COMMISSIONER FOR HUMAN RIGHTS

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Written comments of the Commissioner for Human Rights in the case *Guðmundur Andri Ástráðsson v. Iceland*

(Application No. 26374/18)

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 Court, the Commissioner for Human Rights (**CHR**) wishes to submit the written observations related to the present case.

I. General observations

2. The purpose of this intervention is to address the key legal issues arising from *Guðmundur Andri Ástráðsson v. Iceland* case which is now pending before the Grand Chamber of the Court.

3. The aim of the Commissioner's third party intervention in this case is to obtain confirmation and further clarification of the European requirements for the appointment of judges in the context of the exercise of individuals' right of access to court and effective judicial protection (Article 6 (1) ECHR). The Commissioner understands that the present case is examined by the Court in the context of particular facts related to the functioning of the Icelandic judiciary, which the CHR does not intend to comment on. However, the legal issues that have arisen in this case are of a more general nature and may also be relevant to other States Parties to the Convention. Whereas formally the Court's judgment has direct effect only on the parties to the case, its practical importance is more extensive, since it contributes to the ECtHR case-law, which the Court will not deviate from without good reason[1].

[1] See e.g. ECtHR, judgment of 8.11.2016, 18030/11, *Magyar Helsinki Bizottság v. Hungary*, HUDOC, para. 150.

4. The ruling of the Grand Chamber in the present case will indeed be relevant for the assessment whether nominations of judges in Poland comply with the Convention standards. Questioning the lawfulness of judge's appointment undermines the legitimacy of the court (the adjudicating panel) insofar as it is composed of a person whose judicial status has been called into question. In such a situation, it necessitates to consider whether such an authority is a court "established by law" within the meaning of Article 6 (1) ECHR. It ultimately leads to doubts as to whether judicial decisions rendered by such a body are legally binding. The very consideration of such contingencies and, moreover, admitting the possibility for the litigants to submit applications in this respect, undermines the confidence of individuals in the entire justice system, impedes access to court and threatens the exercise of individual rights and freedoms.

5. The changes made in recent years to the judicial system in Poland, including changes in the process of judicial appointments, have made the legal issues arising in the *Ástráðsson* case extremely relevant and very timely. These changes have eventually resulted in questioning the status of judges appointed in a process which involves the newly staffed National Council of the Judiciary (**NCJ**). The complex issues of the status of judges and courts have become particularly apparent following the CJEU judgment of 19 November 2019 in the case of *A.K. and Others*[2], the subsequent Supreme Court judgment of 5 December 2019[3], as well as next measures taken by various ordinary courts in Poland (see *infra* paras. 37–44). The executive and legislative bodies attempt to prevent courts from examining these questions by making use of disciplinary and administrative measures, as well as initiating further legislative changes.

6. As a consequence of the developments in Poland, there is a growing risk of legal chaos threatening the stability of judicial decisions and undermining legal certainty. One of the main challenges facing public authorities in Poland of today, is to work out criteria and mechanisms to address the current situation. The ECtHR's ruling in the present case may be of assistance in this process by voicing unequivocal European standards for the appointment of judges.

II. The court "established by law" and the principle of the lawful judge

7. Inasmuch as the requirement of a court "established by law" is rooted in the rule of law[4], the principle of the lawful judge, i.e. the judge appointed in accordance with the law, implements the same principle. The Commissioner for Human Rights shares the view that the expression "established by law" refers not only to the legal basis for the very existence of the court, but also to the composition of the court in each case it considers[5]. That inevitably incorporates the process of appointing judges into the concept of a court "established by law" within the meaning of Article 6 (1) ECHR. Similarly, the Polish Constitutional Tribunal also recognized that the right to a proper composition and status of judicial bodies that examine the case forms a very important element of the constitutional right to a court[6].

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[2] CJEU, judgment of 19.11.2019, C–585/18, C–624/18 and C–625/18 *A.K. and Others v National Council of Judiciary and Supreme Court (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982.

