges' immunity.

3. Lack of sufficient guarantees of a fair trial

29. The current rules of disciplinary proceedings do not meet the standards of a fair trial. The disciplinary court of first instance to examine an individual case is chosen in a discretionary manner – with no statutory criteria, by the decision of the President of the Disciplinary Chamber. The disciplinary case thus fails to be considered by a court established by law. There is also no guarantee that disciplinary cases will be dealt with within a reasonable time. Furthermore, the appointment of a defence counsel and the assuming of the judge's defence does not halt the proceedings. In addition, the disciplinary court may conduct the proceedings despite reasoned absence of the charged judge or the defence counsel, which undermines the right of defence.

4. The Muzzle Law

30. The law was adopted in December 2019 and entered into force in mid-February 2020.[28] The new legislation introduced instruments that further restrict judicial independence and the

[26] Act of 7.12.2017 on the Supreme Court, original text: *Dziennik Ustaw* of 2018, item 5.
[27] See Resolution of 23.01.2020 of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf (accessed; 19.10.2020).
[28] Act of 20.12.2019 amending the Law on System of Ordinary Courts, the Supreme Court Act and certain other acts, *Dziennik Ustaw* of 2020, item 190.

disciplinary regime was made even tighter, introducing a higher degree of arbitrariness. This allows proceedings to be conducted not to improve the functioning of the judiciary, but to discipline judges and break their objections to the changes introduced by the government. The law was passed in connection with the ECJ judgment in case C-585, 624 and 625/19 *A.K. and others*.[29] It was intended to corroborate flawed appointments to the Supreme Court as of 2018, and make it impossible to verify the legitimacy, independence and impartiality of persons nominated, thus preventing the *effet utile* of the ECJ ruling.

31. The Law introduced a number of **mechanisms *de facto* precluding effective judicial review in cases of doubts about the independence of judges** appointed upon recommendation of the new National Council of the Judiciary (**NCJ**). First, it prohibits to examine the lawfulness of judges' appointments made with the participation of the new NCJ. Secondly, the law confers exclusive competence to rule on the independence of judges to the Chamber of Extraordinary Control and Public Affairs of the Supreme Court, which if fully staffed with persons affected by doubts similar to those they are to rule on (*nemo iudex in causa sua*).[30] Thirdly, the law requires judicial proceedings to continue, irrespective of whether the independence of the court or the judge is challenged.[31] Fourthly, the law orders to ignore requests to verify the lawfulness of new judicial nominations.[32]

32. Moreover, the law provides for **broadening the definition of a disciplinary offence** and at the same time it changes the way it is construed in the law. The legislature provided an exemplary list of disciplinary offences that may be committed by judges. By introducing an open concept of disciplinary offences, and setting examples of those offences that appear to be important to the political authorities and not those that might be particularly harmful to the parties of court proceedings, the law-maker indeed **delegated discretionary power to disciplinary bodies** and allowed them to determine the conduct which is or is not to be considered an offence. They will be able to do so in a arbitrary manner without any substantial statutory limitations, and essentially uncontrolled by law.

33. Such a high degree of legal uncertainty and the lack of foreseeability of the law should be considered unacceptable, especially since it concerns the field of repressive law. It sets a sort of trap for judges, who are not able to find out from the content of the law which conduct is prohibited under the threat of disciplinary sanctions. The statutory catalog of disciplinary offences can include virtually any conduct of a judge that, for some reason, will not be appreciated by representatives of the legislature, the executive, other state bodies, or the disciplinary officers themselves.

5. Preliminary inquiry as a part of disciplinary proceeding

34. The CHR would like to point out that under the disciplinary regime, at first, preliminary inquiries (*postępowania wyjaśniające*) are instituted against judges, which may then lead to disciplinary proceedings. In order to assess the threat to judicial independence and the interference with judges' rights under the Convention, these inquires should also be viewed as disciplinary proceedings. It should be emphasized that the preliminary inquiries are undertaken by disciplinary officers as a part of the disciplinary proceedings *sensu largo*. This is confirmed both by the structure of the Law on the System of Common Courts and the rules of functional interpretation. The lawmaker placed the provision of Article 114(1) of the Law, which provides for preliminary inquiries, in Chapter 3 of the Law, concerning the disciplinary responsibility of judges and junior judges (*asesorzy*).

[29] ECJ judgment of 19.11.2019, C-585/19, C-524/19 and C-525/19 *A.K. and others*.
[30] Article 26(2), Article 82(2)–(3) of the Muzzle Law.
[31] Article 26(2) of the Muzzle Law.
[32] Article 26(3) of the Muzzle Law.

