Warsaw, 10.06.2024

COMMISSIONER FOR HUMAN RIGHTS

Marcin Wiącek

VII.510.20.2024.JRO

Mr Marko Bošnjak
President of the First Section
European Court of Human Rights
F-67075 Strasbourg Cedex
Fax: +33 (0)3 88 41 27 30
+33 (0)3 90 21 43 10

Written observations in case Grzegorczyk v. Poland (application no 2203/23)

Dear Mr President,

in reference to the letter of the Section Registrar of 13 May 2024 no ECHR-LE14.8bP3 MZ/MSS/ana, I respectfully submit my written observations. The observations presented herein address only the general principles applicable to the determination of the case.

Yours sincerely

(-) Marcin Wiącek

Office of the Commissioner for Human Rights
of the Republic of Poland
al. Solidarności 77
00-090 Warsaw

Phone (+48 22) 55 17 700
Helpline 800 676 676
biurorzecznika@brpo.gov.pl
bip.brpo.gov.pl

Written observations of the Commissioner for Human Rights of the Republic of Poland in case *Grzegorczyk v. Poland*

I. Introductory remarks

1. In the Commissioner's opinion, the most salient general legal issues in the present case can be summarized in two questions:

1) can a judge be forced to adjudicate in a panel that is not an impartial and independent tribunal established by law?

2) does Polish law provide to a judge an effective recourse against a decision forcing him to adjudicate in such a panel (either transferring him/her to particular chamber or designating him to particular panel)?

To answer this questions, it is necessary to consider following issues:

II. The status of Supreme Court judges appointed in breach of law within 2018-2024 timeframe in light of current circumstances

2. As the European Court of Human Rights is well aware, the most salient deficiency of Polish judiciary system is the composition of National Council of Judiciary, which is responsible for selection of candidates for judicial posts. Polish judges are appointed by the President at the request of National Council of Judiciary (Art. 179 of the Constitution), composed of representatives of three branches of government: including 17 of the courts (15 judges + 2 presidents of highest courts), 2 of the executive and 6 of the parliament (Art. 186(1) of the Constitution). Although the Constitution does not specify the details of election of 15 judicial members of NCJ, it was universally assumed that they must be chosen by judges themselves – until 2017. On 8 December 2017 parliament passed a law, shifting power to appoint 15 judicial members from judicial communities to the Sejm (first chamber of parliament): the Act of 8 December 2017 amending National Council of Judiciary Act (hereinafter: 2017 Act).[1] The new Council – composed of 21 representatives of the parliament, 2 representatives of the executive and 2 representatives of the judiciary – commenced its mission on 6 March 2018. Since then, the President appointed over 3000 judges[2] at the request of new NCJ (who hereinafter be also recalled as "judges appointed under 2017 Act" or "judges appointed after 6 March 2018").

3. According to the case law of Polish courts, the composition of the adjudicating panel is unlawful when a judge appointed after 6 March 2018 sits in it and if the defectiveness of the appointment procedure leads to, in specific circumstances, to breach of the standard of independence and impartiality within the meaning of Art. 4 (1) of the Constitution, Art. 47 of the Charter of Fundamental Rights of the EU (hereinafter: CFF) and Art. 6(1) of the ECHR. Consequently, an assessment of specific circumstances related to the appointment of a judge and his/her adjudication in particular case is carried out, which allows to determine whether he/she

[1] Journal of Laws of 2018, item 3.

[2] According to data from the Chancellery of the President, in March 2024 there were 3310 judges appointed under 2017 Act procedure, including 2477 judges *sensu stricto* and 888 judicial assessors.

demonstrates the required independence necessary to fairly resolve the case.[3] Such an assessment is described as a **test of individual independence**, which requires to analyse all relevant factors that can affect judge's ability to conduct a fair trial: not only mode of appointment (in particular whether he/she was selected on the basis of objective criteria), but also behaviour before and after the appointment, formal and informal relations with the executive and legislative branches, evenhandedness of decisions already made in the particular case.[4] However, some commentators formulate more radical views – from which the Supreme Court distances itself – that all judges appointed after 6 March 2018 are not judges at all, and as a result, all judgments rendered by them are automatically invalid, regardless of individual circumstances.[5]