[3] Supreme Court, judgment of 5.12.2019, case III PO 7/18, http://www.sn.pl/aktualnosci/SiteAssets/Lists/Komunikaty_o_sprawach/AllItems/III-PO-0007_18.pdf (accessed: 5.01.2020).

[4] ECtHR, judgment of 28.11.2002, 58442/00, *Lavents v Latvia*, HUDOC, para. 82.

[5] *Lavents v Latvia*, para. 114.

[6] See Constitutional Tribunal, judgment of 24.10.2007, case SK 7/06, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=1816&sprawa=4377 (accessed 5.01.2020), para. 3.2.

8. The European standard of a "court" requires i.a. that the judicial body is set up in accordance with the intention of the legislature[7]. Not only the legal basis, the jurisdiction of the court and its composition must be regulated beforehand by legal provisions[8], but the law should equally determine the criteria and procedure for the appointment of judges, and the judge must indeed be nominated in compliance with these provisions[9]. In addition, the domestic rules governing the participation of judges in the consideration of the case must be respected, e.g. as regards the term of office, incompatibility or exclusion of judges[10].

9. All the above requirements are expressly intended to avoid excessive, arbitrary influence on the judiciary by other branches of government, and particularly the executive,. Accordingly, the principle of the lawful judge, is in fact meant to safeguard judicial independence from unlawful interference of the political powers[11]. Against this background, the Commissioner attaches great importance to ensuring that the substantive criteria and procedural rules governing the appointment of judges are shaped by the domestic legislation in such a way that judges and courts are capable of exercising their judicial function in an objective and impartial manner.

10. The requirement that the provisions relating to the selection of candidates and appointment to judicial posts should be strictly observed[12] serves two basic purposes. First, it creates a genuine basis for the independence and impartiality of the person appointed as a judge, who can carry out his or her judicial activities with the confidence that he or she has taken up the office by reason of professional qualifications, on the basis of objective criteria and in a duly completed procedure. This prevents the creation of dependence between the candidate to be appointed as judge and other persons, especially politicians, who may have engaged in efforts for the selection of that particular judge. A judge must not owe his or her professional career to other persons, who in future might expect that judge to handle a specific case allocated to him or her on grounds other than the established facts of the case and the applicable law.

11. Secondly, the strict observance of legal rules during the appointment procedure builds the public trust in the administration of justice and thus enhances the democratic legitimacy of the judiciary. It also increases the level of acceptance of court decisions in the society and thereby improves the effectiveness of judicial mechanisms. Furthermore, it provides the parties involved in the proceedings with the confidence that their interests are decided by impartial judges who are not favouring any of the parties and who are not guided by illegitimate considerations. It is not only essential that judges are independent and impartial, but also that the procedure for their appointment appears to be so – otherwise, the confidence of litigants and the public in the independence and impartiality of the courts might be eroded[13].

12. The Commissioner for Human Rights considers that a flagrant breach of the domestic rules on the appointment of judges constitutes a clear violation of the Article 6 (1) ECHR. There is a breach of that Article without the need to examine any other elements, in particular, any further guarantees of a fair trial. It constitutes an autonomous breach because it has the nature of a primary violation of an individual's right guaranteed by Article 6 (1) ECHR. The failure to establish the court by the law in force renders further examination under Article 6 (1) aimless, since there can no longer be a fair trial before an authority lacking the attribute of being a court. The European Court of Human Rights

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[7] *Lavents v Latvia*, para. 114; see also General Court of the European Union, judgment of 23.01.2018, T-639/16 P, *FV v Council of the European Union*, EU:T:2018:22, para. 72.
[8] *Lavents v Latvia*, para. 114; GCEU, *FV*, para. 68.
[9] Compare GCEU, *FV*, para. 74.
[10] *Lavents v Latvia*, para. 114; GCEU, *FV*, para. 73.
[11] See ECtHR, judgment of 20.10.2009, 4313/04, *Gorguiladzé v Georgia*, HUDOC, para. 69; ECtHR, judgment of 27.10.2009, 30323/02, *Pandjikidzé v Georgia*, HUDOC, para. 105; GCEU, *FV*, para. 68.
[12] See also e.g. GCEU, *FV*, para. 74–75.
[13] GCEU, *FV*, para. 75.

has ruled that such a body cannot, in any event, guarantee a fair trial to the persons subject to its jurisdiction[14].