35. When carrying out preliminary inquiries, the disciplinary officer takes action to determine, whether there are grounds for a disciplinary offence. The disciplinary officer calls judges as witnesses, demands written explanations from them, requests the courts to send information about the cases handled by the judge, and also requests the court files to be handed over. The inquiries are in fact the first initial phase of the disciplinary procedure. They cannot therefore be treated as a separate element from the disciplinary proceedings. On the contrary, they constitute an inherent preliminary phase of the disciplinary procedure.

36. Such **preliminary inquiries can have a chilling effect on other judges to the same extent as disciplinary proceedings** themselves. In the context of judges defending judicial independence both types of proceedings are illusory. **They are undertaken with the intention to involve judges in a legal procedure**, take away their time for visiting the prosecutor' office, for being questioned, for writing explanations. Thus they impede the performance of the judges' tasks, cause delays in handling court cases, and eventually, provide a pretext for media attacks by pro-government broadcasters. Indeed, they amount to legal harassment.

IV. Systematic use of the disciplinary regime against judges

37. Over the past few years, the Commissioner for Human Rights has intervened in numerous cases of judges subjected to the oppressive practice of initiating unfounded, intimidating disciplinary proceedings. In this respect, the Commissioner has gathered extensive documentary, which it can make available to the Court upon request. Many examples of oppression against judges were also collected by the Association of Polish Judges *"Iustitia"*, in a recent report *"Justice Under Pressure"*.[33]

38. Currently, **any judge in Poland may reasonably fear that he or she will face severe consequences** for his or her attitude and opinions that are in line with the requirements of judicial independence, the guarantees of the European Convention, EU law, and the case law of both European Courts, in Strasbourg and in Luxembourg, but are not in line with the will of the representatives of legislative and executive authorities.

39. It is clear from the Commissioner's review of the practice of disciplinary officers that **the system of disciplinary responsibility has been used with the intention of breaking judicial independence**. The initiation of disciplinary proceedings against judges has become a "normal" practice for disciplinary officers and is used as **a routine tool to intimidate judges**. Therefore, the judges' fear of launching disciplinary proceedings against them, of facing charges, and being drawn into the disciplinary mechanism – is based not on a subjective perception, but on **an objectively existing pattern**.

40. The legislature deliberately designed the current disciplinary regime for judges to be used as an instrument of political control over judges and courts. The practice reveals **a constant, intentional pressure of political authorities on judges, carried out in a programmed and immediate manner**, often on the same or the following day after an act or an opinion of the judge that does not meet the expectations of the government. The functioning of the disciplinary regime in its current form, flagrantly violates the constitutional legal order, undermines the principle of the separation of powers, seeks to subjugate judges and courts to the political will, and destroys the public image of courts as impartial and independent bodies.

41. Public authorities, do not actually hide what their true aim is. On the contrary, it seems that they try to publicize their actions in order to further strengthen the chilling effect, to make judges

[33] J. Kościerzyński (ed), *Justice under pressure – repressions as a means of attempting to take control over the judiciary and the prosecution in Poland. Years 2015–2019*, Warszawa 2020, https://www.iustitia.pl/images/pliki/raport2020/Raport_EN.pdf (accessed: 19.10.2020)

feel threatened, and thus to trigger a "self-restraint" attitude to prevent judges from taking actions or making comments that they are obliged or entitled to under the law but which are not desired by the political authority.

V. Additional comments on further actions against judge Tuleya

42. After judge Tuleya filed the complaint with the Strasbourg Court, the National Public Prosecutor's Office on 14 February 2020 requested the Disciplinary Chamber of the Supreme Court to **waive the judge's immunity and allow him to be held criminally responsible**, indicating an intention to charge him under Article 231(1) of the Criminal Code. This is a continuation of the case referred to in Court's "Statement of facts" as the case no. 2.

43. The case concerns the examination by the judge of the complaint against the prosecutor's decision to discontinue the proceedings on the circumstances of the relocation on 16 December 2016 of the Sejm's voting on the 2017 state budget from the Plenary Room of the Sejm to the so-called Column Room, followed by obstructing the participation of members of the parliamentary opposition. The Prosecutor's Office accuses the judge of allowing media representatives to record the announcement of the decision ordering the Prosecutor's Office to resume the investigation in the case, while in the oral motives of the decision, the judge cited excerpts from the testimony of some politicians of the ruling majority from the investigation files. The case is still pending, after rejection of the request by the Disciplinary Chamber acting in the first instance, the Prosecutor's Office appealed to the Disciplinary Chamber acting in the second instance. The date of the hearing was already postponed twice (5 and 22 October 2020).