4. Meanwhile, in the case law of the Court of Justice of the EU, there is a tendency to avoid the automatic presumption that a judge appointed after 6 March 2018 never meets the requirements of independence. In this regard, the position of the CJEU is similar to that of the Supreme Court. Although, of course, the ECtHR is in no way bound by the position of the CJEU, the interpretation of Art. 47 of CFF may affect interpretation of Art. 6 of ECHR due to **the principle of equivalence**, according to which, it is presumed that acts of EU law guarantee the same level of protection as the Convention.[6]

5. First of all, it should be underlined that the CJEU has never stated that the election of the National Council of the Judiciary by the parliament is per se incompatible with EU law - only that the election of the NCJ in conjunction with other circumstances leads to the violation of the individual's right to effective judicial protection (Art. 47 of CFF and Art. 19(1) of TEU). It is for the national court to assess these circumstances, and if so, each case must be assessed individually.

6. Responding to preliminary questions from Polish courts regarding cases heard with the participation of judges appointed after 6 March 2018, the CJEU emphasized that one of the circumstances to be taken into account is the activity of such a judiciary council: the court should therefore take into account "the way in which that body exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary and its various powers, in particular if it does so in a way which is capable of calling into question its independence in relation to the legislature and the executive"[7] and should ensure that "the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges."[8]

7. The Luxembourg Court remains cautious about assessment of 2017 Act, pointing out that "such changes are liable to create a **risk**, hitherto absent from the selection procedure previously

---

[3] Resolution of three chambers of the Supreme Court of 23.01.2020, Ref. No. BSA I-4110-1/20. See also resolution of the Supreme Court of 2.06.2022, Ref. No. I KZP 2/22.

[4] See e.g. judgment of the Supreme Court of 26.07.2022, Ref. No. III KK 404/21.

[5] E.g. A. Kappes, J. Skrzydło, *Czy wyroki neo-sędziów są ważne? – Rozważania na tle uchwały trzech połączonych izb Sądu Najwyższego z 23 stycznia 2020 r. (BSA I-41 10-1/20)*, „Palestra" 2020/5, p. 124–127; G. Kamieński, *Wyłączenie z mocy samego prawa sędziego delegowanego na podstawie art. 77 Prawa o ustroju sądów powszechnych (art. 48 § 1 pkt 1 k.p.c.)*, „Przegląd Sądowy" 2022/10, p. 46-47. See also resolution no. 4 of Association of Polish Judges „Iustitia" of 17.04.2021, https://www.iustitia.pl/83-komunikaty-i-oswiadczenia/4159-uchwaly-zwyczajnego-zebrania-delegatow-ssp-iustitia-w-dniu-17-kwietnia-2021r (access: 7.06.2024)

[6] Judgment of ECtHR of 30.6.2005, *"Bosphorus Airways" v. Ireland* (Grand Chamber), §155-165. See also decision of the Commission of 9.1.1990, *M & Co. v. Federal Republic of Germany* and decision on the admissibility of 18.6.2013, *Povse v. Austria*.

[7] Judgment of the CJEU of 19.11.2019, C-585/18, C-624/18 and C-625/18, *A.K. v Krajowa Rada Sądownictwa and CP and DO v Sąd Najwyższy*, §144.

[8] C-585/18, C-624/18 and C-625/18, §134.

in force, of the legislature and the executive having a greater influence over the KRS [Polish abbreviation for the National Council of the Judiciary] and of the independence of that body being undermined."[9] The fact that the CJEU talks about "risk" and not "certainty" proves that the mere fact that the majority of the National Council of the Judiciary is composed mainly of representatives of the executive and legislative branches does not automatically mean that each judge appointed upon its recommendation will never be independent. Therefore, if the National Council of the Judiciary conducts a fair competition procedure and selects a candidate for a judge solely on the basis of objective criteria, then the risk he or she will not meet the minimum requirements of EU law in terms of independence is reduced.

8. This line of reasoning was confirmed in two judgments regarding status of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court (hereinafter: CECPA).