13. The Commissioner is of the opinion that since the guarantees of access to court, and in particular those which are the constitutive elements of the definition of a "court", form the core of the right to a fair trial – each judicial body is *ex-officio* bound to verify whether it meets these requirements. Such an obligation arises whenever compliance with these guarantees is called into question by raising pleas which do not appear to be manifestly devoid of merit[15]. Accordingly, a similar obligation will be incumbent on the court examining the appeal against the decision of the contested body when such pleas are raised before it[16].

III. Flagrant violation of domestic law on judicial appointments

14. A person appointed as a judge in flagrant breach of the domestic law should not be allowed to exercise judicial functions. A judicial authority of which such a person is an adjudicating member should not be deemed to be a court established by law within the meaning of the Convention.

15. An appointment process in flagrant breach of the law means a process that is manifestly contrary to the explicit legal rules enacted to govern it. A manifest violation consists in a striking discrepancy between the way in which the appointment process should be conducted in accordance with the applicable rules, and the way it actually took place. It involves conduct contrary to express legal injunctions or prohibitions.

16. According to the consistent case-law of the ECtHR, failure to comply with the rules on the establishment and jurisdiction of judicial bodies may constitute violation of Article 6 (1) of the ECHR[17], provided that the violation of the applicable domestic law is "flagrant"[18] (or "substantive")[19]. The Commissioner for Human Rights supports the opinion that instances of flagrant violation must be fundamental in nature and form an integral part of the appointment process in the assessment and selection of judges[20].

17. The threshold of a flagrant breach of law indicates that the appointment process violated the applicable rules in a manner that would have had a substantial impact on whether the process would have been completed at all (if someone was appointed), or what its outcome would have been (who would have been appointed). This threshold refers to the nature and seriousness of the infringement in the process of nomination. It is a rigorous category separating ordinary irregularities from infringements which are so fundamental that the decision made in such a deficient process becomes unacceptable. A flagrant violation of the law amounts to the nullification of the results of the process of appointment and denies legitimacy to the person who was so appointed.

18. The CHR submits that it is reasonable to presume that any infringement of a fundamental legal rule amounts to a flagrant breach of law. This includes constitutional provisions, standards of the European Convention on Human Rights, principles of European Union law. Such a presumption is

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[14] *Pandjikidzé v Georgia*, para. 121.
[15] See CJEU, judgment of 1.07.2008, C-341/06 P and C-342/06 P, *Chronopost and La Poste* v *UFEX and Others*, EU:C:2008:375, para. 46.
[16] CJEU, *Chronopost*, para. 47.
[17] ECtHR judgment of 5.10.2010, 19334/03, *DMD Group A.S. v. Slovakia*, HUDOC, para. 61.
[18] *Lavents v Latvia*, para. 114; see also ECtHR judgment of 31.05.2011, 59000/08, *Kontalexis v. Grece*, HUDOC, paras. 41, 44; ECtHR judgment of 4.03.2003, 63486/00, *Posokhov v. Russia*, HUDOC, paras. 39, 43; ECtHR judgment of 2.05.2019, 50956/16, *Pasquini v. San Marino*, HUDOC, paras. 102, 104; ECtHR judgment of 13.04.2006, 73225/01, *Fedotova v. Russia*, HUDOC, para. 42.
[19] ECtHR, judgment of 9.07.2010, 6945/04, *Ilatovskiy v Russia*, HUDOC, para. 40.
[20] ECtHR, judgment of 12.03.2019, 26374/18, *Guðmundur Andri Ástráðsson v Iceland*, HUDOC, para. 115.

particularly justified where the breach has already been established by a final judicial decision of the Constitutional Court, the Supreme Court, the ECtHR or the CJEU.