44. The Commissioner should in principle refrain from commenting on the facts of an individual case. However, the CHR makes certain exception in this respect because he considers them as **an example of systemic actions by national authorities aimed at producing a general effect**. The CHR comments focus on the systemic aspects of the case pending before the Court

45. The Commissioner perceives the intention to charge the judge under Article 231(1) Criminal Code as an act of legal harassment, unfounded by the facts or the law in force, an act of repression against the judge, intended to remove him from adjudicating. It is also an example of stigmatization, and a warning to other judges.

46. First, **the judge would be prosecuted for the content of his judicial decision and the oral reasons he gave, which were not in line with the intentions of the government**. In his decision, the judge **ordered to continue the case that was very inconvenient for the ruling majority**. Giving reasons for the decision, the judge quoted excerpts from the testimony of the members of the ruling party, which showed, i.a., that it had already been planned in advance to relocate the session of the Sejm, that access to the new session room was blocked for members of the opposition so that they could not submit formal motions and take part in the vote, that there may not have been the required quorum in the room during the vote, and that the voting minutes were altered. In addition, the judge also ordered the prosecutor's office to investigate whether the questioned MPs gave false testimony, as there were significant discrepancies among them.

47. Second, the political context of the proceedings launched by the National Prosecutor's Office is evident. The information provided was undesirable for the Sejm's majority, showed its actions in a negative perspective, brought out the likelihood of serious violation of the Sejm's Rules of Procedure. They substantiated also that some MPs were deliberately prevented from exercising the rights of their parliamentary mandate. Due to the presence of the mass media, the announcement and justification of the court's decision was made widely known to the public.

48. The interest of the political authorities in the judge increased after the announcement of the decision. The Prosecutor's Office interviewed the staff of the department of the Regional Court,

where judge has been working, questioned the court clerk (*protokolant*), who took the minutes of the court's hearing, interrogated the president of the Regional Court and also heard the former president of the criminal department, who assigned the case to the judge.

49. Third, the gravity of the case initiated by the request of the National Prosecutor's Office is much more serious than previous cases of disciplinary responsibility. The prosecutor's office, which is directly subordinate to the Prosecutor General – the Minister of Justice, initiated criminal proceedings against a judge, which may lead to the imprisonment and removal from office.

50. In the Commissioner's opinion, the request of the National Prosecutor's Office to the Disciplinary Chamber aimed at activating the regime of criminal responsibility against the judge, is **an individual measure of repression and revenge of the political authorities** on the judge who critically assesses changes in the judiciary, demonstrates personal independence, is an inspiration for other judges in Poland and provides an example of conduct that should be expected from a judge. The Prosecutor's action is intended to result in the suspension or removal of the judge from judicial profession. Thus, the motion of the Prosecutor's Office is at the same time **a measure of "general prevention" against all judges in Poland**, intimidating them from following a likewise path, inducing them to give up showing signs of independence. It is supposed to give a clear signal to judges: it does not pay to disagree with the current government.

VI. Conclusions, a need to protect judges against the abuse of the disciplinary regime

51. The Commissioner concludes that state authorities exert a planned, systematic, illegitimate pressure on judges. On a nationwide scale, they wish to gain influence over the judiciary. They do so either by taking dissuasive and repressive measures, as this case demonstrates, or by placing the persons they support in the courts, as exemplified by the Supreme Court appointments since 2018, re-staffing of the National Council of the Judiciary, or previous nominations to the Constitutional Tribunal, including placing of duplicate-judges (*sędziowie-dublerzy*) in it.

52. Infringements of Articles 8 and 10 of the Convention, in cases such as this one, have not been the aim, but are the result of actions taken by public authorities against judges. Since the requirement of judicial independence means that the rules governing a disciplinary regime must provide the necessary guarantees to prevent the risk of that regime being used to politically control the content of court decisions, the state is obliged to effectively implement these conditions at domestic level, i.e. **remove any national legislation or adapt the practice of national bodies that stand in the way of achieving this**.

53. National judges must be protected against any threat or temptation to submit to outside interference or pressure that might jeopardize their independence. The law should exclude all forms of direct influence, but also more indirect forms of interference that may affect the decisions of individual judges. National legislation must therefore also ensure that, in particular, there is no risk of the system of disciplinary measures being used for political control over decision of judges and courts.

54. The current failure to exclude this risk should be considered as **a serious systemic flaw**, since the disciplinary regime applies to every national judge. The threat therefore **affects the entire justice system of a State Party to the Convention, which undermines the European requirement for effective judicial protection**.

Adam Bodnar
Commissioner for Human Rights
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