9. In 2019 the CJEU ruled that "a national court seised of an application for recusal as an adjunct to an action by which a judge holding office in a court that may be called upon to interpret and apply EU law challenges a decision to transfer him without his consent, must – where such a consequence is essential in view of the procedural situation at issue in order to ensure the primacy of EU law – declare to be null and void an order by which a court, ruling at last instance and comprising a single judge [of the CECPA], has dismissed that action."[10] However, the Court did not question the status of the CECPA in general, but only the status of one ruling of one single judge**,** who not only has been appointed under 2017 Act procedure, but also:

i) has been appointed on the basis of the resolution of the NCJ, which was then still in the middle of appeal review before the Supreme Administrative Court[11];
ii) his appointment as a judge was in violation of the decision of the Supreme Administrative Court suspending the execution of the resolution of the NCJ recommending his candidacy[12];
iii) he was appointed without waiting for the CJEU's answer to the request for a preliminary ruling from the Supreme Administrative Court regarding effectiveness of remedy against NCJ resolutions in light of recent amendments to NCJ Act[13];
iv) he ruled on the motion for recusal without access to the file of the case and despite the fact that it has been assigned before to the Civil Chamber of the Supreme Court[14].

10. From 2019 ruling follows the logical conclusion that **rulings of Supreme Court judges appointed under 2017 Act are not automatically "null and void", but can be treated as such only in case of cumulation of serious legal defects.**

11. In 2023 the CJEU refused to consider referral from the 3-judges panel of Chamber of Extraordinary Review and Public Affairs, declaring that the latter "does not have the status of an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter."[15] Although this time the CJEU challenged the status of the CECPA in general, relying on the recent ruling of ECtHR in case *Dolińska-Ficek and Ozimek v. Poland*, once again the conclusion

[9] Judgment C-791/19, §104.
[10] Part of ratio decidendi of CJEU judgment of 6.10.2021, C-487/19.
[11] Judgment C-487/19, §134.
[12] Judgment C-487/19, §§138-139.
[13] Judgment C-487/19, §140.
[14] Judgment C-487/19, §151.
[15] Judgment of CJEU of 21.12.2023, C-718/21, §77.

did not follow only from the fact of appointment at the request of NCJ in its new composition, but also from five other relevant and individual circumstances, including the facts that:

i) the CECPA was created *ex nihilo* within the Supreme Court, and composed entirely of judges appointed after 6 March 2018[16];
ii) the remedies available against resolutions of the NCJ proposing candidates for appointment to the Supreme Court were, initially, substantially amended in order to practically exclude effective judicial review[17];
iii) the CECPA consists mostly of judges who were appointed in violation of the 2018 decision of the Supreme Administrative Court suspending the execution of the resolution no 331/2018 of the NCJ recommending their candidacies[18];
iv) the Polish legislature passed the law attempting to force the Supreme Administrative Court to discontinue proceedings on the validity of the resolution no 331/2018[19];
v) in 2021 the resolution no 331/2018 has been annulled by the Supreme Administrative Court[20].

12. From 2023 ruling follows another logical conclusion that **the status of Supreme Court chambers cannot be determined solely on the fact that they consist of judges appointed under 2017 Act, but also other individual circumstances regarding legality of the whole appointment procedure must be taken into account.**

13. The CJEU recently affirmed its position from 2023, rejecting again the preliminary question from the Chamber of Extraordinary Control and Public Affairs because of lack of status of an independent court established by law.[21]

III. The issue of the Chamber of Professional Responsibility of the Supreme Court as an "independent and impartial tribunal established by law"

14. The Commissioner pledges the Court to apply analogous individual assessment in case of the Chamber of Professional Responsibility of the Supreme Court. The status of this Chamber has not yet been questioned by any national nor European court.