19. In the Chamber ruling in the present case, the Court indicated that it takes into account whether the facts before the Court demonstrate that a breach of the domestic rules on the appointment of judges was deliberate or, at a minimum, constituted a manifest disregard of the applicable national law[21]. A similar approach of having regard to the intentional nature of the breach has been also adopted in the case law of the European Union courts. The ECtHR itself invoked the General Court ruling in the case *FV v Council of the European Union*.

20. The concept of investigating the true aims of actions taken by public authorities is clearly set out in the CJEU judgment C-619/18 on the Polish Supreme Court[22]. The Court has compared the declared objectives of the amendments introduced by the national legislator in relation to the termination of judges' professional activity with the actual wording of the legal rules adopted, as well as their real implications[23]. The Court concluded that doubts on the true objectives of the changes made cannot be dispelled by the arguments put forward by the government[24].

IV. The issue of legal certainty

21. In the Commissioner's view, one of the major issues which does not yet seem to have been fully clarified by the European Court of Human Rights are the implications for legal certainty of the determination that the domestic court was not "established by law" or that the national judge was not a "legal judge". In situations in which a court or a judge is liable to be challenged, individuals involved in court proceedings may suffer both: (a) if the decision in their case is not (yet) reversed on that account – because they are not sure whether this will not change in the future; and (b) when the decision is revoked, annulled or nullified – because they will be brought back to the situation ex ante and faced with renewed court proceedings.

22. In the joint dissenting opinion judges Lemmens and Griţco invoked the presumption of legality meant to serve the legal certainty. Yet, even if, in many situations, the presumption of legality provides a relative, perhaps only temporary stability of the judicial decision, it still can prove insufficient. When a judge or a court is challenged, there are two basic mechanisms for examining the merits of the pleas, and if necessary, for determining the legal consequences of the disqualification of the court / judge.

23. First, derived from the principle of effectiveness (effet utile) of Convention standards – the admissibility, within the available legal remedies, of examining the status of a court / judge as to the lawfulness of their establishment. And if, in the course of the review, the hypothesis that the court / judge does not meet the requirements is confirmed, the reviewing court would have to be able to refuse to recognize the body as a court or the person as a judge, with the power to determine further legal consequences, such as the reversal of a flawed court decision.

24. Secondly, in the case there are no available legal remedies – the possibility, which exists in a number of countries and is also recognized under European Union law[25], of relying on the concept of the non-existent act (non-act, nullity, *sententia non existens*). It consists in refusal to apply the non-existent act in the specific case. In the EU law, which embraces most of the States Parties to the Convention, this mechanism is based on the principle of primacy of Union law and implies the

[21] ECtHR, *Ástráðsson*, para. 102.
[22] CJEU, judgment of 24.06.2019, C-619/18, *Commission v Poland (independence of the Supreme Court)*, EU:C:2019:531.
[23] CJEU, *Independence of the Supreme Court*, paras. 80 et subseq.
[24] CJEU, *Independence of the Supreme Court*, para. 87.
[25] See e.g. ECJ, judgment of 15.06.1994, C-137/92 P, *Commission v BASF AG and Others*, EU:C:1994:247, para. 49.

possibility to bypass any domestic act that is incompatible with EU law[26]. The act of appointing a person as a judge may fall also within that mechanism, if it is established that the appointment was made in a flagrant breach of the law. Then, the very act of appointment and, consequently, the judge appointed by that act, as well as the judicial panel with the participation of that person – would become "invisible" from the point of view of European Union law (inapplicable, unenforceable). Accordingly, decision issued by such a judge would be equally "invisible", must remain unapplied and do not produce any legal effects.

25. The Commissioner for Human Rights considers that the deliberate interference by the executive (and also by the legislature, as the case may be) with the status of a judge or a court in a manner incompatible with the Convention should preclude the subsequent consideration of arguments relating to the principle of irremovability of judges and the principle of legal certainty, especially if there was no effective mechanism to review the lawfulness of the appointment of a person to the judicial position prior to the act of appointment. Intentionality aimed at circumventing or breaching the applicable laws may not be rewarded by acceptance of the situation thus created (*ex iniuria ius non oritur*).