15. The Chamber of Professional Responsibility of the Supreme Court was established on 22 July 2022 in replacement of the Disciplinary Chamber, in order to implement CJEU[22] and ECtHR judgments[23], according to which the former Disciplinary Chamber did not meet minimum requirements regarding independence and impartiality. According to the Supreme Court Act, the CPR consists of 11 members chosen in the two-tier procedure: 1) the Chairman of the Supreme Court College selects by draw 33 candidates from among Supreme Court judges; 2) the President of the Republic handpicks 11 judges out of those 33 candidates.[24]

[16] Judgment C-718/21, §66.
[17] Judgment C-718/21, §67-69.
[18] Judgment C-718/21, §70-74.
[19] Judgment C-718/21, §75.
[20] Judgment C-718/21, §76.
[21] Judgment of CJEU of 29.5.2024, C-720/21.
[22] CJEU judgments of 19.11.2019, C-585/18, C-624/18, C-625/18 and of 15.7.2021, C-791/19.
[23] ECtHR judgment of 22.7.2021, *Reczkowicz v. Poland.*
[24] Art. 22a-22b of the Supreme Court Act of 8 December 2017 (Journal of Laws of 2024, position 622, as amended).

16. In the opinion of the Commissioner, five individual circumstances should be taken into account by assessment of the status of CPR as an "independent and impartial tribunal established by law".

17. First of all, it should be noted that while the CECPA consists only of judges appointed after 6 March 2018, the CPR composition includes 6 judges appointed under 2017 Act and 5 judges, whose status is unquestionable. However, even among Supreme Court judges appointed under 2017 Act there are two substantial differences as to their status. **While in case of 14/18 CECPA judges the resolution of NCJ was suspended and later annulled by Supreme Administrative Court, in case of 6/11 CPR judges the resolution of NCJ was never suspended nor annulled.**

18. Second, the Supreme Court Act does not specify any criteria for the President's choice, nor does it require him to provide any justification. Moreover, the Prime Minister has the discretionary power to veto President's choice by refusing his countersignature (Art. 144(2) of the Constitution). In both cases such broad leeway creates a substantial risk of adjusting nominations to the current needs of executive's policy, especially in regard of motions brought to the CPR by prosecutors and disciplinary commissioners who directly answer to the Minister of Justice. Already at the stage of legislative proceedings, the Commissioner raised doubts as to the compliance of this procedure with the principle of separation of the judiciary from other branches of government (Article 173 of the Constitution).

19. Third, the Supreme Court Act does not explicitly allow any legal challenge against the President's decision. Although in Polish law the mere lack of regulation of the remedy does not automatically exclude any possibility of recourse[25], given the courts' reluctance to accept their jurisdiction regarding strictly nomination decisions within judiciary (see paras. 2 and 4), it is far from certain that they will allow a recourse against the President's decision to transfer a Supreme Court judge from one chamber to the Chamber of Professional Responsibility.

20. Fourth, at this moment, 6 out of 11 members of the CPR are judges appointed in the inherently defective procedure under the 2017 Act. All reservations raised in national and European jurisprudence as to the mode of appointment of those judges remain valid - no legal steps have been taken by the government and parliament to remedy their status.

21. Fifth, the Chamber of Professional Responsibility adjudicates in panels of various composition, which means that many of them consist only of judges of unquestionable status, which means that sometimes this Chamber is able to deliver a ruling as an impartial and independent tribunal established by law. Cases regarding judicial and prosecutorial immunities are handled in the first instance by panel of 1 judge and in the second instance by panel of 3 judges.[26] Disciplinary cases are handled in first the instance by panels of 2 judges+1 juror or in the second instance by panel of 3 judges+2 jurors.[27] According to the rules of procedure of the Supreme Court established by the President of the Republic, the Head of the Chamber must designate panels in alphabetical order, including judges appointed in the procedure under the

[25] Because the courts are entitled and obliged to interpret the law in a pro-constitutional manner (Article 45 and Article 77 (2) of the Constitution).

[26] Art. 110 §2a of the Law on the System of Common Courts (Journal of Laws of 2024, item 334) and Art. 145 §1a of the Law on Prosecutor's Office (Journal of Laws of 2024, item 390).

[27] Art. 73 of the Supreme Court Act, Art. 110 §1 of the Law on the System of Common Courts and Art. 145 §1 of the Law on Prosecutor's Office.