26. In the case C-508/19 *Prokurator Generalny* pending before the CJEU, which has been initiated by preliminary questions referred by the Polish Supreme Court, the Court also examined the issue of deliberate breach of the law by public authorities. The CHR would like to point to the following paragraphs of the Supreme Court's reasoning (to substantiate its first question)[27] that may be of relevance to the ECtHR:

> 20. In view of the need to balance the different principles of Union law, the Supreme Court reserves that Question No 1 seeks to establish an EU standard on this issue under two additional conditions.
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> (…)
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> 22. The second condition is that the legislature or executive of the Member State must have deliberately and intentionally brought about the state of affairs described above by excluding the possibility of judicial review of the compatibility with Union law of domestic legislation or proceedings at the pre-appointment stage. If such a judicial review had been carried out (alone or in cooperation with the CJEU in the framework of Article 267 TFEU) and the review resulted in a finding of a breach of the principle of effective judicial protection, national law could not apply. Consequently, they could not constitute the legal basis for handing over the act of appointment to judicial office.
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> 24. The latter condition is all the more important in that the deliberate exclusion of judicial verification of the compatibility of domestic legislation with EU law before the appointment justifies disregarding any arguments arising from the principle of legal certainty and the principle of the irremovability of judges which might justify giving a negative answer to the first question of the Supreme Court. The intentional exclusion by the national legislator of judicial review of

[26] See CJEU, *A.K. and Others*, paras. 160, 164 and 166; see also CJEU, judgment of 29.04.1999, C-224/97, *Erich Ciola v. Land Vorarlberg*, EU:C:1999:212, para. 33 *in fine*; CJEU, judgment of 8.06.2001, C-118/00, *Gervais Larsy v Institut national d'assurances sociales pour travailleurs indépendants (INASTI)*, EU:C:2001:368; CJEU, judgment of 18.07.2007, C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA*, EU:C:2007:434; CJEU, judgment of 3.09.2009, C-2/08, *Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v Fallimento Olimpiclub Srl*, EU:C:2009:506; CJEU, judgment of 11.09.2014, C-112/13 *A. v B. and Others*, EU:C:2014:2195; CJEU, judgment of 27.05.2019, C-508/18 and C-82/19 PPU, *OG and PI*, EU:C:2019:456.

[27] Official Journal of the European Union C 337 of 07.10.2019, p. 6; the question reads: "*Should the second subparagraph of Article 19(1), Articles 2, 4(3) and 6(3) TEU, in conjunction with Article 47 of the Charter of Fundamental Rights ('CFR') and the third paragraph of Article 267 TFEU, be interpreted as meaning that the court of final instance of a Member State may, in proceedings seeking a declaration that a service relationship is non-existent, declare that a person who has received a document appointing him to the position of judge in that court is not a judge in the case where that document of appointment was issued on the basis of provisions which infringe the principle of effective judicial protection or under a procedure which is incompatible with that principle, in the case where a judicial review of these matters prior to the delivery of the document of appointment has intentionally been made impossible?"*.

domestic provisions for their compliance with EU law indicates an awareness of the contradiction of national regulations with the EU standard. In addition, it indicates a wish to intentionally create a situation of permanent and systemic breach of the rule of law in that Member State.

24. Equipping a national court acting as a court of the Union with such an extraordinary measure to protect the rule of law is, in the view of the Supreme Court, the only effective solution to prevent a systemic breach of the principle of effective judicial protection from having irreversible consequences. The creation of such a measure by the CJEU will discourage Member States from infringing the principle of effective judicial protection by appointing courts or judges in a manner contrary to that principle, as they will have to reckon with the fact that such actions are not irreversible.[28]

IV. The principle of subsidiarity and the state's margin of appreciation

27. The right to be tried by an independent and impartial court established by law is an essential element of the right to a fair trial guaranteed by the European Convention on Human Rights. The Convention's standard is autonomous, independent of respective national standards. Accordingly, the Court is not bound by the domestic authority's assessment of the breach. Even if the national body considers that, despite the deficiencies in the appointment process, they did not undermine the fairness of the judicial proceeding before the flawed court, the ECtHR nonetheless has the power to assess the implementation of the European standard in this situation on its own. It can do so in relation to the very assessment of whether the domestic law setting out the substantive and procedural rules for the appointment of a judge has been observed.

28. The Court's capacity to make that verification does not contravene the principle of subsidiarity and the margin of appreciation of a State Party to the Convention. The subsidiarity test is a general principle indicating that it is primarily for the national bodies to carry out such an assessment. Yet, the Court remains competent to review whether the national assessment preserves the Convention standard. In this context, the ECtHR will not normally be authorized, for example, to verify the very allocation of individual cases to particular courts or judges since this falls within the state's margin of appreciation. Nevertheless, the requirement that the case is to be considered by a court established by law, and staffed by lawfully appointed judges, implies by its very nature, the necessity to examine whether it was formed in a lawful manner. If the ECtHR were denied the right to carry out its own verification in this respect, this would make that very guarantee of Article 6 illusory. The Court in its supervisory role cannot therefore be bound by the conclusions reached by the national authority; on the contrary, it is entitled to make an independent assessment itself.

29. Still, the principle of subsidiarity constraints the exercise of Court's powers. While recognizing that it is primarily for the domestic courts to interpret national legislation, the ECtHR will challenge their assessment only in cases of flagrant breach of that legislation[29]. So far, in cases involving Article 6 (1) ECHR, the Court found that there was a violation of the right to be tried by a court established by law, where the domestic bodies themselves found that the composition of the court was irregular, where the national legislation was imprecise, unclear or unconstitutional, and where the violation of domestic law was manifest, including the lack of a legal basis for the involvement of the person in the adjudicating

[28] Supreme Court, Decision of 12.06.2019, case II PO 3/19, unofficial translation by the CHR; the original Polish text: http://www.sn.pl/sites/orzecznictwo/orzeczenia3/ii%20po%203-19.pdf (accessed 5.01.2020).
[29] *Lavents v Latvia*, para. 114.

body[30]. The Court's assessment could also include the degree to which national authorities, when making their own assessment, took into account the guidance provided by the Court's case law[31].

V. The Polish context: changes in judicial appointment process

30. Any major reform of the judiciary should be implemented by political authorities, while respecting the role that the judiciary plays in a democratic society ruled by law, upholding the constitutional principles of the separation of powers, judicial autonomy, as well as the objectivity and impartiality of judges. It should be carried out with thought, prudence, in a proper legislative process and after comprehensive consultations, involving also the judges themselves. The primary consideration should be to offer the most effective judicial protection for individuals to exercise their rights and freedoms. The legislative and executive bodies should act with due caution so as not to distort the balance between the various branches of government. They should resist the temptation to gain excessive influence over the exercise of judicial power, and should not attempt to equip themselves with measures enabling political control of the content of judicial decisions.

31. The above features describe standards that the Commissioner believes are natural and evident, yet which have not necessarily been followed in recent years by the executive and the legislature when they introduced a number of changes in the Polish judiciary. Many of them have been reduced to increasing the influence of political bodies on the personal composition of judicial authorities as well as other bodies which may influence the functioning of the judiciary.

32. The changes resulted in: (a) the *de facto* elimination of genuine constitutional review and the resignation of the Constitutional Tribunal from its role as a guardian of the Constitution – a process initiated by making it impossible for three lawfully appointed judges to take up their functions at the Constitutional Tribunal and replacing them with three other persons unlawfully appointed instead; (b) the renunciation of the National Council of the Judiciary of its constitutional task of safeguarding the independence of courts and judges – by politicizing the process of electing judges-members to the Council, making it a non-transparent one, and staffing this body mostly with persons related to the Minister of Justice; (c) a partial capture of the Supreme Court – by introducing two new chambers, which were exclusively staffed with new judges selected in a flawed appointment procedure from among candidates who were designated by political factors; (d) the carrying out of a politically motivated replacements of presidents and vice-presidents of a number of ordinary courts; (e) establishment of a disciplinary system for judges being used as a system of political control of the content of judicial decisions.