2017 Act.[28] As a consequence, judges with unquestionable status may be forced to adjudicate jointly with judges appointed in violation of national law. Out of the 5 members of the Chamber of Professional Responsibility appointed before 6 March 2018, the 3 agrees to adjudicate jointly with judges appointed under the 2017 Act.[29] Meanwhile the majority of jurors serving at the Supreme Court refuses to participate in panels with judges appointed under the 2017 Act.[30] As a result, the CPR adjudicates in three types of panels, which can consist of:

1) only judge(s) appointed under the 2017 Act;

2) only judges of unquestionable status;

3) judges from both groups mentioned in 1-2 (mixed panels).

22. In light of circumstances described above it is clear that status of CPR is more complex than in case of CECPA or former Disciplinary Chamber. The status of CPR should not be assessed in general, but the status of each CPR panel should be assessed individually. In the assessment it should be taken into consideration, whether panel includes judge appointed under the 2017 Act and whether has he/she been appointed on the basis of suspended or annulled resolution of NCJ. The question remains, whether the Constitution or ECHR precludes to transfer a Supreme Court judge of unquestionable status to the CPR against his/her will, regardless if he/she is to adjudicate also with judges appointed in violation of law or not.

IV. The transfers of judges between divisions and chambers of a court and designation of judges to panels

23. It is necessary to differentiate between the compulsory transfer of a judge from one chamber to another and compulsory designation of a judge to specific panel that might not be «established by law» within the meaning of Art. 6 of the ECHR. The first problem concerns a question of judge's "right to specialize in specific area of law" – whether can he/she legitimately expect to adjudicate in the same chamber for the whole life, basically only on matters relating to his/her specialty. The second problem concerns a question of right to the tribunal established by law – whether a judge can be forced to adjudicate jointly with judges whose status have been challenged by final ruling of national and European courts.

IV.A. The question of a "right to adjudicate only in cases corresponding to the preferred area of law"

25. The issue of the admissibility of transferring judges between departments or chambers of a court against their will raises controversies in Polish case-law and legal literature. The main argument used in this discussion relates to the constitutional principle of irremovability (Art. 180 of the Constitution).

According to one view, the act of appointment binds the judge with the place of service (*miejsce służbowe*) associated with a specific division or chamber (which specializes in concrete

[28] §80 (2) of the regulation of the President of the Republic of 14 July 2022 – Rules of Procedure of the Supreme Court (Journal of Laws 2024, item 806 as amended). The Head of the Chamber can bypass alphabetical order only in few specific circumstances such as serious health issue or having less then 6 months to the retirement (§80 (5) of Rules of Procedure).

[29] Judge Wiesław Kozielewicz (Head of the Chamber), judge Zbigniew Korzeniowski and judge Krzysztof Staryk.

[30] See resolution of the Juror's Council no 3/2023 of 12.10.2023, https://konstytucyjny.pl/wp-content/uploads/2023/10/uchwala-3-2023-RL-SN.pdf (access: 5.6.2024).

area of law). In such a situation, any transfer of a judge against his/her will would have to be treated as a violation of the principle of irremovability.[31] According to the second view, the act of appointment only results in tying him/her with a specific court, but not with a specific organizational unit of a given court. From this perspective, the transfer of a judge within the organizational structure of the same court does not violate the principle of irremovability.[32]

26. In the Commissioner's opinion, the constitutional principle of irremovability does not prevent the legislator from establishing a new chamber of a court, composed of selected judges transferred from other chambers of that court.

27. The Polish judge model is based on the legal fiction of comprehensive knowledge in all areas of law (except for administrative judges, where the law clearly requires them to have outstanding knowledge of administrative law[33]). In the case of Supreme Court judges, the law simply requires them to have a "high level of legal knowledge", without limiting it to a specific area of law.[34] Of course, in practice, each Supreme Court judge has specific preferences as to the field of cases in which he/she feels most competent. However, there is no legal provision from which "the right to adjudicate only in cases corresponding to the preferred area of law" can be derived. It should also be borne in mind that the changing legal reality requires judges to constantly update their knowledge: legal provisions are changing, and the limits of jurisdiction of a given chamber may be expanded to include matters that it has not dealt with before.