33. All the above-mentioned developments are consequences of major interference by political authorities with the procedures for appointing to posts in the administration of justice, including in particular the process of judicial appointments. In the Commissioner's view, only a strict compliance with the rules of the Constitution, domestic legislation, as well as international and supranational standards binding Poland, would be capable of preventing such negative effects.

34. To provide a more detailed account of the actual difficulties that have arisen, the Commissioner wishes to point to those shortcomings in the process of appointing in 2018 new judges to the Supreme Court which, in his view, constitute a flagrant violation of national rules applicable to judicial nominations. These include: (1) the initiation of the nomination procedure on the basis of an unconstitutional act, *i.e.* the statement by the President of the Republic of Poland without the required countersignature of the Prime Minister; (2) the participation in the nomination procedure of the National

[30] See i.a. M. Szwed, *Orzekanie przez wadliwie powołanych sędziów jako naruszenie prawa do sądu w świetle wyroku Europejskiego Trybunału Praw Człowieka z 12.03.2019 r., 26374/18, Guðmundur Andri Ástráðsson przeciwko Islandii*, „Europejski Przegląd Sądowy" 7/2019, p. 45.
[31] See in this respect ECtHR, *Ástráðsson*, para. 101.

Council of the Judiciary, a body composed in a unconstitutional manner which no longer fulfills its role in preserving judicial independence; (3) deliberate obstruction of *ex ante* judicial review of the legality of acts of appointment; (4) failure to comply by the NCJ and the President of the Republic with the binding court decision suspending the implementation of an NCJ resolution on submitting a motion for appointment[32].

35. In the context of Poland's membership in the European Union and its obligations under the EU Treaties, including in particular Article 19 (1) TEU (principle of effective judicial protection), some of the changes introduced in the Polish judiciary have been or will become the subject of proceedings before the Court of Justice of the EU. The Court has already delivered judgments in cases brought by the European Commission under Article 258 TFEU (infringement actions) concerning the independence of the Supreme Court[33] and the independence of ordinary courts[34], in both cases recognizing a breach by Poland of its EU obligations.

36. The CHR would like to suggest that, in the context of the present case pending before the European Court of Human Rights, the CJEU's preliminary ruling in the case of *A.K. and Others* may be of relevance[35]. The case was initiated by questions referred by the Polish Supreme Court and concerned the independence of the National Council of the Judiciary and the Disciplinary Chamber of the Supreme Court.

VI. The CJEU ruling C-585/18, C-624/18 and 625/18, A.K. and Others

37. In the judgment delivered on 19 November 2019 the Court of Justice reaffirmed that the national courts are empowered to verify whether the case has been or is to be resolved by a body which complies with the requirements of EU law[36].

38. The CJEU formulated a method for assessing the independence of a judicial body (i.e. the Disciplinary Chamber of the Supreme Court), indicating who should carry out such an assessment and according to what criteria. The criteria pointed to by the CJEU include: (1) the circumstances in which the Disciplinary Chamber was established and the activities of the National Council of the Judiciary, which was responsible for selecting nominees to the Chamber (paras. 143–145); (2) the characteristics and nature of the Disciplinary Chamber itself (paras. 147–151); and (3) the public confidence in the independence of the Chamber ("legitimate doubts", para. 153).

39. The Court also confirmed that, where an authority (such as the NCJ) which is responsible for safeguarding judicial independence is involved in the establishment of the composition of the court, the assessment of the lawfulness of the appointment of a judge also involves verifying whether that authority actually exercises its duties in a manner which offers sufficient guarantees of independence from the legislative and executive bodies. The assessment of the body cannot be confined to an analysis of the legislation, but needs to take account of its practice and the entire context of its activities.