IV.B. The right to adjudicate in a panel "established by law"

28. Meanwhile, Article 6 ECHR guarantees everyone the right to have their case heard by an independent and impartial tribunal established by law. In the Commissioner's opinion, this provision provides rights not only for the parties to the court proceedings, but also for the judge himself. A judge has a legal and moral obligation to ensure that the trial is conducted in compliance with the law, which also requires him/her to assess whether the panel on which he/she is to adjudicate can be recognized as an independent and impartial tribunal established by law. If in a panel sits a judge, whose status has been questioned by a final ruling of national or European court, another judge has by virtue of Art. 6 of ECHR the right to refuse to adjudicate jointly with him/her, in order to avoid participation in a body that is not an independent and impartial tribunal established by law.

V. Theory and practice of judicial review of presidential decisions in Poland

29. The issue of judicial review of presidential decisions has long been controversial in Poland. In recent years, however, a line of jurisprudence began to develop, according to which a distinction must be made between the President's decisions based on the Constitution that are exempted from the requirement of the Prime Minister's countersignature (so-called prerogatives) and decisions made within the powers granted to him only by statute (requiring the Prime

[31] See National Council of Judiciary resolution no 275/2023 of 20.04.2023. Similar position, although on slightly different grounds, was taken by the Supreme Court in its decision of 3.4.2023, Ref. No. II CSKP 496/22.

[32] See more –for broader constitutional context - J. Roszkiewicz, *Kompetencja Pierwszego Prezesa Sądu Najwyższego do wyznaczenia sędziego Sądu Najwyższego do rozpoznawania dodatkowych spraw spoza jego izby – uwagi na tle sprawy K 7/23 przed Trybunałem Konstytucyjnym,* 1 Przegląd Prawa Publicznego 2024.

[33] Art. 6 §1 point 6 of Law on System of Administrative Courts (Journal of Laws of 2022, item 2492).

[34] Art. 30 §1 point 6 of Supreme Court Act.

Minister's countersignature). Administrative courts find review of the prerogatives inadmissible (at least when it comes to their jurisdiction)[35], but allow the review of some of presidential statutory powers. Therefore, the President can act in two alternative capacities – in political sphere as a head of state or in administrative sphere as an "organ of public administration in functional sense" [36]. In other words, the President's actions fall under administrative courts jurisdiction only if he applies administrative law, but not if he applies only constitutional law.

30. In consequence, the administrative courts refuse to review presidential decisions regarding judicial appointments[37], or consent to renunciation of Polish citizenship[38] (because they are made within the role of head of state exercising his constitutional powers), but they allow complaints against the decisions awarding the title of professor[39] or ascertaining the date of retirement of a Supreme Court judge[40] (because they are made within the role of an organ of public administration in functional sense, applying administrative law). In other words, not every decision of the President is automatically subject to review by administrative courts. Administrative courts address this issue carefully and evaluate each kind of presidential decision individually, assessing it in the light of the requirements of administrative law.

31. In the opinion of the Commissioner for Human Rights, this approach is correct. Nothing in the Constitution prevents the admissibility of judicial review of the President's decisions regarding the powers granted to him solely by statute (and not by the Constitution). The only question is, which courts should conduct such review and what criteria should they rely on.

32. In the Commissioner's opinion, it cannot be a priori assumed that each decision of the President constitutes an administrative decision (or other act in the field of public administration), subject to the jurisdiction of administrative courts. For many years, Polish public law has distinguished between administrative decisions and unusual type of acts of public authority undertaken outside the sphere of administrative law, an example of which are the decisions of the Minister of Justice regarding the delegation of a judge from a lower court to a higher court.[41] Perhaps the President's decision to transfer a Supreme Court judge from one chamber to the Chamber of Professional Responsibility could be qualified as another example of such unusual act. Considering that this act produces effect similar to judicial appointment, which administrative courts - as already mentioned - refuse to control, there is a serious doubt whether Polish law guarantees an effective recourse against this type of decisions. Therefore, the legislator should enact an adequate statute to introduce such recourse, the details of which will be discussed in the next point.