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[32] The developments in Poland triggered critical reaction of a number of international institutions, including the Council of Europe bodies: primarily the Venice Commission which drafted a handful of disapproving opinions on enacted national legislation, but also the Human Rights Commissioner, the GRECO, the Secretary General, the Parliamentary Assembly or the Consultative Council of European Judges. A number of EU institutions also expressed negative evaluation of the changes made, e.g. the European Commission, the European Parliament, the Council, the CJEU, or the European Network of Councils for the Judiciary. Similarly, the OSCE Office for Democratic Institutions and Human Rights voiced its concern, as well as some United Nations bodies, e.g. the Human Rights Council or the Special Rapporteur on the independence of judges and lawyers.

[33] CJEU, judgment of 24.06.2019, C-619/18, *Commission v Poland (independence of the Supreme Court)*, EU:C:2019:531.

[34] CJEU judgment of 5.11.2019, case C-192/18, *Commission v Poland (independence of ordinary courts)*, EU:C:2019:924.

[35] *Supra* note 2.

[36] CJEU, *A.K. and Others*, paras. 132, 140, 153–154; see also Supreme Court, III PO 7/18, para. 24.

40. It is also clear from the Court's ruling that the act of appointing a person as a judge by the President of the Republic does not preclude the examination of the appointment. If, in accordance with domestic law, the acts of the Head of State cannot themselves be subject to judicial review, the law must provide effective legal protection at the earlier stage, i.e. in relation to the proposal submitted to the President for the appointment of a person. Consequently, it must be assumed that the act of the President cannot by itself repair a pre-existing deficiency in the appointment process, especially in the case of an *ultra vires* or improper exercise of authority, error of law or manifest error of assessment[37].

41. In the *A.K.* ruling, the CJEU devoted much attention to the National Council of the Judiciary as the body which prepares the decisions to appoint a judge by the President of the Republic. Although its resolutions in these matters are not formally binding, but are a necessary step in the nomination procedure. They do in fact determine who will be appointed, and therefore they produce particular legal effects for both those recommended for nomination and the rejected candidates.

42. The Court indicated that the participation of such a body may, in principle, contribute to making the appointment process more objective, if that body is itself sufficiently independent of the legislature and the executive as well as of the authority to which it is required to deliver such an appointment proposal[38]. The degree of independence enjoyed by the NCJ in exercising its responsibilities may be relevant for ascertaining whether the judges which it selects will be capable of meeting the requirements of independence and impartiality[39].

43. The Court of Justice eventually indicated that even if individual considerations would not amount to the negative assessment of the judicial body in question, the assessment should not focus on isolated criteria or facts, instead they should be taken together to present the overall picture of the court and its operation. The final assessment of whether an authority is indeed a "court" should therefore be comprehensive and take into account all relevant considerations of its establishment and functioning.

44. In line with the terms of the judicial dialogue based on Article 267 TFEU, the Court of Justice has left it to the national court to carry out the assessment and draw conclusions. On the basis of the above CJEU guidelines, the Polish Supreme Court made such an assessment in the judgment of 5 December 2019. The three-judge panel of the Supreme Court (Chamber of Labour and Social Security) held that the National Council of the Judiciary is not an impartial and independent body and the Disciplinary Chamber of the Supreme Court is not a "court"[40].

VII. Conclusions

45. The Commissioner for Human Rights considers that a flagrant violation of domestic rules laying down the conditions and procedure for the appointment of judges means that the person so appointed is not in fact a judge and the court in which he or she adjudicates is not a court "established by law". In such a case, the requirements of Article 6 (1) ECHR are not satisfied, and the State Party is bound to take all necessary measures, including general ones, to ensure that its justice system fully complies with Convention standards.

[37] CJEU, *A.K. and Others*, para. 145; ECtHR, judgment of 18.10.2018, 80018/12, *Thiam v France*, HUDOC, para. 25; see also Supreme Court, III PO 7/18, para. 28.
[38] CJEU, *A.K. and Others*, paras. 137–138.
[39] CJEU, *A.K. and Others*, para. 139.
[40] Supreme Court, III PO 7/18, paras. 79 and 88.