---

[35] There is a theoretical possibility of review conducted by common courts, but very limited, because their jurisdiction encompasses only civil and criminal cases (which are interpreted narrower than in Strasbourg jurisprudence), while presidential decisions are acts of public law (constitutional or administrative). Moreover, there has been no ruling of common court allowing a recourse directly questioning the legality of President's decision. However, there are examples of rulings refusing to review presidential decisions – see e.g. decision of District Court in Warsaw of 30.11.2016, Ref. II Co 90/16.

[36] A. Jakubowski, *Prezydent Rzeczypospolitej Polskiej jako organ administrujący (organ administracji publicznej)*, 2 Państwo i Prawo 2023, p. 9. Similar position was taken by the Czech Supreme Administrative Court – see D. Kryska, *Srovnání českého a polského správního soudnictví*, Praha 2013, pp. 234–244, 26.

[37] See e.g. Supreme Administrative Court decisions of: 16.10.2012, Ref. No. I OSK 1885/12; 7.12.2017, Ref. No. I OSK 857/17; 27.2.2023, Ref. No. II GSK 1463/22.

[38] See e.g. Voivodship Administrative Court in Warsaw rulings of: 27.1.2005, Ref. No. II SAB/Wa 378/04; 15.7.2005, IV SA/Wa 515/05; 24.7.2020, Ref. No. II SAB/Wr 26/20.

[39] See e.g. Supreme Administrative Court ruling of 11.5.2021, III OSK 3265/21.

[40] See e.g. Supreme Administrative Court rulings of: 25.04.2019, II GZ 62/19; 30.09.2020 r., II GSK 295/20.

[41] Resolutions adopted by full panel of the Supreme Court of 14.11.2007, Ref. No. BSA I-4110-5/07 and 28.1.2014, Ref. No. BSA-I-4110-4/13.

VI. Conclusions

33. Having regard to the above, the Commissioner for Human Rights concludes as follows:

1) Art. 6 of ECHR and Art. 45 of the Constitution confer upon judge the right and duty to adjudicate on a panel that meets the requirements of an independent and impartial tribunal established by law. Therefore, judge cannot be forced to sit on a panel with judges appointed in violation of the law, which has been confirmed in the final judgments of national courts, the European Court of Human Rights and the Court of Justice of the European Union.
2) However, neither the Constitution nor the ECHR guarantees judges the right to specialize in a specific area of law nor the right to be assigned to the same division or chamber of a court for the whole life.
3) A distinction must therefore be made between the decision to transfer a judge from one chamber to another and the decision to designate him or her to a specific panel handling a given case. In the case of the Chamber of Professional Responsibility, it is possible to adjudicate in panels that meet the requirements of an independent and impartial tribunal established by law, but §80 (2) of the Rules of Procedure allows and requires the Head of that Chamber to designate mixed panels (consisting of judges with questionable and unquestionable status), if this results from the alphabetical order of judges.
4) Article 6 of the ECHR and Article 45 of the Constitution require to establish a procedure enabling a judge to challenge a decision designating him/her to a panel with a judge appointed in violation of the law in the circumstances indicated in point 1. Currently Polish law does not guarantee any kind of recourse against a decision of the Head of the Chamber of Supreme Court designating judge to particular panel, even if its composition might be unlawful.
5) The status of CPR is more complex than in case of CECPA or former Disciplinary Chamber. The status of CPR should not be assessed in general, but the status of each CPR panel should be assessed individually. In the assessment it should be taken into consideration, whether panel includes judge appointed under the 2017 Act and whether he/she has been appointed on the basis of suspended or annulled resolution of NCJ.
6) The nature of President's decision to transfer a Supreme Court judge from one chamber to the CPR remains undetermined. In light of current case-law the President’s actions fall under administrative courts jurisdiction only if he applies administrative law, but not if he applies only constitutional law. In this case it can be argued that the President applies neither and his decision constitutes an act of unusual nature. Considering that this act produces effect similar to judicial appointment, which administrative refuse to control, there is a serious doubt whether Polish law guarantees an effective recourse against this type of decisions.